

Al-Kidd v. Ashcroft: Clearly Established Confusion

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ABSTRACT: In the aftermath of September 11, 2001, Attorney General John Ashcroft authorized the U.S. government to use material-witness arrest warrants to detain and investigate terrorist suspects. At that time, existing law permitted this investigatory use, based primarily on the principle that subjective intent is irrelevant in the standard Fourth Amendment context. In al-Kidd v. Ashcroft, the Ninth Circuit Court of Appeals erred in denying former Attorney General Ashcroft qualified immunity. Ashcroft’s decision to permit the government to use a valid material-witness arrest warrant to detain Abdullah al-Kidd did not violate al-Kidd’s constitutional rights, regardless of the government’s subjective intent. Furthermore, assuming that the government’s actions were unconstitutional, the Ninth Circuit erred in denying Ashcroft qualified immunity because the law at the time was not “clearly established.”

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I. INTRODUCTION

In the aftermath of September 11, 2001, the U.S. law-enforcement community was reeling and in search of answers. Faced with a grieving and apprehensive nation, the federal government took action by adopting new and controversial anti-terrorism techniques. Included in this arsenal was—and still is—the federal material-witness statute.¹ The government began using the longstanding statute not for its original purpose of compelling witnesses to appear at trial, but for investigating potential terrorism-related activity.² While the initial reaction to such a policy may be to condemn it as unjust and unsound from a policy standpoint, the legal justifications behind the government's decision to use it are compelling.³

The case of *al-Kidd v. Ashcroft* centers on the constitutional implications of the government's arrest and detention of plaintiff Abdullah al-Kidd as a material witness.⁴ Specifically, this Note will focus on the Ninth Circuit Court of Appeals' flawed decision to deny former Attorney General John Ashcroft qualified immunity for his role in authorizing the federal government to use the federal material-witness statute to detain and investigate terrorist suspects. This Note will begin by explaining the concepts of material-witness detention and qualified immunity. Next, it will detail and analyze *al-Kidd*, arguing that the majority erred in denying the U.S. Attorney General qualified immunity. This Note will then discuss the potential future implications resulting from the case and will conclude by offering recommendations on how to avoid those implications.

II. BACKGROUND

There are two primary components that comprise this Note's analysis of *al-Kidd v. Ashcroft*: material-witness detention and qualified immunity. This Part will first discuss the concept of the material witness and how the law permits the government to arrest that witness in certain circumstances, despite the fact that the government does not suspect that the witness ever committed an actual crime. This Part will then describe the legal defense of

1. 18 U.S.C. § 3144 (2006).

2. Donald Q. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?*, 18 GEO. MASON L. REV. (forthcoming 2010) (manuscript at 17–18), available at <http://ssrn.com/abstract=1586502>.

3. This Note is an analysis of the recent Ninth Circuit Court of Appeals' decision in *al-Kidd v. Ashcroft* from a legal perspective. It analyzes how the decision meshes with previously existing federal law and offers insight as to what the case's implications are for the future and how courts might address those implications. This Note is not a policy analysis and is not a critique on the merits or morals of any specific law-enforcement technique. This Note in no way advocates for or against such techniques. It is only a legal analysis conducted in the context of preexisting law.

4. 580 F.3d 949, 952 (9th Cir. 2009), cert. granted, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

qualified immunity—a defense that law-enforcement authorities may invoke in efforts to avoid civil liability.

A. MATERIAL-WITNESS DETENTION

A material witness is a “witness who can testify about matters having some logical connection with the consequential facts [of a criminal proceeding], [especially] if few others, if any, know about those matters.”⁵ Problems involving material witnesses arise when, for whatever reason, material witnesses fail or refuse to appear at trial or a deposition hearing.⁶ To combat these problems, the government has availed itself of the option of temporarily detaining witnesses to ensure their participation in criminal proceedings.⁷ The U.S. Supreme Court has stated, “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.”⁸ While the U.S. Supreme Court has recently emphasized the importance of requiring citizens to share crime-related information, the roots of this practice extend back centuries.⁹

1. The Evolution of Material-Witness Detention

The concept of detaining material witnesses in criminal proceedings is anything but novel.¹⁰ During the waning years of the fourteenth century, English courts of equity invented the subpoena writ to enable the Crown to compel witnesses to testify at trial.¹¹ Two centuries later, the Second Act of Philip and Mary empowered “the Crown [to] bind over witnesses to appear [at criminal trials] and compel them to testify against the accused.”¹² The practice of detaining material witnesses then crossed the Atlantic, appearing in the Judiciary Act of 1789,¹³ which declared that judicial authorities could

5. BLACK’S LAW DICTIONARY 1741 (9th ed. 2009).

6. See Cochran, *supra* note 2 (manuscript at 8) (explaining that the modern federal material-witness statute exists to prevent persons who have material information in a criminal proceeding from fleeing before law-enforcement authorities can obtain that information).

7. See *infra* notes 10–20 and accompanying text (providing a history of the practice of material-witness detention).

8. Stein v. New York, 346 U.S. 156, 184 (1953), *overruled in part on other grounds by* Jackson v. Denno, 378 U.S. 368 (1964).

9. See *infra* notes 10–20 and accompanying text (documenting the history of material-witness detention).

10. See Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN’S L. REV. 483, 487–88 (2002) (documenting material-witness detention’s historical roots in the common law).

11. *Id.* at 488.

12. *Id.* at 487–88 (quoting Joseph Casula & Morgan Dowd, Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, 38 (1958)) (internal quotation marks omitted).

13. *Id.* at 489 (describing the Judiciary Act of 1789, ch. 20, 1 Stat. 73).

compel—under the threat of imprisonment—any person to appear in court or at a deposition hearing.¹⁴

Material-witness-detention practices in the United States evolved over the next two centuries, resulting in the federal material-witness statute, 18 U.S.C. § 3144.¹⁵ Congress passed § 3144 in 1984 as part of the Bail Reform Act,¹⁶ thus empowering federal judicial officers to order the arrest of any person whose testimony is “material in a criminal proceeding” if it appears from an affidavit that “it may become impracticable to secure the presence of the person by subpoena.”¹⁷ Upon arrest, § 3144 instructs law-enforcement authorities to treat material witnesses as standard criminal defendants awaiting trial under the guidelines of 18 U.S.C. § 3142.¹⁸ Section 3144 also establishes that law-enforcement authorities are not to detain material witnesses for the sake of securing their testimony if the authorities can adequately obtain the testimony through deposition and if further detention is unnecessary to “prevent a failure of justice.”¹⁹ Finally, the material-witness statute permits authorities to delay the release of a material witness for a “reasonable period of time” until the authorities are able to take the witness’s deposition in accordance with the Federal Rules of Criminal Procedure.²⁰

14. One section of the statute stated: “And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court.” Judiciary Act of 1789 § 30. A second section of the statute declared: “And copies of the process shall be returned . . . into the clerk’s office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment.” *Id.* § 33.

15. The federal material-witness statute states:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3144 (2006).

16. Studnicki & Apol, *supra* note 10, at 494.

17. 18 U.S.C. § 3144.

