

Federal appeals court upholds Bush abuse of “material witness” statute

A green light for arbitrary arrests

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On November 7, a three-judge panel of the Second Circuit Court of Appeals upheld the Bush administration’s practice of arresting people not suspected of any crime, based on their designation as “material witnesses” whose testimony might assist a grand jury.

The ruling from the Second Court of Appeals, which reviews federal cases from New York and other northeastern states, reversed a federal district court ruling outlawing the government’s abuse of the material witness designation.

The immediate effect of *United States v. Awadallah* is to reinstate the indictment of Osama Awadallah, a 21-year-old Jordanian citizen, on two counts of “knowingly making a false material declaration” before the New York grand jury investigating the September 11 terrorist attacks. Despite two years of investigations, the grand jury has returned no indictments relating to complicity in the attacks, and there is no allegation that Awadallah was involved with those atrocities or any other terrorist plots.

The more long-term impact of the ruling is to give the Bush administration a free hand to round up and interrogate citizens and other people living in the United States legally, regardless of whether they are suspected of criminal conduct. There need not be a criminal case pending, or even a specific criminal investigation. It is sufficient that an FBI agent file an affidavit claiming that someone might have information relevant to an ongoing grand jury investigation and that the person might not report to testify in response to a subpoena. The person can then be picked up and booked into jail, questioned without an attorney or the benefit of *Miranda* rights (because he or she is not a criminal suspect), and then held for weeks without bail.

The circumstances of this case reveal not only the complicity of certain federal judges in the dismantling of fundamental democratic rights, but also the brazen manner in which the Bush administration is running roughshod over the US Constitution.

Awadallah is a permanent resident alien living near his family in Southern California. His father and brother are US citizens. He has a solid history of working and attending school. He attracted FBI attention when a piece of paper found in a car abandoned by alleged hijackers at Washington Dulles International Airport on September 11 had his first name written next to a phone number. The number was that of a residence in the San Diego area where Awadallah had lived for a short time with several other young Arab men almost two years earlier.

He was picked up by a dozen or more FBI agents during the mid-afternoon of September 20, 2001, outside his San Diego apartment. The agents forced him to sign a consent to search his home, and then interrogated him for six hours, finishing around midnight.

Court records show that Awadallah fully cooperated during the questioning, and he has never been accused of answering any of those

questions falsely. He was released, but the agents insisted he return the next morning for three polygraph tests. After the examinations, the agents handcuffed, fingerprinted and photographed him, and then locked him up in a cell.

When a lawyer hired by Awadallah’s family went to the federal jail to provide representation, he was told falsely that Awadallah was not there. After the lawyer insisted that his client was there—Awadallah had recently called his brother from the facility—a correctional officer brought another inmate to the interview room. When the lawyer protested, he was escorted out of the facility.

While playing this shell game with Awadallah’s counsel, the agents obtained from a judge in New York City a “material witness” warrant to arrest Awadallah—hours *after* the arrest had occurred. For the next 25 days, Awadallah was held without bail and under barbaric conditions.

He was served food that his religious beliefs did not allow him to consume. He was not given toilet paper or soap for two days, and, for three to four days, he was not allowed to shower. His cell was flooded for two days when a toilet backed up. He was held in solitary confinement and strip-searched every time he left his cell, at least once in the presence of a female officer. He was taunted for his religious beliefs, transported in painful cuffs and shackles, and denied family visits or telephone calls.

On October 10, Awadallah, who speaks limited English, was escorted into the New York grand jury chambers shackled by his arms and legs, wearing inmate clothes. This young man, who was not accused of committing any crime and who had no contact with the alleged hijackers for almost a year, was handcuffed to a chair and grilled for almost a full day by two government lawyers.

As he had already told his FBI interrogators, Awadallah explained to the grand jury that through his religious activities and other Arab community contacts he met dozens of young men in San Diego’s Arab community, including Nawaf Al-Hazmi, who 18 months later was identified as one of those who participated in the hijacking of American Airlines Flight 77, which crashed into the Pentagon.

Awadallah identified Al-Hazmi by name from a photograph and estimated that he had seen him about 40 times, the last time being almost a year earlier, when Al-Hazmi left San Diego. Awadallah said he had seen Al-Hazmi because the two worked at the same gas station and worshiped at the same mosque.

Awadallah explained that Al-Hazmi introduced him to a friend whose name he could not recall, but whose physical appearance he could describe. That person turned out to be a second alleged Flight 77 hijacker, Khalid Al-Mihdhar.

Throughout his questioning by the FBI and before the grand jury, Awadallah at times had difficulty recalling names, as there were many people involved and much time had passed. The government prosecutors

produced a recent college essay Awadallah had written in a “blue book” for an exam in one of his English-as-a-second-language classes.

Awadallah wrote: “I have been in San Diego since 1998. I have always wanted to meet as much people as I can. I have met many people from many countries. One of the quietest people I have met is Nawaf. Another one, his name Khalid. They have stayed in San Diego for 6 months.”

Confronted with a photocopy of the blue book, Awadallah said that the name “Khalid” was not in his handwriting. Awadallah was brought back to the grand jury five days later, after having examined the original blue book. He testified that the writing was, in fact, his, and that the blue book had refreshed his memory. Al-Hazmi’s friend, he testified, was named Khalid.

