2. Material Witness Statute. — The Material Witness Statute[1] allows magistrate judges to order a person's arrest as a material witness upon a showing by affidavit that "the testimony of [that] person is material in a criminal proceeding" and "it may become impracticable to secure the presence of the person by subpoena."[2] This statute received renewed attention after the terrorist attacks of September 11, 2001, when then–Attorney General John Ashcroft asserted that embarking on a campaign of "[a]ggressive detention of lawbreakers and material witnesses" was "vital to preventing, disrupting, or delaying new attacks."[3] Last Term, in *Ashcroft v. al-Kidd*,[4] the Supreme Court held that the "objectively reasonable arrest and detention of a material witness pursuant to [this statute could not] be challenged as unconstitutional on the basis of allegations that the arresting authority had improper motive"[5] and that Ashcroft was entitled to qualified immunity for such detentions.[6] While the Court reached the correct conclusion on the question of qualified immunity, it should not have gone out of its way to foreclose one check on law enforcement officials when it ultimately left the question of the statute's constitutionality unresolved.

On March 16, 2003, native-born United States citizen Abdullah al-Kidd[7] was arrested and interrogated "pursuant to a material witness warrant while he was checking in for his flight to Saudi Arabia."[8] Federal officers had obtained this warrant two days prior by asserting a number of untruths, stating that "information 'crucial' to Sami Omar al-Hussayen's prosecution would be lost if al-Kidd boarded his flight."[9] Authorities transferred al-Kidd among facilities in Virginia, Oklahoma, and Idaho and confined him, at times naked, for sixteen days in high-security cells that were lit for twenty-four hours a day.[10]

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1 18 U.S.C. § 3144 (2006).

2 *Id.*

3 John Ashcroft, Att'y Gen., Dep't of Justice, Attorney General Ashcroft Outlines Foreign Terrorist Task Force (Oct. 31, 2001), *available at*http://permanent.access.gpo.gov/websites/usdojgov/www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm.

4 131 S. Ct. 2074 (2011).

5 *Id.* at 2085.

6 *Id.*

7 Al-Kidd was born Lavoni T. Kidd in Wichita, Kansas. Al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009).

8 Al-Kidd v. Gonzales, No. CV:05-093-S-EJL, 2006 WL 5429570, at *1 (D. Idaho Sept. 27, 2006).

9 *Al-Kidd*, 131 S. Ct. at 2077. The affidavit asserted that al-Kidd was "scheduled to take a one-way, first class flight (costing approximately $5,000) to Saudi Arabia" when in fact he had purchased a round-trip, coach class ticket, costing roughly $1700. *Al-Kidd*, 580 F.3d at 953. Additionally, the affidavit neglected to mention that al-Kidd was a U.S. citizen, as were "his parents, wife and two children." *Id.*

10 *Al-Kidd*, 580 F.3d at 953.

He was placed on supervised release until the al-Hussayen trial concluded fourteen months later but was never called as a witness.[11]

Al-Kidd filed a *Bivens* action[12] to challenge the constitutionality of his detainment,[13] alleging that Ashcroft had "authorized federal prosecutors and law enforcement officers to use the material-witness statute" pretextually to detain individuals who were suspected of terrorism but against whom the government "lacked sufficient evidence to charge . . . with a crime."[14] Alberto Gonzales, who had replaced Ashcroft as Attorney General, moved to dismiss the claims under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6).[15]

The district court rejected both motions.[16] First, the court rejected Ashcroft's 12(b)(2) motion, stating that al-Kidd's complaint contained sufficient specificity to establish personal jurisdiction over the former Attorney General.[17] Second, the district judge denied Ashcroft's 12(b)(6) motion, finding that Ashcroft's use of the Material Witness Statute furthered investigative rather than prosecutorial activity and thus did not qualify for absolute immunity.[18] Moreover, the court rejected qualified immunity for Ashcroft because al-Kidd had "assert[ed] claims involving Mr. Ashcroft's own knowledge and actions related to Mr. al-Kidd's alleged constitutional deprivations" — here the issuance of an arrest warrant without probable cause.[19] Gonzales filed a timely interlocutory appeal to the Ninth Circuit.[20]

The Ninth Circuit affirmed in part and reversed in part.[21] Writing for the majority, Judge Milan Smith, Jr.,[22] rejected Ashcroft's claim of absolute immunity, concluding that "when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect,"[23] it is "an investigatory [not] advocacy-related" function.[24]

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[11] *Al-Kidd*, 131 S. Ct. at 2079.

