No. 10-98

In The

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE WESLEY MACNEIL OLIVER IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

WESLEY MACNEIL OLIVER
WIDENER UNIVERSITY
SCHOOL OF LAW
3800 Vartan Way
Harrisburg, PA 17106
617-909-9849
wmoliver@widener.edu

Counsel of Record

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Codes

Legislative and Executive Materials

Secondary Authority

Secondary Authority (Continued)

Secondary Authority (Continued)

Secondary Authority (Continued)

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae and the author of this brief, Wesley MacNeil Oliver, is a legal historian specializing in nineteenth and early-twentieth century American criminal procedure. His research reveals that during this period of time, material witness detentions were quite common and a frequent subject of discussions in newspaper columns, city council and legislative debates, and gubernatorial messages.

The author is an Associate Professor of Law at Widener University in Harrisburg, Pennsylvania,[2] and recently completed his J.S.D. dissertation at Yale Law School entitled *The Nineteenth and Early Twentieth Century Origins of Modern Criminal Procedure: A View from the New York Police.* The panel's decision in the instant case relied on his article, *The Rise and Fall of Material Witness*

---

[1] Counsel for both parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae*, made a monetary contribution to its preparation. The Widener University School of Law provided funding for the printing and filing costs.

[2] *Amicus curiae* will be on leave as a Visiting Associate Professor at the University of Tennessee College of Law for the Fall 2010.

Detentions in Nineteenth Century New York, 1 N.Y.U. J.L. & Liberty 727 (2005), in support for its conclusion that the practice of detaining material witnesses dates back to at least the 1840s. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 959 (9th Cir. 2009). The arguments and historical claims in this brief are taken largely from that article and the dissertation.

The author files this brief to correct the lower court's assumptions about the history of material witness detentions. The Ninth Circuit concluded that Ashcroft's use of material witness detentions to hold those suspected of criminal activity was an "unprecedented" use of the power to detain witnesses. *Id.* at 970; *Al-Kidd v. Ashcroft,* 598 F.3d 1129, 1131 (9th Cir. 2010) (Order Denying Rehearing En Banc).

The author's research reveals that the Ninth Circuit's historical conclusion is erroneous. Material witness detentions were frequently used as a mechanism to hold suspects of crimes in the late nineteenth and early twentieth century. Those suspected of no wrongdoing, but possessing information helpful to the government, certainly have been held as witnesses. The more common use of material witness detentions in the late nineteenth and early-twentieth century was, however, to hold those actually suspected of criminal activity. Reformers frequently criticized the detention of material witnesses during this period but were tolerant of the detention of those who were believed to be guilty of wrongdoing.

As Carolyn Ramsey, the only other legal historian to examine the history of this practice, has concluded, material witness detentions in the mid-nineteenth century became "a tool for constructing a case against the witness himself." Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses,* 6 Ohio St. J. Crim. L. 681, 685 (2009).[3] The research of your *amicus curiae* demonstrates that holding innocent bystanders with helpful information was quite controversial in the late nineteenth and early twentieth century; holding *suspects* as witnesses was not.

As a researcher in this area of legal history, the author has an interest in correcting misconceptions about the past. Of interest to this Court, a correct understanding of the past has implications for the parties in this case. Officials, like the former Attorney General, are entitled to qualified immunity from civil rights actions so long as their official acts do not violate "clearly established" constitutional rights. *Saucier v. Katz,* 533 U.S.

---

[3] There are surprisingly few scholarly articles written on material witness detentions. *See, e.g.,* Ricardo J. Bascaus, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 Vand. L. Rev. 677 (2005); Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 Loy. L.A. L. Rev. 1217 (2002); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law,* 76 St. John's L. Rev. 483 (2002). The author and Professor Ramsey alone have examined the history of the use of material witness detentions to hold crime suspects. *See* Ramsey, *supra*, at 685.

194, 201 (2001). The Ninth Circuit was required to consider whether "a reasonable officer would understand" that a constitutional right is violated when the federal material witness detention statute is used to hold a witness also suspected of criminal wrongdoing. *Hope v. Pelzer,* 536 U.S. 730 (2002). It is surely relevant to this consideration that, at the point in American history when witness detentions occurred with relative frequency, the public had far more tolerance for the detention of suspects as witnesses than it did for the detention of individuals believed to be innocent of any wrongdoing.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit relied on incorrect historical assumptions to determine that former Attorney General John Ashcroft was not entitled to qualified immunity for his use of material witness detentions in the wake of the terrorist attacks of September 11, 2001. The Ninth Circuit described Ashcroft's use of material witness detentions to hold those suspected of criminal activity as "unprecedented." *Al-Kidd*, 580 F.3d at 970; *Al-Kidd,* 598 F.3d at 1131. This was an important factual premise in its holding that this practice was clearly unconstitutional. As the lower court's factual description is contradicted by the historical record, this Court should review the Ninth Circuit's holding in light an accurate account of the history of material witness detentions.