18. *Id.*

19. *Id.*

20. *Id.*

2. The Probable-Cause Requirement for Material-Witness Detention

While § 3144 empowers judicial officers to order the arrests of material witnesses,²¹ the Fourth Amendment dictates that “no Warrants shall issue, but upon probable cause.”²² Traditionally, judicial authorities have held that probable cause exists when a judicial officer is able to show that the “reasonably trustworthy” facts and circumstances of a case, as known to him or her, would justify a reasonable person’s belief that an offense has been, or is being, committed.²³ This definition’s application in the material-witness context, however, is complicated by two problems: (1) the term “probable cause” does not appear anywhere in the federal material-witness statute;²⁴ and (2) the federal material-witness statute empowers judicial authorities to issue arrest warrants for individuals who have yet to technically commit a criminal offense.²⁵ Further complicating the issue is the fact that the U.S. Supreme Court has never ruled on a material-witness case in the Fourth Amendment context,²⁶ despite having upheld the practice of detaining material witnesses on other constitutional grounds²⁷ and condoning the

21. *Id.*

22. U.S. CONST. amend. IV. The Fourth Amendment of the U.S. Constitution consists of two clauses. The first, or the “unreasonable search and seizure clause,” provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” *Id.* The second clause, or the “warrant clause,” provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

23. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (“Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))).

24. See 18 U.S.C. § 3144. See sources cited *infra* note 30 for instances where courts have injected a probable-cause requirement into the meaning of the federal material-witness statute.

25. See 18 U.S.C. § 3144 (empowering a judicial officer to order the arrest of a material witness even though law-enforcement authorities do not suspect the witness of any criminal wrongdoing); *infra* Part III.B–C (describing the arguments for both the majority and dissenting sides of the probable-cause debate in *al-Kidd*).

26. *al-Kidd v. Ashcroft*, 580 F.3d 949, 965–66 (9th Cir. 2009) (explaining that the U.S. Supreme Court has never held that material-witness detention is permissible under the Fourth Amendment), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98); see also *id.* at 991 (Bea, J., concurring in part and dissenting in part) (“No court had ever questioned the constitutional validity of the material witness statute.”).

27. *Id.* at 965 n.15 (majority opinion) (citing *Hurtado v. United States*, 410 U.S. 578, 589–90 (1973) (Fifth and Thirteenth Amendments); *New York v. O’Neill*, 359 U.S. 1, 6–7 (1959) (Fourteenth Amendment’s Privileges or Immunities Clause)). In *Hurtado*, the Court upheld the constitutional validity of material-witness detentions on Fifth Amendment grounds:

The detention of a material witness, in short, is simply not a “taking” under the Fifth Amendment, and the level of [the witness’s] compensation, therefore, does not . . . present a constitutional question. . . . Similarly, we are unpersuaded that

practice, generally, in dicta.²⁸ Thus, one must conduct an additional inquiry to specify how the federal material-witness statute complies with the probable-cause requirement of the Fourth Amendment.

While the U.S. Supreme Court has never addressed whether a material-witness arrest warrant must be supported by probable cause, three federal circuit courts—including the Ninth Circuit²⁹—and a number of federal district courts have attempted to resolve the issue.³⁰ These courts require law-enforcement officers seeking material-witness arrest warrants to show that there is probable cause to believe a witness’s testimony is material to a criminal proceeding and that the witness is a flight risk.³¹ Yet, these courts have offered little insight as to what ought to constitute “probable cause” in this analysis.³²

3. Subjective Intent and Material-Witness Detention

While the concept of probable cause highlights one troublesome area of material-witness-detention analysis, another problem arises when law-enforcement authorities use the material-witness statute as a vehicle to serve some subjective, ulterior purpose. Specifically, the U.S. government has used the federal material-witness statute to detain and question suspected terrorists in the post-9/11 world.³³

the classifications drawn by § 1821 as we have construed it are so irrational as to violate the Due Process Clause of the Fifth Amendment.

Hurtado, 410 U.S. at 589–90. The Court in *Hurtado* also upheld material-witness detentions on Thirteenth Amendment grounds: “There is likewise no substance to the petitioners’ argument that the \$1-a-day payment is so low as to impose involuntary servitude prohibited by the Thirteenth Amendment.” *Id.* at 589 n.11.

28. *al-Kidd*, 580 F.3d at 965 n.15 (citing *Stein v. New York*, 346 U.S. 156, 184 (1953), *overruled by* *Jackson v. Denno*, 378 U.S. 368 (1964); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 616–17 (1929)).

29. Note that *al-Kidd v. Ashcroft* is a Ninth Circuit case.

30. See, e.g., *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971) (“Before a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) that the testimony of a person is material and (2) that it may become impracticable to secure his presence by subpoena.” (internal quotation marks omitted)); *United States v. Munguia*, 273 F. App’x 517, 522 (6th Cir. 2008) (adopting two-part probable-cause standard); *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (same); *United States v. Coldwell*, 496 F. Supp. 305, 307 (E.D. Okla. 1979) (same); *United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976) (same).

31. See cases cited *supra* note 30 (discussing examples of what various federal courts have held in regard to probable cause).

32. While these courts have declared that material-witness warrants require probable cause—as measured by looking at the materiality of a witness’s testimony and likelihood of it becoming impracticable to obtain—the courts fail to address how to resolve the issue that the majority in *al-Kidd* raised; i.e., how to judge probable cause that is based on two non-criminal elements.

33. *Cochran*, *supra* note 2 (manuscript at 17–18).

The government derives its power to use the material-witness statute to detain and question suspected terrorists from the U.S. Supreme Court decision in *Whren v. United States*.³⁴ In 1996, *Whren* established the principle that the subjective intentions of a law-enforcement officer are irrelevant in ordinary Fourth Amendment analysis if the officer acted legally from an objective standpoint.³⁵ After 9/11, the federal government began arresting people that it suspected were connected with terrorism as “material witnesses” to various crimes.³⁶ In doing so, the government relied on *Whren*’s holding by arguing that any government suspicions related to terrorism were irrelevant in the material-witness context so long as the actions of law-enforcement authorities were objectively valid with respect to the federal material-witness statute.³⁷

B. QUALIFIED IMMUNITY

Shifting from the topic of material-witness detention, former Attorney General John Ashcroft’s personal liability in *al-Kidd* stems, in part, from the Ninth Circuit Court of Appeals’ decision to deny him qualified immunity. This Part will discuss the concept of qualified immunity and why it exists in our legal system. It will then outline the requirements that a law-enforcement officer must meet in order to adequately assert the defense of qualified immunity.

1. What Is Qualified Immunity, Why Do We Need It, and How Do You Get It?

If an individual feels that a federal official has violated his or her constitutional rights, that individual can bring a *Bivens* action to redress the alleged violation.³⁸ Specifically, a *Bivens* action enables a citizen to recover

34. 517 U.S. 806 (1996).

35. See *id.* at 813. In *Whren*, police officers in a high-drug area were suspicious of the defendants’ behavior and pulled the defendants over for a traffic violation. *Id.* at 808. Upon pulling the defendants over, the officers discovered incriminating evidence against the defendants for drug-related offenses. *Id.* at 809. The defendants sought to exclude the evidence obtained in the traffic stop on the ground that the officers merely used the traffic stop as a pretext to pull them over on drug-related suspicions. *Id.* The Court upheld the admissibility of the evidence by holding that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.* at 813.

