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TEXT AND PRETEXT: THE FUTURE OF MATERIAL WITNESS DETENTION AFTER 
ASHCROFT V. AL-KIDD

Catherine Cone∗

The Supreme Court, in its 2011 decision in Ashcroft v. al-Kidd, closed the door under the Fourth Amendment on a material witness’s ability to argue that the government pretextually held the witness for individual investigation rather than for testimony in an upcoming criminal proceeding. Although traditionally pretext was raised as a Fourth Amendment argument, a material witness can also claim pretext under the federal material witness statute by arguing that detaining officers did not comply with the statute, and thus, avoid the constitutional argument altogether. In al-Kidd, the Court did not address whether a material witness can instead argue pretext through the federal material witness statute directly.

Regardless of whether the country is in the immediate aftermath of an attack on its national security, like the 9/11 attacks, or in peacetime, the concerns that arose in relation to witnesses who were pretextually held following 9/11 are equally applicable. These concerns relate to the justification of a witness’s incarceration and include the government’s misrepresentation of how “material” a witness actually is to a criminal proceeding and the genuine flight risk a material witness poses.

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To protect against the reality of these concerns, courts should read a higher standard into the federal material witness statute before authorizing a warrant to detain a material witness. Today, in order to detain a material witness pursuant to the statute, the government must meet the plain terms of the materiality and impracticability requirements; however, courts have not definitively determined the evidentiary standard used to assess whether those terms have been met. Therefore, the door is still open for discussion concerning the evidentiary burden the government should be required to meet to legally detain a material witness under the statute.

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“There is no worse heresy than that the office sanctifies the holder of it.”

INTRODUCTION

Imagine that following a recent executive order authorizing the use of limited force in Syria, Reuters and the Associated Press confirm that an Iranian terrorist cell is lending support to Bashar al-Assad and planning an attack on U.S. soil. Within days of the alleged order, the Federal Bureau of Investigation (FBI) detains an Iranian man, a community college student who left Iran some years ago and currently resides in San Diego, California. FBI agents claim that the student must be detained as a material witness for the upcoming trial of a suspected Iranian terrorist. The government supports the detention by pointing to a piece of paper found in the terrorist’s car, which bears both the terrorist’s name and the student’s old phone number. The government also indicates that the student’s continuing ties to Iran and his unwillingness to come forward and share information regarding the terrorist further suggest that he is a flight risk. The student is arrested, and weeks later, he has yet to be called as a witness. Although hypothetical, this story closely

1. Letter from John Dalberg-Acton to Bishop Mandell Creighton (April 5, 1887), in HISTORICAL ESSAYS AND STUDIES 503, 504 (John Neville Figgis & Reginald Vere Laurence eds., 1907).
resembles the case of Osama Awadallah, a student who was held as a material witness in the wake of the 9/11 attacks.\(^2\)

The federal material witness statute authorizes a judge to order the arrest of an individual whose testimony “is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.”\(^3\) Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires a material witness’s release if his testimony “can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.”\(^4\) Typically, a material witness challenging his detention will claim that the arrest amounted to an illegal seizure under the Fourth Amendment because the purpose of the arrest was not to use the witness for testimony in another case, but was instead to hold him as a suspected criminal.\(^5\) Thus, the detainee’s argument looks to the subjective intent of the arresting officer in claiming that the detention was pretextual.\(^6\) While the Fourth Amendment is most commonly invoked by material witness detainees arguing pretext, it is no longer an effective legal argument that detainees have at their disposal.\(^7\)

\(^2\) See United States v. Awadallah (Awadallah II), 349 F.3d 42, 45–49 (2d Cir. 2003) (explaining that Osama Awadallah was arrested after the 9/11 attacks when federal agents searched a car that belonged to one of the hijackers of the plane that crashed into the Pentagon and found a piece of paper that read, “Osama 589-5316,” which was used to track down a San Diego address where Awadallah lived). On this evidence, the court considered Awadallah to be a flight risk and issued a warrant for his detention. \textit{Id.} at 47.


\(^4\) To be as factually accurate as possible, this Comment refers to a material witness’s rights through “he/his/him” terminology because the majority of the cases referenced involve male material witnesses’ experiences. However, this Comment intends to show prospectively that any proposed application of the federal material witness statute equally applies to male and female witnesses.


\(^6\) See HRW REPORT, supra note 6, at 18–19 (referencing Michael Chertoff’s admission that he, along with the U.S. Department of Justice (DOJ), and other architects of the post-9/11 counter-terrorism strategy routinely held material witnesses for criminal investigation rather than for use as a witness in an unrelated criminal proceeding).

\(^7\) See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (reasoning that “not a single judicial opinion had held that pretext could render an objectively reasonable
material witness can also claim that detention is illegally pretextual under the material witness statute by arguing that the detaining officers did not comply with the terms of the statute in seeking the detention. Claiming pretext under the material witness statute avoids the constitutional argument altogether.9

Even though material witnesses are no longer being detained in as great a number as they were immediately following the 9/11 attacks, pretextual use of the material witness statute is still relevant today because similar security issues that might motivate the government to detain individuals as material witnesses could arise in the future. Under those circumstances, it is plausible that the government could once again seek to detain material witnesses to bypass the more rigorous standards required to charge an individual with a specific crime.10 Moreover, the issues relevant to the detention of material witnesses who were pretextually held immediately following 9/11 equally apply to material witnesses who are pretextually held today. These issues include the government’s misrepresentation of how “material” a witness is to a criminal proceeding, the actual flight risk that a material witness poses, the witness’s liberty interest, and the court’s interest in conserving judicial resources.

This Comment argues that courts should condition the validity of warrants on clear and convincing evidence under the material witness statute because doing so would protect the witness’s significant liberty interest and help screen for instances of improper motive. In addition to utilizing the clear and convincing standard, conducting periodic status hearings would help to further minimize the pretextual use of the material witness statute because these measures combined would allow courts to regularly and thoroughly scrutinize the government’s proffered reasons for continued detention. This Comment explains why the federal material witness statute is the appropriate avenue to challenge pretextual detention of material witnesses.

9. See al-Kidd, 131 S. Ct. at 2087–88 (Ginsburg, J., concurring in the judgment) (implying that the Court did not explore whether the material witness statute itself was used as a pretext to detain al-Kidd as a suspected terrorist because the Court presumed al-Kidd was held under a validly obtained material witness warrant).

10. See infra Part I.B (illustrating how the events of 9/11, which resulted in an uptick in material witness arrests for individuals, who at times never testified but were later charged with a crime, could set a precedent for future breaches of national security).
Part I provides an overview of the material witness statute, including a discussion of the statute’s interpretive case law and the post-9/11 change in application of material witness detention that led to *Ashcroft v. al-Kidd.* Part I concludes by drawing analogies from the civil detention and equal protection contexts where courts apply higher evidentiary and judicial review standards because of the significant individual interests at stake. These analogies create three illustrations: (1) the clear and convincing standard affords greater protections to the civilly detained during initial determination and periodic review hearings; (2) heightened levels of judicial review monitors against pretext in equal protection cases; and (3) continuing challenges to the government demanding more accountability for illegal civil detentions or unequal and dissimilar treatment can yield parallel safeguards in the material witness context.

Part II builds on these borrowed standards to show that a court determining whether to detain a material witness can similarly require a higher standard of proof from the government in any application for a material witness warrant or petition for continued detention. Specifically, courts should grant the government’s application for a material witness warrant only where the government has provided clear and convincing evidence—the standard used in civil detention cases—in order to protect the witness’s liberty interest. Part II then discusses how using a heightened standard of review to assess the validity of material witness warrants helps detect improper motive by more readily smoking out pretext and protects against unnecessary and harmful deference to government interests at the expense of both the witness and the court. Additional judicial oversight of material witness detention can also ensure that the government is using the least restrictive means to detain material witnesses and is not falsely misrepresenting the reasons why it is appropriate to continue holding the witness. Finally, Part II recommends that courts move away from the era of great deference to government interests, which this Comment suggests can be accomplished through greater checks on prosecutorial and governmental abuse and through new governmental standards of sufficiency as to materiality and impracticability.

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I. BACKGROUND

A. The Federal Material Witness Statute: Origins, Purpose, and Practice

The government’s authority to arrest and detain material witnesses was the long-standing tradition under English Law, dating back to the founding of the United States.\(^1\) The Judiciary Act of 1789 provided that a witness whose testimony was found to be necessary by the court could be detained and imprisoned.\(^2\) The power to actually detain a witness developed as a necessary consequence of the establishment of a compulsory process for the appearance of material witnesses.\(^3\) Today, the federal material witness statute gives courts the power to exercise discretion in determining whether to incarcerate witnesses who refuse to testify, even when the arrest is not preceded by a subpoena.\(^4\)

The “duty to disclose knowledge of a crime” is so essential that Congress developed a practice of allowing for detention of material witnesses even when the knowing party is innocent.\(^5\) As one court has described,

[a] material witness is subject to detention not because he is suspected of a crime, but because he has knowledge of a crime, and because there is adequate doubt whether he will attend the trial . . . . The goal is the presentation at trial of the material knowledge possessed by the witness.\(^6\)

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1. Bacon v. United States, 449 F.2d 933, 938–39 (9th Cir. 1971); In re Francisco M., 103 Cal. Rptr. 2d 794, 802 (Ct. App. 2001) (citing Bacon, 449 F.2d at 938–39); see also Donald Q. Cochran, Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?, 18 GEO. MASON L. REV. 1, 4 (2010) (discussing that under the common law of England, the King’s subjects owed service of knowledge and discovery, which encompassed a duty to testify to material information).

2. See In re Francisco M., 103 Cal. Rptr. 2d at 794 (quoting Stein v. New York, 346 U.S. 156, 184 (1953)).

3. Id. at 805 (emphasis added).
Congress developed the federal material witness statute, 18 U.S.C. § 3144, to effectuate the use of a material witness’s testimony at trial.

1. **18 U.S.C. § 3144**

   The federal material witness statute, 18 U.S.C. § 3144, provides that a court may order the detention of a material witness only upon certain showings by the government that (1) “the testimony of [the] person is material in a criminal proceeding,” and (2) it is “impracticable to secure” the witness’s presence by subpoena.\(^1\) A court assessing materiality asks whether the facts underlying the material arrest warrant, which are set forth in the government’s affidavit, establish probable cause to believe that the detainee had information that is material to a trial or grand jury proceeding.\(^2\) When a court cannot determine whether a witness’s testimony would be material, rather than merely cumulative of other witnesses’ testimony or impeachment evidence, the government fails to demonstrate materiality.\(^3\)

   As to impracticability, a detaining officer must demonstrate to the court that the circumstances surrounding detention of the material witness made it truly impracticable to secure the witness by subpoena.\(^4\) The court’s impracticability determination is based on whether the witness poses a high risk of flight.\(^5\) The impracticability showing in an application for a material witness warrant under the federal material witness statute must be based on probable cause, as is required for materiality.\(^6\)

   The federal material witness statute also requires that government officials secure a material witness’s participation in future criminal proceedings through the least restrictive means possible, whether that be by issuing a subpoena or by deposing the witness ahead of the

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1. 18 U.S.C. § 3144 (2006); *Awadallah II*, 349 F.3d 42, 64 (2d Cir. 2003).
2. See *Awadallah II*, 349 F.3d at 70 (noting that courts adopt a totality of the circumstances approach when assessing materiality).
3. See, e.g., United States v. Basciano, 763 F. Supp. 2d 303, 336 (E.D.N.Y. 2011) (explaining that the testimony of two unidentified witnesses in an organized crime case was not sufficient for the judge to issue a warrant securing their presence at trial because there was not enough known about the witnesses and simply no showing that their testimony would be material to the case).
4. 18 U.S.C. § 3144; see also *Basciano*, 763 F. Supp. 2d at 335–36 (finding that the government did not meet its burden of demonstrating impracticability because without the identity of the witnesses, the court could only speculate as to whether it would be practicable to secure the witnesses’ presence at trial through a subpoena). ("[W]here suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, . . . he may be held . . . to appear at the trial . . . .")
5. *Awadallah II*, 349 F.3d at 64; *Bacon v. United States*, 449 F.2d 933, 942–43 (9th Cir. 1971).
The federal material witness statute recommends that the government use the least restrictive means possible because the government should only deprive a material witness of a liberty interest through arrest and detention as a last resort. Nonetheless, based on the power conferred by the federal material witness statute, a court can employ its judgment in deciding whether to issue an arrest warrant without first requiring a subpoena. Additionally, the statute applies to material witnesses whose testimony will be used at any criminal proceeding, and thus encompasses both grand jury indictments and criminal trials.


Once a material witness has been detained pursuant to a material witness warrant, the witness is to be treated under a second statute that addresses the release or detention of defendants pending trial, 18 U.S.C. § 3142. Section 3142 sets forth the witness’s right to a hearing following detention:

The judicial officer shall hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required . . . upon motion of the attorney for the Government or upon the judicial officer’s own motion in a case, that involves . . . a serious risk that such person will flee . . . .

