No. 10-98

IN THE
Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS WATCH AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

JEFFREY L. FISHER
Co-Chair, NACDL
Amicus Committee
559 Nathan Abbot Way
Stanford, California 94305

JOSEPH F. TRINGALI
Counsel of Record
RYAN A. KANE
FADI HANNA
GREG SZEWCZYK
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
jtringali@stblaw.com

Attorneys for Amici Curiae

234500

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

OTHER AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

INTEREST OF THE *AMICI CURIAE*

Human Rights Watch, a non-profit organization, is the largest U.S.-based international human rights organization, and was established in 1978 to investigate and report on violations of fundamental human rights in some 90 countries worldwide. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others in order to end abusive practices. In June 2005, Human Rights Watch and the American Civil Liberties Union jointly published the report *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (the "Report"). Human Rights Watch has a substantial interest in ensuring that the material witness statute is applied lawfully and with judicial controls sufficient to prevent the abuse of detainees.[1]

National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders and law professors. The American Bar Association (the "ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient and fair administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory and criminal investigations. In furtherance of this and its other objectives, the NACDL files *amicus curiae* briefs addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because its members share deep concern regarding the Government's unlawful use of the material witness statute since the attacks of September 11, 2001, as well as the harm to individuals that has resulted. NACDL works directly with people who have been detained as a result of the wrongful application of the statute. Therefore, NACDL has an interest in ensuring that the statute is applied lawfully and with judicial controls sufficient to prevent the abuse of detainees.

SUMMARY OF ARGUMENT

The material witness statute, 18 U.S.C. 3144 (the "statute"), provides for the arrest and detention of witnesses only when absolutely necessary and for the limited purpose of securing their testimony when material to a criminal proceeding. The statute does not provide for the detention of persons suspected of criminal conduct – but against whom there is insufficient proof to meet constitutional requirements for arresting or charging as criminal suspects – in order to conduct further investigation. Here, the U.S. government (the

"Government"), through the Department of Justice ("DOJ"), misused the statute to arrest and detain Mr. Abdullah al-Kidd ("al-Kidd"), a native-born United States citizen whose testimony was never taken in the proceeding for which he was purportedly detained. Al-Kidd was arrested in the manner of a dangerous criminal suspect (except without *Miranda* warnings), subject to coercive custodial interrogation about his own activities without counsel, detained for fifteen nights in high-security prisons with convicted criminals, routinely shackled and strip-searched multiple times during his detention, and released only subject to restrictive conditions.

The arrest and detention at issue in this case is not unique: Petitioner John Ashcroft ("Ashcroft") implemented an investigative use of the statute to detain persons against whom evidence was insufficient to meet constitutional requirements for criminal charges or arrest. Amicus Human Rights Watch's Report provides the results of interviews with seventy individuals detained under the material witness statute since the attacks of September 11, 2001, as well as interviews with detainees' attorneys and family, information obtained through FOIA requests, and publicly available accounts. If the DOJ truly viewed these detainees as "witnesses," it could have subpoenaed their testimony or deposed and released them, as provided by the statute. However, the DOJ never deposed or called as witnesses many of those detained under the statute, including al-Kidd. To the contrary, and as set forth in the Report and in other public sources, "witnesses" detained under the statute were held for prolonged periods in abusive conditions and released subject to Government monitoring and tight travel and other lifestyle restrictions. Their accounts, detailed below, demonstrate that these

"witnesses" were regarded and treated as *criminal suspects* and that the statute was systematically abused to detain such individuals without attempting to meet constitutional requirements for bringing criminal charges or arrest. The extreme conditions of these detentions, the frequency with which they occurred, and public statements made by Petitioner and other government sources strongly suggest that these detentions were made pursuant to Petitioner's policy of using the statute to detain and investigate suspects without probable cause, rather than to secure testimony.

Moreover, in implementing this policy, the Government has successfully limited public scrutiny by shrouding the policy's details in secrecy. Records of material witness proceedings are routinely sealed, and the most basic information is kept secret. Thus, *amici* cannot be certain of the full extent of the abuses.

ARGUMENT

The material witness statute allows deprivation of liberty for the limited purposes of procuring testimony and only when that testimony cannot be obtained under subpoena. No Congressional statute authorizes the arrest, detention, and governmental supervision of United States citizens based on the mere suspicion of criminal activities. Detaining criminal suspects who cannot constitutionally be charged with criminal conduct is contrary to fundamental American values that are enshrined in the

Fourth,[2] Fifth,[3] Sixth, and Fourteenth Amendments of the U.S. Constitution.[4] Detention of criminal suspects without charge is also a form of arbitrary detention prohibited under international law.[5] Petitioner Ashcroft, however,

---

2. "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest.'" *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (quoting *Henry v. U.S.*, 361 U.S. 98, 101 (1959)); *see also* U.S. Const. Amend. IV.