36. Cochran, *supra* note 2 (manuscript at 18).

37. Petition for Writ of Certiorari at 20–21, *al-Kidd v. Ashcroft*, No. 10-98 (U.S. filed July 16, 2010).

38. BLACK’S LAW DICTIONARY, *supra* note 5, at 191. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (discussing a *Bivens* action). In *Bivens*, a private citizen (“Petitioner”) brought suit against agents of the Federal Bureau of Narcotics (“Respondents”), alleging that Respondents violated his Fourth Amendment rights by conducting an illegal search of Petitioner’s home. *Bivens*, 403 U.S. at 389. Specifically, Petitioner alleged that Respondents “manacled” him in front of his family, threatened to arrest his entire family, searched the entirety of his home, and then took Petitioner to a federal

monetary damages against a federal officer in federal court despite the fact that a statute conferring such a right does not exist.³⁹ The federal official involved in the matter may then assert one or both of two primary defenses: absolute immunity and qualified immunity.⁴⁰ Absolute immunity provides the federal official with a complete defense to any form of civil liability⁴¹ and is typically limited to instances where public officials are “performing particularly important functions.”⁴² In contrast, qualified immunity is more widely available to federal officials, but it only entitles a federal official to immunity from civil liability if the federal official did not violate an individual’s clearly established constitutional right.⁴³

The purpose of qualified immunity is to strike a balance between protecting the rights of citizens and protecting public officials who must regularly exercise discretion over weighty matters while acting in the public interest.⁴⁴ Qualified immunity seeks “to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.”⁴⁵ A federal official may successfully obtain qualified immunity in one of two ways. First, the official may show that he or she did not violate any of a plaintiff’s constitutional rights.⁴⁶ Second, the official may show that despite having violated a plaintiff’s constitutional right, that right was not “clearly

courthouse where he was booked, interrogated, and forced to undergo a visual strip search. *Id.* Petitioner claimed to have been humiliated, embarrassed, and mentally anguished as a result of the search and sought \$15,000 in damages from each Respondent as a result of the alleged Fourth Amendment violation. *Id.* at 389–90. The Court held that Petitioner was “entitled to recover money damages for any injuries he ha[d] suffered as a result of the agents’ violation of the [Fourth] Amendment.” *Id.* at 397. The Court added that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

39. Michael A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. FED. 2D 159, 159 (2007).

40. Alexander A. Reinert, *Immunity from Suit in Prisoners’ Rights Cases*, in *PRISON LAW* 2009, at 289, 291 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. C-219, 2009). Reinert notes that a third defense, sovereign immunity, is available to officials in *Bivens* suits. *Id.* However, sovereign immunity is not relevant to the case at hand, and as such, this Note will not discuss it further.

41. BLACK’S LAW DICTIONARY, *supra* note 5, at 818.

42. *Id.* While former Attorney General Ashcroft presents a separate absolute-immunity argument in his appeal (*see* Petition for Writ of Certiorari, *supra* note 37, at 14–20), absolute immunity is a separate issue beyond the purview of this Note, and as such, will not be discussed further.

43. BLACK’S LAW DICTIONARY, *supra* note 5, at 818.

44. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

45. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overruled in part* by *Pearson v. Callahan*, 129 S. Ct. 808 (2009)) (internal quotation marks omitted).

46. *Saucier*, 533 U.S. at 201 (“Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”).

established” at the time of the alleged violation.⁴⁷ The second piece of this defense begs the question: what is the definition of “clearly established”?

2. What Does “Clearly Established” Mean?

It is difficult to define what “clearly established” means in the context of qualified immunity. As a starting point, the “clearly established” inquiry must take place “in light of the specific context of the case, not as a broad general proposition.”⁴⁸ The U.S. Supreme Court has noted that for a constitutional right to be clearly established, its “contours ‘must be sufficiently clear [so] that a reasonable official would understand that what he or she is doing violates that right.’”⁴⁹ It is not required that a specific action have been previously held unlawful in order to qualify as infringing upon a “clearly established” constitutional right.⁵⁰ Instead, if the allegedly infringing action is so egregious as to render the unlawfulness of the act “apparent”⁵¹ and provide the federal official with “fair warning” that he is depriving the plaintiff of a constitutional right, then the action can qualify as being “clearly established.”⁵²

A potential indicator of the lack of a clearly established right is a circuit split over that right.⁵³ Historically, there has been a split among the circuit courts on whether to consider the rulings of other circuits when determining if a given legal right is clearly established.⁵⁴ The U.S. Supreme Court has stopped short of outlining a dispositive rule on this matter.⁵⁵ In *United States v. Lanier*, the Court noted that while previous U.S. Supreme Court precedent is not a necessity for establishing a clearly defined right, the Court could take into consideration a lack of consistency between the circuit courts when determining whether a constitutional right is clearly

47. *Id.* (“[I]f a violation could be made out . . . the next, sequential step is to ask whether the right was clearly established.”).

48. *Id.*

49. *Hope*, 536 U.S. at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

50. *Anderson*, 483 U.S. at 640.

51. *Id.* (“[I]n the light of pre-existing law the unlawfulness must be apparent.”).

52. *Hope*, 536 U.S. at 741.

53. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) (“If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”).

54. *See Stacey Haws Felkner, Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 AM. JUR. PROOF OF FACTS 3D § 5, at 318 (2000). Felkner explains that when conducting a “clearly established” rights inquiry on federal matters, three circuits (Fourth, Fifth, and Eleventh) only take into account precedents from their own circuit and the U.S. Supreme Court, while four circuits (Second, Seventh, Eighth, and Ninth) are willing to consider relevant holdings from all circuits. *Id.* Falling somewhere in the middle are the First, Sixth, and Tenth Circuits, which favor their own precedents, but will consider the opinions of their sister circuits. *Id.* The Third Circuit has thus far remained silent on the issue. *Id.* at 318–19.

55. *Id.*

established.⁵⁶ With the concepts of qualified immunity and material-witness detention in mind, we now consider the case of *al-Kidd v. Ashcroft*.

III. AL-KIDD V. ASHCROFT

A. FACTS OF THE CASE

In February 2003, a federal grand jury indicted Sami Omar Al-Hussayen, an acquaintance of plaintiff Abdullah al-Kidd, for visa fraud and making false statements to federal officials.⁵⁷ The FBI then became aware that al-Kidd had received over \$20,000 from Al-Hussayen, had met with associates of Al-Hussayen following a trip of al-Kidd's to Yemen, and had "contacts" with the Islamic Assembly of North America ("IANA").⁵⁸ A month later, al-Kidd bought an airline ticket to Saudi Arabia.⁵⁹

Upon learning of the Saudi Arabia ticket, federal agents became worried that al-Kidd would disappear to Saudi Arabia with material information in the Al-Hussayen case.⁶⁰ The agents subsequently appeared before a federal magistrate and sought a warrant for al-Kidd's arrest on the ground that al-Kidd was a material witness to the Al-Hussayen case.⁶¹ The magistrate granted the warrant, and two days later agents arrested al-Kidd at Dulles International Airport just before he boarded a plane to Saudi Arabia.⁶² The government subsequently held and interrogated al-Kidd for fourteen days.⁶³ They released him when he turned over his passport and agreed to comply with specific conditions of release.⁶⁴ The government never called al-Kidd to testify in the Al-Hussayen case.⁶⁵ Al-Kidd filed suit against Ashcroft, among others, under the *Bivens* framework,⁶⁶ claiming that

56. 520 U.S. 259, 268–70 (1997).

