

Center for National Security Studies

Protecting Civil Liberties and Human Rights

Director, Kate Martin

Memorandum

To: Interested Persons
Re: Material Witnesses Detained Since September 11
From: Marcia T. Maack, Sarah Margon
Date: April 12, 2002

In the course of the government's investigation into the September 11 terrorist attacks, it has, by its own account, arrested at least 1,182 people. An undisclosed number of these individuals have been arrested on material witness warrants (the others have been arrested for violating the federal criminal laws, immigration laws, and state and local laws). Although the Department of Justice (DOJ) refuses to reveal the exact number of individuals who have been arrested pursuant to the material witness statute, through newspaper reports we have been able to identify *at least* 25 such individuals.¹

The government claims that all of the material witnesses have been or are being detained in connection with grand jury proceedings.² The DOJ has refused to provide any further information on those being held as material witnesses, claiming that it cannot do so because of the grand jury secrecy rules and sealing orders that have been entered by the courts, and has refused to release the orders themselves.³

Although the government has refused to release any data, press reports have provided some limited information. Most troubling, the news stories indicate that many individuals have been held as material witnesses for significant periods of time prior to testifying before grand juries, if they testified at all. This raises questions as to whether the government is using the material witness statute not to secure testimony, but to secure the detention of individuals it cannot detain by any lawful means. Serious questions are raised as to whether the government is misusing the material witness authority to detain individuals when it could secure their testimony

¹ In addition to these 25 individuals, Zacarias Moussaoui was also detained on a material witness warrant. Of the 1,182 individuals arrested by the government, he is the only person to be charged with conspiracy in the September 11 attacks.

² See Gov. summary judgment motion in *Center for National Security Studies v. Department of Justice*, Civ. Action No. 01-2500 (D.D.C.) at www.cnss.gwu/~cnss/cnssmemoinupport.htm.

³ The government also asserts that the information is exempt from disclosure under the Freedom of Information Act law enforcement exemptions (5 U.S.C. § 552(a)(7)), because releasing it could jeopardize its investigation (Exemption 7A), endanger the health and safety of the material witnesses and the public (Exemption 7F), and could invade the personal privacy of those being held as material witnesses (Exemption 7C).

by deposition. See, e.g., *United States v. Awadallah*, 2002 U.S. Dist. LEXIS 1430, 01 CR 1026 (SAS), at *96-97 (S.D.N.Y. Jan. 31, 2002). It also appears from news articles that at least two individuals (Mohammed El-Yacoubi and Abdulmuhssin El-Yacoubi) were held as material witnesses in connection with a grand jury investigation in which they were the targets of the investigation. See Jerry Seper, *Israel bars entry to men INS cleared*, Washington Times, Apr. 1, 2002; Chuck Raasch, *Virginia City is newest front in terror war*, Indianapolis Star, Mar. 31, 2002. This raises serious concerns about violation of the Fifth Amendment right against self-incrimination.

I. The Material Witness Statute

In order to arrest someone as a material witness under the material witness statute⁴ the government must show that it has probable cause to believe “(1) that the testimony of the person is material and (2) that it may become impracticable to secure his presence by subpoena.” *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971).⁵ “In the case of grand jury proceedings . . . a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy” the first prong. *Ibid.*; see also *In re Berrios*, 706 F.2d 355, 358 (1st Cir. 1983) (refusing to require a greater showing than *Bacon* to satisfy the materiality requirement); *United States v. Oliver*, 683 F.2d 224, 231 (6th Cir. 1982) (same). With respect to the second prong, however, “sufficient facts must be shown to give the judicial officer probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. Mere assertion will not do.” *Bacon*, 449 F.2d at 943.

