RECENT DECISION

CONSTITUTIONAL LAW—ARREST AND DETENTION UNDER THE MATERIAL WITNESS STATUTE—OBJECTIVELY REASONABLE ARREST DID NOT VIOLATE FOURTH AMENDMENT

I. FACTS

In March of 2003, Federal Bureau of Investigation agents apprehended Abdullah al-Kidd on a material-witness arrest warrant[1] as he checked-in for a flight to Saudi Arabia.[2] A

[1] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079 (2011). The federal material-witness statute permits a judge to authorize the "'arrest of [a] person' whose testimony 'is

magistrate judge signed the warrant because of federal officials' statements that al-Kidd was a material witness to crimes committed by Sami Omar al-Hussayen, and that al-Kidd's departure presented a likelihood that crucial information in al-Hussayen's prosecution would be lost.[3] Federal authorities held al-Kidd for sixteen days, and he was placed under supervised release until the end of al-Hussayen's trial fourteen months later.[4]

In March of 2005, Al-Kidd filed a claim against United States Attorney General John Ashcroft challenging the constitutionality of his material-witness arrest. [5] Al-Kidd's complaint made several allegations, including the allegation that his arrest under the material-witness statute was pretextual in nature and that federal officials had no intention of calling al-Kidd as a witness.[6] Ashcroft filed a motion to dismiss al-Kidd's claim based upon

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material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.'" *Id.* (quoting 18 U.S.C. § 3144 (2006)) (alterations in the original); *see infra* notes 23-25 and accompanying text.

[2] *Id.* at 2079. Al-Kidd was a United States citizen with a wife and two children. Al-Kidd v. Ashcroft, 580 F.3d 949, 951 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011). Born Lavoni T. Kidd in Wichita, Kansas, he was a recent Muslim convert. *Id.* at 952. For a brief period of time in 2002, he was under surveillance as part of a broad anti-terrorism investigation. *Id.*

[3] *Al-Kidd*, 131 S. Ct. at 2079. The affidavit, filed by a FBI special agent, contained descriptions of contact al-Kidd allegedly had with al-Hussayen. *Al-Kidd*, 580 F.3d at 952. It stated that al-Kidd had received more than $20,000 from al-Hussayen, and that al-Kidd had met with associates of al-Hussayen after returning from an excursion to Yemen. *Id.* It further stated that al-Kidd had bought a one-way ticket to Saudi Arabia, at a cost of $5000. *Id.* at 953. Justice Ginsburg pointed out in her concurrence that some of the information contained in the affidavit was false. *Al-Kidd*, 131 S. Ct. at 2088 (Ginsburg, J., concurring). For example, al-Kidd's ticket to Saudi Arabia was actually a round-trip ticket, purchased at a price of $1700, not $5000. *Id.*

[4] *Al-Kidd*, 131 S. Ct. at 2079.

[5] *Id.* Al-Kidd filed what is known as a *Bivens* action. *Id.* In *Bivens*, the Supreme Court established that a person is entitled to money damages for injuries that occur as a result of a violation of his or her Fourth Amendment rights by federal officials. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). Al-Kidd made several other claims against Ashcroft and other parties, but they were considered irrelevant, and the Court declined to hear them. *Al-Kidd*, 131 S. Ct. at 2079.

[6] *Al-Kidd*, 131 S. Ct. at 2079. Al-Kidd made allegations that, after the attacks of September 11, 2001, John Ashcroft, the acting United States Attorney General, instructed federal officials to detain individuals under the material-witness statute if they suspected the individuals of supporting terrorism but did not have sufficient evidence to charge them with a crime. *Id.*

absolute and qualified immunity.[7] The United States District Court for the District of Idaho denied Ashcroft's motion.[8] Ashcroft appealed to the United States Court of Appeals for the Ninth Circuit.[9] The Ninth Circuit affirmed the denial of Ashcroft's motion, and held that the "Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity."[10]

The United States Supreme Court granted certiorari and held: reversed and remanded.[11] Where an arrest of a material witness was objectively reasonable and pursuant to a validly obtained warrant, it could not be challenged as unconstitutional based on an allegation that the arresting authority had an improper motive; and thus, such an action did not abrogate qualified immunity for a government official.[12]

II. RELATED LAW

A. The Fourth Amendment on Seizures and Reasonableness

The Fourth Amendment states: "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[13] Courts have determined that a seizure occurs, for purposes of the Fourth Amendment, where a law enforcement official accosts an individual and "restrains his freedom to walk away."[14] Once a seizure has taken place, the language of the

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[7] *Id.*

[8] *Al-Kidd*, 580 F.3d at 956.

[9] *Al-Kidd*, 131 S. Ct. at 2079.

[10] *Id.* (citing *al-Kidd*, 580 F.3d at 949).

[11] *Id.* at 2080, 2085.

[12] *Id.* at 2085.

[13] U.S. CONST. amend. IV.

