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Justices to Hear Appeal Over Liability for Detention

By ADAM LIPTAK

WASHINGTON — Abdullah al-Kidd, born in Kansas and once a star running back at the University of Idaho, spent 16 days in federal detention in three states in 2003, sometimes naked and sometimes shackled hand and foot.

On Monday, the Supreme Court agreed to decide whether he may sue John Ashcroft, the former attorney general, for what Mr. Kidd contends was an unconstitutional use of a law meant to hold "material witnesses." Mr. Kidd says the law was used as a pretext for detaining him because he was suspected of terrorist activities.

The material witness law is typically used to hold people who have information about crimes committed by others when there is reason to think they would not appear at trial to give testimony. Critics say the Bush administration radically reinterpreted the law after the Sept. 11 attacks, using it as a tool for preventive detention.

Laws allowing the preventive detention of terrorism suspects are common in Europe. The United States does not have such a law, but Mr. Kidd contends that a policy set by Mr. Ashcroft allowed federal prosecutors to use the material witness law to the same end.

The United States Court of Appeals for the Ninth Circuit, in San Francisco, last year allowed Mr. Kidd's suit to proceed, rejecting Mr. Ashcroft's claim that he was entitled to prosecutorial immunity.

"To use a material witness statute pretextually, in order to investigate or pre-emptively detain suspects without probable cause," Judge Milan D. Smith Jr. wrote for the majority of the divided three-judge panel, "is to violate the Fourth Amendment," which bans unreasonable searches and seizures.

"Some confidently assert," Judge Smith continued, "that the government has the power to arrest and detain or restrict American citizens for months on end, in sometimes primitive conditions, not because there is evidence that they have committed a crime, but merely

because the government wishes to investigate them for possible wrongdoing, or to prevent them from having contact with others in the outside world. We find this to be repugnant to the Constitution, and a painful reminder of some of the most ignominious chapters of our national history."

Eight judges dissented from the full Ninth Circuit's decision not to rehear the case. They said prosecutors' subjective intentions were irrelevant so long as they followed the letter of the material witness law.

Wesley M. Oliver, a legal historian at Widener University School of Law, filed a brief urging the Supreme Court to hear the case. In an interview, he said the Ninth Circuit's reasoning would "negate an otherwise valid material witness warrant because you think the witness is also a criminal suspect."

"You can now hold the innocent grandmother," Professor Oliver said, "but not the guy suspected of supporting Al Qaeda."

Mr. Kidd, who described himself in a 2004 interview as "anti-bin Laden, anti-Taliban, anti-suicide bombing, anti-terrorism," was never charged with a crime and was never called to testify as a witness.

The Obama administration had urged the justices to reverse the Ninth Circuit's decision allowing his suit to proceed. "If permitted to stand," wrote Neal K. Katyal, the acting solicitor general, "the decision below would seriously limit the circumstances in which prosecutors could invoke the material witness statute without fear of personal liability."

Mr. Kidd, represented by the American Civil Liberties Union, said the appeals court ruling had been straightforward and correct. Mr. Ashcroft's "deliberate decision to authorize the pretextual arrest of witnesses was clearly unconstitutional," Mr. Kidd's lawyers told the justices.

Mr. Kidd, who was known as Lavoni T. Kidd when he led the Vandals of the University of Idaho in rushing in 1995, was on his way to Saudi Arabia to work on his doctorate in Islamic studies in March 2003 when he was arrested and handcuffed at Dulles International Airport outside Washington.

In the 2004 interview, Mr. Kidd said he did not understand why someone held as a mere witness should be subjected to harsh treatment.

"I was made to sit in a small cell for hours and hours and hours buck naked," he said. "I was treated worse than murderers."

Justice Elena Kagan disqualified herself from the case, Ashcroft v. al-Kidd, No. 10-98, presumably because she had worked on it as United States solicitor general.