3. The Due Process clause of the Fifth Amendment authorizes civil, non-punitive detention only in narrow and limited circumstances. There must be a specific justification that is "sufficiently weighty" to overcome the individual liberty interest, and the least restrictive means available must be used, namely means that are not "excessive in relation to" the non-punitive purpose for which the individual is detained. *U.S. v. Salerno*, 481 U.S. 739, 747, 751 (1987) (pre-trial detainees).

4. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." Because of this, a suspect can only be arrested and charged upon a showing by the government of probable cause and the preventive detention of that suspect can only occur in certain special and "'narrow' non-punitive 'circumstances,'" where a special justification outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) (citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

5. *See* International Covenant on Civil and Political Rights ("ICCPR"), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Art. 9 (providing that "everyone has the right to liberty and security of person"). The United States has

distorted the material witness statute into a sweeping investigative detention statute. Petitioner Ashcroft's policy deprived persons suspected of criminal conduct, who were ostensibly only witnesses, of the constitutional safeguards to which criminal defendants are entitled under the Fourth Amendment and other constitutional provisions.

The accounts discussed below show that rather than being viewed as valuable witnesses in important Government investigations, material witnesses detained as part of the Government's response to September 11 were actually regarded as suspects. Many detainees with supposedly "material" information had only thin and insubstantial ties to the crimes purportedly under investigation. And even where detainees showed a history of cooperation with Governmental authorities, the statute's requirement that the use of a subpoena be otherwise impracticable was completely ignored. The detainees were shackled and strip-searched, put in solitary confinement, and coercively interrogated regarding their own actions—not events they allegedly witnessed.

---

been a party to the ICCPR since 1992. *See also* Human Rights Committee, Gen. Comment No. 8, HRI/GEN/1/Rev.9 (Vol. I) (June 30, 1982) (stating that Article 9 of the ICCPR is "applicable to all deprivations of liberty"); ICCPR Art. 9 (3) (stating that "It shall not be the general rule that persons awaiting trial shall be detained in custody."); Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 224-225 (2d ed. 2005) (explaining that, in accordance with Article 9 of the ICCPR, a person's liberty may not be curtailed arbitrarily, either through arbitrary laws or through the arbitrary enforcement of the law in a given case, and that to comply with Article 9, deprivation of liberty "must not be manifestly unproportional, unjust or unpredictable.").

THE GOVERNMENT UNLAWFULLY DETAINED RESPONDENT AND OTHER "MATERIAL WITNESSES" AS PART OF ITS SYSTEMATIC MISUSE OF THE MATERIAL WITNESS STATUTE

Respondent al-Kidd's arrest and detention as a material witness, described below, is representative of the manner in which the material witness statute was misused as a pretense to detain individuals suspected of terrorist activity in connection with the events of September 11. The accounts of eleven additional material witness arrests, told alongside al-Kidd's story, illustrate that rather than being treated as valuable witnesses in important Government investigations, material witnesses detained as part of the Government's response to September 11 were, like Respondent, systematically treated as threatening individuals suspected of crimes. The experiences of the "material witnesses" described below, as well as others whose stories are known, illustrate four central themes in the Government's material witness arrest, interrogation, detention, and release practices. These "witnesses" were:

- arrested in the manner of dangerous criminals, but denied *Miranda* warnings;
- interrogated about their own activities without access to counsel – not about activities they purportedly witnessed;
- detained for prolonged periods of time under high security conditions; and
- only released subject to restrictive conditions even when their testimony was no longer being sought.

The manner of the arrest of innocent material witnesses detained in connection with terrorist-related investigations – many of whom are U.S. citizens and professionals with no criminal record – is indistinguishable from the arrest of a dangerous criminal. "Material witnesses" were routinely arrested by multiple agents, at gunpoint, and handcuffed and shackled. The FBI also transported these "witnesses" to detention centers in a manner that suggests they were perceived to be dangerous. Yet no official hoping to elicit helpful testimony from a witness purposefully terrorizes them during their detention. Indeed, the use of force was so extreme when arresting and transporting some "witnesses" that it plainly reveals that the DOJ's suspicion of criminal activity was the true impetus for their arrest.

The manner and substance of "material witness" interrogations further confirms that Government officials were investigating each of these purported "material witnesses." Al-Kidd and other material witness detainees were interrogated at length about their *own* activities – rather than the activities of others. These interrogations often occurred without counsel or other procedural safeguards. And, in more than two dozen of the seventy material witness cases analyzed by the Report, the government did not provide a detention hearing for three or more days following arrest, and in ten cases the witness never received *any* kind of hearing at which they could contest their detention.[6] Yet under U.S. law, as well as

6. Human Rights Watch and American Civil Liberties Union, Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11 at 48 (2005) ("*Witness to Abuse*").

international law, a person deprived of his or her liberty must be "promptly" brought before a judge or judicial officer.[7]

