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Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

September 8, 2005

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Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

Summary

Witnesses at Congressional oversight hearings alleged that the authority to arrest and hold material witnesses until their appearance at federal criminal proceedings (including grand jury proceedings) had been abused following September 11, 2001. Section 12 of the USA PATRIOT Act and Terrorism Prevention Reauthorization Act (H.R. 3199) as reported by the House Judiciary Committee called for a periodic review and reports on the use of the material witness statute. In the face of Administration opposition, however, the provision was dropped from the bill prior to House consideration. No similar proposal can be found in the version of H.R. 3199 (S. 1389) approved in the Senate. The episode illustrates the level of controversy easily generated by material witness statutes.

This is an overview of the law under the federal material witness statute which authorizes the arrest of material witnesses, permits their release under essentially the same bail laws that apply to federal criminal defendants, but favors their release after their depositions have taken.

A list of citations to comparable state statutes and a bibliography of law review articles and notes are appended.

The report is available in an abridged form – without footnotes, citations to most authorities and appendices – as CRS Report RS22259, *Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act*.

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Arrest and Detention of Material Witnesses: Federal Law in Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

Introduction

When reported by the House Committee on the Judiciary, section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199) directed the Department of Justice to review the detention of individuals under the federal material witness statute, “including their length [of detention], conditions of access to counsel, frequency of access to counsel, offense at issue, and frequency of appearance before a grand jury.” The Office of Management and Budget announced that the Administration strongly opposed section 12 on the grounds that the review by the Department of Justice’s Inspector General and reports to the House and Senate Judiciary Committees called for by that section would “entail wholesale violation” of the grand jury secrecy provisions.¹ Perhaps as a consequence, the section was dropped from the bill prior to House consideration and no comparable provision appears in the version of H.R. 3199 which the Senate approved.

The episode illustrates the level of controversy easily generated by material witness statutes. Under the federal statute, 18 U.S.C. 3144, witnesses in a federal criminal case may find themselves arrested, held for bail, and in some cases imprisoned until they are called upon to testify. The same is true in most if not all of the states.² Although subject to intermittent criticism,³ it has been so at least from

¹ Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 3199 – USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*, available on September 5, 2005 at [<http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3199sap-h.pdf>].

² A discussion of the provisions of state law is beyond the scope of this report. Citations to the state statutes are appended.

³ 1 BISHOP, CRIMINAL PROCEDURE, 18-9 (2d ed. 1872) (“The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear and testify before the upper court. Sometimes the purposes of justices require that these recognizances should be with sureties, and occasionally the unpleasant result follows that a witness cannot obtain sureties, and he is detained in prison”); ALI, CODE OF CRIMINAL PROCEDURE, §58 note (Tent.Draft 1928) (“One of the evils in connection with the administration of the criminal law in most states is the practice or confining for long periods of time, generally in the country jail, witnesses who cannot give bail”); *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATHOLIC UNIVERSITY LAW REVIEW 37, 50 (“Failure of state and federal government to come up with

the beginning of the Republic.⁴ The Supreme Court has never squarely considered the constitutionality of section 3144 or any of its predecessors, but it has observed in passing that, “[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained in the absence of bail, as a material witness,” *Stein v. New York*, 346 U.S. 156, 184 (1953).⁵ Even more telling may be an earlier remark from the Court to the effect that, “[t]he constitutionality of this [federal material witness] statute apparently has never been doubted,” *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929).

In spite of the concerns of some that the authority can be used as a means to jail a suspect while authorities seek to discover probable cause sufficient to support a

a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation”); Studnicki, *Material Witness Detention: Justice Served or Denied?* 40 WAYNE LAW REVIEW 1533, 1568 (1994) (“The continued use of material witnesses statutes will undoubtedly be an issue debated well into the next century. Whether the criminal justice system abandons this ancient practice in favor of a more humane policy toward the treatment of witnesses remains to be seen”); Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 NEW YORK LAW SCHOOL LAW REVIEW 13, 13 (2003) (“Upon the mere conclusory statement of a government official that a person has material information and might not respond to a subpoena, the person may be incarcerated for an indefinite period of time, without bail, and under onerous conditions”).

⁴ 1 Stat. 91 (1789) (“copies of the process [criminal complaint] 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”); *see also*, Rev. Stat. §879 (1878) (“Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case”); 28 U.S.C. 657 (1926 ed.); F.R.Crim.P. 46(b), 18 U.S.C. App. (1946 ed.); 18 U.S.C. 3149 (1970 ed.).