25. See id. (exemplifying how material witness detention can only be prolonged if the witness cannot be deposed and only to “prevent a failure of justice” in recognition of the material witness’s liberty interest); Heidee Stoller et al., Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy, 22 YALE L. & POL’Y REV. 197, 202 (2004).
26. United States v. Anfield, 539 F.2d 674, 677 (9th Cir. 1976) (citing Bacon, 449 F.2d at 939).
27. See In re Application of the U.S. for a Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for John Doe, 213 F. Supp. 2d 287, 289 (S.D.N.Y. 2002) [hereinafter Material Witness Warrant for John Doe] (clarifying that the Bacon court interpreted the statute to include grand jury witnesses and explaining that the Bacon court’s language was in turn incorporated in the revised and current statute); see also Awadallah II, 349 F.3d at 55 (holding that “[w]hen Congress enacted § 3144 . . . there was a settled view that a grand jury proceeding is a ‘criminal proceeding’ for purposes of the material witness statute” and thus applying the statute to both trial and grand jury witnesses); United States v. Oliver, 683 F.2d 224, 230–31 (7th Cir. 1982) (confirming that Oliver was properly detained under the statute because a responsible government official provided that Oliver’s testimony was material to a grand jury proceeding).
28. See 18 U.S.C. § 3144 (establishing that material witnesses are to be treated in accordance with 18 U.S.C. § 3142).
29. See id. § 3142(f) (2) (A) (indicating that a detained witness’s hearing must be held immediately upon the witness’s initial appearance before an officer of the court).
The hearing serves as a valuable procedural safeguard for witnesses because the government is required to inform the detainee of the reasons for the detention, and the detainee is allowed the opportunity to challenge the detention.\(^{30}\)

Underscoring the importance of a material witness’s post-detention hearing, the court noted in \textit{United States v. Feingold}\(^{31}\) that the witness is entitled to present additional information to a judicial officer to arrange the conditions of his release.\(^{32}\) At this hearing, the “full factual picture can be developed, thereby protecting [the witness] against any possible abuse of the arrest power by the Government.”\(^{33}\) Similarly, in \textit{Adams v. Hanson},\(^{34}\) the court was deeply troubled that the witness was not provided such a hearing and thus had no opportunity to be heard.\(^{35}\) The court found that the lack of a hearing violated the witness’s rights, particularly because the judicial process is intended to provide a check on prosecutorial abuse.\(^{36}\) Courts weigh a host of interests at these hearings: (1) the materiality of the testimony, including whether the witness’s testimony is cumulative; (2) the length of proposed detention—the longer the detention, the greater the showing required by the state to justify it; (3) the harm to the witness and the witness’s family, including lost wages and missed

\(^{30}\) Id.

\(^{31}\) \textit{Id.} at 629.


\(^{33}\) \textit{Feingold}, 416 F. Supp. at 629; \textit{see also} 18 U.S.C. § 3142(f)(2)(B) (providing the witness with the opportunity to exercise his right “to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise” through a full evidentiary hearing, unlike ex parte hearings where material witness warrants are granted); Cochran, \textit{supra} note 12, at 6 (observing that § 3142 affords detainees a number of “procedural safeguards,” including the right to proffer testimony and evidence and to present and cross-examine witnesses). Many states have instituted similar practices. \textit{See, e.g.}, \textit{Adams v. Hanson}, 656 F.3d 397, 406 (6th Cir. 2011) (holding that despite the demand of the Michigan material witness statute, the defendant did not have the opportunity to be heard at the post-detention hearing because the court failed to “provide a witness the opportunity to be heard and to assess itself the materiality of her testimony and the likelihood that [the witness] would fail to appear”); \textit{In re Francisco M.}, 103 Cal. Rptr. 2d 794, 806–07 (Ct. App. 2001) (specifying that when a court considers whether to order a witness to appear or face judicial consequences, the court should take into account a non-exhaustive list of factors, such as “[t]he nature of the charges in the underlying criminal prosecution” and “[t]he length of the proposed detention”).

\(^{34}\) Id. at 629.

\(^{35}\) Id. at 629.

\(^{36}\) \textit{Id.} at 406. \textit{see also} \textit{In re Francisco M.}, 103 Cal. Rptr. 2d at 805–06 (noting that the initial hearing entitles the witness to notice of the basis on which detention is sought and the right to dispute the allegations providing for his detention).
classes; (4) the witness’s financial resources, particularly in setting bail; and (5) other alternatives to incarceration.\(^3\)

Another valuable safeguard for any material witness is the habeas corpus statute, 28 U.S.C. § 2241, because as detained individuals, material witnesses fall under the statute’s ambit.\(^4\) This statute offers a material witness the opportunity to have a court determine whether the witness can continue to be held because the statute applies to categories of individuals, including those who are needed in court to testify.\(^5\) For example, José Padilla, a post-9/11 detainee arrested on suspicion of plotting a dirty bomb, questioned his continued detention pursuant to a material witness warrant by filing a habeas corpus petition; Padilla’s petition prompted the U.S. Court of Appeals for the Second Circuit to hold that the President lacked the authority to indefinitely detain a U.S. citizen, who was arrested in the United States, as a material witness.\(^6\)

3. Federal Rules of Criminal Procedure 15 and 46

Similar to the habeas corpus statute, Rule 15 of the Federal Rules of Criminal Procedure—regarding depositions—establishes an additional safeguard for potential material witnesses by providing that an individual may be detained only if the individual cannot be deposed, and additionally sets forth the parameters for deposing detainees.\(^7\) However, depositions are not taken as a matter of right; instead, depositions are only granted in exceptional situations.\(^8\)

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\(^3\) In re Francisco M., 103 Cal. Rptr. 2d at 806–07.


\(^5\) Id. § 2241(c)(5).

\(^6\) Padilla v. Rumsfeld, 352 F.3d 695, 698 (2d Cir. 2003) (stating that the President does not have the authority to detain a material witness seized outside of a combat zone), rev’d, 542 U.S. 426 (2004); see also STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR 100–01 (2008) (detailing that the Second Circuit held that the President did not have the authority to indefinitely detain José Padilla as an enemy combatant, but that the Supreme Court reversed the decision based on a technicality). For an overview of José Padilla’s detention, see José Padilla, N.Y. Times (Sept. 19, 2011), http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html.

\(^7\) FED. R. CRIM. P. 15; see also United States v. Finkielstain, No. 89 CR. 0009, 1989 WL 39685, at *1 (S.D.N.Y. Apr. 18, 1989) (finding that securing the witness’s testimony would be impracticable under the material witness statute because he was a Uruguayan citizen scheduled to leave the United States well in advance of the defendant’s trial, but nonetheless granting the witness’s request that his testimony be taken by deposition because his case was exceptional and presented due process and humanitarian considerations).

\(^8\) See United States v. Kelley, 36 F.3d 1118, 1124–25 (D.C. Cir. 1994) (stating that depositions are meant to safeguard testimony, not “provide a method of pretrial discovery” (internal quotation marks omitted)); United States v. Ismaili, 828 F.2d 153, 159 (3d Cir. 1987) (emphasizing that the 1975 amendment to Rule 15(a) provides a stricter standard for depositions in criminal cases than for depositions in
Furthermore, it is the party requesting the deposition, rather than the government, that must prove that “exceptional circumstances” require that the testimony be taken through a deposition.\footnote{\textit{Kelley}, 36 F.3d at 1124.}

Depositions are intended to facilitate the underlying goal of the material witness statute—detaining material witnesses using the least restrictive means possible. For this reason, reading the federal material witness statute in conjunction with Rule 15 provides that the witness must be released unless the deposition would not serve as an adequate substitute for live testimony, such that the deposition would result in a “failure of justice.”\footnote{See Aguilar-Ayala \textit{v.} Ruiz, 973 F.2d 411, 418 (5th Cir. 1992) (explaining that deposition testimony is not a first measure but a last resort, allowable only after the government exhausted reasonable efforts to assure the witness’s presence at trial).} For example, if a defendant was denied his Sixth Amendment right to confront adverse witnesses or compel witnesses in his favor, then allowing that material witness to testify via deposition rather than appearing in court would violate his constitutional rights and equate to a failure of justice that allows for continued detention of a material witness.\footnote{United States \textit{v.} Huang, 827 F. Supp. 945, 951 (S.D.N.Y. 1993); see also \textit{id.} at 949 (stating that courts reading Rule 15 in conjunction with the material witness statute should deny a request for testimony by deposition only where a failure of justice would ensue); \textit{id.} at 951 (proposing that whether material witnesses are called for the defense as opposed to the government weighs heavily in determining whether it is appropriate for material witness testimony to be taken by deposition).}

Additionally, material witnesses can avail themselves of Rule 46 of the Federal Rules of Criminal Procedure, which requires the government to issue bi-weekly reports to the court stating its reasons for holding any material witness for more than ten days pending indictment, arraignment, or trial.\footnote{See \textit{Fed. R. Crim. P. 46(h)(1)}--(2) (implementing additional checks on the government’s prolonged detention of material witnesses).} The rule affords each witness the ability to have a court exercise continuing supervision over his detention for the purpose of “eliminating all unnecessary detention”\footnote{\textit{Fed. R. Crim. P. 46(h)(1)).} through periodic hearings.\footnote{See \textit{Material Witness Warrant for John Doe}, 213 F. Supp. 2d 287, 296 (S.D.N.Y. 2002) (citing \textit{Fed. R. Crim. P. 46(g)} (amended 2002) (current version at \textit{Fed. R. Crim. P. 46(h)(1)})).} At the hearing, the government must provide the court with a report on each material witness held in its custody for more than ten days whose testimony
is still pending and must give reasons why the witness should not be released.49

4. The Fourth Amendment

A material witness may challenge pretextual detention on constitutional grounds under the Fourth Amendment.50 However, the Supreme Court has foreclosed any argument that might be made regarding pretextual seizures under the Fourth Amendment because the inquiry governing the validity of a search or seizure is objective, not subjective.51 Despite the objective nature of the inquiry, the constitutional question is still raised with regards to whether an individual is detained without reasonable, objective grounds.52 Because the material witness's ability to argue against his detention on constitutional grounds is largely foreclosed,53 this Comment instead encourages questioning the validity of the underlying material witness warrant and any accompanying pretext under the federal material witness statute.

B. Shifting Calculus: Post-9/11 Material Witness Detention and Its Application in Federal Courts

While, in theory, meeting the statutory requirements for material witness detention is intended to apply uniformly, in practice, events affecting the nation’s security altered the application of the federal material witness statute.54 Following 9/11, the number of detainees

49. See id. (expressing that the government is required to report on the status of each witness even if the government wishes to take the witness's testimony by deposition).
50. See U.S. Const. amend. IV (providing for the “right of the people to be secure . . . against unreasonable searches and seizures”).
51. See Scott v. United States, 436 U.S. 128, 138 (1978) (establishing that the relevant question is whether “the circumstances, viewed objectively, justify [the challenged] action”); see also City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000) (explaining that reasonableness inquiries are “predominantly . . . objective inquir[ies]” rather than subjective ones); Whren v. United States, 517 U.S. 806, 814 (1996) (clarifying that so long as the government’s actions viewed objectively are justified, then they are reasonable “whatever the subjective intent” that motivated the relevant officials).
52. See Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) (concluding that an individual “may not be detained even momentarily without reasonable, objective grounds for doing so” because doing so violates the Fourth Amendment).
53. Scott, 436 U.S. at 137 (establishing that “[t]he scheme of the Fourth Amendment becomes meaningful only when . . . the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge”).
54. See Cochran, supra note 12, at 8–14 (discussing the government’s shift in its practice of detaining material witnesses after 9/11 to meet the ends of incapacitating and investigating terrorists through preventive detention); Bradley A. Parker, Comment, Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the
held as material witnesses rose sharply.\textsuperscript{55} The FBI began using material witness warrants to detain dozens of people suspected of being connected to the hijackers, a practice that led to an eighty percent increase in material witness arrests from 2000 to 2002.\textsuperscript{56} Prior to the attacks, the government typically used material witness warrants to hold individuals suspected of criminal activity for which probable cause had not been established.\textsuperscript{57} After 9/11, the government used material witness warrants to detain people whom the government suspected had participated in terrorist-related crime.\textsuperscript{58} Moreover, because material witnesses were being held for individual investigations, many of those detained were never asked to testify.\textsuperscript{59}

Federal district and appellate courts sitting in New York and Virginia were among the first courts to apply the federal material witness statute following the 9/11 attacks.\textsuperscript{60} These courts navigated uncharted waters when they confronted material witness detention issues connected to national security and terrorism. Beginning in the district courts, judges routinely determined whether to detain material witnesses connected to post-9/11 investigations by assessing the government’s position as to the materiality and impracticability of securing witnesses through means other than arrest.\textsuperscript{61} Additionally,
federal district courts held subsequent hearings to weigh the sufficiency of evidence supporting material witness warrants to determine whether continued detention was appropriate.\textsuperscript{62}

In subsequent appellate proceedings, most notably in \textit{United States v. Awadallah}\textsuperscript{63} and \textit{Higazy v. Templeton},\textsuperscript{64} the Second Circuit demonstrated an increased willingness to defer to the government’s position and allow the detention—or continued detention—of material witnesses when national security interests were at stake, even while recognizing that the court might not bestow such deference in other cases.\textsuperscript{65} In \textit{Awadallah}, the U.S. government detained Osama Awadallah on a material witness warrant granted by the U.S. District Court for the Southern District of New York. The warrant was based on FBI Special Agent Ryan Plunkett’s supporting affidavit, which revealed that the FBI had found Awadallah’s phone number in the car of al-Hazmi, a 9/11 hijacker who Awadallah admitted he knew.\textsuperscript{66} The FBI also discovered a box-cutter and photos of Osama bin-Laden in Awadallah’s car.\textsuperscript{67} The FBI claimed that it might be difficult to secure Awadallah’s grand jury testimony because Awadallah had extensive family ties in Jordan and might be a flight risk.\textsuperscript{68}
After assessing the government’s evidence, the district court granted the material witness warrant, although testimony at a later hearing revealed that the affidavit included misrepresentations and omissions. Subsequently, the Second Circuit reviewed Awadallah’s claim regarding both the validity of his material witness warrant and his prolonged detention and found that it was proper to continue holding him—even after excising the affidavit of misrepresentations and omissions—because Awadallah did pose a flight risk. The court found that his connection to one or more of the hijackers and possible incentive to avoid appearing before the grand jury overrode any assurance that Awadallah would appear as directed.

