IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

JOHN D. ASHCROFT, :

Petitioner : No. 10-98

v. :

ABDULLAH AL-KIDD :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, March 2, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:18 a.m.

APPEARANCES:

NEAL KUMAR KATYAL, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

LEE GELERNT, ESQ., New York, New York; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 10-98, Ashcroft v. Al-Kidd.

General Katyal.

ORAL ARGUMENT OF GENERAL NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

GENERAL KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

This lawsuit seeks personal money damages against a former Attorney General of the United States for doing his job, allegedly with an improper motive, yet the Attorney General, like the Federal prosecutor in Idaho who sought the material witness warrant at issue in this case, was performing the functions of his office.

There are three reasons why the Petitioner should not be personally liable for money damages. The first is because the prosecutor's act of seeking the material witness warrant is integrally associated with the judicial process and entitled to absolute immunity. To view it any other way is to expose both line prosecutors and high officials to lawsuits by highly incentivized litigants based on their purportedly bad motives. That is something this Court has manifestly

resisted and for good reason, because improper motives are easy to allege and hard to disprove. Allowing such suits to proceed would result in burdensome litigation and interfere with the ability of prosecutors to do their jobs.

The second reason is that the Fourth Amendment was not violated, and, therefore, qualified immunity applied. There can be little doubt that the statutory requirements of section 3144 were met in this case, and, equally, there can be little doubt that the subjective motivations of Attorney General Ashcroft or the line prosecutor are thoroughly irrelevant to whether a Fourth Amendment violation exists.

This Court has repeatedly rejected subjectivity, explaining that otherwise time-consuming, vexatious, burdensome, and, indeed, destabilizing discovery and litigation would be the inexorable result.

And the third reason, and the easiest reason, is that whatever one thinks the applicable law is, what it -- it was manifestly not the law in 2003 when the warrant in this case was issued by a neutral judge in Idaho.

JUSTICE SCALIA: Can I ask whether your second reason doesn't boil down to saying that it makes very little difference whether -- whether Ashcroft is --

is held immune by absolute immunity or by qualified immunity?

GENERAL KATYAL: Oh, no, it --

JUSTICE SCALIA: Once -- once you say that -- that motive is not introducible with regard to the qualified immunity question, and once you say that he's using a witness subpoena, and you can't look behind it as to whether he was abusing it for some other purpose, is there any difference between absolute and qualified immunity?

GENERAL KATYAL: Well, I take it there may be a difference. We think the Court should first decide the absolute immunity question, which is the way that this Court has historically handled questions when there's an absolute immunity question and then a qualified immunity.

I take it that the qualified immunity question in this case is one about whether motivations matter for the Fourth Amendment; whereas the motivation question in the absolute immunity sense, as Respondents see it, is -- is something broader. It's not limited to the Fourth Amendment, per se. Their argument is if the prosecutor is -- has bad motives essentially or a certain bad motive, an investigatory or purposeful bad motive to engage in preventive detention, that somehow

pierces the veil of absolute immunity. That is something this Court has never accepted.

JUSTICE SCALIA: Well, I thought the -- I thought the argument, rather, was that this is not as close to the core of the prosecutorial function as some of the other functions to which we have given absolute immunity, and since it's so dangerous, since there is such potential for abuse, we shouldn't confer absolute immunity on this particular conduct. But I don't understand why if we agree with you on qualified immunity, there is any difference whatever.

GENERAL KATYAL: Justice Scalia, to be sure, they are now making that argument in this Court, that this doesn't fall -- this isn't intimately associated --

JUSTICE SCALIA: Right.

GENERAL KATYAL: -- with the judicial process. Below, of course, they said the reverse: That material witness warrants were associated with the judicial process and that the only difference is that -- that, here, they had a bad motive.

So I've talked about the bad motive point. Now, with respect to whether this is intimately associated with the judicial process, these are material witness warrants being sought in connection with an ongoing investigation by a prosecutor. It is

quintessentially a prosecutorial function to obtain these warrants and has been for -- for hundreds of years, and it's the exercise of the prosecutor's professional judgment, which is something that this Court has looked to.

JUSTICE SCALIA: Was the prosecution already pending when this -- when this warrant was issued?

GENERAL KATYAL: Yes, it was. The indictment of Mr. Al-Hussayen was in February 2003. The prosecutors learned in March that Mr. Al-Kidd was about to board a plane and go off to Saudi Arabia for an unspecified length of time. They then acted immediately. They went to the court and said we need this warrant to secure this testimony. That is, to me, essentially what prosecutors do and protected by Imbler. To see it any other way is to expose prosecutors to lawsuits for --

JUSTICE GINSBURG: Was Mr. Al-Kidd -- was he released after -- I understand he didn't testify at the trial, and there was an acquittal, and then other charges were dropped. Was Al-Kidd still in custody as a material witness after the trial was over?

GENERAL KATYAL: Justice Ginsburg, he was in -- he was detained for only a period of 16 days total in 2003. Is --

JUSTICE GINSBURG: But he was restrained much longer -- for 15 months.

GENERAL KATYAL: He had travel restrictions placed upon him until the trial was over and until the government -- because after the resolution of Mr. Al-Hussayen's case, which was acquittal on some charges and a hung conviction -- a hung -- a hung decision on others, the government thought about retrying Mr. Al-Hussayen, took it very seriously, and 20 days after al-Hussayen's verdict by the jury, we reached an agreement with them in writing that Mr. Al-Hussayen would leave the country and -- and not come back, and in exchange we weren't going to prosecute him any further. And so, immediately -- I think quite soon after the jury verdict, the -- the conditions placed on Mr. Al-Kidd were lifted.

And I should say that the material witness warrant statute laces into it a whole suite of safeguards to prevent against -- as, Justice Scalia, you pointed out -- the potential abuse for the -- for material witnesses by prosecutors. I think Congress has set up several different things to prevent that. The first is, in order to get a material witness warrant, the prosecutor needs to show both materiality and then practicability.