[14] Terry v. Ohio, 392 U.S. 1, 16 (1968). The Court has noted: "An arrest, of course, qualifies as a 'seizure' . . . ." *Al-Kidd*, 131 S. Ct. at 2080 (citing Dunaway v. New York, 442 U.S. 200, 207-08 (1979)). An arrest can be more generally described as requiring either physical force or, where there is no force, a submission to an assertion of authority. California v. Hodari D., 499 U.S. 621, 626 (1991); *see also* United States v. Mendenhall, 446 U.S. 544, 553 (1980) (holding that a person is only seized through physical force or a show of authority where his freedom of movement is restrained).

Fourth Amendment requires that the seizure be reasonable.[15] The reasonableness of the seizure depends upon "all of the circumstances surrounding the . . . seizure and the nature of the . . . seizure itself."[16] The Supreme Court has described this "reasonableness" standard as one of primarily objective concern.[17] The Court has required that an objective standard be used when examining the reasonableness of a seizure because law enforcement officers are required to make searches and seizures based on objective facts, not the officers' subjective feelings.[18] Furthermore, the Court has historically considered objectiveness as vital in promoting "[e]venhanded law enforcement."[19]

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[15] Virginia v. Moore, 553 U.S. 164, 168 (2008); *see also* United States v. Montoya de Hernandez, 473 U.S. 531 (1985). The Supreme Court has first looked to statutes and common law to determine whether a search of seizure was reasonable. *Moore*, 553 U.S. at 168. Where the Court was unable to find an answer in statutory or common law, the Court analyzed such an action "in light of traditional standards of reasonableness 'by assessing . . . the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 171 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[16] *Montoya de Hernandez*, 473 U.S. at 537 (citing New Jersey v. T.L.O., 469 U.S. 325, 337-42 (1985)).

[17] Devenpeck v. Alford, 543 U.S. 146, 153 (2004). In *Terry*, the Supreme Court stated that it is important that "those charged with enforcing the laws . . . [are] subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular . . . seizure in light of the particular circumstances." *Terry*, 392 U.S. at 21 (citations omitted). Furthermore, the Court noted that when evaluating the standard of reasonableness "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate[.]" *Id.* at 21-22 (citations omitted).

[18] *Terry*, 392 U.S. at 22. The Court believed that its reasonableness approach should mirror the approach law enforcement officers take when deciding whether to institute a search or seizure. *Id.* Law enforcement officers may only carry out a legal search or seizure based on objective reasons, so these objective reasons should be the ones examined. *Id.* Otherwise, "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." *Id.* (citations omitted).

[19] *Devenpeck*, 543 U.S. at 153 (quoting Horton v. California, 496 U.S. 128, 138 (1990)). The Fourth Amendment was not meant to regulate the thoughts of law enforcements officials when making a search and seizure; it was meant to regulate their associated conduct. *See* Bond v. United States, 529 U.S. 334, 338-39 & n.2 (2000).

B. The Material-Witness Statute

The material-witness statute allows a judicial officer to order the arrest of someone who is shown to have testimony "material" to a criminal proceeding when circumstances indicate that, without further action, it will be extremely difficult to secure that person's presence by subpoena in the future.[20] This law functions to prevent a material witness to a crime from evading his obligation to society to testify against the wrongdoer.[21] There are several restrictions on the use of this statute because it involves the detention of individuals who are not charged with a crime.[22] Detention is not allowed under the statute if conditions exist that could "reasonably assure the presence of the person as required,"[23] or if the material witness' testimony could be secured by deposition.[24] Furthermore, detention must cease at any point where such detention is no longer necessary to prevent a "failure of justice."[25]

Despite these safeguards, critics have decried the use of this statute in the post-9/11 environment.[26] Critics point out that arrests made early in the life of the statute were consistent with its original purpose, but that arrests in the post-9/11 period have

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[20] *See supra* note 2 and accompanying text; *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 700-01 (2009).

[21] Cole, *supra* note 20, at 701.

[22] Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SECURITY J. 85, 87-89 (2011).

[23] 18 U.S.C. § 3142(e) (2006 & Supp. 2009). Detention under the material-witness statute is proper only where "no condition or combination of conditions will reasonably assure the appearance of the person as required." *Id.*

[24] 18 U.S.C. § 3144 (2006).

[25] *Id.*; *see also* FED. R. CRIM. P. 15(a)(2). This rule specifically allows a detainee under the statute to request to be deposed. FED. R. CRIM. P. 15(a)(2). A court can then order a deposition at its discretion and discharge the detainee once he has signed the deposition transcript while under oath. *Id.*

[26] *See* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 680-81 (2005) (arguing material-witness arrests are the ones the Fourth Amendment was meant to bar); *see also* Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22, 23 (2009) (detaining individuals under material-witness statutes violates the Fourth Amendment because arrests lack probable cause).

been illegitimate.[27] Complaints have included allegations that material-witness detainees are treated more like suspected criminals than as witnesses to crimes[28] and that their identities are often kept under seal, limiting public scrutiny of the practice.[29] Critics of the material-witness statute have also pointed out the differences in the probable cause standard, needed to support an arrest for a crime, and the reasonable suspicion standard, needed to support an arrest under the material-witness statute.[30] Scholars have accused authorities of using the federal material-witness statute to conduct pretextual arrests, and many claim that such a policy is unconstitutional.[31] Despite these attacks, however, the constitutionality of the material-witness statute itself has not been called into question.[32]

C. City of Indianapolis v. Edmond

In *City of Indianapolis v. Edmond*, the Supreme Court examined the Fourth Amendment reasonableness of a seizure at a

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[27] Parker, *supra* note 26, at 23.