[12] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (providing for damages for violations of a plaintiff's constitutional rights under the Fourth Amendment).

[13] *See Al-Kidd*, 2006 WL 5429570, at *1.

[14] *Al-Kidd*, 131 S. Ct. at 2079.

[15] *See Al-Kidd,* 2006 WL 5429570, at *1–2.

[16] Judge Lodge wrote the memorandum order. *Id.* at *1.

[17] Al-Kidd asserted both that Ashcroft "spear-headed the post-September 11, 2001 practice . . . to use the Material Witness Statute to detain individuals whom they sought to investigate" and that "Ashcroft either knew or should have known the violations were occurring and did not act to correct the violations." *Id.* at *4.

[18] *Id.* at *5–7.

[19] *Id.* at *9.

[20] Al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

[21] *Id.* at 952.

[22] Judge Smith was joined by Judge Thompson.

[23] *Al-Kidd*, 580 F.3d at 962.

[24] *Id.*

The court next rejected Ashcroft's claim of qualified immunity. First, Judge Smith held that Ashcroft had violated the Fourth Amendment by arresting individuals pretextually under the Material Witness Statute.[25] Despite the *Whren* rule — that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"[26] — Judge Smith asserted that delving into subjective intent was appropriate in this context, as "arrests of material witnesses are neither 'ordinary,' nor involve 'probable cause' as that term has historically been understood."[27] Second, the court found that Ashcroft violated "clearly established law."[28] Although no court had "squarely confronted . . . whether misuse of the material witness statute to investigate suspects" was unconstitutional,[29] the court found that the definition of probable cause, and the history and purposes of the Fourth Amendment, "should have been sufficient to put Ashcroft on notice."[30]

Judge Bea concurred in part and dissented in part.[31] He contested the majority's reading that al-Kidd's pretextual arrest on a material witness warrant was unconstitutional[32] and further stated that, even if such a pretextual arrest did violate the Constitution, it did not violate "clearly established law."[33] He also asserted that Ashcroft was entitled to absolute immunity "so long as the 'criminal proceeding' for which the material witness warrant is sought is a criminal trial."[34]

The Supreme Court reversed and remanded.[35] Writing for the Court, Justice Scalia[36] cautioned that courts ought to "think carefully before expending 'scarce judicial resources' to resolve . . . questions of constitutional . . . interpretation that will 'have no effect on the outcome of the case.'"[37] However, he indicated that the Court's opinion would address both prongs of the qualified immunity analysis because the Ninth Circuit had erred at each step.[38]

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[25] *Id.* at 970.

[26] Whren v. United States, 517 U.S. 806, 813 (1996).

[27] *Al-Kidd*, 580 F.3d at 966 (footnote omitted). Because the requirements of § 3144 — materiality and impracticability — do not constitute elements of a crime, the arrest of a material witness is not justified by probable cause. *Id.* at 967.

[28] *Id.* at 973.

[29] *Id.* at 970.

[30] *Id.* at 971.

[31] *Id.* at 981 (Bea, J., concurring in part and dissenting in part).

[32] *Id.* at 990.

[33] *Id.* at 991.

[34] *Id.* at 996.

[35] *Al-Kidd*, 131 S. Ct. at 2085.

[36] Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Kagan took no part in the consideration or decision of the case.

[37] *Al-Kidd*, 131 S. Ct. at 2085 (quoting Pearson v. Callahan, 555 U.S. 223, 236–37 (2009)).