The second is that there are strict limits placed on the conditions of the -- on the ability of the prosecutor to detain anyone. Section 3142 says that a detention can only be allowed by a judge if, quote, "no condition or combination of conditions will reasonably assure the appearance of the individual."

And then there's a formal procedure where they have a right to counsel, they have the right to cross-examine witnesses, to -- to present evidence, to proffer evidence at the hearing, and the like -- all to show that they shouldn't continue to be detained.

JUSTICE ALITO: Well, in light of these restrictions, I would like to come back to the question that I understood Justice Scalia to be asking. If the Court were to hold that obtaining a material witness warrant does not violate the Fourth Amendment where the statutory requirements, and in particular establishing materiality, are met, why would it be necessary for the Court to decide whether there's absolute immunity when a prosecutor seeks a material witness warrant?

GENERAL KATYAL: For two reasons. Number one is I think that's the way this Court has historically gone about it, probably for reasons of constitutional avoidance, to not reach constitutional questions if there's an absolute immunity question.

And the second is, here, you have a Ninth Circuit decision, Justice Alito, that says that -- that absolute immunity can be pierced by a prosecutor's bad motive. That is something that infects not simply material witness warrant cases but, indeed, virtually any case. As we point out and as the dissent below pointed out, that kind of argument could be run by any defendant who says you didn't intend to actually indict me, or, you didn't care about that, you really wanted to flip me to get testimony against some higher-up. And to allow defendants to make those kinds of arguments and to expose line prosecutors and attorneys general to that form of liability is an extremely damaging proposition.

The -- with respect to the Fourth Amendment question about whether or not motive applies, I think this Court has quite clearly said in Whren that motive is not -- is not something that should be looked to, that the subjective motivations of the prosecutor are not -- are --

JUSTICE GINSBURG: But that's after there is probable cause to suspect that criminal activity has occurred. And then you -- once you have probable cause, they're not going to look behind probable cause.

But, here, the whole reason for using this material witness statute is that there isn't probable

cause to believe that al-Kidd did anything. The violation -- there was no violation of the law. So Whren is different. It's a different case.

GENERAL KATYAL: Justice Ginsburg, it's certainly different in -- in that respect, but I do think that difference doesn't matter, because I think what Whren and Edmond and the cases were getting at is, is there some objective, individualized determination by a neutral judge? And, here, as I was saying earlier, there is quite clearly that laced into the 3144 statute itself; that is, the judge must find materiality and -- and impracticability of the testimony. And that is a standard performing, I think, a long-standing government function of making sure that testimony, important testimony, is available at trial.

So it is not like a situation in which the government, just on their mere say-so, can put the -- can detain someone on the basis of them saying, well, we think this person has information. I think there are strict standards placed on that, and, indeed, Federal Rule -- Federal Rules of Criminal Procedure 46 adds standards to it by saying that a prosecutor must report to the judge every 10 days about anyone who is detained and assure no more detention is necessary. So that --

JUSTICE SCALIA: I don't see --

JUSTICE GINSBURG: How does that --

JUSTICE SCALIA: I don't see how that would make any difference to the -- at least to the absolute immunity question. You wouldn't assert that there is absolute immunity if there's a statute such as this, but there is not if there isn't. I mean, either this is core prosecutorial function for which he can't be sued or it isn't. So what difference does this statute make as far -- as far as absolute immunity is concerned?

GENERAL KATYAL: Absolutely, Justice Scalia. I was just answering Justice Ginsburg's question about qualified immunity.

JUSTICE SCALIA: Okay.

GENERAL KATYAL: I imagine one point about the statute might be that the statutes, going all the way back to 1789, do reflect that this is a prosecutorial function to the extent there is any doubt. So, for example, the 1846 statute said that an attorney -- excuse me, an attorney of the United States must apply for a material witness warrant.

JUSTICE SCALIA: So for us to agree with you on absolute immunity, we -- we would have to believe that even if there were no such statute and if a prosecutor simply detained somebody as a material witness without any check of a -- of an independent

magistrate, he would be immune?

GENERAL KATYAL: I think that is correct, that that is quintessentially what prosecutors do in the exercise of trying to get a trial -- a trial going. Now --

JUSTICE BREYER: Suppose -- suppose that a prosecutor reads the statute, there must be an affidavit that says this witness is material. And there is irrefutable evidence that the prosecutor said to colleagues and others: I do not intend to try this person, ever, no matter what; I just want to ask him questions. In that case, has the statute been violated because he is not material?

GENERAL KATYAL: Well, if the -- if the -- I'm not sure I totally follow --

JUSTICE BREYER: I'm not saying it's this case. I'm saying it's a hypothetical case.

GENERAL KATYAL: If the evidence shows that the evidence is not material, then the statute is violated.

JUSTICE BREYER: And the reason it is not material is because the prosecutor has no intention whatsoever of ever bringing this person as a witness in any trial.

GENERAL KATYAL: I do think that that would

generally mean that materiality would be violated. I could imagine --

JUSTICE BREYER: All right.

GENERAL KATYAL: -- some theoretical construct --

JUSTICE BREYER: If materiality is violated, does not then that -- that prosecutor -- since he had no intention of bringing him to trial or of having him as a witness at a trial, that prosecutor would not be immune?

GENERAL KATYAL: Justice Breyer, let me -- let me --

JUSTICE BREYER: -- yes.

GENERAL KATYAL: -- just make sure that I understand the contours of your hypothetical. I don't think that subjective motivations of the prosecutor go to materiality. So if --

JUSTICE BREYER: Well, how does -- how does it --

GENERAL KATYAL: Here's how I think it works: So I think that Congress set up the objective two-part test to decide whether or not an arrest warrant would take place, which is materiality and impracticability. Now, that isn't subjective; that is simply, does the person have material information that can be used that -- that's relevant to the trial.

Now, if the person has a -- the prosecutor has a subjective intent that says I'm never going to use this testimony, then I think that that doesn't -- that will -- that will almost always reflect the fact that materiality just objectively hasn't been met in a given case, but theoretically I could imagine a circumstance in which the prosecutor has that subjective intent but yet is material.