⁵ *See also*, *Blair v. United States*, 250 U.S. 273, 280-81 (1919) (“At the foundation of our federal government the inquisitorial function of the grand jury and compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . [B]y the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy trial and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act, the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. . . [The Revised Statutes] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions . . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice to the forms and modes established in our system of government. . .”); VIII WIGMORE ON EVIDENCE §§2190-2192 (3d ed. 1940).

criminal accusation⁶ or as a preventive detention measure,⁷ the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant.⁸ Particularly in the early stages of an investigation, however, an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect.⁹

The case law and statistical information suggest that the federal statute is used with surprising regularity¹⁰ and most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals.¹¹ Critics, however, contend

⁶ Carlson & Voelpel, *Material Witness and Material Injustice*, 58 WASHINGTON UNIVERSITY LAW REVIEW 1, 9 (1980) ("Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant").

⁷ Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOYOLA OF LOS ANGELES LAW REVIEW 1217, 1225 (2002) ("Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention. . . 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").

⁸ *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("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"); *In re De Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983) ("no showing has been made that the arrest was a subterfuge designed to obtain non-testimonial evidence or to bring a target before the grand jury") (even though the witness had been subpoenaed to appear before the grand jury to testify, provide hair samples, and take part in a lineup).

⁹ Those subject to arrest under the federal statute include Terry Nichols (subsequently convicted for complicity in the Oklahoma City bombing), *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10th Cir. 1996); Jose Padilla (subsequently transferred to military custody as an "enemy combatant"), *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715 (2004); and Brandon Mayfield (whose fingerprint was erroneously thought to match one linked to the Madrid train bombing), *In re Federal Grand Jury Proceedings*, 337 F.Supp.2d 1218, 1220-221 (D. Ore. 2004).

¹⁰ United States magistrate judges conducted 4882 material witness hearings in FY2004; 4070 in FY2003; 2961 in FY2002; 3344 in FY2001; and 3603 in FY2000, Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3 (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [http://www.uscourts.gov]. The annual reports of the Administrative Office of the United States Courts indicate that the statistics have not changed a great deal over the last quarter century, United States magistrates conducted 6865 material witness hearings in FY1981; 8221 in FY1980; 6481 in FY1978; 3230 in FY1977; and 2048 in FY1976, *Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

¹¹ See e.g., *In re Class Action Application of Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F.Supp. 904 (W.D. Tex. 1985); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Aguilar-Tamayo*, 300 F.3d

that since September 11, 2001, seventy individuals, mostly Muslims, have been arrested and detained in abuse of the statute's authority.¹²

Arrest

The federal material witness statute provides that:

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 [relating to bail]. 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. 18 U.S.C. 3144.

An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates.¹³ The statute

562 (5th Cir. 2002); *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D.Cal. 2003), all involving illegal alien smuggling. Statistics from the Administrative Office of the United States Courts indicate that an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur in judicial districts bordering Mexico:

<u>District</u>	<u>FY2004</u>	<u>FY2003</u>	<u>FY2002</u>	<u>FY2001</u>	<u>FY2000</u>
S.D.Cal.	1210	936	721	601	728
D. Ariz.	808	495	295	313	597
D. N.Mex.	287	288	253	233	220
W.D. Tex.	503	406	474	533	566
S.D. Tex.	1423	1290	676	814	765

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), *United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [<http://www.uscourts.gov>]. The historical picture is much the same:

<u>District</u>	<u>FY1981</u>	<u>FY1980</u>	<u>FY1978</u>	<u>FY1977</u>	<u>FY1976</u>
S.D.Cal.	2637	3636	2821	1095	755
D. Ariz.	603	691	978	770	366
D. N.Mex.	57	16	147	154	85
W.D. Tex.	651	734	1267	252	211
S.D. Tex.	2232	1946	2244	461	374

Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

¹² *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, 17 HUMAN RIGHTS WATCH 1-3 (June 2005), available on September 5, 2005 at, [http://hrw.org/english/docs/2005/06/27/usdom11213_txt.htm].

