No. 10-98

IN THE

Morris Tyler Moot Court of Appeals at Yale

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

Eugene Alexis Sokoloff
Wendy Zorana Zupac
127 Wall Street
New Haven, CT 06511
(914) 602-3866

Counsel for Respondent

QUESTIONS PRESENTED

(1) Whether a former government official is entitled to absolute immunity from a claim that he used the material witness statute as a pretext to detain individuals preventatively or for investigative purposes; and

(2) Whether the former government official is entitled to qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from using a material witness warrant as a pretext for detaining a person as though he was a criminal suspect, absent probable cause to believe he was involved in criminal activity; and (b) this Fourth Amendment rule was clearly established at the time of Respondent's arrest.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 1
A) Post-September 11, 2001, Detention Policies 2
B) The Government's Investigation of Al-Kidd 4
C) Al-Kidd's Arrest and Detention 5
D) The Proceedings Below 7
SUMMARY OF THE ARGUMENT 9
STANDARD OF REVIEW 12
ARGUMENT 12
I. ASHCROFT IS NOT ENTITLED TO ABSOLUTE IMMUNITY BECAUSE HIS PRETEXTUAL USE OF THE MATERIAL WITNESS STATUTE TO DETAIN AL-KIDD FOR INVESTIGATIVE OR PREVENTATIVE PURPOSES DID NOT FULFILL A CORE PROSECUTORIAL FUNCTION AND PUBLIC POLICY CONCERNS MILITATE AGAINST IMMUNIZING HIM. 12
A) Absolute Immunity Protects Only Core Prosecutorial Functions Intimately Associated with the Judicial Process. 13
B) Al-Kidd's Arrest Did Not Fulfill a Core Prosecutorial Function. 16
(1) Al-Kidd's Complaint Alleges Facts Consistent with a Finding that the Material Witness Statute Was Used to Fulfill an Investigative or National Security Function. 17
(2) Arresting al-Kidd Fell Outside the Prosecutorial Function of Securing Witness Testimony at Trial. 18
C) Public Policy Considerations Weigh Heavily Against Immunizing Ashcroft. 20
(1) The History of Common Law Immunities Does Not Support Extending Absolute Immunity in this Case. 21
(2) Holding Ashcroft Liable for his Actions Will Not Expose the Office of the Attorney General to Vexatious Legislation. 23
(3) Judicial Review Alone Will Not Suffice to Restrain Pretextual Use of the Material Witness Statute. 25
II. ASHCROFT IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS ACTIONS VIOLATED AL-KIDD'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT TO BE FREE FROM DETENTION AS A CRIMINAL SUSPECT ABSENT SUSPICION OF WRONGDOING. 28

A) Qualified Immunity Does Not Extend to Violations of Clearly Established Constitutional Rights. 28
B) Pretextual use of § 3144 to Detain Individuals Preventatively or for Purposes of Criminal Investigation Violates the Fourth Amendment. 29
(1) The Material Witness Power Extends Only to Detentions for the Limited Purpose of Securing Testimony for Use in Criminal Proceedings. 29
(2) The Fourth Amendment Standard of Reasonableness Limits the Permissible Scope of Material Witness Detentions. 32
(3) Al-Kidd's Complaint Alleges that his Detention was Unreasonable by the Standards of the Fourth Amendment and the Text and Purpose of § 3144. 35
(4) Ashcroft's Intent to Misuse § 3144 was Not Mitigated by Probable Cause. 37
C) It was Not Objectively Reasonable for Ashcroft to Believe that the Law Clearly Established in March 2003 Sanctioned the Pretextual use of § 3144 to Circumvent the Requirements of Probable Cause for Criminal Arrest. 39
(1) The Differing Requirements of Probable Cause for Criminal and Material Witness Arrest Warrants were Clearly Established in March 2003. 40
(2) It was Clearly Established in March 2003 that the Permissible Scope of a Seizure May Not Exceed the Scope of the Evidence Supporting It. 41
CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Al-Kidd v. Ashcroft, 2006 WL 5429570 (D. Idaho) 8
Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) ..... passim
Anderson v. Creighton, 483 U.S. 635 (1987) 28, 29, 39
Bacon v. United States, 449 F.2d 933 (1971) 33, 40
Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) 30, 34
Beck v. Ohio, 379 U.S. 89 (1964) 33, 34, 40
Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 17
Bennett vs. Watson, 3 Maule & Selwyn 1 (1814) 30
Betts v. Richards, 726 F.2d 79 (2d Cir. 1984) 16, 19
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 27
Brinegar v. United States, 338 U.S. 160 (1949) 33, 34, 40
Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 15, 18
Burns v. Reed, 500 U.S. 478 (1991) 14, 18, 21, 22
Butz v. Economou, 438 U.S. 478 (1978) 13, 21, 24, 25
Chandler v. Miller, 520 U.S. 305 (1997) 33
Daniels v. Kieser, 586 F.2d 64 (7th Cir. 1978) 16, 18, 19
Dunaway v. New York, 442 U.S. 200 (1979) 41
Forrester v. White, 484 U.S. 219 (1988) 13, 14, 25
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13, 23, 27, 29
Hope v. Pelzer, 536 U.S. 730 (2002) 29, 39, 40
Horton v. California, 496 U.S. 128 (1990) 32, 34, 38, 41
Hurtado v. United States, 410 U.S. 578 (1973) 32
Imbler v. Pachtman, 424 U.S. 409 (1976) ..... passim
Kalina v. Fletcher, 522 U.S. 118 (1997) 14, 15, 21, 23
Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 33
Michigan v. DeFillippo, 443 U.S. 31 (1979) 33, 34, 40
Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... passim
Odd v. Malone, 538 F.3d 202 (3d Cir. 2008) 16, 19
Pearson v. Callahan, 129 S.Ct. 808 (2009) 29
Pierson v. Ray, 386 U.S. 548 (1967) 22, 23
Saucier v. Katz, 533 U.S. 194 (2001) 39
Stacey v. Emery, 97 U.S. 642 (1878) 40
State ex rel. Howard v. Grace, 18 Minn. 398 (1872) 30
Stein v. People of State of New York, 346 U.S. 156 (1953) 34, 40
Tenney v. Brandhove, 341 U.S. 367 (1951) 25
Terry v. Ohio, 392 U.S. 1 (1968) ..... passim
Torres-Ruiz v. U.S. District Court, 120 F.3d 933 (9th Cir. 1997) 31
Tower v. Glover, 467 U.S. 914 (1984) 21
United States v. Brignoni-Ponce, 422 U.S. 873 (1975). 42
United States v. Robinson, 414 U.S. 218 (1973) 38
Whren v. United States, 517 U.S. 806 (1996) 37, 38
Yaselli v. Goff, 12 F.2d 396 (1926) 22
Yaselli v. Goff, 275 U.S. 503 (1927) 22

STATUTES

18 U.S.C. § 3144 (2006) ..... passim
28 U.S.C. § 1254(1)(2006) 1
28 U.S.C. § 1821(d)(4) (2006) 31
An Act to Regulate the Proceedings in the Circuit and District Courts, 9 Stat. 73, ch. 98, § 8 (1846) 30, 31, 34, 40
Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 33 (1789) 29

OTHER AUTHORITIES

1984 U.S.C.C.A.N. (98 Stat.) 3182 31
4 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 676 (1830) (abridged) 29
Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533 (1994) 21
Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 727 (2005) 22

RULES

FED. R. CRIM. P. 15(a)(2) (2010) 31
FED. R. CRIM. P. 46(h)(2) (2010) 26

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV 32, 33

OPINIONS BELOW

The decision of the court of appeals is reported at 580 F.3d 949. The denial of rehearing *en banc* is reported at 598 F.3d 1129. The opinion of the district court is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 4, 2009 and denied *en banc* review on March 18, 2010. A petition for a writ of certiorari was filed on July 16, 2010, and granted on October 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides, in relevant part, that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause…."

18 U.S.C. § 3144 (2006) provides:

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

STATEMENT OF THE CASE

This case concerns the liability of government officials who authorize or direct the pretextual use of material witness warrants to detain individuals as though they were criminal suspects in the absence of probable cause to believe they are guilty of any wrongdoing. Respondent Abdullah al-Kidd is an African-American convert to Islam from Wichita, Kansas.

On March 16, 2003, federal agents arrested Al-Kidd pursuant to a warrant naming him as a material witness in the prosecution of a former colleague. Compl. ¶¶ 5, 15. Over the next fifteen days, the government shuttled him through three different detention centers and subjected him to harsh and degrading treatment typically reserved for high-risk criminal suspects and convicts, including strip-searches, shackling and housing in maximum-security cells. *Id.* ¶¶ 73, 83, 87, 95. After his release on March 31, al-Kidd was forced to abide by restrictive, parole-like conditions for nearly fourteen months. *Id.* ¶¶ 103-104. He was never called to testify in any proceeding. Although a jury acquitted the defendant against whom Mr. al-Kidd was purportedly a material witness, the government did not move to lift the conditions of his release and al-Kidd was only released as a material witness on his own motion. *Id.* ¶106.