[28] *Id.*

[29] Bascuas, *supra* note 26, at 686.

[30] Heidee Stoller et al., Comment, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 201 (2004). A suspected criminal cannot be arrested until there is enough evidence of criminal activity for probable cause that the individual committed the crime. *Id.* Those detained under the material-witness statute are arrested solely upon statements from a law enforcement official on an affidavit that there is a reasonable suspicion the witness possesses important knowledge. *Id.*

[31] *Id.* at 200-01. Other complaints mention inhumane treatment of the detainees and the fact that many of the detainees are never called to testify. *Id.* at 200. Some are later indicted for crimes, and this supports allegations that such arrests are pretextual so as to arrest an individual for a crime before sufficient evidence exists for an indictment. *Id.*

[32] *See* New York v. O'Neill, 359 U.S. 1, 5, 7 (1959) (holding that a Florida statute allowing detention of a material witness was constitutional); United States v. Awadallah, 349 F.3d 42, 56 (2d Cir. 2003) (recognizing that "the detention of material witnesses for the purpose of securing grand jury testimony has withstood constitutional challenge"); Bacon v. United States, 449 F.2d 933, 941 (9th Cir. 1971) (referring to a material-witness statute and stating that "'[t]he constitutionality of this statute apparently has never been doubted'" (citing Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 617 (1929))).

vehicle checkpoint stop.[33] The City of Indianapolis was operating vehicle checkpoints for the purpose of stopping the transportation and possession of illegal narcotics into the city.[34] Department directives instructed officers conducting vehicle checkpoint stops to search a vehicle only if the vehicle owner consented or if there was an appropriate amount of particularized suspicion.[35] Two men who were stopped at the checkpoints filed a lawsuit against the city, claiming that the checkpoints violated the Fourth Amendment and the Indiana Constitution.[36] After a hearing, the United States District Court for the Southern District of Indiana denied their motion for a preliminary injunction to enjoin the city.[37] A divided Seventh Circuit reversed the lower court's decision and held that the roadblocks infringed upon the Fourth Amendment.[38] The Supreme Court granted certiorari and affirmed the Seventh Circuit's decision.[39] The Court held that the Indianapolis Police Department's purpose in operating the vehicle checkpoints was to uncover evidence of ordinary criminal activity; therefore, the program's function violated the Fourth Amendment.[40]

The Court made several important observations regarding the reasonableness of seizures and the appropriate method for determining their reasonableness.[41] The Court has traditionally held that seizures made without individualized suspicion are only acceptable in very specific situations.[42] When determining

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[33] City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000). A vehicle stop at a roadblock is a seizure for the purposes of the Fourth Amendment. *Id.* at 40 (citing Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 450 (1990)).

[34] *Id.* at 34.

[35] *Id.* at 35.

[36] *Id.* at 36.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 41-42.

[41] *Id.* at 47.

[42] *Id.* at 37. The Court has upheld suspicionless seizures at vehicle checkpoints when the primary goal of the stop necessitates such drastic measures. *E.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that sobriety checkpoints are constitutional); Delaware v. Prouse, 440 U.S. 648, 663 & n.26 (1979) (suggesting that a roadblock operated for the purpose of verifying driver's licenses and vehicle registrations likely constitutional); United States v. Martinez-Fuerte, 428 U.S. 543, 545

whether individualized suspicion is necessary for a seizure, the Court engages in a balancing process, taking into account the nature of the interests threatened and the relation of the interests to the challenged law enforcement practice.[43] The Court reasoned that the city's goal of stopping the transport and possession of illegal narcotics was almost indistinguishable from its general goal of combating everyday criminal behavior.[44] The Court has refused to allow vehicle checkpoint programs where the primary purpose was to control and prevent ordinary criminal behavior.[45]

Lastly, the Court addressed the city's contention that prior decisions by the Court did not allow inquiry into the city's primary purpose for the vehicle checkpoint program.[46] The Court stated that subjective examinations are not improper where searches and seizures are part of a program or "regime."[47] The Court distinguished the city's case by stating that the law required an inquiry into the primary purpose when seizures were made without individualized suspicion as part of a program of searches

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(1976) (holding stops designed to intercept illegal aliens are constitutional). A seizure normally requires individualized suspicion to avoid being unreasonable. *Edmond*, 531 U.S. at 37 (citing Chandler v. Miller, 520 U.S. 305, 308 (1997)). The Court, however, has refused to "limit the purposes that may justify a checkpoint program to any rigid set of categories." *Id.* at 44.