Meanwhile, in Higazy, the Second Circuit reviewed constitutional and qualified immunity claims raised by Egyptian national Abdallah Higazy concerning his detention as a material witness. In Higazy’s prior federal district court case, the district court delved into the validity of Higazy’s underlying material witness warrant and the reasons why the government had misled the court by detaining Higazy for multiple ten-day intervals despite not calling him as a witness in a grand jury proceeding. The district court originally authorized Higazy’s detention, even though it found the government’s showing to be less than substantial, because the totality of the findings demonstrated a significant risk that Higazy would fail to voluntarily appear before the grand jury. The combined factors influencing the district court’s decision included the radio transceiver found in Higazy’s hotel room across the street from the World Trade Center, and the fact that, although Higazy denied ownership of the transceiver, he later admitted to being familiar with the device because of his service in the Egyptian Air Corps.

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69. See Awadallah I, 202 F. Supp. 2d at 96 (recounting the facts that were omitted from the affidavit: Awadallah had last seen Al-Hazmi over a year earlier; Awadallah had moved from an address associated with the phone number eighteen months earlier; he had used the box-cutter recently to install a new carpet in his apartment; he had been cooperative with FBI agents in San Diego; and most significantly, Awadallah had three brothers who lived in San Diego, one of whom was an American citizen).
70. Awadallah II, 349 F.3d at 69–70.
71. Id.
73. See Material Witness No. 38, 214 F. Supp. 2d 356, 358–59 (S.D.N.Y. 2002) (inquiring into the government’s possible misrepresentation based on locating the owner of the alleged evidence and discovering false testimony on the part of two witnesses).
74. Id.
75. Id. at 358.
Ten days later, the district court granted the government’s request to continue detaining Higazy even though he had not yet been presented to the grand jury. Instead, the government formally charged him with making false statements to the government by initially denying possession of the transceiver. Evidence later revealed that the radio transceiver actually belonged to an American pilot; this evidence prompted the district court to hold a hearing inquiring into the parties’ representations to the district court regarding Higazy’s confession. After the government misled the district court twice, the district court found that the government was guilty of misconduct and ordered an internal investigation that would publicize the results with the goal of deterring future misconduct.

C. Ashcroft v. al-Kidd: Closing the Door on Subjective Intent or Leaving the Door Ajar?

Even though the Higazy hearings promised to start a trend toward deterring future misconduct, the Supreme Court’s decision in al-Kidd seemed to reverse this course, at least in regard to a material witness’s ability to challenge the government’s motive. In al-Kidd, the government detained al-Kidd while en route to Saudi Arabia claiming that al-Kidd had material information about an accused terrorist that could only be obtained by detaining al-Kidd as a material witness. Al-Kidd alleged in his petition that after 9/11, Attorney General John Ashcroft implemented a policy that authorized federal officials to pretextually detain terrorism suspects under the federal material witness statutes. The Supreme Court held that although al-Kidd’s arrest was a seizure under the Fourth Amendment, there was nevertheless sufficient individualized suspicion supporting the

76. Id. at 359.
77. Higazy, 505 F.3d at 167; Material Witness No. 38, 214 F. Supp. 2d at 359.
79. Higazy, 505 F.3d at 167; see also Material Witness No. 38, 214 F. Supp. 2d at 363 (“The victim we are here concerned with is not the witness, but the Court, which was materially misled. A wrong that so directly impacts the judicial process should not be wholly beyond the Court’s power to address.”).
80. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (finding al-Kidd’s arrest valid because it was objectively justified, regardless of the government’s subjective intent).
81. Id. at 2079.
82. Id. Al-Kidd, a U.S. citizen with plane tickets to Saudi Arabia, argued that federal officials originally secured the material witness warrant for him by claiming that he possessed information “crucial” to a suspected terrorist’s prosecution, which would be lost if al-Kidd boarded his flight. Id. He challenged the constitutionality of Attorney General Ashcroft’s alleged policy on Fourth Amendment grounds. Id.
material witness arrest warrant to meet the Fourth Amendment “reasonableness” test. 83

Even though the Court seemingly barred a material witness’s ability to argue that the government’s subjective intent led it to improperly detain a witness under the Fourth Amendment, the Court did not address the separate question of whether subjective intent could come into play in assessing the validity of a material witness warrant under the federal material witness statute. 84 The Court effectively foreclosed any detainee held under the material witness statute from arguing that an officer’s improper motive in detaining him violated his Fourth Amendment right because as long as the officer provides an objectively valid reason for detaining a material witness, subjective intent becomes irrelevant. 85 The Court did not, however, rule on the question of whether there was a violation of the material witness statute in this case; in this way, the Court failed to address the fact that al-Kidd could have been subpoenaed, that his testimony could have been secured by deposition, and that the underlying material witness warrant may have been insufficient. 86

Justice Ginsburg suggested in her concurrence that subjective intent might nonetheless be considered in appropriate future cases. 87 Justice Ginsburg found that the Court’s individualized suspicion standard—the purported objective and valid basis upholding the material witness warrant—suffered from a critical flaw, namely that individualized suspicion connoted wrongdoing on the part of the

83. See id. at 2080–83 (explaining that “reasonableness” is an objective inquiry, meaning that if the circumstances viewed objectively justify the challenged action, then the action is reasonable regardless of the subjective intent, and finding that because individualized suspicion supported al-Kidd’s material witness warrant, the seizure was reasonable under the Fourth Amendment).

84. See id. at 2083 n.3 (explaining how the Court did not have to rule on a statutory argument because in the Court’s view, al-Kidd had conceded the validity of the material witness warrant, thus basing its decision on Fourth Amendment grounds).

85. See id. at 2082–84 (rejecting “a district judge’s ipse dixit of a holding” as authority for the proposition that suspects could not be pretextually detained as material witnesses).

86. See id. at 2083 (passing on the sufficiency of the material witness warrant because al-Kidd conceded that the warrant was based on individualized suspicion).

87. See id. at 2087–88, 2089 n.3 (Ginsburg, J., concurring in the judgment) (finding the material witness warrant invalid because the warrant contained omissions and misrepresentations, and concluding that Attorney General Ashcroft intended to detain material witnesses “as a means to tak[e] suspected terrorists off the street” (alteration in original) (citation omitted)). In her concurrence, Justice Sotomayor also endorsed a subjective intent analysis, suggesting that it might be considered in a future case involving the prolonged detention of an individual held without probable cause where the government believed he committed a criminal offense. Id. at 2090 (Sotomayor, J., concurring).
witness rather than necessity for testimony. Moreover, Justice Ginsburg found al-Kidd’s material witness warrant invalid because the government’s findings both as to materiality and impracticability were inadequate, which prompted her to invite courts to engage in more thorough scrutiny of the government’s showings in any material witness warrant.

D. Strict Scrutiny in Equal Protection Cases: How Heightened Scrutiny Helps To Identify Improper Motive

Justice Ginsburg’s concurrence in al-Kidd suggests that district courts reviewing material witness warrant applications or the validity of authorized warrants should exercise vigilance, remembering that the decision to grant arrest is discretionary. Such vigilant exercise by district courts can draw useful parallels from the equal protection context, where a level of heightened scrutiny is employed to screen for improper motive on the part of the government. When the government enacts a practice or statute that is deemed “suspect,” like a race-based measure, a reviewing court will assess the practice under strict scrutiny, which requires the court to uphold the practice or statute only if it furthers a compelling governmental interest and uses narrowly tailored means to achieve that end. For example, in City of Richmond v. J.A. Croson Co., the Supreme Court explained that where race-based measures are used to address prior discrimination, courts apply strict scrutiny because “[a]bsent searching judicial inquiry” into the reasons for employing race-based measures, a court cannot properly assess whether these classifications are “‘benign’ or ‘remedial’” and whether they are “in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” The Court indicated that the function of strict scrutiny in equal protection cases is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely [e.g., narrow tailoring] that there is little

88. Id. at 2088 n.2 (Ginsburg, J., concurring in the judgment).
89. Id.
90. See id. (reminding courts that only through “vigilant exercise” of the duty to scrutinize a material witness warrant application will the court protect the material witness from unnecessary or improper detention).
93. Id. at 493 (plurality opinion) (emphasis added).
or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.\footnote{Id. (emphases added).}

In *Croson*, the City of Richmond argued that it needed to implement a minority “set-aside” program, which required prime contractors to allot a fixed percentage of the contract’s total dollar amount to minority business enterprise subcontractors in order to remedy past discrimination.\footnote{See id. at 477–80 (majority opinion) (explaining the city’s argument that prior discrimination was responsible for the small number of minority-owned businesses in the local construction industry).} The Court, however, found that the program failed to pass muster under strict scrutiny because the city did not prove a compelling interest that would justify the program.\footnote{Id. at 498–500.} Specifically, the Court found the city’s factual predicate insufficient because it was based on a general finding that showed a history of discrimination across the entire construction industry.\footnote{Id. at 498–99 (indicating that the city’s argument that the entire Richmond construction industry had practiced discrimination failed to precisely define the wrong in a way that would allow for any meaningful relief for minority business enterprises).} The Court felt that this type of broad assertion provided the legislature with no guidance to determine the scope of the injury that was to be remedied.\footnote{Id.; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (plurality opinion) (providing that broad generalizations do not serve as adequate justifications for race-based relief because they have “no logical stopping point”).} Additionally, the Court held that the plan was not narrowly tailored because it was not linked to documented discrimination in any meaningful way, and because it failed to consider race-neutral means, such as the simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races, for increasing minority-owned business participation in the construction industry.\footnote{Croson, 488 U.S. at 507.} Thus the Court’s vigilant exercise of judicial review ultimately allowed it to identify the city’s actual motive, which the Court identified as likely having been achieving “outright racial balancing,” for enacting race-based measures.\footnote{Id.; see also infra note 130 and accompanying text.}
E. Clear and Convincing Evidence in Civil Cases: How a Requirement of Heightened Evidentiary Showings Better Protects Individual Liberty Interest

1. Setting the clear and convincing standard

Similar to the safeguards afforded by strict scrutiny, the civil detention context also provides a useful model for material witness detention courts to follow when reviewing applications for material witness warrants. Civil detention cases illustrate that requiring a clear and convincing standard from the government before authorizing civil detention provides significant protection of individual liberty interest.\(^{101}\)

For example, Justice Harlan explained that the standard of proof in civil detention cases is intended to “‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’”\(^{102}\) The standard serves two functions: (1) to allocate the risk of error between the parties; and (2) to indicate the level of relative significance the ultimate decision carries.\(^{103}\) Along this spectrum of risk, civil cases between private parties that involve only monetary damages are at the low end because society is minimally concerned with the fairness of the outcome. For this reason, a mere preponderance of the evidence is the requisite burden of proof,\(^{104}\) the result of which is that the litigants equally share the risk of error.\(^{105}\) At the opposite end of the spectrum lie the interests of the criminal defendant that are protected by the constitutional requirement that defendants only be found guilty when the state has proven its case beyond a reasonable doubt, which limits as much as possible the likelihood of any error in judgments.\(^{106}\) The

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\(^{101}\) See Foucha v. Louisiana, 504 U.S. 71, 79–80 (1992) (recognizing an individual’s liberty interest under the Due Process Clause by requiring that the state provide clear and convincing evidence of mental illness and dangerousness before authorizing the individual’s commitment to a mental institution); Addington v. Texas, 441 U.S. 418 (1979) (applying the clear and convincing standard to protect the interests of the mentally ill).

\(^{102}\) Id.

\(^{103}\) Id. (asserting that a preponderance of the evidence standard requires only that the party bearing the burden convince the factfinder by a fifty-one percent likelihood of each element and thus creates an equal risk of error in the outcome by both the party bearing the burden of proof and the factfinder).