The detentions endured by these material witnesses were prolonged, harsh experiences. Individuals detained under Petitioner's policy were held under high security conditions for time periods far longer than necessary to secure testimony, and treated as though they were dangerous criminals. First Amended Complaint ("FAC") ¶ 131 ("a federal official noted that after September 11, 2001, the DOJ's Bureau of Prisons often 'did not distinguish between detainees who . . . posed a security risk and those detained aliens who were uninvolved witnesses.") (citing "The September 11th Detainees," April 2003 ("OIG 2003 Report") at 20). While Congress has authorized the arrest of witnesses, it has consistently placed restrictions on the jailing of witnesses, historically permitting detention only if a witness did not provide assurances to a court that he would testify.[8] The material witness statute itself provides that "*No material witness may be detained* because of

7. When an individual has been deprived of a liberty interest, the Fifth Amendment right to Due Process guarantees a prompt hearing, conducted at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979). International law similarly requires that detained persons shall be entitled to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, *supra* note 5, Art. 9(4).

8. Michael Greenberger, *Infinite Material Witness Detention without Probable Cause: Thinking Outside the Fourth Amendment* in At War with Civil Rights and Civil Liberties 92 (Thomas E. Baker and John F. Stack, Jr. eds., 2006)

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."[9] During the drafting of the current 18 U.S.C. 3144, the Senate Appropriations Committee stressed that "whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody."[10] Nonetheless, more than one third of the material witness detainees after September 11, 2001 were held for two months or more, and many were held without being given the opportunity to be deposed.[11] Over the course of these prolonged detentions, "material witness" detainees were consistently subject to harsh treatment.[12]

After release from detention, these material witnesses were also subject to continuing restrictions on their liberty for far longer than necessary to secure testimony. Material witnesses have been stripped of their passports, subject to a curfew, required to check-in regularly with Government authorities, and even been forced to wear an

9. 18 U.S.C. § 3144 (emphasis added).

10. S. Rep. No. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 ("[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.")

11. *Witness to Abuse, supra* note 6, at 26 and 78-79.

12. Greenberger, *supra* note 8, at 89 ("It is clear that the Ashcroft Justice Department detains grand jury material witnesses under harsh and coercive conditions. Facts surrounding the recent arrests of other grand jury material witnesses illustrate that these indefinite and often harsh detentions are part of a tactic to coerce incriminating statements.")

electronic bracelet.[13] Some of these restrictive conditions, such as in the case of al-Kidd, have even persisted *after* the Government decided not to call the "material witness" to testify.

The accounts below represent only a fraction of the improper arrests and detentions detailed in *amicus'* Report. There may be other cases that have not yet come to light. Secrecy has been the rule, not the exception. Indeed, there were release orders that prevent many material witnesses from speaking of their experience to anyone, even family members.[14] The DOJ, moreover, has routinely refused access to information on individual detentions sought by the attorneys and the families of detainees.[15] The DOJ refused access to information about the use of the policy to the general public[16] and

---

13. *Witness to Abuse*, *supra* note 6, at 30-31.

14. Eric Lichtblau, Bush's Law: The Remaking of American Justice 31 (2008).

15. "The government refused to say how many people it had held as material witnesses, sealing court records on national security grounds and leaving the media and rights groups to guess based on anecdotal evidence." *Id.* at 27; *see, e.g., U.S. v. Awadallah*, 202 F. Supp. 2d 55, 59-61 (S.D.N.Y. 2002) (Awadallah's location was kept secret from his family *and attorney* until after he had been transferred from San Diego to New York).

16. *See* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677, 686, 691 (2005) (in the case of Mohammed Bellahouel, the "government fought to keep the entire matter sealed and asked to file even its response to the certiorari petition under seal. [...] By then, [the material witness] had been living freely in

even refused to turn over information when directed to do so by the House of Representatives Committee on the Judiciary.[17] In fact, most material witness cases remain under seal today. [18] Although the strict secrecy

Florida for months and had never been charged with any crime. The Court in fact did keep most of Mr. Bellahouel's petition and most of the government's opposition under seal and ultimately denied review."). *See generally Center for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 922 (D.C. Cir. 2003) ("The government withheld all requested information with respect to material witnesses. Although the government has refused to disclose a comprehensive list of detainees' names and other detention information sought by plaintiffs, the government has from time to time publicly revealed names and information of the type sought by plaintiffs regarding a few individual detainees, particularly those found to have some connection to terrorism."); Rachel Stevens, *Center for National Security Studies v. United States Department of Justice: Keeping the USA PATRIOT Act in Check One Material Witness at a Time*, 81 N.C. L. Rev. 2157, 2175-2176 (June 2003) (The government's secretive behavior with respect to material witnesses is dangerous because it allows the federal government to "hold people anonymously and indefinitely without filing criminal charges" while allowing the government to build cases against those detained and other would-be targets).

17. Bascuas, *supra* note 16, at 686, 688 ("Perhaps realizing that DOJ was itself responsible for shrouding the 'material witness' detentions in secrecy, the Judiciary Committee requested the government's motions to seal each 'material witness' proceeding and the sealing orders. Tellingly, the DOJ refused to provide those documents as well: 'We are prohibited by court orders from providing any information regarding specific sealed material witness proceedings, including copies of sealing orders. We routinely move to seal all grand jury material witness proceedings...'") (internal citations omitted).