¹³ 18 U.S.C. 3156(a)(1) (“As used in sections 3141-3150 of this chapter— (1) the term ‘judicial officer’ means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release

applies to potential grand jury witnesses as well as to potential trial witnesses.¹⁴ Section 3144 on its face authorizes arrest at the behest of any party to a criminal proceeding. In the case of criminal trial, both the government and the defendants may call upon the benefits of section 3144.¹⁵ Availability is a bit less clear in the case of grand jury proceedings. In a literal sense, there are no parties to a grand jury investigation other than the grand jury.¹⁶ Moreover, it seems unlikely that a suspect, even the target of a grand jury investigation, would be considered a “party” to a grand jury proceeding. The purpose of section 3144 is the preservation of evidence for criminal proceedings. Potential defendants, even if they are the targets of a grand jury investigation, have no right to present evidence to the grand jury.¹⁷ On the other hand, a federal prosecutor ordinarily arranges for the presentation of witnesses to the grand jury.¹⁸ It is therefore not surprising that the courts seem to assume without deciding that the government may claim the benefits of section 3144 in the case of grand jury witnesses.¹⁹

Issuance of a section 3144 arrest warrant requires affidavits establishing probable cause to believe (1) that the witness can provide material evidence, and (2) that it will be “impracticable” to secure the witness’ attendance at the proceeding simply by subpoenaing him.²⁰ Neither the statute nor the case law directly address

a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia”). Section 3041 authorizes federal and state judges and magistrates to issue arrest warrants and conduct bail proceedings in federal criminal cases.

¹⁴ *United States v. Awadallah*, 349 F.3d 42, 49-51 (2d Cir. 2003); *United States v. Bacon*, 449 F.2d 933, 939-41 (9th Cir. 1971); *contra*, *United States v. Awadallah*, 202 F.Supp.2d 55, 61-79 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42 (2d Cir. 2003).

¹⁵ *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1966).

¹⁶ *United States v. Williams*, 504 U.S. 36, 47 (1992)(“the grand jury . . . has not been textually assigned [by the Constitution] to any of the branches described in the first three Articles. It is a constitutional fixture in its own right. In fact the whole theory of its function is that it belongs to no branch of the institutional government”).

¹⁷ *Chandler v. Moscicki*, 253 F.Supp.2d 478, 490 (W.D.N.Y. 2003), quoting, *United States v. Williams*, 504 U.S. 36, 52 (1992)(“a suspect under investigation by the grand jury does not have a right to testify or have exculpatory evidence presented”).

¹⁸ Rule 17(a) of the Federal Rules of Criminal Procedure states that federal criminal subpoenas are issued in blank by the clerk of the court and filled in by “the party” requesting them. Nevertheless, federal prosecutors complete and see to the service of most grand jury subpoenas, *Lopez v. United States*, 393 F.3d 1345, 1349 (D.C.Cir. 2005)(“the term ‘grand jury subpoena’ is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does”).

¹⁹ See e.g., *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003)(“in the case of a grand jury proceeding, we think that a statement by a responsible official, such as the United States Attorney is sufficient”), quoting on the question of affidavit sufficiency under section 3144, *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

²⁰ *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971);

the question of what constitutes “material” evidence for purposes of section 3144, but in other contexts the term is understood to mean that which has a “natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.”²¹ At the grand jury level, the government may establish probable cause to believe a witness can provide material evidence through the affidavit of a federal prosecutor or a federal investigator gathering evidence with an eye to its presentation to the grand jury.²² This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury’s power of inquiry.²³

As to the second required probable cause showing, a party seeking a material witness arrest warrant must establish probable cause to believe that it will be impractical to rely upon a subpoena to securing the witness’ appearance. The case law on point is sketchy, but it seems to indicate that impracticality may be shown by evidence of possible flight,²⁴ or of an expressed refusal to cooperate,²⁵ or of difficulty

United States v. Coldwell, 496 F.Supp. 305, 307 (E.D.Okla. 1979).

²¹ *Neder v. United States*, 527 U.S. 1, 16 (1999), quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)(materiality as an element of various federal fraud statutes). In the context of the prosecution’s failure to disclose material exculpatory evidence, “the material standard *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” *Banks v. Dretke*, 540 U.S. 668, 698 (2004), quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

²² *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

²³ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)(“Because [the grand jury’s] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime”); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991)(“The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed”).

²⁴ The government’s affidavit merely asserted “with respect to the probability of Nichol’s flight: Terry Nichols’ renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena,” *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10th Cir. 1996), dismissing as moot an appeal from, *United States v. McVeigh*, 940 F.Supp. 1541, 1562 (D.Colo. 1996)(denial of a motion to quash a material witness arrest warrant on grounds of impracticality).