Without releasing him from custody, the US government arrested Awadallah, charging that he deliberately lied when he claimed not to know Al-Mihdhar’s first name, and lied about writing “Khalid” in his college examination essay. The charges carry a maximum sentence of 10 years imprisonment.

Awadallah was held without bail until United States District Judge Shira Scheindlin set a \$500,000 bond. Awadallah was finally freed on December 13, 2001, after spending 83 days in custody.

Five months later, in two thorough and passionate decisions, Judge Scheindlin dismissed Awadallah’s indictment. She began by quoting from a Supreme Court decision rendered shortly after the Civil War. “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government” (*Ex parte Milligan*, 1866).

Scheindlin ruled that the “material witness” statute could not be applied to grand jury proceedings, which are open-ended investigations managed by prosecutors outside the presence of judges and without the counterbalance of defense attorneys. She was clearly troubled by the potential abuse of a rule that would allow government agents to arrest and incarcerate people solely on the basis that they might have information useful to a grand jury investigation.

Scheindlin compared such “material witness” warrants to the hated general warrants of King George III, which played a role in provoking the American Revolution. She quoted the Supreme Court’s observation that they placed “the liberty of every man in the hands of every petty officer.”

In her second decision, Scheindlin ruled that regardless of whether the “material witness” statute applied to grand juries, the indictment had to be dismissed because of serious FBI misconduct in this case. Awadallah was arrested long before the warrant was obtained, although the warrant was required for him to be lawfully arrested, and the FBI agent’s affidavit left out important information, such as the fact that Awadallah had already been interrogated and was cooperative during the questioning, so that the New York judge did not know the true facts when he signed the warrant.

Scheindlin’s rulings triggered a vicious reaction in the right-wing press. Using the fact that Awadallah shares a common Arabic first name with the alleged September 11 mastermind, Osama bin Laden, the *Wall Street Journal* crudely referred to Scheindlin as “Osama’s favorite judge.”

Fox News Network’s resident blowhard, Bill O’Reilly, urged his viewers over the course of several shows to demand that Scheindlin be impeached and removed from the bench for failing “to protect Americans from harm” by allowing “a man who is associated with two terrorist killers to walk free.”

O’Reilly added, “We have to protect ourselves because some of the people in power can’t or won’t do it for us. Judge Scheindlin has to go.”

O’Reilly even insinuated that her violent removal might be in order when he agreed with one of his guests, a former CIA official, who “longed for the days of the 19th century, where you get a rail out and put

the judge on top, and ride him out of town.”

On November 17, ten days after the ruling in *Awadallah*, another panel of the Second Circuit heard two hours of oral arguments in *Padilla v. Rumsfeld*. Jose Padilla, a US citizen who converted to Islam and adopted the name Abdullah al Muhajir, was arrested at Chicago’s O’Hare International Airport on May 8, 2002, on a “material witness” warrant for the same New York grand jury before which Awadallah had testified.

Before Padilla’s lawyer could challenge the warrant in court, Attorney General John Ashcroft held a televised press conference in which he claimed that Padilla was involved in a conspiracy to detonate a nuclear “dirty bomb” on behalf of Al Qaeda, and President Bush declared him an “enemy combatant.”

These actions were taken even though the authorities found no evidence on Padilla’s person of his involvement in such a plot at the time of the arrest. Since that time, Padilla has been held incommunicado in a naval brig in South Carolina—a period of almost 18 months.

In the appeal, Padilla is challenging the Bush administration’s designation that he is an “enemy combatant” who can be imprisoned indefinitely “pursuant to the laws of war.” The Bush administration is appealing a lower court order entitling Padilla to consult with his attorney to prove he is not an “enemy combatant.”

Paul D. Clement, the chief deputy to US Solicitor General Theodore Olsen, told the panel that Padilla was not entitled to dispute Bush’s claim in court because “Al Qaeda made the battlefield the United States, and there’s every indication they want to make the battlefield the United States again.”

At least two of the three panel members noticeably recoiled in response to Clement’s claims. Judge Barrington Parker, Jr., whom Bush himself recently elevated to the Second Circuit, told Clement that if his argument were accepted, “we would be affecting a sea change in the constitutional life of this country by making changes that would be unprecedented in civilized society.”

Judge Rosemary S. Pooler, a Clinton appointee, added, “As terrible as 9/11 was, it didn’t repeal the Constitution.” The third judge, Richard C. Wesley, openly sympathized with the government position, and suggested that the case be moved to South Carolina, where the Fourth Circuit, the most conservative federal court in the United States, would hear the appeal.

Two other people have been designated “enemy combatants” since the 2001 attacks: Ali Salem Kahlal Al-Marri, a citizen of Qatar who has been accused of being an Al Qaeda sleeper agent, and Esam Hamdi, a Louisiana native captured during the fighting in Afghanistan.

A ruling is expected in the *Padilla* case in a matter of weeks. Like the recent ruling in *Awadallah*, it is subject to review by the Supreme Court, which recently agreed to review the constitutionality of the Bush administration’s indefinite detention of alleged terrorism suspects in Guantanamo Bay, Cuba.



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