Reproduced with permission from St. John's University School of Law

ARTICLES

WITNESS DETENTION AND INTIMIDATION: THE HISTORY AND FUTURE OF MATERIAL WITNESS LAW

STACEY M. STUDNICKI† & JOHN P. APOL††

INTRODUCTION 485
I. THE HISTORY OF MATERIAL WITNESS DETENTION 487
A. WITNESSES UNDER THE COMMON LAW 487
B. EARLY AMERICAN FEDERAL LAW 489
C. THE BAIL REFORM ACT 492
D. THE FEDERAL RULES OF CRIMINAL PROCEDURE 493
II. THE FEDERAL MATERIAL WITNESS STATUTE 494
A. MATERIALITY REQUIREMENT OF SECTION 3144 497
B. IMPRACTICABILITY REQUIREMENT OF SECTION 3144 499
C. THE DEPOSITION ALTERNATIVE OF SECTION 3144 502
III. PROCEDURAL CONSIDERATIONS 505
A. MATERIAL WITNESSES AND THE FOURTH AMENDMENT 505
B. MATERIAL WITNESS ARREST WITHOUT A WARRANT 507
C. MATERIAL WITNESS DETENTION PURSUANT TO THE COMMON LAW POWERS OF THE COURT 510
D. MATERIAL WITNESSES AND GRAND JURY PROCEEDINGS 511
E. MATERIAL WITNESS DETENTION UNDER THE ALL WRITS ACT 516
F. MATERIAL WITNESSES AND THE EXCLUSIONARY RULE 519

† Deputy Defender, Federal Defender Office, Legal Aid and Defender Association, Detroit, Michigan; B.S., Wayne State University, 1987; J.D., *summa cum laude*, Detroit College of Law, 1991.

†† Professor Emeritus, Michigan State University-Detroit College of Law; B.A., Grand Valley State College, 1969; J.D., University of Michigan, 1972.

IV. THE MISUSE OF MATERIAL WITNESS LAWS:
INVESTIGATORY DETENTION 520
V. PROPOSED CHANGES TO MATERIAL WITNESS LAWS 529
VI. ALTERNATIVES TO MATERIAL WITNESS DETENTION 531
CONCLUSION 533

"The 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."[1]

INTRODUCTION

A material witness is an individual who has unique information about a crime, beneficial to defense or prosecution. The United States has a history of authorizing and sanctioning the custodial detention of such witnesses to ensure their appearance and testimony at relevant court proceedings. Indeed, not only is there a federal material witness statute,[2] but most states also have a material witness law.[3]

The manner in which material witnesses are treated presents a dilemma between the constitutional rights of the individual and the needs of the criminal justice system. Typically, after a person is a witness to criminal activity and is deemed to have "material information" pertaining to the crime, the government is allowed to detain them if the requirements of the applicable material witness law are met.[4] Material witnesses may be required to post a bond or undergo a form of recognizance to ensure their presence at the criminal proceeding. If the witness refuses, or is unable to guarantee his return, these statutes allow the witness to be incarcerated for an indefinite period of time.[5]

The detention of material witnesses should be a seldom-used procedure. Recent events, however, particularly the September 11, 2001 terrorist attacks on the United States, have brought material witness laws to the forefront as the government seeks to use the laws as investigatory tools to detain individuals while

[1] Stein v. New York, 346 U.S. 156,184 (1953).

[2] See 18 U.S.C. § 3144 (2000).

[3] See Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice,* 58 WASH. U. L.Q. 1, 3 (1980) (noting that at least forty-five states have material witness laws); Joseph Casula & Morgan Dowd, Comment, *The Plight of the Detained Material Witness,* 7 CATH. U. L. REV. 37, 38 (1958) (stating "every [U.S.] jurisdiction" either permits or requires a recognizance of a material witness).

[4] See Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?,* 40 WAYNE L. REV. 1533, 1554 (1994) (noting a judicial officer may arrest a material witness once the requirements of the federal material witness statute have been satisfied).

[5] See *id.; see also* Carlson & Voelpel, *supra* note 3, at 3.

determining whether a crime has been committed by the detainee or perhaps by an acquaintance of the detainee.[6] Such "investigatory detentions" are not only a misuse of the material witness laws, but also troubling and potentially unconstitutional*P*

Material witness law is unique because of the potential *carte blanche* it provides to the government and law enforcement officials who may abuse it. In the aftermath of the September 11, 2001 terrorist attacks, the Federal Bureau of Investigation (FBI) has been accused of misusing the material witness law to detain people while investigating their backgrounds and activities.[8] Indeed, the United States Attorney General announced that the "aggressive detention" of material witnesses in the wake of September 11th would be the norm.[9] The secrecy surrounding the detention of material witnesses adds to the potential for misuse of this authority as an investigatory tool, rather than a legitimate means of obtaining testimony or protecting a witness. Further, it is easier to arrest an individual as a material witness than as a criminal defendant since there is no required showing of probable cause that the witness has committed a crime.[10]

This Article will trace the origins of the authority to detain witnesses from early common law through modern criminal law and procedure. It will also analyze the federal material witness statute and examine the requirements mandated by law in order

[6] See John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo,* NEWSDAY, Sept. 18, 2002, at A6 (noting the federal government has interpreted the statute as permitting detention of people who it suspects "might be up to no good or might be withholding information," before it has enough evidence to charge those people with, a crime).

[7] See Terry v. Ohio, 392 U.S. 1, 27 (1968). Officers are allowed to momentarily stop and detain an individual in order to engage in brief questioning. This is permitted without probable cause, but the officers must have a reasonable suspicion that the person is involved in criminal activity in order to effectuate the stop and detention. *Id.; see also* United States v. Grant, 920 F.2d 376, 384 (6th Cir. 1990).

[8] See Riley, *supra* note 6 (noting that critics have accused the government of "turn[ing] a narrow law designed to assist the judicial process into a broad preventive detention statute" that gives the government overly broad arrest powers that are "vulnerable to misjudgments and abuse").

[9] See Cam Simpson, *Roundup Unnerves Oklahoma Muslims,* CHI. TRIB., Apr. 21, 2002, at 1 (quoting Attorney General John Ashcroft).

[10] See *Grant,* 920 F.2d at 384 (noting police officers may detain witnesses for questioning without demonstrating he or she has probable cause to believe the witness is involved in a crime).

to detain a witness. Finally, the Article will discuss investigatory detention practices by the government and propose changes to the current material witness laws in order to prevent such abuses in the future.

I. THE HISTORY OF MATERIAL WITNESS DETENTION

A. *Witnesses Under the Common Law*

Prior to the year 1400, the modern witness was practically unknown in jury trials, and it was not until the 1500s that the witness became a common figure in trials and a source of information for the jury.[11] In 1562, the Statute of Elizabeth[12] originated the imposition of a penalty and a civil cause of action against any person who refused to testify after being served with process and given expenses.[13] Consequently, "[t]his statute did for testimony at common law what the subpoena had done for testimony in chancery more than one hundred years" earlier.[14] The Statute of Elizabeth, however, applied only to civil proceedings.[15]

In criminal cases, the date when process began to be issued for the Crown's witnesses is debatable.[16] The Second Act of

[11] 8 JOHN HENRY WIGMORE, EVIDENCE § 2190, at 62 (John T. McNaughton rev., 1961). Prior to that time, jurors fulfilled the role of both trier and witness. Their personal knowledge of the events in question was a chief source of the information which today is furnished by ordinary witnesses. *Id.*

[12] Statute of Elizabeth, 1562-63, 5 Eliz., c. 9, § 12 (Eng.):

> If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default (shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved).

WIGMORE, *supra* note 11, § 2190, at 65 n.17.

[13] WIGMORE, *supra* note 11, § 2190, at 65. These prospective witnesses were given expenses to encourage their presence at trial, as required by the Statute of Elizabeth. *Id.*

[14] *Id.* According to Wigmore, this statute not only typified the duty of being a witness, but represented the right to appear and testify, free from the threat of being sued for "maintenance" as a meddlesome witness. *Id.* § 2190, at 65 n.18.

[15] *Id.* § 2190, at 67.

[16] *Id.* Wigmore asserts that compulsory process for witnesses in criminal cases

Philip and Mary in 1555 enabled "the Crown [to] bind over witnesses to appear [at criminal trials] and compel them to testify against the accused."[17] The accused in a criminal trial was not allowed to have defense witnesses until the late 1600s, when general statutes guaranteed compulsory process.[18]

The Court of Chancery in England recognized a definite testimonial compulsion and duty much earlier than the common law courts, as evidenced by the invention of the subpoena writ in the late 1300s.[19] Thus, the equitable courts had more than a century's start on the common law courts in establishing the power to compel witnesses to testify.[20] "[The] rapid increase in the activity of the Chancery during the 1500s was one of the causes which contributed to the introduction at that time of compulsory process for witnesses in the common law courts . . . ."[21]

The emergence of the law securing accused persons the right to compulsory process for witnesses cured a defect of the common

"presumably ... preceded the time of Elizabeth's statute," but does not give an exact year. *Id.* In *Wilson v. United States,* 221 U.S. 361 (1910), it was stated:

> Prior to [Elizabeth's] statute, there must have been a power in the crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger.

Id. at 373.

[17] Casula & Dowd, supra note 3, at 37-38. The statute provided:

> And be it further enacted, That the said Justices shall have Authority by this Act, to bind all such be Recognizance or Obligation, as do declare any Thing material to prove the said Manslaughter or Felony against such Prisoner as shall be so committed to Ward, to appear at the next general Gaol-delivery to be holden within the County, City or Town Corporate where the Trial of the Said Manslaughter or Felony shall be, then and there to give Evidence against the Party.

Id. at 38 n.4 (quoting 1555, 2 & 3 Phil. & M., c. 10 CEng.)).

[18] WIGMORE, supra note 11, § 2190, at 67. Critics have disagreed and argued that the subpoena existed earlier in other processes. *Id.* § 2190, at 68 n.28.

[19] *Id.* § 2190, at 67-68.

[20] *Id.* According to Wigmore, the subpoena writ was first used by the clerks in Chancery in the latter end of the reign of Edward III, about 1375. *Id.* § 2190, at 65 n.19.

[21] *Id.*

> There had been before that time no compulsion; and the poena of centum libri effectually supplied the compulsion. We may well understand that a 'revolution in equitable proceedings' was by this sub poena clause brought about. This and the Statute of Elizabeth mark an epoch in the history of legal theory and practice.

Id. §2190, at 65-66 n.19.

law by giving the criminally accused the right already possessed both by parties in civil cases and by the prosecution in criminal cases.[22] By 1612, in *The Countess of Shrewsbury's Case,*[23] Lord Bacon declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[24] The compulsion of Crown witnesses to appear and testify was firmly established by 1695, when the Act of William III gave "parties indicted for treason... like process to compel their witnesses to appear as was usually granted to compel witnesses appearing against them."[25]

B. *Early American Federal Law*

The First Judiciary Act of 1789[26] regulated the examination of witnesses in United States courts. The Act recognized the duty of witnesses to appear and testify.[27] The Act also codified the authority to require recognizance of material witnesses in criminal proceedings and to imprison them upon failure to do so.[28] In 1869, the Act was relied upon in one of the earliest

22 *Id.* §2191, at 68.

23 77 Eng. Rep. 1369 (KB. 1612).

24 Blair v. United States, 250 U.S. 273, 279-80 (1918) (quoting The Countess of Shewsbury's Case).

25 *Id.* at 280 (citing Act of William III, 1695, 7 & 8 Will. 3, c. 3, § 7 (Eng.)). The "duty" of private citizens to provide assistance to the courts and legal system, when called upon to do so, is a longstanding tradition. "Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." Babington v. Yellow Taxi Corp., 164 N.E. 726, 727 (N.Y. 1928) (Cardozo, C.J.); see *also In re* Quarles, 158 U.S. 532, 535 (1895) ("It is the duty... of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.").

