No. 10-98

# In the Supreme Court of the United States

JOHN ASHCROFT, PETITIONER

*v.*

ABDULLAH AL-KIDD

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX


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**PETITION FOR A WRIT OF CERTIORARI FILED: JULY 16, 2010**
**CERTIORARI GRANTED: OCT. 18, 2010**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-36059

ABDULLAH AL-KIDD, PLAINTIFF-APPELLEE

*v.*

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 12/11/06 | 1 | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. Setting schedule as follows: appellant's opening brief is due 1/22/07; appellees' brief is due 2/22/07; appellants' optional reply brief is due 14 days from service of aples brief. 3/19/07,, ; [06-36059] (SW) |
| | | * * * * * |
| 1/23/07 | 9 | Filed original and 15 copies Appellant Alberto R. Gonzales, Appellant John Ashcroft, Appellant Robert Mueller, Appellant Michael Chertoff, Appellant Dennis |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Callahan, Appellant Vaughn Killeen, Appellant James Gneckow, Appellant Scott Mace, Appellant U.S. Dept. of Justice, Appellant U.S. Dept. Homeland, Appellant FBI, Appellant Terrorist Screening, Appellant Donna Bucella, Appellant United States opening brief (Informal: No) 49 pages and five excerpts of record in 1 volume; served on 1/22/07 [06-36059] (RT) |
| | | * * * * * |
| 5/29/07 | 20 | Filed original and 15 copies appellee Abdullah Al-Kidd's 64 pages brief; served on 5/25/07 [06-36059] (RT) |
| | | * * * * * |
| 6/26/07 | 32 | Filed original and 15 copies appellants' reply brief, (Informal: No ) 30 pages; served on 6/25/07 [06-36059] (RT) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 4/8/08 | 42 | ARGUED AND SUBMITTED TO DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.. (KM) |
| | | * * * * * |
| 6/23/08 | 44 | Filed order (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.): Submission of this case is vacated and shall be deferred pending the disposition by the United States Supreme Court in Van de Kamp v. Goldstein, No. 07-854, and Ashcroft v. Iqbal, No. 07-1015. The panel requests supplementary briefing by the parties regarding the effect, if any, of the Supreme Court's dispositions in these cases, due no later than twenty (20) days after the filing of the later of the two dispositions. Dispositions shall be deemed to have occurred respecting each such case when the Supreme Court first files an opinion, memorandum, or other order disposing of the same. Petitions to the Supreme Court to rehear such case or cases shall |

| DATE | DOCKET NUMBER | PROCEEDINGS |
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| | | not be considered in the timing contemplated by this order. The simultaneous briefs may be in letter form, and shall not exceed fifteen (15) double-spaced pages. (WL) |
| | | * * * * * |
| 6/8/09 | 46 | Submitted (ECF) Supplemental brief for review. Submitted by Appellant John Ashcroft. Date of service: 06/08/2009. [6948679] (MMC) |
| | | * * * * * |
| 6/10/09 | 51 | Submitted (ECF) Supplemental brief for review. Submitted by Appellee Abdullah Al-Kidd. Date of service: 06/08/2009. [6951261] (LPG) |
| | | Filed clerk order: Supplemental Brief [51] filed by Abdullah Al-Kidd. No paper copies of this brief are required. (LA) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 9/4/09 | 57 | Filed order (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) The case is resubmitted as of 09/04/09. [7052143] (PH) |
| | | * * * * * |
| 9/4/09 | 59 | FILED OPINION (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) For the reasons indicated in this opinion, we AFFIRM in part and REVERSE in part the decision of the district court. Each party shall bear its own costs on appeal. Judge: DRT, Judge: CTB Concurring & Dissenting, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT.— [Edited 09/08/2009 by ASW-Opinion resent with correction.] [7052176] (PH) |
| | | * * * * * |
| 10/19/09 | 60 | Filed (ECF) Appellant John Ashcroft petition for rehearing en banc (from 09/04/2009 opinion). Date of service: 10/19/2009. [7099274] (MMC) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/20/09 | 61 | Filed order (MILAN D. SMITH, JR.) Plaintiff-Appellee is directed to file a response to Defendant-Appellant's petition for rehearing en banc, filed with this court on October 19, 2009. The response shall not exceed 15 pages, unless it complies with the alternative length limitations of 4200 words, or 390 lines of text, Circuit Rule 40-1(a), and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7100253] (WL) |
| 11/10/09 | 62 | Filed (ECF) Appellee Abdullah Al-Kidd response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 11/10/2009. [7126109]. (LPG) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/18/2010 | 63 | Filed Order for PUBLICATION (DAVID R. THOMPSON, CARLOS T. BEA and MILAN D. SMITH, JR.) The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Judge Bybee was recused in this matter. The petition for rehearing en banc is DENIED. [7270768] Judge M. Smith concurs, Judges DFO and RMG dissent from the order Denying Petition for Rehearing with suggestion Rehearing En Banc. (PH) |

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
(Boise – Southern)

No. 1:05–cv–00093–EJL–MHW

ABDULLAH AL-KIDD, PLAINTIFF

*v.*

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/15/05 | 1 | COMPLAINT against all defs (Filing fee $ 250.), filed by Abdullah Al–Kidd. (Attachments: # 1 Civil Cover Sheet) (dkh,) |
| | | * * * * * |
| 11/18/05 | 40 | AMENDED COMPLAINT against all defendants, filed by Abdullah Al–Kidd. (Woolley, Cynthia) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 1/24/06 | 55 | MOTION to Dismiss by Dennis M Callahan, James Gneckow, Scott Mace, John Ashcroft. Responses due by 2/17/2006 (Christian, Forrest) |
| | | * * * * * |
| 3/15/06 | 63 | MEMORANDUM in Opposition re 55 MOTION to Dismiss filed by Abdullah Al-Kidd. Replies due by 4/14/2006. (Gelernt, Lee) |
| | | * * * * * |
| 5/15/06 | 71 | REPLY to Response to Motion re 55 MOTION to Dismiss filed by Dennis M Callahan, James Gneckow, Scott Mace, John Ashcroft. (Christian, Forrest) |
| | | * * * * * |
| 9/27/06 | 79 | ORDER denying 47 Motion to Dismiss, denying 55 Motion to Dismiss, granting 58 Motion to Substitute Party. Dennis M Callahan terminated and substituted dft John Sugrue, Former Warden, Oklahoma Federal Transfer Center; The Government is granted leave to file a motion to |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | dismiss as to dft Surgue on or before 10/30/06. Signed by Judge Edward J. Lodge. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by dks, ) |
| | | * * * * * |
| 11/27/06 | 89 | NOTICE OF APPEAL as to 79 Order on Motion to Dismiss,, Order on Motion to Substitute Party,,, by John Ashcroft. (Notice sent by e-mail to Court Reporter) (Meeks, J) |
| | | * * * * * |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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Case No. 05-093-EJL

ABDULLAH AL-KIDD, PLAINTIFF

*v.*

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; JAMES DUNNING, SHERIFF FOR THE CITY OF ALEXANDRIA; DENNIS M. CALLAHAN, FORMER WARDEN, OKLAHOMA FEDERAL TRANSFER CENTER; VAUGHN KILLEEN, FORMER SHERIFF OF ADA COUNTY; FBI AGENTS MICHAEL JAMES GNECKOW, SCOTT MACE; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL BUREAU OF INVESTIGATION; TERRORIST SCREENING CENTER; DONNA BUCELLA, DIRECTOR OF THE TERRORIST SCREENING CENTER; UNITED STATES; JOHN DOES 1-25, DEFENDANTS

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Filed: Nov. 18, 2005

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**FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

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Plaintiff Abdullah al-Kidd, through counsel, hereby complains and alleges the following:

## INTRODUCTION

1. This case involves a gross abuse of the government's power under the federal material witness statute. *See* 18 U.S.C. § 3144 (material witness statute).

2. The material witness statute gives the government the power to arrest a wholly innocent individual, without charges, solely for the purpose of securing his testimony in a criminal proceeding. Not surprisingly, however, the statute places strict limits on the use of this extraordinary power, limits likewise mandated by the United States Constitution.

3. Three safeguards are especially critical. First, and fundamentally, the statute may not be used as a pretext to arrest an individual whom the government lacks probable cause to charge with a crime but nonetheless wishes to detain preventively and/or to hold for further investigation. Second, even where an individual is genuinely sought as a witness, and not as a criminal suspect, the witness may not be arrested unless he has engaged in some action that provides a legitimate basis for reasonably believing that his testimony could not be secured voluntarily or by issuance of a subpoena. Finally, an individual arrested as a material witness must be detained under conditions consistent with his status as an innocent witness, and not under the conditions used to jail criminal suspects, much less those actually convicted of a crime.

4. In the aftermath of September 11, 2001, the government has blatantly and systematically ignored all three of these essential safeguards, as well as numerous

others mandated by statute and the Constitution. The facts of this case acutely illustrate the illegality of the government's post-9/11 material witness policies and practices.

5. In March 2003, plaintiff Abdullah al-Kidd was humiliatingly arrested at Dulles International Airport on a material witness warrant and led away in handcuffs in front of scores of onlookers by agents of the Federal Bureau of Investigation (FBI). After interrogating Mr. al-Kidd, the FBI had him jailed at the Alexandria Detention Center in Virginia.

6. Over the next fifteen days, Mr. al-Kidd was shuffled between three different detention facilities across the country. When transported between facilities, he was shackled with leg restraints, a "belly chain" and a set of handcuffs looped through the chain so that his hands could not move more than a few inches from his waist. At each facility, he was held under high-security conditions and rarely permitted to leave his cell, often spending twenty-three hours a day in lockdown.

7. On some occasions, Mr. al-Kidd was singled out for treatment worse than that afforded the other individuals housed in the high-security wing, many of whom had been charged or convicted of serious crimes. At one facility, for example, Mr. al-Kidd was required to remove his clothes and to sit naked in a cell in view of a female guard and the other detainees, all of whom were fully clothed.

8. On March 27, 2003, while Mr. al-Kidd remained in detention, the Director of the FBI, Robert Mueller, brought Mr. al-Kidd's case to the attention of the United States Congress. Testifying before a House subcommittee, Director Mueller stated that the government

was making progress in the fight against terrorism and that there had been more than 200 "suspected terrorists . . . charged with crimes, 108 of whom have been convicted to date." The Director then offered a number of examples of the government's recent successes in combating terrorism. The Director's first example was the capture of Khalid Shaikh Mohammed, who according to the government was the "mastermind" of the September 11 attacks and is supposedly being held in a secret location abroad. The next example Director Mueller gave was the arrest of Mr. al-Kidd. He then listed three additional examples, all of which involved individuals who had been criminally charged with terrorism-related offenses. The Director's testimony did not mention that Mr. al-Kidd had been arrested as a witness, and not on criminal charges.

9. Mr. al-Kidd was eventually released from detention on March 31, 2003, but ordered to live with his wife and in-laws in Nevada and restricted to traveling within Nevada and three other states. More than fourteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without a conviction on a single count. Mr. al-Kidd was never called as a witness (and was never subsequently charged with a crime).

10. Even after the trial concluded, the government did not move to have Mr. al-Kidd dismissed as a material witness. Instead, Mr. al-Kidd filed a motion with the Court to lift the restrictions and to dismiss him as a material witness, which the Court granted in June 2004.

11. To this day, the government has never explained why the Director of the FBI would tell the United States Congress that the arrest of Mr. al-Kidd—supposedly a witness—represented one of the government's notewor-

thy recent successes in the war on terrorism. Nor has the government ever explained why Director Mueller's testimony failed to mention the fact that Mr. al-Kidd had been arrested only as a witness, and not on criminal charges.

12. The government has likewise never explained why a supposed witness would need to be routinely shackled when transported. Nor has the government explained why a witness would need to be detained under high-security conditions.

13. Most importantly, the government has never explained why Mr. al-Kidd had to be arrested and detained at all (even assuming that the government genuinely had believed it needed his testimony). Indeed, the government was able to secure a material witness warrant for Mr. al-Kidd's arrest only by providing the Court with a patently false and wholly misleading affidavit. That affidavit contained only three sentences directly addressing why the government believed it could not secure Mr. al-Kidd's testimony without arresting him:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

*See* Affidavit at ¶¶ 7, 8 (Attached as Exhibit A).

14. The government has since admitted, however, that through further investigation it learned that Mr. al-Kidd had a round-trip ticket, and not a one-way ticket (an admission made only after Mr. al-Kidd had spent more than two weeks in detention). Furthermore, Mr. al-Kidd did not have a first-class ticket costing approximately $5,000, as the affidavit alleged, but rather, a coach-class ticket costing less than $2,000.

15. In addition to the false statements, the affidavit was wholly misleading in what it omitted to tell the Court. Among other things, the affidavit failed to inform the Court:

- that Mr. al-Kidd was not a Saudi national returning to his home country, but rather a native-born United States citizen and a graduate of the University of Idaho;

- that Mr. al-Kidd had a wife, child, parents and siblings who were native-born United States citizens living in this country;

- that Mr. al-Kidd had talked with the FBI on several occasions prior to his arrest, either in-person or on the phone, and had voluntarily answered dozens of questions for hours on a wide range of topics;

- that each of these in-person conversations had taken place at his mother's home (where Mr. al-Kidd was living at the time) and that Mr. al-Kidd had never failed to show up to these prearranged meetings;

- that prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

- that the FBI had never told Mr. al-Kidd that he might be needed as a witness at some point, that he

could not travel abroad, or that he must inform the FBI if he did intend to travel abroad; and finally,

- that Mr. al-Kidd was never asked if he would be willing to testify, to voluntarily relinquish his passport or to otherwise postpone his trip to Saudi Arabia (where he was scheduled to further his studies at a well-known university).

16. Instead, the government simply blind sided a cooperative United States citizen months after they had last contacted him, without ever giving him the opportunity to cooperate voluntarily—all under the pretense that his testimony was critically needed in a future trial (a trial in which Mr. al-Kidd was never even called to testify).

17. Mr. al-Kidd brings this action to vindicate his statutory and constitutional rights to be free from arbitrary and punitive arrest and detention. He seeks a declaration that his rights were violated and an order expunging his unlawful arrest record. He also seeks an appropriate amount of monetary damages for his harrowing and wholly unnecessary experience. The Defendants are the United States, the responsible federal agencies, and various federal and state officials.

**JURISDICTION AND VENUE**

18. This case is brought pursuant to, *inter alia*, the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; *Bivens*; the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*; 42 U.S.C. § 1983; and 18 U.S.C. §§ 3142, 3144. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has jurisdiction under

28 U.S.C. § 1331; 28 U.S.C. § 1343; 28 U.S.C. § 1346; 28 U.S.C. § 2201; and 28 U.S.C. § 2202.

19. By letter dated September 15, 2005, Mr. al-Kidd was informed by the FBI that his administrative claims under the Federal Tort Claims Act (FTCA) had been denied (Attached as Exhibit B). Mr. al-Kidd has thus exhausted his administrative remedies for purposes of his claims under the FTCA. *See* 28 U.S.C. §§ 2675, 1346.

20. Venue is proper in the District of Idaho because a substantial part of the events complained of and giving rise to Plaintiff's claims occurred in this District. *See* 28 U.S.C. §§ 1391(b), 1391(e), 1402(b).

