

# Former Bush Administration Attorney General John Ashcroft “Is Not Above The Law”

Ninth Circuit Rules

By [Mike Whitney](#)

Global Research, September 07, 2009

7 September 2009

Region: [USA](#)

Theme: [Law and Justice](#), [Terrorism](#)

In a critical case which could determine the future of “preventive detention” in the U.S., the Ninth Circuit Court of Appeals ruled that ex-Attorney General John Ashcroft can be sued for arresting Muslims as material witnesses as a pretext for investigating their possible links to terrorism. The 2 to 1 ruling (all three judges were Reagan or Bush appointees) is a setback for hardliners in the Bush administration who maintain that the state has the right to circumvent the 4th amendment and imprison “suspects” without establishing probable cause. Judge Milan Smith—a George W. Bush appointee—reproached Ashcroft’s conduct in an eloquent defense of the Constitution and basic civil liberties:

“Almost two and a half centuries ago, William Blackstone, considered by many to be the preeminent pre-Revolutionary War authority on the common law, wrote:

‘To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.’ (WILLIAM BLACKSTONE)

The Fourth Amendment was written and ratified, in part, to deny the government of our then-new nation such an engine of potential tyranny. And yet, if the facts alleged in al-Kidd’s complaint are actually true, the government has recently exercised such a “dangerous engine of arbitrary government” against a significant number of its citizens, and given good reason for disfavored minorities (whoever they may be from time to time) to fear the application of such arbitrary power to them.

We are confident that...the Framers of our Constitution would have disapproved of the arrest, detention, and harsh confinement of a United States citizen as a “material witness” under the circumstances, and for the immediate purpose alleged, in al-Kidd’s complaint.” (Judge Milan Smith; majority opinion)

Abdullah al-Kidd was arrested in March 2003, was held at jails in three states for 16 days and then monitored while living at home for 15 months. Ashcroft named him as a material

witness in the case of Sami Omar Al-Hussayen, who was allegedly connected to a radical Islamic organization. Al-Kidd is an American citizen, but was never formally charged with a crime. He was simply swept up in the DOJ's post-9-11 dragnet-hysteria wherein Muslims were targeted as likely terrorists because of their religion.

Ashcroft's claim of "absolute immunity" from being sued was rejected outright by all three judges. The Attorney General is not above the law.

In 2002—in another high-profile case which cited Ashcroft by name—the court ruled that the material witness statute "should not be abused as an investigatory anti-terrorism tool." This is important, because it proves that Ashcroft was aware that what he was doing was illegal, but persisted with the policy anyway. In fact, Ashcroft made public statements to the effect that he would not conform with the clearly-articulated guidelines of the earlier rulings.

He publicly stated, "Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks."

Judge Milan Smith addressed Ashcroft's defiance saying:

"Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute. If there is probable cause to believe an individual has committed a crime or is conspiring to commit a crime, then the government may lawfully arrest that person, but only upon such a showing.

We therefore hold that al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003....the Supreme Court has aptly noted, qualified immunity must not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the Harlow standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate . . . ." This is as true in matters of national security as in other fields of governmental action.

We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law. Al-Kidd's arrest failed to meet the statutory requirements set forth by Congress, and was therefore unlawful."

The court's decision is quite narrow and merely allows al-Kidd to pursue his case in a higher court. Even so, the court's revulsion to Ashcroft's behavior is striking and, no doubt, worrisome for the former head of the D.O.J. Judge Smith notes that Ashcroft's conduct suggests that he knew the limits of the law, and yet, "purposely instructed his subordinates to bypass the plain reading of the statute." In other words, Ashcroft deliberately broke the law.

In fact, the Justice Department has already issued apologies to 10 people who were illegally arrested as who were as material witnesses, which is as close as one gets, to an admission of guilt.

Naturally, the loonies on the far-right have taken up Ashcroft's cause and are howling about the liberal bias of the "out-of-control" justice system . Conservative blogger, Roger Kimball says, "The Ninth Circuit Court of Appeals has once again distinguished itself in the annals of politically-correct fatuousness." Kimball adds:

"Speaking as a knuckle-dragging right-winger, I would regard any person who converted to Islam and and changed his name to "Abdullah" as guilty until proven innocent.... I'm glad that "Abdullah" popped up on the radar screen as he was on his way to Saudi Arabia. And if he has yet to be charged with anything, I hope that the guys in the white hats continue to cast a beady eye in his direction....I believe John Ashcroft should be honored as a national hero for his stalwart and effective stewardship of the Department of Justice at a most dangerous moment. (Roger Kimball, "Another Ridiculous Decision from the Ninth Circuit")

Kimball's spirited defense of Ashcroft provides an interesting contrast with Judge Smith's final summation of the case:

"More than 217 years after the ratification of the Fourth Amendment to the Constitution, some confidently assert that the government has the power to arrest and detain or restrict American citizens for months on end," the opinion stated. "Not because there is evidence that they have committed a crime, but merely because the government wishes to investigate them for possible wrongdoing." (Ashcroft's detention policy) "is repugnant to the Constitution and a painful reminder of some of the most ignominious chapters of our national history."

The original source of this article is Global Research  
Copyright © [Mike Whitney](#), Global Research, 2009

---

[Comment on Global Research Articles on our Facebook page](#)

[Become a Member of Global Research](#)

Articles by: [Mike Whitney](#)

**Disclaimer:** The contents of this article are of sole responsibility of the author(s). The Centre for Research on Globalization will not be responsible for any inaccurate or incorrect statement in this article. The Centre of Research on Globalization grants permission to cross-post Global Research articles on community internet sites as long the source and copyright are acknowledged together with a hyperlink to the original Global Research article. For publication of Global Research articles in print or other forms including commercial internet sites, contact: [publications@globalresearch.ca](mailto:publications@globalresearch.ca)

[www.globalresearch.ca](http://www.globalresearch.ca) contains copyrighted material the use of which has not always been specifically authorized by the copyright owner. We are making such material available to our readers under the provisions of "fair use" in an effort to advance a better understanding of political, economic and social issues. The material on this site is distributed without profit to those who have expressed a prior interest in receiving it for research and educational purposes. If you wish to use copyrighted material for purposes other than "fair use" you must request permission from the copyright owner.

For media inquiries: [publications@globalresearch.ca](mailto:publications@globalresearch.ca)