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Coercive Process For Material Witnesses Needs Reform

By **Preston Burton, Paige Ammons and Caroline Eisner** (March 24, 2019)

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The material witness statute confers incredible power on the government to obtain the arrest and detention of a witness — even though that person is not accused of having committed any crime — simply by showing the court that the person is purportedly "material in a criminal proceeding" and that it "may become impracticable" to obtain the witness' testimony using a subpoena alone.

Despite this broadly defined authority, the statute, codified at 18 USC § 3144, provides precious little guidance on the standards for assessing materiality, gauging the impracticability of securing their grand jury or trial testimony with a subpoena in the ordinary course, or how these uncharged yet detainable people should be housed and treated. Courts are highly deferential to the government on these matters, and, as a result, witnesses are routinely subjected to detention in local jails and face undue coercion to agree to be debriefed or otherwise cooperate in ways they may well have declined had they been a subpoenaed witness.

This process is deeply flawed and antithetical to the fundamentals of American criminal justice, and to the rights of individuals, particularly those not charged with any crime. The standard for establishing materiality or impracticability in these matters should be more clearly articulated and heightened. In the absence of meaningful change to the materiality standard, the government should at least be required to furnish nonpenal detention options and spare witnesses the indignity of being processed as if they had been charged with committing a criminal offense.

The U.S. District Court for the District of Columbia recently appointed us to represent a client who was arrested and detained under a material witness warrant. Most of the aspects of that representation remain sealed, but it garnered a significant amount of media attention. We will not discuss the facts in that case, but our experience highlighted for us several flaws in the material witness statute and process.

Historical Context and Applicable Precedent

Some form of the material witness statute has existed since 1789,[1] but the government began issuing thousands of material witness warrants in the mid- to late-1990s,[2] and prosecutors employed the statute often in the aftermath of the Sept. 11 attacks.

From 2002 to 2016, the number of material arrests increased by 43 percent, with more than 75,000 material witness arrests made during that time period. In 2016 alone, authorities made nearly 5,600 material witness arrests. Congressional research statistics suggest that the statute has been used primarily against foreign witnesses, many of whom remained in local jails for months.[3]

Reported court decisions provide little guidance on evaluating the validity of a material warrant, are exceedingly deferential to the government, and utterly fail to articulate alternative detention options.
Following 9/11, then-U.S. District Judge Michael Mukasey authored an influential decision

that essentially abdicated establishment of materiality of the person's testimony to the say-so of federal prosecutors.[4] The U.S. Court of Appeals for the Second Circuit, in a split decision (in which the majority was joined by a non-Article III judge sitting by designation) affirmed Judge Mukasey's analysis and essentially ignored addressing the other requirement for a material witness — the standard for establishing "impracticability" of securing testimony with an ordinary subpoena, which is the standard that under which reviewing courts have traditionally employed a more robust review of government applications.[5]

These two influential decisions have effectively granted federal prosecutors expansive power (and limited judicial review) to secure material witness warrants.

Proposed Amendments to the Statute

Sen. Patrick Leahy, D-Vt., led an unsuccessful attempt in 2005 to amend the statute and rein in the government's expansive ability to detain material witnesses. The proposed amendments would have applied the more stringent standard of "clear and convincing evidence" for establishing whether the government successfully demonstrated both materiality and impracticability where prosecutors have not first served witnesses with a subpoena, and would have required material witnesses be detained, "to the extent practicable," apart from accused or convicted criminals. The amendments also would have applied rigid time frames for the length of detention, and imposed congressional oversight on specific uses of the material witness statute.[6]

In light of the current application of the statute, these proposals should be revisited.

Flaws in the Statute

Deferring the question of materiality to the mere representations of prosecutors is, in effect, an abdication by the court. Presumably any witness the government seeks to present before a grand jury is "material" in the sense that the government seeks his or her testimony and believes it would be useful to the case. As such, the materiality prong is essentially meaningless. The standard should be more exacting in order to justify revoking the liberty of an uncharged witness, and require the government to detail how the witness is not merely material, but essential.

Courts have sometimes employed more rigorous inquiry as to the impracticality prong, see, e.g., Bacon v. United States;[7] Arnsberg v. United States,[8] but, again, in the case of foreign witnesses, the presumption seems to be that their theoretical ability to return home at some point, or seek refuge in an embassy, renders it impractical to rely upon a grand jury subpoena alone to compel their appearance. In effect, if the witness hails from a country whose political position is antagonistic to the U.S., simply incanting the ability of such a witness to seek such haven has become sufficient grounds for detention and no further analysis of whether the witness has actually demonstrated any such intention is required. And to further its argument, the government often relies on detention decisions involving defendants, not witnesses.[9]

Once detained, the witness is entitled to have his or her eligibility for release assessed under the Bail Reform Act, which is specifically incorporated by the material witness statute. Of course the Bail Reform Act presumes that defendants will be released pending trial, suggesting that material witnesses would enjoy the same or even enhanced protection of their liberty. But for material witnesses, nothing could be further from the truth.