18. In Awadallah's case, the transcript of his detention hearing on September 25, 2002 is sealed and remains sealed today.

imposed by the Government has effectively prevented information on many detained material witnesses from reaching the general public, the accounts of the following individuals – the result of exhaustive interviews and research by *amicus* Human Rights Watch – illustrate the Government's policy of systematically misusing the material witness statute and the criminal-like manner of witnesses' arrest, interrogation, detention, and release.

A. Abdullah al-Kidd

Al-Kidd, a natural-born United States citizen with a wife and child in the country, was arrested at the airport as he was checking in for a round-trip flight to Saudi Arabia where he intended to study at a well-known university to which he had received a scholarship. FAC ¶¶ 5, 14, 42. Despite having cooperated with the FBI on numerous prior occasions, al-Kidd was arrested in the manner of a dangerous criminal – except without *Miranda* warnings: he was tightly handcuffed in the airport in front of staring onlookers and transported for interrogation. *See* Br. in Opp. at 5, 7; FAC ¶¶ 66-67. Immediately after his arrest, al-Kidd was interrogated not about his knowledge regarding the prosecution pursuant to which he was

---

U.S. v. Awadallah, 202 F. Supp. 2d 17, 23 (S.D.N.Y. 2002) (only the portions referred to in the court's opinion are public). In the case of Maher Mofeid Hawash, arrested as a material witness in 2003, so secretive were the facts and circumstances surrounding his arrest and detention that supporters protested and wrote to their Congressmen "to attract national attention to his detention." Janine Robben, *What Price Security?: The War on Terror Comes Home to Oregon*, 64-Jul Or. St. B. Bull. 9, 12 (2004); *see also In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266 (D. Or. 2003).

purportedly detained, but instead about his own religious beliefs, his own conversion to Islam, and his own past travels. FAC ¶¶ 46, 66-68.

Al-Kidd was not released for 15 days. FAC ¶¶ 71, 77. During this period, this supposed "material witness" was detained in high-security conditions, strip-searched, and rarely permitted to leave his cell. *See* Br. in Opp. at 5, 7. At one point, al-Kidd was forced to sit completely naked for a considerable period of time in a cell where he could be seen by guards, including at least one female guard, and other detainees, who were fully-clothed and being processed. FAC ¶ 86. During his transfer from Virginia to Idaho, officers refused to loosen "witness" al-Kidd's handcuffs – despite the fact that they did so for other prisoners on the plane – because "his case was special." FAC ¶ 92. Once he arrived in Idaho, al-Kidd was housed in a high-security unit, where unlike the other cells in the unit, the lights remained on twenty-four hours every day. FAC ¶ 92.

Even after his release, al-Kidd remained subject to restrictive conditions: he was stripped of his passport, was required to live with his in-laws and report regularly to the government, and was only permitted to travel within a four-state area. FAC ¶¶ 9, 103. Yet, despite the length of the detention and the post-release restrictions on his liberty (more than one year), al-Kidd was never asked to provide deposition or trial testimony for the prosecution pursuant to which he was supposedly detained. Indeed, even after the Government failed to call him as a witness, it still did not lift the restrictions placed on his liberty. Al-Kidd had to file a motion with the court in Idaho to vacate the conditions of supervision. FAC ¶¶ 106-107.

B. Tajammul Bhatti

Tajammul Bhatti, a sixty-eight year-old physician and U.S. citizen since 1970, became the focus of an FBI investigation when several of his neighbors, who considered him "suspicious," convinced Bhatti's landlord to break into his apartment. Upon finding books on electronics and flying, the landlord contacted the FBI. After conducting a secret search of Bhatti's apartment, the FBI arrested Bhatti as the only suspect in a grand jury criminal proceeding that had not yet been instituted at the time of his arrest.[19] Despite the fact that Bhatti himself was a suspect, and was arrested by several FBI agents with guns drawn, he was technically detained pursuant to a "material witness" warrant.

Bhatti was jailed for six days, during which time he was forced to sleep on concrete floors because the jail had no free beds.[20] Though technically detained as a material witness, Bhatti was interrogated without counsel about his own religion and beliefs.[21] Bhatti was barred access to his own court proceedings, and was refused information about the basis of his own detention.[22]

Bhatti was called to "testify" in a grand jury proceeding that was investigating his *own conduct*. Bhatti was never otherwise called to testify as a witness, nor was

19. *Witness to Abuse*, *supra* note 6, at 22.

20. *Id.* at 23.

21. *Id.* at 50.

