



**Congressional  
Research Service**

Informing the legislative debate since 1914

---

# Federal Material Witness Statute: A Legal Overview of 18 U.S.C. § 3144

Updated June 26, 2024

**Congressional Research Service**

<https://crsreports.congress.gov>

R41903

## Summary

This is an overview of the law under the federal material witness statute, 18 U.S.C. § 3144, which authorizes the arrest of material witnesses, permits their release under essentially the same bail laws that apply to federal criminal defendants, but favors their release after their depositions have been taken.

A list of citations to comparable state statutes is appended.

The report appeared in an earlier version as CRS Report RL33077, *Arrest and Detention of Material Witnesses: Federal Law In Brief*, by Charles Doyle (2006).

## **Contents**

Introduction .....	1
Arrest .....	3
Bail .....	6
Depositions .....	6
Related Matters.....	8

## **Appendixes**

Appendix A. 18 U.S.C. § 3144 (text) .....	9
Appendix B. Citations to State Material Witness Statutes .....	10

## **Contacts**

Author Information.....	10
-------------------------	----

## Introduction

Under the federal material witness statute, 18 U.S.C. § 3144, witnesses in a federal criminal case may find themselves arrested, held for bail, and in some cases imprisoned until they are called upon to testify.<sup>1</sup> The same is true in most if not all of the states.<sup>2</sup> Although subject to intermittent criticism,<sup>3</sup> it has been so at least from the beginning of the Republic.<sup>4</sup> The Supreme Court has never squarely considered the constitutionality of § 3144 or any of its predecessors, but it has observed in passing that, “[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained in the absence of bail, as a material witness.”<sup>5</sup> Even more telling may be an earlier remark from the Court to the effect that, “[t]he constitutionality of this [federal material witness] statute apparently has never been doubted.”<sup>6</sup>

<sup>1</sup> 18 U.S.C. § 3144 (text appended).

<sup>2</sup> A discussion of the provisions of state law is beyond the scope of this report. Citations to the state statutes are appended.

<sup>3</sup> 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, § 34, at 18–19 (2d ed. 1872) (“The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear and testify before the upper court. Sometimes the purposes of justices require that these recognizances should be with sureties, and occasionally the unpleasant result follows that a witness cannot obtain sureties, and he is detained in prison”); CODE OF CRIMINAL PROCEDURE § 58 note (AM. L. INST. Tentative Draft No. 1, 1928) (“One of the evils in connection with the administration of the criminal law in most states is the practice of confining for long periods of time, generally in the county jail, witnesses who cannot give bail”); Joseph Casula & Morgan Dowd, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 50 (1957) (“Failure of state and federal government to come up with a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation.”); Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1568 (1994) (“The continued use of material witness statutes will undoubtedly be an issue debated well into the next century. Whether the criminal justice system abandons this ancient practice in favor of a more humane policy toward the treatment of witnesses remains to be seen.”); Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13, 13 (2003) (“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”).

<sup>4</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789) (“[C]opies of the process [criminal complaint] shall be returned as speedily as may be into the clerk’s office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment.”); *see also*, Rev. Stat. § 879 (1878) (“Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case.”); 28 U.S.C. § 657 (1926); FED. R. CRIM. P. 46(b), 18 U.S.C. App. (1946); 18 U.S.C. § 3149 (1970).

<sup>5</sup> *Stein v. New York*, 346 U.S. 156, 184 (1953), *overruled on other grounds in Jackson v. Denno*, 378 U.S. 368 (1964); *see also*, *Blair v. United States*, 250 U.S. 273, 280–81 (1919) (“At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . . [B]y the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act, the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. . . . [The Revised Statutes] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions . . . it 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 . . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice to the forms and modes established in our system of government ” (citation omitted)); VIII WIGMORE ON EVIDENCE §§ 2190–92 (3d ed. 1940).

<sup>6</sup> *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929).

