NEW YORK LAW SCHOOL

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 48
Issue 1 *Criminal Defense in the Age of Terrorism*

Article 3

January 2004

The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses

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THE MATERIAL WITNESS STATUTE POST SEPTEMBER 11: WHY IT SHOULD NOT INCLUDE GRAND JURY WITNESSES

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I. INTRODUCTION

Cornerstones of the American system of justice are the requirement that a person neither be subjected to unreasonable seizures[1] nor be deprived of liberty without due process of law.[2] Since September 11, 2001, the United States Department of Justice has increasingly sought to circumvent these constitutional protections through utilization of the Material Witness Statute, 18 U.S.C. § 3144 ("Material Witness Statute"), to incarcerate individuals thought to have information relevant to a grand jury investigation.[3] Upon the mere conclusory statement of a government official that a person has material information and might not respond to a subpoena, the person may be incarcerated for an indefinite period of time, without bail, and under onerous conditions.

Consider the case of twenty-year-old Osama Awadallah, a Jordanian national of Palestinian descent. On September 20, 2001, Mr. Awadallah resided in San Diego, California, where he worked

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1. U.S. CONST. amend. IV.

2. U.S. CONST. amends. V, XIV.

3. 18 U.S.C. § 3144 provides:

> Release or detention of a material witness
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> 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 section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

and attended college.[4] At about 10:30 A.M., eight FBI agents surrounded him in the parking lot of his apartment complex. The FBI was investigating Mr. Awadallah because its agents found a scrap of paper, among other papers, with the words "Osama 589-5316" inside the trunk of a car at Washington-Dulles International Airport that had been abandoned by one of the alleged September 11 hijackers. As the government quickly determined, Mr. Awadallah had not used that telephone number for 17 months.

Four agents simultaneously approached Mr. Awadallah and questioned him, while others surrounded him on the periphery. He was ordered into his apartment so the interrogation could continue. Once inside, it was the FBI that decided whether or not Mr. Awadallah could say his mid-day prayers. They did not allow him to use the bathroom unless they could watch him urinate. After a period of time, the FBI decided to continue the interrogation at the FBI office. Once there, Mr. Awadallah was placed in a room latched from the inside with a trick lock.[5] He was not free to leave the FBI office and was prevented from attending his evening class. When Mr. Awadallah was hungry, after fasting, he was not given an adequate meal, but only a snack from a vending machine. The FBI then told him that they would not be finished until he passed a polygraph test, which could only be conducted the next day.

As he promised, Mr. Awadallah voluntarily returned to the FBI office the following morning. According to two FBI agents, who interviewed Mr. Awadallah during the two days preceding his formal arrest, Mr. Awadallah had been extremely cooperative and "not defiant in any way."[6] Mr. Awadallah was formally detained only af-

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4. Much of this article has been excerpted from the Brief for Appellee Osama Awadallah filed in the United States Court of Appeals for the Second Circuit in the case *United States v. Awadallah,* 349 F.3d 42 (2d Cir. 2003) (No. 01-1269), written by counsel for Mr. Awadallah, Robert J. Boyle and Lawrence M Stern. The author also wishes to acknowledge the contribution of the New York Council of Defense Lawyers and the New York Civil Liberties Union, both of whom submitted amicus curae briefs in support of Awadallah. The author also wishes to thank the staff of this Law Review and their advisors for their assistance.

5. A "trick lock" appears like an unlocked door knob that is, in fact locked. Thus, if Awadallah had attempted to terminate the interview and leave the room, he would have been prevented from doing so.

6. Joint Appendix at 251, 302, 329, United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (stating that Mr. Awadallah was "very cooperative"; "very, very cooperative"; "fully cooperative").

ter he "specifically told the agents that he was not willing to [voluntarily] go to New York." Several hours after his detention, Mr. Awadallah was arrested pursuant to a material witness warrant signed earlier that day in the United States District Court for the Southern District of New York.

Although accused of no crime, Mr. Awadallah was classified as a high security inmate at the San Diego Metropolitan Correctional Center ("MCC") and placed in solitary confinement. He was not permitted contact with family or friends. Mr. Awadallah did not appear in court until September 24, but the proceeding was adjourned to September 25 because no interpreters were available. Mr. Awadallah's attorney requested that he be deposed, but that motion was ignored. On September 27, Mr. Awadallah was transported first to San Bernadino and then to the Federal Transfer Center in Oklahoma City. He did not arrive at the New York MCC until October 1, ten days after his arrest. During the transport, Mr. Awadallah's whereabouts were unknown to his family and his attorney. Mr. Awadallah appeared in the Southern District of New York the next day. Despite his counsel's request that he immediately appear before the grand jury the government succeeded in delaying that appearance until October 10.

At the New York MCC, Mr. Awadallah was treated in a cruel and inhumane manner. He was placed in a cell so cold his skin turned blue and he was kicked by a guard and thrown into a chair. The same guard jammed his face into an elevator wall, made his handcuffs extremely tight, stepped on the chain linking his ankles, and pulled his hair to move his face in front of an American flag. The FBI agents who saw the bruises on Mr. Awadallah's body after he arrived at the New York MCC ignored them and did not even mention the injuries in their reports.

The government's response to Mr. Awadallah's ordeal in prison was:

> Although this Court may find that, during Mr. Awadallah's 20 day-detention, there were times when he did not receive a religious diet (although it had been ordered for him), the floor of his cell was wet with dirty water on two days, an officer twisted his hand and forced his face down while he was kneeling, an officer threw a pair of shoes at him, and officers handled him roughly and/or made in-

> appropriate remarks-none of which is condoned by the Government-*he was not "torture[d]*."[7]

Mr. Awadallah spent a total of 20 days in jail before he was finally summoned to a grand jury. Based on his testimony before the grand jury, Mr. Awadallah was subsequently indicted for perjury.[8] On April 30, 2002 the court dismissed the indictment, stating that Mr. Awadallah's arrest was illegal because the Material Witness Statute did not authorize the arrest of grand jury witnesses.[9] Mr. Awadallah remained in custody for a total of 83 days before he was finally released on bail. On November 7, 2003, the United States Court of Appeals for the Second Circuit reversed Judge Scheindlin's order and reinstated Mr. Awadallah's indictment.[10]

This article contends that grand jury witnesses are plainly excluded from the provisions of the Material Witness Statute and related statutes. In addition, given the nature of grand jury proceedings, any attempt to authorize the arrest of putative witnesses cannot withstand constitutional scrutiny. Part I of this article examines whether grand jury proceedings have traditionally been considered criminal proceedings and concludes that they have not. Part II examines the text of the Material Witness Statute and related statutes and explains why under principles of statutory construction, the Material Witness Statute cannot be read to include grand jury witnesses. Finally, Part III argues that interpreting the Material Witness Statute to authorize the arrest of grand jury witnesses would violate the Constitution.