\(^{104}\) Id. at 423–24 (discussing why, given the weighty interests of the defendant, society finds it appropriate to impose the highest burden of proof upon the government rather than risk possible error by having the defendant shoulder the burden of proof).
intermediate standard, generally known as clear and convincing evidence, protects important individual interests in a number of civil cases, including deportation and denaturalization cases.\footnote{Id. at 424; see also Woodby v. INS, 385 U.S. 276, 285 (1966) (assigning clear and convincing evidence as the appropriate standard of proof in deportation cases); Chaunt v. United States, 364 U.S. 350, 353 (1960) (finding the clear and convincing standard necessary in deportation cases); Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943) (declaring that denaturalization cases merit clear and convincing evidence).}

In \textit{Addington v. Texas}, Frank O'Neal Addington challenged a Texas court's decision that found him mentally ill and committed him to a mental institution to protect him from himself and to protect others from any danger that he might otherwise pose; the Texas court applied a preponderance of the evidence standard, whereas Addington argued that the court should have used a beyond a reasonable doubt standard.\footnote{Addington, 441 U.S. at 421–22.} To decide what standard should govern in an involuntary commitment case, the Supreme Court balanced Addington's individual interest in freedom from indefinite and involuntary confinement against the state's interest in committing to mental institutions individuals who are emotionally disturbed and might pose a danger to themselves and others.\footnote{Id. at 425; see also Foucha v. Louisiana, 504 U.S. 71, 75–76 (1992) (reaffirming \textit{Addington} and finding that to involuntarily commit an individual to a mental institution, the state is required by the Due Process Clause to prove by clear and convincing evidence that the individual is mentally ill and that he poses a danger to himself and others); Debra T. Landis, Annotation, \textit{Modern Status of Rules as to Standard of Proof Required in Civil Commitment Proceedings}, 97 A.L.R. 3d 785, 785 (1980) [hereinafter Landis, \textit{Modern Status}](stating that clear and convincing evidence is the appropriate standard of proof where the state involuntarily commits mentally ill and dangerous individuals to mental institutions or individuals found unfit to stand trials).} The Court noted that of equal importance in the assessment is the function of the legal process, the goal of which is to minimize the risk of erroneous decisions.\footnote{See \textit{Addington}, 441 U.S. at 425 (suggesting that courts can help minimize improper outcomes by factfinders that might harm individual liberty interest by imposing higher burdens of proof at initial commitment proceedings); Speiser v. Randall, 357 U.S. 513, 525–26 (1958) (discussing that the possible margin of error in a freedom of speech case requires that the government bear the burden of proving that appellants engaged in criminal speech).} Thus, in \textit{Addington}, the Court held that Addington's interest in liberty outweighed the state's interest in protecting the public from the any potential threat he might pose, such that due process required a showing of clear and convincing evidence to justify his involuntary commitment, though proof beyond a reasonable doubt was not constitutionally compelled.\footnote{Addington, 441 U.S. at 427, 430–31. But see Foucha, 504 U.S. at 76 (distinguishing criminal cases in which a defendant has pleaded not guilty by reason of insanity, and holding that in such instances, the government need not meet the...}
As Addington illustrates, in civil detention cases, the government bears the burden of proving under a certain evidentiary standard that there is a sufficient state interest in indefinitely committing an individual.\footnote{Addington, 441 U.S. at 425.} Despite having recognized the importance of individual liberty interest, the Supreme Court has, at times, reversed the burden of proof when certain factors weigh in favor of the state’s interests over the individual’s interests. In Ohio v. Akron Center for Reproductive Health,\footnote{497 U.S. 502 (1990).} for example, an Ohio statute criminalized performing an abortion on an unmarried and unemancipated minor except in four scenarios, two of which depended on a judicial procedure that might allow a minor to bypass the notice and consent provisions.\footnote{Id. at 507–08.} To utilize the judicial bypass option, the minor had to prove—by clear and convincing evidence—an allegation of maturity, a pattern of abuse, or an explanation as to why notice was not in her best interests.\footnote{Id. at 508.} The minor, Rachel Roe, raised a facial challenge to the statute’s constitutionality, arguing that a bypass procedure should not require a minor to prove maturity or best interests by clear and convincing evidence because when a state is seeking to infringe on an individual’s liberty interest, it is the state that should be saddled with the risk of error.\footnote{Id. at 509, 515.} The Court rejected Roe’s argument and held that the state was entitled to impose a heightened evidentiary burden because the minor, assisted by an attorney and guardian ad litem, would testify unopposed.\footnote{Id. at 516.}

These cases illustrate how the clear and convincing standard serves as a safeguard for important individual and state interests by requiring that the party bearing the burden of proof offer a high enough quantum of evidence before a court can authorize civil detention or alternatively allow the individual’s interest to go unopposed where the individual is already protected through certain mechanisms. Applied to material witnesses, clear and convincing evidence could similarly require more from the government before allowing for any deprivation of liberty.

\footnote{standard of clear and convincing evidence to involuntarily commit the individual); Jones v. United States, 463 U.S. 354, 363–66 (1983) (relieving the state of its evidentiary standard when it involuntarily commits criminal defendants found not guilty by reason of insanity).}
2. The clear and convincing standard upon review

Courts are concerned with the appropriate burden of proof not only during initial determinations regarding involuntary commitment, but also during periodic review proceedings of an individual’s detention. The state carries the burden of continuing to show by clear and convincing evidence that the individual both presently poses a danger to society and suffers from a mental illness. Consequently, in some civil detention cases, courts are additionally required to periodically review the government’s reasons justifying continued commitment of the individual. The Supreme Court has indicated that regardless of the reason for confinement to a mental institution, the individual can only be held so long as he continues to be mentally ill and dangerous; the individual cannot be held any longer than this. Involuntary commitment is therefore not constitutionally permissible after the justification for the initial commitment ceases to exist. Moreover, the individual is entitled to periodic review of his condition in order to prevent or cure any risk of error in the initial determination that committed the individual to the mental institution in the first place.

State courts have indicated that many statutes calling for the confinement of sexual offenders and sexual psychopaths require periodic status hearings because these hearings provide the offender with additional procedural safeguards. Giving courts additional

118. Foucha v. Louisiana, 504 U.S. 71, 77–78 (1992); see In re Det. of Turay, 986 P.2d 790, 813–14 (Wash. 1999) (stating that in annual show cause hearings for committed sexual violent predators, the state bears the burden of proving that the individual is currently suffering from a mental defect that makes him likely to engage in acts of sexual violence).

119. See, e.g., Landis, Modern Status, supra note 109, at 785 (discussing that Texas courts are required to periodically review a mental patient’s condition when the state has involuntarily committed the patient).

120. Foucha, 504 U.S. at 77; see Jones v. United States, 463 U.S. 354, 368, 370 (1983) (providing that the committed individual can only be confined until “he has regained his sanity or is no longer a danger to himself or society”); O’Connor v. Donaldson, 422 U.S. 563, 575 (1975) (holding that involuntary commitment is appropriate only when the individual is both mentally ill and dangerous).

121. O’Connor, 422 U.S. at 575.

122. See Addington v. Texas, 441 U.S. 418, 428–29 (1979) (stating that mentally ill patients are provided continuous opportunities to have their confinement reviewed thus ensuring that any risk of erroneous confinement is minimized).

123. See, e.g., In re Arnold, 292 S.W.3d 393, 397 (Mo. Ct. App. 2009) (noting that periodic review reduces the risk of error); In re Turay, 986 P.2d at 806–07 (providing that the state statute mandates that sexually violent predators receive an annual review hearing); see also Debra T. Landis, Annotation, Standard of Proof Required Under Statute Providing for Commitment of Sexual Offenders or Sexual Psychopaths, 96 A.L.R. 840, 845 (1979) [hereinafter Landis, Standard of Proof]. Unlike sexually violent predators (SVP), mentally ill individuals committed under other statutes receive review every 180 days rather than annually because the course of treatment for the mentally ill
opportunities to review whether to extend an individual’s involuntary commitment ensures that the state can continue to show that the sexual offender poses an ongoing danger to others due to a mental abnormality or mental disorder. However, once the individual has been treated adequately and cleared by personnel at the relevant facility, such that he no longer poses a danger to himself or others, the original reason for holding him is no longer valid and the court is required to release the individual.

The material witness statute serves as a mechanism for ensuring that the testimony of witnesses, who possess material information related to criminal proceedings and who pose a flight risk, is secured by authorizing detention of these witnesses. However, the government’s burden in showing that a material witness is both material and impracticable is not a clearly established burden, as illustrated by the varying federal case law. What is clear is that a material witness can only effectively ask whether the government was improperly motivated when seeking a material witness’s arrest through the federal material witness statute because the Supreme Court has foreclosed any discussion of subjective intent under the Fourth Amendment after al-Kidd.

However, a material witness still has the ability to raise subjective intent and argue pretextual detention by arguing that the government has not met its burden under the federal material witness statute. Because no clear burden attaches to these showings, differs significantly from that of SVPs, and because SVPs pose a higher public safety threat given that they have committed at least one sexually violent act. In re Turay, 986 P.2d at 807.

124. See, e.g., In re Turay, 986 P.2d at 813–14 (holding that the state must continue to prove at an annual show cause hearing that the sexual offender is suffering from a mental disorder that would make him likely to engage in acts of sexual violence if released into the community or discharged from treatment).

125. See Landis, Standard of Proof, supra note 123, at 842 (indicating that sexual offenders or sexual psychopaths can only be committed so long as they remain a danger to others because the relevant statutes are intended to both protect society from ongoing danger and to treat the individual).

126. See 18 U.S.C. § 3144 (2006) (“If it appears . . . that the testimony of a person is material in a criminal proceeding, and 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 . . . .”).

127. Compare United States v. Feingold, 416 F. Supp. 627, 629 (E.D.N.Y. 1976) (holding that the impracticability prong was met where several subpoena attempts were unsuccessful), with Bacon v. United States, 449 F.2d 933, 944 (9th Cir. 1971) (determining that the impracticable prong was not satisfied even though the witness had access to a large sum of cash, contact with the fugitive, and was captured on the rooftop of a building).

128. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079 (2011) (holding that “reasonable” under the Fourth Amendment is determined by an objective test and that the subjective intent motivating officials is irrelevant).
though, the civil detention context illustrates how in arguing subjective intent, material witnesses would greatly benefit from requiring the government to show by clear and convincing evidence that these witnesses are material and impracticable at the time the government requests a material witness warrant because a higher initial burden of proof helps protect individual liberty interest. And assuming these warrants are granted, material witnesses would equally gain from having courts review their material witness warrants under a higher standard of review because, as strict scrutiny illustrates in the equal protection standard, the higher the standard of judicial review, the greater the court’s ability to identify improper motive on the government’s part.

II. UNDER THE FEDERAL MATERIAL WITNESS STATUTE, COURTS SHOULD CONDITION GRANTING AND REVIEWING MATERIAL WITNESS Warrants ON CLEAR AND CONVINCING EVIDENCETo PROTECT THE WITNESS’S LIBERTY INTEREST, SCREEN FOR IMPROPER MOTIVE, AND OBTAIN ADEQUATE JUSTIFICATION FOR PROLONGED DETENTION

Courts should implement the clear and convincing evidentiary standard employed in civil detention cases in the material witness context because it will allow courts to require concrete showings of materiality and impracticability when the government applies for a material witness warrant, which is necessary because of the particular liberty interest at stake. If a court grants the material witness warrant, then at the material witness’s first hearing, the court should proceed to review the underlying warrant under a heightened standard of review, much like courts do in the equal protection context when they use strict scrutiny, so that the court may thoroughly assess whether the witness has in fact been held for testimony in a future criminal proceeding or instead, for individual

129. See 151 Cong. Rec. 20,942–43 (2005) (statement of Sen. Patrick Leahy) (proposing a bill to replace the material witness statute that would require that the government show probable cause that the witness has been served with a subpoena and failed or refused to appear as required, or else prove by clear and convincing evidence that the service of a subpoena is likely to result in flight risk, in order for a court to grant a material witness warrant). Senator Leahy’s bill would accomplish what this Comment proposes—convincing or dissuading the court for a second time that the government has fully met its evidentiary burden, and identifying instances of pretextual detention—by only authorizing detention where there is clear and convincing evidence that the witness may flee or fail to appear in court and by prolonging that detention only if continued clear and convincing proof is shown that such release will not reasonably assure the appearance of the witness as required.” See S. 1739, 109th Cong. § 1(a)(2), (d)(2)(A), (d)(3)(A) (2005) (requiring clear and convincing evidence for initial and continued detention).
investigation in contravention of the statute’s purpose. Lastly, even if the warrant passes muster under this stricter standard of review, courts can nonetheless hold periodic hearings to demand that the government show why the witness continues to pose a flight risk and present what diligent efforts it is taking to hold the witness under the least restrictive means possible.

A. Requiring Clear and Convincing Showings of Materiality and Impracticability in Applications for Material Witness Warrants Protects the Material Witness’s Significant Liberty Interest in Otherwise One-Sided Proceedings

A court can appropriately require a showing of clear and convincing evidence, following the standards of proof in civil detention cases, before granting a material witness warrant because the determination is made at a non-adversarial ex parte proceeding. At a material witness warrant proceeding, only the government presents its position, and no other party has the opportunity to voice opposition on the material witness’s behalf. For example, in Akron Center for Reproductive Health, the Supreme Court approved a state’s requirement that a minor prove maturity or best interests by clear and convincing evidence before allowing a bypass procedure to parental notice of an abortion, particularly because judicial bypass procedures occurred at ex parte proceedings where the minor’s testimony went unopposed. Similarly, applications for material

131. See 151 CONG. REC. 20,944 (2005) (statement of Sen. Patrick Leahy) (recommending that courts conduct periodic reviews to ensure that material witnesses continue to pose a flight risk meriting extended detention).
132. Cf. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 516 (1990) (upholding the clear and convincing evidentiary standard that a minor must meet to obtain judicial bypass of the parental notification requirement under the Ohio abortion statute). Non-adversarial ex parte proceeding refers to a court hearing where only one party is represented, thus eliminating the proceeding’s otherwise adversarial nature. See MODEL RULES OF PROF’L CONDUCT R. 3.5(b) (2012). For that reason, ex parte communications are often banned under statute and enforced by courts. See 5 U.S.C. § 557(d)(1) (2006) (banning ex parte communications by any interested person outside of the relevant administrative agency on the merits of the issue).
133. See Stoller et al., supra note 25, at 197, 201 (describing that material witnesses can be subjected to arrest and detention solely on the basis of the government’s statement).
134. See Akron Ctr. for Reprod. Health, 497 U.S. at 516 (accepting the clear and convincing evidentiary standard and further noting that the Court’s precedent does not require a lower standard, and that the minor was aided by both an attorney and a guardian ad litem).
witness warrants merit a clear and convincing standard of proof because courts determine whether to grant material witness warrants at ex parte hearings where the government alone presents its case and the material witness is not afforded representation or the corresponding ability to question the government’s showings.\footnote{\textit{Awadallah II}, 349 F.3d 42, 47 (2d Cir. 2003) (basing the material witness warrant solely on the affidavit of the investigating FBI agent); \textit{In re Francisco M.}, 103 Cal. Rptr. 2d 794, 799 (Ct. App. 2001) (granting the government’s ex parte motion to detain Francisco as a material witness based only on the detective’s declaration).}