In spite of the concerns of some that the authority could be used as a means to jail a suspect while authorities seek to discover probable cause sufficient to support a criminal accusation<sup>7</sup> or as a preventive detention measure,<sup>8</sup> the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant.<sup>9</sup> Particularly in the early stages of an investigation, however, an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect.<sup>10</sup>

Moreover, the Supreme Court held in *Ashcroft v. al-Kidd* that “an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.”<sup>11</sup> The *Ashcroft* five-Justice majority, however, included Justice Kennedy who observed that the “Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the material witness statute in this case was lawful.”<sup>12</sup> The three other Justices who took part in the case (the ninth Justice was recused) shared that view and those who had declined to join the majority opinion, separately declared that “[w]hether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority’s opinion suggests.”<sup>13</sup>

It is clear, nevertheless, that the federal material witness statute is used with regularity<sup>14</sup> and most often in the prosecution of immigration offenses involving material witnesses who are foreign

<sup>7</sup> Robert L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L. REV. 1, 9 (1980) (“Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant.”).

<sup>8</sup> Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1225 (2002) (“Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention. . . . The government uses these laws to round up people because of what it expects them to do, rather than what it can prove they have done.”).

<sup>9</sup> *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) (“The district court noted (and we agree) that it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation.”); *In re De Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983) (“[N]o showing has been made that the arrest was a subterfuge designed to obtain non-testimonial evidence or to bring a target before the grand jury.” (even though the witness had been subpoenaed to appear before the grand jury to testify, provide hair samples, and take part in a lineup)). (Case law under § 3144 is relatively sparse and dated).

<sup>10</sup> *United States v. Nichols*, 77 F.3d 1277, 1278 (10th Cir. 1996) (Those subject to arrest under the federal statute included Terry Nichols (who was subsequently convicted for complicity in the Oklahoma City bombing); *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004) (Jose Padilla was subsequently transferred to military custody as an “enemy combatant”); *In re Fed. Grand Jury Proceedings 03-01*, 337 F. Supp. 2d 1218, 1220–21 (D. Or. 2004) (Brandon Mayfield’s fingerprint was erroneously thought to match one linked to the Madrid train bombing).

<sup>11</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011).

<sup>12</sup> *Id.* (Kennedy, J., concurring with whom Ginsburg, Breyer, and Sotomayor, JJ. joined as to Part I).

<sup>13</sup> *Id.* at 751–52 (Sotomayor, J., concurring in the judgment with whom Ginsburg and Breyer, JJ. joined). Justice Kagan took no part in the case.

<sup>14</sup> United States magistrate judges conducted 6,681 material witness hearings in FY2023; 6,341 in FY2022; 6,187 in FY2021; 4,070 in FY2003; 2,961 in FY2002; and 3,344 in FY2001, Administrative Office of the United States Courts, *Judicial Business of the United States Courts, Judicial Business*, Tables M-3 (2010–2023), <https://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. The annual reports of the Administrative Office of the United States Courts indicate that the statistics have not changed a great deal over time, United States magistrates conducted 6,865 material witness hearings in FY1981; 8,221 in FY1980; 6,481 in FY1978; 3,230 in FY1977; and 2,048 in FY1976, *Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

nationals.<sup>15</sup> Critics, however, contended that immediately after September 11, 2001, Muslims were disproportionately arrested and detained in abuse of the statute's authority.<sup>16</sup>

## Arrest

The federal material witness statute provides that:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [relating to bail]. No material witness may be detained because of inability to comply with any

<sup>15</sup> See, e.g., *In re Class Action Application of Habeas Corpus*, 612 F. Supp. 940 (W.D. Tex. 1985); *United States v. Nai*, 949 F. Supp. 42 (D. Mass. 1996); *United States v. Aguilar-Tamayo*, 300 F.3d 562 (5th Cir. 2002); *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003), all involving illegal alien smuggling. Statistics from the Administrative Office of the United States Courts indicate that an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur in judicial districts bordering Mexico:

District	FY2023	FY2022	FY2021	FY2020	FY2019
S.D. Cal.	2,333	2,143	1,402	2,151	2,379
D. Ariz.	1,653	1,112	271	995	1,456
D.N.M.	124	106	101	152	201
W.D. Tex.	34	48	43	587	1,021
S.D. Tex.	2,380	2,750	4,196	2,363	2,816

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3, (2023); *id.* (2022); *id.* (2021); *id.* (2019), <https://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. The historical picture is much the same:

District	FY1981	FY1980	FY1978	FY1977	FY1976
S.D. Cal.	2637	3636	2821	1095	755
D. Ariz.	603	691	978	770	366
D.N.M.	57	16	147	154	85
W.D. Tex.	651	734	1267	252	211
S.D. Tex.	2232	1946	2244	461	374

*Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

By comparison, United States magistrate judges in districts not bordering Mexico conducted far fewer:

District	FY2023	FY2022	FY2021	FY2020	FY2019
C.D. Cal.	4	42	48	28	68
W.D.N.Y.	0	3	2	1	0
N.D. Ill.	0	0	0	0	0
W.D. Okla.	0	1	5	0	4
D. Nv.	3	2	1	1	0

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3, (2023); *id.* (2022); *id.* (2021); *id.* (2019), <https://www.uscourts.gov/Statistics/JudicialBusiness.aspx>.

<sup>16</sup> 151 CONG. REC. S10296 (daily ed. Sept. 21, 2005), citing, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, 17 HUMAN RIGHTS WATCH 1–3 (June 2005), <https://www.hrw.org/report/2005/06/26/witness-abuse/human-rights-abuses-under-material-witness-law-september-11>.

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.<sup>17</sup>

An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates.<sup>18</sup> The statute applies to potential grand jury witnesses as well as to potential trial witnesses.<sup>19</sup> Section 3144 on its face authorizes arrest at the behest of any party to a criminal proceeding. In the case of a criminal trial, both the government and the defendants may call upon the benefits of § 3144.<sup>20</sup> Availability is a bit less clear in the case of grand jury proceedings. In a literal sense, there are no parties to a grand jury investigation other than the grand jury.<sup>21</sup> Moreover, it seems unlikely that a suspect, even the target of a grand jury investigation, would be considered a “party” to a grand jury proceeding. The purpose of § 3144 is the preservation of evidence for criminal proceedings. Potential defendants, even if they are the targets of a grand jury investigation, have no right to present evidence to the grand jury.<sup>22</sup> On the other hand, a federal prosecutor ordinarily arranges for the presentation of witnesses to the grand jury.<sup>23</sup> It is therefore not surprising that the courts seem to assume without deciding that the government may claim the benefits of § 3144 in the case of grand jury witnesses.<sup>24</sup>

Issuance of a § 3144 arrest warrant requires affidavits establishing probable cause to believe (1) that the witness can provide material evidence, and (2) that it will be “impracticable” to secure the witness’ attendance at the proceeding simply by subpoenaing him.<sup>25</sup> Neither the statute nor the case law directly address the question of what constitutes “material” evidence for purposes of § 3144, but in other contexts the term is understood to mean that which has “a ‘natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.’”<sup>26</sup> At the grand jury level, the government may establish probable cause to believe a

<sup>17</sup> 18 U.S.C. § 3144.

<sup>18</sup> *Id.* § 3156(a)(1) (“As used in sections 3141–3150 of this chapter—(1) the term ‘judicial officer’ means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia”). Section 3041 authorizes federal and state judges and magistrates to issue arrest warrants and conduct bail proceedings in federal criminal cases.

<sup>19</sup> *United States v. Awadallah*, 349 F.3d 42, 49–51 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933, 939–41 (9th Cir. 1971); *contra United States v. Awadallah*, 202 F. Supp. 2d 55, 61–79 (S.D.N.Y. 2002), *rev’d*, 349 F.3d 42 (2d Cir. 2003).

<sup>20</sup> *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992); *Nai*, 949 F. Supp. at 44.

<sup>21</sup> *United States v. Williams*, 504 U.S. 36, 47 (1992) (“[T]he grand jury . . . has not been textually assigned [by the Constitution] to any of the branches described in the first three Articles. It ‘is a constitutional fixture in its own right.’ In fact the whole theory of its function is that it belongs to no branch of the institutional Government . . . .” (quoting *United States v. Chanen*, 549 F. 2d 1306, 1312 (9th Cir. 1977))).

<sup>22</sup> *Chandler v. Moscicki*, 253 F. Supp. 2d 478, 490 (W.D.N.Y. 2003) (“[A] ‘suspect under investigation by the grand jury does not have a right to testify or have exculpatory evidence presented.’”) (quoting *Williams*, 504 U.S. at 52).