22. *Id.*

he ever charged with a crime.[23] Bhatti was released under the conditions that he remain solely in western Virginia, and refrain from discussing his experience with anyone, including his family.[24]

C. Brandon Mayfield

Brandon Mayfield, an American citizen and former Army officer with an honorable discharge, was arrested pursuant to a material witness warrant despite the fact that he was the primary suspect in the March 2004 Madrid train bombings. At the time, Mayfield was living with his wife and three children in Oregon, where he practiced law.[25] The FBI began to investigate Mayfield after his fingerprint was incorrectly matched with a fingerprint found at the scene of the bombing in Madrid.[26] The FBI spent more than a month listening to electronic wiretaps on Mayfield's home, conducting secret searches of his home and office, collecting his DNA, and keeping him under surveillance. After conducting extensive surveillance, the FBI arrested the suspect they were nearly certain was responsible for the Madrid bombing, Brandon Mayfield, on a material witness warrant.[27]

FBI agents arrested Mayfield at his law office and, at

---

23. *Id.* at 23, 93.

24. Lichtblau, *supra* note 14, at 31.

25. *See Mayfield v. Gonzales*, No. Civ. 04-1427-AA, 2005 WL 1801679, at *2 (D. Or. July 28, 2005).

26. *Id.* at *2-4.

27. *Witness to Abuse*, *supra* note 6, at 20.

the same time, seized nearly all of his clients' confidential files.[28] Simultaneously, dozens of agents searched Mayfield's home while forcing his wife to sit at the kitchen table and preventing her from making phone calls. Despite having already arrested the "material witness" at his office, Mayfield's home was searched for more than five hours.[29] At the time of Mayfield's arrest, the DOJ had not yet convened a grand jury investigation.[30]

Mayfield was detained in prison for more than two weeks, and held under house arrest for an additional week. Despite being held as a material witness, "the government threatened [Mayfield] with capital punishment during his immunity negotiations."[31] For at least half of his time in custody, Mayfield was kept in a special prison unit that was the most restrictive area of the prison – prisoners were "locked-down" in their cells for 22 hours each day – that was used to house a small number of high-profile and dangerous prisoners.[32] Mayfield was also subject to regular strip-searches during his detention.[33]

---

28. *Id.* at 39.

29. *Id.*

30. *Id.* at 21.

31. *Id.* at 32.

32. U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Handling of the Brandon Mayfield Case* (March 2006), at 259-264. The OIG's examination of Mayfield's material witness warrant concluded that "the affidavits contained several inaccuracies that reflected a regrettable lack of attention to detail" and "found the wording of the affidavits to be troubling in several respects." *Id.* at 19.

33. *Id.* at 75.

Brandon Mayfield was never called to testify. On May 24, 2004, the DOJ moved to have him dismissed as a material witness after Spanish authorities apprehended a man whose print actually matched the Madrid print alleged to be Mayfield's.[34] The FBI subsequently admitted that it had mismatched Mayfield's print.[35]

D. Abdallah Higazy

The Government claimed to have evidence suggesting that Abdallah Higazy was involved in the September 11 attacks when it arrested him as a material witness. At the time, Higazy was an Egyptian graduate student in the United States on a grant from the U.S. Agency for International Development ("USAID"). At the suggestion of USAID, he stayed at the Millennium Hotel in New York City during his orientation, which included September 11, 2001. After the attacks and evacuation of the hotel, a hotel security guard falsely claimed that he had found a pilot's air-land radio in a safe in Higazy's room. At the time, the DOJ believed that the hijackers may have had assistance from somebody on the ground. The Government, accepting that the air-land radio belonged to Higazy, clearly considered Higazy to be a coconspirator in the 9/11 attacks. However, despite the Government's belief that he may have played a significant role in the attacks, Higazy was arrested pursuant to a material witness warrant.[36]

---

34. *Witness to Abuse*, *supra* note 6, at 21.

35. *See id.* ("A panel of international experts, convened by the FBI, has since rebuked the fingerprint experts for succumbing to institutional pressure to make a false identification."); *see also Mayfield*, 2005 WL 1801679, at *3-4.

36. *Witness to Abuse, supra* note 6, at 24.

During his detention, Higazy was interrogated without counsel.[37] He was detained for prolonged periods of time without any opportunity to directly confront the true reason for his detention. He was kept in solitary confinement for thirty-four days.[38] The court at his second detention hearing observed: "'I am concerned that a witness not be held for a prolonged period of time simply on the basis of being a material witness. [The initial] [t] en days struck me as fairly lengthy . . . I would be very, very loath to extend it beyond then absent truly new developments.'"[39]

Higazy was never called to testify. In January 2002, an airline pilot came to the hotel to claim the very same radio attributed to Higazy. It eventually came to light that the security guard had lied to the FBI, having known that the radio was not in the safe in Higazy's room.[40] Upon this exculpatory evidence, Higazy was freed after being held for thirty-four days under the material witness statute.

---

37. *Id.* at 59.

38. *Id.* at 24, 59-61. Solitary confinement was a technique used on many of these witnesses. *See, e.g., id.* at 51-52, 87-89 (Tarek Albasti held for two weeks in solitary confinement despite never being asked to testify); *id.* at 57, 90-91 (Omar Bakarbashat held for three months in solitary confinement, never testified, and was eventually charged with working while on a student visa); *id.* at 72-74 (Faisal al Salmi held for three weeks in solitary confinement).

