AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Infamous Crimes and Criminals/The War on Terror

**Ashcroft v. al-Kidd, 563 U.S. \_\_\_** (2011)

*Abdullah al-Kidd was arrested in March 2003 and detained as a material witness for the prosecution of Sami Omar al-Hussayen, a suspected terrorist. Although al-Kidd was detained for two weeks and held on supervised release for more than a year, he was never asked to testify. In March 2005, al-Kidd sued John Ashcroft, the attorney general of the United States. Al-Kidd claimed that Ashcroft never had any intention of calling him as a witness, that the true reason he was arrested and detained was that Ashcroft suspected al-Kidd of being a terrorist but lacked the evidence necessary for an arrest, and that his pretextual arrest violated the Fourth Amendment. A federal district court denied Ashcroft’s motion to dismiss the case and that denial was affirmed by the Court of Appeals for the Ninth Circuit. Ashcroft appealed to the Supreme Court of the United States.*

*Prominent legal scholars and liberal organizations filed amicus briefs asking the Supreme Court to rule that al-Kidd could sue Attorney General Ashcroft. The brief for Human Rights Watch stated,*

*Petitioner John Ashcroft (“Ashcroft”) implemented an investigative use of the statute to detain persons against whom evidence was insufficient to meet constitutional requirements for criminal charges or arrest. . . . [T]hese “witnesses” were regarded and treated as criminal suspects and that the statute was systematically abused to detain such individuals without attempting to meet constitutional requirements for bringing criminal charges or arrest. The extreme conditions of these detentions, the frequency with which they occurred, and public statements made by Petitioner and other government sources strongly suggest that these detentions were made pursuant to Petitioner’s policy of using the statute to detain and investigate suspects without probable cause, rather than to secure testimony.*

*Prosecutors and former attorneys general from both Republican and Democratic administrations filed an amicus brief urging the justices to dismiss the lawsuit. The brief from the attorneys general pointed out*

*it is largely uncontested that: (1) Al-Kidd had numerous ties to Omar Al-Hussayen, a citizen of Saudi Arabia who, at the time of Al-Kidd’s arrest, was under indictment for multiple false statements and visa-fraud offenses; and (2) Al-Kidd was arrested at Dulles International Airport as he was preparing to fly to Saudi Arabia for an extended period of study, and thus federal prosecutors might have had difficulty procuring his presence at Al-Hussayen’s trial through use of a subpoena.*

*The Supreme Court unanimously declared that Ashcroft enjoyed qualified immunity from the lawsuit because his actions did not violate a clearly established constitutional right.[[1]](#footnote-1) The justices divided on whether the government violated al-Kidd’s rights. Justice Scalia and the three other more conservative justices insisted that, as long as reasonable suspicion existed that al-Kidd was a material witness, Ashcroft’s subjective motives were irrelevant to the constitutional issue. The four more liberal justices on the Supreme Court (Justice Kagan did not vote) claimed the court should not discuss the issue, but all expressed significant concerns with government behavior. What were those concerns? Why did Justice Scalia believe that these concerns were not germane to the constitutional questions in the case? Suppose Justice Kagan had participated. Do you believe she would have voted to support the attorney general (Kagan formerly served in the Obama Justice Department) or voted consistently with her general liberal convictions?*

JUSTICE [SCALIA](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0254763301&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) delivered the opinion of the Court.

. . .

The federal material-witness statute authorizes judges to “order the arrest of [a] person” whose testimony “is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena.” Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires release if their testimony “can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.”

. . .

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct. . . .

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” An arrest, of course, qualifies as a “seizure” of a “person” under this provision, and so must be reasonable under the circumstances. Al–Kidd does not assert that Government officials would have acted unreasonably if they had used a material-witness warrant to arrest him for the purpose of securing his testimony for trial. He contests, however (and the Court of Appeals here rejected), the reasonableness of using the warrant to detain him as a suspected criminal.

Fourth Amendment reasonableness “is predominantly an objective inquiry.” We ask whether “the circumstances, viewed objectively, justify [the challenged] action.” If so, that action was reasonable “whatever the subjective intent” motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, and it promotes evenhanded, uniform enforcement of the law.