<sup>23</sup> Federal criminal subpoenas are issued in blank by the clerk of the court and filled in by “the party” requesting them. (Fed. R. Crim P. 17(a)). Federal prosecutors complete and see to the service of most grand jury subpoenas. *Lopez v. DOJ*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (“[T]he term ‘grand jury subpoena’ is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does.”).

<sup>24</sup> *See, e.g., Awadallah*, 349 F.3d at 66 (“[I]n the case of a grand jury proceeding, we think that a mere statement by a responsible official, *such as* the United States Attorney, is sufficient . . . .” (quoting *Bacon*, 449 F.2d at 943 on the question of affidavit sufficiency under § 3144)).

<sup>25</sup> *Id.* at 64; *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *Bacon*, 449 F.2d at 943; *United States v. Coldwell*, 496 F. Supp. 305, 307 (E.D. Okla. 1979).

<sup>26</sup> *Neder v. United States*, 527 U.S. 1, 16 (1999) (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, (continued...))

witness can provide material evidence through the affidavit of a federal prosecutor or a federal investigator gathering evidence with an eye to its presentation to the grand jury.<sup>27</sup> This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury's power of inquiry.<sup>28</sup>

As to the second required probable cause showing, a party seeking a material witness arrest warrant must establish probable cause to believe that it will be impractical to rely upon a subpoena to secure the witness' appearance. The case law on point is sketchy, but it seems to indicate that impracticality may be shown by evidence of possible flight,<sup>29</sup> or of an expressed refusal to cooperate,<sup>30</sup> or of difficulty experienced in serving a subpoena upon a trial witness,<sup>31</sup> or presumably by evidence that the witness is a foreign national who will have returned or been returned home by the time his testimony is required.<sup>32</sup> Evidence that investigators have

---

509 (1995) (materiality as an element of various federal fraud statutes)). In the context of the prosecution's failure to disclose material exculpatory evidence, "the materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

<sup>27</sup> *Awadallah*, 349 F.3d at 66; *Oliver*, 683 F.2d at 231; *Bacon*, 449 F.2d at 943.

<sup>28</sup> *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) ("Because [the grand jury's] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.'"); *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) ("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. 'A grand jury 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.'" (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).

<sup>29</sup> The government's affidavit merely asserted "[W]ith respect to the probability of Nichol's flight: 'Terry Nichols[]' renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena.'" *In re Material Witness Warrant Nichols*, 77 F.3d 1277, 1278 (10th Cir. 1996) (quoting affidavit of FBI Special Agent Henry C. Gibbons) (dismissing as moot an appeal from, *United States v. McVeigh*, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (denial of a motion to quash a material witness arrest warrant on grounds of impracticality)).

<sup>30</sup> *Coldwell*, 496 F. Supp. at 307 (As to impracticality, "the Dempewolf affidavit shows that (a) Alston has refused to cooperate with law enforcement officials. . . (b) Alston has indicated that he will not testify in this case unless the Oklahoma Bureau . . . satisfies certain conditions that . . . are impossible to meet; (c) two unsuccessful attempts have been made to serve Alston with a subpoena through his attorney; and (d) Alston's attorney has indicated that Alston has expressed a definite unwillingness to cooperate with the government").

<sup>31</sup> *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976) ("We are not here dealing with a witness before a grand jury where disregard of a subpoena would simply mean a continuation of the grand jury's deliberations until an appropriate warrant might be served and executed. Here, Feingold's testimony is needed at Nashi's trial. Once commenced, the trial would continue on consecutive days, and Feingold's testimony would be needed before the Government rested its case. Since Feingold is presumably in California, for the Government to have to defer its arrest warrant until he ignored a subpoena to attend the trial will preclude his testifying altogether. The . . . affidavit showed unsuccessful attempts to serve Feingold with a subpoena either through his California attorney or on seven different days at Feingold's home").