[43] *Edmond*, 531 U.S. at 47. In this case, society's "'general interest in crime control'" was not enough to create a "justification for a regime of suspicionless stops." *Id.* at 41 (quoting *Prouse*, 440 U.S. at 659 n.18). The Court has deemed such vehicle checkpoints as intrusions and reasoned that the need for individualized suspicion provides a check on law enforcement's ability to conduct vehicle checkpoints, preventing such intrusions from encroaching upon constitutional freedoms. *Id.* at 47. The Court has interpreted the Fourth Amendment to give individuals freedom from excessive, unreasonable seizures. *See id.*

[44] *Id.* at 42. The Court rejected the city's argument that the "severe and intractable nature of the drug problem" separated it from other crimes in the general crimes category. *Id.* (citation omitted). The Court rejected comparisons to sobriety checkpoints because drug possession by motorists did not present the immediate, vehicular threat to life as did drunk drivers. *Id.* at 43. The Court also refused to recognize the city's comparisons of their drug stops to border stops made to detect smuggling of illegal aliens. *Id.*

[45] *See supra* note 43 and accompanying text.

[46] *Edmond*, 531 U.S. at 45.

[47] *Id.* (citing Whren v. United States, 517 U.S. 806, 810-13 (1996)). The city attempted to analogize the vehicle checkpoints to a vehicle stop made by an individual officer with reasonable suspicion that a crime has been or is being committed. *Id.*

and seizures.[48] Although a reasonableness examination of a seizure under the principles of the Fourth Amendment was "predominantly an objective inquiry," the Court included vehicle stop programs as one of the three exceptions where purpose or subjective intentions may be analyzed.[49]

D. Whren v. United States

In *Whren v. United States*, the Supreme Court examined the reasonableness of a traffic stop under the Fourth Amendment when the police officers allegedly had an improper pretext for making the stop.[50] Washington D.C. police officers were patrolling a high crime area when they spotted a driver and a passenger, in a truck with a temporary license plate, acting suspiciously at a stop light.[51] The officers followed the truck and observed it turn without signaling and accelerate at an unreasonable rate of speed.[52] Upon stopping the vehicle, one of the officers approached the truck and observed two bags of drugs in the hands of one of the occupants.[53] The occupants were arrested and indicted on various federal drug charges.[54] The two men filed a motion to suppress the drug evidence and argued that the officers lacked probable cause or reasonable suspicion that they were involved in illegal drug activity.[55] They also argued that the officer's stated purpose for approaching their vehicle, to confront the driver about traffic violations, was a pretext for searching for drugs.[56]

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[48] *Id.* at 45-46 ("[P]rogrammatic purposes may be relevant to the validity of the Fourth Amendment intrusions undertaken pursuant to a general scheme *without* individualized suspicion." (emphasis added)).

[49] *Id.* at 47. Special-needs and administrative-search cases have demonstrated that purpose may be relevant where there is a lack of individualized suspicion. *Id.* The third exception is that purpose may be examined where there is a program of searches and seizures not based on individualized suspicion. *Id.* at 45-46; *see supra* note 48 and accompanying text. The Court in *Whren* mentioned yet another exception. *Whren*, 517 U.S. 806, 817 (1996); *see infra* note 61 and accompanying text.

[50] *Whren*, 517 U.S. at 808.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 808-09.

[54] *Id.* at 809.

[55] *Id.*

[56] *Id.*

The United States District Court for the District of Columbia denied the motion to suppress and the two men were convicted of the charges.[57] The District of Columbia Circuit for the United States Court of Appeals affirmed their convictions,[58] and the men appealed to the Supreme Court, which granted certiorari.[59] The Court held that the subjective intentions or ulterior motives of police officers are not examined in an ordinary Fourth Amendment analysis, and will not invalidate a search or seizure where probable cause exists.[60] Furthermore, the Court stated that a balancing process, weighing governmental and individual interests, will always find a search or seizure reasonable under the Fourth Amendment when that search or seizure is based upon probable cause.[61]

E. Qualified Immunity

A state or federal official may affirmatively plead qualified immunity when an individual has filed a civil claim requesting damages against the official for an alleged violation of that individual's federal constitutional rights.[62] If successful, it protects an official from civil damages liability for violations of an individual's constitutional rights if the official was performing a

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[57] *Id.* The district court stated that "'the facts of the stop were not controverted,' and '[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop.'" *Id.* (citation omitted).

[58] *Id.* The Court of Appeals stated that "'regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation.'" *Id.* (quoting United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996)).

[59] *Id.*

[60] *Id.* at 813. In this case, the officers had probable cause to believe that the vehicle had violated traffic laws, offenses that warranted a vehicle stop. *Id.* at 808-09.