[38] *Id.* Justice Scalia stated further that both prongs of the analysis were reached because "revers[ing] an erroneous judgment . . . ensures that courts do not insulate constitutional decisions at

First, the Court tackled whether Ashcroft's conduct "violated a statutory or constitutional right,"[39] namely, the Fourth Amendment right to "be secure . . . against unreasonable searches and seizures."[40] The Court underscored that "Fourth Amendment reasonableness 'is predominantly an objective inquiry,'"[41] so objectively reasonable actions are considered reasonable in fact "'*whatever* the subjective intent' motivating the relevant officials."[42] The Court acknowledged two limited exceptions to this principle — subjective intent is relevant in special-needs[43] and administrative-search[44] cases — but asserted that al-Kidd's allegations did not fall under either exception.[45] Justice Scalia also clarified that the Ninth Circuit had read *Whren* too narrowly, explaining that *Whren* "reject[ed] inquiries into motive generally" in Fourth Amendment cases.[46] Because al-Kidd did "not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant," no violation was found.[47]

Second, the Court refused to find that the alleged constitutional violation was "clearly established" such that "every reasonable official would have understood that what he is doing violates that right."[48] Justice Scalia emphasized that "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional" at the time of al-Kidd's arrest.[49] Though lack of specifically applicable case law is not dispositive to the inquiry,[50] the Court underscored that it had "repeatedly told courts . . . not to define clearly established law at a high level of generality."[51] The majority thus refused to find the alleged constitutional violation "clearly established."[52] As dictated by the Court's analysis of

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the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote." *Id.*

39 *Id.*

40 U.S. CONST. amend. IV.

41 *Al-Kidd*, 131 S. Ct. at 2080 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000)).

42 *Id.* (quoting *Whren v. United States,* 517 U.S. 806, 814 (1996)).

43 Where a search or seizure is justified by "special needs, beyond the normal need for law enforcement," courts examine law enforcement officers' actual intentions. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (internal quotation marks omitted).

44 When the search or seizure is "in execution of an administrative warrant," law enforcement officers do not need a judicial warrant or probable cause. *Al-Kidd*, 131 S. Ct. at 2081.

45 *Id.*

46 *Id.* at 2082.

47 *Id.* at 2083.

48 *Id.* (internal quotation marks omitted).

49 *Id.*

50 *Id.* A law can be deemed clearly established when existing precedent has "placed the statutory or constitutional question beyond debate." *Id.*

51 *Id.* at 2084.

52 *Id.*

both prongs of the qualified immunity inquiry, Ashcroft was entitled to qualified immunity from al-Kidd's suit.[53]

Justice Kennedy filed a concurring opinion.[54] Although he joined the Court's opinion in full, he highlighted that the Court's "holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful"[55] and that the "scope of the statute's lawful authorization is uncertain."[56] Justice Kennedy also emphasized that the Attorney General is a national officeholder with responsibilities in many jurisdictions and that this fact ought to be considered when determining whether a law is "clearly established."[57]

Justice Ginsburg concurred in the judgment.[58] She agreed that Ashcroft was entitled to qualified immunity because the law had not "clearly established" a constitutional violation.[59] However, she objected to the majority's "disposition of al-Kidd's Fourth Amendment claim on the merits,"[60] asserting that because the underlying affidavit contained numerous "omissions and misrepresentations, there is strong cause to question the Court's opening assumption — a valid material-witness warrant — and equally strong reason to conclude that a merits determination was neither necessary nor proper."[61] She lastly underscored the "need to install safeguards against disrespect for human dignity . . . that will control officialdom even in perilous times."[62]

Justice Sotomayor also concurred in the judgment,[63] stating she could not join the majority opinion because it unnecessarily resolved a "difficult and novel questio[n] of constitutional . . . interpretation that will 'have no effect on the outcome of the case.'"[64] She asserted that the merits of al-Kidd's Fourth Amendment claim presented "a closer

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[53] *Id.* at 2085.

[54] Justices Ginsburg, Breyer, and Sotomayor joined Part I of Justice Kennedy's concurrence.

[55] *Al-Kidd*, 131 S. Ct. at 2085 (Kennedy, J., concurring).

[56] *Id.* at 2085–86. Justice Kennedy suggested that the Material Witness Statute "might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause" and that arrests made under the statute might therefore raise other complicated constitutional issues. *Id.* at 2086. However, he declined to explore the matter further, stating that "the Court is correct to address only the legal theory put before it." *Id.*

[57] *Id.* at 2086.

[58] Justice Ginsburg was joined by Justices Breyer and Sotomayor.

[59] *Al-Kidd*, 131 S. Ct. at 2087 (Ginsburg, J., concurring in the judgment).

[60] *Id.*

[61] *Id.* at 2088.

[62] *Id.* at 2089.