²⁵ *United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D. Okla. 1979)(As to impracticality, “the Dempewolf affidavit shows that (a) Alston has refused to cooperate with law enforcement officials. . . (b) Alston has indicated that he will not testify in this case unless the Oklahoma Bureau . . . satisfies certain conditions that . . . are impossible to meet; (c) two unsuccessful attempts have been made to serve Alston with a subpoena through his attorney;

experienced in serving a subpoena upon a trial witness,²⁶ or presumably by evidence that the witness is a foreign national who will have returned or been returned home by the time his testimony is required.²⁷ Evidence that investigators have experienced difficulties serving a particular grand jury witness may not be enough to justify the issuance of an arrest warrant in all cases.²⁸

Bail

With limited variations, federal bail laws apply to material witnesses arrested under section 3144.²⁹ Arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to detain private counsel.³⁰ The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is

and (d) Alston's attorney has indicated that Alston has expressed a definite unwillingness to cooperate with the government").

²⁶ *United States v. Feingold*, 416 F.Supp. 627, 628 (E.D.N.Y. 1976) ("We are not here dealing with a witness before a grand jury where disregard of a subpoena would simply mean a continuation of the grand jury's deliberations until an appropriate warrant might be served and executed. Here, Feingold's testimony is needed at Nashi's trial. Once commenced, the trial would continue on consecutive days, and Feingold's testimony would be needed before the Government rested its case. Since Feingold is presumably in California, for the Government to have to defer its arrest warrant until he ignored a subpoena to attend the trial will preclude his testifying altogether. The . . . affidavit showed unsuccessful attempts to serve Feingold with a subpoena either through his California attorney or on seven different days at Feingold's home").

²⁷ Perhaps because the point seems too obvious for dispute or discussion, none of the reported federal cases appear to have held the impracticality of future appearance requirement can be satisfied by evidence that a material witness, who is a foreign national illegally present in this country, may be overseas and thus beyond the reach of the court's subpoena when his testimony is required. The number of foreign material witnesses arrested and held for the trial of immigration prosecutions indicate the government has experienced little difficulty satisfying the impracticality requirement in such cases, see e.g., *Torres-Ruiz v. United States District Court*, 120 F.3d 933 (9th Cir. 1997); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Huang*, 827 F.Supp. 945 (S.D.N.Y. 1993).

²⁸ *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9th Cir. 1985) ("In the district court's view, the difficulties encountered by agents . . . in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena. . . . The facts do not show that Arnsberg was a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena").

²⁹ 18 U.S.C. 3144 (" . . . 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 . . .").

³⁰ *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940, 943-45 (W.D.Tex. 1985); 18 U.S.C. 3142(f); 18 U.S.C. 3006A(a)(1)(G).

preferred, and finally as a last option detention is permitted.³¹ A defendant is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety.³² A material witness need only satisfy the appearance standard.³³ A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify.³⁴ If neither word nor bond nor conditions will suffice, the witness may be detained.³⁵ The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.³⁶

Depositions

Section 3144 declares 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 corresponding federal deposition rule permits the witness,³⁷ the government, or the defendant to request that a detained material witness’ deposition be taken.³⁸ A court enjoys only limited discretion to deny a

³¹ 18 U.S.C. 3142(a)(“Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be – (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section.”).

³² 18 U.S.C. 3142(b)(“The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community”).

³³ *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003), citing, S.Rep.No. 98-225, at 28 no.90 (1983)(“Of course a material witness is not to be detained on the basis of dangerousness”); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass. 1996)(“a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight”).

³⁴ 18 U.S.C. 3142(c).

³⁵ 18 U.S.C. 3142(e).

³⁶ *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003); 18 U.S.C. 3142(g).

³⁷ F.R.Crim.P. 15(a)(2)(“A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript”).

³⁸ F.R.Crim.P. 15(a)(1)(“A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is

detained witness' request. The Fifth Circuit has observed that, "Read together, Rule 15(a) and section 3144 provide a detained witness with a mechanism for securing his own release. He must file a written motion requesting that he be deposed. The motion must demonstrate that his testimony can adequately be secured by deposition, and that further detention is not necessary to prevent a failure of justice. Upon such showing, the district court must order his deposition and prompt release," *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992). Other courts seem to agree.³⁹ The "failure of justice" limitation comes into play when release of the witness following the taking of his deposition would ultimately deny a defendant the benefit of favorable material testimony in derogation of his right to compulsory process.⁴⁰ It does not include the fact that a judicial officer will not be present at the taking of the deposition or that the witness is an illegal alien subject to prosecution.⁴¹

Unlike the request of a detained witness, a government or defendant's request that a witness' deposition be taken must show "exceptional circumstances" and that granting the request is "in the interest of justice," F.R.Crim.P. 15(a)(1).⁴² Nevertheless, the fact that a witness is being detained will often be weighed heavily regardless of who requests that depositions be taken.⁴³ The Circuits appear to be divided over whether in compliance with a local standing order the court may authorize depositions to be taken *sua sponte* in order to release a detained material

not privileged, including any book, paper, document, record, recording, or data.").

