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1 P R O C E E D I N G S

2 (11:18 a.m.)

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

6 ORAL ARGUMENT OF GENERAL NEAL KUMAR KATYAL

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 is held immune by absolute immunity or by qualified
2 immunity?

3 GENERAL KATYAL: Oh, no, it --

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

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

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

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

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

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

15 JUSTICE SCALIA: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: I don't see --

1 JUSTICE GINSBURG: How does that --

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

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

13 JUSTICE SCALIA: Okay.

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

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

1 magistrate, he would be immune?

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

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

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

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

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

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

25 GENERAL KATYAL: I do think that that would

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

3 JUSTICE BREYER: All right.

4 GENERAL KATYAL: -- some theoretical
5 construct --

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

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

12 JUSTICE BREYER: -- yes.

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

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

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

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

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

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

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

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

24 GENERAL KATYAL: Absolutely.

25 JUSTICE SCALIA: Well, then how can you have

1 absolute immunity?

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

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

6 GENERAL KATYAL: Exactly.

7 JUSTICE SCALIA: I see.

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

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

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

1 causes prosecutors to flinch in the performance of their
2 duties.

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

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

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

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

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

11 GENERAL KATYAL: Justice Sotomayor --

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

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

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

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

3 GENERAL KATYAL: That is precisely correct.

4 We don't think those are constitutionally compelled, but
5 we do think they provide a very important safeguard.

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, General.
18 Mr. Gelernt.

19 ORAL ARGUMENT OF LEE GELERNT
20 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

1 not pressing that argument.

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

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

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

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

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

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

15 How often is that going to arise?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. GELERNT: We have -- we have looked for
6 those, Justice Kennedy. We have not been able to find
7 them. What we do know about the States, though is that
8 more than 30 of the States have statutes that are much
9 more restrictive than the Federal Government, because
10 what they do is they follow what the framers did in
11 1789, which is to say the witness has to be given an
12 opportunity to comply, and that's what the framers did.
13 You have to ask the witness if they will continue to
14 comply. If they won't -- or you have to make a showing
15 of why it's impossible to ask them.

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

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

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

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

17 MR. GELERT: Do I think the Constitution
18 requires that?

19 JUSTICE ALITO: Yes.

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

1 historically, and there may be a real constitutional
2 argument.

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

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

21 JUSTICE ALITO: You might turn out --

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

1 witness statute cases, and what would he have found?

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: What we said in

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

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

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

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

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

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

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

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

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

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

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

1 I mean, consider two cases --

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

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

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

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

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

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

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

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

24 MR. GELERT: Yes, Your Honor.

25 JUSTICE ALITO: Do you think that a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 different reasons.

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

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

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

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

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

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

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

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

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

16 MR. GELERNT: Yes, Your Honor.

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

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

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

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

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

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

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

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

12 All the other cases, some of which you have
13 denied absolute immunity, some of which you have
14 granted, it's been the defendant in the full judicial
15 process. Here we're talking about third parties after
16 9-11 who repeatedly went to jail. I think the
17 allegations are very clear that it's at least but-for --
18 we think sole -- but certainly far more than dual
19 motive. People were held -- half the people were held
20 more than 30 days, even though the statutory presumption
21 is 10 days. Many people were held for months. They
22 were arrested at gunpoint. They were not immunized;
23 half the people were not called to testify.

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

1 periods of time, interrogated about their own
2 activities.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 General, you have 10 minutes remaining.

5 REBUTTAL ARGUMENT OF GENERAL NEAL KUMAR KATYAL

6 ON BEHALF OF THE PETITIONER

7 GENERAL KATYAL: Thank you. This is a
8 simple case. It's not about Guantanamo, it's not about
9 separation of powers, it's about one simple thing:
10 should we allow damages actions against an Attorney
11 General of the United States and ultimately AUSAs for
12 doing their job, when they're alleged to have a bad
13 motive?

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

25 And particularly when you lace on to that

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

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

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

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

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

14 GENERAL KATYAL: The officer --

15 JUSTICE BREYER: Yes, yes.

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

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

21 GENERAL KATYAL: Yes.

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

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

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

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

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

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

25 But with respect to my friend's point about

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

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

19 Maybe I'll just make one final point,
20 picking up on what Justice Alito said about the
21 allegations in this very case, because I don't think if
22 you look at the complaint that the allegations in this
23 case prove either that the Attorney General or the line
24 AUSA had a single motive. This is fleshed out at pages
25 17 to 19 of our reply brief. At best, they're

