Al-Kidd v. Ashcroft

United States Court of Appeals, 9th Circuit, 2009
580 F.3d 949

MILAN D. SMITH, JR., Circuit Judge: . . .

FACTS AND PROCEDURAL BACKGROUND

A. al-Kidd

Plaintiff-Appellee al-Kidd was born Lavoni T. Kidd in Wichita, Kansas. While attending college at the University of Idaho, where he was a highly regarded running back on the University's football team, he converted to Islam and changed his name. In the spring and summer of 2002, he and his then-wife were the target of a Federal Bureau of Investigation (FBI) surveillance as part of a broad anti-terrorism investigation allegedly aimed at Arab and Muslim men.[2] No evidence of criminal activity by al-Kidd was ever discovered. Al-Kidd planned to fly to Saudi Arabia in the spring of 2003 to study Arabic and Islamic law on a scholarship at a Saudi university.

On February 13, 2003, a federal grand jury in Idaho indicted Sami Omar Al-Hussayen for visa fraud and making false statements to U.S. officials. On March 14, the Idaho U.S. Attorney's Office submitted an application to a magistrate judge of the District of Idaho, seeking al-Kidd's arrest as a material witness in the Al-Hussayen trial. Appended to the application was an affidavit by Scott Mace, a Special Agent of the FBI in Boise (the Mace Affidavit). The Mace Affidavit described two contacts al-Kidd had with Al-Hussayen: al-Kidd had received "in excess of $20,000" from Al-Hussayen (though the Mace Affidavit does not indicate what this payment was for), and al-Kidd had "met with Al-Hussayen's associates" after returning from a trip to Yemen. It also contained evidence of al-Kidd's contacts with officials of the Islamic Assembly of North America (IANA, an organization with which Al-Hussayen was affiliated), including one official "who was recently arrested in New York." It ended with the statement, "[d]ue to Al-Kidd's demonstrated involvement with the defendant . . . he is believed to be in possession of information germane to this matter which will be crucial to the prosecution." The Mace Affidavit did not elaborate on what "information" al-Kidd might have had, nor how his testimony might be "germane"– let alone "crucial"– to the prosecution of Al-Hussayen.

The affidavit further stated:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia. . . . It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

In fact, al-Kidd had a round-trip, coach class ticket, costing approximately $1,700. The Mace Affidavit omitted the facts that al-Kidd was a U.S. resident and citizen; that his parents, wife, and two children were likewise U.S. residents and citizens; and that he had previously cooperated with the FBI on several occasions when FBI agents asked to interview him. The magistrate judge issued the warrant the same day.

Pursuant to the material witness warrant, al-Kidd was arrested two days later at the ticket counter at Dulles International Airport. He was handcuffed and taken to the airport's police substation, where he was

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2. Al-Kidd is Muslim, but is African-American and not of Arab descent.

interrogated. Thereafter, he was detained for an aggregate of sixteen days at the Alexandria Detention Center in Virginia, the Oklahoma Federal Transfer Center, and the Ada County, Idaho, Jail. He was strip searched on multiple occasions and confined in the high-security unit of each facility. During transfer between facilities, al-Kidd was handcuffed and shackled about his wrists, legs, and waist. He was allowed out of his cell only one to two hours each day, and his cell was kept lit twenty-four hours a day, unlike other cells in the high-security wing.

On March 31, after petitioning the court, al-Kidd was ordered released, on the conditions that he live with his wife at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to a probation officer and consent to home visits throughout the period of supervision, and surrender his passport. After almost a year under these conditions, the court permitted al-Kidd to secure his own residence in Las Vegas, Nevada, as al-Kidd and his wife were separating. He lived under these conditions for three more months before being released at the end of Al-Hussayen's trial, more than fifteen months after being arrested.[4] In July 2004, al-Kidd was fired from his job. He alleges he was terminated when he was denied a security clearance because of his arrest. He is now separated from his wife, and has been unable to find steady employment. He was also deprived of his chance to study in Saudi Arabia on scholarship.

