

WILL SCOTUS GIVE ASHCROFT IMMUNITY IN ASHCROFT V. AL-KIDD?

SCOTUS decided today to take John Ashcroft's appeal of a 9th Circuit decision finding that he did not have immunity from suit in using the material witness statute to illegally hold someone without probable cause.

The Supreme Court, finishing its first sitting of the new Term, agreed on Monday to hear a single new case, a plea by former U.S. Attorney General John Ashcroft for immunity to a lawsuit claiming he misused a federal anti-terrorism law. The Court, among denied cases, refused to hear a new challenge to the denial of voting rights to individuals when they are serving time in prison.

The Court limited its review of the new terrorism case (*Ashcroft v. Al-Kidd*, 10-98) to two issues: whether Ashcroft is entitled to absolute immunity in a case involving a detention under the federal "material witness" law, and whether he is entitled at least to qualified immunity to a Fourth Amendment claim. The Court did not grant review of a third issue, involving the former Justice Department chief's liability for false statements by a federal agent – apparently because the challenger has dropped that claim. Justice Elena Kagan did not take part in the Court's action, presumably because she had some prior role in the case as U.S. Solicitor General.

This is worrisome, not just because it's another example of how Elena Kagan's recusal on all these cases give the court an inherent

conservative bias (even assuming Kagan will be better on executive power issues than I think she will be), but because by taking the case SCOTUS seems to suggest the 9th Circuit decision deserves more scrutiny.

The case concerns the arrest and detention for 16 days of Abdullah al-Kidd. After he was released, he was held on what amounts to probation for over a year, though he never did testify.

ACLU's lead attorney on the case, Lee Gelernt, seems to have the same worry: Gelernt is pushing to have the 9th Circuit decision upheld.

Arresting and detaining someone for an extended period without probable cause to believe he violated the law goes against the most basic principles on which our country is founded. The appeals court made it very clear that former Attorney General Ashcroft could be held personally responsible if he used the material witness law to circumvent the Constitution's longstanding rule that a suspect may not be arrested without probable cause of wrongdoing. The appeals court opinion was the right one, and the Supreme Court should uphold that decision. Government architects of policies that so clearly defy the Constitution must be held accountable to the law.

Presumably, immunity for Ashcroft here will extend to other Administration officials who trample rights in the guise of fighting terrorism.