57. *al-Kidd v. Ashcroft*, 580 F.3d 949, 952 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).

58. *Id.* According to the Al-Hussayen indictment, the IANA is "an organization with the 'purpose of *Da'wa* (proselytizing), which included the website dissemination of radical Islamic ideology the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism.'" *Id.* at 952 n.3 (quoting Al-Hussayen indictment).

59. *Id.* at 953.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 982 (Bea, J., concurring in part and dissenting in part).

64. *Id.* The court ordered al-Kidd to live in Nevada, travel only within Nevada and three other states, maintain regular contact with a probation officer, permit federal authorities to visit his home, and surrender his passport. *Id.* at 953–54 (majority opinion).

65. *Id.* at 954.

66. *Id.* at 955–56. See generally *supra* note 39–40 and accompanying text (discussing *Bivens* framework).

the government's action of holding him as a material witness was illegal because the government based its actions on pretext.⁶⁷

B. MAJORITY OPINION

In *al-Kidd v. Ashcroft*, the majority held that Ashcroft was not entitled to qualified immunity.⁶⁸ According to the majority, Ashcroft violated al-Kidd's constitutional right to be secure from unreasonable searches and seizures as protected by the Fourth Amendment.⁶⁹ Furthermore, the majority held that al-Kidd's constitutional right was "clearly established" at the time of his detention.⁷⁰ With respect to its Fourth Amendment analysis, the majority held "*that probable cause—including individualized suspicion of criminal wrongdoing—is required when [the federal material-witness statute] is not being used for its stated purpose, but instead for the purpose of criminal investigation.*"⁷¹ The majority then continued, "*misuse of the statute, resulting in the detention of a person without probable cause for purposes of criminal investigation . . . is repugnant to the Fourth Amendment.*"⁷²

The first major premise in the majority's argument is that probable cause—which the majority claimed requires a belief that someone has committed or is committing an offense⁷³—does not justify the arrest of a material witness "because the two requirements of § 3144 (materiality and

67. *al-Kidd*, 580 F.3d at 982–83 (Bea, J., concurring in part and dissenting in part). In total, al-Kidd raised three separate claims: (1) the harshness of his confinement conditions rendered them unconstitutional; (2) the government's action of holding him as a material witness was illegal because it was based on pretext; and (3) the government's material-witness warrant was invalid because it was based on an affidavit containing intentional material misrepresentations (stating incorrectly that al-Kidd's plane ticket was a one-way, first-class ticket, although the ticket was actually a round-trip, coach-class ticket, and the affidavit did not mention that al-Kidd had cooperated with FBI agents in the past). *Id.* at 982–83. This Note focuses only on the "pretext" claim, which is founded on the assumption that al-Kidd's arrest warrant was objectively valid.

68. *Id.* at 964–73 (majority opinion). Al-Kidd contended that § 3144 represents a "limited exception' to the ordinary rule that arrests may only be made upon probable cause of criminal wrongdoing," and as such, the government's use of the statute "for any purpose other than obtaining testimony, and specifically to investigate or preemptively detain terrorism suspects, without probable cause, is unconstitutional." *Id.* at 966. Meanwhile, Ashcroft contended that al-Kidd's claim was inconsistent with the well-settled law that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)) (internal quotation marks omitted).

69. *Id.* at 965, 970.

70. *Id.* at 973 ("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.").

71. *Id.* at 970.

72. *Id.*

73. *Id.* at 966 ("*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.'" (quoting *Whren*, 517 U.S. at 811)).

impracticability) do not constitute the elements of a crime.”⁷⁴ As such, in the context of § 3144, the majority held that so long as the statute is being “genuinely used,” “a showing of probable cause is not required” to make a material-witness arrest.⁷⁵ This statement seems to stand in contrast to the court’s holding in *Bacon v. United States*, which required that prior to issuing a material-witness arrest warrant, a magistrate “must have probable cause to believe” that a material witness’s testimony is “material” and “may become impracticable to secure” by subpoena.⁷⁶

The second premise in the majority’s Fourth Amendment argument is that *al-Kidd* is a “special needs” case that is beyond the reach of the traditional *Whren v. United States* rule of objective Fourth Amendment analysis,⁷⁷ and as such, the court may inquire into the subjective purpose behind the government’s arrest of al-Kidd.⁷⁸ Here, the majority noted that a material-witness arrest is a Fourth Amendment “seizure” and, thus, is subject to the Fourth Amendment’s reasonableness requirement.⁷⁹ It also observed that “[a]ll seizures of criminal suspects require probable cause of criminal activity.”⁸⁰

Yet, the majority chose to part ways with *Whren* in two respects. First, the majority cited material-witness arrest statistics that it believed indicate *al-Kidd* falls outside the realm of “ordinary, probable-cause Fourth Amendment analysis.”⁸¹ Second, the majority discarded the requirement that probable cause exist for a material-witness warrant to issue, thus undercutting the traditional notion that subjective intent plays no role in Fourth Amendment probable-cause analysis.⁸² After all, the majority stated, “*Whren* rejected only

74. *Id.* at 967.

75. *Id.* at 970.

76. 449 F.2d 933, 943 (9th Cir. 1971). The *al-Kidd* majority unconvincingly attempted to reconcile its logic with *Bacon* by claiming that *Bacon* merely “required that the elements of the material witness statute be shown by ‘probable cause,’ not because that, in itself, satisfies the Fourth Amendment’s ‘probable cause’ requirement, but because permitting arrests only upon establishing the elements by that burden of proof was ‘reasonable’ under the Fourth Amendment.” *al-Kidd*, 580 F.3d at 967–68.

77. *al-Kidd*, 580 F.3d at 968. See generally *supra* note 35 (discussing the principle established in *Whren*).

78. *al-Kidd*, 580 F.3d at 968–69.

79. *Id.* at 965; 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.’” (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))).

80. *al-Kidd*, 580 F.3d at 970.

81. *Id.* at 966. The majority argued that because material-witness arrests similar to al-Kidd’s made up only a small percentage of the total 2003 arrests by federal law-enforcement agents, material arrests are not “ordinary” in the Fourth Amendment context. *Id.* at 966 n.16.