**PARTIES**

21. Plaintiff ABDULLAH AL-KIDD is a United States citizen currently living in Las Vegas, Nevada.

22. Defendant ALBERTO GONZALES is the Attorney General of the United States of America. As Attorney General, he has ultimate responsibility for the United States Department of Justice and the Federal Bureau of Investigation, the Bureau of Prisons and the United States Marshals Service. In this capacity, Defendant Gonzales has responsibility for administering the material witness statute, and also has oversight of various databases that contain and disseminate arrest and detention records. Defendant Gonzales is the successor to John Ashcroft, who served as Attorney General of the United States until February 2005. Defendant Gonzales is sued in his official capacity.

23. Defendant JOHN ASHCROFT was the Attorney General of the United States of America from 2001-2005, and at the time Mr. al-Kidd was arrested and detained.

As Attorney General, he had ultimate responsibility for the United States Department of Justice, the Federal Bureau of Investigation, the Bureau of Prisons and the United States Marshals Service. In this capacity, Defendant Ashcroft had responsibility for administering the material witness statute, and also had responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Ashcroft is sued in his individual capacity for damages.

24. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. As Director, he has responsibility for administering the material witness statute and also has responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Mueller is sued in his official capacity.

25. MICHAEL CHERTOFF is the Secretary of the Department of Homeland Security. As Secretary of Homeland Security, he has responsibility for the maintenance and operation of various databases that contain and disseminate arrest and detention records. Defendant Chertoff is sued in his official capacity.

26. Defendant SCOTT MACE is the FBI agent who prepared and signed the affidavit submitted in support of the application to arrest Mr. al-Kidd as a material witness. Defendant Mace is sued in his individual capacity for damages.

27. Defendant MICHAEL JAMES GNECKOW was an FBI agent referenced in the affidavit submitted in support of the material witness application in Mr. al-Kidd's case. According to the affidavit, Defendant Gneckow provided Defendant Mace with information for the

factual assertions in the affidavit. Defendant Gneckow is sued in his individual capacity for damages.

28. Defendant JAMES DUNNING is, and was at all relevant times to this complaint, the Sheriff for the City of Alexandria, Virginia. As Sheriff, Defendant Dunning had responsibility for the conditions under which Mr. al-Kidd was confined at the Alexandria Detention Center. As Sheriff, Defendant Dunning was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Defendant Dunning is sued in his individual capacity for damages.

29. Defendant DENNIS M. CALLAHAN, at all relevant times to this complaint, was the Warden for the Oklahoma Federal Transfer Center. While Warden, Defendant Callahan had responsibility for the conditions under which Mr. al-Kidd was confined. While Warden, Defendant Callahan was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Upon information and belief, Defendant Callahan is no longer the Warden of the Oklahoma Federal Transfer Center. Defendant Callahan is sued in his individual capacity for damages.

30. Defendant VAUGHN KILLEEN, at all relevant times to this complaint, was the Sheriff of Ada County, Idaho. While Sheriff, Defendant Killeen had responsibility for the conditions under which Mr. al-Kidd was confined at the Ada County Jail. While Sheriff, Defendant Killeen was responsible for subjecting Mr. al-Kidd to punitive, unreasonable and excessively harsh conditions in violation of the Constitution and federal statutes. Upon information and belief, Defendant Killeen is no longer

Sheriff of Ada County. Defendant Killeen is sued in his individual capacity for damages.

31. Defendant UNITED STATES DEPARTMENT OF JUSTICE ("DOJ") is a federal agency authorized by statute to arrest material witnesses, impose conditions of confinement on material witnesses, and to administer and maintain various databases that contain and are used to disseminate arrest, detention and other records.

32. Defendant UNITED STATES DEPARTMENT OF HOMELAND SECURITY ("DHS") is a federal agency that operates and maintains federal databases that contain and are used to disseminate arrest, detention and homeland-security related records.

33. Defendant FEDERAL BUREAU OF INVESTIGATION ("FBI") is the agency within DOJ responsible for gathering intelligence for material witness and criminal proceedings, seeking warrants, executing arrests, and administering certain databases that contain and are used to disseminate arrest, detention and other records.

34. Defendant TERRORIST SCREENING CENTER ("TSC") is a multi-agency program established by Homeland Security Presidential Directive 6. Upon information and belief, it is housed within the FBI to centralize foreign and domestic intelligence, criminal information, and homeland security data for dissemination to law enforcement officials and others.

35. Defendant DONNA BUCELLA is the Director of the Terrorist Screening Center and has ultimate responsibility for the Center's actions, including the maintenance and dissemination of arrest, detention and re-

cords relating to terrorism investigations. Defendant Bucella is sued in her official capacity.

36. Defendant UNITED STATES is sued under the Federal Tort Claims Act, 28 U.S.C. § 1346, for the tortious acts of its employees.

37. Plaintiff is unaware of the true names and capacities, whether individual or otherwise, of Defendant DOES 1 through 25, inclusive, and therefore sues those Defendants by fictitious names. Plaintiff is informed and believes, and on that basis alleges, that these DOE Defendants, and each of them, are in some manner responsible and liable for the acts and/or damages alleged in this Complaint, and that among these DOE Defendants are supervisory employees and federal and state agents who acted under color of law. Plaintiff will amend this Complaint to allege the DOE Defendants' true names and capacities when they have been ascertained.

**JURY DEMAND**

38. Plaintiff demands a trial by jury in this action on each of his claims triable by jury.

**FACTS**

39. Mr. al-Kidd is a 33-year-old African-American man born in Wichita, Kansas in 1972 and raised near Seattle, Washington. His mother, father and siblings are all native-born United States citizens. Mr. al-Kidd has two native-born United States children. All of these individuals have always resided in the United States.

40. Mr. al-Kidd graduated from the University of Idaho, where he was a standout running back on the

football team. Before graduating, Mr. al-Kidd converted to Islam and changed his name from Lavoni T. Kidd to Abdullah al-Kidd.

41. After graduation, Mr. al-Kidd worked for various social and charitable organizations.

42. While at the University of Idaho, and after graduation, Mr. al-Kidd traveled abroad to further his religious studies. He returned to the United States on each occasion. At the time of his arrest, Mr. al-Kidd was traveling to Saudi Arabia for the purpose of further language and religious study at a well-known university to which he had received a scholarship.

**The Material Witness Application**

43. Following September 11, 2001, the government began a broad anti-terrorism investigation in Idaho focusing in particular on Muslim and/or Arab men.

44. During the spring and summer of 2002, FBI agents conducted surveillance of Mr. al-Kidd and his then-wife (also a native-born United States citizen) as part of their broad terrorism investigation. The FBI surveillance logs do not report any illegal activity.

45. On February 13, 2003, an Indictment was filed in the United States District Court for the District of Idaho in the case of Sami Omar Al-Hussayen, a graduate student at the University of Idaho. The Indictment alleged that Mr. Al-Hussayen had committed visa fraud and had made false statements to United States officials.

46. Approximately one month later, on March 14, 2003, the United States Attorney's Office submitted an application in the United States District Court for the District of Idaho for the arrest of Mr. al-Kidd as a mate-

rial witness pursuant to 18 U.S.C. § 3144. According to the government, Mr. al-Kidd had "crucial" information germane to Mr. Al-Hussayen's criminal trial.

47. United States Magistrate Judge Williams approved the application and issued the material witness arrest warrant for Mr. al-Kidd on March 14, 2003, the same day as the government's request.

48. The material witness application submitted for Mr. al-Kidd's arrest was based on a 3-page affidavit executed by FBI Agent Mace. The affidavit stated that Agent Mace relied on facts acquired and supplied by FBI Agent Gneckow and other law enforcement officials. Agents Mace and Gneckow are Defendants in this action.

49. The affidavit consisted of only three sentences directly pertaining to whether Mr. al-Kidd's testimony could be secured voluntarily or by subpoena, without the need for arrest:

> Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.
>
> * * *
>
> It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

*See* Affidavit at ¶¶ 7, 8 (Attached as Addendum A).

50. The affidavit, on its face, wholly failed to establish probable cause that Mr. al-Kidd's testimony could not be secured voluntarily or by subpoena, without the need for arrest.

51. Defendants Mace and Gneckow knew or reasonably should have known that the affidavit wholly failed to establish probable cause that Mr. al-Kidd would decline to testify voluntarily, or pursuant to a subpoena, without the need for arrest. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in submitting this legally deficient affidavit.

52. Defendants Mace and Gneckow also knew or reasonably should have known that the affidavit contained false, material information. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in including this false, material information.

53. Among these false, material statements was that Mr. al-Kidd had a one-way, first-class ticket to Saudi Arabia costing approximately $5,000. In fact, Mr. al-Kidd's ticket was a coach-class ticket costing approximately $1,700. Furthermore, the government later conceded that additional investigation revealed that Mr. al-Kidd's ticket was not a one-way ticket, but a round-trip ticket.

54. Further, Defendants Mace and Gneckow knew or reasonably should have known that the affidavit omitted material information, and they acted intentionally and/or with reckless disregard in failing to include this information. Among other things, Defendants Mace and Gneckow did not inform the Court of the following material information about which they knew or reasonably should have known:

(a) Mr. al-Kidd was a native-born United States citizen and a graduate of the University of Idaho;

(b) Mr. al-Kidd had a wife, child, parents and siblings who were native-born United States citizens living in this country;

(c) Mr. al-Kidd had talked with the FBI on several occasions prior to his arrest, either in-person or on the phone, and had answered dozens of questions for hours on a wide range of topics, that each of the in-person conversations had taken place at his mother's home (where Mr. al-Kidd was living at the time), and that Mr. al-Kidd had never failed to show up to these prearranged meetings;

(d) Prior to his arrest, Mr. al-Kidd had not heard from the FBI for approximately six months;

(e) At no time prior to his arrest did Defendants Mace or Gneckow, or any other government official, tell Mr. al-Kidd that he could not travel abroad or that he must consult with the government before he scheduled a trip abroad;

(f) At no time prior to his arrest did Defendants Mace, Gneckow, or any government official, tell Mr. al-Kidd that he would be needed as a witness in the Al-Hussayen trial (or any other proceeding) or ask him if he would agree to testify.

55. Mr. al-Kidd would have complied with a subpoena had he been issued one or agreed to a deposition, and Defendants Mace and Gneckow had no reasonable basis for believing otherwise. Similarly, Mr. al-Kidd would have voluntarily postponed his trip to Saudi Arabia and/or relinquished his passport had he been asked to do so, and Defendants Mace and Gneckow had no rea-

sonable basis for believing otherwise. Mr. al-Kidd would also have agreed to return from his trip when needed had he been asked to do so, and Defendants Mace and Gneckow had no reasonable basis for believing otherwise.

56. Defendants Mace and Gneckow sought a material witness warrant for Mr. al-Kidd for the purpose of detaining him preventively and/or for the purpose of further investigating him for possible criminal wrongdoing. Defendants Mace and Gneckow viewed Mr. al-Kidd as a criminal suspect, and not as a witness.

57. Upon information and belief, another material witness in the Al-Hussayen trial who was scheduled to travel to Saudi Arabia was not arrested and detained as a material witness, but only had his passport temporarily confiscated and was later permitted to travel to Saudi Arabia on the condition that he return for the trial. Unlike Mr. al-Kidd, this individual was not a United States citizen, but a Saudi national. Upon information and belief, there was no legitimate basis for treating Mr. al-Kidd differently than this individual; Mr. al-Kidd was treated differently, and arrested and detained because he was viewed as a potential criminal suspect.

58. In addition, the affidavit submitted in support of the material arrest warrant was facially unlawful on the separate and independent ground that it wholly failed to establish probable cause to believe that Mr. al-Kidd had testimony that was germane to Al-Hussayen's criminal proceeding. The affidavit stated that Mr. al-Kidd's testimony was "crucial" to the government's case (testimony which he was never called to provide). The affidavit, however, never precisely explained what information Mr. al-Kidd possessed that was germane to the charges

then pending against Al-Hussayen (visa fraud and making false statements to the government). Instead, the affidavit contained largely irrelevant information or statements attempting to cast Mr. al-Kidd in a suspicious light.

59. Defendants Mace and Gneckow knew or reasonably should have known that the affidavit wholly failed to establish probable cause to believe Mr. al-Kidd had germane testimony. Further, the affidavit was materially misleading and omitted material information. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard to the omissions and the materially misleading nature of the affidavit, and also in submitting a facially invalid affidavit.

60. Among other things, the affidavit stated that Mr. al-Kidd had material information because he or his wife received payments from Al-Hussayen and Al-Hussayen's "associates in excess of $20,000.00." In fact, Defendants Mace and Gneckow knew or reasonably should have known that Mr. al-Kidd worked for the same charitable Islamic organization as Mr. Al-Hussayen for a considerable period of time and received a salary for his work. Defendants Mace and Gneckow acted intentionally and/or with reckless disregard in omitting this material information.

61. Defendants Mace and Gneckow acted under color of law in preparing and executing the affidavit in support of the material witness application in Mr. al-Kidd's case.

62. Defendants Mace and Gneckow acted intentionally, knowingly, and/or with reckless disregard to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful arrest and detention.

63. Defendants Mace and Gneckow knew or reasonably should have known that the reasonably foreseeable consequences of their actions would result in the unlawful arrest of Mr. al-Kidd, and, especially in the aftermath of September 11, 2001, would also subject Mr. al-Kidd to prolonged, punitive and excessive unlawful, and unconstitutional conditions of confinement, and to punishment without due process. In particular, Defendants Mace and Gneckow knew or reasonably should have known the way in which Muslim men, arrested on material witness warrants after September 11, 2001, were treated upon arrest and detention. *See infra* §§ 108-36. Defendants Mace and Gneckow further knew or reasonably should have known that their actions in securing Mr. al-Kidd's arrest would set into motion a series of events, the reasonably foreseeable outcome of which was the prolonged, excessive, punitive and unlawful detention of Mr. al-Kidd.

64. Defendants Mace and Gneckow bear legal responsibility for Mr. al-Kidd's unlawful and punitive arrest; Mr. al-Kidd's prolonged, excessive and unlawful detention; and the punitive, excessive and unlawful conditions of his detention and post-release restrictions, in violation of statutory and constitutional law.

**Mr. al-Kidd's Arrest**

65. On March 16, 2003, two days after the warrant was issued, FBI agents arrested Mr. al-Kidd as a material witness at Dulles International Airport in Virginia while he was at the ticket counter checking in for his flight.

66. Mr. al-Kidd was handcuffed. The agents did not provide him with Miranda warnings. The agents also

did not provide him with a copy of the arrest warrant at that time.

67. After his arrest at the ticket counter, the FBI agents walked Mr. al-Kidd in handcuffs through the airport, as onlookers stared at him. Mr. al-Kidd was wearing religious clothing, making it clear that he was a Muslim man whom the government was arresting, adding to the already extensive and unnecessary humiliation. Mr. al-Kidd was then driven, in handcuffs, to a police substation at the airport, where he was placed in a holding cell.

68. Upon information and belief, Mr. al-Kidd spent approximately 1-2 hours in the holding cell. He was then brought to an interrogation room, where he was informed that he did not have to talk, but that if he cooperated the matter might be resolved quickly and he could continue on his flight. Mr. al-Kidd agreed to talk and was interrogated at length. The agents questioned Mr. al-Kidd about a variety of topics, including his beliefs, conversion to Islam, and his travels.

