SCALIA INVENTS A NEW MEANING FOR "SUSPICION" WHILE LETTING ASHCROFT OFF THE HOOK

SCOTUS has just ruled unanimously that John Ashcroft can't be sued by Abdullah al-Kidd for using a material witness warrant to incarcerate him. The 8 justices (Elena Kagan recused herself) all agree there was no law explicitly prohibiting this kind of abuse of material witness warrants, so Ashcroft has immunity from suit.

Where the decision gets interesting is in the justices' various statements about whether material witness warrants are valid under the Fourth Amendment. The court's swing justice, Anthony Kennedy, basically invited a constitutional challenge of the material witness warrants themselves.

> The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it "may become impracticable" to secure the person's presence by subpoena. Ibid. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case. See ante, at 2.

> In considering these issues, it is important to bear in mind that the Material Witness Statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the Material Witness Statute. See ante, at 11 (reserving the possibility that probable cause for purposes of the Fourth Amendment's Warrant Clause means "only probable cause to suspect a violation of law"). If material witness warrants do not qualify as "Warrants" under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. See United States v. Watson, 423 U. S. 411 (1976). Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness ar-rests might be consistent with statutory and constitutional requirements.

Mind you, he remains coy about what he thinks about the material witness warrants, as his language makes clear: "uncertain," "might," "unclear," "more difficult," "more difficult," "possibilities," "might not," "might." Of note, though, he neither endorses a rather crazy argument Antonin Scalia makes (joined by the usual suspects)—that witnesses to a crime may now be considered suspects of a sort—nor Ruth Bader Ginsburg's trashing (joined by Sotomayor and Breyer but not Kennedy) of that claim.

Here's Scalia's assertion:

> Needless to say, warrantless, "suspicionless intrusions pursuant to a

> general scheme," id., at 47, are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear.The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of Edmond as well.
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> A warrant based on individualized suspicion in fact grants more protection against the malevolent and the incompetent than existed in most of our cases eschewing inquiries into intent.

Here's Ginsburg's response:

> The Court thrice states that the material witness warrant for al-Kidd's arrest was "based on individualized suspicion." Ante, at 6, 8. The word "suspicion," however, ordinarily indicates that the person suspected has engaged in wrongdoing. See Black's Law Dictionary 1585 (9th ed. 2009) (defining "reasonable suspicion" to mean "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"). Material witness status does not "involv[e] suspicion, or lack of suspicion," of the individual so identified. See Illinois v. Lidster, 540 U. S. 419, 424–425 (2004).This Court's decisions, until today, have uniformly used the term "individualized suspicion" to mean "individualized suspicion of wrong-doing."
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> [12 cases—many of them the ones used to authorized warrantless wiretaps—cited]

> The Court's suggestion that the term "individualized suspicion" is more commonly associated with "know[ing] something about [a] crime" or "throwing . . . a surprise birthday party" than with criminal suspects, ante, at 6, n. 2 (internal quotation marks omitted), is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder "suspect" is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to "tak[e] suspected terrorists off the street." App. 41 (internal quotation marks omitted).

And here's Scalia's retort to that:

> JUSTICE GINSBURG suggests that our use of the word "suspicion" is peculiar because that word "ordinarily" means "that the person suspected has engaged in wrongdoing." Post, at 3, n. 2 (opinion concurring in judgment). We disagree. No usage of the word is more common and idiomatic than a statement such as "I have a suspicion he knows something about the crime," or even "I have a suspicion she is throwing me a surprise birthday party." The many cases cited by JUSTICE GINSBURG, post, at 3, n. 2, which use the neutral word "suspicion" in connection with wrongdoing, prove nothing except that searches and seizures for reasons other than suspected wrongdoing are rare.

In other words, Scalia wants to broaden the Fourth Amendment to sanction searches (and arrests) of people suspected of knowing something or doing something (throwing a birthday party!), rather than just those

suspected of doing something illegal.

Not only does Scalia's novel interpretation of the word "suspicion" pre-empt future challenge to material witness warrants' constitutionality, but it also lays a novel groundwork for sanctioning all the domestic surveillance the government has been conducting. After all, the government is wiretapping (or tracking the geolocation of) people who may or may not have committed a crime, but are suspected solely of talking to or hanging out in the vicinity of a suspected terrorist.

And because Kennedy didn't tip his hand in either direction, that's the kind of interpretation the government will use—no doubt in its secret interpretations of the laws—to claim it can surveill even those of us suspected of no crime.

Because suspicion doesn't mean what it used to mean.