In March 2005, Mr. Al-Kidd filed suit alleging that his detention was part of a broader Department of Justice strategy, developed in the aftermath of the September 11, 2001, terrorist attacks, to detain Muslim and Arab men as material witnesses when the government wanted to investigate them, but lacked probable cause to arrest them as criminal suspects. *Id.* ¶ 111. He named Petitioner John Ashcroft, who was the Attorney General at the time of Mr. al-Kidd's arrest, as a defendant. *Id.* ¶ 23.

A) Post-September 11, 2001, Detention Policies

John Ashcroft served as Attorney General of the United States from 2001 to 2005. In this capacity, he oversaw the Department of Justice, the Federal Bureau of Investigation, and the Bureau of Prisons. *Id.* Mr. al-Kidd alleges that after September 2001, Ashcroft presided over the implementation of a policy to use the federal material witness statute, 18 U.S.C. § 3144, to investigate or preventatively detain individuals whom the government lacked probable cause to arrest as criminal suspects. *Id.* ¶ 111. Speaking at a press briefing on October 31, 2001, Ashcroft

announced new measures to "take suspected terrorists off the street… [including] Aggressive detention of lawbreakers *and material witnesses*…." *Id.* ¶ 117 (emphasis added).

In addition to statements by Ashcroft indicating the existence of such a policy, his close aides echoed the Department's willingness to use § 3144 pretextually. Michael Chertoff, then the head of the Criminal Division, characterized material witness warrants as "an important *investigative* tool in the war on terrorism . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of *evidence* you can get from a witness." *Id.* ¶ 121 (emphasis added). A report by the Office of the Inspector General quoted an internal Department document entitled "Maintaining Custody of Terrorism Suspects" ("the OIG Report"), instructing staff that "[i]f a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant." *Id.* ¶ 118. The OIG Report quoted the Senior Counsel in the Deputy Attorney General's Office as saying that the Department's Criminal Division was examining the cases of the terrorism suspects in custody for immigration offenses to determine whether they could be detained "on criminal charges or *on a material witness warrant.*" *Id.* ¶ 119 (emphasis added).

Other top officials made public statements confirming the government's use of § 3144 as an investigative or preventative detention tool. FBI Director Robert Mueller gave a speech in which he declared that "a number of *suspects* were detained on federal, state, or local charges; on immigration violations; or on *material witness warrants*." *Id.* ¶ 122 (emphasis added). White House Counsel Alberto Gonzalez told members of the American Bar Association that "detention as a material witness" was one option available to federal agencies seeking to hold American citizens suspected of involvement in terrorist activities. *Id.* ¶ 123. In testimony before the Senate

Judiciary Committee, the Counsel to the Assistant Attorney General for the Criminal Division told Senators about one individual whom the Department had been unable to charge until "we got enough information to *at least make him a material witness* and then to charge him criminally." *Id*. ¶ 124 (emphasis added).

By one account, nearly fifty percent of material witnesses detained in connection with post-September 11 terrorism investigations were never called to testify. *Id.* ¶ 128. The treatment of individuals detained pursuant to this policy further underscored their true status as criminal suspects, rather than bona fide material witnesses. Departing from normal procedure for eliciting witness testimony, the government refused to offer many of them immunity for their testimony. *Id.* Once arrested, many material witnesses were held in high-security detention conditions more suitable for criminal suspects or convicts rather than mere witnesses. *Id.* ¶ 129-133. The OIG Report noted that, after September 11, the Bureau of Prisons often "did not distinguish between detainees who… posed a security risk and those detained aliens who were uninvolved witnesses." *Id.* ¶ 130.

B) The Government's Investigation of Al-Kidd

Abdullah al-Kidd was born Lavoni T. Kidd in Wichita, Kansas. *Id.* ¶¶ 39-40. He attended the University of Idaho, where he was a star running back on the football team. *Id.* ¶ 40. Prior to graduating, Mr. al-Kidd converted to Islam and changed his name. *Id*. During college and after graduation, he traveled abroad several times to pursue his religious education. *Id.* ¶ 42. At the time of his arrest, al-Kidd was embarking on a trip to Saudi Arabia to undertake further religious and language studies on a scholarship to a well-known Saudi university. *Id*.

During the spring and summer of 2002, the Federal Bureau of Investigation conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born US citizen) as part of a broad terrorism investigation targeting Muslim and Arab men in Idaho. *Id.* ¶ 44. In the course of this

investigation, FBI agents interviewed al-Kidd on several occasions with his consent and full cooperation, questioning him for hours at his mother's home, where he lived. Mr. al-Kidd attended all of these pre-arrangement meetings without exception. *Id.* ¶ 54.

By early 2003, the government's interest in Mr. al-Kidd centered on his tenuous connection to Sami Omar Al-Hussayen, a graduate student at the University of Idaho who worked for an Islamic charity that also employed al-Kidd. *Id.* ¶ 60. On February 13, 2003, federal prosecutors indicted Al-Hussayen on charges of visa fraud and making false statements to government officials. *Id.* ¶ 45.

On March 14, 2003, the United States Attorney's Office in Boise, Idaho filed an application for a warrant to arrest Mr. al-Kidd a material witness in Al-Hussayen's case. *Id.* ¶ 46. The affidavit accompanying the warrant application contained numerous misleading and false statements, including the assertion that al-Kidd or his wife had received more than $20,000 worth of "payments" from Al-Hussayen or his associates. *Id.* ¶ 60. In fact, the money in question was al-Kidd's salary as an employee of the charitable organization for which both he and Al-Hussayen worked. *Id.* The affidavit falsely stated that al-Kidd had purchased a one-way, first class ticket to Saudi Arabia costing $5000, and that his travel to Saudi Arabia would make it impossible for the government to secure his presence at Al-Hussayen's trial by means of a subpoena. *Id.* ¶ 49. In fact, Mr. al-Kidd's ticket was a round-trip coach ticket costing less than $1700. *Id.* ¶ 53. The affidavit also neglected to mention his substantial cooperation with the FBI in the months prior to his arrest and the fact that al-Kidd's wife, child, parents, and siblings are all native-born American citizens living in the United States.

C) Al-Kidd's Arrest and Detention

On March 16, 2003, FBI agents arrested Mr. al-Kidd while he was at a ticket counter at Dulles International airport, checking in to his flight. *Id.* ¶ 65. The agents handcuffed him and

walked him through the airport to a police substation. *Id.* ¶¶ 66-67. Without being apprised of his *Miranda* rights, al-Kidd agreed to talk to the agents and was interrogated at length. *Id.* ¶ 68. The interrogation covered matters beyond al-Kidd's knowledge of Al-Hussayen's alleged criminal activities, and included questions about al-Kidd's beliefs, conversion to Islam, and travels. *Id.* Over the next sixteen days, federal authorities shuttled Mr. al-Kidd through three different facilities in Alexandria, Virginia; Oklahoma; and Boise, Idaho. *Id.* ¶ 70. In each location, Mr. al-Kidd was subjected to humiliating, punitive, and excessively harsh conditions. *Id*. During his detention in Alexandria, al-Kidd was strip-searched and placed in a high-security unit that agents told him had previously housed John Walker Lindh and Zacarias Moussaoui, two individuals charged with terrorism offenses. *Id.* ¶ 73. Guards allowed him out of his cell for just one to two hours each day and forbade visits from a family member. *Id.* ¶¶ 74, 76.

On March 24, 2003, authorities transferred Mr. al-Kidd to the Federal Transfer Center in Oklahoma. *Id.* ¶ 83. En route, federal agents handcuffed his hands and legs, chained his waist and linked the waist chain to his ankles and hands. *Id*. At the Transfer Center, Mr. al-Kidd was singled out from other detainees, taken to a room, and forced to remove his clothes and sit completely naked for a considerable period of time in sight of other detainees and several guards, at least one of whom was female. *Id.* ¶ 86. Once the other detainees had been processed he was finally given clothes, processed, and taken to a high-security Special Housing Unit. *Id.* ¶ 87.

Finally, on March 25, 2003, authorities moved Mr. al-Kidd once again, this time to the Ada County Jail in Boise, where they placed him in a high-security unit. *Id.* ¶¶ 92, 94-95. While at the Jail, he was interviewed by FBI agents and a United States Attorney, to whom he reiterated his willingness to cooperate and affirmed that he would make himself available when needed. *Id.* ¶ 102. While testifying to House and Senate subcommittees during the same period, FBI

Director Robert Mueller offered Mr. al-Kidd's arrest as an example of the government's anti-terror efforts without mentioning that al-Kidd had been detained as a material witness only. *Id* ¶ 100.

Mr. al-Kidd received an initial hearing the day after his arrest, for which he was not provided counsel, and a detention hearing on March 28th. Compl. ¶¶ 77, 101. The government recommended that the court release him only under strict conditions. On March 31, the federal District Court in Boise ordered al-Kidd released into the custody of his wife, who was living in Nevada. The Court confiscated his passport and required him to confine his movements to Nevada and three other states. *Id.* For the next thirteen and one-half months, Mr. al-Kidd lived under these parole-like conditions, which included home visits and mandatory reports to a probation officer. *Id.* ¶¶ 103-04.