Al-Kidd was never called as a witness in the Al-Hussayen trial or in any other criminal proceeding.

B. Ashcroft

Defendant-Appellant Ashcroft was Attorney General of the United States during the relevant time period. According to al-Kidd's complaint, following the September 11, 2001 terrorist attacks, Ashcroft developed and promulgated a policy by which the FBI and DOJ would use the federal material witness statute as a pretext "to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further." (Cited in, and emphasis added to, al-Kidd's complaint.)

To support this allegation, the complaint first quotes Ashcroft's own statement at a press briefing:

> Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . . Aggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks.

John Ashcroft, Attorney General, *Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force* (Oct. 31, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm (emphasis added in complaint). . . .

[The complaint contained other allegations in support of its claim that Attorney General developed and promulgated the policy of using the material witness statute pretextually for preventive detention. The complaint also alleged that material witnesses were routinely held in high security detention facilities and subjected to unreasonable conditions of confinement.]

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4. Al-Hussayen was not convicted of any of the charges brought against him. His trial ended in acquittal on the most serious charges, including conspiracy to provide material support to terrorists, 18 U.S.C. §§2339A, 2339B. After the jury failed to reach a verdict on the remaining lesser charges, the district court declared a mistrial. The government agreed not to retry Al-Hussayen and deported him to Saudi Arabia for visa violations.

DISCUSSION

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

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

A. Absolute Immunity . . .

We hold . . . that when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute, immunity. We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive, as the dissent seems to imply. Even before the Supreme Court's decision in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal,* it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to dismiss. *Twombly's* general requirement that" [f]actual allegations must be enough to raise a right to relief above the speculative level," 550 U.S. 555, applies with equal force to allegations that a prosecutor's actions served an investigatory function. In this case, however, al-Kidd has averred ample facts to render plausible the allegation of an investigatory function:

> • Al-Kidd's arrest was sought a month *after* Al-Hussayen was indicted, and more than a year *before* trial began, temporally distant from the time any testimony would have been needed.
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> • The FBI had previously investigated and interviewed al-Kidd, but had never suggested, let alone demanded, that he appear as a witness.
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> • The FBI conducted lengthy interrogations with al-Kidd while in custody, including about matters apparently unrelated to Al-Hussayen's alleged visa violations.
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> • Al-Kidd *never actually testified* for the prosecution in Al-Hussayen's or any other case, despite his assurances that he would be willing to do so.

All of these are objective indicia . . . that al-Kidd's arrest functioned as an investigatory arrest or national security-related preemptive detention, rather than as one to secure a witness's testimony for trial. Finally:

• Ashcroft's immediate subordinate, FBI Director Mueller, testified before Congress that al-Kidd's *arrest* (rather than, say, the obtaining of the evidence he was supposedly going to provide against Al-Hussayen) constituted a "major success[ ]" in "identifying and dismantling terrorist networks."

We conclude that the practice of detaining a material witness in order to investigate him, on the facts alleged by al-Kidd, fulfills an investigative function.

B. Qualified Immunity

The Attorney General may still be entitled to qualified immunity for acts taken in furtherance of an investigatory or national security function. . . .

3. The Fourth Amendment Claim

Al-Kidd's complaint principally alleges that Ashcroft "developed, implemented and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further." Al-Kidd argues that using §3144 to detain suspects to investigate them violates the Fourth Amendment's guarantee against unreasonable seizure.

a. Al-Kidd's Fourth Amendment Rights Were Violated

. . . We have previously held that material witness arrests are "seizures" within the meaning of the Fourth Amendment and are therefore subject to its reasonableness requirement. *Bacon v. United States,* 449 F.2d 933, 942 (9th Cir. 1971).

