

The Department of Justice Office of the Inspector General (OIG) today released a report examining the Department's use of the federal material witness statute in international terrorism investigations during the years 2000-2012. The OIG evaluated the cases of approximately 112 material witnesses detained during this period, from which we identified 12 individuals whose arrests appeared to raise questions regarding whether the Department was misusing the statute. The OIG's in-depth review of the 12 individuals' cases did not find sufficient evidence to conclude that the Department misused the statute in international terrorism investigations. Specifically, the OIG review found no evidence that the Department's use of the statute in these 12 individuals' cases resulted in the arbitrary or indiscriminate detention of Muslim men, and it confirmed that the statute was used for its intended purpose – to secure relevant testimony from a witness who might flee – rather than as a pretext to preemptively detain and investigate individuals suspected of criminal offenses.

The material witness statute authorizes courts to issue special warrants (material witness warrants) which provide for the arrest and detention of a person if his testimony "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 material witness warrant is a powerful and sometimes controversial investigative tool because it may result in the detention of a person for days, weeks, or sometimes months, even though there may not be sufficient evidence to support charging the person with a crime.

The report issued today found that the Department used the material witness statute in international terrorism investigations relatively rarely; the statute is far more frequently used in other investigations, particularly alien smuggling prosecutions. Although the Department dramatically increased its use of the statute in international terrorism investigations immediately following the September 11 attacks, the data reveal an equally dramatic decline in the use of the statute in such cases in recent years. According to Department records, no material witnesses were detained in international terrorism cases from 2004 through 2012.

After reviewing thousands of pages of contemporaneous government documents, the OIG determined that the government had collected ample evidence documenting the basis for the Department's belief that each of the 12 witnesses whose cases we reviewed in depth was involved in or knowledgeable about past or future terrorist conspiracies and therefore had information relevant to a terrorism investigation, and that the witness might flee rather than give relevant testimony. The OIG also determined that the affidavits that FBI agents presented to the courts in order to obtain material witness warrants described the evidence known to the FBI accurately and with particularity, although the review did identify one case in which an FBI agent's affidavit contained inadvertent errors, omitted some relevant information, and could have been more complete.

The report's in-depth review of the 12 individuals' cases also evaluated specific forms of potential misuse of the statute. The review assessed whether the Department used the material witness statute as a pretext to detain the subjects of criminal investigations prematurely – in the absence of probable cause – while developing the evidence needed to file criminal charges. The OIG concluded that, although officials sometimes had mixed motives for detaining a witness, a genuine and legitimate interest in securing relevant testimony from the witness appeared to be present in each of the cases we reviewed in depth. Similarly, the review assessed cases in which the witness was detained for a long period or the Department never actually took his testimony. After reviewing each case in detail, the OIG found reasonable explanations for these circumstances in each case, and found no indication that such explanations were cover for a pretextual use of the statute.

The OIG also found that most of the procedural safeguards in the Federal Rules of Criminal Procedure and the material witness statute worked as intended to limit a material witness's time in detention. In each case, a neutral magistrate authorized the witness's arrest based on a sworn FBI affidavit stating with particularity the facts supporting the issuance of a warrant. Detained witnesses had access to counsel, access to the evidence used to justify their arrests, and an early opportunity to contest the material witness arrest warrant at a hearing. However, the OIG found instances in which the Department did not sufficiently comply with a rule requiring biweekly status reports to the court justifying the witness's continued detention.

The report also examines allegations that some witnesses were subjected to harsh conditions during confinement and transport, such as strip searches and shackling. In general, the relevant statutes do not treat material witnesses any differently than criminal defendants with respect to conditions of confinement. The OIG's review found that, although the conditions under which material witnesses were confined and transported were sometimes harsh, there was no evidence that they violated applicable laws or Department policies.

Finally, the report notes that during the course of this review, the OIG experienced significant delays resulting from limitations imposed upon its access to grand jury material and Title III electronic surveillance material. The Deputy Attorney General ultimately determined that the information in question should be provided to the OIG, and both the Attorney General and the Deputy Attorney General have stated that they will continue to provide the OIG with the necessary authorizations to enable the OIG to obtain records in future reviews. However, it is the view of the Inspector General that the OIG's access to relevant information in possession of the Department should not be conditioned upon the permission of Department leadership, as such a condition conflicts with the core principles of the Inspector General Act and impairs the OIG's independence.

The unclassified report released publicly today contains some information that is redacted because the FBI determined the information is "law enforcement sensitive." The full report, without redactions, has been provided to the Department and the FBI.

The report can be found on the OIG's website at: <http://www.justice.gov/oig/reports/2014/s1409r.pdf>.