82. *Id.* at 970 (“[W]e 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

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.*’⁸³

To support its claim that *al-Kidd* is wholly distinguishable from *Whren*, the majority likened material-witness arrests to the searches and seizures in the “special needs” cases: *City of Indianapolis v. Edmond*, *Ferguson v. City of Charleston*, and *Illinois v. Lidster*.⁸⁴ In these cases, the U.S. Supreme Court permitted inquiries into the “programmatically purposes” of warrantless searches and seizures that were not based on individualized suspicion.⁸⁵ The majority argued that just as these warrantless “special needs” cases justified courts’ inquiries into the subjective “programmatically purposes” behind the various programs, an inquiry into the “programmatically purpose” behind *al-Kidd*’s arrest was appropriate in light of the fact that his arrest was a “seizure[] without suspicion of wrongdoing.”⁸⁶

To summarize, the majority first discarded the probable-cause requirement for material-witness arrest warrants so long as the government uses the material-witness statute for its “stated purpose.”⁸⁷ The majority then attempted to distinguish *al-Kidd* from *Whren* and its progeny, thus enabling the court to bypass widely accepted federal case law and delve into the subjective intent behind *al-Kidd*’s detention.⁸⁸ Finally, the majority concluded that “[t]o use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment.”⁸⁹

In addition to holding that Ashcroft’s policy violated one of *al-Kidd*’s constitutional rights, the majority also held that the violated right was “clearly established” at the time of the violation.⁹⁰ The majority conceded that no case had previously addressed the relevant issues directly, but attributed this to the “unprecedented nature of Ashcroft’s alleged material

may become impracticable to secure the presence of the person by subpoena,’ . . . a showing of probable cause is not required.” (quoting 18 U.S.C. § 3144 (2006)).

83. *Id.* at 966 (quoting *Whren v. United States*, 517 U.S. 806, 811 (1996)).

84. *Id.* at 968–70 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000) (recounting how law-enforcement authorities used warrantless vehicle checkpoints to search for unlawful drugs); *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (describing how law-enforcement authorities operated a system of warrantless mandatory drug testing on maternity patients); *Illinois v. Lidster*, 540 U.S. 419, 422 (2004) (stating that police used warrantless motor-vehicle checkpoints to elicit information about a recent hit-and-run accident)).

85. *See supra* note 84 and accompanying text (describing the “special needs” cases cited by the majority).

86. *al-Kidd*, 580 F.3d at 968.

87. *Id.* at 970.

88. *Id.* at 966.

89. *Id.* at 970.

90. *Id.* at 973.

witness policy.”⁹¹ The majority then cited the proposition that novel factual circumstances can still provide the requisite “notice” so as to be “apparent” to a government official that his or her conduct is violating established law.⁹²

The majority also listed the following facts as evidence that al-Kidd’s right was clearly established: no federal appellate court had upheld the constitutional validity of § 3144 at the time of al-Kidd’s detention;⁹³ previous dicta on the subject linked justification for the statute only to the government’s “need to compel testimony”;⁹⁴ and the definition of “probable cause” was clearly established.⁹⁵ With respect to this last point, the majority noted that *Edmond* had established that “an investigatory programmatic purpose renders a program of seizures without probable cause unconstitutional”⁹⁶ and that “the history and purposes of the Fourth Amendment were known well before 2003.”⁹⁷ The majority also included in its “clearly established” argument the fact that one district court had previously noted (albeit in dicta in a footnote) that § 3144 should not be misused as a tool to investigate terrorism.⁹⁸ According to the majority, the combination of these factors established that al-Kidd’s constitutional right was “clearly established” in March of 2003.⁹⁹

C. DISSENTING OPINION

The dissent’s primary Fourth Amendment contention was that the court should have granted Ashcroft qualified immunity.¹⁰⁰ It stated that al-Kidd’s detention did not violate any of his constitutional rights, and even if it had, those rights were not “clearly established” at the time of his detention.¹⁰¹ The dissent supported its claim that the detention did not violate al-Kidd’s constitutional rights by citing *Whren* for the proposition that “the pretextual use of an objectively justifiable search or seizure does not violate the Fourth Amendment.”¹⁰² The dissent claimed that the majority’s attempt to analogize to “special needs” cases is erroneous because a “programmatic purpose” inquiry is only necessary where “searches occur without the procedural protections of the warrant requirement and the magisterial

91. *Id.* at 970.

92. *Id.*

93. *Id.*

94. *Id.* at 971.

95. *Id.*

96. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)).

97. *Id.*

98. *Id.* at 972.

99. *Id.* at 973.

100. *Id.* at 984 (Bea, J., concurring in part and dissenting in part).

101. *Id.* at 984, 991.

102. *Id.* at 983.

supervision it entails.”¹⁰³ The dissent further argued that the majority’s probable-cause analysis misinterprets the Fourth Amendment because the constitutionality of police action is not dependent on the guilt or innocence of the person being arrested but rather hinges “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.”¹⁰⁴ Moreover, the dissent argued, the existence of probable-cause-backed warrants that permit the government to search the premises of individuals who are under no suspicion of wrongdoing—even though the warrants were for searches and not seizures—defeats the majority’s contention that probable cause must include a suspicion of wrongdoing by the subject of the warrant.¹⁰⁵

After the dissent concluded that al-Kidd’s detention did not violate any of his constitutional rights, it further noted that even if one were to assume that al-Kidd’s detention did indeed violate a constitutional right, that right was not “clearly established” at the time of his detention.¹⁰⁶ According to the dissent, in March of 2003, “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.”¹⁰⁷ As evidence, the dissent pointed out that no court had ever doubted the constitutionality of the federal material-witness statute, no court had ever applied the “programmatic purpose” test to warrant-based searches and seizures, and no court had limited the term “probable cause” to mean “*only* probable cause to believe the subject of the search or seizure had committed criminal wrongdoing.”¹⁰⁸

103. *Id.* at 986.

104. *Id.* at 987. As support, the dissent cited *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a case where government agents, armed with a valid search warrant, searched the offices of the *Stanford Daily* for pictures that they hoped would aid in identifying protesters that had assaulted police officers. *al-Kidd*, 580 F.3d at 988 (Bea, J., concurring in part and dissenting in part). Even though no members of the *Stanford Daily* were suspects in the matter, the U.S. Supreme Court upheld the validity of the warrant, stating, “[V]alid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found.” *Id.* (quoting *Zurcher*, 436 U.S. at 554) (internal quotation marks omitted).

105. *al-Kidd*, 580 F.3d at 988 (Bea, J., concurring in part and dissenting in part).

106. *Id.* at 991. To deny qualified immunity to a government official, a court must hold that the official violated someone’s constitutional right and that the right was “clearly established” at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001), *overruled in part by Pearson v. Callahan*, 129 S. Ct. 808 (2009).

107. *al-Kidd*, 580 F.3d at 991 (Bea, J., concurring in part and dissenting in part).

108. *Id.*

IV. ANALYSIS OF THE CASE

The majority's qualified-immunity holding in *al-Kidd v. Ashcroft* is flawed in multiple ways.¹⁰⁹ First, al-Kidd's detention does not constitute a Fourth Amendment constitutional violation.¹¹⁰ Setting aside all policy debates regarding the practice of detaining material witnesses—with or without pretext—the body of U.S. statutory and case law does not support the proposition that objectively satisfying the requirements of a valid statute—while maintaining a secret subjective intent—amounts to a constitutional violation.¹¹¹ In fact, the preexisting law would indicate precisely the opposite conclusion.¹¹² Furthermore, even if one were to assume that the government's detention of al-Kidd did violate one of al-Kidd's constitutional rights, the law was not clearly established at the time of his detention.¹¹³

A. AL-KIDD'S DETENTION DID NOT VIOLATE A CONSTITUTIONAL RIGHT

From an objective, statutory standpoint, the government's arrest of al-Kidd was valid.¹¹⁴ In accordance with § 3144, government officials presented evidence to a neutral and detached federal magistrate¹¹⁵ that al-Kidd had received \$20,000 from and met with associates of Sami Omar Al-Hussayen, the subject of a terrorism-related grand-jury indictment.¹¹⁶ The government also provided evidence to the magistrate that al-Kidd had purchased an airline ticket to Saudi Arabia.¹¹⁷ Furthermore, al-Kidd's pretext claim assumes the arrest warrant was objectively valid,¹¹⁸ and the facts of the case support this assumption.