However, unlike judicial bypass procedure cases where the Court has found the state’s interest to override a minor’s individual liberty interest, the situation for material witnesses is reversed because the testimony of the government goes unopposed.\footnote{\textit{Akron Ctr. for Reprod. Health}, 497 U.S. at 516 (explaining that an attorney and a guardian ad litem accompany the minor at the judicial bypass hearing); William H. Danne, Jr., Annotation, \textit{Validity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor’s Abortion}, 77 A.L.R. 5TH 1, 152–53 (2000) (reasoning that the Court in \textit{Akron Ctr. for Reprod. Health} allowed the minor to carry the burden of proof through clear and convincing evidence because she alone would present testimony at the judicial bypass hearing and she would be represented by an attorney and a guardian ad litem). \textit{But see Awadallah II}, 349 F.3d at 47 (describing that the government’s interests alone were represented by the Assistant United States Attorney at the ex parte material witness warrant proceeding).} Regardless of whether it is the government or the material witness that is not represented, the underlying concern remains the same: The party not represented is not there to present a position, which may include controverting and presenting evidence against what is being argued before the court at a one-sided proceeding.\footnote{\textit{Awadallah II}, 349 F.3d at 47 (leaving open whether Awadallah’s absence may have harmed his ability to challenge the findings presented by Agent Plunkett and the Assistant United States Attorney before the district court as to why Awadallah could be properly detained).} Therefore, a court can appropriately require the unopposed party to shoulder a heavier burden of proof to balance the otherwise lopsided nature of the proceeding.\footnote{\textit{Awadallah II}, 349 F.3d at 47 (suggesting that the state was the disadvantaged party because “the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor’s testimony”); \textit{Awadallah II}, 349 F.3d at 47 (leaving open whether Awadallah’s absence may have harmed his ability to challenge the findings presented by Agent Plunkett and the Assistant United States Attorney before the district court as to why Awadallah could be properly detained).}

Not only does the clear and convincing standard afford protection to the unrepresented party, like a material witness, but it also helps inform a court’s full and fair assessment of whether a material witness is both material to a criminal proceeding and impracticable to secure through a subpoena as required under the federal material witness

\footnote{\textit{Akron Ctr. for Reprod. Health}, 497 U.S. at 516 (rejecting a challenge to the heightened standard of proof imposed on a minor seeking a judicial bypass procedure where she was represented by an attorney and a guardian ad litem and the state was not represented at all).}
statute. The heightened standard provides a fuller factual picture for the court because it requires the government to show more than conclusory assertions as to both the materiality prong and the impracticability prong. Under the current standard, a presiding judge issues a material witness warrant based on the government’s application, which is supported by affidavits crafted by U.S. attorneys or other government agents. Consequently, courts tend to credit the government’s position in the material witness warrant application for lack of a differing view.

In addition to the one-sided nature of the relevant proceeding, the interest at stake for the material witness is critical in determining the standard of proof that should govern. In Addington, the Court recognized that the liberty interest of individuals committed to mental institutions require the state to provide clear and convincing evidence before an involuntary commitment may be authorized. Similar to the interests of involuntarily committed individuals, material witnesses have an important liberty interest at stake in

139. See 151 Cong. Rec. 20,943 (2005) (statement of Sen. Patrick Leahy) (recommending that material witness warrants be issued if the court is convinced by the government’s clear and convincing showing that the witness is likely to flee or cannot be adequately secured through means other than arrest).

140. See 18 U.S.C. § 3144 (2006) (failing to require a particular standard of proof as to materiality and impracticability showings). But see 151 Cong. Rec. 20,944 (2005) (statement of Sen. Patrick Leahy) (proposing that material witnesses only be held for additional periods when the government can demonstrate through clear and convincing evidence that the witness poses a flight risk, and suggesting that the court take into account the witness’s history and characteristics in determining whether to release or continue detaining the witness).

141. See, e.g., Awadallah II, 349 F.3d at 47 (granting a material witness warrant based on an FBI agent’s affidavit even though the witness had been arrested three hours earlier); In re Francisco M., 103 Cal. Rptr. 2d 794, 799 (Ct. App. 2001) (issuing a material witness warrant based on declarations made by investigating officer Detective Arroyo, who filed the material witness warrant application before the court).

142. See supra notes 65–76 and accompanying text.

143. See, e.g., Fouca v. Louisiana, 504 U.S. 71, 80 (1992) (cautioning that Fouca had a significant liberty interest in freedom from bodily restraint, which would by definition be denied by virtue of being involuntarily committed); Akron Ctr. for Reprod. Health, 497 U.S. at 515–16 (concluding that a clear and convincing standard was appropriate); Addington v. Texas, 441 U.S. 418, 425, 427 (1979) (noting that civil commitment for any purpose substantially deprives the individual of a liberty interest, meriting due process protection and overriding the state’s interest); see also Landis, Modern Status, supra note 109, at 785–86 (discussing that both the mentally ill and those found unfit to stand trial hold important liberty interests in the outcome of their civil commitment proceedings); Landis, Modern Status, supra note 109, at 785–86 (stating that some courts acknowledge that sex offenders who are convicted of a sex offense that may be punished by any period of imprisonment have a critical liberty interest at stake to justify a standard of beyond a reasonable doubt).

144. See Addington, 441 U.S. at 425, 433 (holding that the trial court’s instruction based on a clear and convincing evidence standard did not violate Addington’s due process rights).
material witness warrant proceedings because the court’s
determination can result in the witness’s arrest and incarceration.145
Compare for example, Addington and Osama Awadallah—the
student detained following the 9/11 attacks. Both Addington and
Awadallah had an interest in not being deprived of their liberty.146
Further, both men had an interest in being free of the collateral
impacts of detention, which could endure long after release. For
Awadallah, detention jeopardized his college education, putting his
future ability to achieve a certain level of success and prosperity at
risk, while for Addington, detention forced him to carry the stigma
associated with having been involuntarily committed.147 For these
reasons, a court determining whether to issue a material witness
warrant should consider and protect the witness’s liberty interest by
only authorizing a witness’s arrest where the government meets the
clear and convincing standard.148
Courts generally acknowledge that materiality is a low bar to meet
and will be satisfied so long as the government shows that the
witness’s testimony is central to the proceeding and not merely
duplicative of other witness testimony or impeachment evidence.149

145. See Stoller et al., supra note 25, at 200 (reporting that the government has
detained dozens of individuals since 9/11 and many were subjected to harsh
treatment).
146. See Addington, 441 U.S. at 425–27 (describing that Addington possessed an
individual interest in not being involuntarily confined for an indefinite period and
an individual interest in avoiding an erroneous and inappropriate commitment);
Awadallah II, 349 F.3d at 45–46 (revisiting Awadallah’s story as a college student in
San Diego who was concerned about missing class when he discovered he would be
subject to interrogation by FBI agents).
147. See Addington, 441 U.S. at 425–26 (recognizing the importance of protecting
against the unavoidable labeling that accompanies one who is involuntarily
committed to a mental institution); Awadallah II, 349 F.3d at 45–46 (noting that
Awadallah missed class as a result of his interrogation); see also Ray Rivera & Matthew
Sweeney, Acquaintance of 2 Hijackers is Acquitted, N.Y. TIMES (Nov. 18, 2006),
www.nytimes.com/2006/11/18/nyregion/18immigrant.html (discussing the fact that
Awadallah was a college student prior to his detention and that he subsequently
obtained a college degree).
148. See David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and
War, 97 CALIF. L. REV. 693, 722 (2009) (highlighting that material witnesses have a
substantial "constitutional interest in minimizing nonpunitive restrictions on
individual liberty" that merits careful consideration before granting detention).
149. See, e.g., United States v. Finkielstain, No. 89 CR. 0009, 1989 WL 39685, at *1
(S.D.N.Y. Apr. 18, 1989) (determining that testimony from an accountant who
created shell corporations allegedly used by the defendants to commit fraud
qualified as material); United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y.
1976) (finding that the government had established probable cause that Feingold’s
testimony was material because Feingold had appeared as a witness before the grand
jury that indicted the defendant for income tax evasion, and Feingold had signed
checks totaling $50,000 payable to the XYZ Collection Company, of which defendant
was the sole proprietor); see also Michael A. Rosenhouse, Annotation, Validity,
Construction, and Application of 18 U.S.C.A. § 3144, Governing Arrest and Detention of
Because the government can satisfy materiality by showing that it is reasonably probable that the witness’s testimony is material to a criminal proceeding, the government’s burden of proof operates like a preponderance of the evidence standard. Courts tend to apply this lower standard by crediting the government’s assertions about how material the witness may be—particularly in grand jury cases—when these representations are made by detectives, FBI agents, federal prosecutors, and other government officials. The tendency of courts to defer to the government often leads to findings of materiality based on minimal proof. Consequently, the heightened standard of clear and convincing evidence is necessary to safeguard against instances where materiality might not be satisfied. For example, the threshold may not be met where a witness’s supposed materiality is either cumulative of other testimony or insufficiently.


151. See, e.g., In re de Jesus Berrios, 706 F.2d 355, 358 (1st Cir. 1983) (determining that the government proved materiality when it claimed that the witness’s testimony was material to a grand jury indictment); United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982) (finding that materiality in grand jury proceedings was satisfied based only on a representation from the U.S. Attorney’s Office that the detainee’s testimony was material); Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971) (establishing materiality of the testimony was satisfied by the “mere statement” of a responsible government official claiming the testimony was material); Feingold, 416 F. Supp. at 628 (crediting the assertions of Special Agent Merino asserting that Feingold could give testimony that was material); In re Francisco M., 103 Cal. Rptr. 2d 794, 799 (Ct. App. 2001) (accepting Detective Arroyo’s declarations that Francisco, the material witness, had been present in the murder victim’s car thus making him material to criminal proceedings regarding the murder). A government official’s representation as to materiality is sufficient in the grand jury context because it “strikes a proper and adequate balance between protecting the secrecy of the grand jury’s investigation and subjecting an individual to an unjustified arrest.” Oliver, 683 F.2d at 251; see also Rosenhouse, supra note 149, at 441–44 (discussing the previously cited cases as examples of when and how the materiality prong of the federal material witness statute is satisfied).

152. See supra note 151 and accompanying text (illustrating that courts often credit the government’s showings, particularly with respect to materiality determinations). But see Awadallah II, 349 F.3d at 59 (balancing the government’s interest in investigating the conspirators who carried out the 9/11 attacks against the witness’s liberty interest to determine reasonability of detention and concluding that the federal material witness statute sufficiently minimizes any intrusion on the material witness’s liberty while properly accounting for the government’s “countervailing interests”). The court found that materiality is met based on a totality of the circumstances, where the government’s evidence supported the inference that the witness knew one of the 9/11 hijackers. Awadallah II, 349 F.3d at 70.
particularized to demonstrate that the information possessed by the witness is adequately relevant to the case.\textsuperscript{155}

On the other hand, the impracticability prong generally requires a slightly higher burden of proof because the statute’s terms require that witnesses be secured by subpoena in the first instance and detained only where a subpoena has failed or will likely fail to secure the witness’s presence.\textsuperscript{154} Therefore, courts authorize detaining a material witness only when the witness poses a flight risk.\textsuperscript{155} Even though the statute suggests that impracticability is a weightier assessment, courts often grant material witness warrants where it is more probable than not that the witness will flee rather than requiring the government to prove by clear and convincing evidence that the witness is likely to flee.\textsuperscript{156}

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\item See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2088 n.2 (2011) (Ginsburg, J., concurring in the judgment) (indicating that the affidavit used to secure al-Kidd’s detention failed to provide an adequate basis for the material witness warrant as to materiality because the government “did not state with particularity the information al-Kidd purportedly possessed” that would make him material to the government’s prosecution of defendant Sami Omar al-Hussayen); United States v. Basciano, 763 F. Supp. 2d 303, 336 (E.D.N.Y. 2011) (declaring that even if the identities of two material witnesses, CW-2 and CW-3, were known, there was not a proper showing that their testimony would be material to the case because the testimony could just as easily be “merely cumulative of CW-1’s” or another witness’s testimony or other impeachment evidence).

\item 18 U.S.C. § 3144 (2006); see supra Part I.A.1 (explaining the showings required to meet impracticability under the federal material witness statute).

\item See al-Kidd, 131 S. Ct. at 2088 n.2 (Ginsburg, J., concurring in the judgment) (stating that the government’s representation in the affidavit underlying the material witness warrant failed the impracticability prong where the only representation made was unelaborate and consisted of a statement that al-Kidd would travel to Saudi Arabia and the U.S. government would be unable to secure his presence by subpoena); Awadallah II, 349 F.3d at 77 (Straub, J., concurring in the judgment) (determining that the government failed to meet the impracticability prong where the redacted affidavit did not adequately show Awadallah was a flight risk). But see Awadallah II, 349 F.3d at 70 (majority opinion) (finding that impracticability is met where Awadallah did not step forward to share information he had about one or more of the hijackers, thus suggesting a risk of flight); In re de Jesus Berrios, 706 F.2d at 357 (holding that the material witness warrant was properly issued on the premise that the appellant had avoided service of several subpoenas ordering him to give testimony before the grand jury thus making it impracticable to secure his presence by subpoena); United States v. Finkielstain, No. 89 CR. 0009, 1989 WL 39685, at *1 (S.D.N.Y. Apr. 18, 1989) (accepting that it would be impracticable to secure the witness through subpoena because Lecueder was a Uruguayan citizen scheduled to leave the United States well in advance of the defendant’s trial); Feingold, 416 F. Supp. at 629 (granting the material witness warrant based on Marino’s affidavit showing unsuccessful attempts to serve Feingold with a subpoena either through Feingold’s attorney or on seven different days at his home).
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Material witnesses have an equal if not higher interest in being free from undue constraint than their civilly detained counterparts. First, material witnesses are detained because they can provide critical information in criminal proceedings, not because they pose a danger to others. Material witnesses constitute the unrepresented party at the very hearing determining whether to grant their detention. Consequently, material witnesses should be afforded the same level of assurance that the court will only allow the government to detain them on a clear and convincing showing of materiality and impracticability.