26 Act of Sept. 24,1789, ch. 20, §§ 30, 33,1 Stat. 73.

27 See *id.* § 30, 1 Stat. at 88-90. The Act provided for taking the depositions in civil cases of "any person ... who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district,... or is ancient or very infirm." *Id.* § 30,1 Stat. at 88. It also provided that "any person may be compelled to appear and [be] depose(d], and allowed if witness could not be produced at trial, the deposition could be used in their place." *Id.* § 30,1 Stat. at 89.

28 *Id.* § 33,1 Stat. at 91. This section stated, in pertinent part:

> [C]opies of the process [against the accused] 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.

material witness cases, *United States u. Durling,*[29] which discussed the imprisonment of material witnesses upon failure to post bond.

The federal authority to arrest and detain witnesses continued by statute until 1948.[30] At that time, the United States Congress repealed the statutory provisions in the federal criminal laws that gave the authority to arrest material witnesses.[31] 28 U.S.C. § 657, repealed in a general revision of Title 18 in 1948, provided:

> 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. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused whose testimony, in his opinion, is important and is in danger of being otherwise lost.[32]

The companion statute, 28 U.S.C. § 659, also repealed, was even more important because it contained the only express reference to an authority to arrest a witness:

> Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give

Id.

29 25 F. Cas. 944 (N.D. 111. 1869) (No. 15,010).

30 See Bacon v. United States, 449 F.2d 933, 938 (9th Cir. 1971); *see also* Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 73-74 (authorizing witness detainment); 28 U.S.C. §§ 657, 659 (1940) (repealed 1948).

31 *Bacon,* 449 F.2d at 938.

32 28 U.S.C. § 657 (1940) (repealed 1948); see *also Bacon,* 449 F.2d at 938 n.5.

> recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall . convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.[33]

After the repeal of sections 657 and 659, there was no formal authority to arrest material witnesses because the newly enacted Federal Rules of Criminal Procedure did not explicitly mention such arrests.[34] There is evidence, however, that Congress thought the new rules provided such authority.[35]

Federal Rule of Criminal Procedure 46(b), before it was amended to conform to the Bail Reform Act of 1966, read as follows:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.[36]

Thus, the statutory authority to arrest and detain material witnesses, which had existed from 1789 to 1948, was not necessarily interrupted by the 1948 repeal of the material witness statutes.[37] Instead, "with the enactment of Rule 46(b) the revisors [sic] of Title 18 considered sections 657 and 659 [of Title 28] to be... redundant]."[38] The authority to arrest material witnesses was thought to arise by implication from the Federal Rules of Criminal Procedure.[39] An examination of Rule

33 28 U.S.C. § 659 (1940) (repealed 1948); *see also Bacon,* 449 F.2d at 938 n.5.

34 *Bacon,* 449 F.2d at 938.

35 *Id.* (citing H.R. REP. NO. 80-304, at 9 (1947)).

36 FED. R. CRIM. P. 46(b) (1946) (amended 1966).

37 *Bacon,* 449 F.2d at 938.

38 *Id.*

39 *Id.* In *Bacon,* the petitioner argued that the government lacked the power to arrest her as a material witness because Rule 46(b) and 18 U.S.C. § 3149, the material witness statute in effect at that time, did not provide for arrest. The court concluded, however, that emitting the authority to arrest witnesses in the 1948

46(b) confirms this, as it specifically mentions the requirement of bail and conditions of release if the witness "has been detained for an unreasonable length of time."[40] Presumably, absent the prior arrest of the witness, such phrases would have been unnecessary in the Rule.

C. *The Bail Reform Act*

The enactment of the Bail Reform Act of 1966[41] continued the legislative directive regarding detention of material witnesses. 18 U.S.C. § 3149, prior to repeal in 1984, read as follows:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall 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 further detention is not necessary to prevent a failure of justice. Release 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.[42]

The Bail Reform Act of 1966 did not specifically authorize the arrest of witnesses; rather, it provided for their release.[43] This omission was cured in 1984 when Congress amended the Act.[44] The reported history of the new statute reveals that two significant changes were made from the old law pertaining to material witnesses. First, by providing that a material witness be treated in accordance with section 3142 (pertaining to the release or detention of a defendant pending trial), the new statute permits the judge to "order the detention of the witness if there were no conditions of release that would assure [the]

revision of the federal laws was inadvertent, stating, "On balance, a grant of power to arrest material witnesses can fairly be inferred from Rule 46(b) and from § 3149 as well." *Id,* at 937; *see also* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 3144, 1984 U.S.C.C.A.N. (98 Stat.) 3211-12 (codified at 18 U.S.C. § 3144).

40 FED R. CRIM. P. 46(b) (1946) (amended 1966).

41 Act of June 22, 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 216 (codified at 18 U.S.C. § 3149 (repealed 1984)).

42 18 U.S.C. § 3149 (1970) (repealed 1984).

43 *Bacon,* 449 F.2d at 937.

44 Act of Oct. 12, 1984, § 3144, 1984 U.S.C.C.A.N. at 3211. The Bail Reform Act as amended in 1984 is reported at 18 U.S.C. § 3141 et seq.

appearance [of the witness]."[45] This cured the ambiguous language in the repealed statute requiring the conditional release of the witness in the same manner as a defendant awaiting trial.[46] This revision, however, also opened the door to the potential abusive treatment of material witnesses, since witnesses now can be treated in the same manner as a criminal defendant.[47]

The second change in the law was to finally grant the court specific authority to arrest the witness.[48] This cured the omission of express arrest authority that troubled the court in *Bacon v. United States,*[49] because the old statute authorized release conditions but not the initial arrest. The current federal statute, 18 U.S.C. § 3144, clearly authorizes the arrest and detention of material witnesses:

> 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. 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.[50]

D. *The Federal Rules of Criminal Procedure*

The Federal Rules of Criminal Procedure were amended in 1966 and 1984 to conform to the amended Bail Reform Act.[51] The current Federal Rule of Criminal Procedure 46 cites the Bail Reform Act as controlling in all questions of bail prior to trial.[52] In addition, the rule places responsibility for supervising the

45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 449 F.2d 933, 938 (9th Cir. 1971).
50 18 U.S.C. § 3144 (2000).
51 3 MATTHEW BENDER, MOORE'S FEDERAL PRACTICE HANDBOOK 581 (1990).
52 *Id.*

pretrial detention of witnesses directly upon the district court and requires the government attorney to make a biweekly report to the court regarding the status of all defendants and witnesses held in custody.[53] Furthermore, the government attorney must indicate why each witness should not be deposed and released.[54]

On April 29, 2002, the Supreme Court, upon recommendation by the Judicial Conference of the United States, proposed several amendments to the Federal Rules of Criminal Procedure.[55] Unless Congress alters the amendments, they will take effect December 1, 2002. The Court rejected an amendment to Rule 26 that would have permitted use of two-way video transmissions to take testimony of unavailable witnesses, noting potential conflict with the Confrontation Clause of the Sixth Amendment.[56] The proposed amendment would have allowed video testimony in those cases in which deposition testimony could be used under Rule 15.[57] An amendment to Rule 46 has been approved, however, which would delete the requirement that the government file biweekly reports with the court concerning the status of defendants in detention.[58]

II. THE FEDERAL MATERIAL WITNESS STATUTE

The current federal material witness statute, 18 U.S.C. § 3144, was enacted in 1984 as part of the Bail Reform Act.[59] The statute outlines the procedure that must be followed to secure the detention of a witness in a federal trial. The party asserting that the testimony of the witness is "material" in a criminal proceeding must file an affidavit.[60] The party seeking

53 FED. R. CRIM. P. 46(g).

54 *Id.* This conforms with the federal material witness statute, as reported in its legislative history: "However, the Committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody." Act of Oct. 12, 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 3211.

55 *Journal of Proceedings,* 71 CRIM. L. REP. (BNA) 2039 (May 1, 2002).

56 *Id.*

57 See *id.* Federal Rule of Criminal Procedure 15 provides for the testimony of a prospective witness, in "exceptional circumstances," to be taken by deposition upon motion of the party presenting that witness. FED. R. CRIM. P. 15(a)(l). If a witness is detained as a material witness under 18 U.S.C. § 3144, Rule 15 provides that the court, upon written motion of the witness and notice to the parties, may allow the witness' deposition to be taken and the witness discharged. *Id.* at 15(a)(2).

58 See FED. R. CRIM. P. 46(g), *amended by* FED. R. CRIM. P. 46(h).

59 See Act of Oct. 12,1984,1984 U.S.C.C.A.N. at 3211.

60 18 U.S.C. §3144 (2000).

the witness's detention must demonstrate that it may become impracticable to secure the witness's presence by subpoena.[61] If the judicial officer is satisfied that these requirements have been met, the witness may be arrested and treated as a person charged with committing a crime.[62] The statute governing the release or detention of a criminal defendant pending trial is then invoked.[63] After appearing before a judicial officer, the witness can be released without conditions, released subject to conditions, or detained.[64] If the judicial officer issues an order releasing the witness, the release can be on personal recognizance or upon the execution of an unsecured appearance bond.[65] Alternatively, the court can impose a condition or combination of conditions for the release of the witness.[66] If the court orders the witness detained, the detention may be temporary[67] or indefinite.[68]

Although courts did not provide counsel for indigent material witnesses prior to 1985, *In Re Class Action Application*

[61] *Id.; see also* Act of Oct. 12,1984, 1984 U.S.C.C.A.N. at 3211.

62 18 U.S.C. § 3144; *see also* Act of Oct. 12,1984, 1984 U.S.C.C.A.N. at 3211. "A material witness warrant [like any other arrest warrant] must be based on probable cause." United States v. Feingold, 416 F. Supp. 627,628 (E.D.N.Y. 1976).

63 See 18 U.S.C. § 3142.

[64] *Id.* § 3142(a).

[65] *Id.* § 3142(a)(l).

[66] *Id.* §3142(aX2). Section 3142(g)(lM4) provides:

> The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—
>
> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including-
> (A)the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> (B)whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Id. §3142(g)(lM4).

[67] *Id.* §3142(a)(3),(e).

[68] *See id.* § 3142(a)(4).

For Habeas Corpus ("Class Action")[69] held that incarcerated material witnesses had a Fifth Amendment due process right to appointment of counsel.[70] The *Class Action* court observed that under federal law, material witnesses were to be treated in accordance with the statute that sets bail for criminal defendants.[71] The bail statute, the court noted, provides for the appointment of counsel for indigent criminal defendants.[72] The court concluded that Congress intended to provide a right to counsel in material witness cases,[73] that the Fifth Amendment required appointment of counsel,[74] and that appointment of counsel was necessary to avoid extended incarceration of witnesses.[75]

Under the federal material witness statute, it is common practice to obtain an arrest warrant for a material witness. Such a warrant must be based on probable cause, which consists of two elements:[76] the testimony of the person must be material,[77] and it must be impracticable to secure the person's presence by subpoena.[78] Both of these requirements have been challenged in

[69] 612 F. Supp. 940 (W.D. Tex. 1985) *("Class Action").*

[70] *Id.* at 943-44.

[71] *Id.* at 942-43 (citing 18 U.S.C. § 3142). Section 3142 provides for the release or detention of defendants and witnesses pending trial. 18 U.S.C. § 3142.

[72] *Class Action,* 612 F. Supp. at 943.

[73] *Id.*

[74] *Id.* at 944. The Fifth Amendment provides: "[n]o person shall... be deprived of life, liberty, or property, without due process of law . ..." U.S. CONST, amend. V. The court reasoned that "[t]he material witness is deprived of liberty without an opportunity to consult with counsel or to have his interests represented because he is not charged with a crime. Consequently, individuals that are incarcerated without being charged with criminal activity are afforded less protection than individuals charged with criminal activity." *Class Action,* 612 F- Supp. at 945.

[75] *Class Action,* 612 F. Supp. at 945.