109. See Petition for Rehearing En Banc at 12, *al-Kidd*, 580 F.3d 949 (No. 06-36059) (arguing that the Ninth Circuit panel erred in its qualified-immunity holding).

110. *al-Kidd*, 580 F.3d at 983 (Bea, J., concurring in part and dissenting in part).

111. See *infra* Part IV.A (explaining that *Whren* and its progeny have established that subjective motivations do not render unconstitutional actions that are objectively valid in the Fourth Amendment probable-cause context); see also *al-Kidd*, 580 F.3d at 983 (Bea, J., concurring in part and dissenting in part) (declaring that the court should have followed *Whren*'s lead, thus giving Ashcroft qualified immunity); Petition for Rehearing En Banc, *supra* note 109, at 12–13 (arguing that the court should have followed *Whren* and its progeny).

112. See sources cited *supra* note 111.

113. *al-Kidd*, 580 F.3d at 991 (Bea, J., concurring in part and dissenting in part); see Petition for Rehearing En Banc, *supra* note 109, at 15 (arguing that even assuming a constitutional violation occurred, the violated right was not clearly established at the time).

114. See *al-Kidd*, 580 F.3d at 991 (Bea, J., concurring in part and dissenting in part) (noting that the government used an objectively valid arrest warrant to arrest al-Kidd).

115. The Fourth Amendment does not exist to “den[y] law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 13–14 (1948).

116. *al-Kidd*, 580 F.3d at 982 (Bea, J., concurring in part and dissenting in part).

117. *Id.*

118. *Id.* at 984.

In order to establish a constitutional violation, the majority thus looked past the objective validity of al-Kidd's detention and insisted upon analyzing the subjective motive behind the arrest. This act, in itself, contradicts the well-settled law of *Whren v. United States* that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹¹⁹ To circumvent this obstacle, the majority attempted to distinguish *al-Kidd* from *Whren* by contending that al-Kidd's arrest was neither "ordinary" in the Fourth Amendment sense nor supported by probable cause.¹²⁰ Both of these conclusions are flawed.

First, regarding the claim that al-Kidd's arrest warrant was not "ordinary" in the Fourth Amendment context, the only evidence the majority provided to support this claim consists of statistics that establish material-witness arrests constitute only a small percentage of the total arrests that federal law-enforcement agents made in 2003.¹²¹ The majority offered no case law whatsoever to supplement its statistics and provided no authority to support the proposition that whether an arrest is "ordinary" in the Fourth Amendment context hinges on how many times per year law-enforcement officers conduct that type of arrest. While the majority's statistics inform us that federal law-enforcement agents conducted 4592 material-witness arrests in 2003, resting just above the 4338 "violent offense" arrests that same year,¹²² it provided no legal justification for concluding that al-Kidd's material-witness warrant was not "ordinary" in the Fourth Amendment context.

Regarding the majority's claim that the government lacked probable cause for al-Kidd's detention, again its argument is unpersuasive.¹²³ The majority's entire probable-cause analysis centers on the notion that probable cause *must* entail a suspicion of wrongdoing by the subject of the investigation.¹²⁴ Yet this strict adherence to a narrow view of the concept has numerous shortcomings in the material-witness context. First and foremost,

119. *Id.* at 966 (majority opinion) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)) (internal quotation marks omitted).

120. *Id.*

121. *See id.* at 966 n.16 (detailing statistics that indicate that in 2003, material-witness arrests comprised 3.6% (4592 arrests) of the total number of arrests that federal law-enforcement agents made that year (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ NO. 210299, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 17 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf>)).

122. *Id.* (citing BUREAU OF JUSTICE STATISTICS, *supra* note 121, at 17).

123. *See id.* at 987 (Bea, J., concurring in part and dissenting in part) (arguing that the majority's reliance on the "traditional" definition of probable cause is incorrect); *see also* Petition for Rehearing En Banc, *supra* note 109, at 14 (arguing that the majority's probable-cause approach is "fundamentally flawed").

124. *See al-Kidd*, 580 F.3d at 968 ("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.").

it fails to resolve the material-witness dilemma at hand. Consider the following: the material-witness statute empowers a magistrate to issue an arrest warrant for a witness whose testimony is material in a criminal proceeding and may become impracticable to obtain;¹²⁵ the Fourth Amendment requires all arrest warrants to be supported by probable cause;¹²⁶ and the U.S. Supreme Court has never doubted the constitutionality of the federal material-witness statute in the Fourth Amendment context¹²⁷ and has actually twice upheld the statute's constitutionality on other grounds.¹²⁸ The majority's insistence that probable cause entail an element of criminal wrongdoing—as opposed to probable cause to believe that a witness's testimony is material and may become impracticable to obtain—is inconsistent with these basic facts. If the majority's definition were to prevail, it would render the material-witness statute useless.¹²⁹ After all, if the legal system prohibits law-enforcement authorities from arresting a material witness until they have probable cause to believe that the witness has committed some criminal wrongdoing, at that point the authorities can simply obtain a non-material-witness arrest warrant and bypass the material-witness process altogether.¹³⁰ While dissolving the practice of compelling material witnesses to appear at trial may be the policy result that some would prefer, the dissolution would also directly contradict centuries of valid material-witness history.¹³¹

The majority appears to have foreseen the inconsistent logic that would result from its definition of “probable cause” and preemptively attempted to resolve the conundrum by declaring that “when the material witness statute is genuinely used . . . a showing of probable cause is not required.”¹³² This statement is alarming in two respects. First, it implies that under certain circumstances, a magistrate may issue an arrest warrant *without* probable cause.¹³³

125. 18 U.S.C. § 3144 (2006).

126. U.S. CONST. amend. IV.

127. *al-Kidd*, 580 F.3d at 965–66 n.15; *id.* at 991 (Bea, J., concurring in part and dissenting in part).

128. *See supra* note 26 and accompanying text (explaining that the U.S. Supreme Court has never questioned the validity of the federal material-witness statute).

129. *al-Kidd*, 580 F.3d at 989 (Bea, J., concurring in part and dissenting in part).

130. *Id.*

131. *See supra* notes 10–20 (detailing the history and evolution of the material-witness-detention concept).

132. *al-Kidd*, 580 F.3d at 970.