³⁹ *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 935 (9th Cir. 1997); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1996); *United States v. Huang*, 827 F.Supp. 945, 948 (S.D.N.Y. 1993).

⁴⁰ *United States v. Huang*, 827 F.Supp. 945, 950-52 (S.D.N.Y. 1993); cf., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-73 (1982)(The government may deport "illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense").

⁴¹ *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 936 (9th Cir. 1997).

⁴² *United States v. Allie*, 978 F.2d 1401, 1404 (5th Cir. 1992); *United States v. Lai Fa Chen*, 214 F.R.D. 578, 579 (N.D.Cal. 2003).

⁴³ *United States v. Fai Fa Chen*, 214 F.R.D. 578, 580-81 (N.D.Cal. 2003)(Other courts faced with a motion brought by the government to depose material witnesses have considered their detained status when finding exceptional circumstances [citing *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992) and *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988). . . Although detention itself does not amount to a per se 'exceptional circumstance' under Rule 15(a)(1), it would be the rare case when it would not"). In *Rivera*, the court observed that "[i]f the court had denied the motion for depositions, these alien witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported," 859 F.2d at 1207.

witness.⁴⁴ In any event, whether any such depositions may be introduced in later criminal proceedings will depend upon whether the defendant's constitutional rights to confrontation and compulsory process have been accommodated.⁴⁵

Related Matters

The government must periodically report to the court on the continuing justification for holding an incarcerated material witness.⁴⁶ While a material witness is being held in custody he is entitled to the daily witness fees authorized for attendance at judicial proceedings.⁴⁷ Upon his release, the court may also order that he be provided with transportation and subsistence to enable him to return to his place of arrest or residence.⁴⁸ Should he fail to appear after he has been released from custody he will be subject to prosecution,⁴⁹ an offense which may be punished more severely if his failure involves interstate or foreign travel to avoid testifying in a felony case.⁵⁰

⁴⁴ Compare, *United States v. Lopez*, 918 F.2d 111, 112-114 (10th Cir. 1990)(depositions should not have been taken), and, *United States v. Allie*, 978 F.2d 1401, 1403-405 (5th Cir. 1992)(depositions were validly taken).

⁴⁵ *United States v. Allie*, 978 F.2d 1401, 1406-408 (5th Cir. 1992); *United States v. Eufracio-Torres*, 890 F.2d 266, 268-71(10th Cir. 1989); *United States v. Rivera*, 859 F.2d 1204, 1207-209 (4th Cir. 1988); *United States v. Huang*, 827 F.Supp. 945, 947-52 (S.D.N.Y. 1993).

⁴⁶ F.R.Crim.P. 46(h)(2) (“An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)”).

⁴⁷ 28 U.S.C. 1821 (“ . . . (b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. . . (d) . . .(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section”).

⁴⁸ 18 U.S.C. 4282 (“On the release from custody of . . . a person held as a material witness, the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest”).

⁴⁹ 18 U.S.C. 3146 (“(a) Offense.— Whoever, having been released under this chapter [relating to bail] knowingly – (1) fails to appear before a court as required by the conditions of release . . . shall be punished as provided in subsection (b) of this section. (b) Penalties – (1) The punishment for an offense under this section is . . . (B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both”).

⁵⁰ 18 U.S.C. 1073 (“Whoever moves or travels in interstate or foreign commerce with intent either . . . to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, is charged shall be fined under this title or imprisoned not more than five years, or both. . . “).

Section 12

Witnesses at Congressional oversight hearings charged that the authority under 18 U.S.C. 3144 had been misused following September 11, 2001:

[The authority has been used] to secure the indefinite incarceration of those [prosecutors] wanted to investigate as possible terrorist suspects. This allowed the government to . . . avoid the constitutional protections guaranteed to suspects, including probable cause to believe the individual committed a crime and time-limited detention. . .

Witnesses were typically held round the clock in solitary confinement, subjected to the harsh and degrading high security conditions typically reserved for the most dangerous inmates accused or convicted of the most serious crimes. . . they were interrogated without counsel about their own alleged wrongdoing.