> [T]his Court firmly believes that the appointment of counsel to represent these individuals will ensure that any decision to continue their incarceration is wellreasoned and based upon **full** consideration of all relevant evidence. In addition, appointment of counsel will help ensure that a material witness receives all of his rights ... and ... that any conditions imposed upon the release of the individual will be only as stringent as is required to secure his presence as a witness at trial. Lastly, counsel. .. can ensure that the material witness receives all rights available to him ... regarding the deposition of individuals prior to trial.

Id.

[76] See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

[77] *Id.*

[78] *Id.*

court.[79] In addition, if testimony may be secured through deposition, then the witness should not be detained. Each of these elements of section 3144 merit further examination.

A. *Materiality Requirement of Section 3144*

Bacon v. United States[80] is an important decision construing material witness law. *Bacon* was decided under the former material witness statute, 18 U.S.C. § 3149, and its pre-1972 companion, Federal Rule of Criminal Procedure 46(b).[81] Thus, the court considered the validity of a material witness arrest without the benefit of any clear statutory authority to do so.

The *Bacon* court determined that a material witness arrest warrant should be held to the same standards of probable cause as any arrest warrant.[82] The probable cause necessary in the material witness context necessarily differs, however, from probable cause for a standard arrest warrant. The court determined first, that the testimony of the witness must be "material" and second, that it must be impracticable to secure the witness's presence by subpoena.[83] The court also decided that the mere assertion by the government that the testimony of the witness is material was sufficient because of the special secrecy concerns of grand jury investigations. Therefore, the court refused to require a detailed factual basis for materiality.[84]

The defendant in *United States v. Oliver*[85] faced a similar situation. He had been arrested as a material witness to appear before a grand jury based upon the bare assertion by the government attorney that his testimony was material.[86] Oliver challenged his arrest as a material witness, citing lack of probable cause for issuance of the warrant, namely, that the

[79] MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 57 (1985). Although the judicial officer must inquire into the materiality of the witness and his potential unavailability at trial, the prosecutor's affidavit is generally held to be prima facie proof.

[80] 449 F.2d 933 (9th Cir. 1971).

[81] *See id.* at 937-38.

[82] *Id.* at 942.

[83] *Id.* at 943.

[84] *Id.* This might be inconsistent with *Giordenello v. United States,* 357 U.S. 480, 486 (1958), which states that the reviewing magistrate cannot rely on the conclusions of the government, but rather, must have a factual basis for probable cause determinations.

[85] 683 F.2d 224 (7th Cir. 1982).

[86] *Id.* at 226.

materiality requirement was not satisfied.[87] The court held that a materiality representation by a "responsible official" was adequate,[88] but expressly limited its holding to witnesses material to the functions of a grand jury.[89]

In *Arnsberg v. United States?*[90] the plaintiff sued the government to recover damages for the execution of an invalid material witness arrest warrant against him.[91] A magistrate had issued a warrant calling for Arnsberg's arrest as a material witness, but the warrant was facially invalid.[92] Arnsberg claimed that his subsequent arrest pursuant to the invalid warrant constituted false imprisonment and an unreasonable seizure under the Fourth Amendment.[93] Arnsberg argued that he had not been personally served with a subpoena and, therefore, had no obligation to appear before the grand jury. Consequently, he could not be arrested for failing to appear.[94] The government countered that the material witness arrest warrant was justified because agents were unable to serve Arnsberg with the subpoena.[95] The court noted, however, that even under the government's theory, the warrant was invalid because the agents' difficulties in attempting to serve Arnsberg did not establish probable cause for believing that it would be

[87] *Id.* at 231.

> Oliver... contends that in order to satisfy the materiality requirement, we should require that a factual basis be set forth in the materials submitted with the issuing judicial officer. Representation by an Assistant United States Attorney that the witness is material is insufficient in Oliver's mind. He argues that the present requirement permits a much lower standard than that required for the issuance of a standard arrest warrant.

Id..

[88] *Id.* "We believe requiring a materiality representation by a responsible official of the United States Attorney's Office strikes a proper and adequate balance between protecting the secrecy of the grand jury's investigation and subjecting an individual to an unjustified arrest." *Id.*

[89] *Id.* "We too limit our holding to witnesses material to the functions of a grand jury. We express no view on the propriety of extending this rule to witnesses material to a trial, where the special concerns of the grand jury are not present." *Id.*

90 757 F.2d 971 (9th Cir. 1984).

[91] *Id.* at 975.

[92] *Id.* The magistrate found the elements necessary for a material witness arrest warrant satisfied, but the warrant itself stated that the arrest was for "Failure to Appear before the Federal Grand Jury." The statute allegedly violated by Arnsberg was listed as "Title 18, Section 3149"—the material witness arrest statute. *Id.* at 975.

[93] *Id.* at 975-76.

[94] *Id.* at 976.

[95] *Id.*

impracticable to secure his presence by subpoena.[96] After weighing the competing interests, the court concluded that the warrant was invalid regardless of whose version of the arrest was accepted.[97] The court noted, however, that this did not make execution of the warrant a tortious act for which the government was liable.[98] The court also held that the doctrine of sovereign immunity precluded recovery on Arnsberg*s Fourth Amendment claim."

B. Impracticability Requirement of Section 3144

The second element of probable cause requires the impracticability of securing the witness's presence by subpoena. A sufficient showing of probable unavailability at trial has been based on circumstances such as a witness moving without leaving a forwarding address, a witness not appearing when requested or subpoenaed to appear, or the inability to serve a subpoena upon a witness.[100]

In one of the oldest material witness cases, *Barry v. United States ex rel. Cunningham*,[101] petitioner Cunningham filed a writ of habeas corpus directed to the Sergeant at Arms of the United States Senate, David S. Barry, after he was arrested and detained for refusing to answer a Senate committee's questions regarding campaign donations.[102] The issue was whether the Senate had the authority to force Cunningham to testify as a witness by means of an arrest warrant.[103] The Court noted that "as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed."[104] The Court, however, in upholding Cunningham's detention, indicated that "a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming."[105]

[96] *Id.*
[97] *Id.* at 976-77.
[98] *Id.* at 979-80.
[99] *Id.* at 980.
[100] GRAHAM, *supra* note 79, at 57.
[101] 279 U.S. 597 (1929).
[102] *Id.* at 610-11.
[103] *Id.* at 613.
[104] *Id.* at 616.
[105] *Id.* at 616-17.

In *United States v. Anfield*[106] a witness was arrested shortly before the defendant's criminal trial, even though he had already appeared before a grand jury in compliance with a subpoena.[107] When his trial testimony differed substantially from his grand jury testimony, he was indicted for perjury.[108] Anfield argued that he was a putative defendant at the time he testified at the trial as a material witness and, therefore, should have received Miranda warnings.[109] The court disagreed, noting Anfield's incarceration as a material witness did not entitle him to Miranda warnings,[110] and holding that the use of his trial testimony in his subsequent perjury prosecution was proper.[111]

Similarly, the petitioner in *United States v. Feingold*[112] argued that the government could not issue a material witness arrest warrant until he had actually disobeyed a subpoena.[113] The court held that the requirement of impracticability was met because there had been several unsuccessful attempts to serve Feingold with a subpoena.[114] Because his testimony was needed for a trial, rather than a grand jury proceeding, it was urgent to secure his appearance while the trial was in progress.[115] Thus, his arrest was deemed proper.

In *United States v. McVeigh,*[116] co-defendant Nichols heard his name broadcast over the media in connection with the Oklahoma City bombing in April 1995.[117] He went to the police

[106] 539 F.2d 674 (9th Cir. 1976).

[107] *Id.* at 676.

[108] *Id.*

[109] *Id.* at 676-77; see *also* Miranda v. Arizona, 384 U.S. 436, 467-79 (1966) (discussing constitutionally mandated warnings).

[110] *Anfield,* 539 F.2d at 677; see *also* United States v. Mandujano, 425 U.S. 564, 578-80 (1976) (holding that Grand Jury witnesses are not entitled to *Miranda* warnings).

[111] *Anfield,* 539 F.2d at 677.

[112] 416 F. Supp. 627 (E.D.N.Y. 1976).

[113] *Id.* at 628.

[114] *Id.* at 629.

[115] *Id.* at 628-29. The court stated:

> 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 .... Once commenced, the trial would continue on consecutive days, and Feingold's testimony would be needed before the Government rested its case.

Id. (citation omitted).

[116] 940 F. Supp. 1541 (D. Colo. 1996).

[117] *Id.* at 1547.

station, near his home to ask why his name was being associated with the bombing investigation.[118] A material witness arrest warrant was obtained while he was being interviewed by FBI Agents.[119] The affidavit for the warrant was drafted using a material witness warrant that had been issued the previous day for a different investigation.[120] The drafter mistakenly included the language from the prior warrant on the face of the Nichols warrant, indicating that he "has attempted to leave the jurisdiction of the United States, and it may become impracticable to secure his presence by subpoena."[121] After discovering the mistakes in the affidavit, the judge signed a revised warrant. The judge was not told that Nichols was at the police station when the application for the warrant was presented, and the agents interviewing Nichols were not told when the warrant was obtained because of a "command decision to keep the interview going, recognizing that upon his arrest Terry Nichols might stop talking."[122] Several hours into the interview, Nichols was formally arrested on the material witness warrant and the interview ended.[123]

Nichols' attorney moved to quash the material witness warrant, arguing that there was a lack of probable cause because impracticality had not been demonstrated, and therefore, any statements made by Nichols following his arrest as a material witness should be suppressed.[124] Counsel pointed out that the affidavit was incorrect because Nichols had voluntarily met with authorities, and even consented to searches of his home and vehicle.[125] The court denied the motion, finding the agents'

[118] *Id.*
[119] *Id.* at 1549.
[120] Id.
[121] *Id.* The affidavit contained other mistakes, such as bearing the caption "United States v. Terry Lynn Nichols," even though no criminal charges had yet been initiated by the government, and the affidavit was entitled "Warrant for Arrest" without indicating it was for the arrest of a material witness. *Id.*
[122] *Id.* at 1550.
[123] *Id.* During the time Nichols was in the police station, the news media broadcast that he was in custody in Kansas. *Id.* The Kansas Federal Public Defender, David Phillips, began trying to locate Nichols, to see if he needed an attorney. *Id.* He called the police station where Nichols was being interviewed and someone took the message "without comment." *Id.* "No one told Mr. Nichols about that offer for legal assistance, and he did not request counsel while he was at the ... police station .. .." *Id.*
[124] *Id.* at 1562.
[125] *Id.* at 1551-52.

affidavit met the government's burden of demonstrating probable cause.[126] The court found that the inaccurate statement on the face of the warrant was not in the supporting affidavit and therefore was "not a part of the showing of probable cause."[127] Nichols appealed, but the Court of Appeals for the Tenth Circuit held the appeal moot since a new arrest warrant against Nichols had been filed based upon a criminal complaint, and the material arrest warrant had been dismissed by the district court.[128] Nichols' detention continued, and he was ultimately charged and convicted as a co-conspirator in the Oklahoma City bombing.[129]

C. The Deposition Alternative of Section 3144

No material witness may be detained if his testimony can be secured by deposition, provided the deposition would be a sufficient alternative to the witness's live testimony and that "further detention is not necessary to prevent a failure of justice."[130] The release of a material witness may be delayed for a reasonable time until the witness's deposition can be taken pursuant to the Federal Rules of Criminal Procedure.[131] It has been observed, however, that resort to this procedure by a material witness, who is generally reluctant to testify, is understandably rare.[132]

The deposition must be admissible despite any objections by the government or the accused.[133] Such objections are typically based upon the Confrontation Clause of the Sixth Amendment[134]

[126] *Id.* at 1562. The agent asserted, in the supporting affidavit, "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." *Id.*

[127] *Id.*

[128] United States v. Nichols, 77 F.3d 1277,1279 (10th Cir. 1996).

[129] United States v. Nichols, 169 F.3d 1255, 1260 (10th Cir. 1999) (finding Nichols guilty of eight counts of involuntary manslaughter and of conspiring to use a weapon of mass destruction). Nichols was sentenced to life imprisonment on the conspiracy count and six years on each manslaughter count. His convictions were affirmed on appeal. *Id.*

[130] Aguilar-Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992); *see also* 18 U.S.C. § 3144 (2000).