[61] *Id.* at 817. The Court has found that even where probable cause exists, a balancing analysis is needed where a search or seizure is conducted in an extreme manner that threatens an individual's safety or personal privacy. *See* Tennessee v. Garner, 471 U.S. 1, 3, 8-9 (1985) (balancing process needed for a seizure by deadly force); Winston v. Lee, 470 U.S. 753, 755, 760 (1985) (balancing process needed for a seizure involving physical penetration of the body); Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (balancing process needed for an entry into a home without a warrant).

[62] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

discretionary function within the scope of his job.[63] An individual, however, may circumvent an official's qualified immunity defense if he can show that the official's conduct met two criteria.[64] First, that the official violated a recognized constitutional or statutory right.[65] And second, that the right was "clearly established."[66] As a defense, qualified immunity has functioned fairly effectively, providing "ample protection" to government officials in performance of their duties.[67]

III. *ASHCROFT V. AL-KIDD*

A. Majority Opinion

In *al-Kidd*, the Supreme Court addressed the issue of whether former United States Attorney General John Ashcroft could successfully assert his qualified immunity defense where al-Kidd alleged that Ashcroft's authorization of al-Kidd's detention under the federal material-witness statute violated the Fourth Amendment.[68] The Court held that because the material-witness warrant was based on individualized suspicion, an objective inquiry deemed it reasonable under the Fourth Amendment;

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[63] Anderson v. Creighton, 483 U.S. 635, 638 (1987). This type of immunity addressed concerns that civil damages suits against public officials affected society negatively by perpetuating a fear of individual monetary liability and risk of litigation that could prevent public officials from performing their duties effectively. *Id.* at 639-40.

[64] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (citing *Harlow*, 457 U.S. at 818).

[65] *Id.* (citing *Harlow*, 457 U.S. at 818).

[66] *Id.* (quoting *Harlow*, 457 U.S. at 818). "Clearly established" means that the "'contours'" of the legal right must be clear. *Id.* at 2083 (quoting *Anderson*, 483 U.S. at 640). The two-tiered standard was meant to "'avoid excessive disruption of government'" and be fairly straightforward, allowing the "'resolution of many insubstantial claims on summary judgment.'" Malley v. Briggs, 475 U.S. 335, 341 (1986) (quoting *Harlow*, 457 U.S. at 818).

[67] *Malley*, 475 U.S. at 349 (Powell, J., concurring); *see supra* note 65 and accompanying text. Qualified immunity should only fail as a defense when the official acts with total incompetence, or knowingly and purposefully breaks the law. *Malley*, 475 U.S. at 349.

[68] *Al-Kidd*, 131 S. Ct. at 2079.

therefore, Ashcroft did not violate al-Kidd's constitutional rights.[69] The Court also held that Ashcroft did not violate any clearly established law and was entitled to a qualified immunity defense.[70]

The Court's opinion began by mentioning that the Ninth Circuit had addressed both prongs of the two-prong qualified immunity test.[71] Thus, the Court had full discretion to correct the lower court's erroneous decisions on both prongs, even if such an analysis was not necessary to reverse the lower court's judgment.[72]

Under the first prong of the qualified immunity test, the Court addressed whether Ashcroft violated a statutory or constitutional right.[73] The Court stated that the reasonableness standard under the Fourth Amendment required an objective inquiry.[74] The Court examined the facts to determine if they warranted an exception to the Court's normal policy of not probing subjective intent.[75] The Ninth Circuit had relied upon such an exception when it ruled that *Edmond* allowed a determination of the purpose of a program where a seizure involved a lack of

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[69] *Id.* at 2082-83. The Court rejected the idea that there should be a subjective inquiry into the alleged pretext of al-Kidd's arrest since his arrest was based upon individualized suspicion. *Id.* at 2082.

[70] *Id.* at 2085.

[71] *Id.* at 2080. The Court's opinion included a prelude which contained a short discussion on the parameters of the material-witness statute. *Id.* at 2079; *see also supra* notes 20-31 and accompanying text. It also included a background discussion of the purpose of the qualified immunity defense and the two-prong test used to determine if it is abrogated. *Al-Kidd*, 131 S. Ct. at 2080; *see also supra* notes 64-70 and accompanying text.

[72] *Al-Kidd*, 131 S. Ct. at 2080. The Court mentioned that it should be very careful when "expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 236-37 (2009)). The Court stated that it needs to exercise this discretion to prevent lower courts from keeping novel constitutional issues from its review and deciding constitutional questions incorrectly. *Id.* The Court was also concerned that the lower courts' language could possibly degrade the defense of qualified immunity. *Id.*

[73] *Id.*

[74] *Id.*; *see supra* notes 15-19 and accompanying text.

