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ESSAY

DETENTION, MATERIAL WITNESSES & THE WAR ON TERRORISM

*Laurie L. Levenson**

Fifteen years ago, Justice Thurgood Marshall warned in his dissent in *United States v. Salerno*¹ that we are quickly moving to a criminal justice system where “a person innocent of any crime may be jailed indefinitely.”² The issue in *Salerno* was the constitutionality of the Bail Reform Act of 1984 that authorized detention of defendants who pose a pretrial danger to the community.³ At the time it was adopted, the new law caused quite a

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1. 481 U.S. 739 (1987).

2. *Id.* at 755 (Marshall, J., dissenting). Justice Marshall wrote:

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

Id. at 755-56.

3. *See id.* at 741.

stir.⁴ Defendants were to be presumed innocent and bail was to be determined based upon flight risk.⁵

When the majority in *Salerno* held that prospective danger to the community could be used as a criterion for denying bail,⁶ it fundamentally changed how the criminal justice system views detention—a change that reverberates in the War on Terrorism today. Up to that time, there had been a presumption that a defendant should not be prejudged as a threat to security. *Salerno* altered that. We moved into an era in which there might technically be a presumption of innocence, but there are a host of criminal and civil laws that allow the government to detain individuals because it suspects they could cause future harm.⁷

When *Salerno* was first announced, there was strong public reaction. Editorials in three major newspapers condemned the decision. The *Los Angeles Times* wrote:

The purpose of bail is to make sure that an accused person will appear at trial while not keeping him in jail before he is convicted. It is a perversion of the system to use bail to keep people in jail without trial. If there is a

4. The *Salerno* decision prompted a series of commentaries criticizing the move toward preventive detention. See, e.g., Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Florallynn Einesman, *How Long is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1 (1992); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990); Kevin F. Arthur, Comment, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987); Michael J. Eason, Case Note, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048 (1988); Margaret S. Gain, Note, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371 (1988-89); Scott D. Himsell, Comment, *Preventive Detention: A Constitutional but Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986); Marian E. Lupo, Comment, *United States v. Salerno: "A Loaded Weapon Ready for the Hand"*, 54 BROOK. L. REV. 171 (1988); Donald W. Price, Note, *Crime and "Regulation": United States v. Salerno*, 48 LA. L. REV. 743 (1988); M. Gray Styers, Jr., Note, *United States v. Salerno: Pretrial Detention Seen Through the Looking Glass*, 66 N.C. L. REV. 616 (1988); John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U. L. REV. 271 (1988).

5. See *Salerno*, 481 U.S. at 742.

6. See *id.* at 748-49.

7. See *id.*

The War on Terrorism has capitalized on this new attitude. Following the events of September 11, 2001, the Justice Department and the courts had little hesitancy in detaining individuals who have been prejudged as dangerous. In the rush to shore up national security, the government detained thousands of people. Some were alleged to be in violation of the immigration laws; others were designated as “material witnesses.”

Of the hundreds of aliens who were rounded up on immigration violations,¹² none have been directly linked to the terrorist attacks of September 11. However, the admitted purpose of the roundup was preventive detention. During Congressional hearings, Senator Sam Brownback, a ranking member of the Senate Judiciary Immigration Subcommittee stated, “Clearly, clearly, our immigration laws and policies are instrumental to the war on terrorism. While a battle may be waged on many fronts, for the man or woman on the streets immigration is the front line.”¹³

One of the sad consequences of the War on Terrorism is that it set back advances that had been recently made on behalf of detained immigrants.¹⁴ Just a few months before the September 11 attacks on the World Trade Center and the Pentagon, the United States Supreme Court held in *Zadvydas v. Davis*¹⁵ that indefinite detention of removable aliens violates due process.¹⁶ Conversely, by October 26,

12. Six months after the terrorist attacks of September 11, 2001, 563 individuals detained by the Immigration and Naturalization Service remained in custody. See *The Dept. of Justice and Terrorism: Hearing of the S. Judiciary Comm.*, 107th Cong. 36 (2001).

13. *Hearing on Anti-Terrorism Border Controls: S. Judiciary Immigration Subcomm.*, 107th Cong. (2001) (FDCH Political Transcripts).

14. See *Ashcroft Warns More Terrorist Attacks Likely, Urges Passage of Anti-Terrorism Measures*, THE BULLETIN'S FRONTRUNNER, Oct. 1, 2001 (“Before September 11, the ‘push in Washington was to restrict the powers of immigration authorities, not extend them. Courts, legislators and even President Bush had criticized federal agents about their use of classified or secret evidence, called ‘poisonous’ by one judge and ‘obnoxious’ by another.”).