[63] Justice Sotomayor was joined by Justices Ginsburg and Breyer.

[64] *Al-Kidd*, 131 S. Ct. at 2089–90 (Sotomayor, J., concurring in the judgment) (alterations in original) (quoting *id.* at 2081 (majority opinion) (quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009))) (internal quotation mark omitted).

question than the majority's opinion suggests," since the Court's conclusion was premised on the misrepresentative affidavit.[65]

The Supreme Court correctly concluded that Ashcroft was entitled to qualified immunity. However, the majority could have resolved the question of qualified immunity by addressing only the second prong of the analysis. By delving into the merits of the Fourth Amendment claim, the Court eliminated the reasonableness argument against material arrest warrants without providing any guidance on whether such a warrant could be used to detain persons suspected of crimes without violating the Constitution. Because this holding rejected one significant tool preventing overreach of the Material Witness Statute, the Court ought to have instead exercised judicial caution, waiting until it could address the statute's constitutionality before destroying one of the only major restraints on its application.

Since 9/11, the United States has witnessed Fourth Amendment creep.[66] Indeed, there is concrete evidence that, for at least sixteen months after 9/11, the Bush Administration believed that no Fourth Amendment protections applied whatsoever to domestic efforts to guard against terrorism.[67] As time passed, commentators noted that "the number of efforts to claim exception — to argue that unusual times call for unusual measures — has in fact *increased.*"[68] The "[w]idespread use of the material witness statute" by federal law enforcement as a tool to detain persons suspected of terrorist connections became a predominant area of concern.[69] Material witness designations were "never . . . as a means to detain those whom the authorities suspected of being a threat to society but did not have enough evidence to charge,"[70] but were derived at common law to compel non-

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[65] *Id.* at 2090.

[66] *See generally* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004) (detailing various ways that the USA PATRIOT Act and other measures adopted by the government after 9/11 loosened the requirements necessary to detain, search, and seize both citizens and immigrants).

[67] *See Memo on Illegal Searches Comes to Light*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/stories/2008/04/02/national/main3991241.shtml?tag=contentMain;contentBody (discussing a 2003 memo adopting the position that had been outlined two years prior that the Fourth Amendment did not apply domestically to terror prevention measures); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States* (Oct. 31, 2001), *available at* http://www.gwu.edu/~nsarchiv/torturingdemocracy//documents/20011023.pdf ("[T]he better view is that the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks.").

[68] *See* Scheppele, *supra* note 66, at 1051.

[69] Edward Walsh, *Court Upholds a Post-9/11 Detention Tactic*, WASH. POST, Nov. 8, 2003, at A11.

[70] Laurie L. Levenson, Essay, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1222 (2002); *see also* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Un-*

parties who had "particular information about a crime that could be helpful to the defense or prosecution"[71] to appear in court out of loyalty to the polity.[72] However, after 9/11, the designation of material witness often became "a temporary moniker to identify an individual who will soon bear the status of defendant."[73] As a consequence, it quickly became clear that the Material Witness Statute was being utilized in an unintended and unprecedented manner that raised serious Fourth Amendment concerns.[74]

Chief among these concerns is that the Material Witness Statute imposes a significantly lighter burden for detaining individuals than that required for arresting suspects with probable cause.[75] While the Material Witness Statute's standards are met merely by a showing of the materiality and impracticability of obtaining an individual's testimony in another manner, probable cause is traditionally understood to mean that arrest may be carried forth only if an officer can show "a reasonable ground for belief of guilt."[76] This fact has prompted troubled scholars to note that "[t]he different burdens for establishing probable cause to arrest a criminal suspect and a material witness create the opportunity for abuse in the form of pretextual detention under the lower material witness standard in place of arrest as a crim-

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til Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet, 58 VAND. L. REV. 677, 708 (2005) (arguing that the authority to detain individuals without probable cause to believe they committed a crime was not authorized by the First Judiciary Act of 1789).

71 Michael Greenberger, *Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment*, *in* AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES 91 (Thomas E. Baker & John F. Stack, Jr., eds., 2006).

72 *See* 8B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 46.11 (2d ed. 1978); Levenson, *supra* note 70, at 1222.