133. *Id.* at 989 n.10 (Bea, J., concurring in part and dissenting in part). The majority declared that when § 3144 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’ . . . a showing of probable cause is not required.” *Id.* at 970 (majority opinion) (quoting 18 U.S.C. § 3144 (2006)). In other words, the majority seems to imply that if judicial authorities “genuinely” use § 3144, then a magistrate may issue an arrest warrant that is not based on probable cause.

The Fourth Amendment, quite explicitly, prohibits this.¹³⁴ Second, it also implies that courts should apply different probable-cause standards depending on the subjective motivations of the authorities seeking the warrant.¹³⁵ According to the majority, if the authorities are “genuinely” using the statute for its “stated purpose,” then no probable-cause standard is required.¹³⁶ But, if authorities are using the statute for some other subjective purpose, then probable cause suddenly becomes relevant.¹³⁷ While inquiries into subjective intent should, and do,¹³⁸ play a role under limited circumstances in our legal system, determining whether or not a court should honor the Fourth Amendment requirement that warrants are to be based on probable cause should not be one of them.¹³⁹

Building on its conclusion that probable cause is not required when law-enforcement authorities are “genuinely” using the material-witness statute, the majority attempted to further distinguish *al-Kidd* from *Whren* by arguing that *al-Kidd* is a rare “special needs” case that empowers courts to inquire into the “programmatic purpose” behind the government’s actions.¹⁴⁰ “Special needs” cases involve “intrusions that occur pursuant to a general scheme absent individualized suspicion” and permit courts to bypass the typical Fourth Amendment objective analysis and “inquir[e] into purpose at the programmatic level.”¹⁴¹ Again, the majority’s argument errs in a significant way, as the “programmatic purpose” test exists as a tool for analyzing the constitutionality of *warrantless* searches and seizures.¹⁴² In *al-Kidd*, government officials obtained a warrant based on the individualized

134. See U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause . . .”).

135. *al-Kidd*, 580 F.3d at 989 n.10 (Bea, J., concurring in part and dissenting in part).

136. *Id.* at 970 (majority opinion).

137. See *id.* (declaring that the need for probable cause hinges on whether authorities are using the federal material-witness statute for its stated purpose). The majority stated:

[W]e recognize that when the material witness statute is genuinely used . . . 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.*

Id.

138. See *id.* at 968–69 (noting the cases of *Illinois v. Lidster*, 540 U.S. 419 (2004), *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), as examples of where the U.S. Supreme Court deemed it appropriate to inquire into the “programmatic purpose” behind a government program); see also *supra* note 84 (discussing *Lidster*, *Ferguson*, and *Edmond*).

139. See *al-Kidd*, 580 F.3d at 989 n.10 (Bea, J., concurring in part and dissenting in part).

140. See *id.* at 968 (majority opinion).

141. *Id.* (quoting *Edmond*, 531 U.S. at 46) (internal quotation marks omitted).

142. *Id.* at 986 (Bea, J., concurring in part and dissenting in part); Petition for Rehearing En Banc, *supra* note 109, at 14–15.

suspicion that al-Kidd's testimony was material and might become impracticable to obtain.¹⁴³ Considering these facts, *al-Kidd* is not a "special needs" case subject to a court's "programmatically purpose" inquiry.¹⁴⁴

The majority failed to adequately distinguish *al-Kidd* from *Whren*.¹⁴⁵ As a result, *Whren*'s rule that "pretextual use of an objectively justifiable search or seizure does not violate the Fourth Amendment" should govern *al-Kidd*.¹⁴⁶ After all, a "pretextual use of an objectively justifiable search or seizure" is precisely what al-Kidd claims happened in *his case*.¹⁴⁷ The federal agents in *al-Kidd* complied with § 3144 because they obtained a warrant supported by probable cause before arresting al-Kidd.¹⁴⁸ Regardless of what subjective intentions Ashcroft may have maintained while authorizing the chain of events leading to al-Kidd's arrest, it is well-settled law that those subjective intentions should play no role in answering the question of whether al-Kidd's material-witness detention was a constitutional exercise of government authority—a question that should be answered in the affirmative.¹⁴⁹

*B. ASSUMING ASHCROFT VIOLATED AL-KIDD'S CONSTITUTIONAL RIGHT,
THAT RIGHT WAS NOT CLEARLY ESTABLISHED*

Even if one were to assume that the government's detention of al-Kidd did actually violate one of al-Kidd's constitutional rights, that right was not "clearly established" at the time of al-Kidd's detention.¹⁵⁰ To be "clearly established," a constitutional right's "contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"¹⁵¹ While a right can be "clearly established" despite having never been at issue in a case, the allegedly infringing action must be so egregious as to render the unlawfulness of the act "apparent"¹⁵² and provide the federal official with "fair warning" that he is depriving the plaintiff of a

143. *al-Kidd*, 580 F.3d at 986 (Bea, J., concurring in part and dissenting in part).

144. *Id.*; Petition for Rehearing En Banc, *supra* note 109, at 14–15.

145. *al-Kidd*, 580 F.3d at 986 (Bea, J., concurring in part and dissenting in part).

146. *Id.* at 983, 985.

147. *Id.* at 983.

148. *See id.* ("[There is] considerable authority recognizing that the pretextual use of an objectively justifiable search or seizure does not violate the Fourth Amendment . . .").

149. The dissent in *al-Kidd* stated:

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.

Id. at 989.

150. *Id.* at 991.

151. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

152. *Anderson*, 483 U.S. at 640.

constitutional right.¹⁵³ The majority proffered a handful of claims that it contended clearly established al-Kidd's right prior to his detention. This Note will describe a number of those claims and then offer responses to them.

Claim: At the time, no federal appellate court had upheld the constitutional validity of § 3144.¹⁵⁴ Response: While this may be true, its reciprocal is also true: at the time, no federal appellate court had ever *refused* to uphold § 3144's constitutional validity.¹⁵⁵ In fact, the dissent pointed out that "[n]o court had ever questioned the constitutional validity of the material witness statute."¹⁵⁶ Furthermore, the practice of detaining material witnesses has existed and endured for centuries.¹⁵⁷

Claim: Previous dicta linked justification for the statute only to the government's need to compel testimony.¹⁵⁸ Response: While true to a certain degree, this point has little relevance to the legal issues in *al-Kidd*. Just as in *Whren*, where the Court never claimed that the constitutionality of the police behavior at issue hinged on whether the justification for traffic laws had anything to do with narcotics enforcement,¹⁵⁹ in *al-Kidd*, Ashcroft never suggested that one of the motivations behind Congress's enactment of § 3144 was to provide a springboard from which law-enforcement authorities could conduct pretextual investigations.¹⁶⁰ Nobody is disputing the original justifications for the material-witness statute. The justifications have nothing to do with how a person in Ashcroft's position would interpret *Whren* and its progeny.

Claim: Two-and-a-half years prior to al-Kidd's arrest, *Edmond* had established that "an investigatory programmatic purpose renders a program of seizures without probable cause unconstitutional."¹⁶¹ Response: Assuming this point to be true, it fails to help clearly establish a constitutional right in the present case. As noted earlier, *Edmond* applied to *warrantless* seizures without probable cause,¹⁶² whereas in *al-Kidd* the government acted with a warrant that the government had obtained on a showing of probable cause in accordance with a federal statute.¹⁶³

153. *Hope*, 536 U.S. at 741.