With respect to that, Congress has a different safeguard at the back end, in 3144, and that is the language in 3144 that says a judge in the detention hearing is to inquire as to whether or not the detention is necessary, quote, "if there will be a failure of justice" if the person is released.

JUSTICE SCALIA: And you can't look behind that, right? You can't look behind that? If the -- if the judge has said it's material, that's the end of it; you have absolute immunity, right?

GENERAL KATYAL: Well, I think that the -- the defense can litigate that and appeal that set of issues, but I don't think --

JUSTICE SCALIA: Can appeal the -- the judge's determination that -- that it's material?

GENERAL KATYAL: Absolutely.

JUSTICE SCALIA: Well, then how can you have

absolute immunity?

GENERAL KATYAL: Well, they did, because we're talking about --

JUSTICE SCALIA: Oh, you mean at the time it's issued?

GENERAL KATYAL: Exactly.

JUSTICE SCALIA: I see.

GENERAL KATYAL: At the time itself. But I think that's an important point, Justice Scalia. With respect to absolute immunity, this Court has often said that it is the crucible of the trial process itself that often is a safeguard against abuse.

JUSTICE SCALIA: Well, what if you didn't have -- again, what if you didn't have this prescribed judicial process?

GENERAL KATYAL: I take it that the logic of this Court's precedence is that absolute immunity would still apply. And the reason for that is that absolute immunity isn't some rule to just protect prosecutors willy-nilly; it's to protect the public. And as this Court said most recently unanimously in the Van de Kamp case, that -- quoting Learned Hand -- that -- that there is a cost to this. No doubt that certain individuals will be harmed, but the cost of rooting out the bad apples through damages lawsuits is far worse, that it

causes prosecutors to flinch in the performance of their duties.

JUSTICE SOTOMAYOR: There is a difference between calling a witness at trial and arresting a person. How is it a part of the prosecutorial or the trial function to arrest someone? Isn't what's protected absolutely is your use of that person at trial, not your arrest or detention of them?

GENERAL KATYAL: No, I do think it goes quite a bit further than that. I think it -- and I think Burns v. Reed -- and the relevant language is at page 492 -- I think is -- is relevant because it says that it's pretrial conduct, in order to secure the testimony for trial or the like is -- is what is protected as well, that it would be far too narrow to just focus on the trial itself; and that would be the contours of absolute immunity.

I think Justice Kennedy's opinion in Buckley is also instructive in this regard, because what that opinion says is that allowing only immunity for the trial would just allow individuals to constantly replead their allegations and focus only on the pretrial conduct and be an end run around absolute immunity. And, again, absolute immunity is important not for the prosecutor for his own sake or her own sake, but because ultimately

that is what -- that causing -- damage liability will -- will make prosecutors flinch the performance of their duties more generally.

JUSTICE SOTOMAYOR: You don't -- you don't think there's a reason to make prosecutors flinch against willy-nilly -- that's not what I'm -- I'm claiming happened here, but if you take the point that you're raising, then prosecutors can out of spite, out of pure investigative reasoning, out of whatever motive they have, just lock people up.

GENERAL KATYAL: Justice Sotomayor --

JUSTICE SOTOMAYOR: And you're -- you're basically saying --

GENERAL KATYAL: -- making prosecutors flinch is -- is always a bad thing. What I'm referring to is this Court's precedents that say damages liability on prosecutors is the wrong way to go about it because the costs are too high compared to the benefits, and there are other ways of dealing with that -- from professional discipline, as Malley v. Briggs and Imbler said; to -- to -- to bar actions; to the crucible of the trial process itself, which is a way of dealing with that.

JUSTICE SCALIA: Well, there are procedures set forth in the statute, I'd say you would add, which

you think are not necessary, but are there in order to make them flinch in a different -- in a different --

GENERAL KATYAL: That is precisely correct. We don't think those are constitutionally compelled, but we do think they provide a very important safeguard.

JUSTICE KENNEDY: What's your best authority that at -- at common law or the common law tradition, there is absolute immunity for witness -- for the issuance of witness warrants?

GENERAL KATYAL: I don't think it's come up with respect to public prosecutors, and so our argument here, to the extent the Court reaches that question -- and, again, it wasn't -- it wasn't raised below in the brief in opposition, but if the Court wanted to reach that question, I think it would be that the argument would derive the same way as the arguments in this Court's post-Imbler cases, which is, as long as it is intimately associated with the judicial function that the prosecutor is doing, then absolute immunity should extend to that context.

JUSTICE KENNEDY: Then a second question, quite apart from immunity, just addressing the substantive constitutional issues under the statute, suppose that the prosecutor has probable cause to indict and try the person for the crime. Suppose also that

there is good reason to show that he would be a material witness as to another participant in the crime. Does the government have any duty to proceed with the indictment, or can they just hold the person as a material witness without indicting?

GENERAL KATYAL: I do think that the government -- I'm not sure if we have any policy with respect to that, but I think that -- that we -- that at least for Fourth Amendment purposes, there wouldn't be a violation if the government held the person for essentially a dual motive, and that is what I understand they have now conceded at page 31 of their brief, which is in dual motive cases, the government's action is permissible.

If there are no other questions, I'll reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Gelernt.

ORAL ARGUMENT OF LEE GELERNT

ON BEHALF OF THE RESPONDENT

MR. GELERNT: Mr. Chief Justice, and may it please the Court:

In Dunaway, this Court emphatically reaffirmed the bedrock Fourth Amendment principle that a criminal suspect may not be arrested, absent probable

cause to believe there has been a law violated. The rule is fundamental to our traditions, is widely viewed as a defining feature of our country, and has been steadfastly protected by this Court for more than 2 centuries in both good and bad times.

The material witness statute represents a dramatic departure to the rule, allowing the arrest of uncharged, innocent, even cooperative people. If a material witness arrest is constitutional, it can only be because its purpose is to secure testimony and not to preventively detain and investigate the witness himself.