. . .

A warrant issued by a neutral Magistrate Judge authorized al-Kidd’s arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear.

. . .

Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.[[2]](#footnote-2)

JUSTICE KAGAN took no part in the consideration or decision of this case.

JUSTICE [KENNEDY](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0243105201&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455), with whom JUSTICE [GINSBURG](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0224420501&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455), JUSTICE [BREYER](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0254766801&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455), and JUSTICE [SOTOMAYOR](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0145172701&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) join in part, concurring.

. . .

The Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful. . . . Under the statute, a Magistrate Judge may issue a warrant to arrest someone as a material witness upon a showing by affidavit that “the testimony of a person is material in a criminal proceeding” and “that it may become impracticable to secure the presence of the person by subpoena.” The scope of the statute’s lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it “may become impracticable” to secure the person’s presence by subpoena. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case.

In considering these issues, it is important to bear in mind that the Material Witness Statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment’s Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the Material Witness Statute. If material witness warrants do not qualify as “Warrants” under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment’s separate reasonableness requirement for seizures of the person. Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.

JUSTICE [GINSBURG](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0224420501&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455), with whom JUSTICE [BREYER](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0254766801&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) and JUSTICE [SOTOMAYOR](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0145172701&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) join, concurring in the judgment.

. . . I agree with the Court that no “clearly established law” renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. But I join Justice SOTOMAYOR in objecting to the Court’s disposition of al-Kidd’s Fourth Amendment claim on the merits. . . .

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

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

. . .

This Court’s decisions, until today, have uniformly used the term “individualized suspicion” to mean “individualized suspicion of wrongdoing.” The Court’s suggestion that the term “individualized suspicion” is more commonly associated with “know[ing] something about [a] crime” or “throwing . . . a surprise birthday party” than with criminal suspects is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder “suspect” is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. . . .

I also agree with Justice KENNEDY that al-Kidd’s treatment presents serious questions, unaddressed by the Court, concerning “the [legality of] the Government’s use of the Material Witness Statute in this case.” In addition to the questions Justice KENNEDY poses, and even if the initial material witness classification had been proper, what even arguably legitimate basis could there be for the harsh custodial conditions to which al-Kidd was subjected: Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days’ incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist.

However circumscribed al-Kidd’s [*Bivens*](http://web2.westlaw.com/find/default.wl?serialnum=1971127105&tc=-1&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&tf=-1&findtype=Y&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) *v. Six Unknown Named Agents* (1971)[[3]](#footnote-3) claim against Ashcroft may have been, his remaining claims against the FBI agents who apprehended him invite consideration of the issues Justice KENNEDY identified. His challenges to the brutal conditions of his confinement have been settled. But his ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times.

JUSTICE [SOTOMAYOR](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0145172701&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455), with whom JUSTICE [GINSBURG](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0224420501&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) and JUSTICE [BREYER](http://web2.westlaw.com/find/default.wl?tc=-1&docname=0254766801&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.07&db=PROFILER-WLD&tf=-1&findtype=h&fn=_top&mt=Westlaw&vr=2.0&pbc=BD0B6D14&ordoc=2025376455) join, concurring in the judgment.

I concur in the Court’s judgment reversing the Court of Appeals because I agree with the majority’s conclusion that Ashcroft did not violate clearly established law. . . .

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

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

. . .

1. The excerpts below omit the discussion of this issue. [↑](#footnote-ref-1)
2. Justice GINSBURG suggests that our use of the word “suspicion” is peculiar because that word “ordinarily” means “that the person suspected has engaged in wrongdoing.” We disagree. No usage of the word is more common and idiomatic than a statement such as “I have a suspicion he knows something about the crime,” or even “I have a suspicion she is throwing me a surprise birthday party.” (footnote by Justice Scalia) [↑](#footnote-ref-2)
3. *Bivens* authorizes suits against federal agents who violate constitutional rights. [↑](#footnote-ref-3)