

# **Statement of Lee Gelernt**

**September 30, 2010**

## **Court Should Not Review al-Kidd Ruling That Ashcroft May Be Held Liable For Material Witness Policy**

In *al-Kidd v. Ashcroft* (10-98), the Ninth Circuit affirmed an Idaho district court and held that former Attorney General John Ashcroft could be held personally liable for damages if he adopted a post- 9/11 policy of using the material witness statute as a pretext to arrest and detain suspects without probable cause to believe that they had committed a crime. The Solicitor General's certiorari petition is pending. The plaintiff in the case, Abdullah al-Kidd, is a 37 year-old African-American, U.S. citizen born in Kansas who converted to Islam while attending the University of Idaho, where he was a standout running back on the football team.

### **Background**

In 2003, al-Kidd was arrested on a material witness warrant at Dulles Airport on his way to study in Saudi Arabia. He sued various officials and the United States; only the claims against Ashcroft are currently before the Court.

The government obtained the warrant by informing an Idaho Magistrate that al-Kidd's testimony was "crucial" to a then-pending terrorism case against Sami Al-Hussayen and that it would be impracticable to obtain his testimony if al-Kidd travelled to Saudi Arabia. Among other things, the affidavit falsely stated that al-Kidd had only a one-way ticket, a point the government later conceded was erroneous. The affidavit also neglected to inform the Magistrate that al-Kidd was a U.S. citizen whose family members were also U.S. citizens living in this country; that he had voluntarily talked with the FBI on several occasions prior to his arrest and had never failed to show up to these pre-arranged meetings; that prior to his arrest, al-Kidd had not heard from the FBI for approximately six months; that the FBI had never told al-Kidd that he might be needed as a witness or that he should inform them if he intended to travel abroad; and finally, that al-Kidd was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip.

Although supposedly only a witness, al-Kidd was interrogated about his own activities, spent 16 days in jail under horrible conditions, and was released only after he agreed to severe restrictions of supervision, which lasted more than one year. He was never charged with a crime or even called as a witness in the Al-Hussayen trial (which ended without a conviction). Claims against the wardens of the three detention facilities have settled for monetary damages and/or prospective institutional changes. Claims against the United States and the two FBI agents who sought the warrant remain pending in Idaho district court.

The complaint contains extensive evidence that Ashcroft adopted and implemented a nationwide policy of using the material witness statute as a cover to arrest criminal suspects without probable cause, including statements made by Ashcroft himself. The complaint also notes congressional testimony delivered by FBI Director Robert Mueller only days after Mr. al-Kidd's arrest in which Mueller cited al-Kidd's arrest as one of the government's recent "successes" in combating terrorism, along with the capture of Khalid Sheik Mohammed (the alleged "mastermind" of the September 11 attacks). Tellingly, the Director's testimony did not even mention that al-Kidd had been arrested as a witness.

## **Legal Arguments**

The case is currently before the Court on a motion to dismiss, which was filed prior to any discovery in the case. The district court denied that motion and the Ninth Circuit affirmed. The government then sought en banc review, which was likewise denied with eight judges dissenting. The primary questions raised by the Solicitor General are whether Ashcroft is entitled to either absolute or qualified immunity from damages if, as the complaint alleges, he used the material witness statute as a cover to arrest suspects. On a motion to dismiss, the allegations of the complaint must be accepted as true.

In our opposition to the Solicitor General's petition, we have urged the Court to deny review on the ground that there is no circuit split and the Court will have another opportunity to review the case, on a concrete factual record, if Ashcroft were later found liable after trial or summary judgment proceedings. We have also argued that the Ninth Circuit's decision was correct because (1) Ashcroft's policy was investigative in nature, and thus not entitled to absolute prosecutorial immunity, and (2) Ashcroft should have known that arresting innocent individuals on the pretext that they were "witnesses" violated clearly established Fourth Amendment law, thereby defeating qualified immunity.

Finally, we have informed the Court that we are no longer pursuing the claims raised in the Solicitor General's third question: whether Ashcroft can be held responsible for the specific false statements in the affidavit submitted by the Idaho FBI agents in support of al-Kidd's arrest (as opposed to adopting the nationwide policy of using the statute as a pretext).