15. 533 U.S. 678 (2001).

16. See *id.* at 689. See generally Daniel Kanstroom, *United States Immigration Policy at the Millennium—Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) (explaining how to best understand the constitutional doctrine of deportation law); Kevin Costello, Comment, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J.

case to be made against someone, let the government make it. If not, “preventive detention” should not be used as a substitute.⁸

Similarly, Stephen Chapman of the *Chicago Tribune* proclaimed, “[i]nnocent until proven guilty’ is one of those axioms so basic to the American way that it can be repeated by every schoolchild. So when the Supreme Court does violence to the concept . . . the damage ought to evoke alarm.”⁹ Finally, the *New York Times* editors opined:

Who is hurt by this decision, other than thugs like Anthony (Fat Tony) Salerno . . . ?

But [he’s] not the only one[.]. “Lock him up,” today’s prosecutor may urge. “There’s danger of violence.” The sharper danger is that tomorrow’s prosecutor will find it easier to “regulate” other defendants, who harbor unpopular ideas. In defending the rights of unsavory citizens, we defend our own. In restricting them, the Court demeans liberty.¹⁰

Attitudes have changed. Following *Salerno*, the public and the courts predictably moved into an era in which we are relatively comfortable with preventive detention. Legally, there may still be the presumption that a defendant is innocent, but we have many more laws today that permit the preventive detention of individuals in the name of guaranteeing society’s security.¹¹

8. *Throwing Away the Key*, L.A. TIMES, May 28, 1987, at Metro 4.

9. Stephen Chapman, *The Court Bails Out of Its Obligation to Shield the Innocent*, CHI. TRIB., May 31, 1987, at 3.

10. *Dangerous Until Proved Innocent*, N.Y. TIMES, May 28, 1987, at A22.

11. The movement toward additional detention has also resulted in the increased civil commitment of persons deemed to have a dangerous mental condition after they have completed their criminal sentences. See *Kansas v. Hendricks*, 521 U.S. 346 (1997). See generally Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (concluding that the criminal justice system’s shift toward detaining dangerous offenders is a “move in the wrong direction”); Carol S. Steiker, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998) (calling for a more general discussion of the limits of the preventive state); Kimberly A. Dorsett, Note, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113 (1998) (criticizing the Supreme Court’s justifications for upholding a law authorizing the indefinite detention of sexual offenders).

individual available to testify in a criminal proceeding. Although they were being detained, material witnesses were conceptually different from defendants who were incarcerated. Material witnesses were to be held because they could assist the criminal justice system in convicting those who pose a danger; they themselves were not considered a threat.²⁴

With the War on Terrorism, the legal seas have changed. The designation of material witness has often become a temporary moniker to identify an individual who will soon bear the status of defendant. Consider, for example, the initial designation of Terry Lynn Nichols as a material witness in the bombing of the Murrah Federal Building in Oklahoma City.²⁵ When Nichols challenged the material witness warrant, the authorities simply substituted it with a criminal complaint charging malicious destruction of government property.²⁶ Given the breadth of our conspiracy laws, it is not difficult to find a sufficient link to charge a person who has intimate knowledge regarding a crime as a co-conspirator to that crime.

Similarly, it has not been difficult for prosecutors in terrorism cases to convert material witnesses into defendants. One standard technique is to question the witness before the grand jury, knowing that the individual is unlikely to cooperate fully. When the detainee withholds information or lies to the grand jury, charges of perjury or

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 [sic], a judicial officer may order the arrest of the person and [order him detained].

18 U.S.C. § 3144 (1984).

24. In fact, to encourage individuals to be more cooperative as material witnesses, the courts provide for alternatives to incarceration, such as the deposition of material witnesses so they may be released. See Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L.Q. 1, 39-40 (1980); see also Lisa Chanow Dykstra, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 634-46 (1991) (discussing protections for homeless material witnesses).

25. See *In re Material Witness Warrant (Nichols)*, 77 F.3d 1277, 1279 (10th Cir. 1996) (striking down a challenge to a material witness warrant because it became moot when criminal charges were filed).