[75] *Al-Kidd*, 131 S. Ct. at 2082.

probable cause.[76] The Court corrected the Ninth Circuit's interpretation of *Edmond*, stating that *Edmond* approved a subjective inquiry into the purpose of a program only where Fourth Amendment intrusions were part of a grand scheme with no individualized suspicion.[77] The Court distinguished the facts in al-Kidd's case from those in *Edmond*, highlighting the fact that the warrant against al-Kidd was issued by a neutral magistrate judge and that the affidavit filed alongside the warrant enumerated specific reasons why al-Kidd was a material witness.[78] Those facts established individualized suspicion; therefore, the *Edmond* exception did not apply.[79] Additionally, the Court stated that the standard of individualized suspicion was a high one, and it provided more than sufficient protection for an individual's Fourth Amendment rights.[80]

The Court also rejected another of al-Kidd's arguments: that *Whren* required the Court to ignore subjective intent only where there is probable cause to believe a law has been broken.[81] The Court rejected al-Kidd's incorrect interpretation of *Whren* because even if an official had ulterior motives, such motives would not invalidate a search or seizure that was legitimate for separate reasons.[82] The Court concluded its examination of the first prong

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[76] *Id.* at 2081. The Court quickly dismissed any comparisons of al-Kidd's arrest to special-needs and administrative-search cases, where the actual motivations of law enforcement officials making an arrest do matter, because his arrest was based on an arrest warrant issued by a judicial official. *Id.*; *see supra* note 49. The Ninth Circuit had relied upon another exception to this general principle, the *Edmond* exception. *Al-Kidd*, 131 S. Ct. at 2081; *see supra* notes 48-49 and accompanying text.

[77] *Al-Kidd*, 131 S. Ct. at 2081 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000)).

[78] *Id.* at 2082.

[79] *Id.*; *see supra* note 48-49 and accompanying text.

[80] *Al-Kidd*, 131 S. Ct. at 2082. The Court recognized this standard as greater than the one present in most of their cases inquiring into intent. *Id.* The Court was adamant that an objective standard has been applied in situations where there was probable cause and no warrant, so a situation where there was a valid warrant coupled with individualized suspicion should not necessitate a subjective inquiry. *Id.*

[81] *Id.* (citing Whren v. United States, 517 U.S. 806, 813 (1996)). The arrest of al-Kidd did not involve a violation of a law. *Id.* When taken out of context, the Court's statements in *Whren* could suggest that the circumstances surrounding al-Kidd's arrest necessitated a subjective inquiry. *Id.*

[82] *Id.* The Court had referred to "probable cause to believe a crime had occurred" because it was the legitimizing factor in the situation at hand. *Id.* This did not mean

of qualified immunity by holding that Ashcroft did not violate al-Kidd's Fourth Amendment rights because the material-witness warrant, which was supported by individualized suspicion, was validly obtained under an objective inquiry.[83]

Finally, the Court examined the second prong of the qualified immunity test and the Ninth Circuit's determination that Ashcroft had indeed violated a "clearly established" legal right.[84] At the time of al-Kidd's arrest, there was no established precedent ruling that an objectively reasonable material-witness arrest warrant could somehow violate a constitutional right.[85] The Court harshly criticized the Ninth Circuit for finding a clearly established right.[86] The Ninth Circuit based its opinion upon dicta in a footnote from a federal district court opinion out of New York[87] and other cases present in the "broad 'history and purposes of the Fourth Amendment.'"[88] Even if it had found differently in its first-prong analysis, the Court concluded, that right would in no way be "clearly established."[89]

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that there could not be other legitimizing factors. *Id.* at 2083. In this case the validly obtained warrant issued by a judicial official was the legitimizing factor, meaning no subjective inquiry was needed. *Id.*

[83] *Id.*

[84] *Id.* The Court could have decided the issue of qualified immunity based on the determination that Ashcroft had not violated a known statutory or constitutional right. The Court deemed it necessary, however, to comment on the Ninth Circuit's finding that the violated right was indeed "clearly established." *Id.* at 2083-84; *see supra* note 79.

[85] *Al-Kidd*, 131 S. Ct. at 2083. There need not be a case directly on point in order to consider a right as "clearly established," but precedent must have established the existence of that legal right beyond logical debate. *Id.*

[86] *Id.* at 2084.

[87] *Id.* at 2083-84. The footnote, found in *United States v. Awadallah*, lacked any citations supporting it. *Al-Kidd*, 131 S. Ct. at 2083 (citing United States v. Awadallah, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003)). It suggested that the pretextual use of a material-witness warrant for preventive detention of suspected terrorists or terrorist supporters was an "illegitimate use of the statute." *Id.* (quoting *Awadallah*, 202 F. Supp. 2d at 77 n.28). Such language suggested that this illegitimate use could then be considered unconstitutional. *Id.* at 2084.

[88] *Id.* (quoting *al-Kidd*, 580 F.3d 949, 971 (9th Cir. 2010)). The Court admonished the Ninth Circuit for making loosely defined statements of law with no legal support. *Id.* The Ninth Circuit's opinion even mentioned the founding fathers' disgust for general warrants issued by the English Crown, and analogized the British general warrants with material-witness warrants. *Id.*

[89] *Id.* at 2085.