The Supreme Court has never held that detention of innocent persons as material witnesses is permissible under the Fourth Amendment, and this circuit, in one of the few circuit-level cases to examine the validity of material witness detentions under the Fourth Amendment, declined to reach the facial constitutionality of the predecessor of §3144. *Id.* at 941. Al-Kidd does not contend that §3144 is facially unconstitutional. Rather, he contends that it is intended to be a "limited exception" to the ordinary rule that arrests may only be made upon probable cause of criminal wrongdoing. He further claims that its use for any purpose other than obtaining testimony, and specifically to investigate or preemptively detain terrorism suspects, without probable cause, is unconstitutional. Ashcroft contends that this position is inconsistent with *Whren v. United States's* rule that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." 517 U.S. 806, 813 (1996). But arrests of material witnesses are neither "ordinary,"[16] nor involve "probable cause" as that term has historically been understood.

Whren rejected only the proposition that "ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause *to believe that a violation of law has occurred.*" *Id.* at 811

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16. In 2003, the year of al-Kidd's arrest, material witness arrests made up only 3.6% of all arrests by federal law enforcement agents. Of those, 92.3% were made by the former Immigration and Naturalization Service, typically to detain illegally smuggled aliens for testimony against their smugglers before removal. *See, e.g., Aguilar-Ayala v. Ruiz*, 973 F.2d 411 (5th Cir. 1992). Less than 0.3% of arrests by non-immigration federal law enforcement agents were material witness arrests. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2003*, NCJ No. 210299 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0301.pdf, at 18.

(emphasis added). Indeed, *probable cause,* since before the founding, has always been a term of art of criminal procedure. . . .

> This Court repeatedly has explained that "probable cause" to justify an arrest means 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). . . .

Because material witness arrests are seizures without suspicion of wrongdoing, the *Whren* rule, that subjective motivation is irrelevant in the presence of probable cause, does not apply to our Fourth Amendment analysis in this case. In *City of Indianapolis v. Edmond,* the Supreme Court struck down motor vehicle checkpoints set up "to interdict unlawful drugs" carried by those stopped. 531 U.S. 32, 35 (2000). The Court explained that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, *Whren* does not preclude an inquiry into programmatic purpose in such contexts." *Id.* at 45-46. The Court went on to clarify:

> our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level.
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> . . . [W]e examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.

Id. at 46-47 (citation omitted).

Edmond, therefore, establishes that "programmatic purpose" is relevant to Fourth Amendment analysis of programs of seizures without probable cause. It further establishes that if that programmatic purpose is criminal investigation, it is fatal to the program's constitutionality: "the constitutional defect of the program is that its primary purpose is to advance the general interest in crime control." *Id.* at 44. The following year's *Ferguson v. City of Charleston* held unconstitutional a program of mandatory drug testing of maternity patients because "the immediate objective of the searches was to generate evidence *for law enforcement purposes* " against the women tested. 532 U.S. 67, 83 (2001). By contrast, in *Illinois v. Lidster,* the Court *upheld* seizures at a motor vehicle checkpoint set up by the police a week after a hit-and-run accident, "at about the same time of night and at about the same place" as the accident, where the checkpoint was "designed to obtain more information about the accident from the motoring public." 540 U.S. 419, 422 (2004). The Court in *Lidster* distinguished the seizure in *Edmond* on the basis that, in *Lidster:*

> the stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Id. at 423. As Justice Stevens wrote in concurrence, "[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier." *Id.* at 428 (Stevens, J., concurring in part, dissenting in part).[19] That is precisely the distinction at work here, and the reason we hold that Ashcroft's policy as alleged was unconstitutional.

Al-Kidd alleges that he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained. Assuming that allegation to be true, he has alleged a constitutional violation. Contrary to the dissent's alarmist claims, we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy as contemplated by *Edmond,* 531 U.S. at 457, and finding that the purpose of the policy alleged in al-Kidd's first amended complaint impermissible under the Fourth Amendment.