The lower court held, first, that the use of the federal material witness statute to hold those suspected of terrorist activities violated the Fourth Amendment. 580 F.3d. at 965-70. The court reasoned that this use of material witness detention circumvented the Fourth Amendment's requirement that probable cause exist to hold a person suspected of a crime. *Id.* at 966-67. The court then concluded that this practice violated a "clearly established" Fourth Amendment right to be free from an unreasonable seizure, despite there being only a single federal district court opinion on the issue that forbids pretextual material witness detentions in *dicta.* *Id.* at 972-73 (*citing United States v. Awadalluh,* 202 F.Supp.2d 55, 77 n.28 (S.D.N.Y. 2002).[4]

The Ninth Circuit attributed the absence of precedent condemning the "pretextual" use of material witness detentions to the fact that this was an "unprecedented" and "novel" use of the power. *Al-Kidd*, 580 F.3d at 970; *Al-Kidd*, 598 F.3d at 1131. The court further opined that courts would not have previously had occasion to condemn this practice because the "obviousness of the illegality" prevented officials from using material

---

[4] The lower court considered and rejected Ashcroft's claim that he was entitled to absolute immunity. *Al-Kidd*, 580 F.3d at 957-64. The author has discovered no historical evidence suggesting that there is an historical basis for Ashcroft's defense of absolute immunity. The historical record does, however, provide information helpful to analyzing whether Ashcroft violated a "clearly established" constitutional right. *Hope v. Pelzer,* 536 U.S. 730, 740 (2002); *United States v. Lanier,* 520 U.S. 259, 270-71 (1997).

witness detentions to hold suspects prior to September 11. *Id.* at 970.

The Ninth Circuit could have arrived at these conclusions only by ignoring eighty to ninety years of (frequently ignored) history of criminal procedure. Historically, material witness detentions had long been used as "a tool for constructing a case against the witness himself." Ramsey, *supra*, at 685. The long-standing – long-accepted – practice of detaining suspects as witnesses should be considered in determining whether the former Attorney General was "on notice" that the practice was unconstitutional.

Studies on the history of material witness detentions have focused on three cities, New York, Chicago, and Los Angeles, though it is clear that the practice occurred in other American cities, including Boston and New Orleans, in the late nineteenth and early twentieth centuries. *See* Ramsey, *supra*, at 686, 696, 700 n.108; Oliver, *supra*, at 728 n.1; *Dr. Bell's Letter,* 2 Pa. J. on Prison Discipline 97, 98 (1846) (observing practice in Boston). The history of the practice in New York City, the subject of the author's study, has lent itself to the most thorough analysis as better records of early police practices appear to have been kept in New York than in other American cities from the Antebellum to the Progressive Eras.[5]

---

[5] The New York Municipal Archives claims that its "[r]ecords pertaining to the administration of criminal justice, dating from 1684 to 1966, constitute the largest and most

It is clear that many of those identified, and detained, as witnesses in all of these cities were in fact suspects. *See* Ramsey, *supra*, at 686. The historical record in New York City, however, allows for a much more complete account of the history of material witness detentions in that city than is possible for other cities in this era.

Whenever New Yorkers expressed objections to the detention of material witness detentions during this period, one type of detainee was the source of their concern – the innocent detainee. Reformers from the 1840s to the 1930s expressly recognized that detaining suspects of crimes as witnesses – thus circumventing the probable cause requirement to arrest and hold a suspect – was not a concern of theirs. The very detailed picture we have of the history of material witness detentions in New York City reveals that the public acceptance of material witness detentions depended on their selective use – the very use of which respondent al-Kidd complains.

Material witness detentions were controversial from the time they first began in the 1840s. The fear that innocent persons would be detained almost immediately prompted calls for abolition of the practice. In the 1850s, reformers were appeased when the City of New York provided better housing for witnesses. By 1883, reformers

---

comprehensive collection of such material in the English-speaking world." http://www.nyc.gov/html/records/html/about/archives.shtml (visited July 11, 2010).

accepted another compromise: a new rule that permitted *only* the detention of those witnesses suspected of criminal activity.