69. After the interrogation, Mr. al-Kidd was again handcuffed and taken to the Alexandria Detention Center in Virginia.

**Detention Conditions**

70. Mr. al-Kidd was ultimately detained for 16 days, until his release in Boise on March 31, 2003. During this time, he was held in three different facilities: the Alexandria Detention Center in Virginia, the Federal Transfer Center in Oklahoma, and the Ada County Jail in Boise, Idaho. In each facility, he was treated as if he were a terrorist suspect, rather than a witness, and sub-

jected to humiliating, punitive and excessively harsh conditions and restrictions of his liberty.

71. When Mr. al-Kidd was transferred between detention centers, he was likewise treated as if he were a terrorist suspect, rather than a witness, and subjected to humiliating, punitive and excessively harsh conditions and restrictions of his liberty.

**Alexandria Detention Center**

72. At the Alexandria Detention Center in Virginia, Mr. al-Kidd was initially detained in a holding cell for approximately three days with a cell mate. The small cell contained only one bed, with a toilet beside the bed. Consequently, Mr. al-Kidd slept on the floor, near the toilet. He was forced to curl up or move to the corner of the cell whenever his cell mate used the toilet. For a significant period of time, the toilet was clogged, creating a strong stench in the small cell. Mr. al-Kidd ate all his meals in the cell and was not given an opportunity to shower. Upon information and belief, Mr. al-Kidd's cell mate was not a witness, but a criminal defendant.

73. After approximately three days in the holding cell, Mr. al-Kidd was strip-searched and transferred to a high-security unit of the jail. Mr. al-Kidd was told that he was being held in the same cell where John Walker Lindh and Zacarias Moussaoui, two individuals who have been charged with terrorist offenses by the United States, had been detained.

74. Mr. al-Kidd spent the next five days in a small cell in the high-security unit of the Alexandria Detention Center. The cell had only a food slot, whereas the other cells had a small glass-covered window allowing prison-

ers to see out of their cells. Mr. al-Kidd was allowed out of his cell for approximately 1-2 hours per day.

75. Upon information and belief, many, if not most, of the other inmates in this high-security unit had been charged with or convicted of serious crimes.

76. Upon information and belief, Mr. al-Kidd's brother-in-law attempted to visit him twice at the Alexandria facility and on both occasions detention guards refused to allow him to see Mr. al-Kidd. There was no legitimate reason for refusing both of these requests.

77. During the time Mr. al-Kidd was held at the Alexandria facility, he received a hearing in the United States District Court for the Eastern District of Virginia but was not provided with counsel for that initial hearing. At the hearing, held on March 17, the government moved to continue his detention without bond until he could be transferred to Idaho. United States Magistrate Judge Liam O'Grady asked whether Mr. al-Kidd wanted to have his detention hearing in the Eastern District of Virginia within the next three days or instead be transferred to Boise, Idaho for the hearing. The Magistrate Judge further advised Mr. al-Kidd that it might be in his interest to be transferred to Boise where people were more familiar with his case. Mr. al-Kidd expressed concern about how long it would take to have his hearing in Idaho, but was told by the government attorney that he would be transferred as quickly as possible. Without the aid of an attorney and feeling overwhelmed, Mr. al-Kidd agreed to be transferred to Boise on the assumption that the transfer would occur quickly. Mr. al-Kidd was not transferred to Idaho until March 25, 9 days after his arrest and more than one week after the hearing.

78. Without undue burden, Mr. al-Kidd could have been transferred to Idaho more expeditiously than he was. There was no legitimate reason for the long delay in transferring Mr. al-Kidd to Idaho.

79. Defendant Dunning, while Sheriff and acting under color of law, had ultimate responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in the Alexandria facility.

80. Defendant Dunning, while Sheriff, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

81. Defendant Dunning, while Sheriff, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

82. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Dunning, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

**Oklahoma Federal Transfer Center**

83. On March 24, 2003, eight days after his arrest, Mr. al-Kidd was transported to Oklahoma. Federal agents handcuffed his hands and legs, chained his waist, and then linked his waist chain to his ankles and a box on his hands, which was padlocked.

84. Federal agents then escorted Mr. al-Kidd in shackles to an airfield and onto a special "Con Air" plane with approximately 100 other detainees. He remained

shackled for the entire trip to the Federal Transfer Center in Oklahoma.

85. Upon information and belief, many of the other detainees on the plane had been charged with or convicted of serious offenses.

86. At the Oklahoma Federal Transfer Center, Mr. al-Kidd and the other detainees from the plane were brought to a large room. After a considerable wait, Mr. al-Kidd was singled out and brought to wait in a dark room by himself, while the other detainees were brought to another part of the facility for processing. Mr. al-Kidd was then transferred to a cell, made to remove his clothes and forced to sit completely naked for a considerable period of time, where he could be seen by guards, including at least one female guard, and other detainees, who were clothed and being processed. Mr. al-Kidd remained naked in his holding cell until other detainees had been processed. Eventually he was given clothes and processed.

87. After he was processed, Mr. al-Kidd was placed in a high-security Special Housing Unit of the facility. He was told he was being placed there because of his situation.

88. Defendant Callahan, while Warden and acting under color of law, had responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in his facility.

89. Defendant Callahan, while Warden, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

90. Defendant Callahan, while Warden, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

91. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Callahan, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

**Ada County Jail**

92. On March 25, 2003, Mr. al-Kidd was again shackled and transferred to Boise, Idaho. During the flight, Mr. al-Kidd asked to have his handcuffs loosened slightly. His request was denied, even though others on the plane were allowed to have their handcuffs loosened. When Mr. al-Kidd tried to go to the bathroom, he was unable to do so because his handcuffs were too tight and the officer on the plane would not loosen them. According to the officer on the flight, Mr. al-Kidd could not have his handcuffs loosened because his case was special.

93. When Mr. al-Kidd arrived in Boise on March 25, he remained handcuffed and shackled while he was transferred to a holding cell in the United States District Court. Mr. al-Kidd then met with a lawyer from the Federal Public Defender's office in Idaho for a brief period before he was scheduled to appear in court.

94. At the hearing, the government requested a three-day continuance. The government also asked that Mr. al-Kidd's detention be continued without bail, as-

serting that he posed a danger and that there was a risk he would flee. Mr. al-Kidd's assigned public defender also sought some additional time to review the case with his client. The Court ultimately granted a two-day continuance and scheduled a hearing for March 27. Mr. al-Kidd was then transported to the Ada County Jail.

95. Mr. al-Kidd was placed in a high-security unit of the prison, where he was housed in a cell with a glass wall that was infested with ants. Unlike the other cells in his wing, Mr. al-Kidd's cell remained light 24 hours a day. Mr. al-Kidd was only allowed out of his cell for approximately one hour per day. Mr. al-Kidd spent approximately five days in this cell.

96. Defendant Killeen, while Sheriff, and acting under color of law, had ultimate legal responsibility and oversight for the unlawful, excessive, and punitive manner in which Mr. al-Kidd was held in his facility.

97. Defendant Killeen, while Sheriff, knew or should have reasonably known that Mr. al-Kidd was being subjected to unlawful, excessive, and punitive detention conditions.

98. Defendant Killeen, while Sheriff, acted intentionally, knowingly, with reckless disregard and/or deliberate indifference to the constitutional and legal rights of Mr. al-Kidd to be free from unlawful, excessive, and punitive detention conditions.

99. There was no legitimate reason for the excessive and punitive conditions under which Mr. al-Kidd was detained. Defendant Killeen, without undue burden, could have detained Mr. al-Kidd under less restrictive conditions.

100. During the time Mr. al-Kidd was detained in Idaho, FBI Director Mueller told a House Subcommittee that the government was making progress in the fight against terrorism and that there had been more than 200 "suspected terrorists . . . charged with crimes, 108 of whom have been convicted to date." The Director then offered a number of examples of the government's recent successes. The Director's first example was the capture of Khalid Shaikh Mohammed, the supposed mastermind of the September 11 attacks. His second example was the arrest of Mr. al-Kidd, after which he listed individuals who had been criminally charged with terrorism-related offenses. The Director's testimony never mentioned that Mr. al-Kidd had been arrested as a witness, and not on criminal charges, leaving little doubt that the government viewed Mr. al-Kidd as a suspect whom it wished to investigate and detain preventively. *See* Hearing of the House Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies, March 27, 2003. In April 2003, the Director repeated this testimony about Mr. al-Kidd before a Senate Subcommittee. *See* Hearing of the Senate Subcommittee on Commerce, Justice, State and the Judiciary, April 10, 2003.

**Detention Hearing and Release Conditions**

101. On March 28, 2003, Defendant Gneckow, FBI agent Joseph Cleary, and a United States Attorney interviewed Mr. al-Kidd at the Ada County Detention Center in the presence of Mr. al-Kidd's attorney from the Public Defender Service. Mr. al-Kidd was again questioned about his conversion to Islam, his beliefs

about Islam, his activities, his travels and his associations with Al-Hussayen.

102. During the meeting, Mr. al-Kidd repeated once again his willingness to cooperate and assured the government that he would make himself available for subpoena and appear at any time that he was requested to do so. The government ultimately proposed that he be released only under strict conditions.

103. Fifteen days after his arrest, on March 31, 2003, the Court ordered Mr. al-Kidd released on conditions. Among other things, the Court ordered that Mr. al-Kidd be released into the custody of his wife (who was living at her parents' home in Nevada). The Court confiscated his passport, barred him from applying for a new one, and limited his travel to Nevada and three other states. He was required to report to a probation officer in Idaho and Nevada, and subjected to home visits throughout his period of supervision.

104. For the next thirteen and one-half months, Mr. al-Kidd lived under conditions imposed by the Court.

105. After almost a year of living in these restrictive conditions, Mr. al-Kidd's marriage began to fall apart. In March 2004, Mr. al-Kidd moved to modify his release conditions because his living conditions had become unbearable and he and his wife were separating. The Court granted the motion and allowed him to secure his own residence in Las Vegas, Nevada.

106. On June 10, 2004, a jury acquitted Sami Omar Al-Hussayen on the most serious charges (added in superceding indictments) and failed to reach a verdict on the remaining lesser charges. The government never

called Mr. al-Kidd to testify at the trial and never retried Al-Hussayen.

107. At the conclusion of the trial, the government did not move to have Mr. al-Kidd's release conditions lifted. Accordingly, Mr. al-Kidd filed a motion to do so, which the Court granted, dismissing him as a material witness.

**Defendant Ashcroft and the Post-9/11 Material Witness Policies and Practices**

108. Defendant Ashcroft bears legal responsibility for Mr. al-Kidd's unlawful and punitive arrest; Mr. al-Kidd's prolonged, excessive, and unlawful detention; and the punitive, excessive and unlawful conditions of his detention and post-release restrictions.

109. The harm and legal wrong suffered by Mr. al-Kidd was a product of, and caused by, the Justice Department and Defendant Ashcroft's post-9/11 material witness policies and practices.

110. Prior to September 11, 2001, the Justice Department used the material witness statute sparingly and under narrow circumstances with United States citizens.

111. After September 11, 2001, the Justice Department and Defendant Ashcroft routinely used the material witness statute in numerous new, unlawful ways, especially against Muslim and/or Arab men. First, and foremost, the government used the statute as a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investi-

gate for possible criminal wrongdoing (*i.e.*, to arrest "suspects").

112. Pursuant to this new, unlawful use of the Justice Department's material witness powers, Defendants' purpose in arresting and detaining Mr. al-Kidd was not to secure his testimony, but to preventively hold and investigate him for possible criminal wrongdoing, as evidenced by various actions, including Director Mueller's House and Senate testimony; the fact that Mr. al-Kidd was not given the opportunity to cooperate voluntarily before being arrested; the manner in which Mr. al-Kidd was detained; the fact that he was routinely shackled when transported; the fact that the government opposed his release from detention on the ground that he was a danger to the community; the fact that he was under surveillance prior to his arrest; the types of questions he was routinely asked during FBI interrogations; statements by the FBI and other government agents in the media; the nature of his release conditions; and the fact that he was never called to testify.

113. The post-9/11 material witness policies and practices adopted and implemented by Defendant Ashcroft were part of a broader set of policies and practices concerning individuals whom the government lacked probable cause to arrest on criminal charges but wished to hold preventively and/or to investigate for criminal wrongdoing.

114. According to an internal report issued by the Justice Department's Office of Inspector General, Defendant Ashcroft issued a memorandum shortly after September 11, 2001, directing federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to,

terrorist activities." *See* "The September 11th Detainees," April 2003 ("OIG Report") at 1. On October 25, 2001, Defendant Ashcroft delivered a speech to the United States Conference of Mayors in which he said, "It has been and will be the policy of this Department of Justice to use . . . aggressive arrest and detention tactics in the war on terror." *See* OIG Report at 12.

115. After September 11, 2001, the government's aggressive arrest and detention policies and practices led to numerous non-citizens being preventively detained on immigration charges and U.S. citizens and non-citizens being preventively detained on garden-variety criminal charges. *See* OIG Report at 12-13.

116. As a fundamental component of this broader detention policy, Defendant Ashcroft also developed, implemented and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism *suspects* about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further.

117. Defendant Ashcroft stated at an October 31, 2001 press briefing, "Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's concentrated strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . Aggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks" (emphasis added).

118. An internal DOJ document, discussed in the OIG Report, echoes the theme of using the material wit-

ness statute to arrest and hold suspects, rather than to secure testimony. The document, entitled "Maintaining Custody of Terrorism *Suspects*," includes the following statement: "If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or *pursuant to a material witness warrant*." *See* OIG Report at 38-39 (emphasis added).

119. The OIG Report also refers to a statement by a Senior Counsel in the Deputy Attorney General's Office noting that the "Criminal Division is examining each of the cases [of terrorist *suspects* in INS custody] to determine whether the person can be detained on criminal charges or on a *material witness* warrant if the person is ordered released from INS custody." *See* OIG Report at 75 (emphasis added).

120. Public statements by other top officials who worked closely with the Justice Department in the development of post-9/11 policies confirm the new material witness policies and practices. For example, Mary Jo White, the U.S. Attorney for the Southern District of New York in the years immediately preceding and following September 11, 2001, stated that "[s]ome of the criticism that has been leveled at [DOJ for its post-9/11 use of the material witness statute] is not wholly unjustified. . . . Does it really sort out to being in one sense preventative detention? Yes, it does, but with safeguards." *See* Adam Liptak, "Threats and Responses: The Detainees; For Post-9/11 Material Witness, It Is a Terror of a Different Kind," *New York Times*, August 19, 2004.

121. Michael Chertoff, the head of the DOJ's Criminal Division in the years immediately following Septem-

ber 11, 2001, was a major proponent of the aggressive detention policy and publicly highlighted the DOJ's use of the material witness statute, saying, "It's an important investigative tool in the war on terrorism. . . . Bear in mind that you get not only testimony—you get fingerprints, you get hair samples—so there's all kinds of *evidence* you can get from a witness." *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002 (emphasis added).

122. In an April 19, 2002 speech to the Commonwealth Club of California, FBI Director Robert Mueller stated, "[A] number of *suspects* were detained on federal, state, or local charges; on immigration violations; or on *material witness* warrants" (emphasis added).