26. See *id.*

obstruction of justice can be substituted for the material witness warrant.²⁷

Until recently, courts have permitted this troubling investigative tactic.²⁸ However, the courts' attitudes may be changing. On April 30, 2002, United States District Judge Shira A. Scheindlin in New York upheld a challenge to the material witness laws used to hold individuals for grand jury investigations. In *United States v. Awadallah*,²⁹ the court struck down the use of the federal material witness laws to detain a college student whom prosecutors believed had information regarding the September 11 attacks.³⁰ According to Judge Scheindlin, the material witness statute should be limited to only "criminal proceedings," which do not include grand jury investigations. As Judge Scheindlin stated, Osama Awadallah, was imprisoned as a high security inmate³¹ and "having committed no crime—indeed, without any claim that there was probable cause to believe he had violated the law," he "bore the full weight of a prison

27. See, e.g., *In re Grand Jury Subpoena of Ali*, No. M 11-188 (RPP), 1999 WL 595665 at *5 (S.D.N.Y. Aug. 6, 1999) (denying a detainee's motion to vacate a civil contempt order issued after his refusal to testify before the May 1999 Special Grand Jury convened to investigate the bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania).

28. The tactic is commonly known as a "perjury trap" and was used in 1999 during the investigation of the bombings of the Kenyan and Tanzanian embassies. See *id.* at *2.

29. 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

30. Awadallah was arrested on September 21, 2001, after his college professor noted that Awadallah had stated in his examination booklet that "Nawaf" and "Khalid," the names of two of the September 11 hijackers, were the quietest people he had ever met. In the grand jury, Awadallah admitted knowing one of the hijackers but not the other. However, he returned to the grand jury a few days later to admit that he knew both. Nonetheless, prosecutors charged him with two counts of perjury before the grand jury. See Mark Hamblett, *Material Witnesses' Detention Narrowed*, at <http://www.law.com> (May 1, 2002); Jess Bravin, et al., *Judge Rules Against Imprisoning People to Help Investigations*, L.A. DAILY J., May 2, 2002, at A4.

31. According to Awadallah's counsel, Awadallah was subject to constant verbal and physical abuse while in custody at the Metropolitan Correctional Center in South Manhattan. Additionally, he was subjected to videotaped strip searches and denied basic prison privileges, such as family visits, mail, television, writing material, most reading materials, and sometimes access to his counsel. See Randall B. Hamud, *Diary of a Terrorist's Lawyer*, CAL. LAW. 20 (Apr. 2002) (describing the abusive prosecutorial tactics and difficult conditions under which Awadallah and his co-detainees were detained).

2001, Congress had provided a legislative mechanism for lengthy detention of aliens. Under the new USA PATRIOT Act,¹⁷ if the Attorney General designates an alien as a terrorist threat, that individual may be held for repeated six-month periods with no limit on the number of times such a designation may be made.¹⁸ Thus, we have become so comfortable with the concept of preventive detention that we now allow it based upon the certification of the Attorney General, rather than court order.

The War on Terrorism also has made a fundamental change in the use of material witness laws. Under the material witness laws, individuals who have not committed any crime themselves may nonetheless be detained for extended periods of time.¹⁹ They stand in legal limbo. As alleged witnesses to other people's crimes, they can be detained until after the criminal justice system is done with them. They are subject to deprivations of their liberty, even though they have not committed a crime. They are detained because, even though they may not be a risk to society, they know about someone else who may be. They are held because it strategically benefits the government to have them in custody.²⁰

CONST. L. 503 (2001) (arguing that indefinite detention of removable criminal aliens with little chance of deportation violates the Constitution); Clay McCaslin, Comment, "My Jailor is My Judge": *Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193 (2000) (considering the constitutional issues presented by the *Zadvydas* case).

17. 107 H.R. 3162, 107th Cong. (2001) (enacted).

18. *See id.* at § 412.

19. *See generally* Laurie L. Levenson, *Material Witnesses*, NAT'L L.J., B11 (Nov. 5, 2001) (indicating the detainee can be held as long as there is probable cause that he or she has material evidence regarding a criminal offense). For more information regarding material witnesses and their rights, see Susan Kling, Note, *A Mandatory Right to Counsel for the Material Witness*, 19 U. MICH. J.L. REFORM 473 (1986).

20. In her article, *Un-American Activities: Racial Profiling and the Backlash After Sept. 11*, Farah Brelvi reported that the Washington Post quoted a senior federal law enforcement official involved in the investigation, and he stated on condition of anonymity that "the detention of these 'material witnesses' is 'pushing the envelope' of civil liberties." Witnesses are detained for weeks or longer if they have any affiliation with suspected terrorists. Farah S. Brelvi, *Un-American Activities: Racial Profiling and the Backlash After Sept. 11*, 48 FED. LAW. 69, 73 (Nov./Dec. 2001).