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

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

9 If there are no further questions --

10 CHIEF JUSTICE ROBERTS: Thank you, General.
11 The case is submitted.

12 (Whereupon, at 12:14 p.m., the case in the
13 above-entitled matter was submitted.)
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<p>A</p> <p>ABDULLAH 1:6</p> <p>ability 4:4 9:2</p> <p>able 28:6 35:6</p> <p>above-entitled 1:11 53:13</p> <p>absent 20:25</p> <p>absolute 3:21 5:1 5:9,13,15,20 6:1,6,8 9:19,25 10:3 12:3,5,9 12:22 15:18 16:1,10,17,18 17:17,23,24 19:8,19 42:7 43:1,17,19,20 47:1,3,11,13 48:19 51:13,22</p> <p>absolutely 12:10 15:24 17:7 23:13 36:15</p> <p>abuse 6:8 8:20 16:12 49:2 52:8</p> <p>abused 43:12,14</p> <p>abusing 5:8</p> <p>accepted 6:2</p> <p>account 28:21</p> <p>accused 45:1</p> <p>acknowledge 21:12,14 37:20</p> <p>acquittal 7:20 8:6</p> <p>act 3:19 43:24 44:12</p> <p>acted 7:12</p> <p>Acting 1:15</p> <p>action 20:13 45:15,20 50:13</p> <p>actions 18:21 48:10 49:6</p> <p>activities 48:2</p> <p>activity 10:21</p> <p>acts 44:8</p> <p>actual 47:10</p> <p>add 18:25 49:4</p>	<p>address 42:2,4</p> <p>addressed 42:19</p> <p>addressing 19:22</p> <p>adds 11:21</p> <p>adhere 35:23 37:3,17</p> <p>administrative 36:6,12,13 37:12</p> <p>adopt 46:5</p> <p>adopted 46:10</p> <p>affidavit 13:7 27:2 50:10,23 51:11</p> <p>agent 51:11,12 51:17</p> <p>agree 6:10 12:21 32:16 33:10,11</p> <p>agreed 33:20</p> <p>agreement 8:11</p> <p>agreements 48:22</p> <p>ahead 37:15 41:23</p> <p>alike 53:8</p> <p>Alito 9:12 10:2 23:4,16 29:10 29:19 30:21 35:3,12 37:20 37:25 40:16 45:14,17 46:2 52:20</p> <p>allegation 24:11</p> <p>allegations 17:22 22:13 26:21 27:3 38:16 40:9 40:9,19 42:1,4 44:4 47:17 49:16 52:21,22</p> <p>allege 4:2 25:8 25:10 26:18 27:3,25 40:16 48:23</p> <p>alleged 48:12</p>	<p>allegedly 3:12</p> <p>allow 10:11 17:21 21:21 22:23 29:11 48:10,18 51:17</p> <p>allowed 9:4 21:24</p> <p>allowing 4:2 17:20 21:7 31:12 48:15</p> <p>allows 34:24</p> <p>alternative 44:10</p> <p>Al-Hussayen 7:9 8:9,11 44:20</p> <p>Al-Hussayen's 8:6,10</p> <p>Al-Kidd 1:6 3:4 7:10,18,21 8:15 11:1 26:21 38:18 50:1</p> <p>Amendment 4:7 4:13 5:19,22 9:16 10:14 20:9 20:24 31:5,11 31:14 35:6,18 36:2,21 37:1,22 37:23 39:8 41:13,16 50:1 52:4</p> <p>analysis 30:10 46:17,18</p> <p>analytical 40:7</p> <p>ancillary 43:6 50:3</p> <p>answer 32:19 46:12</p> <p>answered 23:1</p> <p>answering 12:11</p> <p>apart 19:22 49:8</p> <p>apologize 27:16 40:23 45:4</p> <p>apparent 38:5</p> <p>appeal 15:20,22</p> <p>appeals 25:14</p>	<p>27:17 33:21</p> <p>appearance 9:6</p> <p>APPEARANC... 1:14</p> <p>appendix 40:20</p> <p>apples 16:25</p> <p>applicable 4:19</p> <p>application 35:6</p> <p>applied 4:8</p> <p>applies 10:15</p> <p>apply 12:20 16:18 35:7 53:6</p> <p>applying 43:19</p> <p>appreciate 38:1</p> <p>approach 43:21</p> <p>Arabia 7:11</p> <p>area 33:13</p> <p>arguing 28:19 44:23</p> <p>argument 1:12 2:2,5,8 3:3,6 5:22 6:4,13 10:7 19:11,15 20:19 21:17,18 21:25 22:1,2 29:10 30:2 34:6 45:4 48:5,19</p> <p>arguments 10:11 19:16</p> <p>arrest 14:21 17:6 17:8 21:7,9,21 22:13,25 30:12 35:19,22 42:13 42:13,24,25 43:1</p> <p>arrested 20:25 25:13,19 47:22</p> <p>arresting 17:4</p> <p>arrests 36:11 45:11</p> <p>article 30:23</p> <p>Ashcroft 1:3 3:4 4:11,25 27:1</p> <p>aside 23:23</p>	<p>31:15</p> <p>asked 41:7</p> <p>asking 9:14 24:15 29:1 36:20 39:23 42:3 44:11</p> <p>asks 39:3</p> <p>assert 12:4</p> <p>associated 3:20 6:14,18,23 19:18</p> <p>assume 30:5</p> <p>assumed 44:6</p> <p>assure 9:6 11:24</p> <p>attempt 28:21</p> <p>attorney 3:11,13 4:11 12:19,19 48:10 49:12,15 49:16 50:5 52:23</p> <p>attorneys 10:12 53:8</p> <p>AUSA 52:24</p> <p>AUSAs 48:11</p> <p>authority 19:6 51:24</p> <p>authorize 31:14</p> <p>automobile 36:14</p> <p>available 11:15 45:20 46:6,10</p> <p>avoidance 9:24</p> <p>awake 49:17</p> <p>a.m 1:13 3:2</p> <p>B</p> <p>back 8:12 9:13 12:16 15:10 22:21 26:3 29:25 34:22 39:14,17 41:19 45:13 50:9</p> <p>bad 3:24 5:23,24 5:24 6:20,21 10:3 16:24</p>
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