Further, the dissent's assertion that we are suggesting "the only governmental interest of sufficient weight to justify an arrest is a reasonable belief that the arrestee has committed a crime" grossly mischaracterizes our holding. Dissent at 12336. To the contrary, we recognize that when the material witness statute is genuinely used to secure "testimony of a person . . . material in a criminal proceeding" because "it is shown that it may become impracticable to secure the presence of the person by subpoena," 18 U.S.C. §3144, a showing of probable cause is not required. Our holding does nothing to curb the use of the material witness statute for its stated purpose. *What we do hold is that probable cause – including individualized suspicion of criminal wrongdoing – is required when 18 U.S.C. §3144 is not being used for its stated purpose, but instead for the purpose of criminal investigation.* We thus do not render the material witness statute "entirely superfluous," dissent at 12339; it is only the *misuse* of the statute, resulting in the detention of a person without probable cause for purposes of criminal investigation, that is repugnant to the Fourth Amendment.

All seizures of criminal suspects require probable cause of criminal activity. To use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment. *Accord Awadallah II,* 349 F.3d at 59 ("[I]t would be improper for the government to use §3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established.").

b. Al-Kidd's Right Was "Clearly Established"

Ashcroft alternatively contends that if we conclude that the use of material witness orders for investigatory purposes violates the Constitution, we should still grant him qualified immunity because that constitutional right was not "clearly established" in March 2003, when al-Kidd was arrested. We disagree.

. . . [T]he Supreme Court has stated:

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19. We are mindful of the difference between a traffic stop and a material witness arrest. The material witness is subject to a seizure an order of magnitude greater than that at issue in *Lidster*, where the stops were "brief," and were of drivers in their cars. (As the Court noted, the "Fourth Amendment does not treat a motorist's car as his castle." 540 U.S. at 424.) An individual seized as a material witness is taken from her home and daily affairs and confined to a small space for a period of time measured not in minutes or even hours, but ranging from days to months. Al-Kidd disclaims any attack on material witness detention generally, and we are in any event bound by *Bacon*'s determination that the material witness statute, backed by a "probable cause" requirement to guarantee particularity, has struck a "reasonable" balance between the witness's interest in liberty and the government's need for testimony. But the severity of the deprivation of liberty in material witness arrests only militates for correspondingly more severe judicial scrutiny of its application.

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent."

[*Hope v. Pelzer*, 536 U.S. 730 (2002)] at 739 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)) (internal citations omitted)." [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.

What *was* clearly established in March 2003? No federal appellate court had yet squarely held that the federal material witness statute satisfied the requirements of the Fourth Amendment. Even our decision in *Bacon* held only that it was unconstitutional as applied to the petitioner. 449 F.2d at 943. What *obiter dicta* existed on material witness detention, however, clearly linked its justification only to the state's overriding need to compel testimony in criminal cases. Even dicta, if sufficiently clear, can suffice to "clearly establish" a constitutional right. *See Hope,* 536 U.S. at 740-41. But there is more.

The definition of probable cause, as set forth in *Beck v. Ohio,* was certainly clearly established. While the Supreme Court's decision *permitting* suspicionless seizures in some circumstances in *Lidster* had not yet been decided, its decision in *Edmond,* stating that an investigatory programmatic purpose renders a program of seizures without probable cause unconstitutional, had been decided two and a half years earlier. 531 U.S. at 47. That holding was reaffirmed the following year in *Ferguson,* 532 U.S. at 81-83, which highlighted the close connection between the investigative "programmatic purpose" and the search scheme that was ruled unconstitutional. Those decisions, which emphasized that an investigatory programmatic purpose would invalidate a scheme of searches and seizures without probable cause, should have been sufficient to put Ashcroft on notice that the material witness detentions – involving a far more severe seizure than a mere traffic stop – would be similarly subject to an inquiry into programmatic purpose.

Moreover, the history and purposes of the Fourth Amendment were known well before 2003:

> The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Dunaway v. New York, 442 U.S. 200, 213 (1979) (quoting *Henry v. United States,* 361 U.S. 98, 100-01 (1959)) (internal citation omitted). The Fourth Amendment "reflect[s] the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford v. Texas,* 379 U.S. 476, 481 (1965).