Material witnesses have a significant liberty interest that justifies both application of a higher evidentiary standard at the initial determination hearing that precedes detention as well as to heightened judicial scrutiny of their material witness warrants following detention. Unlike defendants, material witnesses are not held because they are suspected of or have committed a crime.

157. See supra note 16 and accompanying text (explaining how the material witness’s duty to disclose information is high enough to warrant infringing on the witness’s liberty interest).

158. See supra notes 16–17 and accompanying text (explaining that a material witness can be detained because the witness possesses knowledge of a crime, not because the witness is suspected of engaging in crime or because the witness may pose a danger to the community).

159. See supra notes 132–33, 135–36 and accompanying text (discussing the nature of the initial material witness warrant proceedings).

160. See supra notes 143–48 and accompanying text (providing the circumstances under which clear and convincing evidence is warranted). But see supra note 156 (specifying instances where a clear and convincing standard would not be appropriate if it would preclude finding impracticability where the government made reasonable efforts to subpoena or genuinely showed flight risk). In cases where a material witness has avoided service of a subpoena or is imminently scheduled to leave the country with no clear prospect of returning, a higher evidentiary burden might otherwise inhibit the government’s ability to hold witnesses who are critical to the government’s case and unavailable for testimony through other means. See supra note 156.

161. Part II.B focuses on entirely separate proceedings than those discussed in Part II.A. Where Part II.A targeted proceedings where the court is determining whether to issue a material witness warrant at all, e.g., authorize detention, Part II.B hones in on hearings where the court is determining whether to continue authorizing detention. Thus, Part II.B is directed at the validity of the material witness warrant rather than the determination to issue the warrant.

162. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2088 n.2 (2011) (Ginsburg, J., concurring in the judgment) (taking issue with the majority’s emphasis on the validity of the material witness warrant, which was based on individualized suspicion, because it implied that al-Kidd had engaged in wrongdoing); see also Cole, supra note 148, at 722 (stating that the federal material witness statute allows detention not
contrary, the material witness statute “does not ‘involv[e] suspicion, or lack of suspicion,’ of the individual so identified.”

Consequently, a material witness’s interest in liberty is seriously at risk, and failing to employ heightened judicial review at this separate and subsequent stage of the process could allow the government to continue holding witnesses for which the government lacks probable cause to charge with a crime. Therefore, in failing to apply a heightened standard of judicial review, a court can specifically contravene the federal material witness statute by allowing for detention of a material witness on less than adequate grounds.

If, upon review, a court grants continued detention by effectively rubberstamping the government’s previously authorized material witness warrant, then the court may less easily distinguish cases where the government seeks to detain a witness for individual investigation rather than for testimony. Deferring to the government’s position a second time, rather than requiring ongoing clear and convincing evidence of materiality and impracticability when reviewing a material witness warrant, presupposes that the government is continuing to hold the witness for its stated reasons. In practice,
such sustained deference can operate like a rebuttable presumption favoring detention, defeated only by evidence to the contrary presented by the material witness. In certain factual contexts, like in the aftermath of a breach of national security, the government may make overly generalized assertions that a witness continues to be material to mask its actual intent to hold the individual until it can gather sufficient evidence to charge the witness with a crime. Consequently, failing to review a material witness warrant under a clear and convincing standard may lead to increased pretextual detention, whereas the government might otherwise be deterred to prolong detention if it knew that a higher standard of review hung in the balance.

Concerns regarding pretext do not only arise in the material witness context. Extrapolating from the equal protection context, where courts apply strict scrutiny when reviewing race-based remedial measures that are by nature suspect, a court can similarly review a material witness warrant under the clear and convincing standard. This is because the warrant is similarly suspect, as it was previously granted at a one-sided proceeding where the government carried a low evidentiary burden. Therefore, this Comment argues that applying a clear and convincing standard of review would accomplish two goals. First, it would convince the court for a second time that the government has fully met its evidentiary burden or poke holes

168. See id. (stating that Awadallah’s continued detention was “reasonable under the circumstances” where the circumstances relied on by the court included its initial reasons to detain that were based “solely on the contents of Agent Plunkett’s [the FBI agent] affidavit”). Awadallah could have had a colorable argument for challenging his detention if his attorney had highlighted the contradicting information.

169. See HRW REPORT, supra note 6, at 14 (raising the specter that the post-9/11 increased detention of material witnesses suggests that the government often held witnesses who the government believed may have participated in terrorism directly as opposed to only possessing information about terrorism); Klein & Wittes, supra note 13, at 139–40.

170. See Parker, supra note 54, at 28 (suggesting that courts can deal with excessive deference, which often leads to pretextual detention, by raising the standards used to determine whether a material witness actually poses a flight risk). In Awadallah, if the Second Circuit had applied a heightened standard of review, then it could only have authorized Awadallah’s continued detention based on express findings by the government showing why Awadallah posed a flight risk. Id. at 36.

171. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (noting that in the equal protection context, the conclusory statement offered by the state alleging the existence of racial discrimination requires careful and heightened scrutiny as opposed to a remedy founded on a respective statute’s clear legislative purpose); see also Stoller et al., supra note 25, at 197, 201 (describing that material witnesses are subject to arrest and detention based exclusively on the government’s evidence, offered ex parte).
where it has not, and second, it would separate instances of pretext from legitimate cases of prolonged detention. 172

As Croson illuminates, heightened judicial review helps to smoke out pretext because by applying heightened scrutiny, the court exposes the government's findings to a searching judicial inquiry into whether it offered concrete reasons for treating a class of individuals in a certain way rather than the court relying on a statement that the measures the government used are benign. 173 Similarly, applying searching judicial inquiry at hearings on motions to quash material witness warrants would give the court a chance to evaluate the underlying material witness warrant with a more critical eye than the judge who previously granted the warrant in an expedited ex parte hearing. 174

In material witness cases, the government often claims that a witness continues to be material to criminal proceedings and yet fails to call the witness or explain the delay. 175 Doing so suggests either that the witness was being held, pending individual investigation, or that the witness's materiality and impracticability had been exaggerated. 176 The government likely overstates its case or fails to provide an explanation for not calling a witness because doing so facilitates prolonged detention without necessarily requiring further investigation into whether it is necessary, arguably an administrative

172. See 151 CONG. REC. 20,942–43 (2005) (statement of Sen. Patrick Leahy) (requiring the government to show through clear and convincing evidence at the material witness's hearing that no condition or combination of conditions will reasonably secure the witness's appearance at a pending criminal proceeding to ensure that the witness is only held for testimony and not for individual criminal investigation).

173. See id. (discussing that in the equal protection context, the Court applies strict scrutiny because doing so helps identify instances where the state is implementing race-based remedial measures, and arguing that such measures are authorized by the Fourteenth Amendment but never specifically showing why and how that is so).

174. See supra note 132 and accompanying text (describing that courts can appropriately require clear and convincing evidence from the unilaterally represented party to provide an additional safeguard to the otherwise unrepresented party). By implication, if the clear and convincing standard protects the unrepresented party at the initial determination, it follows that those interests would similarly be protected by using the same standard upon review. See In re Det. of Turay, 986 P.2d 790, 813–14 (Wash. 1999) (demanding the same standard of clear and convincing evidence for insanity and dangerousness when authorizing the initial involuntary commitment upon review of confinement).

175. See Material Witness No. 38, 214 F. Supp. 2d 356, 358–59 (S.D.N.Y. 2002) (noting that the material witness was never called to testify before the grand jury despite the court granting the government's request for prolonged detention).

176. See id. at 359 (explaining that rather than present the witness to the grand jury, the government instead charged the witness with making "material false statements" for denying that the witness possessed the radio transceiver, which arguably calls into question the materiality and impracticability of the witness).
convenience to the government. Moreover, extending a witness’s detention may also give the government a chance to establish probable cause to charge the witness with a crime.

Reviewing a material witness warrant under a relatively relaxed level of scrutiny can lead to unnecessarily prolonged detention or to pretextual use of the material witness statute. However, heightened review of materiality and impracticability can spare a material witness from a prolonged detention. In both the equal protection and the material witness contexts, courts can reach thoroughly reasoned decisions that do not immediately credit the government’s assertions by applying a heightened standard of judicial review. For example, unlike Croson, where the Court rejected the city’s claim that its race-based measures helped remedy racial discrimination as overbroad, the Second Circuit in Awadallah required more than a mere assertion but nonetheless credited the government’s claim that specific facts in the affidavit showing the FBI agent’s personal knowledge of the materiality of Awadallah’s testimony was sufficient to prove materiality rather than probing further into the facts that arguably made Awadallah material to a criminal proceeding. In other cases

177. See supra notes 25, 59, 76 and accompanying text (describing instances where the government held the material witness for extended periods, at least one of which required multiple stages of review and continued approval by the court).
178. See Cochran, supra note 12, at 13–14 (noting that the DOJ prolonged detention of material witnesses to investigate possible terrorist activity and that the courts furthered this end by establishing a review procedure of material witness warrants that amounted to a mere formality).
179. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2088 n.2 (2011) (Ginsburg, J., concurring in the judgment) (implying that because the affidavit underlying al-Kidd’s material witness warrant was devoid of any concrete showings of materiality and impracticability, it is arguable that al-Kidd was held pretextually by the government).
180. Id. (reasoning that if reviewing courts employed a more searching inquiry of the government’s reasons supporting a witness’s materiality and impracticability, they could avoid detention altogether or lessen its duration).
181. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–08 (1989) (evaluating the City of Richmond’s set aside plan under strict scrutiny, which required that the state demonstrate a compelling interest in having such a plan as well as facts demonstrating that the plan was narrowly tailored); Awadallah II, 349 F.3d 42, 65–66 (2d Cir. 2003) (requiring specific facts tending to prove materiality rather than accepting a “mere statement” of materiality by a government official alone); see also Stoller et al., supra note 25, at 206–07 (commenting on how the approach to materiality in Awadallah provides a more probing analysis than the Bacon “mere statement” rule, which lacked constitutional requirements for findings of particularity and an independent judicial determination).
182. Compare Croson, 488 U.S. at 498–99 (concluding that the city’s plan provided no more than a generalized assertion of past discrimination in the construction industry, which was insufficient to justify the proposed remedy), with Awadallah II, 349 F.3d at 65–66 (deciding that FBI Agent Plunkett’s assertions showing specific involvement with the agents who personally dealt with Awadallah, coupled with Agent Plunkett’s involvement in other indictments and convictions as part of an
where the government repeatedly failed to call the material witness to testify, if the reviewing court had applied a heightened standard of review, it could have potentially avoided unnecessary extended detainment by pressing the government for concrete reasons why the witness had not yet been called to testify as well as the particular reasons why it might be necessary to continue holding the witness.  

Because both materiality and impracticability are fact-driven assessments that are subject to change based on new information, the government has an implied duty to continue making its case for detention. At the second hearing following Egyptian national Higazy’s detention as a material witness after the government had connected him to the radio transceiver, the court learned that the government had not presented Higazy to the grand jury and required the government to provide the court with further information justifying Higazy’s continued detention. The court required this additional showing in recognition of its duty not to further detain a material witness without an adequate basis for doing so. Nonetheless, the court granted an extended detention based on what was later discovered to be a false confession. However, under a clear and convincing evidence review of the material witness warrant, the court would likely have discovered that the underlying confession was false and obtained through coercion. Alternatively, if the government knew it would be held to a clear and convincing

ongoing investigation into the 9/11 attacks, sufficiently established materiality). The Second Circuit greatly emphasized the personal knowledge element of Agent Plunkett’s assertions in the affidavit, which may have imposed a stricter standard on the government than the “mere statement” rule used by prior courts, and the court subsequently decided that the government had established probable cause to find Awadallah material based on Agent Plunkett’s representations. Awadallah II, 349 F.3d at 65–66, 69–70. Arguably, however, the court’s determination fell short of a searching inquiry into whether a 9/11 hijacker’s possession of Awadallah’s phone number along with Awadallah living close to one of the hijackers showed a compelling enough reason to make Awadallah material to a criminal proceeding and to warrant his continued arrest.

183. See Material Witness No. 38, 214 F. Supp. 2d 356, 358–59 (S.D.N.Y. 2002) (describing that material witness Higazy was not called to testify before a grand jury despite being detained for multiple ten day intervals).

184. See, e.g., id. at 359 (requiring that the government provide the court with further information, after the initial ten day period to hold and call witness Higazy had passed, to see what, if any, new information may have surfaced to warrant further detention).

