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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, vs. ALBERTO GONZALES, Attorney General of the United States; JOHN ASHCROFT, Former Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; MICHAEL CHERTOFF, Secretary	CASE NO. 05-093-EJL OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS (Docket # 55)

of the Department of Homeland Security; JAMES DUNNING, Sheriff for the City of Alexandria; DENNIS M. CALLAHAN, Former Warden, Oklahoma Federal Transfer Center; VAUGHN KILLEEN, Former Sheriff of Ada County; FBI Agents MICHAEL JAMES GNECKOW, SCOTT MACE; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL BUREAU OF INVESTIGATION; TERRORIST SCREENING CENTER; DONNA BUCELLA, Director of the Terrorist Screening Center; UNITED STATES; JOHN DOES 1-25,

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TABLE OF CONTENTS

INTRODUCTION

Defendants Mace, Gneckow and Ashcroft have moved to dismiss under F.R.C.P. Rule 12(b)(6) for failure to state a claim, and Defendant Ashcroft has also moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The central flaw running throughout defendants' brief is the failure to distinguish between the standards governing the arrest and detention of witnesses (such as plaintiff al-Kidd) and those governing the arrest and detention of individuals charged with or convicted of criminal offenses (which plaintiff was not). Under the Ninth Circuit's well-established standards, a *witness* may not be arrested and detained without being given the "opportunity" to voluntarily cooperate – an opportunity that Mr. al-Kidd was never afforded, even though he is a United States citizen who had cooperated extensively with the FBI and had never stopped cooperating. *Bacon v. United States*, 449 F.2d 933, 945 (9th Cir. 1971).[1]

FACTUAL STATEMENT

1. Plaintiff al-Kidd is a 33-year-old African-American man raised near Seattle. Like Mr. al-Kidd, his mother, father, siblings and children are all native-born United States citizens. At the time he was arrested, Mr. al-Kidd was married to a native-born United States citizen. Am. Compl. ¶¶ 15, 39, 54b. Mr. al-Kidd graduated from the University of Idaho, where he was a starting running back on the football team. Before graduating, he converted to Islam and changed his name from Lavoni T. Kidd to Abdullah al-Kidd. Am. Compl. ¶¶ 15, 40, 54a.

2. While in college, and after graduation, Mr. al-Kidd traveled abroad to further his religious studies. He returned to the United States on each occasion. At the time of his arrest,

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[1] Defendant Callahan has also sought dismissal on the principal ground that he became warden after plaintiff was released. Plaintiff does not object to Callahan's dismissal and has filed a motion to substitute the correct warden of the Oklahoma facility.

Mr. al-Kidd was traveling to Saudi Arabia to study on a scholarship at a well-known university. Am. Compl. ¶¶ 15, 42.

3. During the spring and summer of 2002, FBI agents conducted surveillance of Mr. al-Kidd and his then-wife as part of a broad terrorism investigation in Idaho. The FBI surveillance logs do not report any illegal activity by Mr. al-Kidd. Am. Compl. ¶ 44.

4. On March 14, 2003, the United States Attorney's Office submitted an application and supporting affidavit to this Court for the arrest of Mr. al-Kidd as a material witness pursuant to 18 U.S.C. § 3144, in the Al-Hussayen case. Am. Compl. ¶ 46. According to the affidavit, al-Kidd had "crucial" information and was a flight risk because he was scheduled to travel to Saudi Arabia in two days. Am. Compl. ¶¶ 46, 49, 58. Significantly, the warrant contained false statements about Mr. al-Kidd's plane ticket, which the government subsequently conceded. The affidavit also omitted numerous facts, including that Mr. al-Kidd (a) had extensively cooperated with the FBI and had never stopped cooperating, (b) had never been told to refrain from traveling or to inform the FBI if he planned to travel, (c) had never been asked, much less refused, to testify, and (d) had never been asked to relinquish his passport or otherwise postpone his trip to Saudi Arabia pending trial or a deposition. Am. Compl. ¶¶ 15, 54, 55, 112.

5. Based on the incorrect and misleading affidavit, United States Magistrate Judge Williams issued the material witness arrest warrant on March 14, 2003. Am. Compl. ¶ 47. On March 16, 2003, Mr. al-Kidd was arrested by FBI agents at Dulles Airport and led away in handcuffs in front of scores of onlookers. Am. Compl. ¶¶ 5, 65. Over the next fifteen days, Mr. al-Kidd was shuffled between three different detention facilities across the country. Am. Compl. ¶ 6, 70. When transported between facilities, he was shackled, Am. Compl. ¶¶ 6, 83, 84, 92, 93,

112, and at each facility held under heightened security conditions. Am. Compl. ¶¶ 6, 73-74, 87, 95, 157.