The facts alleged of al-Kidd's arrest, that he was arrested because he was associated with the webmaster of an allegedly jihadist website, demonstrate the continued relevance of the Founders' concerns. The Fourth Amendment was, in large measure, a direct response to the so-called "Wilkes cases." As summarized by the Supreme Court:

> The *Wilkes* case arose out of the Crown's attempt to stifle a publication called The North Briton, anonymously published by John Wilkes, then a member of Parliament-particularly issue No. 45 of that journal. Lord Halifax, as Secretary of State, issued a warrant ordering four of the King's messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, * * * and them, or any of them, having found, to apprehend and seize, together with

> their papers." "Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect." Holding that this was "a ridiculous warrant against the whole English nation," the Court of Common Pleas awarded Wilkes damages against the Secretary of State.

Id. at 483 (alteration in original) (footnotes omitted). Within three days of the issuance of Halifax's general warrants, forty-nine people had been arrested, none of whom was named in the warrant, but all of whom were alleged associates of the allegedly seditious pamphleteer. Nelson B. Lasson, *The Fourth Amendment to the Constitution* 43-44 (1937). The warrant authorizing al-Kidd named him in particular, and so was not a general warrant in that sense. But the result was the same: gutting the substantive protections of the Fourth Amendment's "probable cause" requirement and giving the state the power to arrest upon the executive's mere suspicion.

Finally, months before al-Kidd's arrest, one district court in a high-profile case had already indicated, in the spring of 2002, that *§3144 itself* should not be abused as an investigatory anti-terrorism tool, calling out Ashcroft by name:

> Other reasons may motivate prosecutors and law enforcement officers to rely upon the material witness statute. Attorney General John Ashcroft has been reported as saying: "Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." *Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute.* If there is probable cause to believe an individual has committed a crime or is conspiring to commit a crime, then the government may lawfully arrest that person, but only upon *such* a showing.

Awadallah I, 202 F. Supp. 2d at 77 n.28 (citation omitted, first emphasis added). The statement was dicta in a footnote of a district court opinion. But it was categorical, and it addressed *exactly* what al-Kidd alleges happened ten months after the opinion was first issued. It is difficult to imagine what, in early 2003, might have given John Ashcroft "fair[er] warning" that he could be haled into court for his alleged material witness policies. *Hope,* 536 U.S. at 741.

We therefore hold that al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003. Although Ashcroft has raised in this appeal neither a national security nor an exigency defense to al-Kidd's action, we note that we are mindful of the pressures under which the Attorney General must operate. We do not intend to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949). But, as the Supreme Court has aptly noted, qualified immunity must

> not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . . ." This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

[*Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985)] at 524 (quoting [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)] at 819) (internal citations omitted).

4. The §3144 Claim

[The Court holds that the complaint plausibly pled facts sufficient to state a claim for supervisory liability for the §3314 claim that the Mace Affidavit failed to demonstrate probable cause for either the materiality of al-Kidd's testimony or the reasons it would be impracticable to secure that testimony by subpoena.] . . .

CONCLUSION

Almost two and a half centuries ago, William Blackstone, considered by many to be the preeminent pre-Revolutionary War authority on the common law, wrote:

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131-32 (1765). The Fourth Amendment was written and ratified, in part, to deny the government of our then-new nation such an engine of potential tyranny. And yet, if the facts alleged in al-Kidd's complaint are actually true, the government has recently exercised such a "dangerous engine of arbitrary government" against a significant number of its citizens, and given good reason for disfavored minorities (whoever they may be from time to time) to fear the application of such arbitrary power to them.

We are confident that, in light of the experience of the American colonists with the abuses of the British Crown, the Framers of our Constitution would have disapproved of the arrest, detention, and harsh confinement of a United States citizen as a "material witness" under the circumstances, and for the immediate purpose alleged, in al-Kidd's complaint. Sadly, however, even now, more than 217 years after the ratification of the Fourth Amendment to the Constitution, some confidently assert that the government has the power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely because the government wishes to investigate them for possible wrongdoing, or to prevent them from having contact with others in the outside world. We find this to be repugnant to the Constitution, and a painful reminder of some of the most ignominious chapters of our national history.