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7. Government's Post-Hearing Reply Memorandum at 25, United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003).

8. During his interrogations and in the grand jury, Mr. Awadallah readily admitted that he had been acquainted with one of the alleged September 11 hijackers, Nawaf Al-Hazmi, and a second man who usually accompanied him since they all attended the same San Diego mosque. But he testified that he could not recall the second man's name. The sole basis for the perjury indictment was a school notebook in Mr. Awadallah's handwriting which contained the second man's name, "Khalid" another purported hijacker. Although Awadallah corrected his testimony on the very next day, he was nonetheless indicted for perjury.

9. United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (Scheindlin, J.). Judge Scheindlin held that the fruits of the unlawful arrest—the allegedly perjurious testimony—must be suppressed.

10. United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003). A petition for rehearing *en banc* has been filed. As of the date of this article, there has been no decision on that petition.

II. Are Grand Jury Proceedings Criminal Proceedings?

The Material Witness Statute authorizes the arrest of material witnesses in "criminal proceedings." Is a grand jury proceeding a "criminal proceeding" as that term is utilized in the Material Witness Statute? The United States Supreme Court has made clear that while the grand jury is necessary to the initiation of the criminal process, it is separate and apart from that proceeding. The purpose of a grand jury is to inquire into the existence of "possible" criminal conduct.[11] The grand jury is a "body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[12] It is presumed to be "acting independently of either the prosecuting attorney or judge"[13] in order to "clear the innocent, no less than bring to trial those who may be guilty."[14] It acts as the "substantive safeguard against oppressive and arbitrary proceedings."[15] Clearly, a constitutional safeguard against the public opprobrium and oppression associated with criminal proceedings is not itself a "criminal proceeding."

To be sure, grand juries are addressed in Title 18 of the United States Code, entitled "Crimes and Criminal Procedure," and grand jury proceedings are governed by Rule 6 of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."). But that does not, by definition, render them "criminal proceedings."[16] The grand jury was not created by Congress when it passed Title 18 or by the United States Supreme Court when it promulgated the criminal rules. Rather, it is an institution that was incorporated into the Fifth Amendment by the Founders. Like its English ancestor, its basic

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11. Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

12. Costello v. United States, 350 U.S. 359, 362 (1956).

13. Stirone v. United States, 361 U.S. 212, 218 (1960).

14. United States v. Dionisio, 410 U.S. 1, 16-17 (1973).

15. Smith v. United States, 360 U.S. 1, 9 (1959); *see also* Wood v. Georgia, 370 U.S. 375, 390 (1962) ("[The grand jury is] a primary security to the innocent against hasty, malicious and oppressive prosecution . . . ser[ving] the invaluable function in our society of standing between the accuser and the accused."); *Ex Parte* Bain, 121 U.S. 1, 11 (1887) ("[T]he grand jury is a means of protecting the citizen against unfounded accusation, whether it comes from the government or be prompted by partisan passion or private enmity.").

16. The term "criminal proceeding" is defined neither in Title 18 nor the Federal Rules of Criminal Procedure.

purpose is to see whether there is a legitimate basis for instituting criminal proceedings.[17] Given that purpose, it is logical that when crafting statutory rules governing grand jury procedures, Congress would place them within Title 18 and the Fed.R.Crim.P. It does not follow, however, that an investigatory proceeding to determine whether a crime has been committed and whether to institute a criminal proceeding against an individual is itself a criminal proceeding.

The Second Circuit's decision in *United States v. Awadallah*[18] and the Ninth Circuit's 1971 decision in *Bacon v. United States,*[19] are the only federal appellate decisions to address whether a grand jury proceeding is a criminal proceeding in the material witness context. Both courts held that grand jury proceedings fall under the Material Witness Statute's scope. Both courts also recognized, however, that other appellate courts have specifically held that grand juries are not "criminal proceedings."[20]

Indeed, many courts have characterized grand jury proceedings as civil. For example, in 1973, two years after its *Bacon* decision, the Ninth Circuit decided *United States v. Alter,*[21] and held that the notice provisions of Rule 45 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") apply to grand jury subpoenas. In *In Re Grand Jury Proceedings (Manges)*[22] the same court held that the 60-day notice requirement for *civil* appeals under the Federal Rules of Appellate Procedure ("Fed. R. App. P.") 4(a) applied to contempt adjudications arising out of grand jury proceedings. The non-criminal nature of grand jury proceedings has also been recognized in the Third Circuit, which has held that a motion to quash a grand jury subpoena is a civil proceeding.[23] Similarly, in *United States v.*

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17. *Costello*, 350 U.S. at 362 ("The grand jury's basic purpose is to provide a fair method for *instituting* criminal proceedings. . . .") (emphasis added).

18. 349 F.3d 42 (2d Cir. 2003).

19. 449 F.2d 933 (9th Cir. 1971).

20. *See* United States v. Thompson, 319 F.2d 665, 668 (2d Cir. 1963) (collecting cases). In *Awadallah*, the Second Circuit also noted that the definition of "criminal proceeding" contained in Black's Law Dictionary "could suggest that grand jury proceedings lie outside the scope of § 3144." *Awadallah*, 349 F.3d at 52.

21. 482 F.2d 1016, 1020 (9th Cir. 1973).

22. 745 F.2d 1250 (9th Cir. 1984).

23. Lee v. Johnson, 799 F.2d 31, 36-38 (3d Cir. 1986). In another case, the Court of Appeals for the Third Circuit noted that criminal cases are prosecutions to secure

Bonnell[24] a grand jury subpoena was treated as a civil action for purposes of certifying an appeal from an order refusing to stay its enforcement.

