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Ashcroft v. al-Kidd: Official Immunity and Material Witnesses Before the Supreme Court

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Summary

Public officials cannot be sued personally for injuries resulting from the performance of their duties. They lose this qualified immunity when the injuries resulted from their violation of clearly established law. In *Ashcroft v. al-Kidd*, the Supreme Court concluded that clearly established Fourth Amendment jurisprudence did not forbid the Attorney General from encouraging the use of the federal material witness statute as a pretext to detain and question a potential criminal suspect.

The Court left for another day several related issues. Does the material witness statute permit authorities to arrest, question, and detain an individual because he is criminal suspect rather than a witness? Is the material witness statute unconstitutional on its face? Does the Fourth Amendment permit recourse to the material witness statute in order to arrest, question, and detain an individual without probable cause to believe he has committed a crime? Does the absolute immunity that attends the performance of duties in a judicial environment apply? Are the absolute and qualified immunity standards the same for local prosecutors as for the Attorney General?

Al-Kidd was arrested on a federal material witness warrant. Federal law permits the arrest of a witness when there is probable cause to believe that he has evidence material in a judicial proceeding and may be unavailable when his testimony is needed. Arrest of a criminal suspect requires probable cause to believe that he has committed a crime. Al-Kidd sued the Attorney General alleging that, in the wake of the 9/11 attacks, the Justice Department had created and implemented a policy of arresting terrorist suspects without criminal probable cause by using the material witness statute as a subterfuge. The Attorney General moved to dismiss on grounds of absolute and qualified official immunity. Prosecutors are entitled to absolute immunity from suit for activities performed as officers of the court. They are entitled to no more than qualified immunity for activities performed as investigators. They are entitled to qualified immunity for the performance of their official duties, unless they violate a clearly established constitutional or statutory right.

The Ninth Circuit Court of Appeals held that (1) prosecutors who use material witness warrants as an investigative tool are not entitled to absolute immunity; (2) prosecutors, who use such warrants without probable cause to believe the witness has committed a crime, violate the clearly established Fourth Amendment proscription on unreasonable searches and seizures; (3) prosecutors who do so are not entitled to qualified immunity; and (4) the same is true of senior officials who direct such misconduct.

Justice Scalia, writing for the Court, resolved the matter narrowly. He observed that in most instances, the Fourth Amendment reasonableness of an arrest is judged objectively. An otherwise reasonable arrest is ordinarily permissible regardless of the alleged motives of the arresting officers. Where there is probable cause for the arrest of a material witness, motive is irrelevant, and the arrest is reasonable by Fourth Amendment standards. Since the Attorney General thus did not instigate a clearly established violation of the Fourth Amendment as alleged, he was entitled to qualified immunity from suit.

Related reports include CRS Report R41903, *Federal Material Witness Statute: A Legal Overview of 18 U.S.C. 3144*, by Charles Doyle.

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Introduction

May a United States Attorney General be sued for damages as a consequence of a policy that resulted in the otherwise valid arrest of a material witness, when the arrest was ordered for an improper purpose? No, agreed the Justices of the Supreme Court.[1] The decision does not resolve the question of whether the material witness statute can be used for such purposes. It does not resolve the constitutionality of the material witness statute. It does not resolve the question of whether the Fourth Amendment permits the arrest of an individual—using the material witness statute as a subterfuge—without probable cause to believe that he has committed a crime. It does not resolve the question of whether a prosecutor who applies to a magistrate for an arrest warrant under such circumstances is entitled to the absolute immunity that attends the participants in judicial proceedings. It does not resolve the question of whether the absolute and qualified immunity standards are the same for an Assistant United States Attorney as the Attorney General and all the supervisory attorneys in between. It simply declares the alleged conduct did not violate Fourth Amendment law, clearly established at the time. Consequently, the then Attorney General was entitled to qualified immunity.

Background

In February of 2003, an Idaho federal grand jury indicted Al-Hussayen for visa fraud and false statements in connection with his student visa.[2] The United States Attorney's Office then applied for a material arrest warrant for al-Kidd under 18 U.S.C. 3144.[3] It offered an FBI (Federal Bureau of Investigation) affidavit in support of its application. The affidavit asserted that al-Kidd was associated with Al-Hussayen, that al-Kidd had traveled to and returned from Yemen; that he had received over $20,000 from Al-Hussayen; and that al-Kidd had contact with officials of the Islamic Assembly of North America (IANA).[4] It also stated that al-Kidd was "believed to be in possession of information germane to the this matter which will be crucial to the prosecution;" that he was scheduled to fly one-way to Saudi Arabia within two days of the application; and that after he traveled to Saudi Arabia, "the United States government [would] be unable to secure his presence at trial via subpoena."[5]