73 Levenson, *supra* note 70, at 1223; Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, ACLU INTERNATIONAL CIVIL LIBERTIES REPORT (Dec. 10, 2004), http://www.aclu.org/files/iclr/malhotra.pdf ("Before September 11, this law was only to hold witnesses who were scared to testify . . . . Since September 11, however, the government has used this law to circumvent probable cause requirements to hold Muslim 'witnesses' it believes to be suspects, indefinitely without charges.").

74 *See* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1543 (1994). *See generally* Brief of Amici Curiae Legal History & Criminal Procedure Law Professors in Support of Respondent, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) (No. 10-98), 2011 WL 317147.

75 Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 78 (1968); *cf.* Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 716 (1969) ("The indefinite detention of an individual innocent of any crime almost certainly offends the average citizen's sense of fair play far more than the detention of a person arrested on 'probable cause' and charged with committing a crime.").

76 Al-Kidd v. Ashcroft, 580 F.3d 949, 967 (9th Cir. 2009) (citing *Brinegar v. United States,* 338 U.S. 160, 175 (1949)).

inal suspect."[77] This discrepancy creates a loophole that can be exploited by law enforcement.

There are two clear ways that courts can close this dangerous loophole. First, judges could follow the Ninth Circuit's reasoning and allow inquiry into the subjective intent of the relevant official when the Material Witness Statute is utilized. Although the Supreme Court has previously held that subjective intent plays no role in ordinary Fourth Amendment analysis,[78] courts could adopt the Ninth Circuit's reasoning that material witness detentions constitute an exception to this principle.[79] Second, courts could impose a higher evidentiary burden, such as that required for a criminal arrest. This solution would provide additional protections to individuals such as al-Kidd by ensuring that they are not subject to de facto arrest masquerading as witness detainment.[80] Either avenue would have the effect of diminishing officials' ability to exploit the disparity of standards by requiring heightened oversight of their actions, thereby diminishing the appeal of engaging in pretextual uses of the Material Witness Statute beyond its intended purposes and authorization.[81]

The Court's decision in *al-Kidd* is misguided because it reaches beyond the limited qualified immunity inquiry to reject explicitly this first solution when the case did not present a clear opportunity to adopt the second. Although some of the Justices implied that they might be sympathetic to adopting some form of the second solution,[82] "this case d[id] not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case" given al-Kidd's failure to plead the facial unconstitutionality of the statute.[83] Instead, the majority went out of its way to reject the first solution of permitting trial judges to examine subjective intent in the material witness context. In so doing, the Court's opinion actually *buttressed* the use of material witness arrest warrants by foreclosing an avenue for challenging potentially pretextual uses of the Material Witness Statute without addressing the facial constitutionality of its probable cause requirements.

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[77] Heidee Stoller et al., *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 201 (2004).

[78] Whren v. United States, 517 U.S. 806, 813 (1996).

[79] *See al-Kidd*, 580 F.3d at 966.

[80] This solution would address the constitutional objection that the standard for detainment authorized by § 3144 is not sufficiently stringent to justify search and seizure under the Fourth Amendment and would further mitigate fears that the statute could be applied to "obtain preventive detentions outside the narrow range of instances in which preventive detentions have been deemed constitutional." Stoller et al., *supra* note 77, at 214.

[81] *Cf.* Brief of Amici Curiae Legal History & Criminal Procedure Law Professors in Support of Respondent, *supra* note 74, at *2.

[82] *See al-Kidd*, 131 S. Ct. at 2088 (Ginsburg, J., concurring in the judgment).

[83] *See id.* at 2090 (Sotomayor, J., concurring).

Given the implicit limits that al-Kidd's pleadings placed on the Court's ability to address this question, the Court should not have overruled the Ninth Circuit's merits decision and instead ought to have waited to rule on this question until a case presented itself that would permit the Court to address directly the constitutionality of the statute. Scholars have long recognized that a "foundational tenet of our legal tradition is that courts are directed to fashion a remedy after finding an incursion on a right."[84] Indeed, "[w]ithout some means of enforcing the rights 'secured' by the Constitution and federal laws, there is always the risk, indeed the probability, that in some instances rights will be of little more than hortatory value."[85] This risk is of particular concern in the realm of criminal procedural protections, such as those enshrined in the Fourth and Fifth Amendments, given that government officials "will be *less* likely to respect constitutional rights that are not backed by remedies" in such contexts.[86] As a consequence, "the practical value of a right is determined by its associated remedies,"[87] and it is jurisprudentially misguided to assert that a right meaningfully exists if no remedy attaches to its violation.[88]