On June 10, 2004, a jury acquitted Sami Omar Al-Hussayen of the most serious charges against him and failed to reach a verdict on the other charges. *Id.* ¶ 106. The government never called Mr. al-Kidd to testify and did not move to have his release conditions lifted at the conclusion of the trial. *Id.* ¶¶ 106, 107. The District Court ultimately dismissed al-Kidd as a material witness on his own motion. *Id.* ¶ 107. By the time his detention conditions were lifted, Mr. al-Kidd's marriage had collapsed, and he was suffering from severe emotional distress. *Id.* ¶¶ 105, 145. He lost his job with a military contractor because his arrest record prevented him from obtaining a security clearance, and his prospects for future employment may likewise be compromised. ¶¶ 146, 147.

D) The Proceedings Below

In March 2005, Mr. al-Kidd filed suit in the United States District Court for the District of Idaho. In his First Amended Complaint, al-Kidd alleged that he had suffered violations of the material witness statute (the "§ 3144 Claim"), his Fourth Amendment rights (the "Fourth

Amendment Claim"), and his Fifth Amendment rights (the "Conditions of Confinement Claim"). He named as defendants the FBI agents who filed the false and misleading warrant affidavit that led to his arrest, several other state and federal law enforcement officials, and John Ashcroft, the Petitioner here.

On September 26, 2007 the District Court denied the defendants' motions to dismiss the suit pursuant to Federal Rules of Civil Procedure 12(b)(2) and (6). In its opinion, the District Court specifically rejected Ashcroft's claims that he was entitled to dismissal of the counts against him by virtue of the principles of absolute and qualified immunity. *Al-Kidd v. Ashcroft*, 2006 WL 5429570 (D. Idaho) at *7 and *9.

Ashcroft filed a timely interlocutory appeal in the Court of Appeals for the Ninth Circuit. On appeal, Ashcroft argued that he enjoyed absolute immunity from the § 3144 and Fourth Amendment Claims. While he conceded that he could not invoke absolute immunity to contest the Conditions of Confinement Claim, he argued that qualified immunity shielded him from all three claims. The Ninth Circuit affirmed part and reversed in part, allowing the Fourth Amendment and the § 3144 Claims to proceed, but dismissing the Conditions of Confinement Claim as insufficiently pled. *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009). On March 18, 2010, the Ninth Circuit declined to rehear the matter *en banc*. A petition for certiorari followed and was granted by this Court on October 18, 2010. Only two of the three questions in Ashcroft's petition are presented for review. In their Brief in Opposition to Ashcroft's petition, Respondents disclaimed any intent to pursue a third issue, regarding his liability for the allegedly false statements in the material witness warrant affidavit, whether or not certiorari was granted. Br. in Opp. i. Accordingly, this Court declined to hear that matter.

SUMMARY OF THE ARGUMENT

The Ninth Circuit correctly denied Petitioner's claims of absolute and qualified immunity, holding that the policy he allegedly created or supervised was not an exercise of his core prosecutorial functions and that it violated Mr. al-Kidd's clearly established Fourth Amendment rights.

I. Absolute immunity is an extraordinary defense, extended to prosecutors only when they are fulfilling those core prosecutorial functions so intimately associated with the judicial process that the public's interest in shielding them from suit outweighs the individual interest in vindicating constitutional rights by actions for damages. The facts of this case do not support extending immunity to Petitioner because he was not fulfilling such a prosecutorial function and because no pertinent consideration of public policy supports immunizing his actions.

In evaluating whether an action is "prosecutorial," this Court has consistently used a functional approach, which emphasizes the nature of an activity rather than the identity of the actor. The narrow range of immunized actions includes initiating a prosecution or presenting the government's case in court. Prosecutors do not enjoy absolute immunity for their investigative or national security functions. Mr. al-Kidd alleges that Petitioner created or supervised a policy to use the material witness power as a pretext to detain him and others, whom the government did not have enough evidence to arrest and detain as criminal suspects, either preventatively or for further investigation. The facts taken as true for the purposes of determining immunity strongly suggest that al-Kidd's detention was investigative in nature or connected with Petitioner's national security duties, and that absolute immunity therefore should not apply.

In addition to considering the nature of a challenged action, this Court considers the public policy implications of extending absolute immunity, none of which support immunizing Petitioner here. This Court looks to common law immunities, the need for effective law

enforcement and questions of judicial efficiency to determine whether eliminating a private remedy for a particular constitutional tort is in the public interest. There is no evidence that prosecutors enjoyed absolute immunity when seeking a material witness warrant at common law and no historical basis for extending it to pretextual uses of the material witness power. Nor is there any evidence that prosecutors in Petitioner's position would be hampered in carrying out their legitimate duties by the threat of vexatious litigation if Mr. al-Kidd's suit went forward. Rather, the threat of litigation in a case such as this is an important deterrent against abuses of office, which might otherwise go unpunished. Whatever concerns remain are amply addressed by the doctrine of qualified immunity, which would dispose of meritless claims without undue burden. Finally, none of the existing procedural constraints on prosecutors in Petitioner's position suffice to prevent the type of harm suffered by Mr. al-Kidd. Reliance on the normal channels of judicial review would not therefore offer a more efficient means of vindicating citizens' rights in a case such as this.

II. Petitioner cannot claim the protection of qualified immunity because he violated Mr. al-Kidd's clearly established Fourth Amendment rights by detaining him on the pretext that he was a material witness, but with the intent to hold him in conditions of criminal arrest, without any evidence that al-Kidd was involved in wrongdoing. Qualified immunity operates to protect government agents only when they act reasonably in light of established legal principles. To defeat a defense of qualified immunity, a court must find that the defendant violated the plaintiff's rights, and that it was objectively unreasonable for the defendant to believe that his actions were lawful.

Petitioner violated al-Kidd's Fourth Amendment rights by detaining him as though he were a criminal suspect, without making the required showing of probable cause to do so. The

lawful arrest of a criminal suspect must be based on a showing of probable cause that the individual in question has committed, is committing or will imminently commit some crime. By contrast, the material witness power provides for arrest based only on probable cause that an individual has testimony material to a criminal proceeding and that the testimony cannot be secured effectively by subpoena. Because the Fourth Amendment protects against unreasonable searches and seizures, the scope of any seizure must be limited to what the facts and circumstances surrounding it can reasonably support. It follows that the arrest of a material witness, which is made without any negative inference about the arrestee, must be accompanied by less invasive conditions than a criminal arrest, which requires evidence of wrongdoing.

Mr. al-Kidd alleges that federal agents treated him as or more severely than individuals suspected or convicted of serious crimes. During his fifteen days in detention, al-Kidd was strip-searched, shackled, forced to share a cell with a criminal suspect, and confined to high security cells, at least one of which was illuminated day and night. Government agents repeatedly told him that his was a "special case" and subjected him to more severe treatment than suspected or convicted criminals. In fact, the government never offered a scintilla of evidence that Mr. al-Kidd was involved in wrongdoing of any kind. The conditions of his detention were therefore unreasonable in light of the minimal showing made to secure a warrant for his arrest.

The Fourth Amendment principles at issue in this case were clearly established for decades when Petitioner created or supervised the policy that led to Mr. al-Kidd's arrest. The disparate requirements for criminal and material witness arrests were well articulated by this Court and Congress by the mid to late nineteenth century. There is no legal or semantic equivocation between a reasonable suspicion of guilt and a showing that a person may have material testimony to offer, which cannot be adequately secured by subpoena. Moreover, this

Court forty years ago spelled out the principle that the Fourth Amendment's prohibition against unreasonable searches or seizures means that the extent of the evidence used to support a seizure limits the permissible extent of the seizure itself. It was therefore objectively unreasonable for Petitioner to believe that a policy to arrest individuals as material witnesses and treat them as though they were criminal suspects could pass constitutional scrutiny.

STANDARD OF REVIEW

Petitioner appealed from the denial of his motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court granted certiorari only on the questions pertaining to Petitioner's claims of absolute and qualified immunity. Because "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated," this Court has held that "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985). "All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Id.* at 528.

ARGUMENT

I. ASHCROFT IS NOT ENTITLED TO ABSOLUTE IMMUNITY BECAUSE HIS PRETEXTUAL USE OF THE MATERIAL WITNESS STATUTE TO DETAIN AL-KIDD FOR INVESTIGATIVE OR PREVENTATIVE PURPOSES DID NOT FULFILL A CORE PROSECUTORIAL FUNCTION AND PUBLIC POLICY CONCERNS MILITATE AGAINST IMMUNIZING HIM.

Absolute immunity protects only those core prosecutorial functions so intimately associated with the judicial process that the public's interest in shielding them from suit outweighs the individual interest in vindicating constitutional rights by actions for damages. The policy Ashcroft created or supervised exceeded the narrow bounds of absolutely protected actions

because it served an investigative or national security function, rather than a prosecutorial one. The history of common law immunities, the negligible risk of vexatious litigation, and the absence of checks on the type of misconduct at issue here all weigh against barring Mr. al-Kidd's action.

A) Absolute Immunity Protects Only Core Prosecutorial Functions Intimately Associated with the Judicial Process.