The warrant issued, and al-Kidd was arrested two days later at Dulles International Airport in the Eastern District of Virginia.[6] He was then returned to Idaho by way of the transfer facility in Oklahoma.[7] Nine days later, he was presented to the magistrate in Idaho who denied bail.[8] Shortly thereafter, the government proposed that he be released on the condition that he reside with his in-laws in Nevada, surrender his passport, and confine his travel to Nevada and three adjoining States.[9]

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[1] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011). The decision reversed *al-Kidd v. Ashcroft*, 580 F.3d 949, 981 (9th Cir. 2009), rehearing en banc denied, 598 F.3d 1129 (2010), cert. granted, 131 S.Ct. 415 (2010).

[2] *al-Kidd v. Ashcroft*, 580 F.3d at 952-53.

[3] *Id.* at 952.

[4] *Id.* at 952-53.

[5] *Id.* at 953.

[6] *Id.*

[7] Petition for Certiorari at 4-5, *Ashcroft v. al-Kidd*, No. 10-98 (U.S. July, 2010).

[8] *Id.* at 5.

[9] *Id.*

A year after al-Kidd's arrest, Al-Hussayen, a computer science student at the University of Idaho, was also charged with conspiring to provide material support to terrorists, in connection with website services he allegedly provided Islamic Assembly of North America (IANA).[10] The jury subsequently acquitted Al-Hussayen of the terrorism counts, but was unable to agree on a verdict on the fraud and false statement charges.[11] Al-Kidd was never charged nor called to testify at Al-Hussayen's trial. The court lifted the conditions on al-Kidd's release after the trial.[12] He then sued a line of federal officials from the FBI to the Attorney General, claiming a violation of the Fourth and Fifth Amendments and of the material witness statute:

> Al-Kidd asserts three independent claims against Ashcroft. First, he alleges that Ashcroft is responsible for a policy or practice under which the FBI and the DOJ sought material witness orders without sufficient evidence that the witness's testimony was material to another proceeding, or that it was impracticable to secure the witness's testimony—in other words, in violation of the express terms of [18 U.S.C.] §3144 itself—and that al-Kidd was arrested as a result of this policy (the §3144 Claim). Second, al-Kidd alleges that Ashcroft designed and implemented a policy under which the FBI and DOJ would arrest individuals who may have met the facial statutory requirements of §3144, but with the ulterior and allegedly unconstitutional purpose of investigating or preemptively detaining them, in violation of the Fourth Amendment (the Fourth Amendment Claim). Finally, al-Kidd alleges that Ashcroft designed and implemented policies, or was aware of policies and practices that he failed to correct, under which material witnesses were subjected to unreasonably punitive conditions of confinement, in violation of the Fifth Amendment (the Conditions of Confinement Claim). *al-Kidd v. Ashcroft*, 580 F.3d at 957.

The defendants moved to dismiss for failure to state a claim and on grounds of absolute and qualified immunity.[13] Prosecutors enjoy absolute immunity from suit for what they do in court.[14] They enjoy qualified immunity for work they do as investigators.[15] Qualified immunity becomes unavailable if an official acts contrary to a clearly established constitutional or statutory right.[16] The District Court denied the motions, and Ashcroft appealed.[17] The Court of Appeals reversed the District Court's refusal to dismiss the Fifth Amendment claim.[18] It affirmed, however, the District Court's refusal to dismiss for failure to state a claim under section 3144 or grounds of either absolute or qualified immunity.[19]

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[10] U.S. Department of Justice, *Saudi National Charged With Conspiracy to Provide Material Support to Hamas and Other Violent Jihadists*, Press Release (Mar. 4, 2004), available at http://www.justice.gov/opa/pr/2004/March/04_crm_137.htm.

[11] The government agreed not to retry Al-Hussayen on the charges that had divided the jury, and he was deported to Saudi Arabia, *id.*

[12] *al-Kidd v. Ashcroft*, 580 F.3d at 953-54.

[13] *Id.* at 956-57.

[14] *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (2009), citing, *Imbler v. Pachtman*, 424 U.S. 409, 431, n. 33 (1976).

[15] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Burns v. Reed*, 500 U.S. 478, 496 (1991).

[16] *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993), citing, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

[17] *Id.* ("Ashcroft argues that he is entitled to absolute prosecutorial immunity as to the § 3144 and Fourth Amendment Claims. He concedes that no absolute immunity attaches with respect to the Conditions of Confinement Claim. He also argues that he is entitled to qualified immunity from liability for all three claims").

[18] *Id.* at 979.