Contrast the Ninth Circuit decision in *Bacon*. There the court reasoned that Congress must have viewed criminal procedures and proceedings to include grand jury proceedings because Rule 2 of the Fed.R. Crim. P. states that the Rules are "intended to provide for the just determination of every criminal proceeding," and the Rules include both Rule 6, governing grand juries, and Rule 17, governing subpoenas.[25] But that reasoning, as the District Court found in *Awadallah*, is specious:

> Rule 2 does not define the phrase "criminal proceeding" as it is used throughout the Federal 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 [former] Rule 46 . . . 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."[26]

Any reliance on Rule 2 for the proposition that a grand jury proceeding is a criminal proceeding is further negated by examining other instances where the term "criminal proceeding" is utilized. Specifically, Fed. R. Crim. P. 7 and 12 require certain elements in criminal proceedings that are not present in grand jury proceedings. Fed. R. Crim. P. 7(c)(2) provides that "[n]o judgment or forfeiture may be entered in a criminal proceeding unless

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convictions for criminal conduct, civil cases are everything else. United States v. Lavin, 942 F.2d 177, 181 (3d Cir. 1991).

24. 483 F. Supp. 1091 (D.Minn. 1979).

25. 449 F.2d at 940-41 (quoting FED. R. CRIM. P. 2).

26. United States v. Awadallah, 202 F. Supp. 2d 55, 74 (S.D.N.Y. 2002). In the *Awadallah* appeal the government argued that Rule 17(a)'s reference to the title "if any" of the proceeding "makes clear that the criminal proceeding may be a grand jury proceeding because all indictments have titles" is unpersuasive. That Rule, which was patterned after Rule 45 FED. R. CIV. P. plainly contemplates issuance of subpoenas before an action or proceeding has been commenced.

the indictment or the information provides notice. . .” to the defendant. However, there is no indictment during a grand jury investigation, and no judgment may be entered during the investigation. Fed. R. Crim. P. 12 states that “[p]leadings in criminal proceedings shall be the indictment and the information, and the pleas shall be not guilty, guilty and nolo contendere.” Contrast grand jury proceedings, where there is no indictment until all the witnesses are examined and the grand jury has completed its work. And, of course, no pleas are necessary because no one has yet been charged with a crime.

Therefore, since courts have held that civil procedures apply to grand jury proceedings and criminal proceedings require elements that grand jury proceedings lack, grand jury proceedings are not plainly within the Material Witness Statute’s scope. Moreover, as discussed in the following section, if the rules of statutory construction are applied, it becomes evident that the Material Witness Statute does not authorize the arrest of grand jury witnesses.

III. Statutory Construction And the Material Witness Statute

Statutory construction must commence with the words of the statute itself.[27] Before resorting to legislative history, the meaning of ambiguous terms should be determined by examining the specific context in which the terms are used and the broader statutory scheme.[28] Statutory phrases must not be considered in isolation.[29] Rather, a court must look “to the provisions of the whole law and to its object and policy”[30] because a statute’s structure clarifies any ambiguity in the literal language.[31]

As discussed above, the term “criminal proceeding” is, at best, ambiguous. But under the principle of *noscitur a sociis*, any ambiguity in a term may be eliminated “by the company it keeps.”[32] This

27. Connecticut v. United States Dep’t of Interior, 228 F.3d 82 (2d Cir. 2000).

28. Castellano v. City of New York, 142 F.3d 58, 67 (2d Cir. 1998) (citing Robinson v. Shell Oil Co., 519 U.S. 337 (1997)); *see also* Conroy v. Aniskoff, 507 U.S. 511, 515 (1993) (holding that the meaning of a statute, plain or not, depends on its context).

29. United States v. Morton, 467 U.S. 822, 828 (1984).

30. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (citations omitted).

31. Castillo v. United States, 530 U.S. 120, 124 (2000).

32. Gustafsen v. Alloyd Co., 513 U.S. 561, 575 (1995).

principle requires a court to avoid ascribing to a term a meaning so broad that it is inconsistent with its accompanying words because to do so would give "unintended breadth to the Acts of Congress."[33] When this principle is applied to the Material Witness Statute it is clear that while the statute does not define a "criminal proceeding," the accompanying words and sentences in that statute and closely related statutes demonstrate that the term does not include grand jury proceedings.

A. The Requirement That The Application Be Made By A "Party"

An application under the Material Witness Statute may only be made by a "party" to a criminal proceeding. The phrase "by a party to a criminal proceeding" clearly "invokes the adversarial process – a proceeding where there is a prosecutor and a defendant."[34] The grand jury is not an adversarial proceeding, let alone a criminal one. Rather, it is an investigatory body whose primary purpose is to protect individuals from "the vast power of government."[35] As an independent body, it is charged with determining whether a criminal proceeding should be initiated.[36] A "party" to a criminal proceeding does not exist until *after* the grand jury has returned an indictment and a criminal proceeding is instituted.[37]

In their brief to the Second Circuit in *Awadallah*, the government cited *Black's Law Dictionary* as providing an "obvious" definition of a party: "one who takes part in a transaction."[38] The government argued that because the United States Attorney takes part in the grand jury's transactions, that office is the "party" referred to in the Material Witness Statute.[39] But the government's reliance on that portion of *Black's Law Dictionary* is misplaced because that definition of "party" is derived from the Uniform Com-

33. *Id.* at 575 (citing Jarecki v. G.D. Searle & Co, 367 U.S. 303, 307 (1961)).

34. United States v. Awadallah, 202 F. Supp. 2d 55, 62 (S.D.N.Y. 2002).

35. *Id.* at 62, n.12 (citing Branzburg v. Hayes, 408 U.S. 665, 687, n.23 (1972)).

36. Costello v. United States, 350 U.S. 359, 362 (1956).

37. *Awadallah*, 202 F. Supp. 2d at 62-63.

38. Government's Brief at 66, United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (01 Cr. 1026).

39. *Id.* Significantly, in *Awadallah* the arrest warrant application was not even supported by an affidavit from an Assistant United States Attorney. The affidavit was sworn to by an FBI Agent.

mercial Code.[40] Indeed, *Black's* defines "party" in connection with legal proceedings as "[o]ne by or against whom a lawsuit is brought a party to the lawsuit."[41] That definition clearly contemplates an adversarial proceeding, which the grand jury is not.

The Second Circuit adopted the government's position, reasoning (in the context of Fed. R. Crim. P. 15, discussed below) that "[t]he prosecutor and the witness may broadly be deemed parties, however, in the sense that each has interests to advance and protect before the grand jury."[42] But as the United States Supreme Court has emphasized, the United States Attorney is not a "party" to a grand jury proceeding. Rather, he or she is the grand jury's legal advisor.[43] While the United States Attorney's office does have an important role in securing evidence and presenting witnesses, it does so on behalf of the grand jury, not as a "party" appearing before it.[44] A grand jury subpoena is not the "compulsory process of the United States Attorney's Office . . . for the purpose of conducting his own inquisition."[45]

When interpreting a statute, a court must strive to give effective meaning to every clause and word.[46] Courts are thus reluctant to treat statutory language as surplusage in any setting.[47] Congress expressly limited the scope of the Material Witness Statute to applications by "parties". Since there are no parties to grand jury proceedings, Congress could not have intended that the statute be used to arrest and detain grand jury witnesses.