Mr. Ashcroft acted outside of the scope of his core prosecutorial duties when he created or supervised a policy of using the material witness statute, 18 U.S.C. § 3144, as a pretext to detain suspects for investigative or preventative purposes. Absolute immunity is an extraordinary defense because it "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). This Court has therefore been "quite sparing" in granting absolute immunity, and has refused to extend it "further than its justification would warrant." *Forrester v. White*, 484 U.S. 219, 224 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982). The burden is on Ashcroft to prove that considerations of public policy require extending the scope of absolute immunity to the present suit. *See Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."). Mr. Ashcroft should not be permitted to avail himself of the shield of absolute immunity because he created or supervised the Justice Department's material witness policy in his capacity as an investigator or national security officer, rather than as a prosecutor.

Absolute prosecutorial immunity is limited to activities "intimately associated with the judicial process," including "initiating a prosecution" and "presenting the State's case." *Imbler*, 424 U.S. at 430-31. Because the purpose of absolute immunity is to protect the integrity and

functioning of the judicial *process*, and not any particular judicial *officer*, this Court has applied a functional approach, emphasizing that absolute immunity turns on the nature of the action performed, rather than the identity of the actor. *See Kalina v. Fletcher,* 522 U.S. 118, 127 (1997); *Forrester*, 484 U.S. at 229. Accordingly, this Court has been careful to ensure parity between liability faced by prosecutors and other government agents carrying out the same activities. For example, high-ranking prosecutors like Ashcroft are not absolutely immune when they advise or direct lower-ranking officials or agents to engage in unlawful searches and seizures. *See, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) ("If a prosecutor plans and executes a raid…, he has no greater claim to complete immunity than . . . police officers allegedly acting under his direction."). As this Court stated in *Burns v. Reed*:

> it would be incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice . . .. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.

500 U.S. 478, 495 (1991).

The functional approach to determining whether a particular action is prosecutorial in nature requires a court to examine it according to the facts of the particular case. This is because the same action can serve either a prosecutorial or investigative function, depending on the context. For example, a prosecutor may interview a witness in order to acquire evidence, an investigative function, or to prepare the witness to testify at trial, a prosecutorial function. The Court of Appeals for the Ninth Circuit rightly refused to create a "formalistic taxonomy of acts that are inherently either prosecutorial or investigative." *Al-Kidd v. Ashcroft*, 580 F.3d 949, 962 (9th Cir. 2009). Nevertheless, this Court has developed a few bright-line rules, which are instructive. One critical demarcation is that a "prosecutor neither is, nor should he consider

himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274.

Once probable cause exists, the most obvious example of a core prosecutorial function is the decision to bring charges against an individual, which is considered so integral to the role of the prosecutor in the judicial system that absolute immunity attaches even when the accused alleges that the prosecutor acted with malice. *Imbler*, 424 U.S. at 421-22. Other protected actions include presenting testimony in court, *Id.*, or in an information, appearing in court to apply for a search warrant, or filing an arrest warrant, *Kalina*, 522 U.S. at 129. Controlling the presentation of a witness's testimony at trial also falls within this scope. *Imbler*, 424 U.S. at 431 n.32.

A prosecutor is not entitled to absolute immunity when his or her actions are investigative in nature. The key distinction is between acts "in the nature of *acquisition* of evidence or in the nature of *evaluation* of evidence for the purpose of initiating a criminal process." *Buckley*, 509 U.S. at 265. Only the latter, evaluative role qualifies as "prosecutorial." This Court noted:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial… and the detective's role in *searching for clues and corroboration* that might give him probable cause to recommend a suspect be arrested. When a prosecutor performs the investigative functions normally performed by a detection or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other.

Id. at 273-74 (internal citations omitted) (emphasis added). Thus, in *Buckley*, this Court refused to extend absolute immunity to a prosecutor's fabrication of crime scene evidence, an act clearly related to the acquisition of evidence, rather than the evaluation of the appropriate use of evidence during a criminal proceeding. *Id*. at 274-75.

Finally, absolute immunity does not apply to national security activities. In *Mitchell v. Forsyth*, this Court evaluated a suit brought against a former Attorney General, John Mitchell,

for authorizing a warrantless wiretap on an antiwar activist's phone line. 472 U.S. 511, 513 (1985). This Court held that "the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." *Id.* at 520. Despite Mitchell's argument that the attorney general's national security functions were so sensitive that they deserved absolute immunity, this Court stated that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." *Id.* at 523.

Mr. al-Kidd alleges that Ashcroft's policy was to detain terrorism suspects under material witness warrants before the government had enough information to charge them with criminal activity. When Ashcroft and his subordinates detained al-Kidd and interrogated him about matters unrelated to the trial for which he was ostensibly a material witness, they acted outside the boundaries established by the *Buckley* court. In questioning him broadly, they were not preparing a witness for trial, but rather engaging in an investigative fishing expedition.

B) Al-Kidd's Arrest Did Not Fulfill a Core Prosecutorial Function.

Ashcroft cannot claim absolute immunity because the facts of Mr. al-Kidd's case do not justify this extraordinary defense. The circuit courts that have evaluated whether the use of a material witness warrant is a prosecutorial function have examined the action within the context of each particular case. *See Odd v. Malone*, 538 F.3d 202 (3d Cir. 2008); *Betts v. Richards*, 726 F.2d 79 (2d Cir. 1984); *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978). It is not enough to argue that the material witness power has generally or historically served a prosecutorial function. The specific facts of the case must justify immunity. The timing of al-Kidd's arrest, the wide-reaching nature of his interrogation, and statements by Ashcroft and other officials indicating that material witness warrants were being used to detain suspects preventatively or for

investigative purposes, all belie Ashcroft's claim that he was acting within the scope of his core prosecutorial functions. *See al-Kidd*, 580 F.3d at 963 (listing "objective indicia" indicating that al-Kidd's arrest served an investigative function, and noting that al-Kidd had met the requirement that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

(1) Al-Kidd's Complaint Alleges Facts Consistent with a Finding that the Material Witness Statute Was Used to Fulfill an Investigative or National Security Function.

This Court has consistently held that prosecutors are not entitled to absolute immunity when fulfilling an investigative or national security function. Several public statements by Mr. Ashcroft and his close aides reveal that after September 11, the Department of Justice used material witness arrests to fulfill investigative or national security functions by preventatively detaining terrorism suspects and interrogating them while they were in custody, in the hopes of obtaining enough information to charge them criminally. Ashcroft stated during a press briefing on October 31, 2001, that the Department of Justice had implemented aggressive policies to "take suspected terrorists off the street… [including] aggressive detention of lawbreakers *and material witnesses*…." Compl. ¶ 117 (emphasis added). Michael Chertoff characterized material witness warrants as an "important *investigative* tool on the war on terrorism" and discussed the sort of "evidence" the government could get from a witness, such as fingerprints and hair samples. *Id.* ¶ 121. An internal DOJ document outlined strategies for detaining terrorism suspects on either immigration charges or material witness warrants, and high-ranking government officials openly discussed using material witness warrants to detain suspects until they had enough information to charge them criminally. *Id.* ¶¶ 118-19, 122-24.

Mr. Ashcroft should not be granted absolute immunity for his role in creating and supervising an investigative program, which encouraged the pretextual use of the material witness warrant. Because the actions of lower-ranking officers and federal agents fulfilling Ashcroft's directive would be evaluated under the qualified immunity framework, the same framework should be applied to his role in creating and supervising the directive. *See, e.g. Burns v. Reed*, 500 U.S. at 495; *Buckley*, 509 U.S. at 273-74. In *Mitchell*, this Court rejected an Attorney General's argument that national security functions warrant absolute immunity, and it should do the same here.

(2) Arresting al-Kidd Fell Outside the Prosecutorial Function of Securing Witness Testimony at Trial.

The specific circumstances of Mr. al-Kidd's arrest and detention support his allegation that he was a victim of Mr. Ashcroft's material witness policy. The government detained al-Kidd under the pretext of securing his testimony for the Al-Hussayen trial. Yet, any claim that the arrest advanced a prosecutorial function is undermined by the timing of the arrest in relation to Al-Hussayen's trial and the fact that al-Kidd was never actually called to testify, as well as the facts that the government never gave al-Kidd the opportunity to avoid arrest by cooperating and that agents questioned him about issues unrelated to Al-Hussayen.

The circumstances under which Mr. al-Kidd was arrested and detained differ significantly from those in which the Courts of Appeal have found that the use of the material witness power fell within the scope of absolutely immunized prosecutorial functions. The Court of Appeals for the Seventh Circuit held in *Daniels v. Kieser* that a prosecutor using the material witness power to secure essential testimony after a trial had begun "was attempting to prove all elements charged in the indictment"—a core prosecutorial function. 586 F.2d at 68. The court noted that "in making the often difficult decision as to what behavior is investigative or

administrative and what is quasi-judicial, *whether or not the trial has commenced may be relevant*." *Id.* at 67 n.5 (emphasis added). Similarly, in *Betts v. Richards,* the Court of Appeals for the Second Circuit evaluated a prosecutor's decision to seek an arrest warrant for the state's primary witness, "the person directly responsible for the initiation of the criminal proceeding," after she failed to appear in court. In that case, the exigency of the situation warranted extending absolute immunity. 726 F.2d at 8. In both of these cases, the material witness power was necessary to secure crucial testimony in time for trial. *See Al-Kidd*, 580 F.3d at 961 (noting that the *Daniels* and *Betts* courts "emphasized the close temporal and circumstantial connection between trial and seeking arrest"). In contrast, the government arrested Mr. al-Kidd when it had no need for his testimony, and detained him far longer than necessary to secure it by deposition. Notably, the Court of Appeals for the Third Circuit recently held that absolute immunity did not extend to a prosecutor's failure to secure a material witness's release from detention when this failure "occurred during a prolonged and clearly delineated period of judicial inactivity." *Odd v. Malone*, 538 F.3d 202, 212 (3d Cir. 2008). These circuit court decisions highlight the importance of timing in determining whether a material witness arrest served a core prosecutorial function.

