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March 9, 2016

The Honorable Loretta Lynch  
United States Attorney General  
Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Dear Attorney General Lynch:

In September, 2014, the Department of Justice Office of Inspector General (IG) released a report examining the government's use of the federal material witness statute, 18 U.S.C. § 3144, in terrorist investigations. While the report ultimately concluded that there was not sufficient evidence of misuse during the covered time period, I remain concerned that federal prosecutors lack clear and appropriate guidance on the application of the statute. I stress the importance of issuing new guidelines in the US Attorneys' Manual to reflect the intended meaning of the material witness statute and to address the following concerns.

First, I am deeply concerned that a material witness may be held indefinitely despite having committed no crime. As intended by the statute, witnesses should be deposed of and promptly released whenever possible. If deposition is not possible, I urge periodic review as to the appropriateness of continuing a material witness's detention. I also recommend a cap on the duration of detention, and guidance in the US Attorneys' Manual setting out how to accomplish such a limitation.

Second, according to the statute, one requisite for detaining a material witness is that it "may become impracticable to secure the presence of the person by subpoena." Such impracticability may be shown by probable cause that the person represents a flight risk. Unfortunately, as the IG's report indicates, courts are inconsistent in their application of this legal standard, with some courts only requiring a showing that the witness has the ability and motive to flee, despite no demonstration of actual intent to do so. As a prerequisite to any detention of a material witness, I believe prosecutors should demonstrate by specific, particularized facts that the witness is likely to flee. In the absence of such a showing, there is considerable risk of abuse, particularly when the witness is also treated as a potential suspect.

Finally, I am also troubled by the report's statement that current federal law does "not treat material witnesses any differently than criminal defendants with respect to conditions of confinement." As is stated in the report, the material witness statute was intended to protect

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material witnesses by providing that all such witnesses be kept “separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.” Unfortunately, what is supposed to be a provision to *protect* witnesses has resulted in what the report admits are “highly restrictive conditions of confinement” in which some material witnesses are placed in solitary confinement. To detain a *witness* in worse conditions than those in which many criminals are held is shocking and contrary to the intent of the statute and basic concepts of liberty and justice. Prosecutors should have clear guidelines that ensure material witnesses are held in the least restrictive manner possible and with the utmost dignity.

I look forward to working with you further to ensure that federal prosecutors have clear guidance on the application of the federal material witness statute and that basic protections are guaranteed to those detained under this authority. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Ron Wyden". The signature is written in a cursive, slightly slanted style.

Ron Wyden