Terrorism, Grand Juries, and the Federal Material Witness Statute.

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[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.[1]

The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.[2]

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* This Article discusses Federal Rules of Criminal Procedure in effect prior to December 1, 2002. The Rules relied upon were not materially altered in the latest version, although some style and phrasing changes were made. *See* H.R. DOC. No. 107-203, at 280-456 (2002) (comparing the language in the current Rules to their preceding version).

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1. Blair v. United States, 250 U.S. 273, 281 (1919).

2. Stein v. New York, 346 U.S. 156, 184 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

I. INTRODUCTION

One week after the September 11, 2001 terrorist attacks, the press reported that at least two persons had been detained pursuant to material witness warrants.[3] Three weeks thereafter, the government had arrested or detained 614 persons as part of its terrorism investigation;[4] this figure included "165 [persons detained] on immigration violations and an undisclosed number as material witnesses."[5] In June 2002, it was further reported that at least 147 persons detained as part of the post-September 11th investigation were still in government custody.[6] Of those 147 persons, seventy-four were being held on immigration-related charges and seventy-three on criminal charges or violations related to the September 11th investigation.[7] While the exact number of persons who have been or are currently being held as material witnesses is not precisely known,[8] one estimate maintained that since the Sep-

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3. Mark Hamblett, *Witnesses Challenge Detention*, N.Y.L.J., Sept. 18, 2001, at 1, LEXIS, Legal News, New York Law Journal File. A material witness has been defined as an individual who "has knowledge of facts closely connected to the crime, or to the accused, in a criminal action." Ronald L. Sluyter, Comment, *Witnesses—Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503, 505 (1961) (footnotes omitted).

4. Karen Gullo, *Terror Probe Nets 600 Arrests*, AP Online, Oct. 8, 2001, *at* 2001 WL 28749862.

5. Jim McGee & Dan Eggen, *Probe Focuses on 220 Detained After Attacks*, WASH. POST, Oct. 10, 2001, at A1, 2001 WL 28363508.

6. Christopher Newton, *Justice Department Reveals 147 People Still Held in Connection to Sept. 11 Investigation*, AP Online, June 14, 2002, *at* 2002 WL 22580092. This figure represented an appreciable decline. By early November 2001, the amount of persons detained reportedly had climbed to 1,182, at which time the government announced that it would no longer keep running tallies. Amy Goldstein & Dan Eggen, *U.S. to Stop Issuing Detention Tallies; Justice Dept. to Share Number in Federal Custody, INS Arrests*, WASH. POST, Nov. 9, 2001, at A16, 2001 WL 29761145.

7. Christopher Newton, *Justice Department Reveals 147 People Still Held in Connection to Sept. 11 Investigation*, AP Online, June 14, 2002, *at* 2002 WL 22580092.

8. *See id.* (reporting that the government did not reveal the number of people they had detained, but acknowledged that material witnesses could be held). The identity of a few of those persons arrested on material witness warrants has been publicly reported. *See, e.g.*, *9/11 Material Witness Guilty of Minor Crime*, WASH. POST, Aug. 16, 2002, at A7, 2002 WL 24828281 (describing the detention of a West African pilot held temporarily as a material witness). On August 2, 2002, in connection with a lawsuit filed under the Freedom of Information Act, a federal judge ordered the government to disclose the names of all those who had been detained in the investigation of the September 11th attacks, including material witnesses. *See* Steve Fainaru & Dan Eggen, *Judge Rules U.S. Must Release Detainees' Names*, WASH. POST, Aug. 3, 2002, at A1, 2002 WL 24825355 (calling for the release of over 1,000 names). On August 8, 2002, the government appealed that order. *U.S.*

tember 11th attacks, over forty persons have been detained under material witness warrants in relation to grand jury investigations.[9]

Under the federal material witness statute, presently codified at 18 U.S.C. § 3144,[10] the government can detain a person in connection with a criminal proceeding if it can establish that the person has material information and presents a risk of flight.[11] Not surprisingly, in the aftermath of the September 11th attacks, the government has relied on this statute to detain witnesses.[12]

Appeals Ruling on Naming of Detainees; Filing Argues Move Would Aid Al Qaeda, WASH. POST, Aug. 10, 2002, at A10, 2002 WL 24826912.

9. *See* Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1, 2002 WL 103571622 (reporting that "[a]uthorities have arrested and jailed at least 44 people as potential grand jury witnesses in the 14 months of the nationwide terrorism investigation"). One notable case involved the arrest on May 8, 2002 of Abdullah al Muhajir, an American citizen also known as Jose Padilla, in connection with a terrorist plot to detonate a "dirty bomb." *See* Dan Eggen & Susan Schmidt, *"Dirty Bomb" Plot Uncovered, U.S. Says: Suspected Al Qaeda Operative Held As "Enemy Combatant,"* WASH. POST, June 11, 2002, at A1, 2002 WL 21751069 (reporting the breakup of a terrorist plot on U.S. soil). Reportedly, Mr. Padilla's detention was effected through a material witness warrant and he was subpoenaed as part of an on going grand jury investigation into the September 11th attacks. *See id.* (stating that prosecutors flew Al Muhajir to New York for an appearance before a grand jury); Jerry Seper, *Lawyer for Suspect in Dirty Bomb Plot Calls Case Weak*, WASH. TIMES, June 13, 2002, at A12, LEXIS, News, News Group File (explaining that the grand jury was part of an ongoing investigation into the terrorist attacks); *see also* Editorial, *Detaining Americans*, WASH. POST, June 11, 2002, at A24, 2002 WL 21750974 (regarding Al Muhajir's arrest and subsequent treatment as enemy combatant). Approximately one month after his arrest, Mr. Padilla was designated as an "enemy combatant" by President George W. Bush and he was transferred to the custody of the military. *See* Susan Schmidt & Walter Pincus, *Al Muhajir Alleged to Be Scouting Terror Sites; U.S. Says Al Qaeda Had Instructed Suspect*, WASH. POST, June 12, 2002, at A1, 2002 WL 21751251 (describing Al Muhajir's change of status from material witness to enemy combatant). That decision, allegedly prompted in part by the government's disinclination to release Mr. Padilla after he refused to testify (and keep him under surveillance), or to grant him immunity is now the subject of litigation. *See* Benjamin Weiser, *Traces of Terror: The Bomb Suspect; Movement in Suit on Custody*, N.Y. TIMES, Aug. 1, 2002, at A20, LEXIS, News, The New York Times File (noting how lawyers representing Mr. Padilla have asked the court to review the legality of his detention); *see also* John Mintz, *Al Qaeda Suspect Enters Legal Limbo; Few Precedents Available for Case, Experts Say*, WASH. POST, June 11, 2002, at A10, 2002 WL 21751043 (noting that moving Al Muhajir to a military prison was President Bush's way of rejecting the options officials were considering under the litigation).

10. 18 U.S.C. § 3144 (2000) (providing in part that a judge may order the arrest of a person if it appears that his or her testimony "is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena").

11. *Id.*

12. *See, e.g.*, Benjamin Weiser, *Papers Outline a Terror Detainee's Case*, N.Y. TIMES, July 29, 2002, at B5, LEXIS, News, The New York Times File (reporting that material-

In April and July 2002, however, two federal judges from the United States District Court for the Southern District of New York issued contradictory rulings regarding the ability of the government to hold a person as a material witness in connection with a grand jury investigation.[13] On April 30, 2002, Judge Shira A. Scheindlin ruled in *United States v. Awadallah*[14] that the government lacked the authority to detain a witness under § 3144 "in order to guarantee that he w[ould] testify before a grand jury conducting a criminal investigation."[15] Just over two months later, on July 11, 2002, in *In re Application of United States for a Material Witness Warrant*,[16] Chief Judge Michael B. Mukasey reached the opposite conclusion, rejecting Judge Scheindlin's reasoning.[17]

The issue raised in these cases—whether the federal material witness statute applies to grand jury investigations—is likely to recur.[18] This Article examines the development of this issue and ana-

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witness law has been "a major investigative tool used by law enforcement in the terror investigation"); Lois Romano & David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASH. POST, Oct. 15, 2001, at A1, 2001 WL 29162055 (reporting that "[t]he government is relying mainly on two legal methods to detain people in the terror investigation: immigration violations and the material witness statute").