The timing of Mr. al-Kidd's arrest strongly suggests that it was unrelated to prosecutorial activity. Government agents arrested Mr. al-Kidd in March 2003, over a month after Al-Hussayen was indicted by a federal grand jury, and over a year before Al-Hussayen's trial began. Compl. ¶¶ 45, 65, 106. The temporal distance between the time of the arrest and the occasions on which Mr. al-Kidd's testimony may have been material to an ongoing judicial proceeding suggests that he was arrested for investigative or national security purposes, rather than as part of the state's presentation of its case against Al-Hussayen. Indeed, Mr. al-Kidd was *never actually*

called to testify in the Al-Hussayen trial, and remained under parole-like conditions even after the trial ended. *Id.* ¶ 106.

Furthermore, despite the fact that Mr. al-Kidd had willingly cooperated with FBI agents on numerous occasions, the government detained him for fifteen days without making any effort to secure his testimony voluntarily, by subpoena or deposition. The government never gave al-Kidd an opportunity to avoid arrest, even though the text of the material witness statute provides that detention is an option of last resort, when other efforts to secure testimony are unavailing. *See* 18 U.S.C. § 3144 (2006) (It must be shown that "it may become impracticable to secure the presence of the person by subpoena," and "[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition"). Moreover, the government appeared interested in al-Kidd for reasons unrelated to its prosecution of Al-Hussayen. During his initial detention at Dulles International Airport, federal agents questioned al-Kidd about a wide range of matters, including his conversion to Islam, his beliefs and his travels. Compl. ¶ 68.

Finally, FBI director Robert Mueller told House and Senate subcommittees that the government was "making progress" in the fight against terrorism, and included the arrest of Mr. al-Kidd among examples of the government's recent successes, even though al-Kidd was detained ostensibly on a material witness warrant and not on criminal charges. *Id*. ¶ 100.

C) Public Policy Considerations Weigh Heavily Against Immunizing Ashcroft.

The grant of absolute immunity to prosecutors in the performance of their prosecutorial functions "is grounded on principles of public policy." *Imbler*, 424 U.S. at 422 (1976). To determine the boundaries of absolute immunity, this Court "look[s] to the common law and other history for guidance because [its] role is not to make a freewheeling policy choice, but rather to

discern Congress' likely intent in enacting [28 U.S.C.] § 1983."[1] *Burns*, 500 U.S. at 493 (internal citations omitted); *see also Kalina*, 522 U.S. at 132 (Scalia, J., concurring). Even where the common law immunized a particular act, this Court still "considers whether § 1983's history or purposes counsel against recognizing the same immunity in § 1983 actions." *Tower v. Glover*, 467 U.S. 914, 920 (1984). Beyond its historical inquiry, this Court considers the prudential "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423 (1976). Finally, this Court examines whether there are enough checks within the judicial system to restrain tortious conduct without resort to litigation. None of these public policy rationales support extending absolute immunity to Mr. Ashcroft's material witness policy.

(1) The History of Common Law Immunities Does Not Support Extending Absolute Immunity in this Case.

The Ninth Circuit noted that Mr. Ashcroft failed to present any "historical evidence that a common-law tradition of absolute immunity from suit for prosecutors in seeking material witness arrests exists, and our own research has uncovered none," even though the practice of detaining material witnesses dates to the eighteenth century. *Al-Kidd*, 580 F.3d at 959; *see also* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534-36 (1994) (detailing the emergence of compulsory process to secure the presence of witnesses at trials).

---

[1] While 28 U.S.C. § 1983 creates a cause of action for constitutional torts by state actors, this Court has held that "in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement… than is accorded state officials when sued for the identical violation under § 1983." *Butz v. Economou*, 438 U.S. 478, 500 (1978).

The basis for granting absolute immunity to prosecutors developed from the common law tradition of granting absolute immunity to judges, witnesses, and grand jurors in an effort to immunize judicial proceedings from liability. *See Imbler*, 424 U.S. at 422-23 ("The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors). This Court noted in *Imbler* that the Courts of Appeal had sometimes described the prosecutor's immunity "as a form of 'quasi-judicial' immunity and referred to it as derivative of the immunity of judges…." *Imbler*, 424 U.S. at 420; *see also Yaselli v. Goff*, 12 F.2d 396, 404 (1926) ("A United States attorney . . . is at least a quasi judicial officer"), *aff'd per curiam*, 275 U.S. 503 (1927).

There is no common-law basis for granting absolute immunity to a prosecutor when he is acting outside of his core prosecutorial duties and outside of the scope of ongoing judicial proceedings. As this Court noted in *Burns*, when discussing immunity for false or defamatory statements, common law immunities protected "prosecutors and other lawyers… (at least so long as the statements were *related to the proceedings*). 500 U.S. at 489-90 (emphasis added); *See also Imbler*, 424 U.S. at 422-23 (immunity extended to prosecutors as to other officers of the court "acting within the scope of their duties").

When prosecutors act in an investigative capacity, their actions are assessed within the framework of the qualified immunity doctrine applied to police officers and other investigators. *See Pierson v. Ray,* 386 U.S. 547, 554 (1967) ("The common law has never granted police officers an absolute and unqualified immunity"); *see also* Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 727, 743 (2005) (noting that nineteenth century New York constables and marshals enjoyed only qualified immunity from suits related to investigative use of material witness power). Likewise,

this Court found in *Mitchell* that there was no historical or common-law basis for granting officials absolute immunity when they performed activities essential to national security. 472 U.S. at 521. Given Mr. al-Kidd's allegations, there is no common-law basis for extending absolute immunity in this case. Rather, Mr. Ashcroft's creation and supervision of a policy encouraging the pretextual use of § 3144 should be evaluated using the qualified immunity doctrine used to assess liability for investigative and national security activities.

(2) Holding Ashcroft Liable for his Actions Will Not Expose the Office of the Attorney General to Vexatious Legislation.

Absolute immunity exists not for the protection of lawbreaking officials but to preserve the public's interest in a well-functioning judicial process. *See Kalina*, 533 U.S. at 127 ("absolute immunity that protects the prosecutor's role as an advocate" exists "because any lesser degree of immunity could impair the judicial process itself"). *Cf. Pierson v. Ray*, 386 U.S. 548, 553-54 (1967) (stating that absolute immunity for judges is "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences"). In evaluating claims of absolute immunity, this Court has considered whether the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler*, 424 U.S. at 424. Yet this Court has also expressed the view that, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he *should be made to hesitate*." *Harlow*, 457 U.S. at 819 (emphasis added).

Allowing Mr. al-Kidd's suit to proceed would not impede the independent exercise of the attorney general's discretion in performing his core prosecutorial function. Using the material witness statute as a pretext to detain and interrogate suspected terrorists is not a prosecutorial function, but an investigative or national security tool. Because of the heightened potential for

abuse of these functions, they entail stricter constraints on government officials. In *Butz*, this Court expressed concern that "the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale." 438 U.S. at 505. Under these circumstances, "an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Attorneys general will not be disincentivized from fulfilling their core prosecutorial duties if al-Kidd's suit is allowed to proceed. They may, however, be disincentivized from improperly using the material witness statute to preventatively detain and interrogate citizens when they do not have enough evidence to bring criminal charges. The circumstances recall this Court's statement in *Mitchell* that "We do not believe the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." 472 U.S. at 524.

Like the defendants in *Butz*, Mr. Ashcroft, as attorney general, had the authority to promulgate policies that would result in violations of constitutional liberties on a massive scale. Moreover, the material witness policy at issue here was connected principally with his national security duties. Ashcroft said as much when he spoke of the Justice Department's "aggressive arrest and detention tactics in the war on terror." Compl. ¶ 114 (quoting Ashcroft's remarks during an October 21, 2001, speech). In *Mitchell*, this Court declined to extend absolute immunity to the attorney general's national security functions in part because "the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or 'quasi-judicial' tasks that have been the wellspring of absolute immunities." 472 U.S. at 521. The Court noted

that while the judicial process inevitably creates losers who might be inclined to pin blame on judges or prosecutors, national security activities are generally "carried out in secret," and "[u]nder such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Id.*

Allowing Mr. al-Kidd's lawsuit would not start a flood of disruptive litigation directed at the attorney general's office. This Court recognized in *Butz* that the doctrine of qualified immunity is sufficient protection to ensure that "[i]nsubstantial lawsuits can be quickly terminated" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 438 U.S. at 507-08. By denying Mr. Ashcroft the extraordinary defense of absolute immunity in the present case, this Court would be recognizing that in circumstances such as this one, allowing victims of overzealous investigative and national security programs to sue for damages may be the best way to vindicate constitutional rights and deter future misbehavior on the part of the attorney general and other high-ranking officials.

(3) Judicial Review Alone Will Not Suffice to Restrain Pretextual Use of the Material Witness Statute.