In addition, pursuant to The Bail Reform Act (18 U.S.C. § 3142) as it applies to material witnesses, a judicial officer “may detain a person pending trial only if, after a detention hearing, the judicial officer determines that ‘no condition or combination of conditions . . . will

⁴ 18 U.S.C. § 3144 provides as follows:

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

⁵ *Bacon* was decided under the previous material witness statute, 18 U.S.C. § 3149. Nevertheless, the probable cause requirement remains the same under 18 U.S.C. § 3144. Cf. *U.S. v. McVeigh*, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (“The burden on the government under [18 U.S.C. § 3144] is to show probable cause to believe that it is or may be impracticable to rely on a subpoena to get the witness before the grand jury.”)

reasonably assure the appearance of the person as required” *United States v. Li*, 949 F. Supp. 42, 44 (D. Mass. 1996) (quoting 18 U.S.C. § 3142 (e)). Accordingly, “a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight.” *Ibid.* (emphasis omitted) (citing *United States v. Jackson*, 823 F.2d 4, 4-5 (2d Cir. 1987) and *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir. 1986)).

Finally, pursuant to § 3144, “no material witness may be detained . . . if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice.” 18 U.S.C. § 3144. Accordingly, “[a] witness may not be detained . . . if a deposition would suffice as an adequate alternative to the witness’ live testimony at the proceeding.” *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992). “If the deposition would prove admissible over any objection under the Confrontation Clause of the United States or the Federal Rules of Evidence, then the material [witness] *must* be deposed rather than detained.” *Aguilar-Ayala*, 973 F.2d at 413 (emphasis added); *see also United States v. Awadallah*, 2002 U.S. Dist. LEXIS 1430, 01 CR 1026 (SAS), at *96-97 (S.D.N.Y. Jan. 31, 2002) (“Under the plain language of the statute, the government must show why the witness should not be released, with or without the taking of his deposition.”).

II. Information on Individuals Being Detained Under the Material Witness Statute

Below is information collected, predominately from media reports but also from indictments, about known material witnesses. Except where otherwise noted, the “arrest date” indicates the date of an individual’s arrest on a material witness warrant, although other charges may have been subsequently (or previously) filed. All articles are cited and attached.

A. **Material Witness Detainees Who Are American Citizens.**

Name: Ahmed Badawi

Arrest Date: October 2001 (exact date unknown)

Suspicious behavior/information surrounding arrests (taken from media sources):
Unknown

Citizenship Status: U.S. citizen

Other Charges and date (if any): None

Release date: 3 days after arrest

News Articles: Thomas C. Tobin, *Ethnicity brings pair scrutiny, detention*, St. Petersburg Times, Oct. 4, 2001.

Name: Mujahid Abdulqaadir Menepta

Arrest Date: October 10, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Friend of Moussaoui

Citizenship Status: U.S. citizen

Other Charges and date (if any): Being a convicted felon in possession of a firearm

Release date: Menepta was denied bail and as of November 11, 2001, was still incarcerated

News Article(s): Ryan Chittyum, *FBI detains friend of suspected terrorist*, Oklahoma Daily, Oct. 18, 2001; Karen Branch-Brioso and Eric Stern, *Ex-St. Louisan is among those rounded up*

after Sept. 11; he is held on unrelated gun charges; was a friend of possible "20th hijacker", St. Louis Post-Dispatch, Nov. 7, 2001. Jo Thomas, *No Bail for Friend of Man Suspected of Preparing Sept. 11 Hijackings*, N.Y. Times, Nov. 10, 2001

Name: Tarek Alabasti

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Had recently taken flying lessons; wife of friend (Fathey Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash."

Citizenship Status: U.S. citizen

Other Charges and date (if any): None

Release date: October 18, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Christopher Drew, Jo Thomas, and Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001.

B. Material Witness Detainees Who Are Not U.S. Citizens

Name: Dr. Albader Al-Hazmi

Arrest Date: September 12, 2002

Suspicious behavior/information surrounding arrests (taken from media sources): Missed work on September 11; has similar last name to one of the hijackers; had obtained an American visa in Jiddah (visa location used by some of the hijackers); had wired \$10,000 from Saudi Arabia to another Saudi Arabian in America; had purchased five tickets on Travelocity, the website allegedly used by the hijackers; had received phone calls over the past couple of years from a bin Laden.