. . . [A] large number of witnesses were never brought before a grand jury or court to testify. More tellingly, in repeated cases the government has now apologized for arresting and incarcerating the “wrong guy.” The material witnesses were victims of the federal investigators and attorneys who were to[o] quick to jump to the wrong conclusions, relying on false, unreliable and irrelevant information. By evading the probable cause requirement for arrests of suspects, the government made numerous mistakes.⁵¹

At the same hearings the Justice Department pointed out that the material witness statute is a long-standing and generally applicable law and not a creation of the USA PATRIOT Act; that it operates under the supervision of the courts; that witnesses are afforded the assistance of counsel (appointed where necessary); and that witnesses are ordinarily released following their testimony.⁵²

⁵¹ *Oversight Hearing on the Implementation of the USA PATRIOT Act Sections 505 and 804: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary (House Hearings)*, 109th Cong., 1st Sess. (2005)(statement of Gregory T. Nojeim, American Civil Liberties Union), available on September 5, 2005 at [<http://judiciary.house.gov/media/pdfs/nojeim052605.pdf>]; see also, *House Hearings* (statement of Shayana Kadidal, Center for Constitutional Rights)(“Since September 11, the Bush Administration has reinvented the meaning of the material witness statute, and has misused it to preventively detain criminal or terrorist suspects against whom it cannot show probable cause of criminal activity while it carries out its investigation and builds its criminal case. This expansive exercise of executive power under the material witness statute has led to serious violations of constitutional and international law by: (1) allowing for arbitrary and indefinite detention upon a minimal showing; (2) limiting the ability of the press and the public to monitor the actions of our executive; and (3) facilitating racial and religious profiling and harsh treatment of suspected terrorists”), available on September 5, 2005 at [<http://judiciary.house.gov/media/pdfs/kadidal052605.pdf>].

⁵² *House Hearings* (statement of Chuck Rosenberg, United States Department of Justice), available on September 5, 2005 at [<http://judiciary.house.gov/media/pdfs/kadidal052605.pdf>].

Section 12 of H.R. 3199 as reported by the House Committee on the Judiciary amended section 1001 of the USA PATRIOT Act by directing periodic review of the exercise of the authority under section 3144. In its original form section 1001 instructs the Justice Department Inspector General to designate an official who is (1) to receive and review complaints of alleged Justice Department civil rights and civil liberties violations, (2) to widely advertise his availability to receive such complaints, and (3) to report to the House and Senate Judiciary Committees twice a year on implementation of that requirement, P.L. 107-56, 115 Stat. 381 (2001). Section 12 amended section 1001 to impose additional responsibilities upon the Inspector General's designee, i.e., (1) to "review detentions of persons under section 3144 of title 18, United States Code, including their length, conditions of access to counsel, frequency of access to counsel, offense at issue, and frequency of appearances before a grand jury," (2) to advertise his availability to receive information concerning such activity, and (3) to report twice a year on implementation to the Judiciary Committees on implementation of this requirement.

OMB announced that the Administration generally supports H.R. 3199 as passed by the House, but that "[t]he Administration strongly oppose[d] section 12 of H.R. 3199, which would authorize the Department of Justice's Inspector General to investigate the use of material witnesses. As it is written, this provision would entail wholesale violation of Rule 6(e) of the Federal Rules of Criminal Procedure, which protects the secrecy and sanctity of grand jury proceedings."⁵³

The exact nature of OMB's objection is somewhat unclear. Rule 6(e) prohibits disclosure of matters occurring before the grand jury, F.R.Crim.P. 6(e). Its purpose is to: (1) prevent the flight of suspects, (2) avoid defaming suspects ultimately found blameless, (3) shield the grand jury from the corrupt influences of the targets of its investigations, and (4) encourage witnesses to be forthcoming.⁵⁴ The rule does not prohibit disclosure by grand jury witnesses of matters occurring during their appearance before the panel.⁵⁵ There is some authority for the proposition that the rule does not bar disclosure to Congress.⁵⁶ And there is reason to believe that the rule

⁵³ Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 3199 – USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*, available on September 5, 2005 at [<http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3199sap-h.pdf>].

⁵⁴ *United States v. John Doe, Inc.*, 481 U.S. 102, 109 n.5 (1983); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979).