[131] 18 U.S.C. § 3144 (2000).

[132] 8 B.J. MOORE, FEDERAL PRACTICE § 46.11 (1978).

[133] *Id.*

[134] *See* U.S. CONST, amend. VI. In *Ohio v. Roberts,* 448 U.S. 56 (1980), the Court described the application that the Confrontation Clause contemplates:

or the Federal Rules of Evidence.[135] Defendants have also objected to the admission of witness depositions under the Sixth Amendment right to the compulsory process of witnesses.[136]

A material witness can file a written motion with the district court pursuant to Rule 15 of the Federal Rules of Criminal Procedure, requesting that he be released and deposed.[137] Together, Rule 15 and the federal material witness statute provide a strategy whereby a witness can seek his own release from confinement.[138] Upon filing a "written motion" to be deposed, the witness must show that his "testimony can adequately be secured by deposition" and "further detention is not necessary to prevent a failure of justice."[139] Generally, judicial applications of Rule 15 place the burden of making the

> IA] personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 63-64 (quoting Mattox v. United States, 156 U.S. 237,242-43 (1895)),

[135] See *Aguilar-Ayala,* 973 F.2d at 413. Federal Rule of Criminal Procedure 15(e) provides that a deposition "may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition." FED. R. CRIM. P. 15(e). Federal Rule of Evidence 804(b)(l) allows a deposition into evidence over a hearsay objection if the witness is "unavailable" as defined in Rule 804(a). FED. R. EVID. 804(b)(l).

[136] *Washington v. Texas, 388* U.S. 14 (1966), defined the right to compulsory process:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id. at 19 (1966); see *also* United States v. Huang, 827 F. Supp. 945, 950-51 (S.D.N.Y. 1993) (using witnesses' depositions in lieu of live testimony would violate defendants' right to compulsory process).

[137] *See Aguilar-Ayala,* 973 F.2d at 413. Federal Rule of Criminal Procedure 15(a) provides, in. part, "If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness." *Id.* (citing FED. R. CRIM. P. 15(a)).

[138] See id. (noting that alien witnesses petitioned for writ of mandamus requesting district court schedule their videotaped depositions).

[139] *Aguilar-Ayala,* 973 F.2d at 413 (quoting 18 U.S.C. § 3144).

written request for a deposition on the material witness.[140] Understandably, the witness who is represented by counsel would be able to meet these requirements much more readily than an unrepresented witness. Thereafter, the district court must order the deposition and release of the witness.[141] Denial of the motion is reserved to "those instances in which the deposition would not serve as an adequate substitute for the witness' live testimony."[142]

The government has the burden of demonstrating a material witness's unavailability in order to admit the deposition testimony.[143] While numerous convictions have been reversed due to the government's failure to establish that a witness was truly unavailable for trial,[144] some federal courts have affirmed criminal convictions despite the apparent availability of the witness for trial.[145] Further, several courts have found that a defendant's Sixth Amendment right to confrontation was violated where the government failed to take steps to secure the attendance of foreign material witnesses at trial and relied instead on depositions taken pursuant to Rule 15.[146] These

[140] See *id.;* United States v. Nai Fook Li, 949 F. Supp. 42, 44 (D. Mass. 1996); *Huang,* 827 F. Supp. at 948.

[141] *Aguilar-Ayala,* 973 F.2d at 413 (citing 18 U.S.C. § 3144).

[142] *Id.; see* United States v. Lopez-Cervantes, 918 F.2d 111, 112 (10th Cir. 1990) (finding depositions taken of alien material witnesses improper, since neither the government nor the witnesses requested the depositions, and both parties objected).

[143] See United States v. Martinez-Perez, 916 F.2d 1020, 1023 (5th Cir. 1990) (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980)); see *also* United States v. Eufracio-Torres, 890 F.2d 266, 270 (10th Cir. 1989) (noting the district court permitted deposition of alien witnesses over defense objection and ordered their release upon their promise to return for trial; witnesses deemed unavailable and deposition testimony admitted over defendant's Sixth Amendment objection, when witnesses failed to return for trial).

[144] See *Aguilar-Ayala,* 973 F.2d at 417-18; see *also* United States v. Fuentes-Galindo, 929 F.2d 1507, 1510-11 (10th Cir. 1991); *Lopez-Cervantes,* 918 F.2d at 115-115; *Martinez-Perez,* 916 F.2d at 1024-26; United States v. Guadian-Salazar, 824 F.2d 344, 347-48 (5th Cir. 1987).

[145] See United States v. Rivera, 859 F.2d 1204, 1207 (4th Cir. 1988) (indicating alien-witnesses were "unavailable," allowing the use of their depositions, notwithstanding that the government approved the deposition procedure, released the witnesses, and did not attempt to obtain their appearance at trial); see *also* United States v. Terrazas-Montano, 747 F.2d 467, 468-69 (8th Cir. 1984) (indicating alien-witnesses who had been deposed were "unavailable" even though the government deported them, knew the witnesses would not return, and did not attempt to obtain their return for trial).

[146] See *Guadian-Salazar,* 824 F.2d at 347 (noting government made inadequate attempts to secure return of witnesses from Mexico to United States for trial);

concerns are mitigated, however, where the defendant has the opportunity to cross-examine the material witness under oath.[147]

III. PROCEDURAL CONSIDERATIONS

A. *Material Witnesses and the Fourth Amendment*

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure" and mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[148] The Supreme Court, in interpreting the prohibition against unreasonable seizures, has held that an individual "may not be detained even momentarily without reasonable, objective grounds for doing so."[149]

A "temporary" seizure of an individual may be justified under *Terry v. Ohio*[150] for investigative purposes. The Supreme Court, however, requires the detention be "reasonably related in scope to the circumstances which justified the interference in the first place."[151] Furthermore, "[tjhe scope of the detention must be carefully tailored to its underlying justification."[152] This narrowed focus of any detention is significant as it applies to warrants.

The Fourth Amendment mandates that issuance of a warrant requires a determination of probable cause by a "neutral and detached magistrate."[153] Probable cause exists when the

United States v. Mann, 590 F.2d 361, 367 (1st Cir. 1978) (admission of a deposition of a witness permitted by the government to leave the United States violated the Confrontation Clause); *see also* Phillips v. Wyrick, 558 F.2d 489, 493 (8th Cir. 1977); United States v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974); United States v. Simuel, 439 F.2d 687, 689 (4th Cir. 1971). *But see* United States v. Allie, 978 F.2d 1401, 1402-04 (5th Cir. 1992) (concluding alien witnesses were "unavailable" for Confrontation Clause purposes even though the government allowed them to leave the country).

[147] See Barber v. Page, 390 U.S. 719, 724 (1968); *Eufracio-Torres,* 890 F.2d at 270; United States v. Salim, 855 F.2d 944, 950 (2d Cir. 1988); United States v. Seijo, 595 F.2d 116,120 (2d Cir. 1979); *Phillips,* 558 F.2d at 493.

[148] U.S. CONST, amend. IV.

[149] Florida v. Royer, 460 U.S. 491, 498 (1983).

[150] 392 U.S. 1,10 (1967).

[151] *Id.* at 20.

152 *Royer,* 460 U.S. at 500.

153 Johnson v. United States, 333 U.S. 10,13-14 (1948).

The point of the Fourth Amendment, which often is not grasped by zealous

facts and circumstances described in the affidavit indicate a fair probability that evidence of a crime will be found on the premises of the proposed search[154] or, in the case of a material witness, when it is determined that the individual's testimony is material and that it is "impracticable to secure [their] presence by subpoena."[155] "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his [or her] action cannot be a mere ratification of the bare conclusions of others."[156]

The validity of a warrant depends "upon the sufficiency of what is found within the four corners of the underlying affidavit."[157] The facts in the affidavit must establish a sufficient nexus between the witness and the testimony sought by the government.[158] When examining warrant requests, courts apply a "totality of the circumstances approach" to determine whether there is probable cause to justify the issuance of the warrant.[159] Affidavits that do not set forth a "substantial basis" to conclude an individual is a material witness are rejected as presenting a lack of probable cause, and it is unreasonable for officers to rely upon such warrants.[160]

> officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id.

[154] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983); see *also* United States v. Loggins, 777 F.2d 336, 338 (6th Cir. 1985); United States v. Algie, 721 F.2d 1039, 1041 (6th Cir. 1983).

155 See Bacon v. United States, 449 F.2d 933,943 (9th Cir. 1971).

[156] *Gates,* 462 U.S. at 239. Generally, a magistrate's determination of probable cause is entitled to great deference. *Id.* at 234, 239. Yet, "the [district] court must.. . insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, 378 U.S. 108, 111 (1964). As such, "[d]eference to the magistrate... is not boundless." United States v. Leon, 468 U.S. 897, 914 (1984).

[157] United States v. Martinez, 588 F.2d 1227,1234 (9th Cir. 1978).

[158] See United States v. Freeman, 685 F.2d 942, 949 (5th Cir. 1982) (requiring connection between the place to be searched and the evidence sought); see *also* United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982) (asserting that there "must be a 'substantial basis' to conclude that the instrumentalities of the crime will be discovered on the searched premises").

[159] *Gates,* 462 U.S. at 230.

[160] Federal courts have invalidated warrants for lack of probable cause when the underlying affidavits did not present evidence establishing the requisite nexus between, for instance, a place to be searched and items to be seized. See United

B. Material Witness Arrest Without a Warrant

The issue of whether a material witness can be arrested under federal law without a warrant, or prior to the subsequent issuance of a warrant, is a contentious one. One court observed, "No case has been found approving the seizure and detention of a *witness* absent a warrant. Police have less authority to detain those who have witnessed a crime than to detain those suspected of committing a crime under the Fourth Amendment."[161]

Historically, the Supreme Court has approved a police officer's arrest without a warrant of an individual suspected of committing a crime if there is probable cause for the arrest.[162] Probable cause is determined by the totality of the circumstances.[163] The Court defined probable cause to search as "a fair probability that contraband or evidence of a crime will be found in a particular place."[164] Furthermore, "[pjrobable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[165]

States v. Gardner, 537 F.2d 861, 862 (6th Cir. 1976). In *United States v. Sauoca,* 761 F.2d 292 (6th Cir. 1985), FBI agents obtained a search warrant for the defendants' hotel room. The affidavit indicated that the agents had seen the defendants in the hotel room and knew that they had outstanding federal arrest warrants for bank robberies on unspecified dates. In invalidating the search warrant for lack of probable cause, the Sixth Circuit recognized the well-established legal principle "that the existence of probable cause to arrest will not necessarily establish probable cause to search." *Id.* at 297 (citing United States v. Hatcher, 473 F.2d 321 (6th Cir. 1973)).

[161] Orozco v. County of Yolo, 814 F. Supp. 885, 893 (E.D. Cal. 1993).

[162] See Henry v. United States, 361 U.S. 98, 100 (1959) (noting that the necessary inquiry was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest); Carroll v. United States, 267 U.S. 132, 156 (1925) ("The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony——"); *see also* Gerstein v. Pugh, 420 U.S. 103, 113 (1975) (stating that the Supreme Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant"); Ker v. California, 374 U.S. 23, 24 (1963) (upholding warrantless arrest based upon probable cause); Abel v. United States, 362 U.S. 217, 226-230 (1960) (upholding warrantless administrative arrest); Draper v. United States, 358 U.S. 307, 310 (1959) (upholding warrantless arrest).

[163] *Gates,* 462 U.S. at 230.

[164] *Id.* at 238.

[165] Brinegar v. United States, 338 U.S. 160,175-76 (1949).