The compromise was consistent with the equitable arguments reformers had made since the earliest days of material witness detentions. Even those who objected to detaining persons on the basis that they possessed helpful information seemed content when law enforcement authorities also suspected those "witnesses" of crimes. Objections to holding witnesses persisted into the twentieth century but with a caveat that the detention of those witnesses also reasonably suspected of criminal activity was acceptable.

A somewhat detailed summary of this history is presented below.

A. Origins of Material Witness Detentions

The legal origin of the power to detain witnesses is somewhat unclear. A New York statute dating back to 1829 permitted a magistrate to require witnesses to provide sureties for their appearance and permitted the magistrate to detain witnesses who were unable to do so. Oliver, *supra*, at 734; N.Y. Rev. Stat., part 4, tit. 2 §§ 21-22 (1829). Some nineteenth and early twentieth century critics claimed that statute merely codified a power that existed in England since 1555, others described the 1829 statute as an innovation.[6]

---

[6] George Medalie, *A Statement of the Facts and Suggested Remedies,* 8 The Panel 1, 3 (Jan.-Feb. 1930); Oliver, *supra*, at 733-

Whatever the original source of the authority to detain witnesses, the power does not seem to have been used with any frequency until the 1840s. Oliver, *supra*, at 737-40.

The earliest, and most highly publicized, accounts of detained witnesses involved victims of crime, held for weeks or months, until the search for the culprit was abandoned, or the culprit was convicted of some very minor offense. One of the earliest stories reported in New York involved a woman who reported to authorities that a bundle of her clothes had been stolen. She was detained for eight months; the thief was never discovered and she was eventually released. Oliver, *supra*, at 729; N. Y. Prison Association, *Annual Report* 81 (1847). Mid-nineteenth century newspapers, for obvious reasons, took particular offense at stories like these. *See, e.g., A Disgusted Hebrew,* New York Times, Jan. 23, 1878, at 3 (describing detention of man who reported the theft of his hat). There was even more outrage when defendants were released

---

36,; N.Y. Legislature, *Report of the Majority and Minority of the Select Committee on Governor's Message Relative to the Imprisonment of Witnesses*, N.Y. Assembly Document No. 68, at 3 (1855); Charles A. Flammer, *The Committing Magistrate* 41 (1881). Sureties operated much like modern bail, except that respectable private citizens were required to swear that they would be answerable for the amount of the bail. A witness, or suspect, to be released on such a recognizance could obtain his release by either posting the entire amount of the required recognizance, or by contracting with a professional bail bondsman to be responsible for the amount in the event he failed to appear. *See* Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)*, at 507-10 (1970).

on bond while the witnesses against them were held as witnesses. *See e.g.,* David R. Johnson, *The New York Police: Colonial Times to 1901*, at 76 (1970) (describing account of detention of rape victim while suspect went free on bond).[7]

Newspapermen were far from the only people talking about the injustices visited by material witness detentions by the second half of the nineteenth century. Mayors, jailors, and even the author Charles Dickens began to express concern about how the power to detain witnesses was being exercised. Accounts focused on the burden placed on innocent bystanders, or victims of crimes, when they were held as witnesses.

In 1841, Mayor Robert H. Morris complained about the conditions in which detained witnesses were being housed. He proposed that a facility, considerably more comfortable than the Tombs, New York City's general-purpose jail, be created for the accommodation of *some* witnesses. For witnesses suspected of being accomplices to crimes, Morris proposed no improvement in their conditions. For those who were merely in the possession of helpful information, he proposed better treatment. Oliver, *supra*, at 766; Robert H.

---

[7] For reasons that have not fully been explained, a number of rape victims were detained as witnesses against their alleged attackers in the second half of the nineteenth century. Forty women in New York City were held as witnesses against their attackers from 1873 to 1882. *See* Oliver, *supra*, at 759 & n.120.

Morris, *Mayor's Message*, 8 Documents of the Board of Aldermen of New York City, Doc. 1, at 7-9 (1841).

The City Jailor two years later would similarly object to housing those "who, through no fault of their own, are placed at the mercy of our laws" in the general jail population. Oliver, *supra*, at 767; M. Fallon, *Report of the Keeper of the City Prison*, 10 Documents of the Board of Aldermen of New York City, Doc. 53, at 957 (1844).