123. On February 24, 2004, in a statement to the ABA Committee on Law and National Security, then White House Counsel Alberto Gonzales described standard DOJ procedure for handling a terrorism suspect: "In any case where it appears that a U.S. citizen captured within the United States may be an al Qaeda operative and thus may qualify as an enemy combatant, information on the individual is developed and numerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a *material witness*, and detention as an enemy combatant" (emphasis added).

124. On June 25, 2003, David Nahmias, Counsel to the Assistant Attorney General, Criminal Division, offered the Senate Judiciary Committee an example of how the DOJ tracked down an alleged terrorist: "[W]e developed . . . clear evidence that he had contact with

an AL Qaida terrorist operative connected to 9/11. And so in December he was approached again . . . and [when] we weren't able to clear things at that point, he was actually made a material witness." Nahmias stated that "we got enough information to at least make him a material witness and then to charge him criminally."

125. Pursuant to its post-9/11 policies and practices, the Justice Department has in fact used the material witness statute for the unlawful purpose of arresting, holding, and interrogating numerous individuals about whom it did not have sufficient evidence to arrest on criminal charges but wished to investigate further and/or detain preventively.

126. Under the post-9/11 policies and practices, some individuals were designated as material witnesses only after already being arrested on another ground, further indicating that the government was using material witness warrants as a means of prolonging a suspect's detention. *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002 (describing a material witness who was first arrested on trespassing charges after a motel clerk reported to the authorities that he looked suspicious).

127. Under the post-9/11 policies and practices, individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena. Some individuals have been arrested as material witnesses despite the fact that they had voluntarily approached the FBI to discuss information they might have, or willingly agreed to talk to the government when

asked. *See* Naftali Bendavid, "Material Witness Arrests Under Fire; Dozens Detained In War On Terror," *Chicago Tribune*, December 24, 2001 (describing a material witness arrested and detained for three days in solitary confinement after willingly and voluntarily allowing the FBI to search his business records and computers).

128. Under the post-9/11 policies and practices, numerous material witnesses who have been detained to secure their supposedly important testimony were never in fact called to testify. By one account, nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify. *See* Steve Fainaru and Margot Williams, "Material Witness Law Has Many In Limbo," *Washington Post*, November 24, 2002. The former Chief of the Criminal Division in the U.S. Attorney's office in Miami has commented that the fact that so many post-9/11 material witnesses were never called to testify "would tend to indicate that the use of the material witness statute was more of a ruse than an honest desire to record the testimony of that person." *Id.* Further confirming their actual status as suspects, rather than witnesses, the government refused to grant many post-9/11 material witnesses immunity for their testimony, although this traditionally has been a standard procedure for eliciting testimony from a witness.

129. Once arrested, material witnesses have been routinely held in high security detention conditions, further highlighting their status as terrorism suspects, rather than true witnesses. At the San Diego Metropolitan Correctional Center, for example, there was an order in place that "material witnesses would not be allowed to make phone calls." *United States v. Awadal-*

*lah*, 202 F. Supp. 2d 55, 60 (S.D.N.Y. 2002) (quoting hearing transcript), *rev'd on other grounds*, 349 F.3d 42 (2d Cir. 2003) (not reaching issues related to detention conditions). At the New York City Metropolitan Correctional Center (MCC), material witnesses were deemed guilty until proven innocent: "'[T]he warden determined that until [the MCC] had any concrete evidence from the FBI or other folks, that there was not a terrorist association or anything of that nature, that [the MCC] would have to keep [the material witnesses] separate[]' and special precautions would apply." *Id.* at 60-61 (quoting hearing transcript).

130. Further, all material witnesses at the New York City MCC detained in relation to September 11, 2001, had their movements recorded with a hand-held camera. *Id.* at 61 (quoting hearing transcript: "It was also decided 'early on' that '[w]ith respect to all of the folks who were being brought in as material witnesses and under investigation for the World Trade Center attacks . . . that [the MCC] would record their movements with a hand-held camera,' a policy that the prison had previously used with the 'African Embassy bombers'"). U.S. Deputy Marshal Scott Shepard stated that "[M]y understanding is that our office treats anyone who is brought in as a material witness regarding the September 11 or any of the other embassy bombing trial[s], or anything like that, is treated as a security risk.'" *Id.* at 60 n.7 (quoting hearing transcript).

131. According to the OIG Report, a federal official noted that after September 11, 2001, the DOJ's Bureau of Prisons often "did not distinguish between detainees who . . . posed a security risk and those detained

aliens who were uninvolved witnesses." *See* OIG Report at 20.

132. There was a general policy that all inmates, including material witnesses, "who were at the New York MCC in connection with the investigation into the September 11th terrorist attacks were designated high-security inmates and handled in accordance with the procedures for such inmates." *United States v. Awadallah*, 202 F. Supp. at 60 (quoting Government Memorandum). *See also* Steve Fainaru, "Suspect Held Eight Months Without Seeing Judge," *Washington Post*, June 12, 2002 (noting that one material witness was held in the Special Housing Unit of the Brooklyn MDC, only allowed out of his cell for a half-hour per day and shackled with leg irons and his hands bound to his waist when he was transported).

133. The Justice Department has also unreasonably prolonged the period of detention for material witnesses—by the DOJ's own estimates about half of the witnesses it arrested in terrorism investigations were detained for more than thirty days. *See* DOJ letter to Congressmembers Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003.

134. Even after being released from detention, many material witnesses have been subjected to impermissibly restrictive release conditions—and yet were still never called to testify. *See*, *e.g.*, William Kates, "Man Held As Witness In Probe of Charity," *Albany Times Union*, March 5, 2003 (reporting that a material witness released on $20,000 bail was subjected to restrictive conditions that required him to remain confined to his home, wear an electronic monitoring bracelet, and surrender his passport).

135. DOJ has also acted under a cloak of secrecy, routinely requesting that records of material witness proceedings be sealed and refusing to make public the most basic information about the material witnesses it has detained, including names or other identifying information, or the exact number of witnesses, even in the face of direct congressional inquiry. In a response to inquiries from members of the House Judiciary Committee, the Acting Assistant Attorney General refused to reveal specific information, making only vague statements such as that "fewer than 50" individuals had been detained as material witnesses in the September 11 investigations as of January 2003, about half of whom were detained for more than 30 days. *See* DOJ letter to Congressmembers Sensenbrenner and Conyers of the House Committee on the Judiciary, May 13, 2003.

136. The abuses occurring under the material witness statute after September 11, 2001, were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities. Defendant Ashcroft (and the other Defendants) knew or reasonably should have known about these abuses. Upon information and belief, the Justice Department has issued apologies to 10-12 individuals who were improperly arrested as material witnesses.

137. Defendant Ashcroft bears legal responsibility for the harm caused Mr. al-Kidd. While he was the Attorney General, Defendant Ashcroft, acting under color of law, was legally responsible for the Justice Department's post-9/11 material witness policies and practices. Defendant Ashcroft was a principal architect of, authorized and set into motion, these policies and practices

regarding the material witness statute, and had responsibility for their implementation and administration. Defendant Ashcroft was also legally responsible for taking any necessary corrective action in light of the mounting evidence of abuse.

138. Defendant Ashcroft knew or reasonably should have known of the unlawful, excessive, and punitive manner in which the federal material witness statute was being used in the aftermath of September 11, 2001. Defendant Ashcroft knew or reasonably should have known that the manner in which the material witness statute was being used would foreseeably result in the unlawful arrest and detention of material witnesses (such as Mr. al-Kidd), and would also foreseeably subject such individuals (such as Mr. al-Kidd) to unreasonable and unlawful use of force, to unconstitutional conditions of confinement, and to punishment without due process.

139. Defendant Ashcroft knew or should have known that corrective action was necessary to prevent the material witness policies and practices, once adopted and implemented, from causing additional and ongoing legal harm and constitutional violations.

140. Defendant Ashcroft's actions were a proximate cause of the reasonably foreseeable legal wrongs suffered by Mr. al-Kidd, including Mr. al-Kidd's unlawful arrest, and the length and conditions of his detention.

141. Defendant Ashcroft, in creating, overseeing, and implementing these unlawful, excessive, and punitive policies and/or practices, acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference, towards the constitutional and legal rights of individuals arrested and detained under the policies

and/or practices (including Mr. al-Kidd). Further, Defendant Ashcroft acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference, towards the constitutional and legal rights of material witnesses arrested and detained under the Justice Department's post-9/11 policies and/or practices in failing to take corrective action.

**Irreparable Harm Suffered by Mr. al-Kidd**

142. There is a real and actual controversy between Plaintiff and Defendants, and Defendants' actions are the proximate cause of Plaintiff's injuries.

143. Mr. al-Kidd has suffered and continues to suffer harm, including irreparable harm, as a direct result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

144. Mr. al-Kidd's marriage slowly unraveled and he ultimately separated from his wife. He was unable to find steady employment after his life had been disrupted by the arrest. He was also deprived of the opportunity to study Islamic law and Arabic in Saudi Arabia on a scholarship.

145. As a result of his arrest, detention, and treatment during detention, Mr. al-Kidd has experienced severe and lasting emotional and mental distress including but not limited to fear, anxiety, nervousness, stress, depression, loss of reputation and humiliation.

146. Upon information and belief, Mr. al-Kidd has also faced, and will continue to face, adverse employment consequences because the government maintains

and disseminates information and records about his arrest and detention as a material witness.

147. In July 2004, Mr. al-Kidd was fired from his job with a contractor who did work on a United States Air Force base in Nevada. Upon information and belief, Mr. al-Kidd was denied a required security clearance because of his arrest and related records maintained by Defendants DOJ, FBI, DHS, and TSC in various databases and disseminated to Mr. al-Kidd's employers and others.

148. Upon information and belief, information and records concerning Mr. al-Kidd's material witness arrest and detention appear in several federal databases, including Defendant FBI's National Crime Information Center ("NCIC") database and the database operated by the Terrorist Screening Center ("TSC").

149. Upon information and belief, Mr. al-Kidd could be arrested and detained again as a material witness under the government's post-9/11 policies and practices.

**COUNT ONE**

**VIOLATION OF THE MATERIAL WITNESS STATUTE AND BAIL REFORM ACT**

**(18 U.S.C. §§ 3142, 3144)**

150. The foregoing allegations are re-alleged and incorporated herein by reference.

151. Mr. al-Kidd's arrest, detention and post-detention release conditions violated the material witness statute because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony

was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; and (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release terms.

152. This count is against all Defendants.

**COUNT TWO**

**VIOLATION OF THE FOURTH AMENDMENT**

153. The foregoing allegations are re-alleged and incorporated herein by reference.

154. Mr. al-Kidd's arrest, detention and post-release conditions violated the Fourth Amendment to the United States Constitution because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release terms; and (e) because of Defendants' unreasonable and unlawful searches, including strip searches.

155. This count is against all Defendants.

**COUNT THREE**

**VIOLATION OF THE FIFTH AMENDMENT**

156. The foregoing allegations are re-alleged and incorporated herein by reference.

157. The arrest and conditions under which Mr. al-Kidd was detained violated both the substantive and procedural components of the Fifth Amendment to the United States Constitution, as did the conditions governing his post-detention release, because, *inter alia*, (a) he was arrested for the unlawful purpose of detaining him preventively and/or for further investigation, and not because his testimony was needed; (b) because there was no probable cause to believe his testimony could not be secured without arrest; (c) because there was no probable cause to believe Mr. al-Kidd had testimony germane to a criminal proceeding; (d) because of the prolonged, excessive, and punitive conditions of Mr. al-Kidd's detention and post-release restrictions; and (e) because there was no individualized assessment, hearing, or proper process before Mr. al-Kidd was detained under high-security, excessive and punitive conditions.

158. This count is against all Defendants.

**COUNT FOUR**

**UNLAWFUL ARREST AND DETENTION**

**(42 U.S.C. § 1983)**

159. The foregoing allegations are re-alleged and incorporated herein by reference.

160. Defendants' actions violated Mr. al-Kidd's constitutional and legal rights to be free from unlawful ar-

rest and post-release conditions, and punitive and unconstitutional conditions of confinement and detention in violation of 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

161. This claim is against all non-federal Defendants acting under color of law.

**COUNT FIVE**

**UNLAWFUL MAINTENANCE OF RECORDS**

**(Expungement Action at Common Law)**

162. The foregoing allegations are re-alleged and incorporated herein by reference.

163. Upon information and belief, Defendants Gonzales, FBI, Mueller, TSC, and Bucella have entered and presently maintain records related to Mr. al-Kidd's arrest and detention in the NCIC and TSC databases, respectively.

164. Upon information and belief, Defendants have entered and presently maintain records related to Mr. al-Kidd's arrest and detention in other databases and record systems.

165. The government may not retain records of arrests or detentions where the maintenance of such records would be fundamentally unfair, such as where the arrest or detention was illegal and unconstitutional.

166. Mr. al-Kidd's arrest and detention violated the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, 18 U.S.C. §§ 3142, 3144, and the FTCA.

167. Maintenance and dissemination of records of his arrest and detention is fundamentally unfair and unlawful.

**COUNT SIX**

**UNLAWFUL MAINTENANCE OF RECORDS**

**(Expungement Action Under NCIC Statute, 28 U.S.C. § 534)**

168. Upon information and belief, Defendants FBI, Mueller and Gonzales have entered and presently maintain records of Mr. al-Kidd's arrest and detention in the NCIC database.

169. Congress has authorized Defendant FBI to enter specified records into the NCIC database and disseminate them to prospective employers, law enforcement officials, and other public and private agencies.

170. Congress has not authorized the FBI to enter records of the arrest and detention of persons subject to material witness warrants into the NCIC database.

171. Defendant FBI's entry into the NCIC of records relating to the arrest and detention of Mr. al-Kidd pursuant to a material witness warrant is arbitrary, capricious, and not authorized by the NCIC statute, 28 U.S.C. § 534.

172. Mr. al-Kidd is entitled to declaratory and injunctive relief ordering that records related to his unlawful arrest and detention be expunged from the NCIC.

**COUNT SEVEN**

**FEDERAL TORT CLAIMS ACT**

**(28 U.S.C. §§ 2671, 1346)**

173. The foregoing allegations are re-alleged and incorporated herein by reference.

174. Defendants Ashcroft, Mace, and Gneckow violated the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671, 1346, by falsely and tortiously arresting and imprisoning Mr. al-Kidd without legal justification. These Defendants acted with malice and/or criminal intent and wrongfully, unlawfully and/or wantonly and maliciously arrested and imprisoned Mr. al-Kidd. These Defendants further acted without just or probable cause.

175. Defendant Ashcroft further violated the FTCA by intentionally, recklessly and/or negligently establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd to be unlawfully and tortiously arrested and punitively detained. Defendant Ashcroft further acted wantonly and maliciously and with malice and/or criminal intent in establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd to be unlawfully arrested and detained. Defendant Ashcroft further acted without just or probable cause in establishing, promulgating and enforcing these unlawful policies and practices.