JUSTICE SCALIA: Do you acknowledge that it is then constitutional? Your -- your opening comments make me think you don't even acknowledge that it's constitutional then?

MR. GELERNT: Justice Scalia, we are not pressing that argument. I would say that based on the legal historian's brief there is a strong argument to be made that it is not constitutional, with respect at least to cooperative witnesses. The statute the Framers enacted in 1789 would not allow the arrest of any witness unless they came voluntarily before the magistrate and refused to even promise to return. Not even a surety or a -- a surety or a bond was allowed. So we do think there is a strong argument, but we are

not pressing that argument.

Our argument is that it cannot be used for ulterior purposes. And I just want to pick up, if I can, with Justice Breyer's hypothetical that he posed to the government, which is of course our hypothetical. The government started out this case throughout the lower courts and in the opening brief saying purpose is wholly irrelevant. This is Whren, even though Whren is probable cause to believe a law has been violated; this is Whren, purpose is wholly irrelevant.

We posed a hypothetical which we actually think is this case and is consistent with our factual allegations, that the sole reason this arrest was made was not to secure testimony but to preventively detain and investigate someone for whom there was no probable cause or violation of the law.

That is -- is a difficult situation I think to reconcile with Whren, I think an impossible situation to reconcile with Whren, or with the text or history of this statute.

The government has now come back and trying to have it both ways and saying, well, the statute wouldn't naturally allow that. But if purpose is -- as Justice Breyer pointed out, if purpose is truly irrelevant why they want to make the arrest, the

government should have answered "that would be fine. The only things we need to satisfy are the objective components of materiality and impracticability."

JUSTICE ALITO: Is this a -- is this a realistic hypothetical that you've posed? Now, in order to detain someone under the material witness statute, that person, potential witness, must have material testimony, not just relevant testimony, material testimony, testimony that would be of some importance in the criminal prosecution. So your hypothetical is a situation in which there is a witness and this witness has important testimony that could be used in a pending criminal case, and yet the prosecution has absolutely no interest in calling that person as a witness.

How often is that going to arise?

MR. GELERNT: Well, Justice Alito, I -- I think a few points, one is just as an initial matter. The statute has not actually been interpreted to go beyond relevance, in the way you're posing it. Interestingly, earlier statutes actually said the testimony needed to be necessary. And so, that's -- that's actually an important watering down.

But putting that aside for the moment, we think that what -- it -- it did happen in this case, it happened after 9-11, I think that goes to the crux of

our case here. We are not trying to fiddle with the use of the material witness statute in the every day context, and I think that's the point the Federal prosecutor's brief is making.

What we are saying is simply that the principle has to be that if you do encounter that extreme case, this Court should not bless the situation where it literally can be used as a preventive --

CHIEF JUSTICE ROBERTS: The problem, and it's, I think, the problem that I think Whren highlighted is that the -- the allegation can so readily be made in every case under the material witness statute is that this is one of those bad intent cases, and the case has to proceed so that we can prove that.

One of the ways we prove that is by asking everybody who is involved in the process. Why did you do this? What was your intent? I mean, the whole purpose of Whren is to make sure that kind of stuff doesn't happen.

MR. GELERNT: Yes, Mr. Chief Justice, but let me -- let me say that I think I -- I understand Whren, I obviously don't want to tell the Court about its own cases, but is that it was drawing a conceptual line, that the first point about Whren, and I think the fundamental point, was the conceptual point that as the

Whren court put it, only an undiscerning reader would conflate cases in which there was probable cause of a violation of the law with cases in which there wasn't.

So I think the Whren court is not saying we wouldn't look at purpose. I think that's the teaching of the special needs cases.

Now, to your practical question about why would this be hard to allege? I actually think that this is one of those unique situations which it would be very difficult to allege. Take the government's cases, for example, that they've cited, like Daniels and Betts, the material witness cases, you have witnesses being arrested, not showing up for trial. As the court of appeals made clear in those cases, they were the main witnesses, not showing up on the day of the trial or right before trial.

It would be virtually impossible for those witnesses to turn around and say the only reason I was arrested was for investigative purposes. And I think that on top of the fact that this statute is used very rarely, I mean what we have pointed out is other than in immigration cases, which the person is already subject to custody, there are only a few hundred each year.

And again, I think what the Green brief is saying by the Federal prosecutors is, look, the settled

understanding of this statute among line prosecutors has always been, you use it to secure testimony. Maybe there's a windfall in the back of your mind that this person might be a suspect, but you certainly can't use it where you have no intention of using the testimony. I think then the limitations on this statute become meaningless. I mean, take --

CHIEF JUSTICE ROBERTS: So every time the prosecutor elects not to call one of these witnesses for a variety of reasons, you would have a claim that this wasn't designed to elicit testimony?

MR. GELERNT: No, no, we don't think so, Mr. Chief Justice. I -- I think what we have -- we have said is that calling the witness or not calling the witness can't be determinative. I think one reason is you wouldn't want to create a perverse incentive to have prosecutors simply call the witness just to cover themselves. So I think you would have to allege much more, and I think that's what we have done.

I think there is an entire set of allegations with respect to Mr. Al-Kidd, and they fit a national pattern. And I would importantly say in the questions presented, the government raised an Iqbal claim as to plausibility only as to a small part of this case which is no longer part of the case, which is, was

Mr. Ashcroft involved in the specific statements in this specific affidavit.

They did not allege that the allegations of a pretextual policy were implausible. So it is not before this court, it is not a question presented, and I think it is telling that the government didn't raise it. They are sitting on all the information about what happened after 9-11 as a policy matter, and they did not claim it was implausible.

JUSTICE KENNEDY: Just a point of detail. I -- I may not be recalling correctly. You said this statute is rarely used. I thought there were 4,000 material witness hearings a year. Is that mostly because of the immigration?

MR. GELERNT: Yes, Justice Kennedy, and I apologize if I wasn't clear. That what the -- what the court of appeals showed and what the statistics also show is that roughly 92 percent of the cases are immigration cases, where the person is already subject to custody, and there wouldn't be any need to use it in that pretextual way.