In 1842, Charles Dickens described seeing a nine-year-old boy housed in the Tombs as a material witness against his father, who was held in the same facility. Charles Dickens, *American Notes* 111 (1842) (Random House 1996).

Though the concerns about material witness detentions in the 1840s focused on detainees suspected of no wrongdoing, reform efforts unsuccessfully advocated eliminating the power to detain any person as a witness. Efforts to abolish the power were strenuously made in the Constitutional Convention of 1846, but were ultimately defeated. Oliver, *supra*, at 769; William G. Bishop & William H. Attree, *Report of the Debate and Proceedings of the Convention of the Constitution of the State of New York* 196, 1050, 1062 (1846).

Calls for the abolition of material witness detention would nevertheless continue into the 1850s, most prominently from the New York Prison Association. The Association, a philanthropic

organization dedicated to more humane and effective prisons, criticized the practice of holding witnesses in each of its annual messages beginning with its inaugural message in 1847. Oliver, *supra*, at 731 n.16. The organization boasted some of the most influential reformers of the day as its members, including Alexis de Tocqueville, Gustav de Beaumont, Thomas Galludet, and Charles Sumner. Oliver, *supra*, at 768 n.140. The practice of detaining witnesses – and holding them within the city jail – continued unabated until the mid-1850s despite their efforts.

B. Increased Attention in the 1850s Prompts the Creation of a House of Detention for Witnesses

Reformers through the 1850s had not adopted the dichotomy Mayor Morris had described in 1841 between "innocent" witnesses and accomplice-witnesses. Their accounts continued to focus on innocent detainees, but they had not embraced more lax rules when dealing with the witnesses who were suspected of wrongdoing themselves. This would come decades later. Their agitation did, however, spark a compromise reform – better conditions for witnesses, all witnesses, not just the "innocent" witnesses as Mayor Morris had advocated a decade earlier.

Reformers convinced the legislature that if the practice of material witness detention were to continue, detainees should be afforded better

accommodations. Reformers had, of course, made two objections to the detention of witnesses for over a decade: that they were detained at all and that they were held in the general jail population. This compromise overcame one of the objections.

Construction of the House of Detention for Witnesses was authorized by an 1857 act. Oliver, *supra*, at 754-55. Under the new law, all witnesses were to be housed in this facility rather than the Tombs. *See* Metropolitan Police Act, 1857 N.Y. Laws 569.

By the 1870s, as many 668 people would spend time in the facility, on average for no longer than 10 to 20 days. Oliver, *supra*, at 762. In the early years of the facility, the *New York Daily Times* reported that the conditions in the house were quite good. *Id.* at 755; *A Visit to the House of Detention*, New York Times, Oct. 4, 1859, at 8. By the 1870s, accounts of the facility were not nearly so positive. A grand jury found that the facility was not "fit for human habitation." Oliver, *supra*, at 755-56 & n.113; *Grand Jury Presentments,* New York Times, Jan. 4, 1874, at 8. At this point, reformers began anew to agitate for an end of witness detentions and with their agitation came a new compromise – a distinction between those merely in possession of helpful information and those suspected of wrongdoing who happened to possess helpful information.

C. Continued Protests to Prevent the Detention of Innocent Witnesses Leads to Dichotomy Between "Innocent" and Accomplice-Witnessses

Another round of reform efforts from the late 1860s through the early 1880s produced a second compromise that seemed to reflect all the objections reformers had implicitly made to material witness detentions. An 1883 law would prohibit the detention of witnesses who were not "reasonably believed" to be accomplices to a crime. 1883 N.Y. Laws 416. As a result of the law, bystanders and victims could no longer be held and those suspected of wrongdoing, but not formally charged, would be held in House of Detention for Witnesses, not in the City's general jail population.

As conditions in the House of Detentions for Witnesses worsened in the 1860s and 1870s, a variety of influential New Yorkers had picked up where other reformers had left off and lobbied the legislature to abolish witness detentions. Among them were the sitting Governor, a former Attorney General for the State of New York and, most significantly, the New York Police Department. Oliver, *supra*, at 775-77. Concerns about being held as a witness had become so pervasive that eyewitnesses had become afraid to speak to officers for fear of being whisked off to the House of Detention for Witnesses. *Id.* at 776; *Metropolitan*

Police Report, N.Y. Assembly Documents, Doc. 38, at 9 (1869). The police therefore asked the legislature to make a very clear statement that individuals would not be jailed for assisting police – even if this meant eliminating the power they possessed to hold suspects they lacked adequate suspicion to charge. *Id.*

With reformers still focused on the plight of innocent detainees, the compromise that would develop in 1883 is hardly surprising. In April of 1881, *Harper's Weekly* published a cartoon, reproduced below, illustrate a particular injustice that had been a rallying example for reformers since the earliest known detained witnesses. The cartoon depicted a witness to a crime held in the House of Detention for Witnesses, while the defendant he was to testified against drank in a bar while out on bond pending trial. The honest seeming figure on the left languished in House of Detention for Witnesses while the knave depicted on the right boldly displayed a copy of his indictment with a notation at the bottom that he is out on bail.

