

# Obama lawyer defends Bush aide against abuse charges

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Solicitor General Neal Katyal, the lawyer who represents the Obama administration in the Supreme Court, argued Wednesday for reversal of a lower court ruling that would allow a lawsuit for money damages to proceed against George Bush's attorney general, John Ashcroft. He is accused of abusing the "material witness" statute by using it as a pretext to jail—under barbaric conditions—a US citizen, Abdullah al-Kidd, suspected of no wrongdoing whatsoever.

Furthering the Obama administration policy of protecting Bush administration officials from suits alleging they violated constitutional rights, Katyal argued that Ashcroft should be held immune from al-Kidd's suit regardless of his motives. Katyal's arguments, which evoked considerable sympathy from extreme right-wing justices Antonin Scalia, John Roberts and Samuel Alito, widens a door for the government to round up and jail anyone it labels a witness in a pending criminal case, regardless of whether probable cause exists to suspect that person of criminal conduct.

Obviously in lockstep with Katyal's position, Scalia—who claims to be a "strict constructionist" bound by the "original intent" of the Constitution's framers—asserted that "the Fourth Amendment doesn't say you need probable cause." In fact, the Fourth Amendment expressly provides that "no Warrants shall issue, but upon probable cause."

*Ashcroft v. Al-Kidd* is the only "war-on-terror" case scheduled for Supreme Court decision this term. Some commentators noted that the justices seemed to be uncharacteristically disinterested during the proceedings, speaking little, asking few challenging questions of either side, and indicating little disagreement, although at one point Associate Justice Ruth Bader Ginsburg said "there are some elements of

this picture that are very disturbing." Associate Justice Elena Kagan, who was Katyal's predecessor as solicitor general and worked on the case, is not participating.

Al-Kidd, born in Kansas, converted to Islam while attending the University of Idaho on a football scholarship. In 2002 he was questioned by the FBI about his own activities and those of another student, Sami Omar al-Hussayen, who had set up web sites for distribution of Islamic religious books in various languages. By all accounts, al-Kidd cooperated fully with the FBI, and never provided false information.

Nevertheless, during March 2003 an FBI agent obtained a "material witness" warrant to jail al-Kidd until the trial of al-Hussayen, who had been charged two months earlier with providing material support to terrorist organizations. The agent lied under oath that al-Kidd was "scheduled to take a one-way, first-class flight (costing approximately \$5,000) to Saudi Arabia." In fact, al-Kidd had a round-trip, coach class ticket, costing \$1,700. He was traveling to complete his doctorate in Islamic studies on a scholarship at a well-known Saudi university.

The agent also neglected to include the facts that al-Kidd was a US native, resident and citizen; that his parents, wife, and two children were likewise US natives, residents and citizens; and that he had already cooperated with the FBI in the course of the al-Hussayen investigation.

The arrest of al-Kidd at Dulles Airport on March 18, 2003 was a pretext, part of the Bush administration's dragnet of Muslims following the September 11 attacks, proved by the fact that Ashcroft described, at an earlier Congressional hearing, "several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens," including a

“strategy to prevent terrorist attacks by taking suspected terrorists off the street” through “aggressive detention of lawbreakers and material witnesses.”

After his arrest, federal agents interrogated al-Kidd and confined him in high security cells lit 24 hours a day—first in Virginia, then Oklahoma, and finally Idaho, frequently handcuffed, shackled and strip searched. In the Federal Transfer Center in Oklahoma City, al-Kidd was left naked with no privacy for more than three hours.

Further proving that the “material witness” warrant was a pretext to obtain an arrest warrant without probable cause, nine days after the arrest, FBI Director Robert Mueller testified before Congress about five supposed “major successes” in “identifying and dismantling terrorist networks,” among them the arrest of al-Kidd “en route to Saudi Arabia.”

Al-Kidd’s attorneys finally secured his release after 16 days in custody, but only on the conditions that he live with his wife and in-laws in Nevada, limit his travel to three other states, surrender his travel documents, report to a probation officer, and consent to home searches.

The case against al-Hussayen finally went to trial in the United District Court for Idaho 15 months after al-Kidd’s arrest. The jury returned not guilty verdicts on all the terrorism-related charges. The prosecutors never called al-Kidd to testify.

“This is a simple case,’ Katyal argued. “It’s not about Guantánamo, it’s not about separation of powers, it’s about one simple thing: should we allow damages actions against an Attorney General of the United States and ultimately Assistant United States Attorneys for doing their job, when they’re alleged to have a bad motive?”

Making clear that the Obama administration places the maintenance of police-state powers above the rights of individuals, Katyal told the Supreme Court justices that “damages liability on prosecutors is the wrong way to go about it because the costs are too high compared to the benefits.” To rein in misuse of “material witness” warrants, Katyal referred to disciplinary actions against prosecutors, which in fact virtually never occur, and “the crucible of the trial process itself.”

Katyal did not explain how “the crucible of the trial process” would prevent abuses when the very ruling he

was asking from the Supreme Court would deny al-Kidd the right to a trial on his claim that Ashcroft abused the material witness warrant process.

Affirming al-Kidd’s democratic right to sue for money damages, the lower court had stated that “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.”

The *al-Kidd* litigation once again demonstrates that the Obama administration is following the footsteps of its predecessor to expand police powers by curtailing democratic rights.

A ruling is expected before the end of the current Supreme Court term this June



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