[19] *Id.* at 977, 963, 973.

Material Witness Statute

Al-Kidd's experience was in one sense neither new nor rare. Witnesses in a federal criminal case may find themselves arrested, held for bail, and in some cases imprisoned until they are called upon to testify, 18 U.S.C. 3144.[20] The same is true in most if not all of the states.[21] Although subject to intermittent criticism,[22] it has been so at least from the beginning of the Republic.[23] The Supreme Court has never squarely considered the constitutionality of section 3144 or any of its predecessors, but it has observed in passing that, "[t]he duty to disclose knowledge of crime ... is so vital that one known to be innocent may be detained in the absence of bail, as a material witness," *Stein v. New York*, 346 U.S. 156, 184 (1953).[24] Even more telling may be an earlier remark from the Court to the effect that, "[t]he constitutionality of this [federal material witness]

[20] This section borrows extensively from CRS Report RL33077, *Arrest and Detention of Material Witnesses: Federal Law In Brief*, by Charles Doyle.

[21] A discussion of the provisions of state law is beyond the scope of this report. Citations to the state statutes are appended.

[22] 1 BISHOP, CRIMINAL PROCEDURE, 18-9 (2d ed. 1872)("The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear and testify before the upper court. Sometimes the purposes of justices require that these recognizances should be with sureties, and occasionally the unpleasant result follows that a witness cannot obtain sureties, and he is detained in prison"); ALI, CODE OF CRIMINAL PROCEDURE, §58 note (Tent.Draft 1928)("One of the evils in connection with the administration of the criminal law in most states is the practice of confining for long periods of time, generally in the county jail, witnesses who cannot give bail"); *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATHOLIC UNIVERSITY LAW REVIEW 37, 50 ("Failure of state and federal government to come up with a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation"); Studnicki, *Material Witness Detention: Justice Served or Denied?* 40 WAYNE LAW REVIEW 1533, 1568 (1994) ("The continued use of material witnesses statutes will undoubtedly be an issue debated well into the next century. Whether the criminal justice system abandons this ancient practice in favor of a more humane policy toward the treatment of witnesses remains to be seen"); Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 NEW YORK LAW SCHOOL LAW REVIEW 13, 13 (2003)("Upon the mere conclusory statement of a government official that a person has material information and might not respond to a subpoena, the person may be incarcerated for an indefinite period of time, without bail, and under onerous conditions").

[23] 1 Stat. 91 (1789)("copies of the process [criminal complaint] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment"); *see also*, Rev. Stat. §879 (1878)("Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case"); 28 U.S.C. 657 (1926 ed.); F.R.Crim.P. 46(b), 18 U.S.C. App. (1946 ed.); 18 U.S.C. 3149 (1970 ed.).

[24] See also, *Blair v. United States*, 250 U.S. 273, 280-81(1919)("At the foundation of our federal government the inquisitorial function of the grand jury and compulsion of witnesses were recognized as incidents of the judicial power of the United States.... [B]y the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy trial and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act, the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized.... [The Revised Statutes] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions ... it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned....The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice to the forms and modes established in our system of government ..."); VIII WIGMORE ON EVIDENCE §§2190-2192 (3d ed. 1940).

statute apparently has never been doubted," *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929).

In spite of the concerns of some that the authority can be used as a means to jail a suspect while authorities seek to discover probable cause sufficient to support a criminal accusation[25] or as a preventive detention measure,[26] the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant.[27] Particularly in the early stages of an investigation, however, an individual's proximity to a crime may make him a legitimate witness as well as a legitimate suspect.[28]

The case law and statistical information suggest that the federal statute is used with regularity, and most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals.[29] Critics, however, contended that in the aftermath of the attacks of September 11, 2001, seventy individuals, mostly Muslims, were arrested and detained in abuse of the statute's authority.[30]

The federal material witness statute provides that

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

[25] Carlson & Voelpel, *Material Witness and Material Injustice*, 58 WASHINGTON UNIVERSITY LAW REVIEW 1, 9 (1980)("Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant").

[26] Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOYOLA OF LOS ANGELES LAW REVIEW 1217, 1225 (2002)("Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention.... The government uses these laws to round up people because of what it expects them to do, rather than what it can prove they have done").

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

[28] Those subject to arrest under the federal statute include Terry Nichols (subsequently convicted for complicity in the Oklahoma City bombing), *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10th Cir. 1996); Jose Padilla (subsequently transferred to military custody as an "enemy combatant"), *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004); and Brandon Mayfield (whose fingerprint was erroneously thought to match one linked to the Madrid train bombing), *In re Federal Grand Jury Proceedings*, 337 F.Supp.2d 1218, 1220-221 (D. Ore. 2004).