39. *Higazy v. Millenium Hotel and Resorts*, 346 F. Supp. 2d 430, 441-42 (S.D.N.Y. 2004).

40. *Id.* at 443-444.

E. The "Evansville Eight"

On October 10, 2001, FBI agents arrested as material witnesses Fathy Abdelkhalek, an Egyptian waiter at an Olive Garden restaurant in Evansville, Indiana, along with seven of his friends.[41] Abdelkhalek became a terrorist suspect after his wife called the FBI and told them that he was "going to crash [into the Sears' tower.]," and the FBI became suspicious of all eight men after a period of surveillance. FBI agents found Abdelkhalek's friends suspicious because they were all Egyptian, had been on the national Egyptian rowing team with each other, continued to remain friends throughout and after their respective emigration to the United States, and regularly played soccer together every morning at 6:00 a.m.[42] Had FBI agents investigated the complaint before making arrests, they would have likely discovered that the Abdelkhaleks had marital troubles and that Abdelkhalek's wife was prone to fits of anger when her husband sent money to his children in Egypt.[43]

None of the eight men were ever informed of the reason for their arrest.[44] They were transported by armed marshals from Evansville to a federal detention facility in Chicago, Illinois, kept in shackles throughout the flight, deplaned into a specially cleared terminal upon arrival, and driven in a van with an armed escort aided

---

41. *Witness to Abuse, supra* note 6, at 87.

42. *Id.*

43. *Id.* at 89.

44. *Id* at 39-40.

by sirens.[45] One of the detainees recalled that "[a]ll the security guards had a gun . . . [a]ll the traffic was stopped. I think I'm dying. We'll go somewhere and die."[46]

At the time of their arrest, none of the men were informed of their right to an attorney, nor were they allowed to contact any attorney.[47] Even after the men were appointed attorneys by the court, one day after their arrest, their court-appointed attorneys could not initially disclose the contents of the material witness warrants to them.[48] The men were ultimately detained in the federal Metropolitan Correctional Center in Chicago, where they were placed in solitary confinement.[49] For ten days, the men had no information as to why or for how long they were detained. These "witnesses" were never asked to testify during their detention or thereafter.[50] A year and a half after their release, the FBI apologized to the men for wrongfully arresting them.[51] In fact, the government has apologized in a number of other "material witness cases." FAC ¶ 136.

---

45. *Id.* at 40.

46. *Id.* (reprinting text of interview with Adel Khalil).

47. *Id.* at 50.

48. *Id.*

49. *Id.* at 53.

50. *Id.*

51. *Id.* at 89. *See also* partial transcript of Bryant Gumbel and Gwen Ifill, *Flashpoints: Sacrifices of Security: In Focus: Profiling: The Evansville 8*, Public Broadcasting System, July 15, 2003, *available at* http://www.pbs.org/flashpointsusa/20030715/infocus/topic_02/evansville.html.

F. Albader al-Hazmi

Dr. Albader al-Hazmi was a San Antonio physician with no prior criminal record when he was arrested as a material witness in September 2001. The Government had come to believe al-Hazmi was somehow involved in the 9/11 attacks. The Government based its suspicion of al-Hazmi on the fact that he shared the last name of one of the hijackers and had been in phone contact with someone at the Saudi Arabian Embassy with the last name "bin Laden," despite the fact that it is a common Arabic name.[52] The DOJ lacked probable cause to arrest al-Hazmi. Accordingly, the DOJ arrested al-Hazmi pursuant to a material witness warrant.

On the day of the arrest, Al-Hazmi and his wife and young children woke up to find five FBI agents in their home with guns drawn. The agents arrested al-Hazmi under a material witness warrant, and proceeded to search his home for twelve hours with little regard for his wife and young children.[53]

During his two-week detention, al-Hazmi was subject to conditions inconsistent with those appropriate for a witness. As he recalled, "I was searched naked many times sometimes twice daily in front of many guards." He also was beaten by guards on multiple occasions; on one such occasion, he recalled, "[o]ne of the guards said to me while beating me, say thanks to Allah."[54] Dr. al-Hazmi

---

52. *Witness to Abuse*, *supra* note 6, at 38.

53. *Id.* at 38-39.

54. *Id.* at 43.

was never called to testify in a criminal proceeding or charged with a crime.

G. Mohammed Bellahouel

"Despite an affidavit setting forth nothing but conjecture and relying on an undisclosed source,"[55] Mohammed Bellahouel was arrested as a material witness. Bellahouel was an Algerian immigrant working as a waiter at a restaurant in South Florida. The Government based its suspicion of Bellahouel on two tenuous "connections" to September 11 hijackers: (1) that Bellahouel had seen a movie with one of the hijackers at a local mall, according to an anonymous source (purportedly an unidentified employee of the theater); and (2) that Bellahouel had worked at the restaurant for 10 months, and therefore likely waited on two of the September 11 hijackers who frequently ate there during his shift.[56]

Based on these thin and unsubstantiated allegations, Bellahouel was secretly held in custody for *five months*.[57] He eventually did testify before a grand jury, and was subsequently cleared of any terrorist involvement.[58] However, the Government has kept the facts of this case largely hidden from the public even after Bellahouel's release.

