

Case will decide fate of Fourth Amendment

By Suruchi Mohan

On March 2, the U.S. Supreme Court heard *Ashcroft v. al-Kidd*. It seems, once again, prosecutors will get a free pass.

At stake is the prosecutor's right to absolute or, at the very least, qualified immunity. But the larger issue for concerned Americans is whether the government can, in the name of national security, attack the Fourth Amendment's guarantee of protection from search and seizure.

Lavoni Kidd was born of American parents in the United States. In the 1990s, while attending the University of Idaho, where he was a star football player, he converted to Islam. He changed his name to Abdullah al-Kidd.

On his way to Saudi Arabia in 2003, on a scholarship for Arabic and Islamic studies, he was arrested by federal agents at Dulles Airport in Washington, D.C. Under the authority of then-Attorney General John Ashcroft, the feds moved him to several high-security prisons intended for convicted criminals. He was strip-searched, shackled and put in a brightly lit cell for 22 to 23 hours a day.

Al-Kidd's arrest under the material witness statute meant that he was supposed to testify against someone charged with a crime. He never did. It soon became clear that al-Kidd was detained so the government could further investigate and charge him with a crime. In this, al-Kidd says, the government went against established law about the material witness statute, which warns against the arrest of citizens without probable cause.

The government wants the case thrown out. It said in court that because Ashcroft was acting in a prosecutorial, not investigatory, capacity, he should be accorded absolute immunity. It also claimed qualified immunity for Ashcroft, arguing that al-Kidd's fundamental rights weren't violated.

Ashcroft has many former attorneys general on his side. They say in their amicus briefs that holding an attorney general personally liable would discourage talented lawyers from taking the nation's top law-enforcement job.

That argument lacks power. Police, who enjoy only qualified immunity, have to make hair-trigger decisions in hostile situations. By contrast, prosecutors can luxuriate in their decision-making process.

With so much power to destroy lives and strike at the Bill of Rights, prosecutors should be made to bear some responsibility. And if liability laws give senior government officials pause, that's a win for American democracy.

The justices' reactions suggest that they will favor the executive branch of the government by granting immunity to Ashcroft. They appeared to buy the government's argument that the costs of liability are too high compared to benefits.

Justice Ruth Bader Ginsburg's question demanding whether "there was any remedy" available for al-Kidd was answered by a nonchalant "conditions of confinement" issue, which was not before the court.

The Supreme Court should let this case proceed to trial. Giving even more power to the executive branch in the name of protecting the "people" would allow the government to nab and hold anyone at will in the harshest of conditions. The "people" will suffer.

Before we know it, we'll become the land of the dreaded midnight knock on the door.

A former technology journalist, **Suruchi Mohan** is the author of the novel "Divine Music." She volunteers at the Northern California Innocence Project and can be reached at pmproj@progressive.org.