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40. *See* U.C.C. §1-201(26).

41. BLACK'S LAW DICTIONARY 1144 (7th ed. 1999).

42. United States v. Awadallah, 349 F.3d 42, 60 (2d Cir. 2003).

43. *See generally* United States v. Sells Engineering, 463 U.S. 418, 430 (1983).

44. *Id.*

45. Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954). *See also* United States v. Melvin, 546 F.2d 1, 5 (1st Cir. 1976) (recognizing that a U.S. Attorney may obtain subpoenas without the knowledge of grand jurors, but re-affirming grand jury's exclusive role as the sole agency for compelling disclosure).

46. Duncan v. Walker, 533 U.S. 167, 174 (2001).

47. *Id.* (citing Bobbit v. Sweet Home Chapter Communities for Greater Ore., 515 U.S. 687, 698 (1994)); Connecticut v. United States Dep't of Interior, 228 F.3d 82, 88-89 (2000) (citing American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982)).

B. The "Materiality" Requirement

The Material Witness Statute authorizes the arrest of only those witnesses whose testimony is "material." By its terms, only a judicial officer is empowered to determine whether the requisite materiality has been shown. Extending the statute to grand jury witnesses would render the materiality requirement superfluous for two reasons.

First, a grand jury's task is to inquire into the *existence* of *possible* criminal conduct.[48] A grand jury may act on "tips, rumors, evidence offered by the prosecutor or their own personal knowledge."[49] Hearsay is admissible.[50] Because of its broad investigatory powers, a grand jury witness cannot prevail on a motion to quash a testimonial subpoena on the ground that the information sought is irrelevant or compliance unreasonable.[51] By inserting a materiality requirement into the Material Witness Statute, Congress expressed a clear intent to limit the statute's arrest power to witnesses who possess information that might affect the result of a case. But if the Material Witness Statute is interpreted to encompass grand jury witnesses, the materiality requirement would be eliminated from the statute because, as stated above, virtually any kind of evidence is admissible before a grand jury.

Second, the secrecy that attaches to grand jury proceedings via Fed. R. Crim. P. 6(e) makes it "very difficult, if not impossible, for a judge to determine who is a material witness."[52] Courts are forced to rely on "a mere statement by a responsible official, such as the United States Attorney" when determining materiality.[53] Not surprisingly, in *Awadallah* the government took the position that the statute requires nothing more than a conclusory statement by a prosecutor. But if that position is upheld, the congressionally man-

48. Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

49. *Id.* at 701.

50. FED. R. EVID. 1101.

51. United States v. Dionisio, 410 U.S. 1, 16 (1973); *see also* United States v. Calandra, 414 U.S. 338 (1974) (holding that the Fourth Amendment exclusionary rule is inapplicable to grand jury proceedings).

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

53. *Id.* (quoting Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971)). *See also In re* DeJesus Berrios, 706 F.2d 355, 358 (1st Cir. 1983) (declining to require more than a mere statement because to do so "would require an exposure of inquiry being pursued by the grand jury").

dated requirement of judicial oversight would be written out of the statute. It must be presumed that Congress did not enact a superfluous requirement.[54] More importantly, no statute should be construed to permit the arrest and detention of individuals not suspected of any crime merely on the statement of a law enforcement official.

The Second Circuit rejected these arguments, agreeing instead with the reasoning of Chief Judge Michael Mukasey in *In Re Material Witness Warrant*.[55] In that case the court observed that notwithstanding grand jury secrecy, there is no great difficulty in assessing materiality in grand jury proceedings.[56] The court analogized to situations where district courts determine motions to quash, order witnesses held in contempt, or determine whether a privilege applies. Those determinations, however, have little, if anything, to do with "materiality". As pointed out above, a witness may not object to a testimonial subpoena on relevance grounds. Nor can the witness raise irrelevance as "just cause" for refusing to answer in contempt proceedings. Moreover, the issue of whether a privilege applies has nothing to do with the materiality of the information. For example, statements made by a witness to his or her attorney might be highly relevant on the question of whether a crime has been committed. However, they are still protected from disclosure by the attorney-client privilege.[57]

It has been argued that it is no more difficult to make a materiality determination for grand jury witnesses than for trial witnesses, who are clearly within the Material Witness Statute's scope. That argument, however, ignores reality. As discussed above, there is virtually no restriction on what is "material" to a grand jury investigation. Since the proceedings are secret, the government is under no duty to explain what relevance, if any, the witness's testimony might have. Conversely, prior to trial there is an indictment charging violations of specific laws. Time periods are generally set forth. There

54. Connecticut v. United States Dep't of Interior, 228 F.3d at 88, 89 (2d Cir. 2000).

55. 213 F. Supp. 2d 287 (S.D.N.Y. 2002).

56. *Id.* at 294-95.

57. *See In Re Grand Jury Subpoena*, 599 F.2d 504 (2nd Cir. 1979) (rules of privilege, including attorney client privilege, apply to grand jury proceedings).

is disclosure under Fed. R. Crim. P. 16 and *Brady v. Maryland*.[58] While it might not always be an easy task to "fit the witness's testimony into the grid of other evidence" prior to a trial,[59] at least there is a grid in which to place it.[60] During a grand jury investigation there is none. As the United States Supreme Court noted in *United States v. Dionisio*: "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find *if* a crime has been committed."[61]

If the Material Witness Statute is extended to grand juries, it would undermine clear congressional intent since it would permit the arrest and detention of individuals who possess immaterial information simply on the word of a prosecutor. Such a drastic expansion of the power to arrest and detain innocent people should be rejected.

C. The Bail Requirement: 18 U.S.C. § 3142

The Material Witness Statute provides that once arrested, the witness must be treated "in accordance with the provisions of section 3142 of [Title 18],"[62] which governs bail. The prefatory language of § 3142 explicitly states that it applies to proceedings "pending trial."[63] There is, of course, no trial *pending* during a grand jury investigation. Assuming *arguendo* that the word "trial" as used therein can be read to include a grand jury proceeding (which it cannot) the factors listed in § 3142 prove that the statute does not apply to grand jury witnesses. Congress requires that a judicial officer consider four factors; however, three of the factors (nature of the offense charged, weight of the evidence against the person, and

58. 373 U.S. 83 (1963).