[29] See e.g., *In re Class Action Application of Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F.Supp. 904 (W.D. Tex. 1985); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Aguilar-Tamayo*, 300 F.3d 562 (5th Cir. 2002); *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D.Cal. 2003), all involving illegal alien smuggling. Statistics from the Administrative Office of the United States Courts indicate that an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur in judicial districts bordering Mexico: FY2010 (4465 of 4793 the material witness hearings held by U.S. magistrate judges were held in one of the five U.S. District Court districts bordering Mexico); FY2009 (3174 out of 4514); FY2008 (4977 out of 5391), *Judicial Business of the United States Courts*, Table M-3 (2010); *id*. (2009); *id*. (2008), available at http://www.uscourts.gov/Statistics/JudicialBusiness/Judicial.aspx.

[30] 151 *Cong.Rec*. 20942-943 (2005)[151 *Cong. Rec.* S10296 (daily ed. Sept. 21, 2005)], citing, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, 17 HUMAN RIGHTS WATCH 1-5 (June 2005), available at http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf.

> condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. 3144.

An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates.[31] The statute applies to potential grand jury witnesses as well as to potential trial witnesses.[32]

Issuance of a section 3144 arrest warrant requires affidavits establishing probable cause to believe (1) that the witness can provide material evidence, and (2) that it will be "impracticable" to secure the witness' attendance at the proceeding simply by subpoenaing him.[33] The statute does not directly address the question of what constitutes "material" evidence for purposes of section 3144, but in other contexts, materiality is understood to mean that which has a "natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."[34] Nevertheless, one of the few cases to address the issue has suggested a broader meaning: materiality is that which has "some logical connection with the consequential facts."[35]

At the grand jury level, the government may establish probable cause to believe a witness can provide material evidence through the affidavit of a federal prosecutor or a federal investigator gathering evidence with an eye to its presentation to the grand jury.[36] This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury's power of inquiry.[37] In al-Kidd's case, for example, the affidavit might have been thought to

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[31] 18 U.S.C. 3156(a)(1)("As used in sections 3141-3150 of this chapter—(1) the term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia"). Section 3041 authorizes federal and state judges and magistrates to issue arrest warrants and conduct bail proceedings in federal criminal cases.

[32] *United States v. Awadallah*, 349 F.3d 42, 49-51 (2d Cir. 2003); *United States v. Bacon*, 449 F.2d 933, 939-41 (9th Cir. 1971); *contra*, *United States v. Awadallah*, 202 F.Supp.2d 55, 61-79 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

[33] *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971); *United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D.Okla. 1979).

[34] *Neder v. United States*, 527 U.S. 1, 16 (1999), quoting, *United States v. Gaudin*, 515 U.S. 506, 509 (1995)(materiality as an element of various federal fraud statutes). In the context of the prosecution's failure to disclose material exculpatory evidence, "the material standard *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Banks v. Dretke*, 540 U.S. 668, 698 (2004), quoting, *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

[35] *In re Grand Jury Proceedings*, 697 F.Supp.2d 262, 274 (D.R.I. 2010)("Materiality is defined in Blacks Law Dictionary as 'having some logical connection with the consequential facts.' In the context of basic evidentiary rules defining relevance, '[m]ateriality concerns the fit between the evidence and the case. It looks to the relation between the propositions that the evidence is offered to prove and the issues in the case.... What is in issue ... is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law.' 1 Kenneth S. Broun, McCormick on Evidence, § 185 (6th ed. 2006)").

[36] *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

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

supply probable cause to believe that al-Kidd had material evidence relating to the grand jury inquiry which ultimately resulted in the indictment of Al-Hussayen for providing material support to IANA in violation of 18 U.S.C. 2339A, 2339B. Whether the affidavit provided probable cause to believe he had material evidence relating the Al-Hussayen's alleged visa fraud and false statements relating to his student visa seems a closer question.[38]

As to the second required probable cause showing, a party seeking a material witness arrest warrant must establish probable cause to believe that it will be impractical to rely upon a subpoena to securing the witness' appearance. The fact that al-Kidd was about to fly to Saudi Arabia would seem sufficient. The case law on point is sketchy, but it seems to indicate that impracticality may be shown by evidence of possible flight,[39] or of an expressed refusal to cooperate,[40] or of difficulty experienced in serving a subpoena upon a trial witness,[41] or presumably by evidence that the witness, unlike al-Kidd, is a foreign national who will have returned or been returned home by the time his testimony is required.[42]

498 U.S. 292, 297 (1991)("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").

[38] The decision to arrest al-Kidd as a "trial" material witness rather than as "grand jury" material witness may have been influenced by a then recent decision in the Southern District of New York that held in a similar case that section 3144 could not be used in relation to grand jury proceedings, *United States v. Awadallah*, 202 F.Supp.2d 55 (S.D.N.Y. 2002), rev'd, 349 F.3d 42 (2d Cir. 2003). The decision, subsequently reversed, was pending before the Second Circuit when the U.S. Attorney applied for the material witness arrest warrant for al-Kidd.

