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U.S. Department of Justice

Office of Professional Responsibility

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MEMORANDUM

TO: Alice S. Fisher
Assistant Attorney General
Criminal Division

Michael A. Battle
Director
Executive Office for United States Attorneys

FROM: H. Marshall Jarrett
Counsel

SUBJECT: Report of Investigation of Misconduct Allegations Related to the Criminal Investigations and Arrests of Individuals on Material Witness Warrants

INTRODUCTION AND SUMMARY

In June 2005, the Human Rights Watch (HRW) and the American Civil Liberties Union (ACLU) published an article entitled "Witness to Abuse: Human Rights Abuses under the Material Witness Law Since September 11." The report asserted that, since the attacks of September 11, 2001, at least seventy men living in the United States – all but one of whom are Muslims – "have been thrust into a Kafkaesque world

of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links.” It asserted that Congress enacted the material witness statute in 1984 to enable the government, under narrow circumstances, to secure the testimony of witnesses who might otherwise flee to avoid testifying in a criminal proceeding. According to the report, however, the Department of Justice has improperly used the law, since September 11, to secure the indefinite incarceration of those it wanted to investigate as possible terrorist suspects.

This Office initiated an investigation to review fourteen matters discussed in the HRW/ACLU report.¹ [REDACTED]

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[REDACTED] Based on the results of our investigation, we concluded that the material witness statute was not misused in the cases we reviewed.

I. Overview of the Material Witness Law

The material witness statute, 18 U.S.C. §3144, provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time

¹ We confined our investigation to a review of allegations which, if true, might constitute professional misconduct or poor judgment by Department attorneys or law enforcement agents.

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until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

~~Section 3142 sets forth conditions for the release or detention of a defendant pending trial.~~ It outlines the conditions that may be imposed on the pretrial release of a defendant and requires that a hearing be held to determine whether any conditions might be set that would reasonably assure the defendant's appearance. It also specifically provides that the person has the right to be represented by counsel, or have counsel appointed if he is financially unable to obtain representation. The material witness statute does not contain limitations on the length of time a witness may be detained.

The circuits that have addressed the issue have held that a grand jury proceeding constitutes a "criminal proceeding" for purposes of the material witness statute.² Before a material witness arrest warrant may issue, the judicial officer must find probable cause to believe that (1) the testimony of a person is material, and (2) it may become impracticable to secure his presence by subpoena.³ The burden of establishing the materiality of a witness's testimony is low. In *Bacon v. United States*, the Ninth Circuit commented that, "[i]n the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy criterion (1)."⁴ However, more than an assertion by the government is required to meet the

² *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). See also, *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003) cert. denied, 125 S. Ct. 861 (2005)(material witness statute authorizes the detention of grand jury witnesses); *In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266 (D. Oregon, 2003) (grand jury proceeding constitutes a criminal proceeding as term used in material witness statute).

³ *Bacon*, 449 F.2d at 943.

⁴ *Bacon*, 449 F.2d at 942. See also, *Awadallah*, 349 F.3d at 65 (holding that FBI agent working closely with prosecutor in a grand jury investigation could also attest to materiality); *United States v. Oliver*, 683 F.2d 224 (7th Cir. 1982)(applying the predecessor of 18 U.S.C. §3144 – §3149).

burden of establishing probable cause that it may be impracticable to secure the witness's testimony by subpoena. "A common sense reading of Section 3144 requires the court to evaluate the material witness' risk of flight, likelihood that the person will appear, and danger to the community or nation."⁵

The law allows detention only for the purpose of and time necessary to obtain the testimony of the witness. It does not authorize the government to detain a criminal suspect for whom there is insufficient probable cause to charge him criminally. In *United States v. Awadallah*, the court stated that it would be improper for the government to use the material witness warrant for other ends, such as the detention of a person suspected of criminal activity for which probable cause had not yet been established.⁶

The statute provides that the witness may be held for a reasonable period of time until the deposition can be taken. Fed. R. Crim. P. 46 provides that, to eliminate unnecessary detention, the court must supervise the detention within the district of any person held as a material witness. In addition, an attorney for the government must provide a bi-weekly report to the court that lists material witnesses held in custody for more than 10 days and states the reasons each witness should not be released with or without a deposition being taken.⁷ These reports are filed under seal in a matter involving a grand jury witness.

⁵ *In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d at 1269.

⁶ 349 F.3d at 59.

⁷ Fed. R. Crim. P 46(h)(1) and (2).

II. Immediate Post 9/11 Arrests

As noted, we investigated fourteen matters in which individuals were arrested immediately following the September 11, 2001 attacks on the World Trade Center and the Pentagon. Based on the results of our investigation, we concluded that no Department attorney engaged in professional misconduct or exercised poor judgment in connection with these matters.

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**Pages 6-32 referred to
EOUSA and/or the FBI;
portions withheld pursuant
to FOIA exemptions
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V. Conclusion

Based on the results of our investigation of fourteen matters discussed in the HRW/ACLU report, we concluded that the Department of Justice attorneys involved did not misuse the material witness statute and thus did not commit professional misconduct or exercise poor judgment. Accordingly, we consider this matter to be closed.

cc: David Margolis
Associate Deputy Attorney General

Scott N. Schools
General Counsel, EOUSA

**Page 34 withheld pursuant
to FOIA exemption b2**