<sup>32</sup> Perhaps because the point seems too obvious for dispute or discussion, none of the reported federal cases appear to have held the impracticality requirement can be satisfied by evidence that a material witness, who is a foreign national illegally present in this country, may be overseas and thus beyond the reach of the court's subpoena when his testimony is required. The number of foreign material witnesses arrested and held for the trial of immigration prosecutions indicate the government has experienced little difficulty satisfying the impracticality requirement in such cases, *see, e.g., Torres-Ruiz v. U.S. Dist. Ct.*, 120 F.3d 933 (9th Cir. 1997); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992); *United States v. Nai*, 949 F. Supp. 42 (D. Mass. 1996); *United States v. Huang*, 827 F. Supp. 945 (S.D.N.Y. 1993).



experienced difficulties serving a particular grand jury witness may not be enough to justify the issuance of an arrest warrant in all cases.<sup>33</sup>

## Bail

With limited variations, federal bail laws apply to material witnesses arrested under § 3144.<sup>34</sup> Arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to retain private counsel.<sup>35</sup> The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is preferred, and finally as a last option detention is permitted.<sup>36</sup> A defendant is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety.<sup>37</sup> A material witness need only satisfy the appearance standard.<sup>38</sup> A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify.<sup>39</sup> If neither word nor bond nor conditions will suffice, the witness may be detained.<sup>40</sup> The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.<sup>41</sup>

## Depositions

Section 3144 declares that “[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” The

<sup>33</sup> *Arnsberg v. United States*, 757 F.2d 971, 976–77 (9th Cir. 1985) (“In the district court’s view, the difficulties encountered by agents . . . in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg’s presence by subpoena. . . . The facts do not show that Arnsberg was a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg’s attendance could not be secured by subpoena.”).

<sup>34</sup> 18 U.S.C. § 3144 (“[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.”).

<sup>35</sup> *Higazy v. Templeton*, 505 F.3d 161, 179 (2d Cir. 2007); *In re Class Action Application for Habeas Corpus*, 612 F. Supp. 940, 943–45 (W.D. Tex. 1985); 18 U.S.C. § 3142(f); *id.* § 3006A(a)(1)(G).

<sup>36</sup> 18 U.S.C. § 3142(a) (“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—(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section.”).

<sup>37</sup> *Id.* § 3142(b) (“The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”).

<sup>38</sup> *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003) (“Of course a material witness is not to be detained on the basis of dangerousness.”) (quoting *S. REP. 98-225*, at 26 n.90 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3562); *United States v. Nai*, 949 F. Supp. 42, 44 (D. Mass. 1996) (“[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.”).

<sup>39</sup> 18 U.S.C. § 3142(c).

<sup>40</sup> *Id.* § 3142(e).

<sup>41</sup> *Awadallah*, 349 F.3d at 63 n.15; 18 U.S.C. § 3142(g).

corresponding federal deposition rule permits the witness,<sup>42</sup> the government, or the defendant to request that a detained material witness' deposition be taken.<sup>43</sup> A court enjoys only limited discretion to deny a detained witness' request. The Fifth Circuit has observed that:

Read together, Rule 15(a) and § 3144 provide a detained witness with a mechanism for securing his own release. He must file a "written motion," requesting that he be deposed. The motion must demonstrate that his "testimony can adequately be secured by deposition," and that "further detention is not necessary to prevent a failure of justice." Upon such showing, the district court must order his deposition and prompt release.<sup>44</sup>

Other courts seem to agree.<sup>45</sup> The "failure of justice" limitation comes into play when release of the witness following the taking of his deposition would ultimately deny a defendant the benefit of favorable material testimony in derogation of his right to compulsory process.<sup>46</sup> It does not include the fact that a judicial officer will not be present at the taking of the deposition or that the witness is an unlawfully present alien subject to prosecution.<sup>47</sup>

Unlike the request of a detained witness, a government or defendant's request that a witness' deposition be taken must show "exceptional circumstances" and that granting the request is "in the interest of justice."<sup>48</sup> Nevertheless, the fact that a witness is being detained will often be weighed heavily regardless of who requests that depositions be taken.<sup>49</sup> The circuit courts appear to be divided over whether in compliance with a local standing order the court may authorize depositions to be taken sua sponte (on their own motion) in order to release a detained material witness.<sup>50</sup> In any event, whether any such depositions may be introduced in later criminal

---

<sup>42</sup> FED. R. CRIM. P. 15(a)(2) ("A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.").

<sup>43</sup> *Id.* 15(a)(1) ("A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.").

<sup>44</sup> *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992) (first quoting FED. R. CRIM. P 15(a); and then quoting 18 U.S.C. § 3144).