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

[40] *United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D. Okla. 1979)(As to impracticality, "the Dempewolf affidavit shows that (a) Alston has refused to cooperate with law enforcement officials.... (b) Alston has indicated that he will not testify in this case unless the Oklahoma Bureau ... satisfies certain conditions that ... are impossible to meet; (c) two unsuccessful attempts have been made to serve Alston with a subpoena through his attorney; and (d) Alston's attorney has indicated that Alston has expressed a definite unwillingness to cooperate with the government").

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

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

Bail

With limited variations, federal bail laws apply to material witnesses arrested under section 3144.[43] Arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to retain private counsel.[44] The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is preferred, and finally as a last option detention is permitted.[45] A defendant is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety.[46] A material witness need only satisfy the appearance standard.[47] A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify.[48] If neither word nor bond nor conditions will suffice, the witness may be detained.[49] The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.[50] And so it seems to have been in al-Kidd's case.

The government must periodically report to the court on the continuing justification for holding material witnesses who have not been released on bail.[51] It is unclear whether and to what extent this safeguard can be bypassed by moving the witness from one district to another, particularly when the individual is treated more like a suspect than a witness.[52]

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[43] 18 U.S.C. 3144 ("... a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title....").

[44] *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940, 943-45(W.D.Tex. 1985); 18 U.S.C. 3142(f); 18 U.S.C. 3006A(a)(1)(G).

[45] 18 U.S.C. 3142(a)("Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section.").

[46] 18 U.S.C. 3142(b)("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

[47] *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003), citing, S.Rept. 98-225, at 28 n.90 (1983)("Of course a material witness is not to be detained on the basis of dangerousness"); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass. 1996)("a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight").

[48] 18 U.S.C. 3142(c).

[49] 18 U.S.C. 3142(e).

[50] *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003); 18 U.S.C. 3142(g).

[51] F.R.Crim.P. 46(h)(2)("An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)").

[52] *Consider, United States v. Awadallah*, 436 F.3d 125, 129 (2d Cir. 2006)("[O]n September 21, Awadallah was arrested on a material witness warrant ... and detained without bailed based on judicial findings that he possessed information material to the grand jury's investigation of the September 11 attacks. Also on September 21, Awadallah was taken from the FBI office to the San Diego Metropolitan Correctional Center ('MCC') [in the Southern District of California], where he was held until September 27. Subsequently, he was moved to the San Bernardino County Jail [in the Central District of California] and then to a federal facility in Oklahoma City. On October 1, he was moved to the New York City MCC where he was held in solitary confinement"); *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2089

Absolute Immunity

Prosecutorial officials enjoy absolute immunity from civil suit for their actions as officers of the court.[53] "To decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of ... functional considerations."[54] Thus, "absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding,"[55] or when a prosecutor "appears in court to present evidence in support of a search warrant application,"[56] or when a supervisory prosecutor trains trial prosecutors on their constitutional pre-trial obligations.[57] Conversely, it does not attach when a prosecutor "gives advice to police during a criminal investigation,"[58] or when a "prosecutor makes statements to the press,"[59] or when "a prosecutor acts as a complaining witness in support of a warrant application."[60]

Ashcroft argued before the Ninth Circuit that applying for a material witness arrest warrant is a prosecutorial function that carries absolute immunity.[61] Al-Kidd countered that absolute immunity no longer covers such an application when it is sought for investigative purposes rather than trial preparation.[62] The Ninth Circuit concurred: "[W]hen a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute immunity."[63]

Qualified Immunity

"Most public officials are entitled ... to qualified immunity" for acts committed in the performance of their duties.[64] "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights....'"[65]

(2011)(Ginsburg, J., concurring in the judgment)(with Breyer and Sotomayor, JJ.)("Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days' incarceration, kept in high security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and wrists").

[53] *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (2009), citing, *Imbler v. Pachtman*, 424 U.S. 409, 431, n. 33 (1976).

[54] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Burns v. Reed*, 500 U.S. 478, 486 (1991).

[55] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Burns v. Reed*, 500 U.S. at 492.

[56] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997).

