ERIC HOLDER'S DEFENSE OF ASHCROFT TO DEFEND THE MATERIAL WITNESS STATUTE

The NYT has a worthwhile editorial lambasting the Obama DOJ's pursuit of SCOTUS review in Ashcroft v. al-Kidd, which will probably result in expanded immunity for government officials that abuse the law so as to abuse the rights of Americans. The editorial focuses closely on the way in which DOJ's defense of absolute immunity amounts to a defense of using the material witness law as an improper basis for detention.

> Prosecutorial immunity is intended to let prosecutors enforce the law without fear of being held personally liable. Protecting that legitimate aim did not require the administration to defend the indefensible. In forcefully defending the material witness statute on grounds that curtailing it would severely limit its usefulness, it is defending the law as a basis for detention. That leaves the disturbing impression that the administration is trying to preserve the option of abusing the statute again.

In other words, NYT argues that DOJ's SCOTUS appeal in this case is as much about preserving the improper use of the material witness statute—to hold a person under the material witness statute so you can conduct an investigation into him—as it is about the immunity per se.

Of course it is.

After all, this is what Eric Holder (along with Janet Reno and two others) had to say about the material witness statute in 2004.

> Even when there is insufficient evidence

> to charge a citizen with a crime, the material witness statute, 18 U.S.C. § 3144, permits the detention of a person whose testimony is "material in a criminal proceeding" if "it may become impracticable to secure the presence of the person by subpoena." This statute is an effective counter-terrorism tool for several reasons. Because a grand jury investigation is a "criminal proceeding" for purposes of this statute, see United States v. Awadallah, 349 F.3d 42, 49-64 (2d Cir. 2003); Bacon v. United States, 449 F.2d 933, 939-41 (9th Cir. 1971), and because of the broad scope of grand jury investigations, see supra p. 11, **the government can detain a suspected terrorist as a material witness before it has evidence sufficient to support a criminal arrest or indictment**.
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> **The government can obtain a material witness warrant with relative ease**. For a grand jury witness, the required showing can be made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury. Bacon, 449 F.2d at 943; Awadallah, 349 F.3d at 65-66. Nor would establishing that a suspected terrorist poses a flight risk be an onerous task. See 349 F.3d at 69 (bail denied in part because witness failed to come forward with material testimony concerning terrorist attack). [my emphasis]

Mind you, in its Cert Petition, the government doesn't admit that the material statute really was used in al-Kidd's case to hold him even though the government had insufficient evidence to do so.

> First, respondent claimed that, in response to the September 11, 2001, terrorist attacks, petitioner implemented a policy of using the

> material witness statute as a pretextual tool to investigate and detain terrorism suspects whom the government lacked probable cause to charge criminally. **Respondent alleged that he was arrested as a result of this alleged policy**, which he contended violated the Fourth Amendment. [my emphasis]

So even though a document—signed by the current Attorney General at a time when al-Kidd was still subject to restricted movement—boasts about how easy it is to use of the material witness statute to hold people without sufficient evidence to do so, DOJ calls this use of the material witness statute "alleged."

I guess if they admitted this was an intentional policy, it'd be harder to get SCOTUS to wink at its use going forward.

Update: harpie's right. This is an editorial, not an op-ed.