59. *In re Material Witness Warrant*, 213 F. Supp. 2d at 295.

60. Chief Judge Mukasey cites to a decision he made involving a grand jury subpoena *duces tecum*. In contrast to testimonial subpoenas, subpoenas *duces tecum* are subject to the reasonableness requirement of the Fourth Amendment. United States v. R. Enters., Inc., 498 U.S. 292 (1991).

61. 410 U.S. 1, 13 (1973) (citations omitted) (emphasis added).

62. 18 U.S.C. § 3144.

63. 18 U.S.C. § 3142(a) states: "Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, *pending trial*, the person be [released] or [detained]." (emphasis added).

danger to the community posed by the person's release) are inapplicable to grand jury witnesses.[64]

In *Awadallah*, the Second Circuit ignored any incongruity, ruling that the provisions of § 3142 should govern insofar as they are applicable to grand jury witnesses.[65] Section 3142, however, should not be judicially rewritten. Indeed, to do so would violate a cardinal rule of statutory construction: Where a statute's language is "plain, 'the sole function of the courts is to enforce it according to its terms.'"[66] Section 3142 provides that a judicial officer "shall" take into account the factors set forth in § 3142(g). Yet, if applied to grand jury witnesses, three of the four factors are rendered superfluous because there is no offense charged, no defendant, and no danger to the community if the (nonexistent) defendant is released. Thus, applying the Material Witness Statute and § 3142 to grand jury witnesses is "an attempt to fit a square peg into a round hole."[67]

D. The Requirement That Witnesses Be Deposed or Released

When enacting the Material Witness Statute, Congress clearly was concerned that material witnesses suspected of no wrongdoing would be released as soon as possible.[68] To facilitate their release, Congress provided that "[n]o material witness may be detained . . . if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure

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64. 18 U.S.C. § 3142(g) specifically states:

> The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person . . . take into account the available information concerning—
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> (1) the nature and circumstances of the offense charged. . .;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person. . .; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

65. United States v. Awadallah, 349 F.3d 42, 61 (2d Cir. 2003).

66. United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

67. United States v. Awadallah, 202 F. Supp. 2d 55, 64 (S.D.N.Y. 2002). *See also Duncan*, 533 U.S. at 174 (stating courts are required to give effect to statutory language especially where term "occupies so pivotal a place in the statutory scheme").

68. Congress faced the same concern in enacting the Material Witness Statute's predecessor statute, former 18 U.S.C. § 3149 (repealed 1984).

of justice."[69] The deposition must be taken "pursuant to the Federal Rules of Criminal Procedure".[70]

Fed. R. Crim. P. 15 governs depositions in criminal cases. It provides for depositions of a "party['s]" witnesses to "preserve testimony for *trial*."[71]. This unambiguous language proves that Congress did not intend the Material Witness Statute to apply to grand jury witnesses because grand jury testimony is not intended to be used at trial.

Moreover, the deposition procedures required under Rule 15, while appropriate for trial witnesses, are incompatible with grand jury proceedings. Such depositions may only take place upon notice to all parties.[72] As discussed above, there are no parties to grand jury proceedings. Also, the Confrontation Clause grants the defendant the right to be present at a deposition taken to preserve testimony for a criminal trial.[73] But, of course, during a grand jury investigation, there is no defendant and the proceedings are secret.[74] Rule 15(d) provides that the "scope and manner of the deposition examination and cross examination must be the same as would be allowed during the *trial*", clearly contemplating that the Federal Rules of Evidence apply.[75] With limited exceptions, those rules do not apply during grand jury proceedings.[76] That neither Congress nor the Supreme Court promulgated separate procedures for grand jury witnesses or explicitly stated that Rule 15 procedures apply to them "only shows that Congress could not have intended that [the Material Witness Statute] would apply to both pretrial and grand jury proceedings."[77]

Even the government has recognized that Rule 15 cannot be applied to grand jury witnesses:

> The deposition provision of [the Material Witness Statute] does not apply [to grand jury witnesses]. . . The pro-

69. 18 U.S.C. § 3144.
70. *Id.*
71. FED. R. CRIM. P. 15 (emphasis added).
72. FED. R. CRIM. P. 15(b).
73. *Id.*
74. FED. R. CRIM. P. 6(e).
75. FED. R. CRIM. P. 15(d) (emphasis added).
76. FED. R. EVID. 1101(d)(2).
77. United States v. Awadallah, 202 F. Supp. 2d 55, 65 (S.D.N.Y. 2002).

> vision is meant to address the detention of material witnesses in the pretrial, as opposed to the grand jury, context. Indeed, the provision makes explicit reference to the taking of depositions in accordance with the Federal Rules of Criminal Procedure, and Rule 15, regarding depositions, addresses depositions in lieu of *trial* testimony in the pretrial context, after charges have been initiated. Thus, the rule contemplates the taking of depositions on notice to the opposing party; no such "opposing party" exists until criminal charges against a defendant have been filed.[78]

Apparently recognizing that this position is in irreconcilable conflict with their claim that the Material Witness Statute applies to grand jury witnesses, the government changed its position in its *Awadallah* appeal. Relying on Chief Judge Mukasey's opinion in *In Re Material Witness Warrant*, the government asserted that a deposition to preserve grand jury testimony might be available, but that it would "differ in procedure from a deposition to preserve trial testimony".[79] The Second Circuit adopted that view. The court noted that the under Rule 15(e), a court may modify certain procedures, such as limiting the witness's right to counsel and/or permitting the introduction of hearsay.[80] But that conclusion represents a misreading of Rule 15(e). As the complete text of that subdivision demonstrates, while a court may make *additional* orders, the scope of a Rule 15 deposition "must" be the same as allowed during a trial.[81] A court is not free to fashion procedures that are neither

78. *Awadallah*, 202 F. Supp. 2d at 65 (citations omitted).

