Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Infamous Crimes and Criminals/The War on Terror

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United States v. Awadallah, 349 F.3d 42 (2nd Cir. 2003)

Shortly after the terrorist attacks on September 11, 2001, federal investigators discovered a piece of paper in a car abandoned by one of the hijackers that had the notation "Osama 589-5316." Osama Awadallah lived at an address with that phone number a year and a half before 9/11. After several days of questioning, the United States Attorney's Office on September 21 decided to arrest and to detain Awadallah as a material witness. District courts in San Diego and New York issued a warrant and later refused to grant Awadallah bail. After twenty days of detention, Awadallah testified before a grand jury. The United States then indicted Awadallah for making false statements in his grand jury testimony. Awadallah moved to have the indictment dismissed on the ground that his testimony was a consequence of his unconstitutional detention. The local federal district court agreed that the federal statute on material witnesses could not be constitutionally applied to a material witness detained for the purpose of testifying before a grand jury. The United States appealed to the Court of Appeals for the Second Circuit.

The Court of Appeals unanimously reversed. Judge Dennis Jacobs ruled that federal law permitted governing officials to detain material witnesses in order to obtain their grand jury testimony. How did Jacobs interpret the federal statute and why did he think that statute constitutional? What safeguards does the opinion provide for material witnesses? Are those safeguards adequate?

JACOBS, CIRCUIT JUDGE.

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The first issue presented is whether the federal material witness statute, 18 U.S.C. § 3144, allows the arrest and detention of grand jury witnesses. . . .

Section 3144, titled "[r]elease or detention of a material witness," provides in its entirety:

> 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.

The statute is cast in terms of a material witness in "a criminal proceeding." The decisive question here is whether that term encompasses proceedings before a grand jury. . . .

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§ 3144 applies to witnesses whose testimony is material in "a criminal proceeding." 18 U.S.C. § 3144. "Criminal proceeding" is a broad and capacious term, and there is good reason to conclude that it

includes a grand jury proceeding. First, it has long been recognized that "[t]he word 'proceeding' is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury."

Second, the term "criminal proceeding" has been construed in other statutes to encompass grand jury proceedings. For example, the statute authorizing the government to appeal from "a decision or order of a district court suppressing or excluding evidence . . . in a criminal proceeding," has been construed to authorize appeal of such an order from a grand jury proceeding. . . .

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The legislative history of § 3144 makes clear Congress's intent to include grand jury proceedings within the definition of "criminal proceeding." . . .

The most telling piece of legislative history appears in the Senate Judiciary Committee Report that accompanied the 1984 enactment of § 3144. The Report stated that, "[i]f a person's testimony is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody." A footnote to this statement advised categorically that "[a] grand jury investigation is a 'criminal proceeding' within the meaning of this section."

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The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions . . ." Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. . . Indispensable to the exercise of its power is the authority to compel the attendance and the testimony of witnesses. . . . When called by the grand jury, witnesses are thus legally bound to give testimony. This principle has long been recognized.

The district court noted (and we agree) that it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation. Moreover, that grand jury was investigating the September 11 terrorist attacks. The particular governmental interests at stake therefore were the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators' means, contacts, and operations in order to forestall future attacks.

On the other side of the balance, the district court found in essence that § 3144 was not calibrated to minimize the intrusion on the liberty of a grand jury witness. . . . We agree with the district court, of course, that arrest and detention are significant infringements on liberty, but we conclude that § 3144 sufficiently limits that infringement and reasonably balances it against the government's countervailing interests.

The first procedural safeguard to be considered is § 3144's provision that "[n]o 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." The district court agreed with the government that this deposition provision does not apply to grand jury witnesses. The government's altered position on appeal is that "Congress intended depositions to be available as a less restrictive alternative to detaining a grand jury witness." . . .

We conclude that the deposition mechanism is available for grand jury witnesses detained under § 3144. . . . The district court is thereby authorized to order a deposition and to release the witness once it has been taken.

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The second procedural safeguard at issue is § 3144's express invocation of the bail and release provisions set forth in 18 U.S.C. § 3142. . . .

[T]he common sense reading of section 3144 is that it refers to section 3142 only insofar as that section is applicable to witnesses, in making available such alternatives to incarceration as release on bail or on conditions, in suggesting standards such as risk of flight, likelihood that the person will appear, and danger to the community, and in providing for a detention hearing. Not every provision of section 3142 applies to witnesses, but some do, and those govern.