Further, the Supreme Court has recognized the constitutional validity of statutorily authorized searches.[166] In *United States v. Watson,*[167] the defendant was arrested in a public area. The arresting officer, a postal inspector, had probable cause to believe Watson possessed stolen mail, which was a federal felony.[168] The inspector had statutory authority to make the arrest under a postal regulation.[169] The Supreme Court found that the statutory authorization to make a warrantless arrest based upon probable cause did not violate the Fourth Amendment.[170] The Court emphasized that it would not transform the judicial preference for warrants into a constitutional requirement.[171] Similarly, Congress does not require proof of exigent circumstances in delegating arrest powers to members of the FBI, and clearly allows agents to make warrantless arrests.[172]

At common law, a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence, as well as for a felony not committed in his presence, if there were reasonable grounds for making the arrest.[173]

[166] An exception to this rule, however, is that a warrant is required to arrest a person in his or her home. See Payton v. New York, 445 U.S. 573 (1980). In *Payton,* the Supreme Court held that, in the absence of exigent circumstances, police may not enter a criminal suspect's home without a warrant:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their. .. houses ... shall not be violated."

Id. at 589. This language unequivocally establishes that "[a]t the very core [of the Fourth Amendment] stands the rights of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment draws a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. See *Payton,* 445 U.S. at 589-90.

[167] 423 U.S. 411 (1976).

[168] *Id.* at 414-15.

[169] *Id.* at 415.

[170] *Id.* at 424.

[171] *Id.* at 423-24.

[172] See 18 U.S.C. § 3052 (2000) (requiring only reasonable grounds to believe a person "has committed or is committing" a felony in order to make an arrest without a warrant).

[173] Kurtz v. Moffitt, 115 U.S. 487, 504 (1885) ("The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been

The court in *Rohan v. Sawin*[174] noted:

> It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law.[175]

The court in *Bacon v. United States*[176] refused to decide "whether, if ever, a material witness may be arrested and detained with probable cause but without a warrant." Various states have recognized the validity of a warrantless arrest of a Material witness.[177] One Oregon court, however, has

generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals."); *see also Watson,* 423 U.S. at 414—24 (holding that the arrest of respondent, having been based on probable cause and made by postal officers acting in strict compliance with the governing statute and regulations, did not violate the Fourth Amendment).

[174] 59 Mass. (5 Cush.) 281 (1850).

[175] *Id.* at 284-85.

[176] 449 p.2d 933, 943 (7th Cir. 1971).

[177] See White v. Gerbitz, 892 F.2d 457 (6th Cir. 1989) (upholding warrantless arrest and detention of homeless man as material witness, supported by probable cause, under Tennessee law). In *State v. Hernandez-Lopez,* 639 N.W.2d 226 (Iowa 2002), the court stated:

> We prefer an officer to obtain an arrest warrant from a magistrate by demonstrating his reasons for believing an individual to be a material witness reasonably likely to be unavailable for trial before arresting an individual as a material witness. However, we recognize exigent circumstances may exist in certain cases, such as where an officer is in hot pursuit of a witness and the warrant requirement would unreasonably frustrate the officer's efforts to locate the witness. If we required an arrest warrant in every case, some witnesses may never be located.

Id. at 242 (citation omitted). Similarly, in *State v. Hand,* 242 A.2d 888 (N.J. 1968), the New Jersey Supreme Court stated:

> Under the common law of New Jersey,... a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is necessary and material witness to a crime punishable by imprisonment for more than one year and that person might be

disapproved of such arrests.[178]

This is an issue that has generated little litigation. Until recently, material witness arrests were relatively rare, at least compared to criminal arrest. Additionally, such arrests were of short duration, and violations were not subject to any remedy, so there was little point to litigation. Furthermore, common sense dictates that most courts would find that, in some situations, police officers could seize and detain material witnesses without a writ. Assume, for example, an officer who knows a witness has critical information and the witness is about to flee the jurisdiction. Must the officer stand idly by and watch the witness depart? Seizing the witness would be both prudent and reasonable, and only unreasonable seizures are prohibited by the Constitution.[179]

C. Material Witness Detention Pursuant to the Common Law Powers of the Court

"Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles . . . ."[180]

Courts have considered whether there is a common law right to arrest material witnesses. In *United States v. Bacon,* the Ninth Circuit noted that most jurisdictions faced with this issue have rejected the existence of this right.[181] One court determined, "If such a right does exist, however, the Court is certain that it would be subject to the same requirements as the statutory right to arrest a material witness—there must be some showing that the witness will not cooperate with law enforcement efforts to obtain her testimony."[182] Clearly, there could hardly be greater power to arrest without a statute than

> unavailable for service of a subpoena . . . . It is, in the opinion of this court, not sufficient for an arrest without a warrant that a person might be a witness to material aspects of a crime. The officer should reasonably believe that the alleged witness can give testimony which is essential to the State.

Id. at 895.

[178] *See* State v. McKendall, 584 P.2d 316, 319 (Or. 1978) (holding material witness orders must originate with a magistrate or judge under Oregon law), *overruled on other grounds by* State v. Lopez, 936 P.2d 386, 388 (Or. 1997).

[179] U.S. CONST, amend IV; see *also supra* Part III.A.

[180] *Exparte* Bowman, 8 U.S. (4 Cranch) 75,93 (1807).

[181] United States v. Bacon, 449 F.2d 933, 939 (1971).

[182] Perkins v. Click, 148 F. Supp. 2d 1177,1183 n.6 (D.N.M. 2001).

with one, for this would render the statute meaningless. The existence of a common law power would only be significant, for instance, if any potential material witness was beyond the scope of the material witness statute.[183]

Despite this, most courts have expressly rejected a common law power to detain persons as material witnesses.[184] Specifically, in the federal system, courts have limited jurisdiction and have only the powers granted by Congress.[185] A gap in the court's power clearly exists and it is the responsibility of Congress to fill it.

D. *Material Witnesses and Grand Jury Proceedings*

"[I]t 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 . . . ."[186]

Courts have debated whether an individual can be detained as a material witness in order to appear and testify before a grand jury when no pending criminal charges are filed against the target of the investigation. In *Bacon v. United States,* the Ninth Circuit determined that a witness could be detained for the purpose of testifying before a grand jury.[187] In *Bacon,* a complaint was sworn before the district judge which stated that the witness "had personal knowledge of matters material to a grand jury investigation and that a subpoena would be ineffective in securing her presence."[188] Based on the complaint,

[183] An example might be found in *United States v. Awadallah,* 202 F. Supp. 2d 55 (S.D.N.Y. 2002). The defendant was seized as a material witness so that he might testify before a grand jury, even though no charges were pending against anyone. *Id.* at 58. The federal material witness statute does not explicitly authorize seizure and detention for grand jury testimony. *Id.* A common law power would fill this particular niche, at least if the common law power was applicable to grand jury proceedings. See *Bacon,* 449 F.2d at 939 (noting that although most courts do not consider a common law right to arrest and detain witnesses, some do, and these courts could apply this right to grand jury proceedings); Crosby v. Potts, 69 S.E. 582, 584 (Ga. Ct. App. 1910) (finding common law right to detain witnesses in context of a criminal trial).

[184] *See Bacon,* 499 F.2d at 939.

[185] See *Boltman,* 8 U.S. at 93.

[186] Blair v. United States, 250 U.S. 273, 281 (1919).

[187] *Bacon,* 449 F.2d at 933.

[188] *Id.* at 934.

the court issued an order to the United States Marshal to arrest Bacon and transport her in custody until she posted bail.[189] Bacon filed a petition for writ of habeas corpus, challenging her detention as a material witness, which was denied by the district court. On appeal, the Ninth Circuit reversed and quashed the arrest warrant on a finding that there was no showing of probable cause to support the conclusion that Bacon could not be brought before the grand jury with a subpoena.[190]

The *Bacon* decision is important because of the context in which the material witness arrest warrant was issued. The court held, "In the case of a grand jury proceeding, we think that a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy [the materiality requirement of the material witness statute]."[191] The court reasoned:

> This is because of the special function of the grand jury; it has exceedingly broad powers of investigation, and its proceedings are secret. We have also held that where a showing is being made in support of a proposed grant of immunity to a grand jury witness, the mere assertion by the United States Attorney that the investigation involves the applicable statute is enough. These principles, we think, are applicable here. We express no opinion as to what showing as to materiality must be made in the case of a witness who is to testify at a trial.[192]

Similarly, in *United States v. Oliver,* the defendant was arrested as a grand jury material witness based merely upon the "bare assertion" of a Government attorney that his testimony was material.[193] Oliver argued that in order to satisfy the materiality requirement and establish probable cause to arrest a material witness, the court should require "that a factual basis be set forth in the materials submitted with the issuing judicial officer."[194] The court rejected Oliver's argument, stating that a grand jury has "unique powers and functions" and requires

[189] *Id.* at 934-35.
[190] *Id.* at 945.
[191] *Id.* at 943.
[192] *Id.* (citations omitted).
[193] United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982).
[194] *Id.* Oliver contended that a factual basis must be established in the materials submitted to the issuing judicial officer in order to satisfy the materiality requirement and that a representation by an Assistant United States Attorney that the witness is material is insufficient. He maintained that to rule otherwise would permit a lower standard than that required for a standard arrest warrant. *Id.*

secrecy to perform its investigatory processes; such secrecy could be seriously jeopardized if the factual basis must be articulated each time a material witness warrant is sought.[195] Thus, the court held that a materiality representation by a responsible official was adequate,[196] but expressly limited its holding to witnesses material to the functions of a grand jury.[197]

In *United States v. Awadallah,* the district court rejected the Government's assertions that material witnesses can be detained for the sole purpose of testifying before a grand jury conducting an investigation,[198] In so doing, the court expressly rejected *Bacon,* finding its language regarding material witnesses and grand juries to be "dicta."[199] The court noted that grand juries operate in secret, and courts are prohibited from inquiring into their proceedings under the Federal Rules of Criminal Procedure.[200] The court further distinguished its holding from *Bacon,* noting that section 3142 of the Bail Reform Act applies to proceedings "pending trial."[201] Moreover, 18 U.S.C. § 3144 requires an affidavit filed by a "party," not a witness, and refers to the adversarial process between a prosecutor and a defendant.[202] The court was troubled by the fact that there are no "parties" to a grand jury proceeding, and that no criminal charges are pending when a grand jury is convened to investigate a matter.[203] Furthermore, the Bail Reform Act contemplates release or detention pending trial, sentence, or appeal, and does not mention "witnesses" per se.[204] The court emphasized that a grand jury has subpoena power, which is

195 *Id.*

196 *Id.* "We believe requiring a materiality representation by a responsible official of the United States Attorney's Office strikes a proper and adequate balance between protecting the secrecy of the grand jury's investigation and subjecting an individual to an unjustified arrest." *Id.*

197 *Id.* "[W]e too limit our holding to witnesses material to the functions of a grand jury. We express no view on the propriety of extending this rule to witnesses material to a trial, where the special concerns of the grand jury are not present." *Id.*

198 United States v. Awadallah, 202 F. Supp. 2d 55, 63 (S.D.N.Y. 2002).

199 *Id.* at 72.

200 *id.* at 63 (citing FED. R. CRIM. P. 6(e)(2).

201 *Id.; see* 18 U.S.C. § 3142(a) (2000) ("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 [released or detained].").

202 *Awadallah,* 202 F. Supp. 2d at 62.

203 *Id.* at 62-63.