So what we're talking about is a few hundred each year throughout the country, and again when it's used properly, it's going to be virtually impossible to allege something like this.

JUSTICE KENNEDY: Do we -- do we -- do we have statistics for the States, how many States hold -- how many people are held under State material witness statutes?

MR. GELERNT: We have -- we have looked for those, Justice Kennedy. We have not been able to find them. What we do know about the States, though is that more than 30 of the States have statutes that are much more restrictive than the Federal Government, because what they do is they follow what the framers did in 1789, which is to say the witness has to be given an opportunity to comply, and that's what the framers did. You have to ask the witness if they will continue to comply. If they won't -- or you have to make a showing of why it's impossible to ask them.

So, I think in many States it won't be a problem. I think actually, you know, the State issue is an important one because what the Federal Government is arguing here is, of course, well, our prosecutors are very well supervised. Well, that -- that doesn't take into account if there is a deliberate attempt to misuse it.

But I also think what we're looking at are States, local counties, cities where there may not be the resources necessary to put checks on, and what the

government's asking is for this Court to hold that as long as you can make the minimal showings of impracticability and materiality, which don't even require the evidence to be important or that the witness be uncooperative, you then can have any purpose you want. So you could have States, cities, local counties saying every member of this gang or every member of this business must know some information about the person that's been indicted.

JUSTICE ALITO: Your argument is that the Constitution does not allow a material witness to be detained, so long as the witness says in court that he or she will show up for trial, no matter how much evidence there is that this person poses a great risk of flight? If the person says in court, I will be there, that's the end of it, the person cannot be detained?

MR. GELERNT: Do I think the Constitution requires that?

JUSTICE ALITO: Yes.

MR. GELERNT: I think it probably does, but we are not taking a position on that. I mean, what we are basically saying is that it is out of whack historically. It wasn't until the mid 1900s where that could happen, where even if they said they would come back, you could hold them. So I think it's out of whack

historically, and there may be a real constitutional argument.

We are not pressing it. We are simply saying that if it's used for its proper purpose, then we are going to assume it's constitutionality, which the Ninth Circuit did, but it can't be that it can be used as a preventive detention. And I think any reasonable official -- and I want to go to the qualified immunity if I could -- would have seen that, because I think the analysis would have been the following. You would have pulled out Dunaway, and you would have seen that you need probable cause to arrest someone, probable cause of wrongdoing.

And you would have then said, well, we don't have probable cause of wrongdoing, so you would have pulled out Whren then, because Whren talked about pretext. What Whren would have told you is do not conflate cases in which there's probable cause of wrongdoing with cases in which the court has granted an exemption from the probable cause --

JUSTICE ALITO: You might turn out --

CHIEF JUSTICE ROBERTS: If you were writing a law review article, you might have done that. But we're talking about an officer. I think the first thing you would do is say, well, let me see these material

witness statute cases, and what would he have found?

MR. GELERNT: Well, I think what he would have found, Your Honor, is that the Court has not specifically -- I grant that it has not specifically ruled on the Fourth Amendment, but what he would have found in Barry and the other cases, is that the Court repeatedly, repeatedly referred to statute as a means of securing testimony.

So I think the reasonable official would have said to themselves, well, it's clear under the Fourth Amendment that I don't have probable cause, but maybe the statute is allowing me to do it.

Now, first of all, it statute can't authorize a Fourth Amendment violation. But putting that aside, just a --

CHIEF JUSTICE ROBERTS: But, again, you're talking about the officer, he reads the statute and then doesn't say, well, but maybe the statute's unconstitutional, so I need to do more research?

MR. GELERNT: Exactly, Your Honor. And I think what the research would have been done, they would have looked at Barry and all this Court's other cases and would have specifically said it's to secure testimony, and then I think a reasonable official would have looked at the text of the statute, everything in

the text of the statute is about securing testimony, including the deposition requirement, you must be released if your deposition is taken, you must have a deposition.

All of those things do not suggest -- if the government's interests could be simply we want to hold this person because for preventive detention reasons, none of the statute would make sense. I think that a reasonable official could not have turned to this statute and said, yes, I'm looking at the statute, and it seems like I can use it for whatever reason I want.

CHIEF JUSTICE ROBERTS: So the eight -- eight judges taking the opposite position in the hearing en banc below were just being unreasonable? It would have been unreasonable for an officer making this determination to agree with eight judges from the Ninth Circuit?

MR. GELERNT: I think, Your Honor, the -- Mr. Chief Justice, the only way I can answer that is to say this Court has -- has never made determinant of whether there are dissents. I mean, take the Brogue in this Court, two justices of this Court descended on merits and yet you still found that the law was clearly established.

CHIEF JUSTICE ROBERTS: What we said in

Wilson, I'm quoting, judges -- when judges disagree on a constitutional question, it is unfair to subject public employees to money damages for picking the losing side of the controversy.

MR. GELERNT: I mean, but I think Brogue goes the other way. Ultimately, all I can say, Mr. Chief Justice, is I think that the -- the fact that there were dissenters can't be dispositive, and ultimately this --

CHIEF JUSTICE ROBERTS: Well, I agree with -- I agree with that, of course, but at the same time, it does seem that you're imposing a very heavy burden on the officers in this area when do you have a situation where eight judges, when they conduct their research, come out the other way. And that type of burden is particularly heavy when you're talking about if they guess wrong, it comes out of their pocket. And if I'm the officer in that situation, I say, well, I'm just not going to run the risk of, you know, having to sell the house because I agreed with eight judges on the Court of Appeals.

MR. GELERNT: Well, Your Honor, I think -- you know, of course, I'm not sure it will actually come out of their pocket, but I get the crux of your point. I do think ultimately, though, that this is a situation

where a reasonable official would have had to say to themselves: I can use this as preventative detention. Because I want to be very clear about our position and how narrow it is.

