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Unanimously Wrong

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At the beginning of every constitutional law class, I emphasize for my students that they should not assume that a decision is "right" just because the U.S. Supreme Court says so, and that they can conclude that even unanimous rulings are wrong. The Supreme Court's recent decision in *Ashcroft v. Al-Kidd*, 2011 DJDAR 7777

(May 31, 2011) was unanimously and tragically wrong. The Supreme Court held that there was no constitutional violation and no basis for recovery of damages when the government used the material witness statute as a pretext for detaining a person that it never sought to use as a material witness.

It is revealing and disturbing that none of the justices state the facts of this case. Abdullah al-Kidd, a U.S. citizen and a married man with two children, was arrested at a Dulles International Airport ticket counter. Over the next 16 days, he was confined in high security cells lit 24 hours a day in Virginia, Oklahoma, and then Idaho, during which he was strip searched on multiple occasions. Each time he was transferred to a different facility, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was released on "house arrest" and subjected to numerous restrictions on his freedom. By the time al-Kidd's confinement and supervision ended, 15 months after his arrest, al-Kidd had been fired from his job as an employee of a government contractor and had separated from his wife.

Al-Kidd was not arrested and detained because he had committed a crime or was suspected of committing a crime. Rather, he was held under the federal material witness statute. But the government was not holding him because they wanted to secure his testimony, as that statute requires. His detention had absolutely nothing to do with obtaining testimony from him. Rather, Al-Kidd was detained to investigate him and the material witness statute was used because the government did not have enough evidence to arrest him on suspicion of any crime.

Nonetheless, the Supreme Court held that Al-Kidd had no claim upon which he could recover. Justice Antonin Scalia wrote for the Court. First, Justice Scalia said that Al-Kidd's Fourth Amendment rights were not violated because a valid warrant had been issued by a magistrate judge and that it is inappropriate for courts to consider the subjective reasons why the attorney general chose to detain Al-Kidd. Justice Scalia wrote: "We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."

There are many flaws in Justice Scalia's reasoning. As Justice Ruth Bader Ginsburg observed, there was no valid warrant for Al-Kidd's arrest. She explained: "Is a warrant 'validly obtained' when the affidavit on which it is based fails to inform the issuing Magistrate Judge that 'the Government has no intention of using [al-Kidd as a witness] at [another's] trial,' and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him. Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge

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was not told that al-Kidd's parents, wife, and children were all citizens and residents of the United States."

Al-Kidd was arrested as a material witness, not for committing any crime, and there was no probable cause or other reason to believe that he would be a material witness. There thus was no probable cause for the arrest and the seizure violated the Fourth Amendment.

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Second, Justice Scalia said that former Attorney General John Ashcroft was protected by qualified immunity because there were no cases on point indicating that his conduct was unconstitutional. He declared: "At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."

But the Supreme Court has expressly held that there need not be a case on point to overcome qualified immunity. *Hope v. Pelzer*, 536 U.S. 730 (2002). The Court explained, "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." The Court concluded that there is not qualified immunity so long as the officer has fair notice that his or her conduct is unconstitutional.

Surely, it does not take a case on point for the U.S. attorney general to know that it is unconstitutional to detain a person as a material witness if there is no desire to use the person as a material witness. It is clearly established law that it violates the Fourth Amendment to detain a person without probable cause and this is exactly what was done to Al-Kidd.

Justice Anthony M. Kennedy, in a concurring opinion, wanted to go even further in providing immunity for national government officials who violate the Constitution. He wrote: "A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule." He said that this was particularly important in areas touching on national security.

But expanding immunity for national officials will mean that those injured by their actions will have no recourse. In other words, the government officials who have the capacity to do the greatest harm will have the most protection from being held accountable.

Al-Kidd should have been a simple case for the Supreme Court. A man was arrested to be a material witness and there was no basis whatsoever, and the government knew this. Instead, the government used the material witness statute as a pretext for preventative detention to investigate a person who committed no crime. This so clearly violates the Fourth Amendment that any government official, especially the attorney general, would know this.

Al-Kidd, of course, was not the only person held on the pretext of being a material witness. But the government never has revealed how many it has held or is holding on this basis. It should do so and acknowledge that they were held illegally and deserve a remedy.

Although several of the justices said that it is an open question whether the material witness statute can be used in this way, the Court's decision means that until it says otherwise the government may arrest any of us on the pretext of being a material witness even if it never intends to use us as a witness at all. This is just wrong even if the result in *Al-Kidd* was unanimous.