204 *Id.* at 66; see 18 U.S.C. § 3141 (2000) (discussing release and detention authority generally).

much less intrusive than requiring the detention of a material witness for the purpose of testifying.[205]

The court concluded that the federal material witness statute does not authorize the detention of material witnesses for a grand jury investigation.[206] The decision reflected concern that the Government, by detaining a witness for investigatory purposes only, was over-reaching and using the material witness statute for a purpose for which it was not intended.[207] "The only *legitimate* reason to detain a grand jury witness is to aid in 'an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.'"[208] Because Awadallah was detained under the material witness statute, an action the court refused to sanction, his grand jury testimony was suppressed as the product of an unlawful seizure, and perjury charges stemming from a conflict in his grand jury testimony were dismissed.[209]

Another federal judge in the same district found the reasoning and conclusion *of Awadallah* to be faulty and refused to follow it. *In re the Application of the United States for a Material Witness Warrant ("Application")*[210] involved an individual detained as a material witness in order to ensure his appearance before a grand jury investigating the September 11th terrorist attacks. The witness moved to quash the material witness warrant, and, relying on *United States v. Awadallah,* argued that the material witness statute does not apply to grand jury proceedings and that the Government violated his Fifth Amendment rights when it transported him from another jurisdiction to New York to testify. He further asserted that the Government should be compelled to depose him immediately, rather than bring him to New York to appear before the grand

[205] *Awadallah,* 202 F. Supp. 2d at 74 (stating that Federal Rule of Criminal Procedure 17, which governs the subpoena power in criminal proceedings, also applies to grand jury investigations).

[206] *Id.* at 76.

[207] *Id.* at 77 (suggesting that the imprisonment of a material witness solely for the grand jury investigation raises serious constitutional questions under the Fourteenth Amendment).

[208] *Id.* (quoting United States v. Calandra, 414 U.S. 338,343-44 (1974)).

[209] *Id.* at 82.

[210] 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

jury.[211]

The court primarily focused on the issue of whether the material witness statute applies to grand jury proceedings. Noting that *Awadallah* dismissed the *Bacon* decision as dicta, the court examined the reasoning used by the *Bacon* court in reaching the conclusion that the material witness law applied to grand jury proceedings:

> [B]ecause the enabling legislation authorized rules that covered grand jury proceedings; because the grand jury is the body authorized by the Constitution to initiate criminal proceedings; because the Supreme Court had extended the Fifth Amendment privilege against self-incrimination to grand jury proceedings; and because the rules themselves—including Rules 2 and 17—showed the Supreme Court's intention to exercise the Congressional grant of authority to the full; it appeared that former Rule 46(b), and section 3149, both of which governed bail for material witnesses, extended to grand jury proceedings as well.[212]

The *Application* court concluded that the Ninth Circuit's determination in *Bacon* that the material witness statute applied to grand jury witnesses was not dicta, but "instead [was] necessary in order for the Court to reach the issue of impracticability."[213]

The *Application* court felt that the *Awadallah* rationale-rejecting the application of the material witness statute to grand jury proceedings because of the absence of the traditional adversarial setting—was flawed for three reasons. First, the court noted that three appellate courts—the Ninth Circuit in *Bacon*,[214] the First Circuit in *In re De Jesus Berrios*,[215] and the Seventh Circuit in *Oliver*[216]—have determined that it is the role of a court to determine the materiality of a grand jury witness

[211] *Id.* at 288. The witness, identified only as "John Doe," also argued that he did not possess material information, and therefore, was not properly subpoenaed as a grand jury witness. *Id.*

[212] *Id.* at 291. Federal Rule of Criminal Procedure 2, cited by the court, provides, "[t]hese rules are intended to provide for the just determination of every criminal proceeding." *Id.* at 290 (quoting Bacon v. United States, 449 F.2d 933, 940 (9th Cir. 1971}). Federal Rule of Criminal Procedure 17 governs issuance of subpoenas both for trial and for grand jury appearances.

[213] *Id.* at 291.

[214] Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).

[215] 706 F.2d 355, 358 (1st Cir. 1983).

[216] United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982).

based solely on the representations of the government.[217] Second, the court pointed out that judges make such determinations frequently "based on sealed submissions, when deciding whether a subpoena calls for relevant information, whether such information is privileged, and the like."[218] Third, the *Application* court noted that it is difficult to determine the materiality of any witness and whether that witness, even trial witnesses, should be detained or not, because frequently that decision will have to be made before the trial begins and the proofs are revealed.[219]

In addition, the court disagreed with the finding in *Awadallah* that there was no evidence of congressional intent to apply the material witness statute to grand jury proceedings.[220] It noted that there is "direct evidence that a relevant Congressional committee, and anyone who read its report, was aware of *Bacon's* holding and also that the new statute [18 U.S.C. § 3144,] would apply to grand jury proceedings."[221] Thus, *Application* concluded that *Awadallah's* reasoning was specious.

Having declined to follow *Awadallah*, the court rejected the witness's requests that his deposition be taken pursuant to Rule 15 and that he be released. The court stated that even if he were deposed, he could not be released as provided for in Rule 15 because he was a deportable alien.[222] The court, however, refused to decide whether Rule 15 applied because the witness did not meet the rule's requirements; the witness failed to move for a deposition in the jurisdiction in which he had been arrested, and he did not show the unavailability of a grand jury to hear his testimony.

E. *Material Witness Detention Under The All Writs Act*

The All Writs Act, originally enacted as part of the Judiciary Act of 1789,[223] provides, "The Supreme Court and all courts established by act of Congress may issue all writs necessary or

[217] *Application,* 213 F. Supp. 2d at 294.

[218] *Id.*

[219] *Id.* at 294-95.

[220] *Id.* at 288.

[221] *Id.* at 297 (citing S. REP. NO. 98-225, at 28 n.88 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211).

[222] *Id.* at 301.

[223] Act of Sept. 24, 1789, 1 Stat. 85.

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[224]

The Act was created "because federal courts are courts of limited jurisdiction having only those powers expressly granted by Congress, and the statute provides these courts with the procedural tools—the various historic common law writs—necessary for them to exercise their limited jurisdiction."[225]

"Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."[226] The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.[227]

A federal court has the power under the All Writs Act to issue an injunctive order in a case before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue orders preserving the status quo to ensure that it will be in a position to exercise its jurisdiction once it is demonstrated to exist.[228]

Judge Scheindlin, in *United States v. Awadallah,* concluded that "Congress has [not] granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury" investigating criminal activity.[229] Other courts, however, have disagreed with Judge Scheindlin.[230]

224 28 U.S.C. § 1651(a) (2000).

225 United States v. N.Y. Tel. Co., 434 U.S. 159, 187 (1977) (Stevens, J., dissenting) (footnote omitted).

226 Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942).

227 *See* Miss. Valley Barge Line Co. v. United States, 273 F. Supp. 1,6 (E.D. Mo. 1967), *affd sub nom.* Osbouine v. Miss. Valley Barge Line Co., 389 U.S. 579 (1968).

228 *See* FTC v. Dean Foods Co., 384 U.S. 597, 603-05 (1966).

229 United States v. Awadallah, 202 F. Supp. 2d 55, 82 (S.D.N.Y. 2002).

230 *See In re* De Jesus Berrios, 706 F.2d 355, 358 (1st Cir. 1983) (concluding that an arrest to obtain material testimony which would not have been obtained through a subpoena was proper); United States v. Oliver, 683 F.2d 224, 230-31 (7th Cir. 1982) (noting that appellant conceded to the government's authority to issue a material witness arrest warrant); Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971) (holding the power of the government to arrest and detain material witnesses is "fairly inferable from [federal statutes!"); *In re* The Application Of United States for Material Witness Warrant, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (finding that the material witness statute as applied to grand jury witnesses

Judge Scheindlin's conclusion was based on the argument that the federal material witness statute does not expressly include the words "grand jury" when referring to criminal proceedings.[231] Yet, because she failed to consider the possibility that the All Writs Act would justify the seizure of a person as a witness in a grand jury proceeding, it is questionable whether her view can withstand judicial scrutiny.[232]

"Courts .. . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[233] The Supreme Court held that the Act justified an order from Judge Scheindlin's very court, the Southern District of New York, directing that the local telephone company provide the technical assistance necessary to enable the installation of pen registers to investigate offenses which there was probable cause to believe were being committed via telephone.[234] More specifically, a court, consistent with the Act, may impose duties and burdens upon third persons,[235] including a requirement that a person present himself for testimony before the grand jury;[236] however, there is no probable cause requirement to submit to questioning before a grand jury.[237]

It is clear the All Writs Act and the federal material witness statute can be amalgamated to cover situations, such as grand jury proceedings, not expressly encompassed by the federal statute. This would be especially true if the requirements of the material witness statute were otherwise followed, for example,

and detention for grand jury purposes, does not violate Fourth Amendment rights).

231 *Awadallah,* 202 F. Supp. 2d at 58.

232 *See id.*

233 28 U.S.C. § 1651(a) (2000).

234 See United States v. N.Y. Tel. Co., 434 U.S. 159, 172 (1977). A pen register records the numbers dialed on a particular telephone. It does not record conversations, and is installed in a remote location. *Id.* at 161 n.1.

235 The original order in *New York Telephone* made no reference to the All Writs Act. See *id.* at 161-63. Nor does the arrest warrant issued in the Southern District of New York in *United States v. Awadallah* reference the Act. The similarities in the two cases are striking.

236 Obviously, a court can enforce a subpoena to appear before a grand jury with the contempt power, which encompasses the power to incarcerate. *See* Blair v. United States, 250 U.S. 273, 281-83 (1919) (noting that the offering of testimony to a grand jury is a "public dut(y]" necessary to the "welfare of the public" and such duty may be ejtercised only in "exceptional circumstances").

237 See United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (noting probable cause is not needed since the purpose of a grand jury proceedings is to establish probable cause). In egregious cases a subpoena might be quashed if compliance would be unreasonable or oppressive. See FED. R. CRIM. P. 17(c).

by appearing before a judicial officer and presenting an affidavit establishing that the testimony of the witness is material to a criminal investigation.[238] It would also be necessary to establish that it was impracticable to secure the witness's presence by subpoena. The Government attempted to do each of the foregoing in *Awadallah.*[239] When read in conjunction with the All Writs Act, it is clear that the material witness statute applies to grand jury proceedings.

F. Material Witnesses and the Exclusionary Rule

The exclusionary rule is a judicially created means of deterring illegal searches and seizures by government and law enforcement officials.[240] The rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons,"[241] but on the contrary, the rule is applied only in contexts "where its remedial objectives are thought most efficaciously served."[242]

The exclusionary rule provides that evidence seized during an unlawful search may not constitute proof against the victim of the search.[243] The rule functions as a remedy created by the courts which is "designed to safeguard Fourth Amendment rights . . . through its deterrent effect."[244]

There are almost no cases involving the exclusionary rule and material witnesses. This is most likely because the testimony of witnesses in criminal cases is typically offered against someone other than the witness. Such other person, usually a defendant in a criminal case, would not have available

[238] The federal statute requires that the testimony be material to a criminal proceeding. The word "investigation" would have to be substituted under the All Writs Act. To do otherwise would imply that the All Writs Act is not applicable to potential grand jury witnesses.

[239] United States v. Awadallah, 202 F. Supp. 2d 55, 80 (S.D.N.Y. 2002).

[240] United States v. Calandra, 414 U.S. 338, 347 (1974).

[241] Stone v. Powell, 428 U.S. 465,486 (1976).

[242] *Calandra,* 414 U.S. at 348; see *also* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998) (stating that the exclusionary rule does not apply to parole revocation proceedings); United States v. Leon, 468 U.S. 897, 906-07 (1984) (indicating application of the exclusionary rule must be determined by "weighing the costs and benefits" of preventing the prosecutor's use of the evidence); United States v. Janis, 428 U.S. 433, 454 (1976) (refusing to apply the exclusionary rule in civil proceedings where the deterring effect on a police officer is sufficiently less than the cost to society of enforcing the exclusion).

[245] See Weeks v. United States, 232 U.S. 383,398 (1914).

[246] *Calandra,* 414 U.S. at 348.

any objection that would involve the exclusionary rule.[245]

Another reason the exclusionary rule would be unlikely to apply in cases involving material witnesses is the reluctance of courts to exclude a witness's testimony. Thus, a witness who is discovered by an illegal search is nonetheless allowed to testify.[246] This is also true of a witness discovered through a statement elicited in violation of *Miranda v. Arizona.*[247] The incremental possibility of deterring other *Miranda* violations by excluding the testimony is outweighed by society's need for reliable testimony from witnesses.[248] Accordingly, given the reluctance of the Court to disqualify witnesses, it seems unlikely that material witness cases will join civil cases, deportation cases, Fourth Amendment habeas cases, grand jury matters, and sentencing issues, as legal vehicles where the exclusionary rule is not applicable.