13. *See* Steve Fainaru, *Judge: U.S. May Jail Material Witnesses; N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal District*, WASH. POST, July 12, 2002, at A12, 2002 WL 23853035 (rejecting the earlier ruling's analysis as flawed); Benjamin Weiser, *The Terror Puzzle: New York; Judge Rules Against U.S. on Material-Witness Law*, N.Y. TIMES, May 1, 2002, at A10, LEXIS, News, The New York Times File (reporting on the ruling that the government may not hold material witnesses for the purpose of grand jury investigations).

14. 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

15. United States v. Awadallah, 202 F. Supp. 2d 55, 82 (S.D.N.Y. 2002). The court in *Awadallah* found that dismissal of the indictment was the appropriate remedy because the testimony upon which defendant was indicted and convicted for perjury, stemmed from his illegal arrest under the material witness statute. *Id.* That same day, in a companion order, the court ruled that intentional omissions and misrepresentations in the affidavit rendered the arrest warrant unlawful and required the suppression of his testimony before the grand jury and dismissal of the indictment. *Id.* at 109. On May 2, 2002, the government filed a notice of appeal with respect to these rulings before the United States Court of Appeals for the Second Circuit. Associated Press, *Federal Prosecutors File Notice of Appeal of Detainment Ruling*, May 3, 2002, WESTLAW, APWIRES Database.

16. 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

17. *See In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (declining to follow *Awadallah*'s holding).

18. *See* Tom Jackman, *Suspect in Terror Probe to Remain in Jail; U.S. Judge Delays Ruling on Denver Man's Challenge to Material Witness Law*, WASH. POST, Aug. 24, 2002, at A6, 2002 WL 25998182 (reporting another challenge to the material witness statute by a witness being held in the Eastern District of Virginia). Nearly all states have enacted stat-

lyzes current holdings. Part II sets forth the history of the federal material witness statute. Part III discusses the procedures governing the operation of the current statute. The few cases that have addressed the application of the statute, in the context of a grand jury investigation as opposed to a trial, are discussed in Part IV. Part V then analyzes the conflicting rulings by the United States District Court for the Southern District of New York on whether the material witness statute applies to grand jury proceedings. Finally, Part VI discusses why the better-reasoned view holds that § 3144 does in fact apply to witnesses who are detained so that their testimony can be presented to a grand jury.

II. HISTORY OF THE FEDERAL MATERIAL WITNESS STATUTE

The first federal statute granting courts the power to arrest and detain a person as a material witness in a criminal case was the First Judiciary Act of 1789.[19] Subsequently, this power was reaf-

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utes addressing the detention of material witnesses. Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Justice*, 58 WASH. U. L.Q. 1, 21 (1980). This Article, however, limits its discussion to the federal material witness statute.

19. Act of Sept. 24, 1789, ch. 20, §§ 30, 33, 1 Stat. 73, 88-91 (1789); *see also* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1536-37 (1994) (noting that "[t]he Act also codified the authority to require recognizance of material witnesses in criminal proceedings, and to imprison them upon failure to do so"); Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 600-01 (1991) (maintaining that "[s]ince 1789, the federal courts have possessed the authority to arrest and detain material witnesses"). The historical antecedents to the federal material witness statute are found in English law. Two commentators have explained:

> Although Elizabeth's statute in 1563 is sometimes cited as authority for the law compelling the attendance of witnesses for the prosecution, the correct interpretation seems to indicate that this Act applied only to civil proceedings. It was by the second Act of Philip and Mary in 1555 that the Crown could bind over witnesses to appear and compel them to testify against the accused. This statute also realized the necessity of securing a person's attendance at trial without subjecting him to confinement by allowing the magistrate to require a recognizance. Lord Hale felt that this was a more effective way to secure attendance than by subpoena. The exact date when the Crown began to issue such process for the witness is unknown. It is to be noted that witnesses were used, however, only for the benefit of the prosecution. The accused at common law was not allowed witnesses until a much later date in English legal history.

Joseph Casula & Morgan Dowd, Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 37-38 (1958) (footnotes omitted); *see also* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534-36 (1994) (discussing the power at common law to

firmed with the passage of the Act of August 23, 1842[20] and the Act of August 8, 1846.[21] In 1928, the federal material witness provisions were codified in Title 28 of the United States Code at §§ 657 and 659.[22]

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detain a witness). One commentator has identified the following policies in support of the detention of material witnesses:

> Material witness statutes arose in the English legal system as a way to enforce a public duty owed to the king. In the United States, this public duty was extended to the courts, fellow citizens, and the criminal justice system. The original purpose behind such proceedings also may have been to protect the safety of the witness during a pending trial. Where safety is not an issue, compelling a witness to post a bond is an obvious way to ensure his or her presence at trial, thereby securing the right of the criminal defendant to confront his or her accusers.

Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75, 82 (1999) (footnotes omitted); *see also* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 601-02 (1991) (noting that a court's authority to arrest and detain material witnesses has been justified on sixth amendment confrontation grounds, as well as "the necessity of maintaining a fair and effective judicial system").

20. Act of Aug. 23, 1842, ch. 188, § 2, 5 Stat. 516, 516-17 (1842). Under this section of the Act, the court had the:

> discretion to require a recognizance of any witness produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony, at the trial of the cause, whose testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and is in danger of being otherwise lost.

Id. at 517.

21. Act of Aug. 8, 1846, ch. 98, § 7, 9 Stat. 72, 73-74 (1846). This section of the Act provided, in pertinent part:

> [O]n the application of any attorney of the United States for any district, and upon satisfactory proof of the materiality of the testimony of any person who shall be a competent witness, and whose testimony shall, in the opinion of any judge of the United States, be necessary upon the trial of any criminal cause or proceeding in which the United States shall be a party or interested, any such judge may compel such person, so required or deemed by him necessary as a witness, to give recognizance, with or without sureties in his discretion, to appear on the trial of said cause or proceeding and give his testimony therein; and, for that purpose, the said judge may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute criminal or civil process in behalf of the United States, to arrest such person and carry him before such judge.

Id. See generally United States v. Lloyd, 26 F. Cas. 984 (C.C. S.D.N.Y. 1860) (No. 15,614) (discussing the effect of this section of the Act on the witness).

22. *See* 28 U.S.C. §§ 657, 659 (1928) (repealed 1948). Section 657 stated:

> 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

In 1946, Congress enacted the Federal Rules of Criminal Procedure (the "Rules").[23] Rule 46(b) concerned material witnesses,[24] and although it did not explicitly provide for their arrest,[25] such

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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.

28 U.S.C. § 657 (1928) (repealed 1948). Section 659 stated:

> 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 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.

28 U.S.C. § 659 (1928) (repealed 1948); *see also* Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 617 (1929) (noting that "[t]he constitutionality of this statute apparently has never been doubted").

23. Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1537 n.24 (1994) (addressing the interplay between §§ 657 and 659 from the 1928 Title 18 and "the new Federal Rules of Criminal Procedure, which were promulgated in 1946").

24. FED. R. CRIM. P. 46(b) (amended 1972). The originally enacted version of this rule read:

> 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 marshall 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 of bail.

Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 601 n.15 (1991) (providing the pre-1972 text of the rule).

25. Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1537 (1994) (finding no direct statutory authority to make arrests under the Federal Rules of Criminal Procedure).

power was inferred.[26] In 1948, Congress repealed §§ 657 & 659, arguably because those sections had been superseded by the new Rules.[27]

As part of the Bail Reform Act of 1966,[28] Congress enacted § 3149 which addressed the detention of material witnesses in "any criminal proceeding."[29] Similar to Rule 46(b),[30] § 3149 did not specifically provide for the arrest of material witnesses,[31] although this grant of authority also was inferred.[32] In 1984, Congress revised the Bail Reform Act as part of the Comprehensive Crime Control

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26. *See* Bacon v. United States, 449 F.2d 933, 938 (9th Cir. 1971) (declaring the power to arrest arising necessarily by implication of Rule 46(b)); *accord* United States v. Verduzco-Macias, 463 F.2d 105, 107 n.1 (9th Cir. 1972). Analyzing the plain language of Rule 46(b), the *Bacon* court reasoned that "[i]t would make little sense to give the court the power to impose bail, but deny it the power to issue a warrant for the purpose of bringing the witness before the court in the first instance." *Bacon*, 449 F.2d at 937.

27. *Bacon*, 449 F.2d at 938 (affirming "there is a strong suggestion that Congress thought the repealed provisions had been superseded by the new Rules of Criminal Procedure") (citing H.R. REP. NO. 84-304 (1947)).

28. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

29. 18 U.S.C. § 3149 (1964) (repealed 1984). Section 3149 stated:

> 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 subpena, 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.

Id.

30. *See* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 601 n.15 (1991) (providing the pre-1972 text of Rule 46(b), which began addressing "the testimony of a person [that] is material in any criminal proceeding").

31. *See* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1538 (1994) (stating that the Bail Reform Act only provided for the release of material witnesses).

32. *See In re* De Jesus Berrios, 706 F.2d 355, 357 n.1 (1st Cir. 1983) (noting that "authority to arrest has been found to be implied in the grant of authority to release"); Bacon v. United States, 449 F.2d 933, 937 (9th Cir. 1971) (determining that the Bail Reform Act "contain[ed] a positive grant of authority to judicial officers 'to impose conditions of release in the case of material witnesses whose presence cannot practicably be secured by subpoena[,]' and to detain witnesses if they are unable to comply with the conditions of release") (quoting S. REP. NO. 89-750, at 19 (1965)); United States v. Coldwell, 496 F. Supp. 305, 307 (E.D. Okla. 1979) (recognizing that a district court "has the power, inferable from 18 U.S.C. § 3149 and Rule 46(b), Federal Rules of Criminal Procedure, to issue a warrant of arrest, not preceded by a subpoena, for a material witness").

Act of 1984.[33] Specifically, Congress amended § 3149, now re-codified at 18 U.S.C. § 3144, to provide for their arrest.[34] The Rules of Criminal Procedure were similarly amended to comport to the revised Act.[35] In particular, Rule 46 provided that the eligibility for release of a material witness prior to trial was governed by § 3144.[36]

III. 18 U.S.C. §§ 3142 & 3144

The principal statute concerning the treatment of material witnesses in federal criminal proceedings is currently found at 18 U.S.C. § 3144. Specifically, § 3144 provides:

> 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 [The Bail Reform Act]. 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 reasona-

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33. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984); *see also* United States v. Salerno, 481 U.S. 739, 742-43 (1987) (discussing major components of the Bail Reform Act of 1984).

34. *See* Pub. L. No. 98-473, § 203, 98 Stat. 1837, 1982 (1984) (providing the text of revised 18 U.S.C. § 3144 that included authorization so that "a judicial officer may order the arrest of the [material witness]"); Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1538 (1994) (curing the deficiency from the Bail Reform Act of 1966, the 1984 Act unambiguously allowed for the arrest of material witnesses). As noted in *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses* shortly after passage of the revised Act:

> Section 3144 changed the law as it applied to material witnesses in two ways. First, Section 3144 unambiguously provides that material witnesses are to be treated in accordance with Title 18, United States Code, Section 3142 which addresses the release of defendants prior to trial. Second, Section 3144 explicitly grants authority to a judicial officer to order the arrest of a person as a material witness.

In re Class Action Application for Habeas Corpus *ex rel.* All Material Witnesses, 612 F. Supp. 940, 942 (W.D. Tex. 1985) (citation omitted); *see also* S. REP. NO. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211 (discussing the restoration of arrest power for material witnesses under the new statute).

35. Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1539 (1994).

36. FED. R. CRIM. P. 46(a) (West Supp. 2002).

> ble period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.[37]

It has been noted that under a plain reading of the statute, either a criminal defendant or the government "can effectuate the detention of a material witness upon a showing that such material witness will, in all likelihood, be unavailable for the criminal proceeding."[38]

With respect to the arrest of a material witness, a warrant will issue once there has been a showing, by way of affidavit,[39] based on probable cause[40] that the witness has material knowledge of a crime and that his or her presence is unlikely to be achieved by subpoena.[41] This requirement is necessary because "the arrest and detention of a potential witness is just as much an invasion of the

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37. 18 U.S.C. § 3144 (2000). In *Hurtado v. United States*, the Supreme Court ruled that the pretrial detention of material witnesses under this statute did not constitute a taking within the meaning of the Fifth Amendment's Due Process Clause. Hurtado v. United States, 410 U.S. 578, 589 (1973).

38. Aguilar-Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992); *see also* United States v. Mercedes, 164 F. Supp. 2d 248, 249 (D.P.R. 2001) (ordering the detention of nineteen material witnesses pursuant to a request from the defense counsel).

39. *See* United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991) (stating that "[p]rior to commencing the procedure delineated in § 3144, a party must file an affidavit establishing that the circumstances contemplated in that section are present"); United States v. Lopez-Cervantes, 918 F.2d 111, 113 (10th Cir. 1990) (acknowledging that "18 U.S.C. § 3144 requires, to commence the procedure, that an affidavit be filed by a party to establish the circumstances contemplated in the section"). *But see* Daniels v. Kieser, 586 F.2d 64, 66 n.2 (7th Cir. 1978) (discussing how an Assistant United States Attorney obtained a material witness warrant without the required affidavit).

40. *See* Illinois v. Gates, 462 U.S. 213, 235 (1983) (recognizing "that 'only the probability, and not a prima facie showing . . . is the standard of probable cause'") (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

41. *See* United States v. Coldwell, 496 F. Supp. 305, 307 (E.D. Okla. 1979) (stating that the probable cause standard for a material witness arrest warrant is "tested by two criteria: (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena'") (based upon the language in 18 U.S.C. § 3149 and Rule 46(b) of the Federal Rules of Criminal Procedure); United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y. 1976) (restating the probable cause standard for a material witness arrest warrant). *See generally*, Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 611 n.52 (1991) (discussing the same criteria and noting that "[t]hese requirements are found in virtually all material witness legislation. They form the basis for arresting a witness and imposing conditions on his liberty"). *But see* United States v. Awadallah, 202 F. Supp. 2d 82, 96-97 (S.D.N.Y. 2002) (questioning the applicability of the probable cause standard and noting that whether such "standard should be used to arrest a material witness is open to debate").

person's security as if she had been arrested on a criminal charge."[42]

Once an arrest is effected, under § 3142, a material witness may be released on personal recognizance or an unsecured appearance bond,[43] released subject to certain conditions,[44] or detained.[45] A judicial officer may detain a witness if, following a hearing,[46] the officer concludes "that no condition or combination of conditions will reasonably assure the appearance of the person as required."[47] A witness who has been arrested and whom the government wishes to detain "has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed."[48] Only if the judicial officer finds by a preponderance of the evidence that the material witness poses a risk of flight may the witness be detained.[49] A material witness's failure to appear

42. Perkins v. Click, 148 F. Supp. 2d 1177, 1183 (D.N.M. 2001).

43. 18 U.S.C. § 3142(b) (2000).

44. *See id.* § 3142(c) (making release a decision by a judicial officer based upon the least restrictive condition he deems worthy to impose provided the person is not to commit a crime during the period of release).

45. *See id.* § 3142(e) (leaving detention as a last resort if no other condition will apply); Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75, 82 (1999) (stating that bail and recognizance are the two most commonly used conditions).