The Court reversed the Ninth Circuit's ruling that denied Ashcroft a qualified immunity defense.[90] Al-Kidd's material-witness arrest warrant was valid and could not be constitutionally challenged on the basis of alleged improper motives of government officials.[91]

B. Justice Kennedy's Concurring Opinion

Justice Kennedy, joined as to Part I by Justices Ginsburg, Breyer, and Sotomayor, agreed with the Court's majority opinion in full, stating that Ashcroft could indeed assert a qualified immunity defense.[92] In his concurrence, he highlighted two additional observations.[93] Justice Kennedy noted that the Court did not entertain an argument that the material-witness statute itself was unconstitutional.[94] There may be, he argued, situations in which the use of a material-witness statute would be unlawful.[95] Justice Kennedy further observed that warrants issued in compliance with the Fourth Amendment are typically based upon probable cause, yet material-witness warrants are issued under a different standard.[96] For Justice Kennedy, these questions created uncertainty as to the validity of future arrests under the material-witness statute.[97]

Justice Kennedy's second observation detailed why the evaluation of whether a constitutional right is "clearly established," for purposes of the two two-prong qualified immunity test, requires a high standard.[98] For example, the existence of

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[90] *Id.*

[91] *Id.*

[92] *Id.* (Kennedy, J., concurring).

[93] *Id.*

[94] *Id.* Justice Kennedy pointed out that al-Kidd only asserted that his arrest was unconstitutional because of the alleged pretextual use of the statute, but did not argue that the statute itself was unconstitutional. *Id.*

[95] *Id.* at 2085-86. Justice Kennedy gave an example of a situation where a normal citizen might observe a crime right before taking a scheduled flight abroad and subsequently have a material-witness warrant issued against him. *Id.* at 2086. It is unclear, in Justice Kennedy's example, what would happen if the citizen was willing to testify. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

inconsistent law in varying jurisdictions could make it difficult for upper-level government officials to adequately perform their jobs.[99] To Justice Kennedy, the case at hand invoked these concerns because the Ninth Circuit's opinion had relied upon dicta in a footnote from a district court opinion as "clearly established" law binding upon the acting United States Attorney General.[100]

C. Justice Ginsburg's Concurring Opinion

Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in the judgment.[101] Justice Ginsburg agreed with the majority's judgment that Ashcroft did not violate a "clearly established law" and was immune from al-Kidd's civil suit seeking damages.[102] Her concurrence, however, disagreed with the majority opinion's ruling on the merits.[103] Justice Ginsburg further disagreed with the majority's assumption that the material-witness arrest warrant was validly obtained because of misstatements in the affidavit filed with the warrant.[104] Additionally, she argued that it was unclear whether the government's use of the material-witness statute was legal or not, given al-Kidd's mistreatment while detained.[105]

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[99] *Id.* at 2086-87. Justice Kennedy explained what would happen if a government official had to abide by the strictest standard of law in any one jurisdiction. *Id.* at 2087. A lower court's opinion could then have the effect of instituting "rules with . . . national significance," thoroughly circumventing the traditional process of appellate review. *Id.*

[100] *Id.*; *see supra* notes 87-88 and accompanying text.

[101] *Al-Kidd*, 131 S. Ct. at 2087 (Ginsburg, J., concurring).

[102] *Id.*

[103] *Id.* Justice Ginsburg disagreed with the majority's ruling on the merits of the first prong of the two-prong qualified immunity test. *Id.* She argued that the *Pearson* principle applied and that the Court should not decide "novel and trying" issues "that will 'have no effect on the [case before them].'" *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 236-37 (2009)); *see supra* note 72.

[104] *Al-Kidd*, 131 S. Ct. at 2088; *see supra* note 3. Justice Ginsburg also noted that the affidavit lacked elements of particularity, did not state any knowledge that al-Kidd supposedly possessed, and did not show how that knowledge would help in the investigation of al-Hussayen. *Al-Kidd*, 131 S. Ct. at 2088.

[105] *Al-Kidd*, 131 S. Ct. at 2089. Justice Ginsburg specifically mentioned the "harsh custodial conditions to which al-Kidd was subjected." *Id.* Al-Kidd was "kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist." *Id.* (citations omitted). Justice Ginsburg suggested the possibility that even if

D. Justice Sotomayor's Concurring Opinion

Justice Sotomayor, with Justices Ginsburg and Breyer joining, concurred in the judgment.[106] Justice Sotomayor agreed with the majority's conclusion that Ashcroft did not violate a "clearly established law" and was entitled to qualified immunity.[107] Justice Sotomayor, however, like Justice Ginsburg, disagreed with the majority's undertaking of a "'difficult and novel'" constitutional interpretation that had "'no effect on the outcome of the case.'"[108] In particular, she disagreed with the majority's determination that pretextual use of a material-witness arrest warrant was not a Fourth Amendment violation.[109] Justice Sotomayor argued that none of the Court's prior decisions espousing the objective inquiry principle addressed the detention of an individual where there was no probable cause to believe he had committed a crime.[110]