One policy justification for absolute immunity is efficiency. Because the judicial process is largely self-correcting, some misconduct in carrying out core prosecutorial functions might be rectified by the normal mechanisms of appellate review. *See, e.g.*, *Imbler*, 424 U.S. at 427 (noting that "[v]arious post-trial procedures are available to determine whether an accused has received a fair trial"). The Court has applied the same rationale in its justifications of judicial immunity, *Forrester*, 484 U.S. at 227 ("[m]ost judicial mistakes or wrongs are open to correction through ordinary mechanisms of review"), and legislative immunity, *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("voters must be the ultimate reliance" for holding legislators accountable).

However, this Court has also expressed concern that "the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution . . . *[t]his is particularly true if a suspect is not eventually prosecuted*." *Burns*, 500 U.S. at 496 (emphasis added). Likewise, in *Mitchell*, this Court found that "built-in restraints [similar to those available in the legislative or judicial process] on the Attorney General's activities in the name of national security… do not exist." 472 U.S. at 523. Indeed, no mechanism exists to protect Mr. al-Kidd and others like him from the pretextual use of the material witness for investigative or preventative detention.

Mr. al-Kidd suffered immediate and severe harm as a result of Mr. Ashcroft's material witness policy. Like the similarly non-prosecutorial activities of the prosecutor in *Burns* and the attorney general in *Mitchell*, Ashcroft's actions as the creator or supervisor of an unlawful policy were left unchecked by the judicial process. By the time he was eventually released, the damage to Mr. al-Kidd's life had already been done—he was robbed of his dignity, his marriage was left in ruins, his plans for academic study were dashed and he was fired from his job as a result of his arrest record. Compl. ¶¶ 105, 145-47.

When used properly, the material witness statute is subject to procedural safeguards, which ensure that material witnesses are not deprived of their liberty for longer than necessary to secure their testimony. The text of § 3144 itself provides that witnesses may not be detained "if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice." 18 U.S.C. § 3144 (2006). Most significantly, Rule 46 of the Federal Rules of Criminal Procedure requires the government to make biweekly reports to the court listing each material witness detained for more than 14 days, and justifying their continued detention. FED. R. CRIM. P. 46(h)(2) (2010). No safeguards are in place to provide

redress to material witnesses whose Fourth Amendment rights against unreasonable seizure are violated by the pretextual use of a material witness warrant.

Mr. al-Kidd received an initial hearing the day after his arrest, and a detention hearing on March 28, in Idaho. Compl. ¶¶ 77, 101. These hearings did not redress or prevent the punitive conditions to which government agents subjected him in detention. At the detention hearing, al-Kidd repeated his willingness to testify voluntarily and make himself available if called upon to do so. *Id*. ¶ 102. Nevertheless, the government succeeded in persuading the presiding judge to release al-Kidd only under very strict conditions. *Id*. ¶ 103. The judge ordered al-Kidd released in the custody of his wife, limited his travel to a four-state area, report to a probation officer, and ordered him to surrender his passport. *Id.* ¶ 103. These parole-like conditions continued beyond the Al-Hussayen trial, for which Mr. al-Kidd was never called to testify. Even after Al-Hussayen's acquittal, the government did not move to lift al-Kidd's release conditions. *Id.* ¶ 106-107. Instead, he was forced to file a motion on his own accord and the court ultimately dismissed him as a material witness fourteen months after he was arrested. *Id.* ¶ 107.

Until the order granting his dismissal, none of the judicial proceedings in Mr. al-Kidd's case served to relieve or correct the injustice he suffered and none held Ashcroft accountable for his actions. For those in al-Kidd's position, with the damage done to his life and the government's actions beyond procedural correction or injunctive or declaratory relief, "an action for damages may offer the only realistic avenue for vindication of constitutional rights." *Harlow*, 457 U.S. at 814; *see also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing").

Extending absolute immunity to Mr. Ashcroft would set a dangerous precedent. It would signal that, as long as prosecutors can find some nexus between a potentially or explicitly

unlawful action and judicial proceedings, they can act with impunity. Aggrieved citizens like Mr. al-Kidd would be left without any effective recourse for violations of their rights.

II. ASHCROFT IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS ACTIONS VIOLATED AL-KIDD'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT TO BE FREE FROM DETENTION AS A CRIMINAL SUSPECT ABSENT SUSPICION OF WRONGDOING.

The Fourth Amendment requires that a seizure extend no further than warranted by the evidence offered to support it. Because the evidentiary basis for detention as a material witness requires no suspicion of wrongdoing, it is substantially different from the showing required to support a criminal arrest. Mr. al-Kidd alleges that Mr. Ashcroft intentionally blurred this distinction to create an unconstitutional form of preventative or investigative arrest out of the narrow material witness power as a component of a nationwide national security program after September 11. Although the government had no evidence that al-Kidd was involved in wrongdoing of any kind, it detained him under the invasive conditions characteristic of criminal arrest. By creating and supervising a policy to use § 3144 pretextually, Ashcroft subverted the protections of the Fourth Amendment and violated al-Kidd's rights. Because the distinction between criminal and material witness arrests was well established when federal agents arrested Mr. al-Kidd in March 2003, Ashcroft cannot claim qualified immunity to prevent al-Kidd from obtaining the redress he deserves.

A) Qualified Immunity Does Not Extend to Violations of Clearly Established Constitutional Rights.

The doctrine of qualified immunity represents a judicial effort to strike a balance between vindicating the constitutional rights of citizens and giving law enforcement the freedom to operate effectively in a complex legal landscape. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Thus, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

To determine whether an official can claim qualified immunity in a given case, a court must determine whether the challenged action violated the law, as well as the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639 (internal quotations omitted); *see also Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("[Q]ualified immunity operates to ensure that… officers are on notice their conduct is unlawful" (internal quotations omitted)). Before a suit can go forward, this two-prong test requires a court to rule both that an action violated the plaintiff's rights and that a reasonable official would not have believed the action to be legal. Courts may choose the order in which they answer these questions, and either may be dispositive. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

B) Pretextual use of § 3144 to Detain Individuals Preventatively or for Purposes of Criminal Investigation Violates the Fourth Amendment.

(1) The Material Witness Power Extends Only to Detentions for the Limited Purpose of Securing Testimony for Use in Criminal Proceedings.

In its earliest legislation on the federal courts, Congress authorized judges to require the "recognizances[2] of… witnesses for their appearance to testify… on pain of imprisonment." Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 33. In its modern incarnation, the material witness power allows a court to detain any individual upon a showing that their testimony "is material in

[2] A recognizance, in this case, was a witness' formal promise to appear and give testimony when called. The 1830 edition of Webster's Dictionary defines "recognizance" as "an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace or pay a debt. This recognizance differs from a bond, as it does not create a new debt, but it is the acknowledgment of a former debt or record. This is witnessed by the record only, and not by the party's seal." NOAH WEBSTER, 4 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 676 (1830) (abridged).

a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena…." 18 U.S.C. § 3144 (2006).

The history of the material witness power allows for only a narrow interpretation of its proper scope and purpose. Detaining a material witness has long been a coercive alternative of last resort when crucial testimony could not otherwise be secured. *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929) (material witness detention only one means to ensure "the due appearance of the witness . . . ." (quoting Ellenborough, C.J., in *Bennett vs. Watson*, 3 Maule & Selwyn 1 (1814)); *see also State ex rel. Howard v. Grace*, 18 Minn. 398, 402 (1872). In 1846, Congress passed a detailed material witness statute authorizing judges to issue a warrant for the arrest of any person "upon satisfactory proof of the materiality of the[ir] testimony" if the judge deemed the testimony "necessary upon the trial of any criminal cause or proceeding . . ." An Act to Regulate the Proceedings in the Circuit and District Courts, 9 Stat. 73, ch. 98, § 8 (1846). If a material witness refused to give recognizance once brought before the court, the judge could order his detention "until he shall be removed to the court for the purpose of giving his testimony, or until he shall have given the recognizance required by said judge." *Id.*

Congress enacted § 3144 in 1984, ending a decades-long period during which there was no explicit statutory authorization for detention of material witnesses in American law.[3] Both the plain language of the statute and its legislative history underscore its limited purpose. "No material witness may be detained… if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." 18 U.S.C. § 3144. The release of the witness may only be delayed "for a reasonable period of time until the

[3] The material witness power was repealed in 1948, but persisted implicitly in statutes related to the release of material witnesses and the Federal Rules of Criminal Procedure. *Bacon v. United States*, 449 F.2d 933, 937-39 (9th Cir. 1971)

deposition of the witness can be taken. . . ." *Id.* The Senate Committee reporting the statute "stress[ed] that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody." 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3211.