We would concede, for purposes of this argument, that if they wanted to use this for dual motives, then there would have been a real question there. If they said, look, we want the testimony, that's what the statute talks about, but we also hope that maybe something else will come out of it, that's a closed question. But if they would have said to themselves, which is all we're saying this case is about, is: Look, we don't want this testimony. In Justice Breyer's hypothetical, there's clear, objective evidence. We don't want to use this testimony, perhaps it's counterproductive in our case; we're not going to use this testimony, but we would like to hold the person. I think that is very difficult for a reasonable official to say to themselves, this statute grants me preventive detention powers.

I mean, I think you would be looking at a statute going back to 1789 that this Court has repeatedly commented on that is only about testimony. You would be saying to yourself, this statute allows me to engage in preventive detention even though Congress

has never passed a statute like that, Congress specifically rejected preventive detention powers --

JUSTICE ALITO: You don't think that an official reading all this Court's cases saying subjective motivation is not proper in determining the application of the Fourth Amendment would be able to think that this would apply here, too? Subjective motivation doesn't count here; what counts is whether there's -- there are objective criteria that would permit the detention?

MR. GELERNT: I don't think so, Justice Alito, respectfully. I think when you pulled out Whren, which, of course, is this Court's landmark decision on pretext -- Whren could not have been clearer. The Court specifically said only an undiscerning reader would conflate the two. And I think the conceptual point Whren was making is straightforward.

The Fourth Amendment says you need probable cause or a violation of the law to arrest someone. If the government wants to walk in and ask for an exemption from that standard and says, the reason we want the exemption is because of the purpose of the arrest, then the Court in Whren said, well, then they must adhere to the purpose. Otherwise, it's simply an end-run about the probable cause.

I mean, consider two cases --

JUSTICE SCALIA: But the Fourth Amendment doesn't say you need probable cause. There are situations where you can conduct a search without probable cause. There's the Terry search. There's administrative searches. There's a lot of exceptions.

MR. GELERNT: Yes, Justice Scalia, but I think -- well, the Terry -- the Terry stops, I think we put to one side, because as the Court in Terry said and as this Court has interpreted Terry, those were because those were not full-scale arrests and the administrative -- sorry.

JUSTICE SCALIA: Administrative searches, automobile searches, you know.

MR. GELERNT: Absolutely, and those all fall into the special needs category, and those were cases you, Your Honor, in Whren distinguished as conceptually different than when there's probable cause of a violation of law, because what you yourself said in Whren was: Look, the government is asking for an exemption from the traditional Fourth Amendment standard and they're saying the reason we want the exemption is because of the purpose of our search.

You said, well, then, of course we're going to hold the government to that purpose. They can't tell

us, look, we don't want to meet the Fourth Amendment standard because of the purpose of what we're doing, but then turn around and not adhere to the purpose.

And so if you had two cases, one where there's probable cause of wrongdoing and another case where there wasn't, the judge would say fine to the first one and then he would say to you, well, the second one, you don't have probable cause. The only thing the government could say at that point was, well, that's true, but we're not trying to investigate or prosecute the person as in Dunaway. We have a different purpose. Maybe it's administrative. Maybe it's to secure testimony. Maybe it's a roadblock. Maybe it's something else. And then if the Court said, well, fine, then go ahead and do that search on less than probable cause, if that's your purpose, you couldn't turn around then and not -- and then not adhere to that purpose. I mean, I think that's what we're talking about, is that --

JUSTICE ALITO: You seem to acknowledge that in -- a dual motive case would not violate the Fourth Amendment, or wouldn't necessarily violate the Fourth Amendment; isn't that right?

MR. GELERNT: Yes, Your Honor.

JUSTICE ALITO: Do you think that a

reasonable official would appreciate, well, it's okay for me to have a dual motive, but I have to stop and think: Is my interest in investigating this individual further the but-for cause of my desire to get a material witness warrant? Do you think that was apparent?

MR. GELERNT: I think it actually is, Your Honor, and the reason is because I think it's -- I think it actually gives cushion to the reasonable official, because I think once you are saying we want to secure testimony, it might be very difficult, as the Chief Justice was pointing out, to say, well, how I do know if I could have ulterior motives or not? That might be a very difficult situation.

But I think a reasonable official -- this Court's proposition that this Court would have to -- would have to bless, based on the allegations here are, the official said, look, we think we can show materiality and practicability because Mr. Al-Kidd is taking a trip, he is being cooperative, but he is taking a trip and he works for the same charity. We do not want the testimony. We can't use the testimony in this trial. The only reason we want to do it is to hold him, and we don't have probable cause of a violation of the law. I think any reasonable official would have understood that as preventive detention, and there --

JUSTICE KENNEDY: I'm not sure why that just can't be resolved under the issue of materiality. The magistrate asks the prosecutor why he wants to do this, and he infers from what the prosecutor said that -- just what you say. Then it's not material. It's not a case.

MR. GELERNT: That goes to the crux of, I think, what is going on here. We have said that both the Fourth Amendment and the materiality as well as other parts of the statute would deal with it precisely. The government's opening brief and throughout the lower courts said, no, it doesn't matter if you're going to use the testimony or not or we have any intention.

We posed that hypothetical in our brief. The government came back and said, well, maybe that could be done with materiality. If the government was going to stick to their position, their conceptual position, they would have come back and said, look, the objective components of materiality and of practicability have been satisfied, because he's taking a trip and he worked for the same charity, and who cares whether -- so if the Court is prepared to put a limit on, you have to use this for its stated purpose, testimony, that's all we're asking for. I mean, the case has changed now because of the concession that the government's made on pages bottom of 15, top of 16,

where they're now saying, yeah, that is a tough situation, and maybe we can deal with that through the statute. But that's all we're saying.

The Ninth Circuit understood this as a sole motive case. The government understood it in their cert petition and in their brief to this Court as a sole motive case. We have said we think the analytical test is a but-for, but we're prepared to go with sole motive, and our allegations, our factual allegations, are consistent. In the proposition, we are simply saying, we don't think this Court can bless it. You satisfy practicability in some objective way; you don't care whether you're going to use the testimony, you may have no use for it, but it's an end-run around locking people up.