154. *al-Kidd*, 580 F.3d at 970.

155. *Id.* at 991 (Bea, J., concurring in part and dissenting in part).

156. *Id.* (emphasis added).

157. See *supra* notes 10–20 (detailing the history and evolution of the material-witness-detention concept).

158. *al-Kidd*, 580 F.3d at 971.

159. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

160. *al-Kidd*, 580 F.3d 949.

161. *Id.* at 971 (citing *City of Indianapolis v. Edmond*, 531 U.S. 3, 47 (2000)).

162. *Id.* at 986 (Bea, J., concurring in part and dissenting in part).

163. See *supra* note 148 and accompanying text.

Claim: The purpose and the history of the Fourth Amendment and the requirement of probable cause are rooted deep in our history.¹⁶⁴ Response: Again, no party in *al-Kidd* is denying this fact. Ashcroft and the government acted with a warrant based on probable cause and in a manner consistent with U.S. law.

Claim: A federal district court had previously noted (albeit in dicta in a footnote) that § 3144 should not be misused as a tool to investigate terrorism.¹⁶⁵ Response: This point is true. Yet a single federal district court's statement—in dicta in a footnote—does not constitute the “consensus of cases”¹⁶⁶ necessary to place a federal official on alert that his actions are unconstitutional.¹⁶⁷

V. FUTURE IMPLICATIONS

If the legal community accepts the majority's qualified-immunity holding, the result will adversely affect law-enforcement agencies and officers nationwide by creating an element of uncertainty that deters them from acting in the future¹⁶⁸—as well as diminish the sanctity of the Fourth Amendment. Law-enforcement officials are the people we rely on for our personal and national protection. Their power has bounds, as it should, and we enforce those limits through various procedural safeguards.¹⁶⁹ Yet, we recognize the qualified-immunity defense for the purpose of protecting public officials who must regularly exercise discretion over weighty matters while acting in *our* best interest. This is why we protect government officials from civil liability until a court of law establishes that an official's actions were so egregious that their unconstitutionality should have been “apparent”

164. *al-Kidd*, 580 F.3d at 971.

165. *Id.* at 972.

166. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (“Petitioners have not . . . identified a *consensus of cases* of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.” (emphasis added)) (same).

167. See Petition for Rehearing En Banc, *supra* note 109, at 16 (arguing that the majority cited only a single case directly on point and that a single case is insufficient to clearly establish a constitutional right); see also *al-Kidd*, 580 F.3d at 991 (Bea, J., concurring in part and dissenting in part).

168. See Richard A. Serrano, *Detained for Years But Never Charged; Lawsuit by Witness Held in Vegas Could Affect Government Actions*, LAS VEGAS SUN, Nov. 5, 2009, 2009 WLNR 22175412. This article points out that the *al-Kidd* decision “could significantly change how the government fights the war on terror in this country. If officials are held personally liable for violating the constitutional rights of innocent people, government might think twice about future arrests.” *Id.*

169. In addition to procedural safeguards, the dissent suggested that other limits on power exist: “[O]ur law provides the prosecutor with official immunity—perhaps not immunity from being fired, impeached, or hounded from public life, but immunity nonetheless—from lawsuits for money damages based on the acts he undertakes on behalf of the public.” *al-Kidd*, 580 F.3d at 981–82 (Bea, J., concurring in part and dissenting in part).

to the actor¹⁷⁰ so as to provide him with “fair warning” that he was depriving the victim of a constitutional right.¹⁷¹

With this standard in mind, Ashcroft’s actions fell short of the threshold for liability, especially considering the nuanced nature of the semantical probable-cause debate between the majority and dissenting opinions. As the U.S. Attorney General following September 11th, Ashcroft neither should have—nor could have—chosen inaction over action out of fear that a federal appeals court would one day split hairs when deciding whether or not probable cause applies to warrants issued under a valid and established federal statute. The majority’s decision that this confusing and complicated issue¹⁷² was “clearly established” at the time of al-Kidd’s arrest sets a dangerous precedent that, if upheld, will deter people from entering public service and will always be present in the back of our leaders’ minds as they attempt to protect our country. Furthermore, any holding that makes the Fourth Amendment requirement of probable cause wholly contingent on the subjective motivations of individuals diminishes the relevance and value of the Fourth Amendment.

VI. RECOMMENDATIONS

At least three remedies exist to aid in resolving the problem presented in *al-Kidd v. Ashcroft*. First, any court that addresses the issue of material-witness arrest warrants needs to establish (immediately and explicitly) that probable cause is required to support an arrest warrant. Probable cause should be a prerequisite to any material-witness arrest warrant, regardless of the subjective intentions of the parties seeking the warrant. The determination that authorities are using the material-witness statute for its “stated purpose” should not empower law-enforcement authorities to bypass the Fourth Amendment’s rule that “no Warrants shall issue, but upon probable cause.”¹⁷³

Second, the U.S. Supreme Court reverse the Ninth Circuit’s holding with respect to qualified immunity. The Court should craft a definitive “probable cause” definition that can adequately address the material-witness situation. The Court should word this new probable-cause definition in such a manner that it will be able to encompass the situation of arresting a

170. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“[I]n the light of pre-existing law the unlawfulness must be apparent.”).

171. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

172. See Michael Greenberger, *Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment*, in *AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES* 83, 110 (Thomas E. Baker & John F. Stack, Jr. eds., 2006) (“[I]f the bewildering nature of the *Bacon*, *Awadallah*, and *In re Material Witness Warrant* litigation suggests anything, it is that section 3144 as presently written is highly confusing and ambiguous.”).

173. U.S. CONST. amend. IV.

material witness, pursuant to a federal statute, despite the fact that the witness has not technically committed a crime.¹⁷⁴

Finally, Congress should take up the issue of material-witness detention and legislate procedural safeguards and limitations. These safeguards must ensure that law-enforcement officials know the bounds of their authority in the material-witness context so as to protect the constitutional rights of American citizens. The safeguards must also be clear and specific enough to enable law-enforcement officials to act reasonably without the fear of being personally liable in the future.

VII. CONCLUSION

The majority erred in denying Ashcroft qualified immunity. Ashcroft did not violate al-Kidd's constitutional rights, and even assuming he did, the law had not clearly established those rights at the time of al-Kidd's detention. This is not a debate about policy—such a debate is for the legislature, not the courts. This is a debate about correctly applying existing case law. While society may or may not agree with the ultimate policy outcome of this case, we should not punish executive-branch officials for that result. Until the U.S. Supreme Court applies a probable-cause definition that is able to accommodate the material-witness statute or Congress modifies the statute itself, the courts should provide future law-enforcement officers with the discretion and direction they need to effectively protect our safety while respecting our constitutional rights.

174. The Ninth Circuit's decision in *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971), can provide insight here. In *Bacon*, the court held that "[b]efore a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.'" *Id.* (quoting 18 U.S.C. § 3144 (2006)). While the existence of the controversy in *al-Kidd* indicates that the *Bacon* probable-cause standard might not be the ultimate solution, the *Bacon* standard can serve as the foundation for a newly modified probable-cause definition that is able to take into account the practice of material-witness detention.