

109TH CONGRESS
1ST SESSION

S. 1739

To amend the material witness statute to strengthen procedural safeguards,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 21, 2005

Mr. LEAHY introduced the following bill; which was read twice and referred
to the Committee on the Judiciary

A BILL

To amend the material witness statute to strengthen
procedural safeguards, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. RELEASE OR DETENTION OF A MATERIAL WIT-**

4 **NESS.**

5 (a) AMENDMENTS TO TITLE 18.—Section 3144 of
6 title 18, United States Code, is amended to read as fol-
7 lows:

8 **“§ 3144. Release or detention of a material witness**

9 **“(a) ARREST OF MATERIAL WITNESS.—**

1 “(1) IN GENERAL.—A judicial officer may order
2 the arrest of a person as a material witness, if it ap-
3 pears from an affidavit filed by a party in a criminal
4 case before a court of the United States, or by an
5 attorney for the Government in a matter occurring
6 before a Federal grand jury, that there is probable
7 cause to believe that—

8 “(A) the testimony of such person is mate-
9 rial in such case or matter; and

10 “(B) the person has been served with a
11 summons or subpoena and failed or refused to
12 appear as required.

13 “(2) EXCEPTION.—A judicial officer may waive
14 the summons or subpoena requirement described in
15 paragraph (1)(B), if the judicial officer finds by
16 clear and convincing evidence that the service of a
17 summons or subpoena—

18 “(A) is likely to result in the person flee-
19 ing; or

20 “(B) cannot adequately secure the appear-
21 ance of the person as required.

22 “(b) WARRANT FOR MATERIAL WITNESS.—

23 “(1) REQUIREMENTS.—A warrant issued under
24 subsection (a) shall—

1 “(A) contain the name of the material wit-
2 ness or, if the name of such witness is un-
3 known, a name or description by which the wit-
4 ness can be identified with reasonable certainty;

5 “(B) specify that the testimony of the wit-
6 ness is sought in a criminal case or grand jury
7 proceeding;

8 “(C) command that the witness be arrested
9 and brought without unnecessary delay before a
10 judicial officer;

11 “(D) inform the witness of the witness’s
12 right to retain counsel or to request that coun-
13 sel be appointed if the witness cannot obtain
14 counsel; and

15 “(E) be signed by a judicial officer.

16 “(2) EXECUTION OF WARRANT.—

17 “(A) ARREST OF WITNESS.—A warrant
18 issued under subsection (a) shall be executed by
19 arresting the material witness.

20 “(B) WARRANT TO BE PROVIDED TO WIT-
21 NESS.—

22 “(i) IN GENERAL.—Upon arrest, an
23 officer possessing the warrant shall show
24 such warrant to the material witness.

1 “(ii) WARRANT NOT IN POSSESSION
2 OF ARRESTING OFFICER.—If an officer
3 does not possess the warrant at the time of
4 arrest of a material witness, an officer—

5 “(I) shall inform the witness of
6 the existence and purpose of the war-
7 rant; and

8 “(II) at the request of the wit-
9 ness, shall provide the warrant to the
10 witness as soon as possible.

11 “(3) RETURN OF WARRANT.—

12 “(A) AFTER EXECUTION.—After executing
13 a warrant issued under subsection (a), an offi-
14 cer shall return the warrant to the judicial offi-
15 cer before whom the material witness is brought
16 in accordance with subsection (c).

17 “(B) UNEXECUTED WARRANT.—At the re-
18 quest of an attorney for the United States Gov-
19 ernment, an unexecuted warrant shall be
20 brought back to and canceled by a judicial offi-
21 cer.

22 “(c) INITIAL APPEARANCE.—

23 “(1) APPEARANCE UPON ARREST.—A material
24 witness arrested pursuant to a warrant issued under

1 subsection (a) shall be brought without unnecessary
2 delay before a judicial officer.

3 “(2) PLACE OF INITIAL APPEARANCE.—The ini-
4 tial appearance of a material witness arrested pursu-
5 ant to a warrant issued under subsection (a) shall
6 be—

7 “(A) in the district of arrest; or

8 “(B) in an adjacent district if—

9 “(i) the appearance can occur more
10 promptly there; or

11 “(ii) the warrant was issued there and
12 the initial appearance will occur on the day
13 of the arrest.

14 “(3) PROCEDURES.—At the initial appearance
15 described in paragraph (2), a judicial officer shall—

16 “(A) inform a material witness of—

17 “(i) the warrant against the witness,
18 and the application and affidavit filed in
19 support of the warrant; and

20 “(ii) the witness’s right to retain
21 counsel or to request that counsel be ap-
22 pointed if the witness cannot obtain coun-
23 sel;

24 “(B) allow the witness a reasonable oppor-
25 tunity to consult with counsel;

1 “(C) release or detain the witness as pro-
2 vided by subsection (d); and

3 “(D) if the initial appearance occurs in a
4 district other than where the warrant issued,
5 transfer the witness to such district, provided
6 that the judicial officer finds that the witness is
7 the same person named in the warrant.