[57] *Van de Kamp v. Goldstein*, 129 S.Ct. at 862 (absolute immunity attaches to those administrative tasks that are of a "kind," citing, *Burns v. Reed*, 500 U.S. at 486 (1991).

[58] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Burns v. Reed*, 500 U.S. at 496.

[59] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993).

[60] *Van de Kamp v. Goldstein*, 129 S.Ct. at 861, citing, *Kalina v. Fletcher*, 522 U.S. at 132.

[61] *al-Kidd v. Ashcroft*, 580 F.3d at 959.

[62] *Id.* at 959-60.

[63] *Id.* at 963. The court also found that the "Attorney General is not entitled to absolute immunity in the performance of his or her national security functions," *id.* at 958, citing, *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985).

[64] *Buckley v. Fitzsimmons*, 509 U.S. at 268, citing, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

[65] *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009), citing, *Harlow v. Fitzgerald*, 457 U.S. at 818; see also, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1945 (2009).

Al-Kidd claimed that his Fourth Amendment rights had been violated by policy created and implemented by the Attorney General used the material witness statute as a pretext to arrest criminal suspects.[66] The material witness statute requires probable cause to believe that an individual has evidence material in a judicial proceeding. The Fourth Amendment requires probable cause to believe that an individual has committed a crime. The two are not the same. Al-Kidd argued that the convenience of the statute cannot be used to avoid the limitations of the Fourth Amendment.[67] The Ninth Circuit again agreed: "All seizures of criminal suspects require probable cause of criminal activity. To use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause is to violate the Fourth Amendment."[68]

Nevertheless, when suit is based on an alleged Fourth Amendment violation, an officer's motives ordinarily play no role in the determination of whether a violation has occurred.[69] The Ninth Circuit, however, accepted al-Kidd's contention that the ordinary rules did not apply because use of the material witness statute did not deal with the ordinary type of probable cause upon which the Supreme Court's cases were predicated: probable cause to believe a crime had been committed.[70] To support the view that official motives matter in some Fourth Amendment cases, the Ninth Circuit pointed to two Supreme Court traffic-stop cases—*Edmond* and *Lidster*—which the Court had distinguished on the basis of the purpose for the stop.[71]

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[66] *al-Kidd v. Ashcroft*, 580 F.3d at 969.

[67] *Id.*

[68] *Id*. at 970, citing in accord, *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003)("[I]t would be improper for the government to use §3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established").

[69] *Whren v. United States*, 517 U.S. 806, 812-13 (1996)(parallel citations omitted ("Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983), we held that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid 'because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana.' We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States v. Robinson*, 414 U.S. 218 (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,' *id*. at 221, n.1; and that a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches, see *id*. at 236.... And in Scott v. United States, 436 U.S. 128, 138 (1978), in rejecting the contention that wiretap evidence was subject to exclusion because the agents conducting the tap had failed to make any effort to comply with the statutory requirement that unauthorized acquisitions be minimized, we said that 'subjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional.' We described Robinson as having established that 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' 436 U.S. at 136, 138. We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

[70] *al-Kidd v. Ashcroft*, 580 F.3d at 966, 968 (emphasis of the court)("*Whren* rejected only the proposition that 'ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause *to believe that a violation of law has occurred*'.... Because material witness arrests are seizures without suspicion of wrongdoing, the *Whren* rule, that subjective motivation is irrelevant in the presence of probable cause, does not apply to our Fourth Amendment analysis in this case").

[71] *al-Kidd v. Ashcroft*, 580 F.3d at 969, quoting, *Illinois v. Lidster*, 540 U.S. 419, 423 (2004)("The Court in *Lidster* distinguished the seizure in [*Indianapolis v.*] *Edmond* [, 531 U.S. 32 (2000)] on the basis that, in *Lidster*: the stop's

The existence of a constitutional violation notwithstanding, qualified immunity cannot be lost unless the constitutional right is "clearly established." "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[72]

The Ninth Circuit conceded that '[n]o federal appellate court had yet squarely held that the federal material witness statute satisfied the requirements of the Fourth Amendment."[73] Yet, the definition of probable cause in a criminal case was clearly established. *Edmonds* had demonstrated the perils of a law enforcement motivated seizure without probable cause. Al-Kidd's situation was akin to those that lead to the adoption of the Fourth Amendment.[74] Moreover, shortly before al-Kidd's arrest, a federal court had questioned the legitimacy of pretextual material witness arrests in remarks that mentioned the Attorney General by name.[75] From this, the Ninth Circuit concluded that "al-Kidd's right not to be arrested as a material witness in order to investigated or preemptively detained was clearly established" at the time of his arrest.[76]

Thus, the Ninth Circuit concluded Ashcroft was entitled to neither absolute nor qualified immunity[77] and declined to reconsider en banc.[78]

Al-Kidd Before the Court

The Supreme Court granted the petition of the United States for certiorari,[79] and reversed.[80] Justice Scalia wrote the opinion for the Court, from which there were no dissenting opinions.

primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.... As Justice Stevens wrote in concurrence, '[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier.' ... That is precisely the distinction at work here, and the reason we hold that Ashcroft's policy as alleged was unconstitutional").