<sup>45</sup> *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 935 (9th Cir. 1997); *United States v. Nai*, 949 F. Supp. 42, 44 (D. Mass. 1996); *United States v. Huang*, 827 F. Supp. 945, 948 (S.D.N.Y. 1993).

<sup>46</sup> *Huang*, 827 F. Supp. at 950–52; *cf.* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872–73 (1982) (The government may deport "illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.").

<sup>47</sup> *Torres-Ruiz*, 120 F.3d at 936.

<sup>48</sup> FED. R. CRIM. P. 15(a)(1); *United States v. Allie*, 978 F.2d 1401, 1404 (5th Cir. 1992); *United States v. Lai Fa Chen*, 214 F.R.D. 578, 579 (N.D. Cal. 2003).

<sup>49</sup> *Lai Fa Chen*, 214 F.R.D. at 580–81 ("Other courts faced with a motion brought by the government to depose material witnesses have considered their detained status when finding exceptional circumstances. . . . Although detention itself does not amount to a per se 'exceptional circumstance' under Rule 15(a)(1), it would be the rare case when it would not" (first citing *Allie*, 978 F.2d 1401; and then citing *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988)). In *Rivera*, the court observed that "[i]f the court had denied the motion for depositions, these alien witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported." 859 F.2d at 1207.

<sup>50</sup> *Compare* *United States v. Lopez-Cervantes*, 918 F.2d 111, 112–14 (10th Cir. 1990) (depositions should not have been taken), *with Allie*, 978 F.2d at 1403–05 (depositions were validly taken).

proceedings will depend upon whether the defendant's constitutional rights to confrontation and compulsory process have been accommodated.<sup>51</sup>

## Related Matters

The government must periodically report to the court on the continuing justification for holding an incarcerated material witness.<sup>52</sup> While a material witness is being held in custody he is entitled to the daily witness fees authorized for attendance at judicial proceedings.<sup>53</sup> Upon his release, the court may also order that he be provided with transportation and subsistence to enable him to return to his place of arrest or residence.<sup>54</sup> Should he fail to appear after he has been released from custody he may be subject to prosecution,<sup>55</sup> an offense which may be punished more severely if his failure involves interstate or foreign travel to avoid testifying in a felony case.<sup>56</sup>

---

<sup>51</sup> *Allie*, 978 F.2d at 1406–08; *United States v. Eufrazio-Torres*, 890 F.2d 266, 268–71 (10th Cir. 1989); *Rivera*, 859 F.2d at 1207–09; *Huang*, 827 F. Supp. at 947–52.

<sup>52</sup> FED. R. CRIM. P. 46(h)(2) (“An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)”). It is unclear whether and to what extent this safeguard can be evaded by moving the witness from one district to another. *See United States v. Awadallah*, 436 F.3d 125, 129 (2d Cir. 2006) (“[O]n September 21, Awadallah was arrested on a material witness warrant and detained without bailed based on judicial findings that he possessed information material to the grand jury’s investigation of the September 11 attacks. Also on September 21, Awadallah was taken from the FBI office to the San Diego Metropolitan Correctional Center (‘MCC’) [in the Southern District of California], where he was held until September 27. Subsequently, he was moved to the San Bernardino County Jail [in the Central District of California] and then to a federal facility in Oklahoma City. On October 1, he was moved to the New York City MCC where he was held in solitary confinement.” (citation omitted)).

<sup>53</sup> 28 U.S.C. § 1821 (“(b) A witness shall be paid an attendance fee of \$40 per day for each day’s attendance. . . . When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.”).

<sup>54</sup> *Id.* § 4282 (“On the release from custody of . . . a person held as a material witness, the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest.”).

<sup>55</sup> A person, released for appearance as a material witness under this chapter relating to bail, who knowingly fails to appear before a court as required by the conditions of their release, shall be punished by a fine or imprisonment for not more than one year, or both. *Id.* § 3146(a), (b).

<sup>56</sup> 18 U.S.C. § 1073 (“Whoever moves or travels in interstate or foreign commerce with intent either . . . to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, is charged shall be fined under this title or imprisoned not more than five years, or both.”).

## **Appendix A. 18 U.S.C. § 3144 (text)**

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 § 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.