The designation of material witnesses dates back to Common Law.²¹ The original concept was that individuals who have relevant testimony regarding a case have a responsibility to appear as witnesses. As Lord Bacon declared, “[a]ll subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.”²² It was never conceived, however, as a means to detain those whom the authorities suspected of being a threat to society but did not have enough evidence to charge.

When America adopted into its laws the power to detain material witnesses,²³ the focus of the law was on having an

21. See generally Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534-36 (1994) (explaining that the notion of the material witness began in the 1500's in England).

22. *Blair v. United States*, 250 U.S. 273, 279-80 (1919) (quoting the Countess of Shrewsbury's case, 2 How. St. Tr. 769, 778 (1612)).

23. The First Judiciary Act of 1789 authorized the detention of material witnesses. See Act of Sept. 24, 1789, ch. 20, §§ 30, 33, 1 Stat. 23, 88-91 (1850). This Act provided in pertinent part:

[C]opies of the process [against the accused] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment.

Id. at § 33.

In 1946, when the Federal Rules of Criminal Procedure were adopted, the federal laws regarding material witnesses were repealed and authorization for their detention was tied to Rule 46(b) of the Federal Rules. Until 1972 it read as follows:

If it appears by affidavit that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail, the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement of bail.

Susan Kling, Note, *A Mandatory Right to Counsel for the Material Witness*, 19 U. MICH. J.L. REFORM 473 n.23 (1986).

Finally, 18 U.S.C. § 3144, adopted in 1984 as part of the Bail Reform Act, now contains the primary provisions regarding material witnesses. It states:

system designed to punish convicted criminals as well as incapacitate individuals arrested or indicted for criminal conduct.”³²

Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention. Despite Judge Scheindlin’s ruling, the Attorney General has indicated he still considers material witness warrants as a viable investigative tool.³³ The government uses these laws to round up people because of what it expects them to do, rather than what it can prove they have done.

The groundwork for using material witness warrants to effect preventive detention was laid in the *Salerno* decision. Writing for the majority, Chief Justice William Rehnquist proclaimed:

[T]he Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. For example, in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons.³⁴

These words have become a justification for the aggressive use of both the immigration laws and material witness warrants to detain individuals suspected of, but not charged with, terrorist acts and sympathies. In the name of security, we have pushed the legal envelope by using laws that were created for other purposes to assist in detaining perceived enemies.

It is time to pause again to consider the dangers in this approach. Certainly, national security is a legitimate goal. The events of September 11 must never be repeated. But, as the road from *Salerno* has demonstrated, it is hard to regain support for freedoms once they are compromised. In his lengthy dissent in *Salerno*, Justice Marshall quoted Chief Justice Robert Jackson from another era,³⁵ whom, thirty-five years before *Salerno*, had reviewed the pleas for bail on appeal by members of the American Communist Party:

32. Hamblett, *supra* note 30, at 2.

33. *See id.*

34. *United States v. Salerno*, 481 U.S. 739, 748 (1987) (citations omitted).

35. *See id.* at 766 (Marshall, J., dissenting).

Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice³⁶

However, imprisonment to protect society is not unprecedented. In fact, quite the contrary is true. As history demonstrates, there certainly is a domino effect. Laws supporting preventive detention pending appeal ultimately lead to laws supporting preventive detention pending trial. Those laws then lead to the increased use of laws for civil commitment, additional use of laws to detain aliens, and the aggressive use of the laws to detain material witnesses. As this trend demonstrates, we are well on our way to making preventive detention the norm, rather than the exception.

It is understandable that during a time of crisis society wants to take all possible steps to protect itself. However, we would be wise to heed Justice Marshall's warning: "the coercive power of authority to imprison upon prediction . . . [poses a danger] to the cherished liberties of a free society."³⁷ If the government fears that illegal aliens are terrorists, then it should hold deportation hearings and deport them. If it feels that individuals designated as material witnesses are disguised terrorists, then it should charge them and try them as terrorists. Do not, however, simply expand the use of preventive detention to accomplish the same goals. Otherwise, the dangerous trend set today is likely to continue for years to come.

36. *Id.* (Marshall, J., dissenting) (quoting *Williamson v. United States*, 184 F.2d 280, 282-83 (1950) (footnotes omitted)).

37. *Id.* at 766-67 (Marshall, J., dissenting).