[72] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), quoting, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[73] *al-Kidd v. Ashcroft*, 580 F.3d at 970.

[74] *Id.* at 971-72 ("The facts alleged of al-Kidd's arrest, that he was arrested because he was associated with the webmaster of an allegedly jihadist website, demonstrate the continued relevance of the Founders' concerns.... The warrant authorizing al-Kidd['s arrest] named him in particular, and so was not a general warrant in that sense. But the result was the same gutting the substantive protections of the fourth Amendment's probable cause requirement and giving the state the power to arrest upon the executive's mere suspicion").

[75] *Id.* at 972, quoting and adding emphasis to, *United States v. Awadallah*, 202 F.Supp.2d 55, 77 n.28 (S.D.N.Y. 2002) ("Attorney General John Ashcroft has been reported as saying: 'Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks.' *Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute*. If there is probable cause to believe an individual has committed a crime or is conspiring to commit a crime, then the government may lawfully arrest that person, but only upon *such* a showing").

[76] *al-Kidd v. Ashcroft*, 580 F.3d at 973.

[77] *Id.* at 981.

[78] *al-Kidd v. Ashcroft*, 598 F.3d 1129 (9th Cir. 2010).

[79] *Ashcroft v. al-Kidd*, 131 S.Ct. 415 (2010).

[80] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011).

Justice Kennedy concurred.[81] Justices Ginsburg, Breyer, and Sotomayor concurred in the result.[82] Justice Kagan did not participate in the case.[83]

In its argument before the Court, the Solicitor contended that (1) Ashcroft is entitled to absolute immunity, because an application for a material witness warrant is a prosecutorial function entitled to absolute immunity; a fact recognized by other circuits.[84] (2) Ashcroft was entitled to qualified immunity, because arrest under a valid material witness arrest warrant was not a violation of the Fourth Amendment regardless of the prosecutor's motives.[85] (3) Ashcroft was entitled to qualified immunity, because any constitutional violation was not clearly established at the time.[86] The Court essentially agreed as to qualified immunity.

It determined that there had been no Fourth Amendment violation: "We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."[87] Moreover, "[b]ecause Ashcroft did not violate clearly established law" and therefore enjoyed qualified immunity, the Court felt it "need not address the more difficult question of whether he enjoys absolute immunity."[88]

The Court's Fourth Amendment finding rested on two point. First, pretexts aside, al-Kidd's arrest satisfied constitutional requirements. Or more precisely al-Kidd did not challenge the constitutionality of his arrest, save on grounds the officers' motivation: "[A]l-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant."[89]

Second, the case presented none of the circumstances under which motivation might undermine a determination of Fourth Amendment reasonableness. True, the Court had considered motivation in its "special needs" and administrative search cases, and in an anti-drug traffic stop case, *Edmond*.[90] Yet there, the government had offered the benign motives of its officers to establish the reasonableness of warrantless searches performed for noncriminal law purposes and of its

[81] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (Kennedy, J., concurring)(joined as to Part I of the concurrence by Ginsburg, Breyer, and Sotomayor, JJ.).

[82] *Id.* at 2087 (Ginsburg, J. concurring in the judgment)(with Breyer and Sotomayor, JJ.); *id*. at 2089 (Sotomayor, J., concurring in the judgment)(with Ginsburg and Breyer, JJ.).

[83] *Id*. at 2085.

[84] Brief for Petitioner at 17, *Ashcroft v. al-Kidd*, No. 10-98 (Dec. 2010), citing, *Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984); *Daniels v. Keiser*, 586 F.2d 64, 68-9 (7th Cir. 1978).

[85] *Id*. at 29-40.

[86] *Id*. at 40-3.

[87] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011).

[88] *Id*.

[89] *Id*. at 2083; but see, *id*. at 2083 n.3 (internal citations omitted)("The concerns of Justices Ginsburg and Sotomayor about the validity of the warrant in this case are beside the point. The validity of the warrant is not our 'opening assumption'; it is the premise of al-Kidd's argument. Al–Kidd does not claim that Ashcroft is liable because the FBI agents failed to obtain a valid warrant. He takes the validity of the warrant as a given, and argues that his arrest nevertheless violated the Constitution because it was motivated by an illegitimate purpose. His separate Fourth Amendment and statutory claims against the FBI agents who sought the material-witness warrant, which are the focus of both concurrences, are not before us").