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: September 25, 2002

News Article(s): Macarena Hernandez, *Prayers Answered; Dr. Al-Hazmi details how faith aided him during his detention*, San Antonio Express-News, Sept. 30, 2001; Robyn Blumner, *FBI Abuses Witness Detention*, St. Petersburg Times, Oct. 14, 2001; Deborah Sontag, *Who is This Kafka That People Keep Mentioning*, N.Y. Times, Oct. 21, 2001.

Name: Ayub Ali Khan

Arrest Date: September 12, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Found on train to San Antonio carrying box cutters and large amounts of cash; had shaved and dyed body hair.

Citizenship Status: Non-citizen

Other Charges and date (if any): Fraud

Release date: N/A

News Article(s): Richard A. Serrano, *Isolation, Secrecy Veil Most Jailed in Roundup*, L.A. Times, Nov. 4, 2001; Larry Neumeister, *Amtrak Detainees Terror Ties Doubted*, Associated

Press, Dec. 12, 2001; *From train station newsstand to terror probe, New Jersey detainees a mystery*, Shawnee Online, Mar. 29, 2001

Name: Mohammed Jaweed Azmath

Arrest Date: September 12, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Found on train to San Antonio carrying box cutters and large amounts of cash; had shaved and dyed body hair.

Citizenship Status: Non-citizen

Other Charges and date (if any): Fraud

Release date: N/A

News Article(s): Richard A. Serrano, *Isolation, Secrecy Veil Most Jailed in Roundup*, L.A. Times, Nov. 4, 2001; Larry Neumeister, *Amtrak Detainees Terror Ties Doubted*, Associated Press, Dec. 12, 2001; *From train station newsstand to terror probe, New Jersey detainees a mystery*, Shawnee Online, Mar. 29, 2001

Name: Tarek Mohamed Fayad

Arrest Date: September 13, 2001 (this is the date he was picked up on immigration charges, unclear whether he was charged as a material witness on the same date)

Suspicious behavior/information surrounding arrests (taken from media sources): May have been a roommate of one of the hijackers.

Citizenship Status: Non-citizen

Other Charges and date (if any): Visa violation, working illegally

Release date: As of early April 2002 had not yet been released/no further information available

News Article(s): Ben Goad, Scott Farwell, *Attack on America; Inland man held, questioned about terror suspect*, The Press-Enterprise, Apr. 2, 2002.

Name: Anwar Almirabi

Arrest Date: September 13, 2001 (he was picked up on this date on immigration charges but the court ordered his arrest as a material witness and it is unclear whether it is the same date.)

Suspicious behavior/information surrounding arrests (taken from media sources): Initially arrested for immigration violation but was then later changed to a material witness warrant.

Citizenship Status: Non-citizen

Other Charges and date (if any): Possibly changed to immigration/visa violation

Release date: As of January 8, 2002 had not yet been released/no further information available

News Article(s): Josh Gerstein, *Mystery Man: Alleged Witness Expected to Testify in Chicago*, abcnews.com, Jan. 8, 2002

Name: Tony Oulai

Arrest Date: September 14, 2001 (on immigration charges)

Suspicious behavior/information surrounding arrests (taken from media sources): Had flight manuals and stun gun in checked luggage.

Citizenship Status: Non-citizen

Other Charges and date (if any): Originally arrested for overstaying student visa but, in early November 2001 was arrested as a material witness. The material witness warrant was dissolved

on February 14, 2002 and he was then arrested for lying to FBI when he was first questioned in September 2001.