176. Defendants Callahan and Ashcroft further violated the FTCA by intentionally, recklessly and/or negligently establishing, promulgating and enforcing the unlawful policies and practices which caused Mr. al-Kidd

to be subjected to prolonged, excessive, punitive, harsh and unreasonable detention and post-release conditions. Defendants Callahan and Ashcroft further acted wantonly, maliciously and/or with criminal intent in establishing, promulgating and enforcing the unlawful policies and practices. Defendants Callahan and Ashcroft further acted without just or probable cause in establishing, promulgating and enforcing the unlawful policies and practices.

177. Defendants Ashcroft (as Attorney General), Mace (as an FBI agent), Gnecknow (as an FBI agent), and Callahan (as a federal warden) were acting within the course and scope of their employment as agents of the United States, and on behalf of the United States, when they committed the tortious and unlawful acts complained of here.

**RELIEF**

WHEREFORE, Plaintiff respectfully requests relief as follows:

178. A declaration that Defendants' actions violated the Constitution; 42 U.S.C. § 1983; the material witness and Bail Reform Act statutes, 18 U.S.C. §§ 3142, 3144; the common law; and the FTCA.

179. A declaration that Defendants' actions, practices, customs, and policies, regarding the arrest and detention and release conditions of material witnesses, alleged herein were unjustified, illegal and violated the constitutional and legal rights of Abdullah al-Kidd.

180. Expungement of all records, fingerprints and notations relating to the unlawful arrest and detention of Mr. al-Kidd as a material witness.

181. Expungement of all FBI records or files in the NCIC, TSC and any other databases, that are unconstitutional, unlawful, or inaccurate.

182. Trial by jury.

183. Compensatory damages in an amount to be proven at trial.

184. Punitive damages in an amount to be proven at trial.

185. Costs and reasonable attorney fees.

186. Such other relief as the Court deems just and equitable.

DATED: Nov. 18, 2005.

Respectfully submitted,

THE ROARK LAW FIRM, LLP
HAMPTON & ELLIOTT
WOOLLEY & POGUE, PLLC

/s/ CYNTHIA WOOLLEY
CYNTHIA WOOLLEY
Attorney for Plaintiff

UNITED STATES DISTRICT
FOR THE DISTRICT OF IDAHO

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No. 03-048-C-EJL

UNITED STATES OF AMERICA

*v.*

SAMI OMAR AL-HUSSAYEN, DEFENDANT

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Filed: Mar. 14, 2002

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**APPLICATION FOR ARREST WARRANT OF MATERIAL WITNESS**

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The United States of America and Thomas E. Moss, United States Attorney for the District of Idaho, by and through Kim R. Lindquist, Assistant United States Attorney, with this Application for Arrest Warrant of Material Witness, and move the Court that an arrest warrant be issued for the following material witness: Abdullah Al-Kidd, a/k/a Lavoni T. Kidd.

On February 13, 2003, an Indictment was filed in United States District Court for the District of Idaho alleging violations of 18 U.S.C. §§ 1001(a) (1) and (2), and 3238—False Statement to the United States; and 18 U.S.C. §§ 1546(a), 3237 and 3238—Visa Fraud. As a result of said Indictment, a warrant of arrest for the defendant was issued.

The testimony of the aforementioned material witness is material to both the prosecution and the defendant herein.

There is a risk that unless the Court detains or imposes restrictions on the travel of said material witness, he will be unavailable at future proceedings in this case.

This application is further based upon the Affidavit of Scott Mace, Special Agent, Federal Bureau of Investigation, the Indictment filed herein, and the warrant of arrest against the defendant herein.

DATED this 14th of Mar., 2002.

THOMAS E. MOSS
United States Attorney
By

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
Assistant United States Attorney

STATE AND DISTRICT OF IDAHO
BOISE, IDAHO

No. 03-048-C-EJL

UNITED STATES OF AMERICA

*v.*

SAMI OMAR AL-HUSSAYEN, DEFENDANT

Filed: Mar. 14, 2003

**AFFIDAVIT**

I, SCOTT MACE, the undersigned, being duly sworn, depose and state as follows:

I am a Special Agent of the FBI currently assigned to the Boise, Idaho, Resident Agency of the Salt Lake City Division. I have been a Special Agent of the FBI for six years and have been involved in multiple investigations involving crimes under Title 18 of the United States Code. This Affidavit is based upon facts acquired by fellow FBI Special Agent Michael James Gneckow and other law enforcement officials pertaining to the investigation. On March 14, 2003, Special Agent Michael James Gneckow advised your affiant of the following:

1) Gneckow is a Special Agent with the Federal Bureau of Investigation (FBI), currently assigned to the Coeur d'Alene, Idaho Resident Agency, within the FBI's Salt Lake City Division. He has been a Special Agent

with the FBI for six (6) years and has ten (10) additional years of Federal law enforcement experience as a Special Agent with the U.S. Naval Criminal Investigative Service (NCIS). He has a Masters Degree in National Security Affairs and has spent the majority of his career investigating matters relating to the national security of the United States.

2) Based upon his own observation and those of other law enforcement officers involved in the subject investigation) this affidavit is made in support of an application for arrest warrant of a material witness, namely: Abdullah Al-Kidd, a/kIa Lavoni T. Kidd.

3) During the past 16 years Gneckow has been involved in dozens of investigations involving illegal activities such as terrorism and money laundering, including the Olympic Park Bombing in Atlanta and numerous investigations overseas. During the period of 1986 to 1996, he was assigned as a foreign counterintelligence/ international terrorism investigator with the United States Naval Crimina1 Investigative Service. For the past six years, as a Special Agent with the FBI, he has been assigned numerous terrorism investigations and has been involved in several search warrants, many of which were related to terrorism or terrorism-related matters. During his career with NCIS and the FBI, he has worked closely with agents and officers of many other agencies, including the CIA, DEA, ATF, Customs Service, IRS, FBI, INS and the various investigative/ intelligence components of the United States Armed Forces, concerning matters relating to the national security of the United States.

4) In addition to his personal experience as above-referenced, he has received specialized training in the

area of terrorism and counter-terrorism, as well as economic-based crime, by attending numerous seminars offered by the Department of Justice, FBI, and other agencies. He has also participated as an instructor in some of these seminars.

5) Gneckow is currently a member of the Inland Northwest Joint Terrorism Task Force and as such, works alongside other Federal, state and local law enforcement officers, including agents of the U.S. Immigration and Naturalization Service (INS) and other personnel who investigative document fraud by foreign nationals.

6) On February 13, 2003, an Indictment was filed in United States District Court for the District of Idaho alleging violations of 18 U.S.C. §§ 1001 (a)(1) and (2); and 3238—False Statement to the United States; and 18 U.S.C. §§ 1546(a), 3237 and 3238—Visa Fraud. During the course of that investigation, information was developed regarding the involvement of Abdullah Al-Kidd with the defendant. That information includes that from March 2000 to November 2001, an individual identified as Abdullah Al-Kidd, a/k/a Lavoni T. Kidd, and/or his spouse, Nadine Zegura, received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000.00. Al-Kidd traveled to Sana'a, Yemen, in August 2001 and remained there until April 2002, when he returned to the United States. Upon his return to the United States, Al-Kidd traveled to Moscow, Idaho, and met with Al-Hussayen's associates. While in Moscow, Al-Kidd emptied a storage facility which contained personal items belonging to him. Among those personal items were documents Al-Kidd left behind, which included a conference program for the second annual IANA

conference in Dearborn, Michigan, in December 1994; a hotel receipt from Sacramento, California, dated 4/26/2001, in the name of Abdullah Al-Kidd, listing his company name as "Al-Multaqa;" and telephone numbers for IANA (734-528-0006) and Basem Khafagi (734-481-1930). Khafagi is a former Director of IANA and former University of' Idaho student (graduated in 1988) who was recently arrested in New York.

7) Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

8) Due to Al-Kidd's demonstrated involvement with the defendant, Sami Omar Al-Hussayen, he is believed to be in possession of infonnation germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena.

Respectfully submitted,

/s/ SCOTT MACE
SCOTT MACE
Special Agent
Federal Bureau of Investigation
Boise, Idaho

Subscribed and sworn to before me this 14th day of Mar. 2003.

/s/ MIKEL H. WILLIAMS
MIKEL H. WILLIAMS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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No. CR-03-048-EJL

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

SAMI OMAR AL-HUSSAYEN

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Filed: Feb. 13, 2003

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**INDICTMENT**

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THE GRAND JURY CHARGES:

At all times pertinent to this Indictment:

**VISA FRAUD AND FALSE STATEMENT**

**The Student Visas**

**Background**

1. In order for a foreign student to study in the United States on an F-1 student visa the student must declare and promise under oath to United States authorities that the student seeks a presence in the United States **solely for the purpose of pursuing the student's course of studies**. In relation thereto, the foreign student must truthfully and fully declare his associations with organizations to the appropriate United States Government authorities in order for those authorities to

evaluate any such association and related activities in relation to the interests of the United States.

2. **SAMI OMAR AL-HUSSAYEN** was a citizen of Saudi Arabia. Between about August 7, 1994 and September 23, 1998, **AL-HUSSAYEN** studied in the United States as a foreign student. He studied at Ball State University in Muncie, Indiana, where he obtained a Masters of Science degree in computer science; and at Southern Methodist University in Dallas, Texas.

3. On or about September 23, 1998, **AL-HUSSAYEN** applied to the University of Idaho at Moscow, Idaho, by submitting an International Application Form requesting that he be admitted to the Computer Science PhD program for the Spring 1999 Semester.

4. In or about January, 1999, **AL-HUSSAYEN** was admitted to the Computer Science PhD program at the University of' Idaho, with an emphasis on computer security and intrusion techniques. University of Idaho records indicated that he began his studies the Spring 1999 Semester. At the time he published his permanent address as 311 Sweet Ave., Apt. #6, Moscow, Idaho.

**The year 1999 transactions**

5. On or about May 17, 1999, United States Immigration and Nationalization (INS) Form I-20 was issued by the University of Idaho, allowing **AL-HUSSAYEN** to study in the Computer Science PhD program beginning no later than August 24, 1999, and ending no later than December 17, 2004.

6. On or about July 17, 1999, while outside the United States, **AL-HUSSAYEN** signed the Student Certifica-

tion of the INS Form I-20 at section #11, which read in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily), **and *solely* for the purpose of pursuing a full course of study at [the University of Idaho]**. I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

**AL-HUSSAYEN** falsely made said certification, knowing of his internet and business activities alleged hereafter. On or about July 20, 1999, the United States Government issued an F-1 student visa to **AL-HUSSAYEN** at Riyadh, Saudi Arabia. The visa was valid for twenty-four months, or until July 20, 2001. (See Counts One and Two hereafter.)

7. On or about August 11, 1999, **AL-HUSSAYEN** was admitted by the United States Government into the United States at John F. Kennedy International Airport in New York City, New York, as an F-1 student. AL-HUSSAYEN was admitted into the United States by the United States Government pursuant to the July 20, 1999 visa and in direct reliance upon **AL-HUSSAYEN**'s certification on the INS Form I-20 dated July 17, 1999. (See Count Three hereafter.)

**The year 2000 transactions**

8. On or about July 7, 2000, a second INS Form I-20 was issued by the University of Idaho and desig-

nated "for Continued attendance at this school" and in order "to add dependant." On or about this same day and in Moscow, Idaho, **AL-HUSSAYEN** signed the Student Certification of said INS Form I-20 at section #11 and which read in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily, **and *solely* for the purpose of pursuing a full course of study at [the University of Idaho]**. I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

**AL-HUSSAYEN** falsely made said certification, knowing of his internet and business activities alleged hereafter. (See Counts Four and Five hereafter.) On or about July 9, 2000, **AL-HUSSAYEN** departed from the United States at the John F. Kennedy International Airport in New York City, New York.

9. On or about August 25, 2000, **AL-HUSSAYEN** was admitted into the United States by the United States Government at Washington, D.C., as an F-1 student. **AL-HUSSAYEN** was admitted into the United States by the United States Government pursuant to the student visa dated July 20, 1999 as previously referenced and in reliance upon **AL-HUSSAYEN**'s certification on the INS Form I-20 dated July 7, 2000. (See Count Six hereafter.)

**The year 2002 transactions**

10. On or about January 10, 2002, AL-HUSSAYEN departed the United States at the John F. Kennedy International Airport in New York City, New York. On or about January 13, 2002, AL-HUSSAYEN signed and submitted to the United States embassy a DOS Form DS-156 for the purpose of obtaining another F-1 student visa. Section 36 of the form reads in pertinent part:

> I certify that I have read and understand all the questions set forth in this application and the answers I have furnished on this form are true and correct to the best of my knowledge and belief. I understand that any false or misleading statement may result in the permanent refusal of a visa or denial of entry into the United States. I understand that possession of a visa does not automatically entitle the bearer to enter the United States of America upon arrival at a port of entry if he or she is found inadmissable.

At section nineteen of the Form DS-156, **AL-HUSSAYEN** stated that the purpose of his entry into the United States was to "study;" and, at section twenty-six, that he would do so at the University of Idaho. At section 20 he stated his permanent address in the United States to be 311 Sweet Ave. #6, Moscow, Idaho, 83843. As part of his application for the F-l student visa, **AL-HUSSAYEN** relied upon and/or submitted the INS Form I-20 dated July 7, 2000, as previously referenced.

11. On or about January 14, 2002, the DOS Form DS-156 was formally stamped as received by the United States Government at the United States Embassy in

Riyadh, Kingdom of Saudi Arabia. However, the application was refused because the birth date of **AL-HUSSAYEN** on the visa application and the July 7, 2000 INS Form I-20 did not match the birth date on his passport.

12. On or about January 14, 2002, and in conjunction with the same F-1 student visa application, **AL-HUSSAYEN** submitted a DOS Form DS-157 Supplemental Non-immigrant Visa Application to the United States Government at the United States Embassy in Riyadh, Kingdom of Saudi Arabia, which DOS Form DS-157 was attached to the original DOS Form DS-156 submitted on January 14, 2002. Section 13 of the DOS Form DS-157 required the applicant to "[l]ist all Professional, Social, and Charitable Organizations to Which You Belong (Belonged) or Contribute (Contributed) or with Which You Work (Have Worked)." **AL-HUSSAYEN** listed "ACM & IEEE." ("ACM" stands for the Association for Computive Machinery, and "IEEE" stands for the Institute of Electrical and Electronic Engineers.) **AL-HUSSAYEN** listed no other affiliations. **AL-HUSSAYEN** falsely and intentionally did not list the Islamic Assembly of North America (hereafter the IANA) and other entities. (See Counts Seven and Eight hereafter.)

13. On or about March 19, 2002, the University of Idaho provided an INS Form I-20 for **AL-HUSSAYEN** "for Continued attendance at this school" and to "correct birth-date." On or about April 6, 2002, **AL-HUSSAYEN** signed the Student Certification of the INS Form I-20 at section eleven, which stated in pertinent part:

> I have read and agreed to comply with the terms and conditions of my admission. . . . I certify that all

> information provided on this form refers specifically to me and is true and correct to the best of my knowledge. I certify that I seek to enter or remain in the United States temporarily, and ***solely* for the purpose of pursuing a full course of study at [the University of Idaho]**. I also authorize the named school to release any information from my records which is needed. [Emphasis added.]