In *al-Kidd*, the Court made precisely this error. At least four Justices strongly implied that they found it constitutionally problematic to use the Material Witness Statute as a pretext for arresting a suspected criminal.[89] In doing so, these Justices joined scholars who have consistently argued that an individual's Fourth Amendment right is violated when the Material Witness Statute is used to hold him or her for an extended period without an opportunity to protest the detainment.[90] But at the same time, the Court was unable to enforce or provide a remedy for the alleged violation of this right because the facts of *al-*

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84 Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 530 (2004); *see also, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy . . . ."); Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) ("[A] right without any remedy is a meaningless scholasticism . . . .").

85 Berzon, *supra* note 84, at 535; *see also* CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 3 (2009) ("Some philosophers believe it is part of the idea of a right that there should be some mechanism in place for its effective enforcement."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 888 (1999) ("[T]he absence of any remedy at all . . . render[s] a constitutional right essentially worthless.").

86 Levinson, *supra* note 85, at 911.

87 *Id.* at 888; *cf.* KARL N. LLEWELLYN, THE BRAMBLE BUSH 84 (1960) ("A right is as big, precisely, as what the courts will do.").

88 *Cf.* Berzon, *supra* note 84, at 544 ("Where . . . judges have been accorded authority to provide remedies, it is our duty to do so, rather than leaving rights inchoate and abstract, without substance in real people's lives."); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1557 (1972) ("[C]onstitutional rights have a self-executing force that not only permits but requires the courts to recognize remedies.").

89 *See, e.g.*, *al-Kidd*, 131 S. Ct. at 2085 (Kennedy, J., concurring).

90 *See generally* Brief of Amici Curiae Legal History & Criminal Procedure Law Professors in Support of Respondent, *supra* note 74.

Kidd did not lend themselves to such a disposition. In fact, not only did the Court fail to provide a remedy, but also it foreclosed one of the few remedies that would have closed the Fourth Amendment loophole. As Professor Daryl Levinson and others have argued, the failure to impose a remedy can effectively neuter an otherwise powerful check on the behavior of law enforcement officials in criminal procedure contexts.[91] In the wake of *al-Kidd*, officials will likely continue to pursue questionable, possibly unconstitutional, detainment policies with the belief that the Court tacitly endorsed their methods. When the Court could have simply granted Ashcroft immunity, it instead sent the contradictory signal that there may be a right at stake, but officials need not be worried about encroaching upon it — at least until the Court has an opportunity to someday fashion a remedy.[92]

As a consequence of the Court's overreach, *al-Kidd* constitutes an example of judicial acquiescence to post-9/11 Fourth Amendment creep, which is all the more significant given the importance of safeguarding citizens' constitutional protections in times of exigency.[93] Instead of establishing such safeguards, the Court has signaled that, so long as law enforcement officials adhere to the permissive material witness warrant process, they may use the Material Witness Statute to detain citizens, whatever true motivation lies behind the material witness designation. Sending this message was both unnecessary and unwise, and ultimately only widens an existing loophole that has allowed officials to detain citizens without legitimate justifications.

3. Right to Informational Privacy. — In two opinions issued over thirty years ago, the Supreme Court suggested, but did not conclusively hold, that the Constitution provides a right against the forced disclosure of private information.[1] While circuit courts have adopted different interpretations of this suggested right to "informational privacy," the Supreme Court has provided no further guidance. Last Term, in *NASA v. Nelson*,[2] the Court finally revisited the issue of informational privacy, but again refrained from deciding that such a right exists. *Nelson*'s narrow holding leaves unresolved

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[91] *E.g.,* Levinson, *supra* note 87, at 887 ("[R]ights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies."). *See generally* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

[92] *Cf.* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) ("Unredressed constitutional violations may have to be tolerated, but they should not be embraced, approved, or allowed to proliferate.").

[93] *Cf.* United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

[1] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977); Whalen v. Roe, 429 U.S. 589, 599 (1977).

[2] 131 S. Ct. 746 (2011).