Release date: As of late March 2001 he had not yet been released

News Article(s): Amy Goldstein, *I Want To Go Home: Detainee Tony Oulai Awaits End of 4-Month Legal Limbo*, Wash. Post, Jan. 26, 2002; Amy Goldstein, *No Evidence in Pilot's Case*, Wash. Post, Feb. 2, 2002; Amy Goldstein, *No longer Material Witness, West African Still Detained*, Wash. Post, Feb. 15, 2001.

Name: Omar Bakarbashat

Arrest Date: September 15 or 16, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with two of the hijackers

Citizenship Status: Non-citizen

Other Charges and date (if any): Overstaying student visa, working illegally

Release date: As of November 17, 2001 he was going to be deported to Yemen/ no further information available.

News Article(s): Carol J. Williams, Michael J. Goodman, William C. Rempel, *German Issues Warrant for Pair Linked to Hijackers*, L.A. Times, Sept. 22, 2001; Seth Hettena, *U.S. seeking to deport Yemeni arrested in San Diego*, Associated Press, Nov. 17, 2001.

Name: Ramez Noaman

Arrest Date: September 19, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): No information available

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: Around November 15, 2001

News Article(s): Seth Hettena, *U.S. seeking to deport Yemeni arrested in San Diego*, Associated Press, Nov. 17, 2001.

Name: Mohdar Abdallah

Arrest Date: September 21, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with hijackers

Citizenship Status: Non-citizen

Other Charges and date (if any): Immigration violation

Release date: As of October 2001, he had not yet been released because he could not afford bail/no further information available.

News Article(s): *Judge Sets \$500,000 bail for material witness in terror probe*, Associated Press, Nov. 21, 2001.

Name: Osama Awadallah

Arrest Date: September 21, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Name and phone number found in hijackers' car; association with two of the hijackers.

Citizenship Status: Non-citizen

Other Charges and date (if any): Two counts of perjury

Release date: December 13, 2001 (on bail)

News Article(s): Richard A. Serrano, *Many Held in Terror Probe Report Rights Being Abused*, L.A. Times, Oct. 15, 2001; Christopher Drew, Jo Thomas, and Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001; Dan Eggen and Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, Wash. Post, Nov. 6, 2001;

Name: Yazeed Al-Salmi

Arrest Date: September 23, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Associating with hijacker Nawaf Alhazmi

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: October 11, 2001

News Article(s): Lois Romano & David S. Fallis, *Questions Swirl Around Men Held In Terror Probe*, Wash. Post, Oct. 15, 2001; Judy Peres, *Concerns rise of civil rights being ignored*, Chicago Trib., Oct. 16, 2001; Christopher Drew, Jo Thomas, and Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001; Naftali Bendavid, *Material witness arrests under fire; dozens detained in war on terror*, Chicago Tribune, Dec. 24, 2001.

Name: Mohammed Youssef

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with Tarek Alabasti who had recently taken flying lessons; wife of friend (Fathey Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash."

Citizenship Status: Non-citizen

Other Charges and date (if any): Overstaying visa

Release date: As of the end of October 2001, he had not yet been released.

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001.

Name: Fathey Saleh Abdelkhalek

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Wife called FBI and reported that he said he was going to commit suicide and "make a crash."

Citizenship Status: Non-citizen

Other Charges and date (if any): Overstaying visa

Release date: October 26, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001

Name: Tarek Eid Omar

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with Tarek Alabasti, who had recently taken flying lessons; wife of friend (Fathey Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash"

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: October 18, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001.

Name: Yasser Shahin

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with Tarek Alabasti, who had recently taken flying lessons; wife of friend (Fathey Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash."

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: October 18, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001.

Name: Adel Ramadan Khalil

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources):

Association with Tarek Alabasti, who had recently taken flying lessons; wife of friend (Fathey Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash."

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: October 18, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, Associated Press, Oct. 29, 2001

Name: Ahmed Attia Hassan

Arrest Date: October 11, 2001

Suspicious behavior/information surrounding arrests (taken from media sources

Association with Tarek Alabasti, who had recently taken flying lessons; wife of friend (Fathey

Abdelkhalek) called FBI and reported that her husband had said he was going to commit suicide and "make a crash."