79. Brief for the Government at 69, United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (No. 02-1269).

80. United States v. Awadallah, 349 F.3d 42,60 (2d Cir. 2003).

81. FED. R. CRIM. P. 15(e) provides as follows:

> *Manner of Taking.* Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:
>
> (1) A defendant may not be deposed without that defendant's consent.
>
> (2) The scope and manner of the deposition examination and cross examination must be the same as would be allowed during trial.
>
> (3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

authorized by Congress nor promulgated by the United States Supreme Court.[82] "Under our Constitution, it is the legislature that weighs the policy concerns for and against enacting certain laws, which the courts then construe and apply."[83] The unambiguous text of the Material Witness Statute requires that any deposition be conducted pursuant to the Fed. R. Crim. P. The only criminal procedure rule governing depositions is Rule 15. That rule limits depositions to preserving trial testimony and requires that specific procedures be utilized.[84]

The Rule 15(a) deposition procedure is an integral part of the Material Witness Statute's statutory scheme because it provides the means whereby an arrested witness may secure his or her freedom. Since that procedure is unavailable to grand jury witnesses, Congress could not have intended them to be included in the Material Witness Statute.[85]

E. Rule 46 of the Federal Rules of Criminal Procedure

Fed. R. Crim. P. 46 is entitled "Release From Custody,"[86] and subsection (a) of that rule is entitled "Before Trial,"[87] which supports the conclusion that the Material Witness Statute was not in-

82. Bank of Nova Scotia v. United States, 487 U.S. 250, 254-55 (1988).

83. *Awadallah*, 202 F. Supp. 2d at 73 (citing Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944) ("While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function . . . Construction is not legislation and must avoid that retrospective expansion of meaning which properly deserves the stigma of legislation.") (citations omitted)).

84. FED. R. CRIM. P. 15.

85. Duncan v. Walker, 533 U.S. 167, 174 (2001). *Duncan* involved the application of the one year statute of limitations for the filing of federal habeas corpus petitions seeking review of State court judgments. 28 U.S.C. §2244(b)(2), the statutory tolling provision, provides that the one year limitations period is tolled while a properly filed "State post-conviction or other collateral review. . .is pending. . .". The petitioner argued that his prior *federal* habeas petition fell under the category of "other collateral review" and therefore tolled the statute. The Court rejected that argument, holding that to do so would render the word "State" mere surplusage in a statute where that term "occupies so pivotal a place in the statutory scheme."

86. FED. R. CRIM. P. 46.

87. FED. R. CRIM. P. 46(a) provides: "Before Trial. The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release."

tended to apply to grand jury witnesses.[88] In their *Awadallah* appeal, the government argued that because a grand jury investigation occurs "prior to trial" that section encompasses grand jury proceedings.[89] The fatal flaw in that reasoning, however, is Rule 46(a)'s requirement that release prior to trial should be governed by § 3142."[90] Section 3142 specifically refers to release "pending" trial. A trial is not pending until there is a defendant charged with a crime. The reference to § 3142 in Rule 46(a) undercuts the government's argument that Rule 46(a) applies to grand jury proceedings.

Fed. R. Crim. P. 46(g) refers to "each defendant and witness" held in custody "pending indictment, arraignment or trial".[91] It has been argued that since the section can be read to include the detention of a "witness" pending "indictment", grand jury proceedings are included. However, a criminal defendant and a material witness can be detained pending indictment or arraignment if, for example, a criminal complaint has been filed. The witness could appropriately be detained for trial on those charges and/or be deposed pursuant to Rule 15.

Rule 46(h) also requires the government to state the reasons why a detained witness "should not be released with or without the taking of a deposition pursuant to Rule 15(a)."[92] As discussed above, that rule only authorizes depositions to preserve trial testimony, not grand jury testimony. Since former Rule 46(a) required a report for "each" detained witness, its reference to Rule 15(a), which applies only to trial witnesses, is further proof that Congress only contemplated the detention of pre-trial witnesses, not grand jury witnesses.

F. Legislative History

Prior to the enactment of the Fed. R. Crim. P. in 1946, the Material Witness Statute only authorized the detention of witnesses

88. *See* Connecticut v. United States Dep't of Interior, 228 F.3d 82, 89 (2000) (resorting to a section's title is appropriate where term is ambiguous).

89. Brief for Government at 70n., United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (No. 02-1269).

90. FED. R. CRIM. P. 46(a).

91. FED. R. CRIM. P. 46(h).

92. *Id.*

whose testimony would be necessary "*on the trial* of any criminal proceeding".[93] The 1946 enactment of former Fed. R. Crim. P. 46(b), titled "Bail for Witness," authorized a court to require bail "[i]f 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. . ."[94] The *Bacon* court held that by removing the word "trial" Congress intended to expand the statute to include grand jury witnesses. That holding is flawed, however, because the Advisory Committee Note to former Rule 46(b) expressly states that the rule is "substantially a restatement of *existing* law."[95] For nearly 200 years the law had authorized the arrest of only potential trial witnesses.[96] Clearly, if Congress had intended to expand the authority to arrest and detain witnesses beyond what had existed for nearly 200 years, it would not have characterized the change as a "restatement of existing law." Indeed, "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect."[97] In addition, the *Bacon* court ignored the rule that courts will not presume a change in substantive law unless that change is clearly expressed.[98] Congress did not clearly express a change when they replaced the term "trial" with "criminal proceeding" in enacting former Rule 46.

Nothing in the legislative history of the Material Witness Statute or its predecessor statutes provides clear evidence that Congress intended to authorize the arrest and detention of grand jury witnesses. The Second Circuit thus was forced to rely on a single footnote in a Committee report accompanying the 1984 re-enactment

93. 28 U.S.C. § 659 (repealed 1948) (emphasis added).

94. Fed. R. Crim. P. 46(b). This rule replaced former § 659.

95. Fed. R. Crim. P. 46(b) advisory committee's note (emphasis added).

96. See United States v. Awadallah, 202 F.Supp.2d 55, 75 n.25 (S.D.N.Y. 2002), for an explication of pre-1946 material witness statutes.

97. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993).

98. Keene Corp. v. United States, 508 U.S. 200, 208 (1993); Fourco Glass Co. v. Transmire Prods. Corp., 353 U.S. 222, 227 (1957). In addition, the *Bacon* court's inability "to accept" that the Supreme Court intended that the statute only apply to pre-trial witnesses is not, as the District Court pointed out, a legally valid reason for rejecting the clear statement in the legislative history. "Whatever merits these and other policy arguments may have, it is not the province of [the courts] to rewrite the statute [or Rules] to accommodate them." Artuz v. Bennett, 531 U.S. 4, 10 (2000).

of the law for the proposition that Congress intended to expand the statute to authorize the arrest of grand jury witnesses.[99] That footnote, which immediately follows the term "criminal proceeding" in the Committee Report, states: "A grand jury is a 'criminal proceeding' within the meaning of [18 U.S.C. § 3144]. *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971)."[100] The significance given to this isolated footnote is unwarranted.