The early versions of the material witness power and § 3144 all share the common substantive aim of guaranteeing the public's right to the witness's testimony, rather than to the body of the witness per se. Under the 1846 Act, detention was only permitted as long as necessary either to give the testimony or to satisfy the court that it would be given when the time came. Once the witness testified or made a formal promise to appear, he was free to go. 9 Stat. 73, ch. 98, § 8. Today, an imprisoned witness may secure his release by trading his deposition for his liberty. On the motion of a material witness, a court may "order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript." FED. R. CRIM. P. 15(a)(2) (2010). If the witness can show that a deposition can adequately capture his testimony and that further detention is not necessary to prevent a failure of justice, § 3144 *requires* his release, even if he is unable to make bond. 18 U.S.C. § 3144; *See also Torres-Ruiz v. U.S. District Court*, 120 F.3d 933, 935 (9th Cir. 1997) (granting writ of mandamus compelling defendant judge to take deposition of material witnesses where plaintiffs were unable to make bond and judge found videotaped deposition would be inadequate). The interaction of §3144 and Rule 15(a)(2) dramatically limit the material witness power, and reflect the fact that advances in technology allowing videotaped or recorded depositions make the physical presence of a witness at trial far less important than it was in the nineteenth century.

Congress' intent to frame the detention of a material witness as testimony-centered is further demonstrated by a provision entitling a material witness to a per diem for each day they are detained and not appearing in court. 28 U.S.C. § 1821(d)(4) (2006). Compensating material

witnesses is another way to recognize that their detention does not change the fact that they are "*innocent* persons who have not been charged with a crime or incarcerated in anticipation of a criminal prosecution." *Hurtado v. United States*, 410 U.S. 578, 604 (1973) (Douglas, J., dissenting). Once he has delivered his evidence, the material witness, like any other witness, has discharged his obligation to the law.

The statutory rights afforded material witnesses show that Congress never intended material witness detentions to serve as investigative seizures or preventative arrests. The deprivation of a witness' liberty under § 3144 is purely instrumental to the delivery of testimony in a criminal proceeding. Indeed, the law favors allowing a witness to testify by alternative means so that they may be freed, rather than detaining them. Section 3144, Rule 15 and 28 U.S.C. § 1821 all point to a narrow, limited power of last resort that cannot justify what Petitioner Ashcroft called "aggressive arrest and detention tactics in the war on terror." Compl. ¶ 114 (quoting OIG Report).

(2) The Fourth Amendment Standard of Reasonableness Limits the Permissible Scope of Material Witness Detentions.

Because the Fourth Amendment prohibits unreasonable searches or seizures, the extent or quality of the evidence used to support a seizure limits the permissible extent of the seizure itself. U.S. CONST. amend. IV ("the right of the people . . . against *unreasonable* searches and seizures, shall not be violated . . . ." (emphasis added)). In *Terry v. Ohio*, this Court explained that, "in determining whether [a] seizure… [was] 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. 1, 19-20 (1968); *see also Horton v. California*, 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that

permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more").

The Fourth Amendment allows the arrest and detention of a person as a criminal suspect only upon a showing of probable cause. This is true whether the arrest is made pursuant to a warrant governed by the Fourth Amendment's Warrant Clause, or without a warrant. *See* U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause"); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (constitutionality of a warrantless arrest "depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it").

Probable cause, "in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion." *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813). A valid criminal arrest must rest on "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an *offense*." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (emphasis added); *see also, Beck*, 379 U.S. at 91. Substantively, probable cause for a criminal arrest is "a reasonable ground for belief of *guilt*." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (emphasis added); *see also Chandler v. Miller*, 520 U.S. 305, 308 (1997) (Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion [of wrongdoing]").

To comport with the Warrant Clause, a warrant issued pursuant to § 3144 must also be made "upon probable cause." U.S. CONST. amend. IV; *Bacon v. United States*, 449 F.2d 933, 943 (1971) (applying "probable cause" standard to material witness warrants prior to enactment of § 3144). In the case of material witness warrants, however, the substance of probable cause differs

materially from that espoused in *Brinegar* and other cases discussing probable cause in the context of criminal arrests. Rather than requiring a reasonable ground for belief of criminal wrongdoing, § 3144 merely requires a showing that an individual's testimony is material and that it may not be adequately secured by subpoena. There is no suggestion that the target of the warrant has committed or is about to commit an unlawful act. To the extent that *Brinegar* purports to describe "substance of all the definitions of probable cause," it is inaccurate because the probable cause showing required by material witness statutes since at least 1846 has involved no suggestion of the witness' "guilt," and this Court has opined that "[t]he constitutionality of [the material witness power] apparently has never been doubted." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929); 9 Stat. 73, ch. 98, § 8. A finding to the contrary would require holding that § 3144 violates the requirements of the Warrant Clause. "Probable cause" is therefore first and foremost a standard of proof, which takes its substance from the type of seizure for which the government seeks authorization.

Seizure in the criminal context is justified by reference to the arrestee's alleged wrongdoing. *Brinegar*, 338 U.S. at 175; *DeFillippo*, 443 U.S. at 37 (1979); *Beck*, 379 U.S. at 91. By contrast, the material witness power reflects the judgment that "The 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. People of State of New York*, 346 U.S. 156, 184 (1953).

In light of the different bases on which probable cause is founded in the criminal and material witness contexts, the Fourth Amendment's reasonableness requirement implies that the nature of the permissible seizure must also differ. *Terry*, 392 U.S. at 19; *Horton*, 496 U.S. at 140. If the principle of reasonableness is to retain any meaning, treating a material witness as though

they were a criminal suspect must be a violation of the Fourth Amendment in the absence of probable cause to believe the witness is guilty of wrongdoing.

(3) Al-Kidd's Complaint Alleges that his Detention was Unreasonable by the Standards of the Fourth Amendment and the Text and Purpose of § 3144.

Mr. al-Kidd alleges that his detention violated the Fourth Amendment because the government treated him no differently from individuals suspected or convicted of serious crimes, even though it advanced no evidence to suspect him of involvement in any criminal activity. The Ninth Circuit accepted these allegations as sufficient to establish Ashcroft's liability, *Al-Kidd v. Ashcroft*, 580 F.3d 949, 965-66 (9th Cir. 2009), and this Court elected to consider only whether the acts alleged in the Complaint merit immunity. During the fifteen days he spent in custody, al-Kidd was held in high-security conditions and often forced to spend twenty-three hours a day in his cell. Compl. ¶ 6. On some occasions, al-Kidd was singled out for worse treatment than criminal suspects or convicts held with him. *Id.* ¶ 7. In one case, he was forced to sit naked in a cell in view of other inmates, all of whom were clothed, and several guards, including at least one female guard. *Id.* ¶ 86.

The government's treatment of Mr. al-Kidd as a criminal arrestee is most clearly indicated by three elements of the litany of deplorable treatment he suffered. First, al-Kidd was housed in cells designed for dangerous criminal defendants and convicts, even though the government had no basis for believing that he was dangerous and his arrest as a material witness gave no legal basis for a suspecting him of wrongdoing. For example, in the Alexandria Detention Center, where al-Kidd was held initially, his cellmate was not a witness, but a criminal defendant. *Id*. ¶ 72. Al-Kidd was eventually transferred to the high security wing of the facility, where he was informed that his cell had previously held John Walker Lindh and Zacarias Moussaoui, two individuals charged with terrorism offenses. *Id.* ¶ 73. During his time in this

cell, al-Kidd was allowed out only 1-2 hours per day and many, if not most, of the prisoners near him were charged with or convicted of serious crimes. *Id.* ¶ 74-75. At the Oklahoma Federal Transfer Center, al-Kidd was again placed in a high-security "Special Housing Unit" and told he was there because of his "special situation." *Id.* ¶ 87. Finally, in the Ada County Jail in Boise, Idaho, al-Kidd was confined for five days in a high security cell, lit twenty-four hours a day, from which he was only allowed out approximately one hour per day. *Id.* ¶ 95.

Second, in the process of shuttling Mr. al-Kidd to among detention facilities, government agents restrained and searched him in ways that were unreasonable under the limited showing of probable cause they made in obtaining the § 3144 warrant. For example, al-Kidd was strip-searched before being transferred to the high-security section of the Arlington facility and again at the Transfer Center. *Id.* ¶ 73, 86. That such searches might be justified by the dangerousness of the actual criminals and criminal suspects around him only underscores that the government held al-Kidd in conditions entirely inappropriate for a material witness. Government agents also restrained al-Kidd in ways typically used only to control dangerous prisoners. During his transfer to the Transfer Center, al-Kidd was fully shackled, with handcuffs around his wrists and ankles, connected to a chain around his waist. *Id.* ¶ 83. When he was flown to the Ada County jail, he was again shackled. When al-Kidd asked to have his cuffs loosened because they caused him discomfort, his request was denied because his case was "special." Meanwhile, others on the plane were allowed to have their restraints loosened. *Id.* ¶ 92.

Finally, in addition to informing al-Kidd on several occasions that his case was "special," the government made no distinction in its public statements between him and individuals actually suspected of wrongdoing. In March and April 2003, FBI Director Robert Mueller told House and Senate subcommittees of Mr. al-Kidd's arrest in the context of describing the

government's "successes" in fighting terrorism. Mueller mentioned Mr. al-Kidd in a list of names that included the alleged mastermind of the September 11 attacks and others, all of whom had been criminally charged with terrorism-related offenses. Mueller never told members of Congress that al-Kidd was merely a material witness or that no evidence had been presented to establish any reason to suspect him of involvement in a crime. *Id*. ¶ 100.

Taken together, these extensive allegations demonstrate that the government treated Mr. al-Kidd as a criminal arrestee, despite having legal authority only to hold him as a material witness. The material witness power has never authorized such treatment, and the Fourth Amendment cannot abide the pretextual use of a material witness warrant to avoid the probable cause requirement for a criminal arrest.