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: October 18, 2001

News Article(s): *Evansville Man Says He Was Questioned About Flying Lessons*, Assoc. Press, Oct. 20, 2001; *Indiana men ordered to testify return to Evansville*, Assoc. Press, Oct. 25, 2001; Kimberly Herfling, *Evansville men still wonder why they were detained in terror investigation*, *Associated Press*, Oct. 29, 2001.

Name: Abdallah Higazy

Arrest Date: December 17, 2001

Suspicious behavior/information surrounding arrest: Pilot's transceiver was found in his hotel room; insisted to FBI that transceiver was not his.

Citizenship Status: Non-citizen

Other Charges and date (if any): Charged with perjury—all charges were dropped on January 16, 2002 after hotel employee admitted that he lied about finding transceiver in Higazy's hotel room.

Release date: January 21, 2002

News Article(s): Jane Fritsch, *Man Charged with Lying About Radio Device in Room*, N.Y. Times, Jan. 12, 2002; Jane Fritsch, *Grateful Egyptian is Freed as U.S. Terror Case Fizzles*, N.Y. Times, Jan. 18, 2002

Name: Mohammed El-Yacoubi

Arrest Date: December 19, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Possible terrorism attempts in Israel

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: Around February 1, 2002

News Article(s): Ted Bidris, *FBI suggests terrorist bombing plot in court papers*, AP Worldstream, March 26, 2002. Chuck Raasch, *Virginia City is newest front in terror war*, Indianapolis Star, Mar. 31, 2001; Jerry Seper, *Israel bars entry to men INS cleared*, Wash. Times, Apr. 1, 2001.

Name: Abdulmuhssin El-Yacoubi

Arrest Date: December 19, 2001

Suspicious behavior/information surrounding arrests (taken from media sources): Possible terrorism attempts in Israel

Citizenship Status: Non-citizen

Other Charges and date (if any): None

Release date: Around January 1, 2002

News Article(s): Ted Bidris, *FBI suggests terrorist bombing plot in court papers*, AP Worldstream, March 26, 2002. Chuck Raasch, *Virginia City is newest front in terror war*, Indianapolis Star, Mar. 31, 2001; Jerry Seper, *Israel bars entry to men INS cleared*, Wash. Times, Apr. 1, 2001.

Name: Youssef Karroum
Arrest Date: January 31, 2002
Suspicious behavior/information surrounding arrests (taken from media sources): Car he was driving tested positive for explosives.
Citizenship Status: Non-citizen
Other Charges and date (if any): None
Release date: February 7, 2002
News Article(s): Salim Jiwa, *Customs Frees Canadian Man, entered to US to buy groceries; held as Ressam case witness*, abcnews.com, Feb. 3, 2001

C. Individuals Who May Be Held as Material Witnesses, but Lack of Sufficient Information Makes It Unclear

Name: Hussein Al-Attas
Arrest Date: Late September/early October 2001
Suspicious behavior/information surrounding arrests (taken from media sources): Friends with Zacarias Moussaoui and Mujahid Abdulqaadir Menepta, both of whom were detained on material witness warrants.
Citizenship Status: Unknown
Other Charges and date (if any): Unknown
Release date: Unknown
News Article(s): Ryan Chittyum, *FBI detains friend of suspected terrorist*, Oklahoma Daily, Oct. 18, 2001.

Name: Mukrram Ali
Arrest Date: Late September/early October 2001
Suspicious behavior/information surrounding arrests (taken from media sources): Friends with Zacarias Moussaoui and Mujahid Abdulqaadir Menepta, both of whom were detained on material witness warrants.
Citizenship Status: Unknown
Other Charges and date (if any): Unknown
Release date: Unknown
News Article(s): Ryan Chittyum, *FBI detains friend of suspected terrorist*, Oklahoma Daily, Oct. 18, 2001.