46. *See* 18 U.S.C. § 3142(f) (2000) (allowing the judicial officer to hold a detention hearing to make a determination on applicable conditions).

47. *Id.* § 3142(e); *see also id.* § 3142(b), (c) (discussing the conditions for release). *See generally* United States v. Feingold, 416 F. Supp. 627, 629 (E.D.N.Y. 1976) (noting that once a material witness "has been taken into custody, he, of course, will be entitled to present additional information to the appropriate judicial officer to arrange suitable conditions for his release").

48. 18 U.S.C. § 3142(f) (2000); *see also* United States v. Rivera, 859 F.2d 1204, 1205 (4th Cir. 1988) (reflecting appointment of counsel for detained indigent material witnesses). The right to counsel, it has been noted, was mandated not only by § 3142(f) but also "by the Fifth Amendment to the Constitution." *In re* Class Action Application for Habeas Corpus *ex rel.* All Material Witnesses, 612 F. Supp. 940, 943-44 (W.D. Tex. 1985); *see also* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 625 (1991) (arguing that "a material witness must be afforded the representation of counsel in accordance with the [F]ifth [A]mendment, above and beyond the requirement of representation set forth in section 3142(f)").

49. *See* 18 U.S.C. § 3142(e) (2000) (providing the determination of detention); United States v. Li, 949 F. Supp. 42, 44 (D. Mass. 1996) (declaring that "a material witness may be detained only if the judicial officer finds by a *preponderance of the evidence*, that the material witness poses a risk of flight").

before a court, as required, will subject the witness to a fine, imprisonment for less than one year, or both.[50]

In determining whether a condition or combination of conditions will reasonably assure the appearance of a material witness at *trial*, the taking of the witness's deposition under Federal Rule of Criminal Procedure 15(a),[51] in lieu of detention, is a condition that must be considered.[52] Even if a material witness is detained, however, he may still file a motion and request the court to order his deposition and to release him after the deposition is taken, provided "further detention is not necessary to prevent a failure of justice."[53] In other words, "[I]t is clear from a conjunctive reading [of Rule 15(a)] with § 3144 that the discretion to deny the motion is limited to those instances in which the deposition would not serve as an

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50. 18 U.S.C. §§ 3146(a)(1), (b)(1)(B) (2000).

51. FED. R. CRIM. P. 15(a) (West Supp. 2002). This rule provided, in pertinent part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . . 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'[s] deposition be taken. After the deposition has been subscribed the court may discharge the witness.

Id. "Exceptional circumstances" need not be shown by a material witness who moves to have his deposition taken; "a motion for the deposition of a detained witness made by a *party* (either the government or the defendant) is subject to Rule 15(a)'s 'exceptional circumstances' requirement." United States v. Allie, 978 F.2d 1401, 1404 (5th Cir. 1992). Additionally, "neither Rule 15 nor section 3144 requires that material witnesses file affidavits giving reasons for their release." United States v. Huang, 827 F. Supp. 945, 950 (S.D.N.Y. 1993); FED. R. CRIM. P. 15(e) (West Supp. 2002) (governing the use of deposition testimony at trial).

52. *See* 18 U.S.C. § 3144 (2000) (opposing detention if testimony can be secured by deposition); *see also Li*, 949 F. Supp. at 45 (recognizing that "a condition of release could be the taking of the witness' deposition in lieu of detention"); United States v. Finkielstain, No. 89 CR. 0009, 1989 WL 39685, at *1 (S.D.N.Y. Apr. 18, 1989) (holding that deposition of the witness was the better alternative to detention given the circumstances).

53. 18 U.S.C. § 3144 (2000); *see, e.g.*, Aguilar-Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992) (recognizing that "Rule 15(a) and § 3144 provide a detained witness with a mechanism for securing his own release"); *Rivera*, 859 F.2d at 1205-06 (upholding ruling where district court granted motion by appointed counsel to have deposition of material witnesses taken); United States v. Linton, 502 F. Supp. 878, 879 (D. Nev. 1980) (ordering deposition of a witness who had been in custody approximately two months); *see also* 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 242 (3d ed. 2000) (pointing out that "there is also a little-used provision [under Rule 15(a)] that if a material witness is committed, the witness may move for the taking of his or her own deposition, and after the deposition has been subscribed the court may discharge the witness").

adequate substitute for the witness' live testimony: that a 'failure of justice' would ensue were the witness released."[54] Finally, the government is under an obligation to report to the court biweekly the identity of any witness who has been detained longer than ten days and to explain "why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a)."[55] While detention of material witnesses normally arises in the trial setting, the next Part discusses cases that have addressed the application of the material witness statute in the context of a pending grand jury investigation.

IV. APPLICATION OF THE FEDERAL MATERIAL WITNESS STATUTE TO GRAND JURY WITNESSES

In the last twenty-five years, there have only been a few reported cases that have applied the material witness statute to a witness who has been detained so that his testimony could be presented to a grand jury. In one of these cases, *Bacon v. United States*,[56] the United States Court of Appeals for the Ninth Circuit analyzed the application of the material witness statute to grand jury proceedings and determined that the statute applied.[57] In the remaining cases, the courts, sometimes relying on *Bacon*, have simply applied the statute to material witnesses detained in connection with a grand jury investigation without questioning its validity in such context.[58] *Bacon*, therefore, sets the baseline for the legal analysis of this issue.

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54. *Aguilar-Ayala*, 973 F.2d at 413; *accord* Torres-Ruiz v. United States Dist. Court, 120 F.3d 933, 935 (9th Cir. 1997). Depositions generally come into play under Rule 15 after charges have been returned but before the commencement of trial. *See, e.g.*, United States v. Eufracio-Torres, 890 F.2d 266, 267-68 (10th Cir. 1989) (discussing the initial detention of illegal alien material witnesses, then the taking of their depositions and subsequent release prior to trial). In one reported case, it was noted that the government was able to take pre-indictment videotaped depositions of material witnesses prior to their release when the targets of the investigation were given notice of the deposition. *See* United States v. Hayes, 231 F.3d 663, 668 (9th Cir. 2000) (en banc) (using the videotaped depositions to modify the conditions of the witness's release).

55. FED. R. CRIM. P. 46(g) (West Supp. 2002) (current version at FED. R. CRIM. P. 46(h)(2)).

56. 449 F.2d 933 (9th Cir. 1971).

57. *See* Bacon v. United States, 449 F.2d 933, 939-41 (9th Cir. 1971).

58. *See* Arnsberg v. United States, 757 F.2d 971, 976-77 (9th Cir. 1985) (describing a civil action under the Federal Tort Claims Act and Fourth Amendment for damages stemming from an arrest in connection with a material witness warrant for a grand jury appear-

In *Bacon*, a material witness complaint was filed against Bacon alleging that she "had personal knowledge of matters material to a grand jury investigation and that a subpoena would be ineffective in securing her presence because she would flee the jurisdiction of the court and of the United States to avoid giving testimony."[59] Based on the complaint, the district court issued a material witness arrest warrant resulting in Bacon's arrest.[60] At the time of her arrest, Bacon was served with a grand jury subpoena and subsequently testified before the grand jury.[61] She then filed a petition for a writ of habeas corpus in district court contesting the validity of her arrest and her conditions of bail.[62] The petition was denied and an appeal followed.[63]

In challenging the legality of her detention, Bacon argued on appeal that § 3149[64] and Rule 46(b)[65] applied exclusively to "'any criminal proceeding'" and "that a grand jury investigation [wa]s

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ance); *In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1024 n.2 (2d Cir. 1985) (holding in an unpublished order that the witness remained subject to arrest while the case was remanded so that the district court could determine whether detention was predicated on the ongoing grand jury investigation), *vacating as moot* United States v. Koecher, 475 U.S. 133 (1986); *In re* De Jesus Berrios, 706 F.2d 355, 357-58 (1st Cir. 1983) (holding that arrest on a material witness warrant for a grand jury appearance was proper); United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982) (holding that in the context of a grand jury investigation, the "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"); United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (holding that there was probable cause to arrest the witness in connection with a grand jury material witness warrant); *In re* Thornton, 560 F. Supp. 183, 184 (S.D.N.Y. 1983) (detailing a contempt proceeding involving a witness arrested in connection with a grand jury material witness warrant).