⁵⁵ F.R.Crim.P. 6(e)(2)("(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B). (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury; (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)[relating to government attorneys and other personnel assisting in the grand jury investigation]"); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

⁵⁶ *In re Rejport & Recommendation of June 5, 1972 Grand Jury*, 370 F.Supp. 1219, 1227-230 (D.D.C. 1974)(permitting disclosure of grand jury material relevant to an impeachment inquiry to the House Judiciary Committee); *In re Grand Jury Investigation of Ven-Fuel*, 441

does not apply to executive branch officials with supervisory authority over Justice Department attorneys who assist the grand jury.⁵⁷ In addition, from time to time, Congress has created several other exceptions to the rule's general prohibitions either by amendment of the Rule,⁵⁸ or by a provision elsewhere in the Code.⁵⁹

The OMB statement that “[a]s it is written, this provision would entail wholesale violation of Rule 6(e) of the Federal Rules of Criminal Procedure” may be an objection to the fact that the proposal does not take the form of an amendment to Rule 6(e).⁶⁰ Yet it seems unlikely that OMB would base a statement of “strong” opposition solely on a question of legislative drafting style.

The statement could be read as a claim that Congress lacks the legislative authority to enact a provision at odds with Rule 6(e). But this cannot be. The rules were and are promulgated as an exercise of legislative authority.⁶¹ Even when amendments to the Federal Rules of Criminal Procedure come from the courts they are subject to Congressional rejection or modification before they become effective.⁶²

The statement might be understood to declare that compliance with section 12 would involve “wholesale” disclosures which would be contrary to the purpose and demands of Rule 6(e) were it not superseded by the instructions of section 12. This might be seen as a contention that without the intervention of section 12, Rule 6(e) would prohibit disclosure of the information identified in section 12 to the designee of the Justice Department’s Inspector General, or to the House and Senate Judiciary Committees, or to either of them.

This may be something of an overstatement. First, Rule 6(e) is implicated only with regard to matters occurring before the grand jury. Thus, Rule 6(e) is not implicated with respect to information concerning the detention of material *trial* witnesses under section 3144 of title 18. Nor is it clear that Rule 6(e) would be implicated by disclosure of information concerning the length of confinement or

F.Supp. 1299, 1320-304 (M.D.Fla. 1997)(permitting disclosure of grand jury material to a House legislative subcommittee).

⁵⁷ *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 429 n.11 (. . . the intent of the Rule is that every attorney (including a supervisor) who is working on a prosecution may have access to grand jury materials, at least while he is conducting criminal matters. . .”).

⁵⁸ E.g., section 203(a) of USA PATRIOT Act, 115 Stat. 279 (2001)(amending Rule 6(e) to permit foreign intelligence information sharing with various federal officials, see F.R.Crim.P. 6(e)(3)(D)).

⁵⁹ E.g., 18 U.S.C. 3322 (authorizing disclosure in conjunction with forfeiture and other civil proceedings of matters occurring before the grand jury involving banking offenses).

⁶⁰ Cf., *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 565-73 (1983)(Attorney General’s statutory obligation to share certain investigative with state authorities did not create an exception to Rule 6(e) requirements); *In re North*, 16 F.3d 1234, 1243 (D.C.Cir. 1994) (Independent Counsel’s statutory reporting obligation did not excuse noncompliance with Rule 6(e) requirements).

⁶¹ 18 U.S. 687 (1940 ed.); 28 U.S.C. 2072, 2074.

⁶² 28 U.S.C. 2074.

access to counsel of material grand jury witnesses as long as individual witnesses were not identified; nor of information in the aggregate of the offenses at issue and frequency of grand jury appearances of incarcerated material witnesses.⁶³ But for section 12, Rule 6(e) would seem to apply to the identities of incarcerated grand jury witnesses, the offenses under consideration by specific grand jury panels, and the frequency of appearance by specific incarcerated witnesses. Even here, however, it is far from clear that absent section 12 the Rule would preclude disclosure to Congress or to Justice Department officials whose duties include investigation of misconduct by Department attorneys.⁶⁴

Nevertheless, perhaps because of Administration opposition, the provision was dropped from H.R. 3199 prior to House passage and no similar provision can be found in H.R. 3199 (S. 1389) as approved in the Senate.