(4) Ashcroft's Intent to Misuse § 3144 was Not Mitigated by Probable Cause.

The Ninth Circuit found that Mr. al-Kidd's Complaint properly set forth a claim for relief by alleging that Mr. Ashcroft acted with purpose to deprive him of his constitutional rights. *Al-Kidd*, 580 F.3d at 975-77. Specifically, Ashcroft created or supervised a policy to use § 3144 pretextually to circumvent the protections of the Fourth Amendment. The Ninth Circuit explained its holding as meaning that "the pretextual use of the material witness statute that results in a person being detained for criminal investigation without adequate probable cause runs afoul of the Fourth Amendment, and is thus unlawful." *Id.* at 976.

An allegation of purpose to use § 3144 pretextually is distinct from an inquiry into the "subjective intentions" of a constitutionally reasonable seizure. This Court has held that "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). In *Whren*, this Court rejected a claim that the subjective intent of police officers to find illegal drugs rendered a traffic stop unconstitutional where the officers did not have probable cause or reasonable suspicion to believe that the

plaintiffs were engaged in drug-related activity. Because the plaintiffs had committed a traffic violation, this Court held that the police had probable cause to detain them. *Id.* at 810. Once a reasonable stop had been effectuated, the subsequent search of the vehicle, which turned up narcotics, was justifiable as "incident" to the arrest for the traffic violation. Writing for the majority, Justice Scalia explained that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Thus, for example, because it is objectively reasonable for an officer to search an individual in custody to ensure his personal safety, the Fourth Amendment does not require a further showing that the officer subjectively feared for his safety. *United States v. Robinson*, 414 U.S. 218, 236 (1973). There is nothing in *Whren*, however, that supports taking actions that are *unreasonable* in light of the circumstances justifying a seizure.

Mr. al-Kidd's allegation is not that Ashcroft had an impermissible intent to do something objectively lawful. Rather, the allegation is that Ashcroft intended to do something objectively *unlawful* (detain al-Kidd as a criminal suspect without probable cause to believe he was involved in criminal activity) using the pretext of a normally lawful act (executing a valid material witness warrant). Where an official intends to undertake unreasonable actions using the pretext of a reasonable seizure, *Whren* is inapposite. It is precisely the Fourth Amendment's concern with reasonableness, cited by Justice Scalia, which forbids a broad type of seizure on the basis of a narrow probable cause showing. *See Terry*, 392 at 19-20; *Horton*, 496 U.S. at 140. In *Whren*, police actually observed the plaintiffs commit an offense, which justified a search leading to the discovery of another offense. Here, the government never presented any evidence that al-Kidd was involved in criminal activity. Absent his alleged acquaintance with Al-Hussayen, there would have been no basis to search or detain him in any way. Rather, Mr. al-Kidd was a law-

abiding citizen about to embark on a legitimate trip for academic study when agents pursuing Ashcroft's unlawful policy calamitously disrupted his life.

C) It was Not Objectively Reasonable for Ashcroft to Believe that the Law Clearly Established in March 2003 Sanctioned the Pretextual use of § 3144 to Circumvent the Requirements of Probable Cause for Criminal Arrest.

Because qualified immunity operates to ensure that officials act with fair warning of the legality of their actions, courts must examine the "objective legal reasonableness of the [challenged] action, assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639 (internal quotations omitted); *Hope*, 536 U.S. at 739 ("In order to conclude that the right which the official allegedly violated is 'clearly established,' the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

What rules are clearly established "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 428 U.S. at 639. While an appeal to general legal principles is insufficient, it is not necessary to show that "the very action in question has previously been held unlawful." *Id.*; *Mitchell v. Forsyth*, 472 U.S. 511, 558, n.12 (1985). The precise articulation of a legal standard is also not necessary. If courts agree that "certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented… the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard." *Saucier v. Katz*, 533 U.S. 194, 202-03 (2001). Even in novel factual circumstances, "officials can still be on notice that their conduct violates established law . . . ." *Hope*, 536 U.S. at 741.

Mr. Ashcroft violated clearly established rights when he created or supervised a policy that sought to circumvent the requirements of the Fourth Amendment to detain material witnesses as though they were criminal suspects. Although the Ninth Circuit acknowledged that

no case had "squarely confronted" the pretextual use of § 3144 at the time of Mr. al-Kidd's arrest, this does not entitle Ashcroft to immunity. *Al-Kidd*, 580 F.3d at 970; *Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances"). Indeed, the disparate requirements for material witness warrants and warrants for criminal arrest had been established for over a century prior to Mr. al-Kidd's March 2003 arrest. Moreover, the unconstitutionality of using a narrow showing of probable cause to carry out a broad seizure was clearly established at least by the time of this Court's decision in *Terry v. Ohio*, in 1968. 392 U.S. at 19. It would therefore have been unreasonable for Ashcroft to believe that the Fourth Amendment could countenance the pretextual use of the material witness power he sanctioned.

(1) The Differing Requirements of Probable Cause for Criminal and Material Witness Arrest Warrants were Clearly Established in March 2003.

Detention of a material witness has never required the suspicion of wrongdoing essential to the probable cause showing for a criminal arrest. *See* Subsection II.B.1, *supra*. By 1878, this Court had clearly articulated that probable cause for a criminal arrest rests on a reasonable belief that an "offence has been committed." *Stacey v. Emery*, 97 U.S. 642, 645 (1878); *see also DeFillippo*, 443 U.S. at 37 (1979); *Beck*, 379 U.S. at 91 (1964). The focus on culpability was reiterated forcefully in 1949, when this Court held that the substance of probable cause was "a reasonable ground for belief of *guilt*." *Brinegar* 338 U.S. at 175 (emphasis added). By contrast, since 1846, a warrant for the arrest of a material witness has required only findings that the witness' testimony is material and that detention is necessary to guarantee the court's access to it. 9 Stat. 73, ch. 98, § 8; 18 U.S.C. § 3144; *Bacon*, 449 F.2d at 937-39. *See also Stein*, 346 U.S. at 184 ("one *known to be innocent* may be detained" under material witness power).

Probable cause to make a criminal arrest is one of the legal concepts most essential to law enforcement. Every police officer and prosecutor in the United States must know that a reasonable belief of past, ongoing or imminent commission of a crime is the sine qua non of an arrest, with or without a warrant. By its plain text, §3144 requires far less. In their affidavit supporting Mr. al-Kidd's arrest as a material witness, federal agents introduced no suggestion that he was involved in any wrongdoing. Compl., Ex. A. Instead, in two brief paragraphs replete with false or misleading statements, they set forth the bare minimum necessary to satisfy the material witness statute. They cannot have believed that a warrant to arrest Mr. al-Kidd as a material witness was equivalent to a warrant for his arrest as a criminal suspect. Yet, once the government detained him, it made no distinction between al-Kidd and individuals suspected or even convicted of crimes.

(2) It was Clearly Established in March 2003 that the Permissible Scope of a Seizure May Not Exceed the Scope of the Evidence Supporting It.

By 1968, it was clearly established that "The scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible" (internal quotations omitted)). *Terry*, 392 U.S. at 19; *Horton*, 496 U.S. at 140. In *Terry*, this Court recognized that a suspicion of wrongdoing short of probable cause could justify intrusions narrower than those involved in a custodial arrest. For example, a police officer "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an intrusion into an individual's privacy, may briefly stop that person to investigate. 392 U.S. at 21. Yet *Terry* did not simply replace the probable cause requirement with a balancing test. *See Dunaway v. New York*, 442 U.S. 200, 211-12 (1979) ("*Terry* and its progeny clearly do not support" extending balancing test to custodial arrests). The bright line of probable cause for arrest remained. A narrow intrusion based on narrow grounds could not evolve into a more

invasive criminal arrest without probable cause to suspect that the arrestee was involved in wrongdoing. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (explaining that after a brief stop based on reasonable suspicion that a vehicle is involved in illegal activity "*any* further detention or search must be based on consent or probable cause" emphasis added)). The precise contours of this Court's extensive jurisprudence on criminal arrests are of course not directly applicable to the suspicionless arrest of a material witness. Yet, by 2003, thirty-five years of Fourth Amendment jurisprudence had put officials on notice that the extent of searches and seizures is constrained by the degree and type of evidence available.

The government has never claimed that it had any reason to suspect Mr. al-Kidd was involved in wrongdoing. On the basis of the evidence offered in the § 3144 affidavit, federal agents would not have been justified in carrying out even a brief *Terry* stop of al-Kidd. They could certainly not have taken him into a custodial criminal arrest. Given the information on the record, Mr. Ashcroft could not have reasonably believed that the Constitution permitted him to treat Mr. al-Kidd as a suspect. It was equally clear that merely establishing that al-Kidd qualified as a material witness in the Al-Hussayen prosecution did not strip him of his Fourth Amendment right to be free from detention under conditions of criminal arrest absent probable cause that he was involved in criminal activity.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Eugene Alexis Sokoloff
Wendy Zorana Zupac
127 Wall Street
New Haven, CT 06511
(914) 602-3866

November 29, 2010

Counsel for Respondent