Figure One. *An Unjust Law*, Harper's Weekly, April 9, 1881, at 1. The caption at the bottom of the cartoon reads, "The Innocent Witness Detained as a Prisoner, whilst the Criminal Goes Free."

The first legislative effort in the 1880s to address reformers' concerns appears to have had little effect. In the state's new Code of Criminal Procedure, the legislature provided that a witness' financial inability to provide a bond securing his appearance at trial could not be the basis for detaining him. N.Y. Code of Crim. Pro. § 219 (1881). For reasons that are not entirely clear, however, the numbers of persons detained as witnesses did not noticeably decrease, and in 1882 the Grand Jury of New York County urged, as many others before them had done, the abolition of material witness detentions. Oliver, *supra*, at 780.

The legislature of 1883 then changed the law once again, providing that only those "reasonably believed" to be accomplices could be held as

witnesses. 1883 N.Y. Laws 416; Oliver, *supra*, at 780. With this law, the legislature forbade the type of detention that had been the thrust of reformers' complaints.

There was a noticeable decrease in the number of persons held following the adoption of the new statute, but a considerable number of people were still held as "witnesses." In the years 1878, 1879, and 1880, 466, 448, and 455 people were held in the house respectively. Oliver, *supra*, at 762. In 1883, 1884, and 1885, 228, 286, and 328 people were held respectively. *Id.*

The most logical inference is that many of the persons held by the late 1870s were, in fact, suspects. This would also explain why the police were willing to give up the power to hold witnesses entirely in the 1870s. If the majority of "witnesses" were, in fact, accomplices, they could have been detained using the ordinary criminal process. The House of Detention for Witnesses had, however, given the New Police Department a mechanism to separate some accomplices and provide them better treatment, perhaps in the hope they would cooperate with the prosecution. *See* Ramsey, *supra*, at 681.

Regardless of how the New York Police Department was actually using the power it was given prior to 1883, one thing was quite clear: reformers in New York prior to 1883 were concerned primarily about innocent detainees and

the compromise legislation captured this concern. If there was concern that the NYPD would use this mechanism to circumvent the probable cause standard typically required to detain a criminal suspect, it certainly was not voiced, before or after the reform of 1883. The examples reformers used – and the statute enacted in 1883 – strongly suggest that New Yorkers had little trouble with a fairly frequently used mechanism to hold suspects as witnesses without a demonstration of probable cause of their guilt.

D. The Re-Emergence of Concern for the Innocent Detainee

By the early twentieth century, the New York Legislature restored the power of police and prosecutors to seek the detention of persons with helpful information, regardless of whether those persons were suspected of involvement in a crime. N.Y. Code of Crim. Pro. § 618-b (1904). No great notice appears to have been taken of the the restoration of the power to detain "innocent" witnesses until Prohibition prompted substantial reconsideration of the criminal justice system. When the Grand Jury of New York County again considered the issue of material witness detention in 1930, it once again focused on the problem of those detained but suspected of no wrongdoing. It expressly found no problem with holding suspects as witnesses.

A variety of criminal justice reforms were proposed in the mid- to late-1920s and 1930s as Prohibition awakened the American conscience to problems associated with various police tactics. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 Yale L. J. 393, 435 n.180 (1995) (observing that the high-profile Wickersham Commission examined a number of aspects of the the criminal justice system, including Prohibition enforcement).

Material witness detentions during this period have largely been overlooked by lawyers and historians as other issues were of more pressing concern during Prohibition. The Wickersham Commission, for instance, revealed a number of concerns about the administration of criminal justice during Prohibition but included little more than a passing reference to material witness detentions. *See* Ramsey, *supra*, at 684. The Commission has primarily been remembered for its discussion of interrogations and, to a lesser extent, its discussion of reckless and sometimes brutal methods of search and seizure. *See Miranda v. Arizona,* 384 U.S. 436, 445 n.5 (1966) (describing Commission's concern about interrogation practices); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State,* 48 Wm. & Mary L. Rev. 1, 161 n.538 (2006) (describing Commission's consideration of excesses in searches and seizure during Prohibition).