IV. THE MISUSE OF MATERIAL WITNESS LAWS: INVESTIGATORY DETENTION

There are documented instances of the use of material witness laws as a pretext to detain individuals while a criminal investigation against them is underway, or until formal criminal

[245] See Rakas v. Illinois, 439 U.S. 128, 134 (1978). A defendant must establish that his or her own rights were violated by the government activity before any evidence will be excluded. It is not sufficient that someone else's rights may have been violated. *See id.* at 139. Thus, even if a material witness' rights were somehow violated, possibly by the unjustified arrest, the defendant would have no basis to object. Further, this may be a logically impossible circumstance. The witness either has something to offer, thus providing at least a partial basis for their seizure, or if the witness has nothing to offer, there is nothing to suppress.

[246] United States v. Ceccolini, 435 U.S. 268, 276 (1978). The willingness of the witness to testify was an important, but not crucial, factor. *Id.* at 276-77 (noting that the more willing a witness is to testify, the less likely an illegal search is needed to find such a witness).

[247] 384 U.S. 436 (1966). See Michigan v. Tucker, 417 U.S. 433, 450 (1974) (holding that testimony of a witness the police discovered through statements of the defendant obtained in violation of *Miranda* is admissible). In *Miranda v. Arizona,* the Court held that a person in custody must be advised of the right to silence and counsel, and appointment of counsel if indigent, prior to interrogation. *Miranda,* 384 U.S. at 468-73. Further, a voluntary, knowing, and intelligent waiver of those rights must be established prior to custodial interrogation. *Id.* at 475.

[248] See *Tucker,* 417 U.S. at 433. Tucker was questioned after being taken into custody, but he was not given complete warnings. His answers led the police to a witness who could provide incriminating testimony. *Id.* at 436. The Supreme Court, in an opinion written by Justice Rehnquist, was unwilling to consider witnesses as suppressible "fruit" of the *Miranda* violation. *Id.* at 457 (Brennan, J., concurring).

charges could be filed against them. Such "investigatory detentions" are not the intended purpose of the material witness laws.

For instance, convicted Oklahoma City bombing co-conspirator Terry Nichols was originally arrested as a material witness, then held by the FBI until charged.[249] In *United States ex ret. Allen v. LaVallee,*[250] the appellant was arrested and held as a material witness for eight days before confessing to a homicide he had allegedly only witnessed.[251] The court upheld the detention as proper, even though no criminal proceeding was pending against anyone at the time the "witness" was taken into custody.[252]

Similarly, *In re De Jesus Berrios*[253] is a case where the appellant challenged his incarceration as a recalcitrant witness after disobeying a grand jury subpoena to provide hair samples and appear in a lineup.[254] He argued that the federal material witness statute permitted detention only to obtain testimony, not demonstrative evidence.[255] The court rejected his argument and found that the arrest was proper since it was based upon the witness's noncompliance with earlier subpoenas that sought his testimony, not exemplars or an appearance in a lineup.[256] Even though the subpoena requiring the demonstrative evidence was served after the witness was arrested, the court refused to find that the earlier "testimony" subpoenas were a subterfuge meant to obtain forms of evidence not allowed by statute.[257]

In *Awadallah,*[258] the court dismissed perjury charges against the defendant, held as a material witness, because of concern that the Government was using the material witness law as a pretext for holding Awadallah while investigating the

[249] *In re* Material Witness Warrant Nichols, 77 F.3d 1277, 1278 (10th Cir. 1996).

[250] 411 F.2d 241 (2d Cir. 1969).

[251] *Id.* at 242.

[252] *Id.* at 244.

[253] 706 F.2d 355 (1st Cir. 1983).

[254] *Id.* at 356.

[255] *Id.* at 357.

[256] *Id.* at 357 & n.2. The court refused to construe the word "testimony" as used in the federal material witness statute, stating, "The word 'testimony' in 18 U.S.C. § 3149 may in fact be broad enough to include nonverbal evidence such as hair samples. We need not reach that question, however____" *Id.* at 357 n.2.

[257] *Id.* at 358.

[258] 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

September 11th terrorist attacks.[259] The court emphasized that allowing the detention of grand jury witnesses under the material witness statute would allow such investigatory detentions to continue unchecked.[260]

In another case related to the September 11th attacks, *United States v. Self,*[261] the defendant was denied bail while an investigation into his alleged activities was ongoing.[262] The defendant was charged with making false statements on applications to the Social Security Administration and the Federal Aviation Administration.[263] The court denied bail, finding the defendant to be a flight risk because of fear that "the Government may choose, at a minimum, to hold him as a material witness if multiple counts of conspiracy to commit murder, likely capital offenses, and other serious crimes were filed related to the September 11 terrorist attacks."[264]

This dilemma, stemming from the absence of a statute allowing law enforcement authorities to detain an individual while investigating a crime potentially committed by that person or his associates, has led to the misuse of the current material witness law. This result is paradoxical because, even if Congress passed such a law, it would be unconstitutional on several grounds.[265]

Constitutional law, specifically the Fourth Amendment,[266] requires the government to have probable cause to arrest and detain.[267] An arrest or detention solely for investigative purposes, other than a momentary stop of a citizen, would violate a number of the detainee's rights, in addition to the right

259 *Id.* at 79.
260 Id.
261 CR 01-0977-PHX-PGR, 2001 WL 1415034 (D. Ariz. Nov. 8, 2001).
262 *Id.* at *5.
263 *Id.* at *3.
264 *Id.* at *4 (footnote omitted).
265 A statute can be constitutional on its face, yet unconstitutional in its application.
266 The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST, amend. IV.
267 See United States v. MacDonald, 456 U.S. 1,8 (1982).

to be free from "unreasonable" government searches and seizures.[268]

Further, the Fifth Amendment[269] right to remain silent is potentially implicated whenever an individual is arrested as a material witness since, arguably, the only way to end the detention is to give a statement to the authorities. Such testimony, in many circumstances, may potentially incriminate the material witness.

An investigatory detention that lasts beyond a few moments also violates the Sixth Amendment[270] since it deprives a material witness of the right to notice of criminal charges and the right to a speedy and public trial, should an indictment ultimately be rendered against the witness.

It could also be argued that a prolonged investigatory detention, absent the probable cause needed for an arrest once charges have been filed against the detainee, violates the detainee's due process rights. Finally, the Eighth Amendment's prohibition on cruel and unusual punishment[271] would be implicated if a federal investigatory detention statute were passed. If an individual were detained solely for investigatory purposes under such a statute, and later charged and convicted of a crime, the time spent in custody during the investigation would not be credited against his subsequent prison sentence.

268 See United States v. Sharpe, 470 U.S. 675, 685 (1985).

269 The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST, amend. V.

270 The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST, amend. VI.

271 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST, amend. VIII.

Related to the detention of material witnesses is the capture and detention of thousands of enemy combatants by American and allied forces in Afghanistan following September 11, 2001. One of those detainees, Yaser Hamdi, was born in Louisiana and is being detained as an enemy combatant in accordance with the laws and customs of war.[272] Shortly after his capture, the Federal Public Defender for the Eastern District of Virginia filed a petition for writ of habeas corpus challenging the Government's detention of Hamdi and naming himself as Hamdi's "next friend."[273] The public defender sought to meet with Hamdi without the presence of military personnel or monitoring by the Government.[274] The district court granted the request and ordered that the attorney and Hamdi be allowed to confer without any interference. The Government filed a motion for stay pending appeal of the order, and the Fourth Circuit focused on the plaintiffs standing to bring such a motion on behalf of the detainee.[275]

The doctrine of "standing," the court explained, requires the plaintiff to have a personal stake in the outcome of a dispute.[276] Since Article III of the United States Constitution limits the power of federal courts to actual cases and controversies, standing is required to identify those cases that are appropriately brought before the federal courts.[277]

The court noted that a person who does not have Article III standing may, nonetheless, proceed in federal court if he meets the criteria to serve as "next friend" of an individual who does have standing.[278] The court examined *Whitmore v. Arkansas,*[279] a United States Supreme Court decision that addressed next

[272] Hamdi v. Rumsfeld, 294 F.3d 598, 601 (4th Cir. 2002).

[273] *Id.; see* 28 U.S.C. § 2242 (stating that a habeas corpus petition can be brought "by the person for whose relief it is intended or by someone acting in his behalf).

[274] *Hamdi,* 294 F.3d at 602.

[275] *Id.* A private citizen, Christian Peregrim, also filed a petition for a writ of habeas corpus as "next friend" of Hamdi. The district court consolidated the Public Defender's habeas petition with Peregrim's petition. *Id.* at 601-02.

[276] *Id.* at 602; see Allen v. Wright, 468 U.S. 737, 750-51 (1984).

[277] *Hamdi,* 294 F.3d at 602; see Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002).

[278] *Hamdi,* 294 F.3d at 603. Next friend standing is often invoked on behalf of death row inmates in order to seek a stay of execution. See, *e.g.,* West v. Bell, 242 F.3d 338, 341 (6th Cir. 2001); Franklin *ex rel.* Berry v. Francis, 144 F.3d 429, 432 (6th Cir. 1998).

[279] 495 U.S. 149 (1990).

friend standing. According to *Whitmore,* "next friend standing" is "an accepted basis for jurisdiction... on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.*[280] The "next friend" does not "become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest."[28*]

The *Whitmore* court, however, cautioned that next friend standing is not available unless certain criteria are met:

> Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.[282]

These restrictions are necessary, the *Whitmore* court explained, because "it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves [as] next friends."[283]

The *Hamdi* court determined that Hamdi met the first prong of the *Whitmore* analysis because he was inaccessible.[284] *Whitmore,* however, also requires a "significant relationship" between the proposed next friend and the real party in interest.[285] Here, the public defender conceded that he had no relationship with the detainee before seeking to intervene on

[260] *Id.* at 162.
[261] *Id.* at 163.
282 *Id.* at 163-64 (citations omitted).
283 *Id.* at 164.
[284] Hamdi v. Rumsfeld, 294 F.3d 598, 603 (4th Cir. 2002).
[285] *Id.* (citing *Whitmore,* 495 U.S. at 163-64).

Hamdi's behalf.[286] This concession proved fatal to the plaintiffs case since the court concluded that the significant relationship inquiry is "an important requirement for next friend standing."[287] Although the court declined to decide "just how significant the relationship between the would-be next friend and the real party in interest must be in order to satisfy the requirements for next friend standing... [i]t suffices here to conclude that no preexisting relationship whatever is insufficient."[288]

Although the court did not doubt the sincerity of the public defender, it felt that it must require a significant, pre-existing, relationship with the real party in interest:

> There [would be] no principled way to distinguish a Public Defender from someone who seeks simply to gain attention by injecting himself into a high-profile case, and who could substantiate alleged dedication to the best interests of the real party in interest by attempting to contact him and his family.[289]

The court concluded by stating:

> The question of next friend standing is not merely "technical," as the district court surmised. Rather, it is jurisdictional and thus fundamental. The Court in *Whitmore* rejected the idea of employing "notions of what might be good public policy to expand our jurisdiction in an appealing case." Because neither the Public Defender nor Peregrim has any prior relationship whatever with Hamdi, each fails to satisfy an important jurisdictional prerequisite for next friend standing.... Jurisdictional limitations have their roots in the respect courts owe the other branches of our government. The structural restraints of separation of powers are important and serve in their own fashion to safeguard the sacred charter of our rights.[290]

Hamdi's father filed a petition seeking to intervene as next friend after the court of appeals heard oral arguments on the

[286] *Id.* at 601.

[287] *Id.* at 604.

[288] *Id.* The court noted that its decision was in accord with other circuits that have examined this issue. *Id.; see* Massie v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001); T.W. v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997); Amerson *ex rel.* M.H. v. Iowa, 59 F.3d 92, 93 n.3 (8th Cir. 1995); Zettlemoyer v. Horn, 53 F.3d 24, 27 n.4 (3d Cir. 1995).