The reality is that many material witnesses do not receive the required presumption of release, meaning that these uncharged individuals can be treated worse than criminal defendants, in some circumstances. They are not afforded the assistance and procedures of

the Pretrial Services Agency in assessing their flight risk or a package of conditions or release, putting the burden on counsel to try to present the same assessment or options to the court regarding electronic monitoring or other measures short of incarceration. The exercise is particularly difficult for a witness with few ties to the community where their testimony is sought.

Proceedings regarding material witnesses frequently are sealed, presumably on the grounds of grand jury secrecy. Doing so enshrouds in secrecy the factual scenarios where the statute is employed, simple statistics on its usage, frequency of release, and conditions of detention, providing courts with little guidance from other courts and leaving open the possibility of government abuse and weakening trust in the system.

Material witnesses are not protected by Rule 5 of the Federal Rules of Criminal Procedure, which requires that arrested individuals have an initial appearance without "unnecessary delay," thus missing a key opportunity to be advised of rights and have bail set. Indeed, witnesses can be arrested in another jurisdiction, informally detained overnight, and then brought to the requesting jurisdiction whereupon they may well be handed over to local jail authorities and detained for days, alongside those accused and convicted of crimes, including violent crimes.

Aside from the indignity of such a detention and being fingerprinted, photographed, shackled and clothed in jail garb, being detained in a correctional facility can impede the material witness' access to adequate legal representation, not only as to the material witness proceedings but also in preparing for the grand jury or trial testimony that the witness is poised to give. All of these factors create an extremely coercive environment for the witness.

Why should a mere witness be subjected to DNA collection, have mugshots and fingerprints archived in a government file, or even have an arrest record — all based on the government's naked assertion of materiality and impracticality? In fact, why shouldn't the arrest record and the related processing material for a material witness be expunged and destroyed?

There has simply been little to no consideration of these very real consequences that will linger well past the witness' detention and eventual release. And, counterintuitively, internal Department of Corrections policy can lead to material witnesses being held in even more restrictive environments than criminal defendants, including solitary confinement or lockdown, in the name of protecting the material witness' "safety" — a left-handed systemic concession that there is a fundamental difference between a defendant and someone who has not been charged with a crime.

Proposals for Change

Many of these issues could be addressed by accommodating material witnesses in a hotel and treating them with the same dignity as a sequestered jury — and nothing in the statute prohibits that from being the practice — but the very U.S. attorney's office seeking testimony from the material witness is also part of the executive branch that holds the discretionary purse strings for deciding whether to expend "additional" resources of hotel accommodations and monitoring by FBI agents. This is a remarkable and troubling connection that should be rectified.

The additional expense of boarding the witness in a nonpenal setting should not be discretionary or an act of grace by the government, and the government should take its resources into account when determining how material the testimony would be. The default resort to incarceration also presents an opportunity for coercion, where the prosecutors

involved in the case are able to withhold more favorable detention conditions until a material witness caves and agrees to certain cooperation demands — something that an ordinary witness is not required to do.

Courts need clearer statutory and precedential guidance in order to develop a more balanced approach to accommodate the government's legitimate desire to obtain testimony from key witnesses it would otherwise be unable to secure, but which also protects witnesses in a way that approaches or surpasses the rights of criminal defendants.

If the materiality standard is not heightened and the government's applications continue to face such a weak threshold, it should then be required to provide witnesses a process and housing that respects individual dignity and recognizes in more than empty words that the individual who is being detained is not charged with having committed any crime.

The current application of the statute shrouds too much in secrecy, defers too much to the government, and leaves open too many opportunities for abuse, and can exert too much pressure on material witnesses, unfairly and unnecessarily treating them like the criminals the government seeks to charge.

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[1] See Bacon v. United States, 449 F.2d 933, 938-39 (9th Cir. 1971) (noting there has been legislative authority since 1789 and tracing the concept back to English Law in 1612). Variations of the material witness statute and process are also adopted by every state. This article addresses the federal statute at 18 USC § 3144.

[2] Statistics are from reporting by the Bureau of Justice Statistics, available at www.bjs.gov.

[3] July 1, 2011 Congressional Research Service Report: "Federal Material Witness Statute: A Legal Overview of 18 U.S.C. 3144."

[4] See In re Application for Material Witness Warrant, 213 F. Supp. 2d 287, 294, 303 (S.D.N.Y. 2002).

[5] See United States v. Awadallah, 349 F.3d 42, 75 (2d Cir. 2003) (Straub, J., concurring).

[6] https://www.aclu.org/other/aclu-memo-interested-persons-regarding-reforms-material-witness-detentions-s-1739

[7] Bacon v. United States, 449 F.2d 933, 944-45 (9th Cir. 1971)

[8] Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985)

[9] Accord United States v. Majid Ghorbani, No. 18-00255 (D.D.C. September 5, 2018) ECF No. 26 at 14-15; United States v. Maria Butina, No. 18-00218 (D.D.C. July 24, 2018) ECF No. 15, at 6.