Locally, in New York City, judges, politicians, and lawyers working through the Bar Association

of New York City placed their focus on similar issues. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 Rutgers L. Rev. 447, 494-509, 510-515 (2010) (describing New York City's response to search and seizure and interrogation practices during Prohibition). The practices of virtually every aspect of the criminal justice system were nevertheless placed under a microscope during the Prohibition Era and material witness detentions were no exception.

The Association of Grand Jurors of New York County published a report in early 1930 echoing the concerns expressed by reformers throughout the nineteenth century. George Z. Medalie, *A Statement of Facts and Suggested Remedies,* 8 The Panel 1 (Jan.-Feb. 1930).[8] The report accounted the injustices done to innocent persons held to secure their testimony. One particularly gripping, yet familiar tale involved a sailor who witnessed a crime and was held for months pending the trial of a culprit who posted bond as the sailor sat in jail. *Id.* at 1.

The report recognized that often detained witnesses were, in fact, uncharged suspects – and expressed no concern about their detention.

---

[8] *The Panel* was published by the Association of Grand Jurors in New York County and dedicated its first publication of 1930 to a symposium on the subject of material witness detentions.

> There is first the class of persons who in some way or other are concerned more or less as accomplices in the commission of the crime charged. The law provides that they be held as material witnesses on bail or be committed in the absence of bail. There is no point in wasting sympathy about the inconvenience to which they may be subjected if they are so held or detained.

Id. at 2. *See also Discussion by Edward A. Alexander and George E. Worthington of the New York Bar,* 8 The Panel, 4, 5 (Jan.-Feb. 1930) (describing with horror with detention of pregnant women "whose only difficulty is that they have been the witness of some serious crime, thus subjecting them to detention as witnesses."); John S. Kennedy, *A Report to the State Commission of Correction,* 8 The Panel, 5, 6 (Jan.-Feb. 1930) (describing a victim being held while the person charged with the crime against him was out on bail).

The report then described a "more troublesome type of material witness detention," the detention of "underworld characters" whose allegiances prevent them from providing helpful information to investigators, if they happen to possess such information. The grand jurors concluded that if it was established that these characters were, in fact, in possession of information material to a prosecution, their detention was appropriate. Noting that such detentions were "not within the

contemplation of our law," the grand jurors observed that "[j]ust judges and public-spirited citizens, however, are hardly inclined to voice a protest at this strain of a legal principle." Medalie, *supra*, at 2.

Like their nineteenth century counterparts, these Prohibition Era reformers sought to improve the lot of those poor souls who, innocent of any crime, were incarcerated to ensure that prosecutions were not lost for lack of evidence. They demonstrated no concern that witnesses might also be suspects – and thus temporarily held on a standard less exacting than probable cause. They even recognized the common practice – and widespread acceptance – of detaining material witnesses who were neither witnesses nor suspects, but merely affiliated with the emerging world of organized crime.

Pretextual detentions of material witnesses thus not only occurred prior to the Terror of September 11, 2001, but the practice was generally accepted for at least eighty years. This fact is difficult to reconcile with the Ninth Circuit panel's conclusion in the instant case describing the practice as "unprecedented" and noting that the lack of authority condemning this use of witness detention is "due more to the obviousness of the illegality than the novelty of the legal issue." *Al-Kidd*, 580 F.3d at 970.

CONCLUSION

For nearly a century police and prosecutors used material witness detentions in exactly the same way former Attorney General John Ashcroft is alleged to have used them in this case. Of course the world has been transformed many times since the heyday of material witness detentions in the Gilded Age and reasonable people could find that practices acceptable in that time violate the Constitution in the modern era. But this historical background is certainly relevant in determining whether it was "apparent" to the former Attorney General that he was violating the Constitution when he held those he suspected of terrorism as material witnesses. Given the Ninth Circuit's reliance on incorrect historical facts, this Court ought to consider this issue in light of the accurate historical record.

Respectfully submitted,

WESLEY MACNEIL OLIVER*
Widener University School of Law
3800 Vartan Way
Harrisburg, PA 17106
(617) 909-9849
wmoliver@widener.edu

* *Counsel of Record*

Date: July 23, 2010

Blank Page