59. *Bacon*, 449 F.2d at 934.

60. *Id.* at 941.

61. *Id.* at 935.

62. *Id.*

63. *Id.*

64. 18 U.S.C. § 3149 (1964) (repealed 1984). Section 3149 was the predecessor to the current statute.

65. *See* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 601 n.15 (1991) (quoting the pre-1972 version of the rule). As noted above, Rule 46 provided that the eligibility for release of a material witness is governed by § 3144. FED. R. CRIM. P. 46(a) (West Supp. 2002).

not a 'criminal proceeding.'"[66] The court of appeals was not persuaded by this contention.[67]

The court commenced its analysis by noting that the Rules of Criminal Procedure did not ascribe a "precise definition to the term 'criminal proceeding.'"[68] Nonetheless, one of the enabling statutes of the Rules, 18 U.S.C. § 3771, specifically granted the Supreme Court the authority to prescribe rules of procedure for "'*any or all proceedings prior to and including verdict.*'"[69] Such "proceedings," the *Bacon* court determined, "reache[d] far enough to include grand jury investigations."[70] The court reasoned that the grand jury was the entity constitutionally empowered to propel "the full weight of the criminal process against persons suspected of crime" and that it would be "incongruous to say that a proceeding before the body charged by the Constitution with initiating criminal prosecutions d[id] not amount to a proceeding in a criminal case prior to verdict."[71]

As to whether the Supreme Court had in fact exercised this authority, the *Bacon* court found that the Rules reflected the discharge of such authority "to the fullest."[72] To illustrate this principle, the court cited Rule 6, which governs the operation of grand juries, Rule 17, which governs the use of subpoenas in criminal proceedings and grand jury investigations, and Rule 2, which states in part that the Rules "'[we]re intended to provide for the just determination of *every criminal proceeding.*'"[73] Since "[t]aken as a whole the Rules [we]re clearly broad enough in scope to encompass grand jury investigations," the court held that the phrase

66. Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971).

67. *See id.* at 944-45 (finding that the government had not shown that it was impracticable to secure the petitioner's appearance before the grand jury by way of subpoena, the court reversed the ruling below and ordered that the warrant be quashed).

68. *Id.* at 939.

69. *Id.* (quoting 18 U.S.C. § 3771).

70. *Id.*

71. *Bacon*, 449 F.2d at 939-40. The court noted that, consistent with this proposition, the Supreme Court had extended the protections of "the Fifth Amendment privilege against self-incrimination to grand jury witnesses." *Id.* at 940 (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

72. *Id.*

73. *Id.*

"criminal proceeding," found in Rule 46(b) and § 3149, also included grand jury proceedings.[74]

V. Analysis of Rulings by the District Court in the *Awadallah* and *Material Witness Warrant* Cases

Notwithstanding the holding in *Bacon* and the consistent application of the material witness statute to grand juries,[75] the court in *United States v. Awadallah* found that § 3144 did not encompass grand jury proceedings. Less than ten weeks after this ruling, another judge in that same district reached a contrary conclusion in *In re Application of United States Material Witness Warrant.*

A. United States v. Awadallah

Awadallah was arrested on a material witness warrant in connection with a grand jury investigation of the September 11th terrorist attacks.[76] Nineteen days after his arrest, he testified before a federal grand jury.[77] Following that testimony, the government charged Awadallah in a criminal complaint with "two counts of knowingly making a false material declaration before the grand jury."[78] The government then indicted him on two counts of perjury.[79]

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74. Bacon v. United States, 449 F.2d 933, 941 (9th Cir. 1971). In reaching this conclusion, the court rejected the analysis of the majority in *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963), which concluded that the phrase "criminal proceeding" found in 28 U.S.C. § 1783 (the statute authorizing issuance of subpoenas to witnesses outside the United States) did not apply to grand jury proceedings. *Id.* at 940. Persuaded by the reasoning of the dissent in *Thompson*, the *Bacon* court found it implausible that the Supreme Court had intended Rule 46(b) "to be so designed that federal law-enforcement agencies c[ould] be frustrated by the flight of a prospective witness whose testimony [wa]s indispensable to the securing of an indictment." *Id.*

75. *See* United States v. McVeigh, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (finding the arrest of the material witness necessary and permissible for purposes of grand jury testimony under 18 U.S.C. § 3144); *accord* Arnsberg v. United States, 757 F.2d 971, 976-77 (9th Cir. 1985); *In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1024 (2d Cir. 1985), *vacating as moot* United States v. Koecher, 475 U.S. 133 (1986); *In re* De Jesus Berrios, 706 F.2d 355, 357-58 (1st Cir. 1983); United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982); *In re* Thornton, 560 F. Supp. 183, 184 (S.D.N.Y. 1983).

76. United States v. Awadallah, 202 F. Supp. 2d 55, 58 (S.D.N.Y. 2002).

77. *Id.*

78. *Id.* at 59.

79. *Id.*

Awadallah moved to suppress his testimony before the grand jury on the grounds that he had been detained illegally under the material witness statute.[80] The district court was persuaded that "[w]hen construed in context, the phrase 'criminal proceeding' in section 3144 could not be clearer: Section 3144 only allow[ed] the detention of material witnesses in the pretrial (as opposed to the grand jury) context."[81] Consequently, the court granted Awadallah's motion and dismissed the indictment.[82]

The *Awadallah* court began its analysis by noting that while the reference to "criminal proceeding" in § 3144 was perhaps ambiguous, an examination of the structure of that statute clarified any lingering uncertainty.[83] Section 3144 starts with the phrase "'[i]f it appears from an affidavit filed by a party'"; therefore, the reference to "party," the court found, "plainly invoke[d] an adversarial process—a proceeding where there is a prosecutor and a defendant and in which either side may submit an affidavit stating why a particular witness [wa]s material to its case."[84] But since "there [we]re no parties to a grand jury proceeding," in fact, "[a] 'party' to a criminal proceeding does not exist until *after* the grand jury has returned an indictment," the court determined that § 3144 was intended to apply only to trials.[85]

In further support of the proposition that § 3144 did not apply to grand jury investigations, the court noted that in such investigations "it [wa]s very difficult, if not impossible, for a judge to determine who is a material witness."[86] The court reasoned that since grand juries operate in secrecy, a judge would have to rely on representations by a prosecutor that a witness's testimony was material, thereby abdicating his role and in effect "read[ing] the materiality requirement out of the statute."[87]

The *Awadallah* court additionally concluded that the reference in § 3144 to the treatment of material witnesses under the Bail Reform Act of 1984 was proof that § 3144 did not apply to the grand

80. *Id.* at 59, 61.
81. *Awadallah*, 202 F. Supp. 2d at 76.
82. *Id.* at 82.
83. *Id.* at 62.
84. *Id.*
85. *Id.* at 62-63, 65.
86. United States v. Awadallah, 202 F. Supp. 2d 55, 63 (S.D.N.Y. 2002).
87. *Id.*

jury,[88] since § 3142 of that Act explicitly stated that it applied to proceedings "pending trial."[89] Similarly, a review of the two Rules of Criminal Procedure relating to material witnesses, Rules 46 and 15, provided further proof that § 3144 did not apply to grand jury proceedings since Rule 46 cross-referenced statutes which only refered to release prior to or during trial[90] and Rule 15 contemplated the preservation of a witness's testimony through deposition for use at a trial.[91] The court also noted the statute established penalties for a witness's failure to appear, limited its prohibition to an appearance before a court, and did "not apply to a witness who ha[d] failed to appear before a grand jury."[92]

The court then reviewed the legislative history of the Bail Reform Act of 1966, which it characterized as "[t]he bedrock of the current material witness statute" and concluded that "Congress only discussed the statute in the context of a pending trial."[93] Additionally, the court found instructive that the legal commentary on the material witness statute before and after the passage of the Act focused on the detention of a witness in a trial setting.[94]

After completing this statutory and legislative history analysis, the *Awadallah* court confronted and swiftly dismissed *Bacon* for three reasons. First, *Bacon*'s holding was not binding; second, its discussion of the application of the material witness statute to

88. *Id.* The court pointed out that the Act "contemplate[d] only two situations in which a judicial officer [wa]s authorized to release or detain an individual: (1) 'Pending trial,' 18 U.S.C. § 3141(a) and (2) 'Pending sentence or appeal,' 18 U.S.C. § 3141(b)." *Id.* at 66.