**AL-HUSSAYEN** falsely made the certification, knowing of his internet and business activities alleged hereafter. On or about the same day of April 6, 2002, **AL-HUSSAYEN** formally submitted the INS Form I-20 dated April 6, 2002, to the United States Government at the United States Embassy in Riyadh, Kingdom of Saudi Arabia, and the United States Government issued **AL-HUSSAYEN** an F-1 student visa in direct reliance upon **AL-HUSSAYEN**'s certifications on the DOS Form DS-156 dated January 14, 2002, and attached DOS Form DS-157, together with the INS Form I-20 dated April 6, 2002. (See Counts Nine and Ten hereafter.)

14. On or about May 9, 2002, **AL-HUSSAYEN** was admitted by the United States Government into the United States at the John F. Kennedy International Airport in New York City, New York, as an F-1 student by virtue of the F-1 student visa issued April 6, 2002, and in direct reliance upon **AL-HUSSAYEN**'s certifications on the DOS Form DS-156 dated January 14, 2002, and attached DOS Form DS-157, together with the INS Form I-20 dated April 6, 2002. During the admission at the John F. Kennedy International Airport, **AL-HUSSAYEN** was inspected by INS and Customs officials. During the inspections, the INS Form I-20 dated April 6, 2002, was photocopied by the Customs officials, with the Customs

officials retaining the copy and the original being returned to **AL-HUSSAYEN**. (See Count Eleven hereafter.)

**The Web-site Activities**

15. From at least October 2, 1998, until the date of this Indictment, **AL-HUSSAYEN** engaged in computer web-site activities that exceeded his course of study at the University of Idaho. These activities included expert computer services, advice, assistance and support to organizations and individuals, including the IANA, in the form of web-site registration, management, administration and maintenance. A number of those web-sites accommodated materials that advocated violence against the United States.

16. The IANA was incorporated in 1993 in Colorado as a non-profit, charitable organization. It maintained offices in Ann Arbor, Michigan. Its official mission statement was that of *Da'wa*: the proselytizing and spreading the word of Islam. The IANA did this, in part, by providing a number of media outlets as vehicles for advocating Islam, such as internet web-sites with "bulletin boards," internet magazines, toll-free telephone lines, and audio ("radio.net") services. The IANA solicited and received donations of monies both from within the United States and without. The IANA also hosted regular Islamic conferences in the United States, with participation by individuals affiliated with other charitable organizations also located within the United States.

17. **AL-HUSSAYEN** was the formal registered agent for the IANA in Idaho (since May 11, 2001) and a business associate of the IANA in its purpose of *Da'wa*

(proselytizing), which included the web-site dissemination of radical Islamic ideology the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism.

18. **AL-HUSSAYEN** was either the registrant or the administrative contact for a number of internet web-sites which either belonged to or were linked to the IANA. A number of said IANA-related web-sites were registered to **AL-HUSSAYEN** directly, to the IANA or to Dar Al-Asr, a Saudi Arabian company that provided web hostings on the internet. **AL-HUSSAYEN** registered web-sites on behalf of Dar Al-Asr, identifying himself as the administrative point of contact for Dar Al-Asr and giving his Moscow, Idaho street address and University of' Idaho e-mail address for reference.

19. Of the afore-referenced web-sites, **AL-HUSSAYEN** was the sole registrant of web-sites **www.alasr.ws** (created September 11, 2000), **www.cybermsa.org** (created March 15, 2001) and **www.liveislam.net** (created July 8, 2002). Web-sites **www.alasr.net** (created August 15, 1999), **www.almawred.eom** (created November 1, 1999) and **www.heejrah.com** (February 22, 2000) were registered to Dar Al-Asr, with **AL-HUSSAYEN** as the administrative contact person. Web-site **www.almanar.net** (created October 2, 1998) was registered to Al-Manar Al-Jadeed Magazine, with **AL-HUSSAYEN** as the administrative contact person. **Iananet.org** (created August 11, 1995) was registered to IANA and designed and maintained by the web-site entity Dar Al-Asr. **Ianaradionet.com** (created May 25, 1999) was registered to IANA, with **AL-HUSSAYEN** as the head of its supervisory committee and member of its technical committee. **Islamway.com** (created August 18, 1998) was regis-

tered to IANA, with direct links to **AL-HUSSAYEN**'s web-sites, including **www.alasr.ws** and **www.cybersma.org**. The registration of web-sites www.alhawali.org and www.alhawali.com (both created November 18, 2000) referenced Al-Asr and **AL-HUSSAYEN**, with **AL-HUSSAYEN** as the administrative contact for **www.alhawali.com.** These two web-sites corresponded to a radical sheikh referenced in paragraph 21 hereafter. Web-site **www.islamtoday.net** (created March 17, 2000) was related to a radical sheikh also referenced in paragraph 21 hereafter and posted articles to some of the Dar Al-Asr and **AL-HUSSAYEN** web-sites.

20. One of the afore-referenced web-sites registered by **AL-HUSSAYEN** was **www.alasr.ws**. On September 11, 2000, **AL-HUSSAYEN** registered the www.alasr.ws website. In about June of 2001, an article entitled "Provision of Suicide Operations" was published on the internet magazine of the website **www.alasr.ws**. The article was written by a radical Saudi sheikh. A portion of the article read as follows:

> The second part is the rule that the *Mujahid* (warrior) must kill himself if he knows that this will lead to killing a great number of the enemies, and that he will not be able to kill them without killing himself first or demolishing a center vital to the enemy or its military force, and so on. This is not possible except by involving the human element in the operation. In this new era, this can be accomplished with the modem means of bombing or **bringing down an airplane** on an important location that will cause the enemy great losses. [Emphasis added.]

21. Www.alasr.ws and other web-sites registered or linked to, or technically advised by **AL-HUSSAYEN**, in-

cluding www.islamway.com (previously mentioned), also posted other violent *jihad* (holy war)-related messages by other radical sheikhs, including those referenced in preceding paragraph 19.

**Financial and Business Activities**

22. From on or about August 17, 1994, until the date of this Indictment, **AL-HUSSAYEN**, at various times. maintained at least six United States bank accounts in Indiana, Texas, Idaho and Michigan. From at least January 23, 1997, until the date of this Indictment, **AL-HUSSAYEN** used said bank accounts to receive large sums of monies from within and without the United States, and to transfer and cause to be transferred large sums of monies to the IANA and other organizations and individuals.

23. From at least January 23, 1997, until the date of this Indictment, **AL-HUSSAYEN** received into and disbursed out of his bank accounts approximately $300,000.00 in excess of the university study-related funds he received during the same period of time, such as the monthly stipend he was given by the Saudi Arabian Government, and the living expenses that corresponded thereto. These excess funds included $49,992.00 paid to AL-HUSSAYEN on September 10, 1998, and $49,985.00 paid to him on September 25, 1998.

24. From at least November 16, 1999, to the date of this Indictment, **AL-HUSSAYEN** made disbursements of the excess funds referenced in the preceding paragraph to the IANA and to the IANA's officers, including a leading official of the IANA. A portion of these funds was used to pay operating expenses of the IANA, including salaries of IANA employees. Furthermore, in 1999,

2000 and 2001 wire transfers were made from **AL-HUSSAYEN** to individuals in Cairo, Egypt; Montreal, Canada; Riyadh, Kingdom of Saudi Arabia; Amman. Jordan; and Islamabad, Pakistan. **AL-HUSSAYEN** also made disbursements to other organizations and individuals associated therewith during the time referenced in this paragraph.

25. From at least November 16, 1999, to the date of this Indictment, **AL-HUSSAYEN** maintained frequent business contact with the leading IANA official referenced above. Not only did **AL-HUSSAYEN** disburse money directly to the official in the form of wire transfers and personal checks, their relationship also included the maintenance of a checking account in a Michigan bank in **AL-HUSSAYEN**'s name alone, but with the official's home address and the official's apparently exclusive use of the account. Among the deposits into the account was a $4,000.00 wire transfer from **AL-HUSSAYEN**, 311 Sweet Avenue, Apt 6, Moscow, Idaho, to **AL-HUSSAYEN**, 219 Fieldcrest Street, Ann Arbor, Michigan. In addition, numerous telephone calls between **AL-HUSSAYEN** and the official were made during the time referenced in this paragraph.

26. From at least March of 1995 until about February of 2002, the IANA received into its bank accounts approximately three million dollars ($3,000,000.00), including the funds received from **AL-HUSSAYEN** as referenced above, and disbursed approximately the same amount. The deposits included a three hundred thousand dollar ($300,000.00) transfer from a Swiss bank account on or about May 14, 1998.

27. From about December of 1994 to about July of 2002, **AL-HUSSAYEN** traveled and otherwise funded

travel for other individuals, including travel related to the IANA, through **AL-HUSSAYEN**'s bank accounts and to locations in numerous states, as well as foreign countries.

28. From at least January 1, 1997, until on or about August 28, 2002, telephones corresponding to **AL-HUSSAYEN** had contact with telephones subscribed to individuals or entities innumerous states, as well as foreign countries. Subscribers corresponding to or associated with some of the numbers included the IANA and the source of the $49,992.00 and $49,985.00 transfers previously referenced paragraph 23.

**THE VIOLATIONS**

In material reliance upon the information contained in the INS I-20 forms and the DOS Forms DS- 156 and DS-157 as heretofore referenced, the United States Government issued **AL-HUSSAYEN** F-1 student visas and allowed him to enter and remain in the United States. However, **AL-HUSSAYEN** entered into and remained in the United States for purposes other than that of solely pursuing his studies, including, but not limited to, material support of the IANA and others by means of his web-site and business activities, and knowingly and wilfully made false statements and omissions to the authorities of the United States in relation thereto. By not truthfully stating and revealing the nature and extent of his activities and affiliations in the United States, **AL-HUSSAYEN** thereby deprived the authorities of the United States of the knowledge thereof and the opportunity to evaluate and address the same within the context of the laws of the United States, resulting in

felony violations by the Defendant, **SAMI OMAR AL-HUSSAYEN**, consisting of Counts One through Eleven.

COUNT ONE
**FALSE STATEMENT TO THE UNITED STATES**
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 17, 1999, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 5 and 6.)

COUNT TWO
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 17, 1999, until the date of this Indictment, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 5 and 6.)

COUNT THREE
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about August 11, 1999, within and as the Same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 5 through 7.)

COUNT FOUR
**FALSE STATEMENT TO THE UNITED STATES**
(Violation 18 U.S.C. 1001 (a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about July 7, 2000, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho; when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraph 8.)

COUNT FIVE
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in fulJ herein.

On or about July 7, 2000 within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a

false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraph 8.)

COUNT SIX
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about August 25, 2000, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigra-

tion laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 8 and 9.)

COUNT SEVEN
**FALSE STATEMENT TO THE UNITED STATES**
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about January 14, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted Department of State (DOS) form DS-156 and form DS-157, thereby knowingly and wilfully failing and refusing to inform United

States Government authorities of his involvement with the Islamic Assembly of North America and other entities; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 10 through 12.)

COUNT EIGHT
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about January 14, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted Department of State (DOS) form DS-156 and form DS-157, thereby knowingly and wilfully failing and refusing to inform United States Government authorities of his involvement with the Islamic Assembly of North America and other entities; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 10 through 12.)

COUNT NINE
**FALSE STATEMENT TO THE UNITED STATES**
(Violation 18 U.S.C. 1001(a)(2) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about April 6, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, in a matter within the jurisdiction of the Executive Branch of the United States Government, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to authorities of the United States in relation to **SAMI OMAR AL-HUSSAYEN**'s status as a foreign student in the United States in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including, but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1001(a)(2) and 3238. (See previous paragraphs 10 through 13.)

COUNT TEN
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3238)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about April 6, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States and (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, in that **SAMI OMAR AL-HUSSAYEN**, in applying for and receiving a student visa, signed and submitted an Immigration and Naturalization (INS) form I-20, thereby knowingly and willfully representing to United States Government authorities that he sought to enter into the United States for the sole purpose of pursuing a full course of study at the University of Idaho, when, in fact, **SAMI OMAR AL-HUSSAYEN** knowingly had been, was and would be engaged in activities other than his course of study at the University of Idaho, including. but not limited to, his involvement with the Islamic Assembly of North America; in violation of Title 18, United States Code, Sections 1546(a) and 3238. (See previous paragraphs 10 through 13.)

COUNT ELEVEN
**VISA FRAUD**
(Violation 18 U.S.C. 1546(a) and 3237)

The previous numbered paragraphs one through twenty-eight are hereby re-alleged as though set forth in full herein.

On or about May 9, 2002, within and as the same pertains to the District of Idaho, **SAMI OMAR AL-HUSSAYEN**, Defendant herein, (1) knowingly made under oath and subscribed as true to the United States a false statement with respect to a material fact in an application and other document required by the immigration laws and regulations of the United States, (2) knowingly presented such application and other document required by the immigration laws and regulations of the United States which contained a materially false statement, and (3) knowingly used a non-immigrant visa obtained by a false statement and claim, in that **SAMI OMAR AL-HUSSAYEN**, in entering into the United States, presented to United States Government authorities a student visa procured by means of a false statement and claim and other document containing such false statement and claim; in violation of Title 18, United States Code, Sections 1546(a) and 3237. (See previous paragraphs 10 through 14.)

Dated this 13th day of February, 2003.

A TRUE BILL

/s/ ILLEGIBLE
FOREPERSON

THOMAS E. MOSS
UNITED STATES A TfORNEY

/s/ KIM R. LINDQUIST
KIM R. LINDQUIST
Assistant United States Attorney

/s/ TERRY L. DERDEN
TERRY L. DERDEN
First Assistant United States Attorney
Chief, Criminal Section

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CV:05-093-S-EJL

ABDULLAH AL-KIDD, PLAINTIFF

*v.*

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES; ET AL., DEFENDANTS

Filed: Sept. 27, 2006

**MEMORANDUM ORDER**

Pending before the Court in the above entitled matter are a motion to dismiss filed by the individually named Defendants and Plaintiff's motion to substitute. The parties have filed their responsive briefing and the matters are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1.

**Factual and Procedural Background**

On March 16, 2003 Mr. al-Kidd was handcuffed and arrested pursuant to a material witness warrant at the ticket counter of the Dulles International Airport while he was checking in for his flight to Saudi Arabia. He was taken to various different detention centers and eventually transported back to Idaho where, on March 31, 2003, he was released pursuant to certain terms and conditions which precluded him from leaving a four-state area of the United States. Mr. al-Kidd remained subject to these restrictions until June of 2004 when the trial of *United States v. Sami Omar Al-Hussayen* was completed, the trial in which Mr. al-Kidd was named as a material witness. The claims raised in the complaint here relate to the circumstances surrounding Mr. al-Kidd's arrest, detention, and treatment. The complaint alleges violations of the material witness statute and bail reform act, violations of the Fourth and Fifth Amendments, § 1983 claims, and claims under the Federal Tort Claims Act. The Defendants relevant to this motion are the individually named Defendants (collectively referred to as "the individual Defendants"): Federal Bureau of Investigation Special Agents Scott Mace and James Gneckow, former Attorney General of the United States John Ashcroft, and former Warden of the Oklahoma Federal Transfer Center Dennis M. Callahan. Mr. al-Kidd seeks civil damages from these individuals under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

**Standard of Review**

I. Rule 12(b)(2)—Lack of Personal Jurisdiction:

Motions to dismiss for lack of personal jurisdiction are raised pursuant to Federal Rule of Civil Procedure 12(b)(2). Because this motion is resolved without a hearing, the plaintiff need only make out a *prima facie* case to withstand a motion to dismiss for lack of personal jurisdiction. *See Data Disc, Inc. v. System Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977). This requires that the plaintiff demonstrate facts that, if taken as true, would support exercising jurisdiction over the Defendants. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). "Although the plaintiff cannot 'simply rest on the bare allegations of its complaint,' uncontroverted allegations in the complaint must be taken as true." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citations omitted). Factual conflicts between the parties contained in their affidavits are resolved in the plaintiff's favor. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

II. Rule 12(b)(6)—Failure to State a Claim:

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-

55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. *See United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963).