8 “(d) RELEASE OR DETENTION.—

9 “(1) IN GENERAL.—Upon the appearance be-
10 fore a judicial officer of a material witness arrested
11 pursuant to a warrant issued under subsection (a),
12 the judicial officer shall order the release or deten-
13 tion of such witness.

14 “(2) RELEASE.—

15 “(A) IN GENERAL.—A judicial officer shall
16 order the release of a material witness arrested
17 pursuant to a warrant issued under subsection
18 (a) on personal recognizance or upon execution
19 of an unsecured appearance bond under section
20 3142(b), or on a condition or combination of
21 conditions under section 3142(c), unless the ju-
22 dicial officer determines by clear and convincing
23 evidence that such release will not reasonably
24 assure the appearance of the witness as re-
25 quired.

1 “(B) TESTIMONY SECURED BY DEPOSI-
2 TION.—No material witness may be detained
3 because of the inability of the witness to comply
4 with any condition of release if the testimony of
5 such witness can adequately be secured by dep-
6 osition.

7 “(3) DETENTION.—

8 “(A) NO REASONABLE ASSURANCE OF AP-
9 PEARANCE.—If, after a hearing pursuant to the
10 provisions of section 3142(f)(2), a judicial offi-
11 cer finds by clear and convincing evidence that
12 no condition or combination of conditions will
13 reasonably assure the appearance of a material
14 witness as required by this section, such judicial
15 officer may order that the witness be detained
16 for a period not to exceed 5 days, or until the
17 testimony of the witness can adequately be se-
18 cured by deposition or by appearance before the
19 court or grand jury, whichever is earlier.

20 “(B) EXTENSION OF DETENTION.—

21 “(i) IN GENERAL.—Subject to clause
22 (ii), upon the motion of a party (or an at-
23 torney for the United States Government
24 in a matter occurring before a Federal
25 grand jury), the period of detention under

1 subparagraph (A) may be extended for ad-
2 ditional periods of up to 5 days, or until
3 the testimony of a material witness can
4 adequately be secured by deposition or by
5 appearance before the court or grand jury,
6 whichever is earlier.

7 “(ii) LIMIT.—The total period of de-
8 tention under this subparagraph may not
9 exceed—

10 “(I) 30 days, where the testi-
11 mony of the witness is sought in a
12 criminal case; or

13 “(II) 10 days, where the testi-
14 mony of the witness is sought in a
15 grand jury proceeding.

16 “(C) GOOD CAUSE REQUIRED.—A motion
17 under subparagraph (B) shall demonstrate good
18 cause for why the testimony of a material wit-
19 ness could not adequately be secured by deposi-
20 tion or by appearance before the court or grand
21 jury during the previous 5-day period.

22 “(4) FACTORS TO BE CONSIDERED.—A judicial
23 officer, in determining whether a material witness
24 should be released or detained—

1 “(A) shall take into account the available
2 information concerning the history and charac-
3 teristics of the witness, including the informa-
4 tion described in section 3142(g)(3)(A); and

5 “(B) may consider challenges to the basis
6 of the warrant.

7 “(5) CONTENTS OF RELEASE ORDER.—A re-
8 lease order issued under paragraph (2) shall comply
9 with the requirements of paragraphs (1) and (2)(B)
10 of section 3142(h).

11 “(6) CONTENTS OF DETENTION ORDER.—A de-
12 tention order issued under paragraph (3) shall com-
13 ply with the requirements of section 3142(i), pro-
14 vided that a judicial officer shall direct that a mate-
15 rial witness be held—

16 “(A) in a facility separate and apart, to
17 the extent practicable, from persons charged
18 with or convicted of a criminal offense; and

19 “(B) under the least restrictive conditions
20 possible.

21 “(e) REPORT.—

22 “(1) IN GENERAL.—Notwithstanding any other
23 provision of law, the Attorney General shall provide
24 to the Committees on the Judiciary of the Senate
25 and the House of Representatives an annual report

1 regarding the use of this section by the United
2 States Government during the preceding 1-year pe-
3 riod.

4 “(2) CONTENT OF REPORT.—A report required
5 under paragraph (1) shall include—

6 “(A) the number of warrants sought under
7 subsection (a), and the number either granted
8 or denied;

9 “(B) the number of material witnesses ar-
10 rested pursuant to a warrant issued under sub-
11 section (a) whose testimony was not secured by
12 deposition or by appearance before the court or
13 grand jury, and the reasons therefore; and

14 “(C) the average number of days that ma-
15 terial witnesses arrested pursuant to a warrant
16 issued under subsection (a) were detained.”.

17 (b) AMENDMENT TO FEDERAL RULES OF CIVIL PRO-
18 CEDURE.—Rule 46(h) of the Federal Rules of Criminal
19 Procedure is amended to read as follows:

20 “(h) SUPERVISING DETENTION PENDING TRIAL.—
21 To eliminate unnecessary detention, the court must super-
22 vise the detention within the district of any defendants
23 awaiting trial and of any persons held as material wit-
24 nesses.”.

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