185. Id.

186. Id.

187. Id.

188. See Higazy v. Templeton, 505 F.3d 161, 166 (2d Cir. 2007) (detailing that Higazy admitted that he had lied during the confession); Material Witness No. 38, 214 F. Supp. 2d at 360 (indicating that Higazy’s counsel made allegations of the coercive and deceptive nature in which the government obtained the confession).
standard of review, it may have provided additional support showing why the confession itself necessarily proved not only that Higazy was material, but also that there were specific reasons why Higazy posed a flight risk that warranted his continued detention.\textsuperscript{189}

As Higazy’s case illustrates, a relaxed standard of review allows a reviewing court to assume that the government’s measures are in fact designed to further the government’s stated goal, and thus, the court fails to hold the government accountable.\textsuperscript{188} Even though remedying racial discrimination or ensuring testimony at trial may serve the purpose of the Equal Protection Clause and the material witness statute respectively, in both contexts the court cannot adequately review the underlying measure “without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis . . . .”\textsuperscript{191} Applying relaxed scrutiny can lead to courts failing to engage in the kind of intense examination of governmental purpose that courts would otherwise exercise when reviewing race- or gender-based measures.\textsuperscript{192}

In the material witness context, when a court is singularly deferential to the government’s position, it is at the expense of the court’s independence and its valuable judicial resources that are necessarily spent presiding over later proceedings when the court discovers it has been misled.\textsuperscript{193} However, the court’s independence could be better preserved if the court scrutinized the warrant to determine whether there is adequate support to uphold continuing detention or whether the government should be required to present new evidence indicating why further detention is necessary.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{189} See Stoller et al., supra note 25, at 206–07 (contrasting the court’s review of Higazy’s warrant under the \textit{Bacon} “mere statement” rule, where the court too readily found materiality based on the representation of the prosecutor, to the more probing \textit{Awadallah} determination, which relied on factual statements).
\item \textsuperscript{190} See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–95 (1989) (plurality opinion) (illustrating that only a searching judicial inquiry will reveal the motivations behind a government action).
\item \textsuperscript{191} Id. at 493.
\item \textsuperscript{192} Id. at 493.
\item \textsuperscript{193} See, e.g., Material Witness No. 38, 214 F. Supp. 2d at 358–60 (explaining that upon learning of the government’s misrepresentations, the court convened a hearing to examine the extent of the misrepresentations regarding the discovery of the transceiver and Higazy’s confession as to possessing it).
\item \textsuperscript{194} See Higazy v. Templeton, 505 F.3d 161, 166–67 (2d Cir. 2007) (establishing that the government’s newly proffered evidence—showing that Higazy confessed to owning the radio transceiver during the lie detector test—was sufficient to prolong his detention even though it had been Higazy who had requested the polygraph). The court previously entertained Higazy’s attorney’s request to grant the polygraph because Higazy was “urgently desirous of taking a lie detector test,” which suggested that Higazy did not own the radio transceiver and likely had been coerced into admitting that he did. \textit{Id.} at 165–66.
\end{itemize}
so could avoid situations like that of Higazy, where subsequent hearings exploring why and how the court had been misled lasted nearly five months.\(^\text{195}\) The court might have spared valuable judicial resources had it used a higher standard of review and required more conclusive proof for prolonging Higazy’s detention because it could have detected at an earlier point that, for example, Higazy had falsely confessed to owning the radio transceiver.\(^\text{196}\)

Moreover, if the court’s role is to examine the congressional intent behind a statute, then clear and convincing evidence can assist the court in preserving this role.\(^\text{197}\) Specifically, reviewing for clear and convincing evidence would compel the court to require particularized evidence of the materiality of a witness and the impracticability of securing a subpoena, which is mandated under the federal material witness statute.\(^\text{198}\)

Reviewing for clear and convincing evidence would allow courts to recognize, as Justice Ginsburg did in \textit{al-Kidd}, that simply because a material witness warrant is “based on individualized suspicion,” it does not follow that the government’s reasons for holding a witness are insulated from scrutiny—particularly when the notion of individualized suspicion tends to imply that the person has engaged in wrongdoing.\(^\text{199}\) Justice Ginsburg’s concurrence implies that the government often detains a witness not when it wishes to call him for testimony but when the government intends to investigate the witness further for \textit{individual wrongdoing}—an end goal that is anathema to

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196. \textit{See supra} notes 187–89 and accompanying text (describing Higazy’s false confession and explaining what the court could have done differently to avoid the hearings inquiring into the government’s misrepresentations in Higazy’s case).

197. Senator Leahy’s proposed bill would amend the material witness statute to ensure that the material witness law is “used only for the narrow purpose that Congress originally intended, to obtain testimony, and not to hold criminal suspects without charge when probable cause is lacking.” 151 CONG. REC. 20,943 (2005) (statement of Sen. Patrick Leahy).

198. \textit{See Ashcroft v. al-Kidd}, 131 S. Ct. 2074, 2088 n.2 (2011) (Ginsburg, J., concurring in the judgment) (indicating that courts might seriously inquire whether the government intends to call the material witness and whether there is sufficient information to hold the witness in order to avoid situations like \textit{al-Kidd’s}). Justice Ginsburg further opined that with a more thorough review of the spare affidavit, “\textit{al-Kidd} might have been spared the entire [detention] ordeal.” \textit{Id}.

199. \textit{See id.} at 2088 n.3 (reasoning that “[m]aterial witness status does not ‘involve[s] suspicion, or lack of suspicion,’ of the individual so identified” (quoting \textit{Illinois v. Lidster}, 540 U.S. 419, 424–25 (2004))).
the statute. Therefore, courts can safeguard their own independence and the interests of material witnesses by employing a clear and convincing standard of judicial review that critically examines the government’s reasons for detaining a material witness and helps identify instances of pretextual detention.

C. Conducting Periodic Hearings Affords Material Witnesses the Requisite Procedural Safeguards and Allows Courts To Continue Reviewing the Government’s Reasons for Prolonged Detention Under Heightened Scrutiny

Periodic status hearings comport with the procedural protections required by Rule 46 of the Federal Rules of Criminal Procedure and can reduce the risk of erroneous prolonged detention by providing increased judicial oversight of the government’s reasons for continuing detention. Because material witnesses hold significant liberty interests, Congress intended to provide material witnesses with the right to mandatory bi-weekly judicial review when these witnesses are detained for an extended period of time. Periodic status hearings can additionally provide a material witness another avenue to challenge his detention and question whether he is being held for individual investigation. Thus, even if a court finds that the

200. See 151 CONG. REC. 20,942–43 (2005) (statement of Sen. Patrick Leahy) (explaining that following 9/11, the government used the material witness statute for other ends—namely to detain people suspected of criminal activity for which probable cause had not been established).

201. See supra notes 190–91, 198 and accompanying text (illustrating that review of materiality and impracticability under heightened scrutiny should operate by providing specific examples where courts based the decision to grant a material witness warrant on factual information noting a particular risk of flight or inability to serve a subpoena).

202. FED. R. CRIM. P. 46(h)(1)–(2); see also Material Witness Warrant for John Doe, 213 F. Supp. 2d 287, 296 (S.D.N.Y. 2002) (noting that Rule 46 requires courts to continually monitor a material witness’s prolonged detention by holding bi-weekly status hearings to eliminate unnecessary detention wherever possible); In re Arnold, 292 S.W.3d 393, 396–97 (Mo. Ct. App. 2009) (describing that a clear and convincing standard rather than a beyond a reasonable doubt standard sufficiently meets the constitutional requirements needed to protect sex offenders because it affords the court with continuing opportunities to review the offender’s civil commitment, thus ensuring a reduced risk of error).

203. See FED. R. CRIM. P. 46 advisory committee’s note (explaining that in 1966, Congress added subsection (h) to Rule 46 to supervise and eliminate all unnecessary detention of defendants and witnesses). In 2002, Congress amended the language to remove the protection for defendants who were otherwise covered by the Speedy Trial Act, but kept the language in for material witnesses because they fall into a class that warrants additional protection. Id.

204. See Adams v. Hanson, 656 F.3d 397, 410 (6th Cir. 2011) (providing that “material witnesses may petition for habeas corpus relief or move to quash their arrest warrants”). Accordingly, both procedural devices can be used as forums for raising the issue of pretextual detention. Id.; see also 109th Cong. § 1 (d)(2)(A), (d)(3)(A)–(C) (2005) (outlining the multiple instances where a material witness could periodically challenge detention under the proposed bill).
underlying material witness warrant is valid, a detainee can still argue at a status hearing or a habeas corpus proceeding that he is being held pretextually under Rule 46.  

Periodic hearings not only provide an opportunity to challenge the government’s motive, but also give courts the ability to engage in a balancing test that weighs the interests of the state in having individuals testify against the interests of the witness in not being unreasonably detained, or being detained using only the least restrictive means. Moreover, courts can strike the proper balance between these competing interests at periodic hearings because they can delve into whether the government has actually attempted to secure testimony by deposition, as well as determine whether detention is the only means possible to secure the witness’s testimony. Additionally, periodic hearings allow the court to consider other factors that may be relevant to whether the witness is being held pretextually. First, courts can consider how material the testimony really is, including whether the witness’s testimony is cumulative. Second, courts can review the length of proposed detention—the longer the detention, the greater the showing required by the state to justify it. Third, courts can assess the harm to the witness and the witness’s family, including lost wages and missed

205. See, e.g., Adams, 656 F.3d at 410 (implying that material witnesses are not foreclosed from arguing improper motive at a Rule 46 or habeas corpus hearing). A habeas corpus proceeding, in particular, allows the presiding court to release a material witness if the witness is able to show that his detainment met certain conditions. Carolyn B. Ramsey, In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses, 6 OHIO ST. J. CRIM. L. 681, 692 & n.60 (2009).

206. From this point forward in this Comment, “periodic hearings” encompass both status hearings under Federal Rule of Criminal Procedure 46 and habeas corpus proceedings, while “status hearings” refers only to Rule 46 hearings throughout Part II.C.

207. In re Francisco M., 103 Cal. Rptr. 2d 794, 805 (Ct. App. 2001) (reasoning that because of the material witness’s unique position, he has the right to not be “unreasonably detained” and thus procedural safeguards must allow the interests of the witness to be heard with the interests of the state). The court went on to indicate that determining whether and how long to detain a witness cannot be determined by applying “mechanical rules” given the important right at stake. Id. at 805. In conducting a balancing test, the court discussed taking a common sense approach that considers the interest of the witness as well as the interests of the prosecution and the defendant in the underlying criminal proceeding for which the witness’s testimony is needed. Id. at 806.

208. See id. at 805 (noting that the government must show that it is necessary to hold the witness based on a good cause belief that the witness will not appear and testify, unless a more restrictive means is used to guarantee the witness’s future testimony). The court should also consider any relevant change in circumstances when assessing whether less restrictive means are appropriate, including whether the witness has changed his attitude toward testifying or toward accepting other alternatives to custody, because such changes would suggest that means other than prolonged detention are appropriate. Id. at 808.
classes. Fourth, the court can consider the witness’s financial resources, particularly in setting bail. Fifth, courts may evaluate other alternatives to incarceration.  

1. The bi-weekly reporting requirement of Rule 46 of the Federal Rules of Criminal Procedure allows a court to continue challenging the government’s reasons for prolonging the detention of an allegedly material witness

Rule 46 affords material witnesses additional opportunities to screen for improper motive when the government prolongs witnesses’ detentions because Rule 46 requires the government to report bi-weekly to the court its reasons for holding any material witness rather than releasing or deposing him. Moreover, courts reviewing prolonged material witness detention are entitled to demand from the government the kind of showing that ensures a material witness is detained no longer than necessary. To ensure that material witnesses are held under the least restrictive means, a court can press the government for clear and convincing evidence demonstrating that it took specific measures to secure the witness’s testimony by deposition or that the witness continues to pose a flight risk. Consequently, to effectively scrutinize unnecessary delay on the government’s part, the court may incrementally increase the evidentiary standard that the government must meet: The longer the witness is held, the greater the encroachment on the witness’s liberty interest.

When used properly, Rule 46 can provide an effective mechanism for challenging improper motive when the reviewing court authorizes continued detention based only on the government’s attempts to

209. Id. at 806–07.
210. Fed. R. Crim. P. 46(h)(1)–(2); see also supra notes 202–05 and accompanying text (discussing the compulsory nature of the Rule 46 bi-weekly reporting requirement and its additional protections, which are not similarly afforded to other detained individuals); cf. 28 U.S.C. § 2241 (2006) (affording certain classes of prisoners the right to a writ of habeas corpus without additionally providing later opportunities for continuing reviewing of their detention).
211. Awadallah II, 349 F.3d 42, 62 (2d Cir. 2005) (outlining the protections for a material witness against unnecessary prolonged detainment found in the federal material witness statute and Federal Rule of Criminal Procedure 46).
212. See Awadallah II, 349 F.3d at 62–63; see also 151 Cong. Rec. 20,943 (2005) (statement of Sen. Patrick Leahy) (asking courts reviewing a material witness’s detention to only authorize prolonged detention if the government shows that the witness poses a flight risk through clear and convincing evidence).
213. See In re Francisco M., 103 Cal. Rptr. 2d at 806 (stating that the longer a witness is held in detention, the more substantial the justification needed from the government to warrant the extended delay).
compel testimony or prove flight risk. In *Awadallah*, the Second Circuit found that the witness’s detention was reasonable even though he was held for twenty days prior to giving testimony because Awadallah received adequate process to ensure he was not detained longer than necessary. However, the lower court could have found Awadallah’s detention unreasonable if it had used the clear and convincing standard to review the government’s reasons for prolonged detention, as that standard requires finding more than a reasonable probability that Awadallah would flee. By requiring a higher burden of proof that a detainee could be a flight risk, the court could have checked the sufficiency of the government’s arguments; likewise, in civil detention cases, courts use a higher burden of proof requiring more than just a few isolated instances of unusual conduct before involuntarily committing an individual. Applying that standard to Awadallah’s case, the court could have required clear and convincing evidence of how his family ties would create a flight risk or pressed for evidence of a pattern of uncooperativeness to minimize any possible erroneous determination prolonging Awadallah’s detention.

