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An Indefensible Defense

It can be hard to distinguish between the Bush administration and the Obama administration when it comes to detainee policy. A case the Supreme Court agreed last week to hear, *Ashcroft v. al-Kidd*, is one of those occasions.

It turns on a principle held sacrosanct since the country's early days: the government cannot arrest you without evidence that you committed a crime. An exception is the material witness law, which allows the government to keep a witness from fleeing before testifying about an alleged crime by somebody else.

These principles were horribly twisted when John Ashcroft was President George W. Bush's attorney general. The Justice Department held a former college football player in brutal conditions on the pretext that he was a material witness in a case in which he was never called to testify and which fell apart at trial.

The Bush administration's behavior was disturbing, and so is the Obama administration's forceful defense of this outrageous practice of using a statute intended for one purpose for something very different. Judge Milan Smith Jr. of the Ninth Circuit Court of Appeals called it "repugnant to the Constitution."

The Justice Department arrested Abdullah al-Kidd, known as Lavoni Kidd when he was a star football player at the University of Idaho, at Dulles airport in March 2003 before he boarded a plane to Saudi Arabia, where he was going to work on his doctorate in Islamic studies. For over two weeks, he was treated like an enemy of the state — shackled, held in high-security cells lit 24 hours a day, and sometimes humiliated by strip searches. When Mr. Kidd was released, he was ordered to live with his wife and in-laws, restrict his travels and report to a probation officer. The restrictions lasted 15 months.

The government said Mr. Kidd was a material witness against Sami Omar Hussayen, who was tried for supporting an Islamic group that the government said "sought to recruit others to engage in acts of violence and terrorism." A jury acquitted Mr. Hussayen on some charges and didn't reach a verdict on others. Mr. Kidd was not called to testify. Nor was he ever

charged with a crime.

Mr. Kidd sued Mr. Ashcroft personally, saying he unlawfully used the material witness statute as a pretext. The former attorney general asserted that he had immunity. In the ruling now being reviewed by the Supreme Court, the Ninth Circuit found that he did not.

To qualify for absolute immunity, the appeals court said, Mr. Ashcroft had to be prosecuting Mr. Kidd, not investigating him. When the purpose is “to investigate or pre-emptively detain a suspect,” at most a prosecutor is entitled to qualified immunity. Mr. Ashcroft didn’t qualify even for that because Mr. Kidd made a plausible case that it was the attorney general’s own strategy that led to misuse of the material witness statute.

The word “plausible” is key. In 2009, by a vote of 5 to 4, the Supreme Court sided with Mr. Ashcroft and others in a lawsuit, because the complaint against them was too vague and the allegations were not plausible. The government hasn’t challenged the plausibility of the core allegations in the current case.

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.