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Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act (H.R. 3199): A Sketch

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Summary

Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199), as reported by the House Judiciary Committee, 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. The provision was dropped from the bill prior to House passage and does not appear in the corresponding measure approved by the Senate (S. 1389/H.R. 3199). The episode illustrates the level of controversy easily generated by material witness statutes.

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 [including a grand jury 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.

This is an abridged version of CRS Report RL33077, *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)*, without footnotes or most citations to authority.

Introduction: 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. Although subject to intermittent criticism, it has been so at least from the beginning of the Republic. The Supreme Court has never squarely considered the constitutionality of the federal statute 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” and that, “[t]he constitutionality of this [federal material witness] statute apparently has never been doubted.”

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 criminal accusation or as a preventive detention measure, the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant. 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.

The case law and statistical information suggest that the federal statute is used with surprising regularity and most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals. Critics, however, contend that since September 11, 2001, seventy individuals, mostly Muslims, have been arrested and detained in abuse of the statute’s authority.

Arrest: An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates. The statute applies to potential grand jury witnesses as well as to potential trial witnesses. 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. 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. 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. On the other hand, a federal prosecutor ordinarily arranges for the presentation of witnesses to the grand jury. 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.

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. Neither the statute nor the case law directly address 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.” 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. This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury's power of inquiry.

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, or of an expressed refusal to cooperate, or of difficulty experienced in serving a subpoena upon a trial witness, 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. 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.

Bail: With limited variations, federal bail laws apply to material witnesses arrested under section 3144. 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. The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is preferred, and finally as a last option detention is permitted. 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. A material witness need only satisfy the appearance standard. 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. If neither word nor bond nor conditions will suffice, the witness may be detained. 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.

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, the government, or the defendant to request that a detained material witness' deposition be taken. A court enjoys only limited discretion to deny a 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." Other courts seem to agree. 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. 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.

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). Nevertheless, the fact that a witness is being detained will often be weighed heavily regardless of who requests that

depositions be taken. 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 witness. 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.

Related Matters: The government must periodically report to the court on the continuing justification for holding an incarcerated material witness. While a material witness is being held in custody he is entitled to the daily witness fees authorized for attendance at judicial proceedings. 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. Should he fail to appear after he has been released from custody he will be subject to prosecution, an offense which may be punished more severely if his failure involves interstate or foreign travel to avoid testifying in a felony case.

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.

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.

Section 12 of H.R. 3199 as reported by the House Judiciary Committee 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 opposes 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."

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. The rule does not apply to grand jury witnesses. There is some authority for the proposition that the rule does not bar disclosure to Congress. And there is reason to believe that the rule does not apply to executive branch officials with supervisory authority over Justice Department attorneys who assist the grand jury. In addition, from time to time, Congress has created several other exceptions to the rule's general prohibitions either by amendment of the Rule, or by a provision elsewhere in the Code.

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). 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. 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.

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 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. 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.

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.