Subsequent *legislation* declaring the intent of an earlier statute is entitled to "great weight."[101] However, a *statement* in a conference report of such legislation as to what Congress believes an earlier statute meant is "obviously less weighty".[102] For that footnote to be controlling it must be: 1) an authoritative interpretation of what the 1966 statute meant, or 2) an authoritative expression of what the 1984 Congress intended.[103] The footnote fails on both counts. First, the footnote cannot represent an authoritative interpretation of the term "criminal proceeding" as used in either the 1948 or 1966 law since "it is the function of the courts, not the Legislature to say what an enacted statute means."[104] Second, the 1984 Congress simply reenacted language that was present in material witness statutes since 1946, thus the footnote cannot explain any words that the 1984 Committee itself drafted. As the *Pierce* court noted, "[q]uite obviously, reenacting precisely the same language would be a strange way to make a change."[105] It was in 1946 that the term "trial" was replaced by "criminal proceeding". At that time, Congress specifically noted that the law was not being substantively changed. The 1966 and 1984 statutes reenacted the identical language. Absent an express acknowledgement by Congress that it was

99. United States v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003).

100. *Id.* (citing S. Rep. No. 98-225, at 28 (1983)).

101. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81 (1969).

102. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'") (citations omitted); United States v. Price, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

103. Pierce v. Underwood, 487 U.S. 552, 566 (1988).

104. *Id.* (holding that a subsequent committee's reference to several correct judicial interpretations of reenacted statute were not authoritative).

105. *Id.* at 567.

making a substantive change in the meaning of that term, the footnote is not "authoritative".[106]

This interpretation is reinforced by the changes that the 1984 Congress did acknowledge. The text of the report notes only two changes to existing law. The 1984 statute authorizes a judicial officer to order: 1) an arrest in the first instance, and 2) the detention of a material witness pursuant to § 3142. The former change was a legislative adoption of the implied power to order an arrest recognized in *Bacon*. It was the Committee's understanding that this power, which was expressly stated in earlier versions of the statute, was inadvertently omitted during the 1946 changes.[107] Yet Congress felt it was necessary to incorporate the arrest power directly into the statute's text. Had the 1984 Congress also intended to legislatively enact that portion of *Bacon*, which sanctioned the arrest of grand jury witnesses—a power not expressly recognized for over 200 years—that change would have been either incorporated into the text or, at a minimum, acknowledged as a material change.[108] One cannot rely on a mere footnote as support for such a major change in the government's arrest power.[109] Moreover, this is not a case where Congress reenacted a statute that has been given a settled judicial interpretation.[110] Prior to 1984, only two cases addressed

106. *Id. See also* Shannon v. United States, 512 U.S. 573, 583 (1994) (declining to read into statute procedure "endorsed" by the Senate Committee, but not contained within statute's text).

107. S. REP. NO. 98-225, at 28-29 (1983).

108. United States v. Price, 361 U.S. 304, 313 (1960) (where report refers to amendment as only a material change from existing law, it is an error to infer other substantive changes).

109. The unreliability of citing cases in Committee Reports was noted by Justice Scalia in his concurring opinion in *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989):

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself. I decline to participate in this process.

110. *Cf.* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (where there has been a *uniform* judicial interpretation of a statutory term, courts are justified in presuming Congress was aware of that interpretation when it re-enacted the statute).

whether a grand jury is a "criminal proceeding" under Title 18. The *Bacon* court found that it was. In *United States v. Thompson*,[111] the Second Circuit held that a grand jury is not a criminal proceeding. Two conflicting decisions do not produce "settled" law.[112]

III. Constitutional Considerations

Extending the Material Witness Statute to grand jury witnesses would raise significant constitutional problems. "If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [courts] are obligated to construe the statute to avoid such problems."[113] Thus, the courts should apply the Material Witness Statute only to trial witnesses.

Extending the statute to grand jury witnesses would eviscerate the Fourth Amendment's prohibition against unreasonable seizures and raise serious due process concerns. It would cede to the executive the unchecked authority to arrest and detain individuals simply on the word of a government official that he or she possesses "material" information. Moreover, that detention could continue indefinitely since the statute does not require that the witness appear before the grand jury within any specified period of time and does not offer the protection accorded trial witnesses. Consequently, the importance of the government's interest does not outweigh the extent of the intrusion on individual liberty.[114]

The Fourth Amendment prohibits unreasonable searches and seizures. The Material Witness Statute authorizes an individual's arrest, which is the classic seizure.[115] Applying the balancing test mandated by *Terry v. Ohio*[116] and *Tennessee v. Garner*,[117] to the Material Witness Statute does not withstand Fourth Amendment scrutiny if the statute is extended to grand jury witnesses. Under *Terry*, an individual may be detained briefly, and his outer clothing searched

111. 310 F.2d 665, 668 (2d Cir. 1963).
112. *In Re* Century Prods., Inc. v. Caplan, 22 F.3d 37 (2d Cir. 1994).
113. INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (citations omitted).
114. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 8 (1985); Terry v. Ohio, 392 U.S. 1, 21 (1968).
115. *Terry*, 392 U.S. at 16.
116. *Id.* at 21.
117. 471 U.S. at 8.

if a police officer is able to point to "specific and articulable facts which, . . . warrant that intrusion," and not inarticulate hunches.[118] Those facts must be presented in a manner permitting evaluation by the "detached neutral scrutiny of a judge."[119] Under the Material Witness Statute, however, a conclusory statement by a government official can satisfy the materiality requirement.[120] Moreover, virtually anything can be "material" in a grand jury investigation.[121] Thus, the grand jury may subpoena and, if the Material Witness Statute is so construed, deprive someone of their liberty on nothing more than a "hunch".[122] If applied to grand juries, the Material Witness Statute would sanction an arrest upon far less information than is constitutionally required for a *Terry* stop. Such a conclusion is plainly at odds with the Fourth Amendment.

Investigating criminal behavior is a government interest, and this interest may justify a temporary seizure.[123] For pre-trial witnesses, the seizure is limited by the availability of depositions pursuant to Fed. R. Crim. P. 15(a). That Rule provides a "reasonable balance among the three competing interests that are at stake when a defendant is prosecuted: Society's interest in enforcing the law, a defendant's Sixth Amendment right to confront the witnesses against him, and a witness's liberty interest."[124] But the deposition procedure is unavailable to grand jury witnesses. The unavailability of a Rule 15 deposition "would eviscerate the limitation that Congress carefully placed upon the government's power to detain uncharged witnesses."[125]

The potential for Fourth Amendment violations is heightened in the grand jury context because presentment of grand jury testimony is at the discretion of the United States Attorney and subject

118. 392 U.S. at 21.