For the reasons indicated in this opinion, we AFFIRM in part and REVERSE in part the decision of the district court. Each party shall bear its own costs on appeal.

BEA, Circuit Judge, concurring in part and dissenting in part: This case raises the question whether a person whom a prosecutor can *rightly* arrest under a statute becomes *wrongly* arrested if the prosecutor's purpose in arresting him had nothing to do with the statute. . . .

II. Qualified Immunity . . .

Al-Kidd bases his claims of liberty from arrest on the Fourth Amendment. The Supreme Court has repeatedly stated that under the Fourth Amendment, an officer's subjective intentions are irrelevant so long as the officer's conduct is objectively justified.

Whren v. United States, 517 U.S. 806 (1996), cited by the majority, is but one example of the general rule that pretextual searches and seizures do not violate the Fourth Amendment. In *Whren,* the Supreme

Court held the stop of a vehicle for a minor traffic violation did not violate the Fourth Amendment even though the officer was using the stop "as pretext[ ] for pursuing other investigatory agendas." *Id.* at 811. The Court stated:

> We [have] flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. . . . [S]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional. We described [*United States v. Robinson*, 414 U.S. 218 (1973), at 236] as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

Id. at 812-13 (internal citations omitted). It is really quite simple. If you are engaged in conduct that justifies your detention, you must put up with that detention, even if the officer who detained you did so out of some secret-and constitutionally insufficient-motive.

There is good reason to eschew inquiry into the subjective motivations of individual officers. First, such an approach provides "arbitrarily variable" protection to individual rights. *Devenpeck v. Alford,* 543 U.S. 146, 154 (2004). If the subjective intentions of the arresting officers are the touchstone of constitutional analysis, courts may reach divergent results about searches and seizures that are utterly indistinguishable in the eyes of the person whose rights are at stake. *See id.* at 154. Second, the inquiry into subjective intentions is impossibly difficult, expensive, and prone to error. As the Supreme Court explained in *Harlow v. Fitzgerald,*

> [t]here are special costs to subjective inquiries of this kind. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. 800, 816-817 (1982) (footnotes and internal quotation marks omitted). *Whren,* along with *Harlow, Robinson,* [*Scott v. United States*, 436 U.S. 128 (1978)], and [*Maryland v. Macon*, 472 U.S. 463 (1985)], makes clear that al-Kidd's arrest on an objectively valid warrant supported by probable cause violated none of al-Kidd's constitutional rights. At a minimum, these cases would have given a reasonable officer good reason to believe that al-Kidd's arrest was constitutionally permissible.

The majority's efforts to distinguish *Whren* are unpersuasive. The majority contends that *Whren* and like cases are inapplicable whenever the government acts without probable cause to believe that the *subject* of the arrest is guilty of some criminal wrongdoing. Maj. Op. at 12296-97. To reach this result, the majority imports the "programmatic purpose" test ordinarily reserved for administrative or "special needs" search cases. The programmatic purpose test, of course, tests the constitutional validity of *warrantless* searches and seizures, such as drunk driving roadblocks, by requiring the government to prove its program serves governmental interests other than the routine collection of evidence for criminal prosecution. *See, e.g., Ferguson v. City of Charleston,* 532 U.S. 67, 78 (2001); *City of Indianapolis v. Edmond,* 531 U.S. 32, 45 (2000). The special needs cases are the sole exception to the general principle that, in testing compliance with the Fourth Amendment, courts are limited to an examination of the objective circumstances which justify the search or seizure, and may not inquire into official purpose. *Whren,* 517 U.S. at 812 ("Not only have we *never* held, outside the context of inventory search or administrative inspection[,] . . . that an officer's motive invalidates objectively justifiable behavior[,] . . . we have repeatedly held and asserted the contrary."). The programmatic purpose test applies here, the majority says, because in *Edmonds,* the Supreme Court said that *Whren* did not apply whenever the government conducted a search or seizure without "probable cause," and because "probable cause" means only probable cause to believe the subject of the arrest committed some wrongdoing. The cases the majority

cites offer no support whatsoever for the majority's approach.