[90] *Id*. at 2081-82, citing inter alia, *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *Camara v. Municipal Court*, 387 U.S. 523 (1967); and *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

suspicionless and warrantless traffic stops conducted for criminal law purposes. Here, the officers had a warrant. From the Court's perspective, that made all the difference.[91]

Whether for want of a Fourth Amendment violation or want of a clearly established Fourth Amendment violation, all of the Justices agreed that the Attorney General was entitled to qualified immunity. Three—Justices Ginsburg, Breyer, and Sotomayor—would have stopped there, and left for another day the Fourth Amendment issue.[92]

The Fourth Amendment issue aside, the Court's treatment of the material witness issue also troubled the three and Justice Kennedy. Justice Kennedy, in the portion of his concurrence joined by Justices Ginsburg, Breyer, and Sotomayor, points out that the opinion for the Court "leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful."[93] He suggested the answer was not completely clear.[94] Justice Ginsburg, joined by Justices Breyer and Sotomayor, went further. She characterized as puzzling the Court's "validly obtained" description of the material witness warrant, and was obviously troubled by al-Kidd's treatment after his arrest.[95]

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[91] *Id.* at 2081, 2082 ("But those exceptions do not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified. The Government seeks to justify the present arrest on the basis of a properly issued judicial warrant so that the special-needs and administrative-inspection cases cannot be the basis for a purpose inquiry here.... The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well").

[92] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2089 (Sotomayor, J., concurring in the result)(with Ginsburg and Breyer, JJ.)(internal citations omitted): "I concur in the Court's judgment reversing the Court of Appeals because I agree with the majority's conclusion that Ashcroft did not violate clearly established law. I cannot join the majority's opinion, however, because it unnecessarily "resolves a difficult and novel questio[n] of constitutional ... interpretation that will 'have no effect on the outcome of the case.' "

"Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's opinion suggests. Although the majority is correct that a government official's subjective intent is generally "irrelevant in determining whether that officer's actions violate the Fourth Amendment," none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law.

"The majority's constitutional ruling is a narrow one premised on the existence of a 'valid material-witness warran[t],'—a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd's complaint. Based on those allegations, it is not at all clear that it would have been 'impracticable to secure [al-Kidd's] presence ... by subpoena' or that his testimony could not 'adequately be secured by deposition.' Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an unnecessary holding on the constitutional question."

[93] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (Kennedy, J., concurring)(joined as to Part I of the concurrence by Ginsburg, Breyer, and Sotomayor, JJ.).

[94] *Id.* at 2085-86 ("The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it 'may become impracticable' to secure the person's presence by subpoena. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case").

[95] *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2087-89 (Ginsburg, J., concurring in the result)(with Breyer and Sotomayor, JJ.) (internal citations omitted): "In addressing al-Kidd's Fourth Amendment claim against Ashcroft, the Court assumes at

Justice Kennedy also suggested that a different "clearly established law" standard might be appropriate for national officials:

> Some federal officers perform their functions in a single jurisdiction, say within the confines of one State or one federal judicial district. They reasonably can anticipate when their conduct may give rise to liability for damages and so are expected to adjust their behavior in accordance with local precedent. In contrast the Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals has approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue.
>
> When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken.[96]

This too, however, lay beyond the narrow focus of the Court's opinion.

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the outset the existence of a validly obtained material witness warrant. That characterization is puzzling. Is a warrant 'validly obtained' when the affidavit on which it is based fails to inform the issuing Magistrate Judge that 'the Government has no intention of using [al-Kidd as a witness] at [another's] trial,' and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him?

"Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd's parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately $5,000; in fact, al-Kidd had a round-trip, coach-class ticket that cost $1,700. Given these omissions and misrepresentations, there is strong cause to question the Court's opening assumption—a valid material-witness warrant—and equally strong reason to conclude that a merits determination was neither necessary nor proper.

"I also agree with Justice Kennedy that al-Kidd's treatment presents serious questions, unaddressed by the Court, concerning 'he [legality of] the Government's use of the Material Witness Statute in this case.' In addition to the questions Justice Kennedy poses, and even if the initial material witness classification had been proper, what even arguably legitimate basis could there be for the harsh custodial conditions to which al-Kidd was subjected: Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days' incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist.... [H]is ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times."

[96] *Id*. at 2086 (Kennedy, J., concurring)(internal citations and quotation marks omitted).

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