89. *Awadallah*, 202 F. Supp. 2d at 63 (citing 18 U.S.C. § 3142(a)). Here, the court noted some of the factors to be taken into account in the detention determination under 18 U.S.C. § 3142(g)(1)-(4), i.e., the nature of the offense, the weight of the evidence, the character of the person, and the danger to the community if the person is released. *Id.* The court reasoned that "[w]eighing these factors [wa]s useful only if there is a defendant—that is, if an offense has been charged and trial is pending." *Id.* at 64.

90. FED R. CRIM. P. 46(a) (West Supp. 2002) (providing for the "release prior to trial" of persons detained "in accordance with 18 U.S.C. §§ 3142 and 3144").

91. *Awadallah*, 202 F. Supp. 2d at 66; *see also* FED. R. CRIM. P. 15(a) (West Supp. 2002) (providing for the preservation of witness testimony "for use at trial" through deposition).

92. *Awadallah*, 202 F. Supp. 2d at 67.

93. *Id.* at 67-68.

94. *See id.* at 69-70 (discussing a variety of commentaries concerning the detainment of material witnesses).

grand jury proceedings was dicta;[95] third, and more to the point, the court declared: "*Bacon* [wa]s wrong."[96] As to the last observation, the court found *Bacon*'s reasoning that Rules 2, 6, and 17 provided support for the proposition that a "criminal proceeding" included a grand jury investigation "specious,"[97] and it criticized *Bacon* for ignoring the legislative history of the statute and "engag[ing] in unfettered speculation about the intent of the drafters."[98]

In conclusion, the court in *Awadallah* determined that even if § 3144 could be interpreted to encompass grand jury investigations, such a construction of the statute would raise "a serious constitutional question under the Fourth Amendment."[99] Specifically, the court questioned whether the deprivation of liberty accompanying the detention of a material witness in the context of a grand jury proceeding could be deemed reasonable under the Fourth Amendment.[100]

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95. *See* United States v. Awadallah, 202 F. Supp. 2d 55, 72 (S.D.N.Y. 2002) (finding that the *Bacon* court's discussion concerning the applicability of the material witness statute to grand jury proceedings was dicta because that court ultimately granted the petition for the writ of habeas corpus on grounds different than those advanced by the petitioner).

96. *Id.* at 71.

97. *Id.* at 74. The court in *Awadallah* stated:

> Rule 2 does not define the phrase "criminal proceeding" as it is used throughout the Rules of Criminal Procedure; nor does it help determine whether a grand jury is (or is not) a proceeding that necessarily comes before the *initiation* of a "criminal proceeding" as used in Rule 46. Rule 6 may establish the procedures that control grand jury proceedings, but this cuts *against* the court's argument that Rule 46 should *also* apply to the summoning of grand jury witnesses. Rule 17 may apply to grand juries, but it does not mention "criminal proceedings." Rather, it states: "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, *if any*, of the *proceeding*, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein."

Id.

98. *Awadallah*, 202 F. Supp. 2d at 75 n.25. To illustrate the point, the court referred to the *Bacon* court's observation that given the scope of Rule 17, "'It [wa]s unlikely that the drafters would provide for the arrest and detention of a material witness for a trial, but not for a grand jury.'" *Id.* (quoting Bacon v. United States, 449 F.2d 933, 941 (9th Cir. 1971)).

99. *Id.* at 77.

100. *See id.* (analyzing the Fourth Amendment issue using the traditional balancing test between government and private interests). The court contrasted the difference in treatment between Awadallah (who was arrested) and a witness who is served with a subpoena to appear before a grand jury as follows:

> The grand jury already has the ability to ask a court to subpoena an individual who must then testify or face criminal sanctions. *See* FED. R. CRIM. P. 17. While this infringes on an individual's liberty, it is nonetheless a reasonable measure to secure

B. *In re* Application of United States for a Material Witness Warrant

Standing in stark contrast to the analysis and ruling in *Awadallah* is the opinion in *Material Witness Warrant.* There, petitioner, who initially had been in the custody of the Immigration and Naturalization Service and subject to an order of deportation, was committed to the custody of the Department of Justice under a material witness warrant issued in assistance of a grand jury subpoena.[101] Petitioner moved to quash the warrant and be deported.[102] In the alternative, he requested that in lieu of testifying before the grand jury, the government take his deposition under § 3144 and Rule 15(a).[103] The district court denied the motion. In doing so, the court rejected the rationale of *Awadallah* upon which petitioner principally relied.[104]

The court in *Material Witness Warrant* commenced its analysis by noting that testimony from material witnesses may be needed in bail proceedings, suppression hearings, grand jury investigations and trials, and that "it would be difficult to imagine a more comprehensive term" than "criminal proceeding," as found in § 3144, to encompass those types of proceedings.[105] However, even assuming that the term was ambiguous, the *Material Witness Warrant* court reasoned that *Awadallah*'s resolution of that ambiguity in favor of a conclusion that § 3144 did not apply to grand jury proceedings was flawed for three reasons.

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information about a potential crime because the extent of the intrusion on the witness's liberty is *minimal.* A subpoenaed witness, for example, would not be repeatedly strip-searched, shackled whenever he is moved, denied food that complies with his religious needs, or prohibited from seeing or even calling his family over the course of twenty days and then testifying while handcuffed to a chair.

Id. at 78.

101. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

102. *Id.*

103. *Id.*

104. *See id.* (declining to follow either the reasoning or the holding in *Awadallah*). In his motion, petitioner also raised certain allegations with respect to his conditions of confinement. *Id.* The court held a ruling on those issues in abeyance until it had an opportunity to consider the views of the Bureau of Prisons. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 288.

105. *Id.* at 293. The court pointed out how in other criminal statutes, i.e., 18 U.S.C. § 3731 (authorizing appeals) and 18 U.S.C. § 1073 (proscribing travel in certain circumstances), the term "criminal proceeding" had been interpreted to include a grand jury. *Id.*

First, the court determined that the use of the word "party" in § 3144 did not necessarily connote a proceeding involving a prosecutor and a defendant; it "applie[d] just as comfortably to any party in interest, as the government is in a grand jury proceeding, and as both the government and a defendant are after an indictment has been returned."[106] Second, courts were equipped and routinely made the type of materiality determinations *Awadallah* found "'very difficult, if not impossible'" in the grand jury setting.[107] Lastly, while § 3144 made controlling references to § 3142, which established procedures and identified factors to consider in the setting of bail, "Not every provision of section 3142 applie[d] to witnesses, but some d[id], and those govern[ed]."[108]

Moreover, contrary to the reasoning of *Awadallah*, the court in *Material Witness Warrant* found that Rules 15 and 46 did not support the conclusion that § 3144 was not intended to apply to grand juries. First, the court observed that the deposition procedure found in Rule 15 did "not bar application of the statute to grand jury witnesses simply because that procedure [wa]s available prin-

106. *Id.* at 294.

107. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 294 (S.D.N.Y. 2002). The court noted that the Ninth Circuit in *Bacon v. United States* and the First and Seventh Circuits in *In re De Jesus Berrios* and *United States v. Oliver*, respectively, all agreed that in ascertaining the propriety of a material witness warrant when the proceeding involves a grand jury, the district court "should determine materiality based on the representation of the prosecutor, lest grand jury secrecy be compromised." *Id.* Further, the court stated that similar determinations were made by courts routinely with respect to sealed submissions challenging the breadth and scope of subpoenas and also at trial, where "the decision likely w[ould] have to be made before the trial begins and thus before it [wa]s possible to fit the witness's testimony into the grid of other evidence." *Id.* at 294-95.

108. *See In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 295 (describing the *Awadallah* court's balancing test for weight of the evidence to be based on the defendant and not on the witness himself). The *Material Witness Warrant* court found that the reasoning underlying *Awadallah*'s wholesale application of § 3142 to material witnesses in the grand jury context suffered from textual and practical defects. *Id.* As to the former, the court explained that given § 3144's reference to "person," which in that context is a witness, "to the extent that the provisions of section 3142 necessarily appl[ied] to a different 'person'—*i.e.*, to a defendant—as they do when they refer to 'the weight of the evidence against the person,' they [we]re not applicable to a section 3144 decision about whether to release a witness." *Id.* With respect to the latter, the court observed that "requir[ing] a judge to evaluate 'the weight of the evidence against the defendant' when deciding whether to detain a material witness, which [wa]s likely to occur before trial . . . [wa]s at best an imponderable undertaking." *Id.* at 296.

cipally for a trial witness."[109] Additionally, the court found that the reference in Rule 46(a) to "the phrase '[r]elease [p]rior to [t]rial' c[ould] just as well cover a grand jury witness as a trial witness [since] a grand jury proceeding takes place prior to trial."[110]

Even if the language of § 3144 was vague on Congress's intent, the *Material Witness Warrant* court ruled that the legislative history of the statute made abundantly clear that "a relevant Congressional committee, and anyone who read its report, was aware of *Bacon*'s holding and also that the new statute would apply to grand jury proceedings."[111] In particular, the court quoted from a Senate Judiciary Committee Report that cited *Bacon* and stated: "'A grand jury investigation is a "criminal proceeding" within the meaning of this section.'"[112]

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109. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 296 (S.D.N.Y. 2002). In support of this point, the court relied upon Rule 46(g), which stated, in part:

> The attorney for the government shall make a biweekly report to the court listing each defendant *and witness* who has been held in custody *pending indictment, arraignment or trial* for a period in excess of ten days. *As to each witness so listed* the attorney for the government shall make a statement of the reasons *why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a).*

Id. The court stated that on its face, Rule 46(g) "d[id] not appear to limit the required showing to trial witnesses, which suggest[ed] that the remedy of testimony by deposition might be available to a grand jury witness when, for example, the grand jury before whom the witness [wa]s to testify cannot convene promptly." *Id.* The government maintained that Rule 15 depositions were not available in the case of grand jury witnesses. *Id.* at 301.

110. *Id.* (alteration in original).

111. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 297. The court in *Material Witness Warrant* rejected the position taken in *Awadallah* that *Bacon*'s ruling on the applicability of the material witness statute to grand jury witnesses was dictum. *Id.* at 291. The court explained:

> If the statute did not authorize issuance of a warrant for the arrest of a grand jury witness, there would have been no occasion for the *Bacon* Court to consider whether the government had made the required showing that it was impracticable to secure petitioner's attendance before the grand jury without such a warrant.

Id.

112. *Id.* at 297 (quoting S. REP. NO. 98-225, at 28 n.88 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211). It is presumed that Congress was aware of the judicial interpretation given to a statute which is subsequently re-enacted. *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) (noting that "Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). The court in *Material Witness Warrant*, however, found that in this instance, "there [wa]s direct evidence of that awareness, and thus of that intent, in the committee report above cited." *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 297.

As to *Awadallah*'s Fourth Amendment concerns, the court in *Material Witness Warrant* concluded that the suggestion that detaining a person for purposes of securing testimony before a grand jury was "somehow less important" than securing such testimony for trial simply "[wa]s at odds with the Supreme Court's view of the importance of grand jury testimony."[113] Further, the court noted that case law applying state material witness statutes in the grand jury context uniformly held that there was no Fourth Amendment violation associated with such detentions.[114] The court also found instructive that other courts routinely applied § 3144 to grand jury proceedings.[115]

In conclusion, the court in *Material Witness Warrant* determined that the broad language of § 3144, its legislative history (most notably the reference to *Bacon* in the committee report), and the case law applying the current statute or its predecessor to grand jury witnesses all supported a determination that § 3144 did in fact extend to grand jury witnesses.[116] As to petitioner's alternative contention that his deposition should have been promptly taken so that he could be released, the court ruled that it "need not decide whether Rule 15 [wa]s elastic enough to authorize a deposition in aid of a grand jury investigation."[117] In this case, the court found,

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113. *In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 298 (S.D.N.Y. 2002); *see also* Blair v. United States, 250 U.S. 273, 281 (1919) (recognizing that testifying before a grand jury is a duty which every U.S. citizen is bound to perform).

114. *See In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 299 (finding courts have held under both state and federal law that as long as the presence of a material witness is necessary for the grand jury, detention does not violate the Fourth Amendment).

115. *Id.* at 300.

116. *Id.*

117. *Id.* at 302. While recognizing that the text of Rule 15 demonstrated on its face that those responsible for drafting it contemplated that the deposition would be used at trial or possibly a hearing of some sort involving parties, the court in *Material Witness Warrant* found that it "[wa]s not inconceivable that a deposition in aid of a grand jury proceeding might be taken pursuant to Rule 15, using those provisions of the Rule that would apply." *Id.* Rejecting petitioner's contention that the deposition in these circumstances would entail an "examination separate from and alternative to a grand jury appearance," the court stated:

> [J]ust [as] Rule 15 itself provides explicitly that a deposition is to be used the way trial testimony is to be used—that it *is* trial testimony, although taken before trial—so too would a deposition taken in aid of a grand jury proceeding, assuming that the Rule were read to authorize such a deposition, be the equivalent in all respects of grand

petitioner failed to meet the requirements of the Rule, and the delay in bringing him before the grand jury was not related to the grand jury's unavailability.[118]

VI. The Federal Material Witness Statute Revisited

A comparison of the *Awadallah* and *Material Witness Warrant* opinions reveals that the latter's analysis of whether § 3144 applies to grand jury proceedings is sound and that its rationale is likely to prevail in the *Awadallah* appeal.[119] The application of the principles of statutory construction support this interpretation.

A. *Rules of Statutory Construction*

It well established "that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[120] Ordinarily, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[121] When the terms of a statute are ambiguous,[122] however, courts may look to the statutory scheme and extrinsic aids in an attempt to discern their meaning.[123] One of these

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jury testimony. For example, there would appear to be no requirement in such a deposition that the witness be accompanied by counsel, inasmuch as a grand jury witness has no right to be accompanied by counsel, although he may leave the grand jury room to consult with counsel.

In re Application of United States for a Material Witness Warrant, 213 F. Supp. 2d at 302.

118. *Id.* As the court noted, the petitioner "d[id] not contend that an actual grand jury [wa]s not available to hear him, and his custodial status assure[d] that he [wa]s available to the grand jury." *Id.*

119. *See* Associated Press, *Federal Prosecutions File Notice of Appeal of Detainment Ruling*, May 3, 2002, WESTLAW, APWIRES Database (reporting on notice of appeal filed with Second Circuit).

120. Caminetti v. United States, 242 U.S. 470, 485 (1917); *accord* United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) (maintaining that "[t]he starting point for our interpretation of a statute is always its language").

121. Perrin v. United States, 444 U.S. 37, 42 (1979).

122. *See* 2A Norman J. Singer, Statutes and Statutory Construction § 46:04, at 145-46 (2000 Revision) (noting that "[a] statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses").