Justice Sotomayor, like Justice Ginsburg, also doubted the validity of the arrest warrant affidavit.[111] She argued that the government probably could have secured al-Kidd's presence with a simple subpoena or his testimony through a deposition.[112] Justice Sotomayor concluded that one ought not to interpret the Court's majority opinion as an endorsement of the government's actions towards al-Kidd.[113]

IV. DISCUSSION

The Supreme Court's opinion in *Ashcroft v. al-Kidd* answered the important question of whether a former upper-level

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the classification of al-Kidd as a material witness had initially been proper, there might not be a basis for his subsequent, post-arrest mistreatment. *Id.*

[106] *Id.* (Sotomayor, J., concurring).

[107] *Id.*

[108] *Id.* at 2089-90 (citations omitted); *see supra* notes 72, 103 and accompanying text.

[109] *Al-Kidd*, 131 S. Ct. at 2090. Justice Sotomayor believed that this issue was one that was "closer . . . than the majority's opinion suggest[ed]." *Id.*

[110] *Id.*

[111] *Id.* For example, the Government failed to disclose that they had no intention of using al-Kidd as a witness at al-Hussayen's trial. *Id.*

[112] *Id.* (quoting 18 U.S.C. § 3144 (2006)); *see supra* notes 23-25.

[113] *Al-Kidd*, 131 S. Ct. at 2090.

government official would be held liable for an alleged violation of an individual's constitutional rights.[114] The Court applied the two-prong qualified immunity analysis to determine whether Ashcroft was entitled to the defense.[115] The Court could have examined only the second prong and found that Ashcroft's conduct did not violate a "clearly established" legal right.[116] The Court's majority, however, also addressed the constitutionality of the government's use of the federal material-witness warrant and determined that the arrest was not a violation of al-Kidd's Fourth Amendment rights.[117]

Justices Ginsburg, Breyer, and Sotomayor argued that the Court should not have determined whether the pretextual use of the material-witness warrant was constitutional. They argued that the Court was overreaching to address an unnecessary constitutional issue.[118] Al-Kidd had not specifically argued that the validly obtained material-witness warrant was unconstitutional; therefore, the majority's ruling assumed that such warrant was constitutional.[119] The concurring Justices disagreed with this assumption and the majority's analysis of the issue.[120]

Should the issue come before the Court in the future, the concurring Justices' opinions have cast doubt on the constitutionality of these warrants.[121] Justices Ginsburg and Sotomayor even specifically suggested that the manner in which the government used the warrants might be unconstitutional.[122] Although the Justices all agreed that a simple qualified immunity inquiry exonerated Ashcroft, the Court's majority assumed an answer to the important question regarding the constitutionality

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[114] *See supra* notes 68-69 and accompanying text.
[115] *See supra* notes 72-73, 84 and accompanying text.
[116] *See supra* note 89 and accompanying text.
[117] *See supra* note 69 and accompanying text.
[118] *See supra* notes 103, 109 and accompanying text.
[119] *See supra* notes 94-95 and accompanying text.
[120] *See supra* notes 94-95, 103, 109 and accompanying text.
[121] *See supra* notes 97, 103-05, 111 and accompanying text.
[122] *See supra* notes 104, 111 and accompanying text.

of the material-witness statute itself.[123] For the concurring Justices, this issue remains unresolved.[124]

CONCLUSION

In *Ashcroft v. al-Kidd*, the Supreme Court applied a two-prong analysis to determine if Ashcroft was entitled to a qualified immunity defense. Applying the first prong of the test, the Court reaffirmed its use of an objective approach when examining whether a search or seizure was reasonable under the Fourth Amendment. The Court refused to treat al-Kidd's arrest under the material-witness statute as an exception to this principle. The Court found that the judicially-issued arrest warrant was based on individualized suspicion and did not necessitate a subjective inquiry into any alleged motives of government officials. The arrest warrant was objectively reasonable; and thus, Ashcroft did not violate a constitutional right. The Court also applied the second prong of the qualified immunity test and unanimously agreed that even if Ashcroft had violated a constitutional right, that right was not clearly established.

Although the Court could have rendered a judgment based on the second prong alone, the majority nonetheless analyzed the first prong in an attempt to correct the Ninth Circuit's erroneous interpretation of two previous Supreme Court rulings. The Court held that an individual could not challenge the pretextual use of a material-witness warrant when the government validly obtained that warrant. While the Court's opinion answered a constitutional challenge to the alleged motivations behind the warrant, it assumed there was no constitutional problem with a material-witness arrest warrant itself. The concurring Justices challenged this assumption, and their opinions cast a shadow of doubt on the constitutionality of detaining individuals under this statute in the future.

Charles E. Cowan

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[123] *See supra* notes 92, 95, 103-04, 108-09 and accompanying text.

[124] *See supra* notes 97, 105, 109 and accompanying text.