⁶³ *In re Cudahy*, 294 F.3d 947, (7th Cir. 2002) (“The purpose of Rule 6(e) is to protect the confidentiality of the grand jury’s hearings and deliberations, and the term ‘matters occurring before the grand jury’ is interpreted accordingly. See *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1097 (7th Cir. 1992) (‘the general rule is that Rule 6(e)’s nondisclosure requirement applies to anything that may reveal what occurred before the grand jury’); *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1001 (D.C. Cir. 1999) (the phrase ‘matters occurring before the grand jury’ encompasses ‘not only what has occurred and what is occurring, but also what is likely to occur, including the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like’); *United States v. Phillips*, 843 F.2d 438, 441 (11th Cir. 1988) (‘the term “matters occurring before a grand jury” has been defined to include anything that will reveal what transpired during the grand jury proceedings’)).

⁶⁴ 5 U.S.C.App.III §8E(b)(2).

Appendices

Citations to State Material Witness Statutes.⁶⁵

Alabama: ALA.CODE §§15-11-13 to 15-11-14;
Alaska: ALASKA STAT. §12.30.050;
Arizona: ARIZ.REV.STAT.ANN. §13-4081 to 13-4084;
Arkansas: ARK.CODE ANN. §§16-85-508, 16-85-208, 16-85-210, 16-85-211;
California: CAL. PENAL CODE §§878-883;
Colorado: COLO.R.CRIM.P. 15(b);
Connecticut: CONN.GEN.STAT.ANN. §54-82j, 54-82k;
Delaware: DEL.CODE ANN. tit.11 §5911;
Florida: FLA.STAT.ANN. §§902.15, 902.17;
Georgia: GA.CODE §§17-7-26, 17-7-27;
Hawaii: HAWAII REV.STAT. §§835-1 to 835-8;
Idaho: IDAHO CODE §§19-820 to 19-824;
Illinois: ILL.COMP. LAWS ANN. ch.725 §5/109-3;
Iowa: IOWA CODE ANN. §§804.11, 804.23;
Kansas: KAN.STAT.ANN. §22-2805;
Kentucky: Ky.R.Crim.P. 7.06;
Louisiana: LA.REV.STAT.ANN. §15:257;
Maine: ME.REV.STAT.ANN. tit.15 §1104;
Maryland: Md.Cts. & Jud. Pro. Code §9-203, Md.Rules, R4-267;
Massachusetts: MASS.GEN.LAWS ANN. ch.276 §§45-52;
Michigan: MICH.COMP.LAWS ANN. §§765.29, 765.30, 767.35;
Minnesota: MINN.STAT.ANN. §§629.54, 629.55;
Mississippi: MISS.CODE ANN. §99-15-7;
Missouri: MO.ANN.STAT. §544.420;
Montana: MONT.CODE ANN. §46-11-601;
Nebraska: NEB.REV.STAT. §29-507 to 29-508.02;
Nevada: NEV.REV.STAT. §178.494;
New Hampshire: N.H.REV.STAT.ANN. §597:6-d;
New Jersey: N.J.STAT.ANN. §2C:104-1 to 104-9;
New Mexico: N.MEX.STAT.ANN. §31-3-7;
New York: N.Y. CRIMINAL PROCEDURE LAW §§620.10 to 620.80;
North Carolina: N.C.GEN.STAT. §15A-803;
North Dakota: N.D.R.Crim.P. 46;
Ohio: OHIO REV.CODE ANN. §§2937.16 to 2937.18;
Oklahoma: OKLA.STAT.ANN. tit.22 §§270-275;
Oregon: ORE.REV.STAT. §§136.608 to 136.614;
Pennsylvania: Pa.R.Crim.P. 522;
Rhode Island: R.I.Super.Ct. R.Crim.P.46, R.I.D.Ct. R.Crim.P. 46;
South Carolina: S.C. CODE ANN. §17-7-230, 17-7-650, 17-5-140;
South Dakota: S.D.COD.LAWS ANN. §23A-43-18;
Tennessee: TENN.CODE ANN. §§38-5-114; 40-10-107 to 40-10-112;
Texas: TEX.CODE OF CRIM.PRO.ANN. arts. 24.14, 24.15, 24.23 - 24.27;
Utah: UTAH R.CRIM.P. R.7, UTAH R.JUV.P. 59;
Vermont: VT.STAT.ANN. §§6605, 7551, 7554;
Virginia: VA. CODE ANN. §19.2-127;
Washington: Wash.Super.Ct.Crim.R. 4.10;
West Virginia: W.VA.CODE ANN. §§62-1C-15, 62-6-4;
Wisconsin: WIS.STAT.ANN. §969.01;
Wyoming: WYO.STAT. §5-6-206.

⁶⁵ In addition, forty-nine states have adopted the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings in one form or another, 11 U.L.A. 1 (2004 Supp.).

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