JUSTICE ALITO: Where did you allege that the desire to detain was the sole motive for this?

MR. GELERNT: Your Honor, I think that the clearest allegations are at 111 and 112 and 154 of our complaint, in the joint appendix. What we said is it was not to secure testimony. And I think the Ninth Circuit certainly understood it that way at pages -- I apologize -- 25A and 40A of the opinion. And the government, in its cert petition and its brief, understood it that way in saying, we don't know how the

Ninth Circuit would deal with a mixed motive case, clearly suggesting that the Ninth Circuit was a sole motive case; and so again, all we are saying is it cannot be that this statute be transformed into a preventive detention statute, and I think particularly so because the government after 9-11 specifically -- as the green brief notes -- specifically asked Congress for preventive detention power, and that power was denied. What they granted was a very limited 7-day hold only for noncitizens.

And so I think what we're talking about in many respects -- at a macro level is a separation of powers case as much as a Fourth Amendment. I think it's not -- it's not dissimilar to the dialogue this Court has been having in the Guantanamo cases with, look, you need to go beyond the Fourth Amendment; if you think you need such a fundamental change to our country's traditions, Congress is going to have to take the first step, we'll look at it and there will be a back and forth.

But here what happened was the preventive detention powers were denied and yet the government still went ahead and used the material witness statute. And again, I can't stress enough that the government did not raise an Iqbal claim as to the plausibility of these

allegations. Only now in the reply brief where they're -- they're trying to address a sole motive situation, or a but-for, which is all we're asking this Court to address, the government has now said the allegations are implausible.

I think that in many situations -- you know, with the absolute immunity point, if I could just turn to that for a second -- the history, as you said, Justice Kennedy, the government has conceded they don't have a case on their side. We have plenty of cases in which, as the historians' brief points out, and as our brief points out, in which there was not immunity for the arrest of a -- for the arrest of a witness, which is very different than calling a witness, Justice Sotomayor.

And what we are talking about here also is the government's burden. So I don't think that's something we could have -- we could have waived, especially since the Ninth Circuit addressed it and put the government on notice that the government came forward with no historical evidence; and it's not inconsistent with warrants generally.

As this Court made clear in Malley, it surveyed the history of arrest warrants and said, look, arrest warrants, there's no history; we're not going to

grant absolute immunity for arrest warrants. In Burns, Justice Scalia pointed out that there is no history with respect to search warrants, and I think the history with respect to material witness warrants is even clearer. So what we're talking about is no history; we're talking about a fairly ancillary and rarely used process to the criminal justice system, and one we're talking about where there's sort of a unique confluence of factors where you have someone who is not the defendant in the trial, who is a third party, and their liberty is being deprived; and it's the type of statute that can be abused. I mean, I think the government's whole point is it's a dual -- it's a dual motive type statute; and so that because it can be inherently abused, there has to be some checks on it.

And this Court has never said that you would have absolute immunity for all prosecutors in all cases. We are certainly not raising a motive case with respect to absolute immunity. What we are simply applying is the Court's test in absolute immunity, which is the functional approach, you have to make that threshold determination about whether something is investigative or not; and I think that's the teaching of Buckley. Take two witness interviews. They're the same act, but the prosecutor clearly can be engaged in interviews for

different reasons.

In Buckley, it happened to be on those facts the Court believed it was investigative, based on the allegations in the complaint. But what if it were 2 days before the presentment to the grand jury? It's likely the prosecutor would have assumed he had probable cause at that point and was prepping the witnesses.

Those are two acts, but you have to look behind them. I think there's no way around looking behind. The alternative, the flip side of what the government's asking, is: rigidly categorize every single act a prosecutor may undertake in this country and say it's either wholly investigatory or wholly prosecutorial. And I think that's a very difficult test.

I think there's no reason why district courts can't make an initial determination. I think here in particular, Judge -- was in a unique position to make the determination. He sat at the underlying trial of Al-Hussayen, so he knew what testimony and what was going on. He --

JUSTICE SCALIA: You're -- you're going way beyond what I thought you were arguing. You're saying you always have to make that determination of good faith, right? In -- in all cases, including when the

prosecution is -- is accused of -- of bringing a prosecution purely for harassment purposes?

MR. GELERNT: No, Your Honor. And I -- I -- Justice Scalia, I apologize if my argument was going beyond.

JUSTICE SCALIA: That's what I thought you were saying.

MR. GELERNT: I think what's going on here is there's a unique set of factors with respect to material witness, not the least of which is the history with respect to both material witness arrests and warrants generally, and I think there's been no counter-history by the government. I think back --

JUSTICE ALITO: We're dealing here with a Bivens action?

MR. GELERNT: Yes, Your Honor.

JUSTICE ALITO: Under what theory is the history of immunity at some point in the 19th century relevant to the scope of the immunity that should be available in a -- in a Bivens action? What's the theory for that?

MR. GELERNT: Well, Your Honor, I think -- I don't know that I have an independent first principles theory. I think this Court has said repeatedly that you will keep the immunities coterminous and you will look

to the history in both cases. So that's the Butz case.

JUSTICE ALITO: Does that make any sense? I can understand it with respect to 1983, on the theory that when Congress passed the predecessor of that statute it implicitly intended to adopt the immunities that were available at the time; but when this Court invented the Bivens claim -- in when -- 1971 or whatever -- that the Court -- the Court was -- committed itself to recognizing only those immunities that were available at the time when 1983 was adopted?

MR. GELERNT: I think, you know, part of what the Court's answer is, it's a practical concern. That it's just too difficult to have different immunities, and the Court -- so the Court has repeatedly reaffirmed that, and I think from a policy standpoint, a practical standpoint, it's felt that that's the right analysis, and there has to be some way to tether the immunity analysis; and history is ultimately, I think -- what the Court has said it's a necessary though not sufficient, and that once you sort of unmoor it from history, it becomes very difficult to keep the two.

