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EDITORIAL

Indefensible Detention

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Should a former attorney general be held personally liable for brazenly misusing the material witness statute when he was in office to hold an American man in brutal conditions on the pretext that he was a witness in a case in which he was never called to testify?

At last week's Supreme Court argument in [Ashcroft v. al-Kidd](#), which turns on that question, the justices' silence suggested they are reluctant to do that — and, in addition, would prefer to avert their eyes from the misuse of the statute.

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Before letting John Ashcroft, a former attorney general, off the hook and giving the Justice Department a pass to continue misusing that law, the justices should read an [amicus brief](#) in support of Abdullah al-Kidd by 31 former federal prosecutors, including former United States attorneys in New York, Illinois and California.

The brief makes clear that the argument presented to the court by the acting solicitor general, contending that Mr. Ashcroft is immune from prosecution and all but ignoring the disgraceful conduct from which he seeks immunity, is hardly Justice Department gospel.

The former prosecutors' brief underscores why the justices should uphold the judgment of the United States Court of Appeals for the [Ninth Circuit](#) that Mr. Ashcroft forfeited immunity when he devised the strategy that led to the statute's misuse.

It emphasizes why they should rule that the material witness statute, letting the government keep a witness from fleeing before testifying about an alleged crime by somebody else, can never be used as a pretext to hold someone for investigation or building a case against him.

Because Mr. Ashcroft chose to appeal before a full record could be developed in this case, the justices must accept as true the facts that Mr. Kidd's complaint alleges and draw reasonable inferences about them in his favor.

The facts are that, without a claim he had broken any law and as one of four seized as part of the F.B.I.'s wider "Idaho probe," Mr. Kidd was arrested, strip-searched, shackled and jailed for 15 days — handled like a suspect, not a witness. Against him and others, the Justice Department used the statute, Mr. Kidd's lawyers inferred and others must as well, "to detain and investigate suspects for whom the government lacked probable cause of wrongdoing, and not to secure testimony."

The government contends that Mr. Ashcroft didn't have to intend to use Mr. Kidd as a witness to detain him because the then-attorney general's motivation was irrelevant. But to the former prosecutors, it is "settled understanding" that the statute has "no other legitimate purpose" except to hold a witness for testimony.

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It can't be used to detain someone because it simply doesn't grant that power. The Non-Detention Act says clearly: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." After Sept. 11, 2001, Mr. Ashcroft asked Congress for that authority. Congress said no — and the Justice Department's misuse of the material witness statute was a ruse to get around that rebuff.

Despite the "settled understanding" to the contrary, the department got away with that ruse until this case. The Supreme Court should say it has no power to do so.

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