First, the special needs cases have no bearing on the inquiry into al-Kidd's arrest for the simple reason that al-Kidd was arrested pursuant to a warrant issued by a neutral magistrate. The "programmatic purpose" inquiry is necessary to test the validity of a special needs search precisely because such searches occur without the procedural protections of the warrant requirement and the magisterial supervision it entails. As the Supreme Court explained in *New York v. Burger,* a statute authorizing a warrantless administrative or special needs search must provide

> a constitutionally adequate *substitute for a warrant.* In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

482 U.S. 691, 710-11 (1987) (emphasis added) (quotations omitted). Material witness warrants, though not based on individualized suspicion of wrongdoing are, of course, warrants: they are based on an individualized determination that the subject of the warrant is in possession of information material in a criminal proceeding and is likely to flee; they are approved by a neutral magistrate; they are subject to continuing oversight; and they issue only upon a showing of probable cause. *Bacon v. United States,* 449 F.2d 933, 942 (9th Cir. 1971); 18 U.S.C. §§3144; Fed. R. Civ. P. 46. The "special needs" cases bear little resemblance to the highly supervised process of obtaining a material witness warrant. Given the protections in §3144, there is simply no need to inquire into the government's "programmatic purpose," and no case has ever so required.

Second, the majority's "traditional" definition of "probable cause," which limits probable cause to mean only probable cause to believe that the arrestee is guilty of wrongdoing, Maj. Op. at 12297-98, reflects a fundamental misunderstanding of the Fourth Amendment. The validity of a police action under the Fourth Amendment turns not on the guilt or innocence of the arrestee, but on whether the government's reasons for arresting the individual are weighty enough, and probably factually likely enough, to justify the intrusion into some individual's rights. *See United States v. Knights,* 534 U.S. 112, 118-19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotation marks omitted). The "probable cause" requirement assures that there is sufficient evidence to believe that the facts that justify the issuance of the warrant exist – that there is a sufficient "probability" the government will find what it is looking for when it intrudes. *Id.* at 121.

Until today, no case has suggested that the only governmental interest of sufficient weight to justify an arrest is a reasonable belief that the arrestee has committed a crime. Most importantly, the Supreme Court has stated that the government's interest in the integrity of the justice system is important enough to justify the arrest of a wholly innocent person to secure that witness's appearance at trial. *See Stein v. New York,* 346 U.S. 156, 184 (1953) ("The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."), *rev'd on other grounds by Jackson v. Denno,* 378 U.S. 368 (1964); *Barry v. United States ex rel. Cunningham,* 279 U.S. 597, 616-17 (1929) ("The constitutionality of [the material witness statute] apparently has never been doubted."). Our own jurisprudence, too, has recognized that "probable cause" for an arrest may exist even in the absence of a reasonable belief that the arrestee has committed wrongdoing. For example, police officers may arrest individuals innocent of any crime if the officer has reason to believe that the individual is a danger to himself. *Maag v. Wessler,* 960 F.2d 773, 776 (9th Cir. 1992). To be sure, in the great run of arrest cases, the relevant inquiry will be whether officers had probable cause to believe the subject

committed wrongdoing. But none of the cases the majority claims defines probable cause had occasion to consider whether such belief was the *only* belief that could justify an arrest. . . .

In short, our cases, and those of the Supreme Court, have routinely recognized that "probable cause," within the meaning of the Fourth Amendment, may be satisfied by proof of something other than wrongdoing by the subject of the search or seizure.