**Discussion**

I. Claims as to Defendant Ashcroft:

The Defendant argues the claims against Mr. Ashcroft should be dismissed because this Court is without personal jurisdiction over him and he is entitled to absolute and qualified immunity on all claims against him.

A. Personal Jurisdiction:

Mr. al-Kidd argues that personal jurisdiction exists over Mr. Ashcroft because following the September 11, 2001 terrorist attacks he created a national policy to improperly seek material witness warrants, oversaw the

execution of such warrants, and failed to correct the constitutional violations of conducting such actions. In sum, Mr. al-Kidd contends that Mr. Ashcroft's actions in adopting a policy which results in the depravation of his constitutional rights is sufficient to overcome the motion to dismiss or, at least, allow for further discovery into the claims against Mr. Ashcroft. Mr. Ashcroft asserts these actions cannot form the basis for personal jurisdiction and that there are no facts alleged that Mr. Ashcroft had any personal involvement in the decision to arrest or detain Mr. al-Kidd.

Personal jurisdiction is required before a court may decide a case in controversy. U.S. CONST. amend. XIV. Where a defendant makes a motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden to demonstrate that jurisdiction is appropriate. *Schwarzenegger*, 374 F.3d at 800. In a Rule 12(b)(2) motion, the Court may consider affidavits and other documents not mentioned in the complaint to make the personal jurisdiction determination. *National Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1101 (D. Idaho 2003). Where a motion is based only on written materials, "the plaintiff need only make a prima facie showing of jurisdictional facts." *Schwarzenegger*, 374 F.3d at 800. During review, uncontroverted allegations in the complaint must be taken as true and conflicts between the parties must be resolved in favor of the plaintiff. *Id*.

Because there is no applicable federal statute governing personal jurisdiction, this Court applies the law of the state in which it sits, in this case Idaho. *Id*. To properly exercise personal jurisdiction over Mr. Ashcroft pursuant to Idaho's long-arm statute, Mr. Ashcroft

must meet the requirements of the long-arm statute and the exercise of personal jurisdiction must comply with due process. *See State of Idaho v. M.A. Hanna Co.*, 819 F. Supp. 1464 (D. Idaho 1993). The Ninth Circuit has recognized that when the Idaho Legislature adopted the long-arm statute it intended to exercise all of the jurisdiction available under the Due Process Clause of the United States Constitution. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987), *see also Houghland Farms, Inc. v. Johnson*, 803 F.2d 978, 981 (Idaho 1990). Thus, the state and federal limits are co-extensive and an independent review of whether jurisdiction exists under the long-arm clause is unnecessary. *See Data Disc*, 557 F.2d at 1286.

There are two forms of personal jurisdiction: general and specific. *Lake*, 817 F.2d at 1420. If the defendant has "continuous and systematic" or "substantial" activities within the forum state, that state has general jurisdiction over the defendant. *Id*. Specific jurisdiction over the defendant is based on the quality and nature of the defendant's contacts with the forum state. *Id*. at 1421. Neither party alleges that this Court has general jurisdiction over Mr. Ashcroft, so the Court will determine whether it has specific personal jurisdiction over him.

To show that the defendant has sufficient contacts with the forum state to meet the specific personal jurisdiction requirements, the plaintiff must show that (1) the defendant purposefully availed himself of the privileges of the forum state, which invoked the benefits and protections of its laws; (2) the claims arose out of the defendant's forum-state related activities; and (3) the exercise

of jurisdiction would be reasonable. *Ziegler v. Indian River Co.*, 64 F.3d 470, 473 (9th Cir. 1995).

There is no respondeat superior liability in either a § 1983 or a *Bivens* action; thus, to hold a supervisory official liable the plaintiff must show one or more of the following are met:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

*Elmaghraby v. Ashcroft, et. al*, No. 04-CV-1409-JG-SMG, 2005 WL 2375202 *14 (E.D.N.Y.) (quoting *Richardson v. Goord*, 347 F.3d 431, 435 (2nd Cir. 2003)). Because "[p]ersonal jurisdiction cannot be based solely on a defendant's supervisory position," it must instead be shown that "defendant 'personally took part in the activities giving rise to the action at issue.'" *Ontel Prods. Inc. v. Project Strategies Corp.*, 899 F.Supp. 1144, 1148 (S.D.N.Y. 1995). Where the complaint fails to sufficiently allege a defendant's involvement in any of the alleged violations of plaintiff's rights, a motion to dismiss should be granted. Where, however, such involvement is alleged but discovery is necessary to ascertain the extent of that involvement, the jurisdiction question overlaps with the merits of the claims and the motion to dismiss should be denied so as to allow discovery to go forward to resolve the question. *See Crawford-El v. Britton*, 523 U.S. 574 (1989); *see also Data Disc*, 557

F.2d at 1285 (stating where "the jurisdictional facts are enmeshed with the merits, . . . [the Plaintiff need only] establish a prima facie showing of jurisdictional facts with affidavits and perhaps discovery materials"). What is required on a motion to dismiss is that the complaint provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests" as required by Federal Rule of Civil Procedure 8(a). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citation omitted).

The complaint here is replete with general allegations regarding the Department of Justice policies following September 11, 2001 including that the Department of Justice adopted a new policy and practice after September 11, 2001 which used the material witness statute as "a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or investigate for possible criminal wrongdoing. . . . " (Dkt. No. 40). The complaint goes on to allege that as a result of this new practice individuals were held for "unreasonably prolonged" periods of time as material witnesses and routinely detained in high-security detention conditions as "terrorism suspects, rather than true witnesses." (Dkt. No. 40). These generalized and conclusory allegations alone are insufficient to invoke personal jurisdiction over any of the named Defendants in this action. They do, however, lend weight to the complaint's allegations that Mr. Ashcroft knew or should have known of the alleged violations given the level of publicity coverage over the allegations that the Department of Justice was using the material

witness statute in an unlawful and abusive manner. (Dkt. No. 40, ¶ 136-41).

The complaint asserts Mr. Ashcroft, as the head of the Department of Justice, was the "principal architect of, authorized and set into motion, these policies and practices regarding the material witness statute, and had responsibility for their implementation and administration" and that Mr. Ashcroft knew or should have known of the "unlawful, excessive, and punitive manner in which the federal material witness statute was being used" and should have foreseen the resulting constitutional violations and failed to act to correct such violations. (Dkt. No. 40, ¶ 136-141).

These allegations against Mr. Ashcroft are sufficient to withstand the motion to dismiss based on a lack of personal jurisdiction. While a superior cannot be held liable simply by virtue of his position, where a plaintiff alleges sufficient facts to state a claim that the defendant was personally involved in the alleged violations and/or knew or should have known of the violations and failed to correct the conduct the superior may be liable. *See Hydrick v. Hunter*, 449 F.3d 978, 991 (9th Cir. 2006) (recognizing "a supervisor is liable for the constitutional violations of subordinates 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.'") (citation omitted). The allegations in the complaint in this case are based on more than Mr. Ashcroft's supervisory status, as the Defendant argues. Here the claims against Mr. Ashcroft contend that he spear-headed the post-September 11, 2001 practice of the Department of Justice to use the material witness statute to detain individuals whom they sought to investigate but had not charged with a crime.

Additionally, that Mr. Ashcroft either knew or should have known the violations were occurring and did not act to correct the violations. Further, the complaint alleges Mr. Ashcroft knew or should have known of the constitutional violations to witnesses held pursuant to the unlawful policy, including Mr. al-Kidd. As such, the complaint has alleged facts which, if true, would subject Mr. Ashcroft to jurisdiction in this District and have stated a claim upon which relief could be granted. These allegations are sufficient to withstand the motion to dismiss. *See Elmaghraby v. Ashcroft*, No. 04-CV-1409-JG-SMG, 2005 WL 2375202 *10 (E.D.N.Y. 2005).

B. Absolute Immunity:

Mr. Ashcroft argues that he enjoys absolute immunity against these claims arguing the prosecutorial immunity doctrine applies. Such immunity, he argues, exists here because the complaint's allegations fail to state a claim as they improperly focus on the Defendant's motives in seeking the warrant when the proper inquiry for the claims turns on the nature or function of the Defendant's activity, not the intent or motive. Prosecutors are absolutely immune from civil liability for their conduct insofar as it is "intimately associated" with the judicial phase of the criminal process. *Botello v. Gammick*, 413 F.3d 971, 975-76 (9th Cir. 2005) (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991)) (citations omitted). The Ninth Circuit has recently detailed the immunity afforded to prosecutors in the context of § 1983 actions:

> A prosecutor is protected by absolute immunity from liability for damages under § 1983 "when performing the traditional functions of an advocate." *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). However, "the ac-

> tions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Prosecutorial immunity depends on "the nature of the function performed, not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). Prosecutors are entitled to qualified immunity, rather than absolute immunity, when they perform administrative functions, or "investigative functions normally performed by a detective or police officer." *Id.* at 126; *see also Burns v. Reed*, 500 U.S. 478, 494-96 (1991).

*Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005); *see also Wilson v. Layne*, 526 U.S. 603, 609 (1999) (recognizing that *Bivens* cases employ the same standard as that used in § 1983 cases). Mr. al-Kidd argues that the nature and function of Mr. Ashcroft's actions were not prosecutorial but investigative and, at best are only afforded qualified immunity. Mr. Ashcroft maintains that any involvement on his part was as a prosecutor.

Although the line between the functions is not entirely clear, it is clear that absolute prosecutorial immunity is justified "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Botello*, 413 F.3d at 975-76 (quoting *Burns*, 500 U.S. at 494). "On the one hand, it is well established that a prosecutor has absolute immunity for the decision to prosecute a particular case, and for the decision not to prosecute a particular case or group of cases." *Id.* In addition, a prosecutor's professional evaluation of a witness is entitled to abso-

lute immunity "even if that judgment is harsh, unfair or clouded by personal animus." *Id.*; *see also Genzler*, 410 F.3d at 636-38 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 ( 1993) ("The Supreme Court rejected the idea that prosecutors are only entitled to qualified immunity when they are engaged in investigation" stating in *Buckley*, that "'evaluating evidence and interviewing witnesses' in preparation for trial is advocacy even though such pretrial activities may be 'investigatory' in nature.").

However, "prosecutors are not entitled to absolute immunity for advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal proceedings." *Botello*, 413 F.3d at 976-77 (citations omitted). "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274. "[A] determination of probable cause does not guarantee a prosecutor absolute immunity for liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5.

"The question is whether a prosecutor's investigation is of the type normally done by police, in which case prosecutors enjoy only qualified immunity, or whether an investigation is bound up with the judicial process, thus affording prosecutors the heightened protection of absolute immunity." *Genzler*, 410 F.3d at 636-38. To determine whether an action is judicial, administrative or investigative, the court looks at "the nature of the

function performed, not the identity of the actor who performed it." *Botello*, 413 F.3d at 975-76 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)) (citation omitted). Thus, whether a prosecutor benefits from absolute or qualified immunity depends on which of the prosecutor's actions are challenged. *Id.* The official seeking absolute immunity bears the burden of demonstrating that absolute immunity is justified for the function in question. *Id.* (citing *Buckley*, *supra)*. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the course of their duties. *Id.* (citing *Burns*, *supra*).

The particular function which Mr. al-Kidd alleges was taken by Mr. Ashcroft resulting in the constitutional violations was the development and implementation of a new policy and practice for use of the material witness statute as an investigative tool to detain and/or investigate for possible criminal wrongdoing or to otherwise hold certain individuals preventively where the Government lacked probable cause. The allegations are that Mr. Ashcroft "directed and oversaw an investigative law enforcement policy and that he used the material witness statute to preventively detain and investigate suspects." (Dkt. No. 63, p. 30). As a result of this policy, Mr. al-Kidd alleges his constitutional rights were violated and Mr. Ashcroft knew, should have known, or acted with reckless disregard and deliberate indifference in failing to correct the policy. As this new policy applies to Mr. al-Kidd's case, he points to various Government reports and the testimony of Director Mueller's testimony before Congress.

The allegations here relate to Mr. Ashcroft's actions which fall within the investigation realm of the type nor-

mally done by police. The development and practice of using the material witness statute to detain individuals while investigating possible criminal activity qualifies as police type investigative activity, not prosecutorial advocacy. Accordingly, Mr. Ashcroft is not entitled to absolute immunity but may be entitled to qualified immunity, which is discussed below.

II. Qualified Immunity:

Government officials enjoy qualified immunity when performing discretionary functions such that they are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test for evaluating a qualified immunity claim is to first "determine whether the plaintiff has shown that the action complained of constituted a violation of his or her constitutional rights. If the court is satisfied that a constitutional violation occurred at the hands of a government official, the second step is to determine: (1) whether the violated right was clearly established and (2) whether a reasonable public official could have believed that the particular conduct at issue was lawful. As such, the process of determining qualified immunity is an examination of the 'objective legal reasonableness' of a government official's conduct." *Id*. at 818.

A. Defendants Mace and Gneckow:

The claims against Defendants Mace and Gneckow are primarily related to their involvement in obtaining the material witness warrant. Agent Mace prepared and

signed the affidavit supporting the warrant application and Agent Gneckow provided the information to Agent Mace upon which the application and affidavit were based.[1] The motion to dismiss asserts Defendants Mace

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[1] The three paragraphs of the affidavit (Dkt. No. 40, pp. 50-51) most applicable here state:

6) On February 13, 2003, an Indictment was filed . . . alleging . . . False Statement to the United States; and . . . Visa Fraud. During the course of that investigation, information was developed regarding the involvement of Abdullah Al-Kidd with [Sami Omar Al-Hussayen]. That information includes that from March 2000 to November 2001, an individual identified as [Mr. al-Kidd], and/or his spouse, Nadine Zegura, received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000.00. Al-Kidd traveled to Sana'a, Yemen, in August 2001 and remained there until April 2002, when he returned to the United States. Upon his return to the United States, Al-Kidd traveled to Moscow, Idaho, and met with Al-Hussayen's associates. While in Moscow, Al-Kidd emptied a storage facility which contained personal items belonging to him. Among those personal items were documents Al-Kidd left behind, which included a conference program for the second annual IANA conference in Dearborn, Michigan, in December 1994; a hotel receipt from Sacramento, California, dated 4/26/2001, in the name of Abdullah Al-Kidd, listing his company name as "Al-Multaqa;" and telephone numbers for IANA (734-528-0006) and Basem Khafagi (734-481-1930). Khafagi is a former Director of IANA and former University of Idaho student (graduated in 1988) who was recently arrested in New York.

7) Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia.

8) Due to Al-Kidd's demonstrated involvement with the defendant, Sami Omar Al-Hussayen, he is believed to be in possession of information germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kidd travels to Saudi Arabia, the United

and Gneckow are entitled to qualified immunity because the arrest warrant was supported by probable cause, or at least "arguable" probable cause, as required by 18 U.S.C. § 3144. Mr. al-Kidd alleges the complaint properly states a claim against agents Mace and Gneckow because probable cause for the issuance of the warrant did not exist; raising arguments involving the *Franks* and *Malley* tests arguing the statements made in the affidavit were deliberately false and contained material omissions.

Mr. al-Kidd further asserts that the probable cause requirements for issuance of a material witness warrant are a different inquiry than that for an arrest warrant for a criminal suspect. In support of this argument, Mr. al-Kidd relies upon *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). In that case, Bacon was arrested under a material witness arrest warrant in order to secure her testimony before a grand jury. Mr. al-Kidd relies on dicta in the opinion where the court, after finding the affidavit submitted in support of the arrest warrant failed to show that Bacon was likely to flee, distinguished the case from the situation where a witness was served with a subpoena. The service of a subpoena, the court noted, would have given Bacon an opportunity, as afforded to most witnesses, to voluntarily comply with the subpoena before being arrested and/or detained. The court concluded that the denial of that opportunity was not warranted on the facts in Bacon's case. *Id*. at 945. This language and reasoning does not, as Mr. al-Kidd contends, stand for the proposition that all potential witnesses must be given to an opportunity to appear

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States Government will be unable to secure his presence at trial via subpoena.

to testify prior to a material witness arrest warrant being sought and executed. What is required for the issuance of a material witness arrest warrant is that "the judicial officer must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his [or her] presence by subpoena.'" *Id.* at 943 (quoting 18 U.S.C. § 3149). Here, the Government asserts that probable cause was shown on both prongs of the test and, therefore, the individual Defendants are entitled to qualified immunity.

As to the materiality question the Government states that the "warrant application presented evidence that plaintiff was involved in business activities that served as the basis for the underlying prosecution of Sami Omar Al-Hussayen" and "[o]n that basis, Judge Williams correctly concluded that there was probable cause to believe that plaintiff's testimony could be material." (Dkt. No. 71, p. 7 n.4). Further, the Government points out that "'a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy' the materiality criterion." *Bacon*, 449 F.2d 943 (distinguishing between the first prong and the second prong concluding that the second prong requires more than mere assertions). As to the second prong, the Government maintains that the impracticability requirement is analyzed consistent with the case law addressing whether an individual is a flight risk and that the Court should look at the totality of the circumstances in making the determination. (Dkt. No. 71, p. 9). Applying this standard, the Government argues Mr. al-Kidd was a flight risk as he was business associate and potential witness in the trial of Mr. Al-Hussayen which involved terrorism related charges; he was scheduled to travel to

Saudi Arabia where there is no extradition treaty with the United States after Mr. Al-Hussayen's indictment and arrest; it appeared that Mr. al-Kidd had the resources, connections, and skills necessary to remain abroad for an extensive period of time and avoid apprehension; he did not report his travel plans to law enforcement nor offer to return for trial or provide any contact information. (Dkt. No. 71, p. 12). The Government also contends Mr. al-Kidd should have consulted with law enforcement regarding his travel plans before leaving because he was aware of the investigation and indictment of Mr. Al-Hussayen and that he was a potential witness in the case. (Dkt. No. 71, p. 12 n. 10).

On the other hand, Mr. al-Kidd argues probable cause was not shown in the warrant affidavit as to either prong of the test. In addition, Mr. al-Kidd asserts that the affidavit contained false statements and omissions which were misleading to the magistrate judge's determination of whether to issue the warrant. In particular, he notes that the affidavit omitted the fact that he was a native-born United States citizen with family ties to the United States, had cooperated with the FBI previously, was not informed that he could not travel or that he needed to inform the FBI of his travel plans, and was not asked to testify or make himself available to testify prior to the Government seeking a warrant.[2] The affi-

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[2] Specifically, Mr. al-Kidd notes the following omissions and false statements:

1) failing to state Mr. al-Kidd and Mr. Al-Hussayen worked together for the same charitable Islamic organization and that Mr. Al-Hussayen was responsible for paying Mr. al-Kidd's salary; thus the $20,000 he received was his salary for work performed over a significant period of time. (Dkt. No. 40, ¶ 60).

davit also, he contends, falsely represented that he had a one-way first class ticket costing $5,000 to Saudi Arabia when he actually had a round-trip coach ticket costing $1,700.

The question before the Court on this motion is the limited question of whether or not the complaint states a cause of action upon which relief can be granted. To establish a prima facie case under 42 U.S.C. § 1983, Plaintiffs "must adduce proof of two elements: (1) the action occurred 'under color of law' and (2) the action resulted in a deprivation of a constitutional right or a federal statutory right." *Souders v. Lucero*, 196 F.3d 1040, 1043 (9th Cir. 1999) (citation omitted); *see also Wilson*, 526 U.S. at 609 (recognizing that *Bivens* cases

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2) failing to state that Mr. al-Kidd was a native-born United States citizen with substantial ties to the United States, including his native-born United States citizen mother, father, sibling, wife, and child. (Dkt. No. 40, ¶¶ 15, 39, 40).

3) failing to state that Mr. al-Kidd had previously cooperated and talked with the FBI, voluntarily answering questions and appearing at all pre-arranged meetings. (Dkt. No. 40, ¶¶ 15, 54).

4) failing to state that the FBI had not contacted Mr. al-Kidd for six months at the time of the application and the FBI had not told him he might be needed as a witness, could not travel abroad, or that he needed to inform the FBI of such travel. (Dkt. No. 40, ¶¶ 15, 54).

5) failing to state that the FBI had not sought Mr. al-Kidd's voluntary cooperation, agreement to testify, or willingness to remain in the United States to be available to testify prior to seeking the warrant.

6) falsely stating the facts related to his air travel as being a one-way, first-class ticket costing approximately $5,000 when the ticket was a round-trip coach ticket costing approximately $1,700. (Dkt. No. 40, ¶¶ 14, 53).

employ the same standard as that used in § 1983 cases). "In order to state a claim under § 1983 for statements in an affidavit to procure a warrant, a plaintiff must show that the investigator made deliberately false statements or recklessly disregarded the truth in the affidavit and that the fabrications were material to the finding of probable cause." *Gailbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citations and quotations omitted). The threshold inquiry is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws." *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

Taking the allegations as true, as the Court must on this motion, the Court concludes that the complaint adequately states causes of action upon which relief can be granted. The parties both raise arguments as to the question of whether probable cause existed for the issuance of the material witness arrest warrant in this case.[3] Generally, police officers are entitled to qualified immunity if a reasonable officer in his or her position would have an arguable basis to believe probable cause existed to arrest or to seek an arrest warrant "in light of clearly established law and the information the [arresting] officers possessed.'" *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1294 (9th Cir. 1999) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citation omitted).

Mr. al-Kidd's allegations are that probable cause was not shown in the warrant application and, therefore, his

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[3] The Government states in its reply that Mr. al-Kidd has not challenged the materiality requirement of 18 U.S.C. § 3144 (Dkt. No. 71, p. 7), however, in his response brief Mr. al-Kidd does contend that probable cause did not exist as to the materiality question. (Dkt. No. 63, p. 17).

constitutional rights were violated. Mr. al-Kidd asserts that in seeking the warrant the officers made material omissions and misstatements upon which the magistrate judge relied in determining probable cause existed and granting the request for a warrant. The Defendants have challenged these allegations and have asserted their own affirmative defenses to the claims. The Defendants' arguments dispute the factual allegations in the complaint and ask the Court to weigh the facts going to the probable cause determination contrary to the facts alleged in the complaint. This is not the appropriate inquiry on this motion. The question of whether qualified immunity applies to the officers in this case can not be resolved on a motion to dismiss for failure to state claim in light of requirement to assume the truth of facts as plead. *Morley v. Walker*, 175 F.3d 756, 760 (9th Cir. 1999). While true that "arguable probable cause" could entitle the officers to the qualified immunity defense, *Hunter*, 502 U.S. at 227, Mr. al-Kidd's factual allegations here regarding the officers' misrepresentations and omissions in the warrant application, if true, would negate the possibility of qualified immunity regardless of the probable cause finding and, therefore, the complaint survives the motion to dismiss. *See Morley*, 175 F.3d at 761; *see also Mendocino Environmental Center*, 192 F.3d at 1294 n.18 ("The issue is not whether the contents of the affidavits, if true, were adequate to provide probable cause. Rather, here, the [plaintiff's] contention is that the [defendants] obtained the warrants by misrepresenting the facts in the affidavits."). The Court also notes that many of the cases cited by the Defendants to support their arguments involved motions for summary judgment which apply a different standard. Because the facts alleged in the complaint state causes

of action upon which relief can be granted, the Court will deny the motion to dismiss.

B. Defendant Ashcroft:

Mr. Ashcroft also asserts that qualified immunity precludes any liability against him because there are no factual allegations that he was personally involved in any decisions relating to Mr. al-Kidd's arrest, detention, and conditions of confinement or even aware of such conditions or detention. Defendant argues the vague and conclusory allegations in the complaint allege nothing more than a claim against Mr. Ashcroft based upon his supervisory status but not upon his actual personal involvement. The Court finds the allegations in the complaint, if true, are sufficient on this motion to raise a claim for relief against Mr. Ashcroft as to his involvement in the constitutional violations allegedly incurred by Mr. al-Kidd. As decided above in the personal jurisdiction section, the allegations against Mr. Ashcroft involve more than vicarious liability but assert claims involving Mr. Ashcroft's own knowledge and actions related to Mr. al-Kidd's alleged constitutional deprivations. Whether these allegations can be substantiated is a question to be decided later.

III. Claims as to Defendant Callahan:

Mr. Callahan argues dismissal of all claims against him is warranted as he did not become the warden of the Oklahoma Federal Transfer Center until after Mr. al-Kidd was released. In response, Mr. al-Kidd has conceded that Mr. Callahan should be dismissed and filed a motion to substitute John Sugrue, the Warden of the Oklahoma Federal Transfer Center at the time of Mr.

al-Kidd's detention. (Dkt. No. 58). Accordingly the Court will dismiss Mr. Callahan as a party in this action.

As to the motion to substitute Mr. Sugrue in this case, the Defendants have filed an opposition to the motion arguing the motion is untimely, fails to meet the precepts of Rule 15(c), and because the Court lacks personal jurisdiction over Mr. Sugrue and the claims are without merit. Mr. al-Kidd disagrees and maintains the substitution should be allowed and his claims should relate back to the time of the filing of the complaint pursuant to Federal Rule of Civil Procedure 15(c)(3).

The Government argues the requirements for service and notice of Rule 15(c)(3) are not met here because they do not allow for notice by way of service upon the United States in the case of claims raised against a person in their individual capacity. Mr. al-Kidd maintains that Rule 15(c)(3) allows for relation-back of claims against government defendants sued individually. Rule 15(c) states:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
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> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is sat-

> isfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Four factors generally guide a court's determination regarding whether to allow an amendment to a pleading: undue delay, bad faith, prejudice to the opposing party, and futility of amendment. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1482 (9th Cir. 1997). Amendments to the complaint are allowed in cases where "the previously unknown defendants were identified only after the statute of limitations had run." *Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) (citations omitted).

Here, Mr. Callahan was named in his individual capacity as warden of the Oklahoma Federal Transfer Center at the time Mr. al-Kidd was held there. Upon

discovering that Mr. Sugrue was actually the warden at the time applicable here, Mr. al-Kidd has sought to amend the complaint to name the appropriate individual. This was clearly a mistake on the part of Mr. al-Kidd caused by the fact that he was wrongly informed at the time of the filing of the initial complaint. Further, it appears the Defendants "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3)(B); *see also Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) ("In the Ninth Circuit, the mistake requirement is construed more liberally than in other circuits."). Therefore, the question on this motion turns on whether the notice requirements of Rule 15(c)(3) are met.

Here, Mr. al-Kidd argues the notice was timely made by service of the complaint upon the United States, that the requested amendment will not prejudice the defense, and that the Government knew or should have known that but for the mistake the action would have been brought against the proper party. The Government disputes that the notice requirements were met. "The Ninth Circuit recognizes the 'imputed notice'/ 'community of interest' theory which, for the purpose of applying relation back, allows courts to infer notice when the party actually notified and the party assumedly notified 'are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.'" *Blackhawk v. City of Chubbuck*, No. 04-CV-629-E-BLW, 2005 WL 3244406 *1 (D. Idaho Nov. 21, 2005) (*citing G.F. Co. v. Pan Ocean Shipping*, 23 F.3d 1498, 1503 (9th Cir. 1994) (quoting 6A Charles Miller, et al.,

*Federal Practice and Procedure* § 1499 at 146 (2d ed. 1990)). The Court finds the notice requirement here is satisfied. "Informal notice is sufficient if it allows the defendant the opportunity to prepare a defense." *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157 (N.D.Cal. Jun. 23, 2005) (citing *Craig v. United States*, 479 F.2d 35, 36 (9th Cir. 1973)). The Government was properly served with the initial complaint in this matter, the claims against Mr. Sugrue remain the same as those raised against Mr. Callahan, the attorney's representing Mr. Sugrue remain the same, and the Government's response to the motion itself demonstrates that Mr. Sugrue will not be prejudiced and is able to present a defense to the charges. Accordingly, the Court will grant the motion to substitute Mr. Sugrue for Mr. Callahan. The amendments shall relate back to the date of the filing of the original complaint.

The Government also alleges that the proposed amendment should be denied as it is frivolous because the Court lacks jurisdiction over Mr. Sugrue and/or because *Bivens* actions do not allow for vicarious liability. Mr. al-Kidd opposes both claims. Though the Court recognizes that "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend," the question of whether or not Mr. Sugrue is subject to personal jurisdiction and/or whether the complaint states a cause of action upon which relief can be granted are issues not yet fully briefed by the parties. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). In response to the Government's motion to dismiss, Mr. al-Kidd conceded the error in naming Mr. Callahan and filed the instant request to substitute parties. Accordingly neither party completed the briefing on these questions on the motion to dismiss or as the arguments apply to this Defendant.

Therefore, the Court will allow Mr. Sugrue leave to file a motion to dismiss on or before October 30, 2006. The parties shall file their responsive briefing accordingly and the Court will render its decision in due course.

**ORDER**

Based on the foregoing and being fully advised in the premises, the Court HEREBY ORDERS as follows:

1) The Motion to Substitute Party (Dkt. No. 58) is **GRANTED**. The Clerk of the Court is directed to **DISMISS** Defendant Dennis Callahan from the action and **SUBSTITUTE** Defendant John Sugrue, Former Warden, Oklahoma Federal Transfer Center, in the place of Defendant Dennis Callahan.

2) The Motions to Dismiss (Dkt. Nos. 47, 55) are **DENIED**.

3) The Government is granted leave to file a motion to dismiss as to Defendant Sugrue on or before October 30, 2006.

DATED: **Sept. 27, 2006**

[SEAL OMITTED]

/s/ EDWARD J. LODGE
EDWARD J. LODGE
U.S. District Judge