---

55. Bascuas, *supra* note 16, at 690.

56. *Id.* at 689-690.

57. *Id.* at 690.

58. *Id.*

H. Ahmed Abou El-Khier

Ahmed Abou El-Khier was arrested as a material witness after a clerk at a motel in Maryland told the FBI he thought El-Khier looked "suspicious." The Government held El-Khier as a material witness on the basis that he had "a relationship with one of the hijackers," but never produced any evidence that he had any connection to the investigation into the events of September 11, 2001. El-Khier was ultimately released without ever testifying.[59]

I. Ismael Selim Elbarasse

Ismael Selim Elbarasse was arrested after Maryland state police stopped him and his family during a family vacation. The officer noticed Elbarasse's wife videotaping the Chesapeake Bay Bridge from the car. Although she was merely filming boats in the bay, the officer presumed she was filming a potential target. Elbarasse, while clearly viewed as a suspect, was held as a material witness for two weeks before being released under house arrest.[60] Additional information is unavailable because all documents in the case of Elbarasse's detention as a "witness" remain under seal.

J. Eyad Mustafa Alrababah

Eyad Mustafah Alrababah was arrested as a material witness after voluntarily contacting the FBI to offer information. Alrababah went to the FBI office in Bridgeport, Connecticut, to inform the authorities that

---

59. *Witness to Abuse, supra* note 6, at 83-84.

60. *Id.* at 84-85.

he had recognized four of the alleged hijackers whose pictures he had seen on television. He told the FBI agents that he had first met the men in March 2001 at his mosque in Connecticut, and had subsequently hosted them at his home and drove them from Virginia to Connecticut in June. He had not seen them since June 2001 and had no prior knowledge of the attacks.[61]

Despite the fact that Alrababah had voluntarily come to the FBI to supply information, he was shackled and arrested that day as a material witness. After he was shackled, Alrababah was moved to the Hartford Correctional Center, where he was held for approximately twenty days. In detention, he was held in solitary confinement and strip- and cavity-searched at least once a week. Alrababah was not brought before a judge until one month after his arrest,[62] and was ultimately held as a "material witness" for four months.[63] He was neither deposed nor called to testify.

K. Abdullah Tuwalah

Abdullah Tuwalah was a scholarship student at Marymount University in Arlington, Virginia when he was arrested as a material witness in connection to the grand jury investigation of Saleh Ali Almari, another student who had been briefly enrolled at Marymount. The FBI connected Tuwalah to Almari because they had

61. *Id.* at 71.

62. *Id.*

63. *Id.* at 26.

met through the Arab social club on campus.[64] Tuwalah's attorney explained that the FBI "said that [Tuwalah] knew some person that knew some person that may have known" something about Almari, describing the connection as "so tenuous."[65] Despite the tenuous connection and the fact that Tuwalah repeatedly informed Government officials that he was willing to testify, Tuwalah was arrested as a material witness.

Tuwalah was detained as a material witness for six weeks, during which the FBI interrogated him several times. Tuwalah was cooperative and even agreed to take a polygraph. Despite his cooperation, however, the FBI treated him in an accusatory manner. Tuwalah's attorney recalled that he had "never seen interview questions like [those directed at Tuwalah]." Even after a grand jury was convened, Tuwalah was never called to testify. [66]

L. Mujahid Menepta

Mujahid Menepta was arrested as a material witness because he attended the same mosque as Zaccarias Moussaui in Norman, Oklahoma. Menepta, a sixty-year-old U.S. citizen with two U.S. citizen sons, spoke to the press outside his mosque because he wanted to protect the younger Muslims, many of whom were immigrants, from the suspicion cast on them in the wake of the September 11 attacks.[67] After speaking to the press,

64. *Id.* at 27.

65. *Id.* at 83.

66. *Id.* at 27.

67. *Id.* at 71-72.

Menepta was approached by the FBI. Despite voluntarily cooperating with the FBI on multiple occasions, Menepta was arrested as a material witness with a show of force more appropriate for a dangerous suspect: twenty agents with guns drawn were waiting for Menepta outside the rehabilitation center where he worked as a therapist for disabled children.[68]

Menepta was incarcerated as a material witness for five weeks. He was not informed that he had a right to an attorney and was denied the opportunity to make a phone call despite his repeated pleas.[69] When two agents interviewed him, he was still kept in handcuffs.[70] Menepta's attorney explained that the DOJ insisted that it had to continue holding him for undisclosed national security reasons. Menepta was never called to testify.[71]

* * *

As demonstrated by the accounts above, the facts concerning what the Government failed to do – namely, its failure to subpoena witnesses rather than arrest them, its failure to depose and release witnesses rather than keeping them in custody, and its failure to ask these "witnesses" to testify in any capacity – illustrate that these individuals were unlawfully detained suspects rather than material witnesses. In addition to the examples discussed above, there are others, including examples where deposition

68. *Id.* at 37.