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While § 3144 contains no express time limit, the statute and related rules require close institutional attention to the propriety and duration of detentions: "[n]o 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." The court must "treat the person in accordance with the provisions of section 3142," which provides a mechanism for release. And release may be delayed only "for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure." Perhaps most important, Rule 46 requires the government to make a "biweekly report" to the court listing each material witness held in custody for more than ten days and justifying the continued detention of each witness. These measures tend to ensure that material witnesses are detained no longer than necessary.

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All told, Awadallah spent 20 days in detention as a material witness before testifying before the grand jury and uttering the allegedly perjurious statements. The undisputed facts establish that he received two bail hearings pursuant to § 3142 within days of his arrest, and that the judges in both hearings found his continued detention to be both reasonable and necessary. Under these circumstances, Awadallah's detention as a material witness was a scrupulous and constitutional use of the federal material witness statute.

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STRAUB, CIRCUIT JUDGE, concurring in the judgment on separate grounds.

I concur in the majority opinion in nearly all respects, including the holdings in Part I that the federal material witness statute, 18 U.S.C. § 3144, permits the arrest and detention of grand jury witnesses and is constitutional. . . .

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[T]he redacted affidavit does not contain sufficient facts to show that "it may become impracticable to secure [Awadallah's] presence [before the grand jury] . . . by subpoena." In excising the tainted evidence from the affidavit, all of the usual indicators of impracticability have been stripped. The redacted affidavit no longer contains any information about Awadallah's ties to San Diego or the length of time he has lived in the United States to show that he is a flight risk; nor any mention of Awadallah's overseas family ties and connections to suggest that he might have a place to go; nor any "admitted connection to the hijackers" to give him an incentive to flee. Furthermore, the amended affidavit evaluated in the majority opinion contains the fact that Awadallah was cooperative with the FBI agents "in the sense that he responded to questions."

From the redacted affidavit, we can draw almost no information about what Awadallah knew about the hijackers (even if we accept that whatever he knew would likely be material). The fact that two of the suspected hijackers had a slip of paper with Awadallah's name and outdated telephone number on it, even taken together with the San Diego connection, does not demonstrate that Awadallah had any particular type of information about the hijackers. Without any facts that even remotely suggest the nature or extent of Awadallah's "information," we are in no position to ascertain whether he should have come forward to the FBI.

Since we do not know whether Awadallah should have been expected to come forward with this unspecified information about the suspected terrorists, in the absence of other factors suggesting that Awadallah posed a flight risk, we cannot gauge whether his decision not to contact the FBI should be viewed—as the majority views it—in its most extreme light: as probable cause to believe that he would be

likely to flee instead of complying with a grand jury subpoena. It is absolutely true that the acts of terrorism committed on September 11 were the equivalent of acts of war, and that the investigation that ensued "galvanized the nation." In such a climate, it is difficult to view Awadallah's failure to come forward with relevant information (again assuming that Awadallah had what he understood to be relevant information) without some degree of suspicion. At the same time, in light of the waves of anti-Muslim sentiment that also followed September 11, as the majority acknowledges, even law-abiding and conscientious members of Muslim communities might, at least initially, have been reluctant to come forward of their own volition.

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Under the view adopted by my colleagues, if an individual with any unspecified level of material information about the persons suspected of perpetrating a crime fails to come forward to the FBI with that information, that failure will serve as proof that he would not abide by a grand jury subpoena and may justify his arrest as a material witness. Even if the majority's holding is viewed to be limited to the obviously unique context of the aftermath of the September 11 attacks, it seems to suggest that any individual with a documented connection to the suspected hijackers—including, e.g., anyone from a neighbor or colleague to a less familiar acquaintance at their mosque—could, without any additional showing, have been arrested as a material witness if he failed (for whatever reason) to come forward in the days following the publication of the suspected hijackers' names and photographs.

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Even if we assume, for the reasons set forth above, that Awadallah's arrest and detention were unlawful, it does not follow that his allegedly perjurious testimony before the grand jury was the fruit of that illegality. This Court has long recognized that it would be "an unwarranted extension of [the fruit of the poisonous tree] doctrine to apply it . . . to a new wrong committed by the defendant." . . .

Here we have a separate crime of perjury committed after the illegal conduct by the government . . . . [T]o call the perjury a fruit of the government's conduct here, is to assume that a defendant will perjure himself in his defense. It is difficult to see any causal relation otherwise between the government's wrong and the defendant's act of perjury during the trial. If this assumption is a premise of the defendant's argument, we cannot accept it for it involves a disregard of the defendant's oath and an assumption that perjury, although a crime, is an inevitable occurrence in judicial proceedings. . . We do not preserve justice by allowing further criminal activity to take place.

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