Drawing further on the civil detention context, courts review individual commitments of sexual offenders based on clear and convincing evidence at annual show cause hearings following the following: (1) Awadallah appeared before a magistrate judge for a bail hearing the first business day after his arrest; (2) his attorney’s request to provide Awadallah’s testimony by deposition was denied only because Awadallah was impracticable to secure by subpoena; (3) Awadallah received a second bail hearing the following day after being transported to New York; (4) his request for release was denied again, but only after a finding that there was no way to prevent Awadallah from leaving New York before he would be summoned for grand jury testimony there; and (5) Awadallah was called for testimony the first business day the grand jury convened.

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214. See *Awadallah II*, 349 F.3d at 62 (noting that Rule 46 allows the court to question whether Awadallah was properly detained when held for several weeks without being allowed to give his deposition or obtain release).

215. See *id.* at 63 (finding the conditions of Awadallah’s detention reasonable). The court determined Awadallah was not unreasonably detained based on the following: (1) Awadallah appeared before a magistrate judge for a bail hearing the first business day after his arrest; (2) his attorney’s request to provide Awadallah’s testimony by deposition was denied only because Awadallah was impracticable to secure by subpoena; (3) Awadallah received a second bail hearing the following day after being transported to New York; (4) his request for release was denied again, but only after a finding that there was no way to prevent Awadallah from leaving New York before he would be summoned for grand jury testimony there; and (5) Awadallah was called for testimony the first business day the grand jury convened. *Id.*

216. See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2088 n.2 (2011) (Ginsburg, J., concurring in the judgment) (indicating that lower courts should evaluate material witness warrants based on clear, concrete, and particularized findings of materiality and impracticability, which by definition would require proof beyond a reasonable probability).

217. See *Awadallah II*, 349 F.3d at 63 (observing that the lower court’s determination that Awadallah was a flight risk was made without providing concrete reasons); see also *Addington v. Texas*, 441 U.S. 418, 426–27 (1979) (stating that the significant loss of liberty associated with involuntary commitment for a mentally ill person mandates a greater showing of illness than merely idiosyncratic behavior).

218. See *Addington*, 441 U.S. at 427 (explaining that clear and convincing evidence reduces the chances that inappropriate and erroneous involuntary commitments will be ordered).
standards of proof the Supreme Court established for involuntary commitments in \textit{Addington}. Because the interests of the committed individual remain the same upon review, the state accordingly continues to bear the burden of proof at the annual show cause hearing. Similarly, a material witness’s liberty interest remains the same throughout the witness’s detention. Consequently, material witnesses, like their civil detention counterparts, should be entitled to periodic review of their detention under the same clear and convincing standard.

Given that the reviewing district court has discretion to determine whether continued detention is justified, the range of outcomes resulting from material witness hearings is subject to what the reviewing court determines as sufficient evidence of flight risk. Therefore, the protections afforded by any periodic hearing are only as strong as the level of scrutiny applied by the court. To ensure that material witnesses are afforded the greatest protection in challenging their prolonged detention and screening for pretext,

219. \textit{See supra} notes 124–25, 133 and accompanying text (discussing that courts apply the \textit{Foucha} and \textit{Addington} clear and convincing standard to the determination of whether to extend a sexual offender’s involuntary commitment at an annual show cause hearing).

220. \textit{See In re Det. of Turay}, 986 P.2d 790, 813–14 (Wash. 1999) (implying that the due process liberty interest requiring clear and convincing evidence of insanity and dangerousness authorizing the initial involuntary commitment equally apply upon review of confinement).

221. \textit{See supra} note 129 and accompanying text (detailing the material witness’s significant liberty interest).


223. \textit{See Awadallah II}, 349 F.3d 42, 62–63 (2d Cir. 2003) (contemplating the sufficiency of the magistrate and district court’s findings regarding why Awadallah posed a flight risk, thus suggesting that evidence of flight risk can outweigh the continued detention’s intrusion on liberty). The court found that the magistrate’s initial findings were justified because the magistrate analyzed Awadallah’s impracticability through a number of factors, including his family, employment, community ties, and financial resources. \textit{Id.} at 63 n.15. Similarly, the court found the district court’s determination to deny Awadallah’s release to be reasonable and necessary when the judge relied on specific facts in the government’s application showing that Awadallah had possible incentive to leave; a determination of reasonableness suggests that no method other than detention could secure his presence before a grand jury. \textit{Id.} at 63.

224. \textit{See Cole, supra} note 148, at 722 (implying that because there is no reason to justify delaying testimony of a material witness, a court should demand no less than good cause for such a delay). Cole argues for the good cause standard in seeking a presumptive time limit on detention. \textit{Id.} Applying the good cause requirement to an evidentiary standard could equate to clear and convincing following Senator Leahy’s approach in his bill to revamp the federal material witness statute. \textit{See 151 Cong. Rec.} 20,943 (2005) (statement of Sen. Patrick Leahy) (suggesting that courts should review prolonged detention under a clear and convincing evidence standard).
witnesses should receive periodic review based on clear and convincing evidence.\textsuperscript{225}

2. \textit{Periodic hearings provide the court with the ability to consider alternative, less-restrictive methods of detention}

Courts can require the government to implement the least restrictive means for detention at periodic hearings taking into account both the important governmental interest and the interests of the witness.\textsuperscript{226} Specifically, at a status hearing, the government can appropriately raise concerns about a witness fleeing prior to providing testimony and the court can consider granting electronic monitoring of a witness as a less restrictive means.\textsuperscript{227} Moreover, habeas corpus proceedings allow the presiding court to release a material witness where the witness is able to show that he has been detained under certain conditions.\textsuperscript{228}

In facilitating the least restrictive detention possible, courts reviewing material witness detention can look to \textit{Croson} for parallel guidance. In \textit{Croson}, the Court noted how the City of Richmond had at its disposal an array of race-neutral mechanisms it could use to increase minority accessibility to city contracting opportunities, and therefore its quota system was not the most narrowly-tailored means of achieving its goal.\textsuperscript{229} Similarly, in the material witness context, the government can use depositions, electronic monitoring, and speedy presentment of material witnesses for testimony, particularly at grand jury indictments that by nature are expedited proceedings, to ensure

\textsuperscript{225} See \textit{supra} notes 202–04 and accompanying text (describing the additional evidence that came to light during Higazy’s detention hearings, evidence that the court might have discovered earlier if it had initially required clear and convincing proof from the government).

\textsuperscript{226} See \textit{In re Francisco M.}, 103 Cal. Rptr. 2d 794, 806–07 (Ct. App. 2001) (suggesting that courts can consider granting less restrictive means of detaining a material witness such as electronic monitoring while simultaneously considering the government’s interests in securing witness testimony).

\textsuperscript{227} Id.

\textsuperscript{228} Ramsey, \textit{supra} note 205, at 692 n.60. Courts have released material witnesses by granting habeas corpus petitions in particular circumstances: where a witness was held for ninety days without adequate explanation for the continuances; where the witness was held without a sufficient showing of flight risk or materiality proving that his testimony was needed for a specific criminal case, aside from a trumped-up “John Doe” case filed to facilitate his detention; and where the witness had been detained for five months in county jail and had not received a hearing nor been separated from those charged with or convicted of a crime. \textit{Id}.

that witnesses are held for only as long as necessary and only under
the least restrictive means possible.230

D. Material Witnesses Are Best Protected When Courts Defer Less to the
Government, When Their Attorneys Request Continuing Review of Prolonged
Detention, and When the Government Requires Clear and Convincing
Standards in Its Material Witness Detention Practice

To stop the government’s practice of detaining material witnesses
based on pretext, courts should refrain from overly deferring to
government interests,231 which necessarily leads to the almost
guaranteed granting of material witness warrants.232 Additionally,
lawyers advocating for material witness clients should avail themselves
of checks on prosecutorial and general governmental abuse by
appealing continued detention as much as possible, questioning
underlying material witness warrants at status hearings, using habeas
corpus proceedings, and raising motions to quash underlying
material witness warrants.233 Both periodic status hearings and habeas
corpus proceedings would serve as critical safeguards for material
witnesses because at either hearing the court would be required to
release any material witness who is held without a showing that the
detainee poses a flight risk or that the witness’s testimony is needed
for a specific criminal case.234 For these reasons, courts should
undertake additional hearings to continually review the status of
material witnesses, and material witnesses should move for habeas
corpus relief and periodic judicial review as much as possible.235

230. See In re Francisco M., 103 Cal. Rptr. 2d at 806–07 (discussing the host of
alternative means available to the government to properly hold material witnesses
and create the least amount of intrusion on the witness’s liberty interest).
231. See Parker, supra note 54, at 28 (illustrating that the Second Circuit judges
“allowed great deference to the government’s claims that the material witnesses
posed a threat to national security,” thus justifying their continued detention).
232. See Higazy v. Templeton, 505 F.3d 161, 165 (2d Cir. 2007) (granting Higazy’s
continued detention despite the government’s weak showing); Awadallah II, 349 F.3d
42, 66–69 (2d Cir. 2005) (authorizing Awadallah’s detention despite
misrepresentations in the government’s material witness warrant application).
233. See Adams v. Hanson, 656 F.3d 397, 410 (6th Cir. 2011) (listing various checks
to prosecutorial power through the judicial process available to people being
detained as material witnesses).
234. See, e.g., In re Lewellyn, 62 N.W. 554, 554 (Mich. 1895) (per curiam)
(releasing the material witness where the witness was held for an excessively long
period and had never received a hearing or been properly segregated from the
general prison population to account for his material witness status); In re
Prestigiaco, 255 N.Y.S. 289, 290–91 (App. Div. 1932) (ordering the material
witness’s release where the court found no adequate evidence of flight risk).
235. See Adams, 656 F.3d at 410 (stating that petitioning for habeas corpus relief or
moving to quash material arrest warrants are safeguards material witnesses may avail
themselves of when challenging their detention).
Complementing the in-court advocacy, the government can evaluate and, where necessary, develop new and higher standards concerning what constitutes a sufficient and credible showing of a material witness warrant application, and subsequently, the government can provide follow-up training on the new standards for staff responsible for securing material witness warrants. If held to a higher standard, the government would be incentivized to make concrete findings rather than consistently have its material witness warrant applications denied by courts. Moreover, implementing higher standards on the front end would also avoid the cost and use of resources required to make subsequent applications to courts denying material witness warrant applications based on scant evidentiary showings. Lastly, Congress should consider replacing the material witness statute with a new statute, similar to the one proposed by Senator Patrick Leahy in 2005, that demands higher standards as to materiality and impracticability, preferably through clear and convincing evidence. Any amendment to the federal material witness statute should similarly require increased and more thorough judicial review of material witness warrants and the need for prolonged detention. These efforts would help preserve a material witness’s individual liberty and help increase the government’s accountability in the ever-expansive realm of material witness detention.

CONCLUSION

The federal material witness statute’s purpose is to allow the government to detain a material witness only where the witness is both material and impracticable. Therefore, courts should review material witness warrant applications under a clear and convincing standard following civil detention cases because such a standard requires showing more than a reasonable probability that the witness is both material to a criminal proceeding and impracticable to secure

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236. FBI Releases Guiding Principles on Training, FED. BUREAU OF INVESTIGATION NEWS BLOG, http://www.fbi.gov/news/news_blog/fbi-releases-guiding-principles-on-training (last visited Dec. 17, 2012) (discussing the FBI’s newest guiding principles on training, mirroring the DOJ’s recently developed training guidance). Counterterrorism training was among the types of training reviewed by the FBI, suggesting that both the DOJ and FBI could similarly institute training on how to properly follow heightened standards for material witness warrants. Id.
237. See 151 CONG. REC. 20,943 (2005) (statement of Sen. Patrick Leahy) recommending that courts require clear and convincing showings of materiality and impracticability and regularly engage in periodic judicial review of whether prolonged detention of any witness is necessary).
238. See id.
by any means other than arrest. By using the clear and convincing standard, material witnesses would have a higher chance of avoiding pretextual detention because courts would be more likely to discover if the government is trying to hold a witness for individual investigation rather than for testimony in a future criminal proceeding. Moreover, the clear and convincing standard used in civil detention cases is specifically designed to protect an important liberty interest. Applying this reasoning to the material witness context, higher evidentiary showings would facilitate greater protection of the material witness’s interest in not being unreasonably detained.

However, even where a material witness is arrested—a still somewhat probable result given the ex parte nature of the initial proceeding—a court can still reassess the validity of the material witness warrant under the same heightened standard of scrutiny. Applying the clear and convincing evidence standard when reviewing material witness warrants and prolonged detention would necessarily require the government to repeatedly prove continued materiality of the witness to an upcoming criminal proceeding and continued risk of flight, such that requires prolonged detention. Furthermore, clear and convincing evidence would require reviewing courts to not overly defer to the interests of the government, and in turn allow courts to more readily identify instances where the government is pretextually holding a witness. Consequently, using heightened judicial review would provide material witnesses the ability to directly challenge the government’s motive within the federal material witness statute’s framework. Lastly, even if the court is satisfied with the government’s showings as to the warrant, courts can prescribe or the witness can petition for periodic hearings under Rule 46 of the Federal Rules of Criminal Procedure, as well as through writs of habeas corpus, to further press the government into showing why the witness necessarily poses a flight risk and what diligent efforts it is taking to hold the witness under the least restrictive means possible.

While using the clear and convincing standard in all stages of material witness proceedings might not serve as a full-proof bulwark against pretextual detention, it would go a long way to afford material witnesses the greatest protection possible. Moreover, reading higher standards of proof and review into the federal material witness statute would help ensure that the statute is used only for its originally intended purpose.