6. On March 27, 2003, while Mr. al-Kidd remained in detention, FBI Director Mueller testified before Congress that the government was making progress in the fight against terrorism and that one of its recent "successes" was the arrest of Mr. al-Kidd. The other examples listed by Director Mueller were all individuals criminally charged with terrorism-related offenses or enemy combatants, such as Khalid Shaikh Mohammed, the alleged "mastermind" of the September 11th attacks. The Director's testimony did not mention that Mr. al-Kidd had been arrested only as a witness. To date, the government has never explained why the FBI Director would tell Congress that the arrest of Mr. al-Kidd – supposedly a witness – represented one of the government's noteworthy recent successes in the war on terrorism. Am. Compl. ¶¶ 8, 11, 100.

7. Mr. al-Kidd was eventually released from detention on March 31, 2003, under severe restrictions. More than thirteen months later, the trial for which Mr. al-Kidd's testimony was supposedly needed ended without a conviction. Mr. al-Kidd was never called as a witness (and was never subsequently charged with a crime). Am. Compl. ¶¶ 9, 70, 103, 106.

ARGUMENT

Dismissal under Rule 12(b)(6) is proper "only if it appears to a certainty that [a plaintiff] would be entitled to no relief under any state of facts that could be proved." *See NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). At the pleading stage, a court must "accept all

material allegations in the complaint as true and construe them in the light most favorable to [the plaintiff]." *See North Star Intern v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983).[2]

FBI Defendants Mace and Gneckow

Mace was the agent who signed and submitted the affidavit in support of Mr. al-Kidd's arrest, and Gneckow provided information for the affidavit. No other FBI agent is mentioned by name in the affidavit. Both defendants acknowledge that FBI agents can be held individually liable for their actions in preparing and submitting an arrest affidavit, under either of two distinct tests. One is the *Franks* test, which looks at whether probable cause for Mr. al-Kidd's arrest would have existed under a "corrected" version of the affidavit – *i.e.*, one without intentional or reckless false statements and omissions. *Franks v. Delaware*, 438 U.S. 154 (1978). The second is the *Malley* test, which looks at whether it was reasonable for defendants to have believed that the affidavit on its face (*i.e.*, as actually presented to the Court), demonstrated probable cause. *Malley v. Briggs*, 475 U.S. 335 (1986). Defendants Mace and Gneckow are liable under both tests.

I. MACE AND GNECKOW ARE LIABLE UNDER THE *FRANKS* TEST.

For a *Franks* claim, plaintiff must show that (1) the false statements and omissions in the affidavit were made deliberately or recklessly, and (2) the "corrected" affidavit (with false statements deleted and omissions added) would not have established probable cause. *See, e.g., Mendocino Environmental Center v. Mendocino County,* 192 F.3d 1283, 1295 (9th Cir. 1999); *Liston v. County of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997).

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[2] Defendant Ashcroft's Rule 12(b)(2) motion is discussed separately. *See* Section V.

A. The Allegations That Defendants Acted Intentionally Or Recklessly Must Be Taken As True.

At the pleading stage, plaintiff need not have, and could not be expected to have, clear proof that defendants acted intentionally or recklessly. The complaint's allegations must be taken as true, and under the *Franks* test, the "question of intent or recklessness is a factual determination for the trier of fact." *Mendocino Environmental Center*, 192 F.3d at 1295. *See Kim v. Gant*, 1995 WL 508208, at *4 (E.D. Pa., Aug. 22, 1995) ("court must take as true the allegation . . . that the troopers knowingly lied in obtaining the warrant").

Defendants suggest that a "substantial showing" of intent or recklessness is required. Defs.' Mem. at 19 (citing, *e.g.*, *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995)). But none of the cases cited by defendants involved motions at the pleading stage; plaintiffs must make a "substantial showing" at the *summary judgment* stage. *See Hervey*, 65 F.3d at 788-89. Defendants also suggest that an omission is only reckless or intentional if it was "clearly critical to the probable cause determination." Defs.' Mem. at 20. But, again, defendants incorrectly rely on summary judgment cases (such as *Hervey*).[3]

Here, the Complaint specifically alleges that the affidavit's false statements and omissions were caused by Mace and Gneckow's intentional and/or reckless actions. *See* Am. Compl. ¶¶ 51, 52, 54, 59, 60. That is sufficient to withstand a motion to dismiss.

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[3] Even at the summary judgment stage, the test is not whether an omission was "clearly critical" to probable cause, which defendants take from a Tenth Circuit case (*Bruning v. Pixler*, 949 F.2d 352); the Ninth Circuit's test is whether an omission "tends to mislead." *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985).

