US Supreme Court protects abuse of material witness warrants

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A unanimous Supreme Court ruled Monday that the Bush administration attorney general, John Ashcroft, cannot be sued personally for directing federal agents to use "material witness" warrants to round up and jail Muslims during the so-called "war on terror."

Three liberal justices joined with the high court's right wing to reverse a three-judge panel of the Ninth Circuit Court of Appeals, on the basis that the constitutional limits on the power to arrest and imprison people not suspected of criminal activity is not "clearly established."

Associate Justice Antonin Scalia's majority opinion relies on the same police-state argument put forward by Obama administration lawyers at the oral argument. He wrote that evidence of actual motive is irrelevant so long as federal agents obtain a warrant based on claims that an arrest is necessary to secure testimony for a legal proceeding. (See, "Obama lawyer defends Bush aide against abuse charges")

Three other right-wing justices, John Roberts, Clarence Thomas and Samuel Alito, joined Scalia's opinion without reservation. Associate Justice Anthony M. Kennedy joined the opinion, but wrote separately that there may be other cases where the use of "material witness" warrants might raise constitutional issues.

Associate Justices Ruth Bader Ginsburg, Sonia Sotomayor and Stephen G. Breyer concurred separately, agreeing only that the constitutional principles that apply to material witness warrants are too unclear for the United States Attorney General to understand, and therefore Ashcroft is entitled to "qualified immunity" from suit.

Associate Justice Elena Kagan, who defended Ashcroft while serving as Obama's solicitor general, did not participate in the decision.

The ruling is sophistic nonsense. The American Revolution was ignited in large part by outrage over arbitrary governmental actions, embodied in the Fourth Amendment's protection of "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Decades, if not centuries, of law establish that an arrest without probable cause to suspect criminal activity is the archetype of an unreasonable seizure.

The lower court ruling explained 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."

Not too repugnant for the current Supreme Court or the Obama administration, however.

"Material witness" warrants are unique in that they authorize the arrest and imprisonment of persons not suspected of criminal activity. Federal agents must produce only facts indicating that "it may become impracticable to secure the presence of the person by subpoena" at a criminal trial or some other proceeding. By placing the government's true motives for seeking the warrant beyond judicial review, Monday's Supreme Court decision provides a ready means for the federal government to round up and jail people simply by identifying them as potential witnesses who might not show up at a trial.

There is no question that in this case the material

witness warrant was a pretext. Ashcroft boasted to Congress about "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." Not long after, on March 18, 2003, at Dulles Airport, the FBI arrested Kansas-born Abdullah al-Kidd, who converted to Islam while attending the University of Idaho on a football scholarship.

The FBI had obtained a "material witness" warrant to jail al-Kidd until the trial of another student, Sami Omar al-Hussayen, who had been charged with providing material support to terrorist organizations based on his operation of an Islamic web site. The warrant application omitted the facts that al-Kidd was a native-born resident and citizen of the United States, as were his parents, wife, and two children, and that he previously cooperated with the FBI investigation. The warrant stated that al-Kidd was "scheduled to take a one-way, first-class flight (costing approximately $5,000) to Saudi Arabia," when he in fact had a $1,700 round-trip, coach ticket.

Nine days after the arrest, FBI Director Robert Mueller described "major successes" in "identifying and dismantling terrorist networks," including the arrest of al-Kidd "en route to Saudi Arabia." Mueller knew al-Kidd was traveling to complete his doctorate in Islamic studies on a scholarship at a well-known Saudi university.

After 16 days in custody—mostly spent in security cells lit around the clock and frequently handcuffed, shackled and strip searched—al-Kidd was released 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 fifteen 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.

As a result of this government abuse, al-Kidd lost his scholarship and his job, and his marriage ended in divorce.

In another "war-on-terror" related matter, *Mohamed v. Jeppesen Dataplan, Inc.*, on May 16 the Supreme Court rejected the petition for certiorari (review) filed on behalf of five men taken to "black site" torture chambers in Morocco, Egypt and Afghanistan, where they were physically and sexually tortured.

The case was filed in Northern California against a subsidiary of aerospace giant Boeing, Jeppesen Dataplan, which contracted with the CIA to transport victims of its so-called "extraordinary rendition" program. At the behest of Bush administration lawyers, the district judge dismissed the case, ruling that pressing such claims, even against a private entity, would reveal state secrets.

Those who had predicted a different approach toward human and constitutional rights from the incoming Obama administration were quickly proved wrong, as Attorney General Eric Holder's Department of Justice defended the blanket use of the "state secrets" doctrine to prevent this case from going forward.

A three-judge Ninth Circuit panel reversed, writing that "As the Founders of this Nation knew well . . . arbitrary imprisonment and torture under any circumstance is a gross and notorious act of despotism."

The Obama administration obtained review of that ruling by an eleven-judge Ninth Circuit panel, which reversed the three-judge panel by a 6-5 vote, reinstating the dismissal. (See, "Federal appeals court adopts Obama 'state secrets' doctrine to block torture case")

The denial of certiorari by the Supreme Court means that the appeals court dismissal stands. The support of only four justices is required to grant certiorari and bring the case up for review. Again, Justice Kagan did not participate as she had previously represented the Obama administration against the torture victims.

These two decisions, taken together, demonstrate once again that there is no significant section of the ruling elite prepared to defend basic democratic and human rights.