[289] *Hamdi,* 294 F.3d at 605.

[290] *Id.* at 607 (citations omitted).

case. In a subsequent ruling on the father's petition as his son's next friend, the court of appeals reversed the district court's order that allowed unrestricted access to court-appointed counsel.[291] In reversing the district court, the court of appeals noted that "a court's deference to the political branches of our national government is considerable."[292] The court further reasoned:

> This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents. And in World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts. It was inattention to these cardinal principles of constitutional text and practice that led to the errors below.[293]

The court of appeals was disturbed that the district court allowed counsel unmonitored access to Hamdi without the benefit of allowing the Government to file a response to the lawsuit.[294] Indeed, the court noted that "[t]here is little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns."[295] The court of appeals refused to dismiss the petition, however, noting such an action "would be as premature as the district court's . . . order."[296] Rather, the court chose to defer to the political branches of government on the issue of Hamdi's status as an "enemy combatant" and the implications inherent therein.[297]

[291] Hamdi *ex* re/. Hamdi v. Rumsfeld, 296 F.3d 278, 279 (4th Cir. 2002).
[292] *Id.* at 281.
[293] *Id.* at 281-82 (citations omitted),
[294] *Id.* at 282.
[295] *Id.*
[296] *Id.* at 283.
[297] The court noted:

> It has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one. Separation of powers principles must, moreover, shape the standard for reviewing the government's designation of Hamdi as an enemy combatant. Any standard of inquiry

In *United States v. Awadallah,*[298] the presiding judge, Shira A. Scheindlin, issued four opinions and orders covering approximately 150 pages.[299] Her opinions make clear that the defendant, originally arrested as a material witness and held as such until arrested on a perjury complaint, was subjected to abuse utterly inconsistent with the treatment of innocent persons, including witnesses.[300] Anyone reading Judge Scheindlin's opinions will sense her outrage at the treatment of this defendant while in government detention.[301]

Nonetheless, the court improperly concluded that a person may not be detained for a grand jury investigation as a witness. The court reached this conclusion by discounting prior case law,[302] which clearly sanctioned such governmental action.[303] Furthermore, a witness may be detained under the authority of the All Writs Act.[304] Thus, any false statement to a grand jury would not, contrary to Judge Scheindlin's opinion, need to be suppressed.

Judge Scheindlin, alternatively, found there was no legitimate basis to detain Awadallah, even if the material witness statute was applicable.[305] Specifically, the court found there was no probable cause for the material witness arrest warrant and that the underlying affidavit was riddled with misrepresentations.[306] The court concluded that the egregious nature of the agent's misrepresentations justified the resulting suppression of Awadallah's perjurious statements before the grand jury.[307]

> must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.

Id. at 283-84 (citations omitted).

[298] 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

[299] See 173 F. Supp. 2d 186 (S.D.N.Y. 2001) *{"Awadallah D;* 202 F. Supp. 2d 17 (S.D.N.Y. 2002) *("Awadallah IF);* 202 F. Supp. 2d 55 (S.D.N.Y. 2002) *("Awadallah IIF);* 202 F. Supp. 2d 82 (S.D.N.Y. 2002) *("Awadallah TV).*

300 *See Awadallah III,* 202 F. Supp. 2d at 59-61; *Awadallah IV,* 202 F. Supp. 2d at 85-96.

[301] See *Awadallah III,* 202 F. Supp. 2d at 59-61; *Awadallah TV,* 202 F. Supp. 2d at 85-96.

[302] Sec, *e.g.,* Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

[303] *Awadallah III,* 202 F. Supp. 2d at 72-76.

[304] See supra Part III.E.

305 *Id.* at 55.

306 *Id.* at 80-82.

[307] *Id.*

The court's findings in *Awadallah* were very fact-specific. Another judge might have reached a different result. Judge Scheindlin's theory, that but for an improper arrest there would have been no testimony before a grand jury or that Awadallah's testimony might have been different if the grand jury appearance were pursuant to a subpoena,[308] is beside the point. An unlawful arrest is not a license to lie. This is an issue that has long been decided.[309] Even if the All Writs Act was not applicable, if there was no probable cause, and if the officers lied in the affidavit, the fact remains that witnesses cannot lie with impunity.

It is still possible that Judge Scheindlin properly excluded the statements of Mr. Awadallah. Her opinions do not specifically address the possibility that Awadallah's grand jury testimony, given after twenty days of abusive captivity, was coerced. If his statements were coerced, due process would keep them from being used for any purpose, even as the basis for a perjury prosecution.[310] Threats of physical violence—and certainly actual violence—can result in a finding of coercion.[311] Such coerced statements are already excluded by the Federal Rules of Evidence.[312] Thus, Judge Scheindlin may still be correct, albeit for the wrong reasons.

V. PROPOSED CHANGES TO MATERIAL WITNESS LAWS

At present, the federal material witness statute, 18 U.S.C. § 3144, requires a showing of probable cause to detain a

[308] Id.

[309] See United States v. Apfelbaum, 445 U.S. 115,127-28 (1980). A witness who has received a grant of immunity has no right to lie, even though immunized testimony cannot be used against him. This is true even for impeachment purposes. Evidence of lying can indeed be used in a subsequent perjury prosecution. *Id.*

[310] *See* Mincey v. Arizona, 437 U.S. 385, 401-02 (1978). In *Mincey,* the Supreme Court held that statements obtained from a defendant in a hospital could not be used against him at trial where it was apparent from the record that they were not "the product of his free and rational choice." *Id.* at 401 (quoting Greenwald v. Wisconsin, 390 U.S. 519, 521(1968)). Although statements made by a defendant in violation of *Miranda v. Arizona,* are admissible for impeachment purposes if their "trustworthiness ... satisfies legal standards," any use of a defendant's involuntary statement is a denial of due process of law. *Id.* at 397-98 (citations omitted).

[311] See Arizona v. Fuhninante, 499 U.S. 279 (1991) (finding that a government informant scared a fellow inmate into confessing by simply saying that child killers face danger from other inmates).

[312] See FED. R. EVID. 403.

witness.[313] When a witness is arrested as material, he is processed by the authorities under the Bail Reform Act, as any other arrestee, and brought before a federal magistrate to address the issue of bond.

The current federal material witness statute, however, is far from perfect. A number of beneficial changes could be made to the statute to provide more protection for the witness while not compromising the intended purposes of the material witness law itself. The current statute is also confusing and ambiguous, as demonstrated by the various interpretations given to it by federal courts around the country.

Such a proposed model statute could read as follows:

> If it appears from an affidavit supported by probable cause, and filed by a party, or potential party or representative thereof, that the testimony of a person is material in a criminal proceeding, including grand jury and other pre-trial proceedings, and if it is shown that (1) it may become impracticable to secure the presence of the person by subpoena, and (2) the witness will flee the jurisdiction or otherwise become unavailable unless arrested, 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. The witness must be taken before a federal magistrate within twenty-four hours of arrest on the warrant. The magistrate must notify the witness of the right to counsel and the right to request the government conduct a deposition in lieu of detaining the witness. The presumption that the witness is entitled to bail should apply in each case. 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. Release of a material witness may be delayed for a reasonable period of time, but in any event no longer than seven days, until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

The witness should be notified of the deposition alternative at the initial court appearance. The judicial officer should inquire of the detainee at that early stage if such a procedure would be acceptable, and if so, the parties should begin exploring that option. Care should be taken to ensure this is not coercive.

[313] 18 U.S.C. §3144(2000).

If a material witness is merely a witness, and not a potential defendant, this is not a problem.

There should also be assurances that the witness is not the target of a criminal investigation. For instance, the material witness statute could expressly provide for immunity of the witness from prosecution in certain cases, thereby insuring that no criminal charges will be forthcoming.

The material witness statute should not be used as a pretext to charging an individual with a crime. Perhaps one way to prevent this would be to require a stricter showing of probable cause by the government. The present standard requires a showing that the testimony of the witness is material, and that it is impracticable to secure the witness's presence by subpoena. Perhaps a further requirement should be added, such as a showing that the witness will flee the jurisdiction absent arrest and detention.

The material witness law could require the filing of an affidavit by the government asserting that the witness will not be charged with a crime, or is not the target of a federal investigation. This "guarantee[7]* could be revoked only upon the discovery of independent evidence that was unavailable at the time the affidavit was presented to the court.

Another way to prevent the misuse of the material witness statute could be to provide for certain punishments upon misuse. For instance, the statute could be amended to provide for the dismissal, with prejudice, of all criminal charges if the government has attested that criminal charges would not be filed, and good cause is not shown why such charges were later filed against the witness. In addition, the statute could waive governmental immunity from a civil cause of action for damages, brought by the witness, if the government either filed an earlier affidavit indicating criminal charges would not be brought and they subsequently were, or if a person is held as an investigatory detainee and subsequently charged with a crime.

VI. ALTERNATIVES TO MATERIAL WITNESS DETENTION

There are alternatives to the imprisonment of material witnesses available at the present time that are meant to ensure the presence of those witnesses at any criminal proceeding

where their testimony is required.[314] Formal use of the material witness laws—and the accompanying punitive treatment of witnesses—should be the last resort of law enforcement. For instance, witnesses located within a state are subject to the judicial and police powers of that state.[315] Thus, a violation of a court order to appear subjects the witness to penalties for contempt of court.[316] In federal grand jury proceedings, a witness who ignores a grand jury subpoena is also subject to the contempt powers of the court, which can be considerable.

Witnesses located outside of a state are subject to the Uniform Act to Secure the Attendance of Witnesses.[317] This Act has been adopted in all fifty states, plus the District of Columbia, Puerto Rico, and the Virgin Islands.[318] It secures the attendance of material witnesses located within a state for criminal trials in other states, and vice versa.[319] Under the Act, a judge certifies that an individual is a material witness in a criminal prosecution or grand jury investigation within a state. A hearing is then be held in the state where the witness is found. If the judge determines that the witness is material, that no undue hardship will occur if he is compelled to attend and testify, and that he will not be subject to arrest or service of process in the other state, then the judge issues a summons ordering the witness to appear and testify in the other state. If the witness does not present himself as ordered, he can be punished through the contempt power of the court in the state that ordered his attendance.

Moreover, every person in the United States is subject to the Federal Fugitive Felon Act, which makes it a federal crime to flee a jurisdiction for the purpose of avoiding the giving of testimony in a criminal proceeding.[320] The Act provides, in relevant part:

[314] Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness,* 55 IOWA L. REV. 1, 2 n.2, 16-17 (1969) (discussing *Hearings on S. 1357 before the Subcomm. on Constitutional Rights, S. Judiciary Comm.,* 89th Cong. 304 (1965)).

[315] *id.* at 16.

[316] *Id.*

[317] See, *e.g.,* MICH. COMP. LAWS ANN. § 767.92 (West 2002) (State of Michigan's version of the Act).

[318] See *id.* § 767.91 (containing a table of jurisdictions where the Act has been adopted).

[319] See *id.* §§ 767.92, 767.93.

[320] 18 U.S.C. § 1073 (2000).

> Whoever moves or travels in interstate or foreign commerce . .. (2) 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, or (3) to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State. . . shall be fined under this title or imprisoned not more than five years, or both.[321]

Finally, as already discussed, Federal Rule of Criminal Procedure 15, together with 18 U.S.C. § 3144, provide for the taking of the deposition of the material witness to avoid unnecessary detention and hardship.

CONCLUSION

The debate over the treatment of material witnesses is one that is likely to continue for many years to come. As long as there are individuals whose information is deemed important by litigants in both state and federal courts, there will be material witnesses. The critical issue which must be addressed in the future, however, is whether the detainment of individuals will continue in its present form, especially the detainment of individuals for investigatory purposes. Perhaps the continual analysis of the material witness issue will open the subject to public discussion and, ultimately, reform.

[321] *Id.*