## Appendix B. Citations to State Material Witness Statutes<sup>57</sup>

**Alabama:** ALA. CODE §§ 15-11-12 to 15-11-14;  
**Alaska:** ALASKA STAT. § 12.30.050;  
**Arizona:** ARIZ. REV. STAT. §§ 13-4081 to 13-4084;  
**Arkansas:** ARK. CODE ANN. § 16-85-508;  
**California:** CAL. PENAL CODE §§ 878–83;  
**Colorado:** COLO. R. CRIM. P. 15(b);  
**Connecticut:** CONN. GEN. STAT. §§ 54-82j, 54-82k;  
**Delaware:** DEL. CODE ANN. tit. 11, § 5911;  
**Florida:** FLA. STAT. §§ 902.15, 902.17;  
**Georgia:** GA. CODE ANN. §§ 17-7-26, 17-7-27;  
**Hawaii:** HAW. REV. STAT. §§ 835-1 to 835-8;  
**Idaho:** IDAHO CODE §§ 19-820 to 19-824;  
**Illinois:** 725 ILL. COMP. LAWS ANN. 5/109-3;  
**Iowa:** IOWA CODE ANN. §§ 804.11, 804.23;  
**Kansas:** KAN. STAT. ANN. § 22-2805;  
**Kentucky:** Ky. R. Crim. P. 7.06;  
**Louisiana:** LA. STAT. ANN. § 15:257;  
**Maine:** ME. STAT. tit.15, § 1104;  
**Maryland:** Md. CODE ANN., CTS. & JUD. PROC. § 9-203;  
**Massachusetts:** MASS. GEN. LAWS ANN. ch. 276, §§ 45–52;  
**Michigan:** MICH. COMP. LAWS §§ 765.29, 765.30, 767.35;  
**Minnesota:** MINN. STAT. ANN. §§ 629.54, 629.55;  
**Mississippi:** MISS. CODE ANN. § 99-15-7;  
**Missouri:** MO. ANN. STAT. §§ 544.420 to 544.440;  
**Montana:** MONT. CODE ANN. § 46-11-601;  
**Nebraska:** NEB. REV. STAT. §§ 29-507 to 29-508.02;  
**Nevada:** NEV. REV. STAT. § 178.494;  
**New Hampshire:** N.H. REV. STAT. ANN. § 597:6-d;  
**New Jersey:** N.J. STAT. ANN. § 2C:104-1 to 104-9;  
**New Mexico:** N.M. STAT. ANN. § 31-3-7;  
**New York:** N.Y. CRIM. PROC. LAW §§ 620.10 to 620.80;  
**North Carolina:** N.C. GEN. STAT. § 15A-803;  
**North Dakota:** N.D. R. Crim. P. 46;  
**Ohio:** OHIO REV. CODE ANN. §§ 2937.16 to 2937.18;  
**Oklahoma:** OKLA. STAT. tit. 22, §§ 270-275;  
**Oregon:** OR. REV. STAT. §§ 136.608 to 136.616;  
**Pennsylvania:** Pa. R. Crim. P. 522;  
**Rhode Island:** R.I. Super. Ct. R.Crim.P.46, R.I. D. Ct. R. Crim. P. 46;  
**South Carolina:** S.C. CODE ANN. §§ 22-5-550, 22-5-560;  
**South Dakota:** S.D. CODIFIED LAWS § 23a-43-18;  
**Tennessee:** TENN. CODE ANN. §§ 40-10-107 to 40-10-112;  
**Texas:** TEX. CODE CRIM. PRO. ANN. art.24.23 to 24.27;  
**Utah:** UTAH R. CRIM. P. 7C;  
**Vermont:** VT. STAT. ANN. tit. 13, § 6605;  
**Virginia:** VA. CODE ANN. § 19.2-127;  
**Washington:** WASH. SUPER. CT. CRIM. R. 4.10;  
**West Virginia:** W. VA. CODE §§ 62-1c-15, 62-6-4;  
**Wisconsin:** WIS. STAT. ANN. § 969.01;  
**Wyoming:** WYO. STAT. ANN. § 5-6-206.

### Author Information

Charles Doyle  
Senior Specialist in American Public Law

<sup>57</sup> In addition, forty-nine states have adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings in one form or another, 11 U.L.A. 1.

---

## **Disclaimer**

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.