So I think what we're talking about here is a -- a statute that had enormous consequences. It's third parties who have been cooperative, even, who have done nothing wrong, that end up in jail, and to say that

there is going to be absolute immunity is very dangerous. This Court has repeatedly said that the thumb has to be on the scale against absolute immunity. That's an extraordinary protection, and if there's anywhere where there needs to not be complete insulation, it would be where you have third parties, and -- who are going to jail.

The only other case, prosecutorial immunity case this Court has had where it was a third party and not the actual defendant was Mitchell, and the Court denied absolute immunity.

All the other cases, some of which you have denied absolute immunity, some of which you have granted, it's been the defendant in the full judicial process. Here we're talking about third parties after 9-11 who repeatedly went to jail. I think the allegations are very clear that it's at least but-for -- we think sole -- but certainly far more than dual motive. People were held -- half the people were held more than 30 days, even though the statutory presumption is 10 days. Many people were held for months. They were arrested at gunpoint. They were not immunized; half the people were not called to testify.

It went on in cities all over the country, people being held under horrendous conditions for long

periods of time, interrogated about their own activities.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General, you have 10 minutes remaining.

REBUTTAL ARGUMENT OF GENERAL NEAL KUMAR KATYAL

ON BEHALF OF THE PETITIONER

GENERAL KATYAL: Thank you. This is a simple case. It's not about Guantanamo, 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 AUSAs for doing their job, when they're alleged to have a bad motive?

If I could start with the Chief Justice's point about the cost of these lawsuits and allowing them to proceed. My friend on the other side says, well, but this will be a small, rare case, an isolated example, but I don't think that's true. I think if you allow their motivation argument to -- to -- to pierce absolute immunity, you will have this in every case or near every case. 95 to 96 percent of Federal cases are resolved by plea agreements. So there isn't someone who is actually called at trial. You could allege it in any of those cases.

And particularly when you lace on to that

what my friend has said is a disturbing, quote, "national pattern of abuse" of the material witness statute, something which we --with which we vigorously disagree, but if you could add the fact that someone wasn't called on in a trial to that national pattern, then you'll be having these damages actions quite a bit of the time. Now he says don't worry, it will only be a few hundred of these lawsuits. Well, leaving apart the fact that that excludes immigration cases and excludes the States' cases, as Justice Kennedy said, a few hundred lawsuits just at the Federal level filed against the Attorney General?

JUSTICE GINSBURG: General Katyal, there are some elements of this picture that are very disturbing, and we are talking about the Attorney General and the Attorney General's immunity. But there are allegations here that this man was kept awake, the lights shining in his cell for 24 hours, kept without clothes. Now that doesn't sound like the way one would treat someone whose testimony you want. Is there a remedy that he has for that obvious mistreatment?

GENERAL KATYAL: Justice Ginsburg, with respect to that whole set of questions, conditions of confinement, that isn't before the Court right now. What is before the Court is -- is exclusively Fourth

Amendment concerns. Now, Mr. Al-Kidd did sue other people, including the warden who was responsible for that, and I think that there have been other ancillary litigation with -- with respect to that, but to hold either the Attorney General or prosecutors liable is something that would, I think, ultimately open the door to, at least there are a few hundred lawsuits at the Federal level if not more.

JUSTICE BREYER: I would like to go back to the statute. If an officer fills out an affidavit for a search and says there were drugs in the house, so I want to search it, and it turns out he was lying, you would have a damages action?

GENERAL KATYAL: The officer --

JUSTICE BREYER: Yes, yes.

GENERAL KATYAL: -- you have -- you potentially have a damages against the officer, not against the prosecutor?

JUSTICE BREYER: No, no. I'm saying the officer, because he told a lie.

GENERAL KATYAL: Yes.

JUSTICE BREYER: All right. Now here it says that the person filling out the affidavit has to say he is a material witness. So suppose that the plaintiffs were to prove that the individual who signed

that was not telling the truth in saying he is a material instant -- witness because not just but for, but there was no possibility he would call this individual, none. And that's what they have to prove. It's really very hard burden of proof.

Now, one, would that interfere significantly with law enforcement? And, two, how do you distinguish it from the drug case?

GENERAL KATYAL: Justice Breyer, I'm not sure if your hypothetical has it as the prosecutor who is filing the affidavit and lying or the agent. If it is the agent, I don't think that is something as to which absolute immunity, that's Malley v. Briggs and a whole line of cases. Qualified immunity, of course, would, and indeed those claims are pending in this --

JUSTICE BREYER: But in the case of the agent, you're prepared to say that we will allow the plaintiff to go into his motive to the extent that the plaintiff can show there is no possibility he intended to call this individual?

GENERAL KATYAL: I think that at least for purposes -- I would say there is at least no absolute immunity prohibition against that. There may be -- may be relevant under other lines of authority.

But with respect to my friend's point about

your hypothetical in which he said that there -- you know, the government isn't sticking to its position or something like that, I just want to be clear. Our position is for the Fourth Amendment, it doesn't look to subjective motivations at all. That's Whren and Brigham City and the like, but the statute in 3144 does have safeguards, prophylactic safeguards to guard against the type of abuse that I think several justices have mentioned today. So that you could only detain someone so long as their release wouldn't result in a failure of justice and the like.

My friend also said that -- that there's no historical precedent for this. I would urge the Court to look at the 1846 statute, which didn't require failure to comply before a witness was brought in on a material witness warrant and it didn't -- and it had sureties in it. I don't think what the government is doing here is any different.

Maybe I'll just make one final point, picking up on what Justice Alito said about the allegations in this very case, because I don't think if you look at the complaint that the allegations in this case prove either that the Attorney General or the line AUSA had a single motive. This is fleshed out at pages 17 to 19 of our reply brief. At best, they're

consistent with their newly minted standard, a dual motive standard.

And given that, I think that the complaint would fall on their own terms, and indeed that law -- that line that they're proposing, a but-for causation line, would be extremely difficult to apply in practice and would ultimately lead to lawsuits filed against attorneys general and line prosecutors alike.

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, General.

The case is submitted.

(Whereupon, at 12:14 p.m., the case in the above-entitled matter was submitted.)