123. *See* United States v. McLemore, 28 F.3d 1160, 1163 (11th Cir. 1994) (asserting that "[w]hen a statute's language is not unambiguous on its face, [courts] look to the legislative history and the statutory scheme").

aids is the statute's legislative history.[124] In this regard, "Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute."[125] Indeed, "absent contrary legislative history, a clear statement in the principal committee report is powerful evidence of legislative purpose and may be given effect even if it is imperfectly expressed in statutory language."[126]

B. *Analysis of the Statutory Language*

Whatever ambiguity in meaning may exist with the term "criminal proceeding" in the abstract, as aptly noted by the court in *Material Witness Warrant*, "it would be difficult to imagine a more comprehensive term" in determining whether "criminal proceedings" include grand jury investigations.[127] To begin, it is significant that § 3144 appears in Title 18 of the United States Code, captioned as "Crimes and Criminal Procedure."[128] That title includes provisions controlling the operation of regular and special grand juries.[129] It is also noteworthy that the term "criminal proceeding,"

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124. *See* Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 627 (1993) (finding ambiguity in the statutory language, the court next turned to legislative purpose); United States v. Donruss Co., 393 U.S. 297, 303 (1969) (choosing to examine legislative history after attempts to determine the plain meaning of the language fail); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:04, at 431 (2000 Revision) (noting that "the history of events during the process of enactment, from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act").

125. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:06, at 440-41 (2000 Revision); *see also* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1470 (7th Cir. 1983) (noting that "[i]f Congress passes a statute, the committee reports may provide important evidence of legislative purpose").

126. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:06, at 441 (2000 Revision).

127. *See In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287, 293 (S.D.N.Y. 2002) (opining that "criminal proceedings" may include trials and grand jury investigations, as well as bail applications and suppression hearings).

128. *See generally* Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 529 (1947) (noting that the title and heading of sections in the Interstate Commerce Act could be used to discern meaning of an ambiguous phrase in the Act but cannot "undo or limit that which the text makes plain"); Russ v. Wilkins, 624 F.2d 914, 922 (9th Cir. 1980) (recommending that "[a]lthough the title of the Act cannot enlarge or confer powers or control the words of the Act, the title may be helpful in interpreting ambiguities within the context of the Act").

129. *See* 18 U.S.C. §§ 3321-34 (2000) (encompassing Chapter 215 on grand juries and Chapter 216 on special grand juries).

which is also found in other sections of Title 18, has been interpreted to include grand jury proceedings.[130]

The Rules of Criminal Procedure similarly also indicate that they were "intended to provide for the just determination of every criminal proceeding."[131] Two Rules provide procedures relating to grand juries. Rule 6 pertains to the operation of grand juries,[132] and Rule 17 governs the issuance of subpoenas in the grand jury and other contexts.[133]

Even if the "ordinary or natural meaning"[134] of the term "criminal proceeding," the setting of § 3144 in Title 18 and the scope of the Rules of Criminal Procedure were not enough, the legislative history of § 3144 makes it abundantly clear Congress intended that section to encompass grand jury proceedings. The report accompanying the Senate Judiciary Committee's analysis of the bill, which contained § 3144, stated: "If a person's testimony is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody."[135] A footnote following the word "proceeding" stated: "A grand jury investigation is a 'criminal proceeding' within the meaning of this section. *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971)."[136] This une-

130. *See, e.g., In re* Grand Jury Proceedings, 835 F.2d 237, 238 (10th Cir. 1987) (interpreting "criminal proceeding" under § 3731 as encompassing grand jury proceedings); Hemans v. United States, 163 F.2d 228 (6th Cir. 1947) (interpreting "criminal proceeding" under § 1073's predecessor § 408e as encompassing grand jury proceedings).

131. FED. R. CRIM. P. 2 (1986); *see also* 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 21, at 27 (3d ed. 1999) (noting that Rules "apply to 'all criminal proceedings,' and the term 'proceedings,' it is said, includes 'all possible steps in the criminal case from its inception to judgment and sentence'" (quoting United States v. Choate, 276 F.2d 724, 727 n.6 (5th Cir. 1960)).

132. FED. R. CRIM. P. 6 (1986 & West Supp. 2002). Captioned, "The Grand Jury," this Rule discussed the summoning of grand juries, objections to the grand jury and/or to grand jurors, the role of the foreperson, who may be present in grand jury proceedings, the recording and disclosing of such proceedings, the return of an indictment, excusing grand jurors, and the discharge of the grand jury. *Id.*

133. FED. R. CRIM. P. 17 (1986 & West Supp. 2002); *see also* CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 271, at 216-17 (3d ed. 2000) (stating that this "rule is not limited to subpoena for the trial. A subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, for determination of an issue of fact raised by a pretrial motion, or for posttrial motions") (footnotes omitted).

134. *See* FDIC v. Meyer, 510 U.S. 471, 476 (1994) (looking to ordinary meaning when a definition for a term has not been given under the Act).

135. S. REP. NO. 98-225, at 28 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3211.

136. *Id.* at 28 n.88.

quivocal reference to the scope of the term "criminal proceeding" in the report, which accompanied the version of § 3144 ultimately enacted into law,[137] authoritatively establishes Congress's intent.[138] Indeed, even absent the direct reference to *Bacon* in the legislative history, Congress is presumed to have been aware of *Bacon* and thus, in the absence of any indication to the contrary, implicitly adopted the meaning ascribed to the term "criminal proceeding" by *Bacon* when enacting § 3144.[139]

Finally, it is not inherently unreasonable under the Fourth Amendment to detain a witness so that his or her testimony can be presented to a grand jury. The grand jury holds a "high place . . . as an instrument of justice"[140] and the courts have made clear, in suf-

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137. *Compare* S. REP. NO. 98-225, at 438, *with* 18 U.S.C. § 3144 (2000) (adopting the language expressed in S. REP. NO. 98-225, at 438 to the letter except for the addition of the words "of this title" at the end of the first sentence).

138. *See* Garcia v. United States, 469 U.S. 70, 76 (1984) (revealing that "[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'") (alteration in original) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:06, at 440-41 (2000 Revision) (finding committee reports to be the best indicator of Congressional intent).

139. *See* Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (finding that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); Lorillard v. Pons, 434 U.S. 575, 580 (1978) (stating that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); Firstar Bank, N.A. v. Faul, 253 F.3d 982, 988 (7th Cir. 2001) (observing that "[i]f a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old").

140. Costello v. United States, 350 U.S. 359, 362 (1956). The Supreme Court has observed:

> The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike th[e] Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush.

United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991) (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).

ficiently analogous circumstances, that the detention associated with the arrest of a material witness passes constitutional muster.[141]

VII. CONCLUSION

The language of 18 U.S.C. § 3144, its accompanying legislative history, and case law all make clear that Congress intended § 3144 to apply to grand jury investigations. Given the position the grand jury holds in the administration of criminal justice, it is entirely appropriate that the government have the authority, if it can demonstrate to a judicial officer "that the testimony of a person is material . . . and . . . that it may become impracticable to secure the presence of the person by subpoena,"[142] to arrest such a person so that his or her testimony can be presented to a grand jury.

141. *See* Stein v. New York, 346 U.S. 156, 184 (1953) (citing Rule 46(b) and New York's material witness statute, the Supreme Court noted that it "never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a [material] suspect as under the circumstances appears reasonable and not coercive"), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 616 (1929) (recognizing 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"); Allen v. Nix, 55 F.3d 414, 416-17 (8th Cir. 1995) (denying habeas corpus relief to petitioner who claimed that detention under Iowa's material witness statute violated the Fourth Amendment); United States *ex rel.* Glinton v. Denno, 339 F.2d 872, 876 (2d Cir. 1964) (holding that continued detention of a witness under New York's material witness statute did not violate the Fourth Amendment); Stone v. Holzberger, 807 F. Supp. 1325, 1336-37 (S.D. Ohio 1992) (denying § 1983 claim that arrest and detention under Ohio's material witness statute violated the Fourth Amendment), *aff'd*, 23 F.3d 408 (6th Cir. 1994).

142. 18 U.S.C. § 3144 (2000).