Of course, taken to its logical conclusion, the majority opinion renders the material witness statute entirely superfluous. To arrest and confine an individual pursuant to the material witness statute, the government must establish "probable cause." *Bacon,* 449 F.2d at 941-43. If "probable cause" exists only when the *subject* of an arrest is suspected of a crime, then a material witness can be arrested as a suspect, and the material witness statute adds nothing. This result is risible.

Once the government demonstrated to a neutral magistrate that it had probable cause to believe al-Kidd had information material to a criminal proceeding and was likely to run off to Saudi Arabia, the *Whren* rule applied with full force, and nothing in *Edmond* or any case the majority cites suggests otherwise. . . .

Finally, [*United States v. Villamonte-Marquez*, 462 U.S. 579 (1983)] also underlines the point that, even assuming we must consider the "programmatic purpose" behind al-Kidd's detention, the relevant inquiry is not into the motivations of individual officers who obtained and executed the particular warrant on which al-Kidd was detained, but into the "programmatic purpose" that provides the constitutional justification for the material witness statute. *See Edmond,* 531 U.S. at 457 ("[W]e caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."). The justification for the use of material witness warrants is the need to assure the proper functioning of the judicial system; this interest is divorced from the government's general interest in crime control and is sufficient, al-Kidd concedes, to justify an arrest. Because this governmental interest justifies this intrusion into al-Kidd's liberty, and because the intrusion is subject to a warrant requirement, inquiry into the minds of individual officers is neither necessary nor desirable. *See Villamonte-Marquez,* 462 U.S. at 584 n.3.

But even if al-Kidd's arrest on a pretextual material witness warrant violated his Fourth Amendment constitutional right not to be subjected to an unreasonable seizure, any such right was certainly not "clearly established" in March 2003. As the majority notes, for a right to be clearly established there need not be a case on point, but the violation must be "apparent" to a reasonable official. *Hope v. Pelzer,* 536 U.S. 730, 739 (2002). In March 2003, when al-Kidd was arrested on a material witness warrant, it would hardly have been "apparent" to a reasonable official that using a valid material witness warrant as a pretext to accomplish other law-enforcement objectives was constitutionally impermissible, especially if the official had read *Whren, Robinson, Scott,* or *Macon.*

No court had ever questioned the constitutional validity of the material witness statute. No court had ever held that the "programmatic purpose" test applied to searches or seizures conducted pursuant to a warrant. No court had held that "probable cause" in the Fourth Amendment meant *only* probable cause to believe the subject of the search or seizure had committed criminal wrongdoing. Every pronouncement by the Supreme Court would have suggested that the pretextual use of a valid warrant was perfectly legal. . . .

V. Conclusion

The majority opinion closes with a quote from Blackstone. What Blackstone describes and condemns therein-the indefinite and secret detention of individuals accused of no crime in harsh conditions-is simply not a description of this case. Even the majority agrees that the harsh conditions of al-Kidd's confinement are not before us because al-Kidd has not adequately pleaded John Ashcroft's personal responsibility for such conditions. Al-Kidd's confinement was neither indefinite nor in secret. He was detained on a warrant issued by a neutral magistrate. The duration of that confinement was subject to continuing judicial

supervision. There is no allegation that al-Kidd was held incommunicado. Nor is there any allegation al-Kidd was somehow denied the right to petition for a writ of habeas corpus, a right that has long secured individuals' freedom from the horrors Blackstone envisioned. We are not called upon to judge the constitutionality of the material witness statute. And we are not called upon to judge whether al-Kidd should be released, only whether he is entitled to proceed in his suit to recover money damages from the pocket of a cabinet-level official. Were we presented with the Blackstonian case the majority envisions, I would surely agree.[21] But we are not, and for the reasons explained above, I dissent in part and concur in part.

21. Although I would distance myself from a certain measure of bristling righteousness in its remarks that al-Kidd was a U.S. citizen, married and with children at the time of his arrest. Maj. Op. at 12270. For all of that, his rights under the Constitution against unlawful arrest were no greater than those of an illegally entered, Mexican, childless spinster.