119. *Id.*

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

121. *See* discussion *infra* Section II(b).

122. Branzburg v. Hayes, 408 U.S. 665 (1972). *See also In re* Sinadinos, 760 F.2d 167, 169-72 (7th Cir. 1985) (upholding the right of a grand jury to subpoena information already in its possession).

123. *Terry*, 392 U.S. at 21.

124. United States v. Awadallah, 202 F. Supp. 2d 55, 78 (2002).

125. *Id.*

to the availability of the grand jury.[126] As the *Awadallah* case vividly illustrates, the intrusion upon Mr. Awadallah's liberty—and dignity—far exceeded any legitimate government interest. As set forth in detail above, Mr. Awadallah was held under onerous, high-security prison conditions for 20 days before he was summoned to the grand jury.[127] Although he requested a deposition on his first appearance in court, that request was ignored. To him, any of the purported protections in the Material Witness Statute were, as Judge Schleindlin found, "meaningless,"[128] thereby denying him due process of law.[129]

IV. Conclusion

The United States Supreme Court has stated that "if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task."[130] If the Material Witness Statute is extended to grand jury witnesses, a prosecutor's power to arrest and indefinitely detain would be virtually unlimited. In a society where "liberty is the norm, and detention . . . without trial [a] carefully limited exception"[131] that result cannot be countenanced.

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126. Chief Judge Mukasey opined that "the inability to convene a grand jury promptly, or to arrange a witness's prompt appearance before it, generally will not be the cause of delay in taking the testimony of a grand jury witness. . ." *In Re* Material Witness Warrant, 213 F. Supp. 2d 287 (2002). The twenty-day, high-security detention of Mr. Awadallah during a time when a grand jury *was* convened refutes that observation. Assuming *arguendo* that Chief Judge Mukasey is correct, the fact remains that the statute contains no limitation on how long a grand jury witness may be held before being called to testify. That power remains with the government.

127. *See supra* text accompanying notes 4-7.

128. *Awadallah*, 202 F. Supp. 2d at 79.

129. Addington v. Texas, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

130. United States v. Sells Engineering, 463 U.S. 418, 434-35 (1983) (citing United States v. Mara, 410 U.S. 19, 45-46 (1973) (Marshall, J. dissenting)).

131. United States v. Salerno, 481 U.S. 739, 755 (1987).

POSTSCRIPT: REPRESENTING A MATERIAL WITNESS; SOME SUGGESTIONS FOR PRACTITIONERS

Individuals arrested under the Material Witness Statute are entitled to appointment of counsel pursuant to the Criminal Justice Act when making an initial appearance before a magistrate.[132] At that initial appearance, counsel may request that the witness be released on bail.[133] Since the witness presumably was arrested upon a judicial finding that he or she possessed material information and would not respond to a subpoena, counsel should demand immediate disclosure of the affidavit submitted in support of the arrest warrant. Counsel should argue that disclosure is necessary so that the witness can rebut possible erroneous and/or deliberate misrepresentations made to the issuing magistrate. Those facts might be relevant on both the issue of bail and/or whether there was, in fact, probable cause to support the arrest.[134] Accordingly, counsel

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132. 18 U.S.C. § 3006A(a)(1)(G) (2003) ("[R]epresentation shall be provided for any financially eligible person who . . . is in custody as a material witness").

133. *See* 18 U.S.C. § 3142.

134. In *Awadallah*, for example, the issuing magistrate was never informed of Awadallah's consistent cooperation in the 24 hours prior to his detention or his family ties within the United States. Judge Scheindlin concluded that these material omissions negated probable cause for Awadallah's arrest. In a particularly alarming portion of its decision, the Second Circuit held that even if the misrepresentations were excised from the affidavit and the omissions included, there would have been probable cause to believe that Mr. Awadallah would not have responded to a subpoena. The court found that Mr. Awadallah's failure to voluntarily come forward in the nine days between the September 11 attacks and his September 20 arrest *standing alone* provided probable cause for his arrest. United States v. Awadallah, 349 F.3d 42, 70 (2nd Cir. 2003). In his concurring opinion, Judge Chester Straub rejected that finding. After noting that nothing connected Mr. Awadallah to the hijackers other than a piece of papers containing an eighteen month old phone number, he observed as follows:

> It is absolutely true that the acts of terrorism on September 11 were the equivalent of acts of war and that the investigation galvanized the nation. In such a climate, it is difficult to view Awadallah's failure to come forward with relevant information (again assuming that Awadallah had what he understood to be relevant information) without some suspicion. At the same time, in light of the waves of anti-Muslim sentiment that also followed September 11, as the majority acknowledges, even law-abiding and conscientious members of the Muslim community might, at least initially, have been reluctant to come forward of their own volition.

Awadallah, 202 F. Supp. 2d at 78(Straub, J. concurring). In addition to the foregoing, the majority's interpretation that the material witness statute permits arrest for failure to volunteer information renders that statute unconstitutional under the Fifth Amendment. United States v. King, 402 F.2d 694, 697 (9th Cir. 1968)("18 U.S.C. §4 [mispri-

should, in the appropriate case, move for bail and to vacate the warrant. Counsel may move to vacate on the ground that the warrant was not supported by probable cause to believe that the witness either possessed material information and/or that the witness would not respond to a subpoena. If appropriate, counsel should also move (either at the initial hearing or thereafter) to vacate the warrant on the additional grounds that the Material Witness Statute does not authorize the arrest of a grand jury witness, and that the statute is unconstitutional as applied to grand jury witnesses.

If the foregoing fails to secure the client's freedom at the initial appearance, counsel should also move to have the witness brought before the grand jury forthwith and/or immediately deposed pursuant to the Fed. R. Crim. P. There may, of course, be important reasons for delaying any grand jury appearance even if the client remains incarcerated. Counsel surely needs to interview his or her client to determine, for example, whether the witness could be a target of the investigation, whether the witness needs to assert the Fifth Amendment privilege against self incrimination and to protect against a possible "perjury trap". Thus, any application must be based upon a strategy that is in the client's best interest.

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sion of a felony] would be unconstitutional under the Fifth Amendment if, and to the extent, applied to require one in defendant's circumstances, after learning of a bank robbery, to report that information to the authorities."); *accord* United States v. Daddano, 432 F.2d 1119, 1125 (7th Cir. 1970).