69. *Id.* at 57.

70. *Id.*

71. *Id.* at 72.

requests were affirmatively denied. For example, when witness James Ujaama's attorney Daniel Sears requested to have his client deposed, the DOJ refused. Sears was a former prosecutor and had also represented a number of material witnesses in the past. He stated that "when we offered the government to provide deposition testimony, the government moved him."[72] Similarly, witness Ali Ahmed's attorney, who had also represented several material witnesses before September 11, had his request denied when he suggested his client be deposed.[73] And Mujahid Menepta's attorney stated that despite her efforts, a deposition was not even on the table – the "government made it clear that it was not an option in this case."[74] In fact, of the seventy individuals detained under Petitioner's policy that have been identified, nearly 50 percent have never been asked to testify as witnesses.[75] Br. in Opp. at 14; FAC ¶ 128 (citing Steve Fainaru and Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held In War On Terror Haven't Testified*, WASHINGTON POST, November 24, 2002, at A1).

Prior to the events of September 11, the DOJ typically used the statute to obtain the testimony of non-U.S. citizens in immigration cases.[76] In fact, most material

72. *Id.* at 79-80.

73. *Id.* at 80 ("No one wanted to take his deposition. There were rumors … and suspicions about his involvement in terrorism. He never got a deposition – it was just dragged out.").

74. *Id.*

75. *Id.* at 1.

76. Heidee Stoller, *et al.*, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L.

witnesses were undocumented immigrants detained to testify against those who smuggled them into the United States.[77] But after September 11, the DOJ itself admits that it has used the material witness statute to detain suspects. The DOJ stated publicly that it would use a wide variety of measures to detain terrorist suspects. Petitioner Ashcroft said at an October 31, 2001 press briefing: "Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist attack by taking suspected terrorists off the street. . . . Aggressive detention of lawbreakers *and material witnesses* is vital to preventing, disrupting, or delaying new attacks." *See* Br. in Opp. at 11 (citing *Attorney General Ashcroft Briefing on New Anti-Terrorism Immigration Policies*, Opening Remarks of John Ashcroft, October 31, 2001) (emphasis added).

Internal DOJ reports reflect a similar approach and attitude: "According to an internal report issued by

---

& Pol'y Rev. 197, 199 n.7 (2004) (citing the Bureau of Justice Statistics, U.S. Dep't. of Justice, Compendium of Federal Justice Statistics 2000).

77. In the year 2000, of over 4,000 federal material witness arrestees, 94% were detained by the INS, and only 2% were American citizens. Stoller, *supra* note 76, at 199 n.7 (citing the Bureau of Justice Statistics, U.S. Dep't. of Justice, Compendium of Federal Justice Statistics 2000)). *See, e.g.*, *Aguilar-Ayala v. Ruiz*, 973 F. 2d 411 (5th Cir. 1992); *U.S. v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003); *U.S. v. Nai*, 949 F. Supp. 42 (D. Mass. 1996); *U.S. v. Huang*, 827 F. Supp. 945 (S.D.N.Y. 1993); *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the Western Dist. of Texas*, 612 F. Supp. 940 (W.D. Tex. 1985).

the Justice Department's Office of Inspector General, Petitioner Ashcroft issued a memorandum shortly after September 11, 2001, directing federal law enforcement personnel to use '*every available law enforcement tool*' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *Id.* at 11 (citing OIG 2003 Report at 1). Another internal DOJ document, titled "Maintaining Custody of Terrorism Suspects," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant." *Id.* at 12 (citing OIG 2003 Report at 38-39). Chief of the Terrorism and Violent Crime Section in the Criminal Division of the DOJ, James Reynolds, acknowledged that those detained under the statute were originally questioned because there were indications that they might have connections with terrorist activity, and even suggested that many of those detainees had no material witness information to provide.[78] In short, the DOJ's own statements and internal documents reflect its intent to use the material witness statute as a mechanism for detaining individuals suspected of criminal activity whom it did not have probable cause to otherwise arrest.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

---

78. *Center for Nat'l Sec. Studies*, 331 F.3d at 941-42 (Tratel, J., dissenting).

Dated: January 28, 2011

Respectfully submitted,

Jeffrey L. Fisher
Co-Chair, NACDL
Amicus Committee
559 Nathan Abbot Way
Stanford, California 94305

Joseph F. Tringali
Counsel of Record
Ryan A. Kane
Fadi Hanna
Greg Szewczyk
Simpson Thacher &
Bartlett LLP
425 Lexington Avenue
New York, New York 10017
jtringali@stblaw.com

Attorneys for Amici Curiae