B. The Corrected Affidavit Does Not Establish Probable Cause Of Flight Risk.

The second step in the *Franks* test is whether the corrected affidavit would have established probable cause. Critically, under *Franks*, the question is not whether a reasonable officer would have believed that the corrected affidavit satisfied probable cause. Rather, the court's inquiry is focused solely on whether the corrected affidavit does or does not establish probable cause because the officer loses his immunity when he intentionally or recklessly submits an affidavit containing materially false statements or omissions. *See, e.g.*, *Mendocino Environmental Center*, 192 F.3d at 1295 ("We begin with the precept that a police officer who recklessly or knowingly includes false material information in, or omits material information from, a search warrant affidavit cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost") (citation omitted); *Liston*, 120 F.3d at 973 n.8.

1. The "Corrected" Affidavit.

The affidavit submitted to Judge Williams contained 8 paragraphs, only three of which (¶¶ 6-8) even discussed Mr. al-Kidd. Those three paragraphs would have read very differently had they not contained numerous omissions and false statements, including:

-- failing to state that Mr. al-Kidd and the defendant Al-Hussayen worked together and that Al-Hussayen was responsible for paying Mr. al-Kidd his salary. Thus, the more than $20,000 received by Mr. al-Kidd was his salary for work over a significant period of time, Am. Compl. ¶ 60;

-- falsely stating that Mr. al-Kidd had a one-way, first-class ticket costing approximately $5,000, when Mr. al-Kidd actually had a roundtrip, coach ticket costing approximately $1,700, *id.* ¶¶ 14, 53;

-- failing to note that Mr. al-Kidd was not a Saudi national returning home, but rather a native-born United States citizen who had substantial ties in the United States, including a native-born United States citizen mother, father, sibling, wife and child, *id.* ¶¶ 15, 39, 40;

-- failing to note that Mr. al-Kidd had talked with the FBI on several occasions, either in-person or on the phone, and had voluntarily answered questions for hours on a wide range of topics at his mother's home, where he was then living, and that he had never failed to show up to these pre-arranged meetings, *id.* ¶¶ 15, 54;

-- failing to note that the FBI had not contacted Mr. al-Kidd for approximately six months and that the FBI never told him, before or after the Al-Hussayen indictment, that he might be needed as a witness at some point or that he could not travel abroad or that he must inform the FBI if he did intend to travel abroad, *id.*;

-- failing to note that the FBI never asked al-Kidd whether he would be willing to continue cooperating and voluntarily agree to testify (or to comply with a subpoena issued to him before he left for Saudi Arabia). *Id.* In addition, the FBI also never asked Mr. al-Kidd whether he would voluntarily relinquish his passport or otherwise agree to postpone his trip to Saudi Arabia until after the trial (or his deposition could be taken), *id.*

Defendants contend that the affidavit, even as corrected, would still have established probable cause to believe that Mr. al-Kidd was a flight risk, thereby warranting the extraordinary step of arresting and detaining a United States citizen as a witness. The flaw in defendants' argument is the same one that runs throughout their entire brief – the conflation of the standards governing witnesses with those applicable to criminal suspects.

2. The corrected affidavit does not satisfy the Ninth Circuit's *material witness* standards.

A material witness cannot be arrested unless there is a genuine reason to believe he would not voluntarily testify or comply with a subpoena. The touchstone is whether the witness has been given the *opportunity* to do so and has refused or has otherwise taken some affirmative action making it clear that he would not cooperate. Thus, the government may not simply presume that an individual will not cooperate. This principle follows from the most basic rule that individuals must always be given the opportunity to comply with their legal obligations.

The leading case in the Ninth Circuit on the standards for arresting a material witness is *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). There, the Court ruled that the FBI had failed to establish probable cause of flight risk – despite the fact that the witness had "access to large sums of money," had "personal contact with fugitives from justice," and had fled to an "adjoining rooftop" when the FBI sought her arrest. *Id.* at 944-45.

The Ninth Circuit emphasized that the witness' access to large sums of money was "at best remotely relevant to her possible recalcitrance." *Id.* at 944. The Court discounted the importance of the money, even in conjunction with the fact that the witness had personal contacts with fugitives, explaining that it "at most tends to show that *if* Bacon wished to flee, she might be able to do so successfully. It does not support the conclusion that she would be *likely* to flee or go underground." *Id.* (emphasis in original).

The Court also concluded that the witness's capture on the adjoining rooftop did not establish flight risk. Notably, the Court did not dispute that an "inference can be drawn that Bacon wished to avoid apprehension" by fleeing when the FBI came to arrest her at her home. *Id.* at 944. But the Court refused to draw the "further inference" that the witness would not have complied with a subpoena, explaining that the situation in which the witness found herself:

> . . . differs greatly from that in which Bacon would have found herself had she been served with a subpoena. She would then have had an *opportunity* to reflect on her obligation to obey the process, free from the fear of imminent arrest by pursuing officers. This opportunity is granted to most witnesses . . . .

Id. at 945 (emphasis added).

In *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), the Ninth Circuit went even further. There, the officers obtained a warrant only after having made *multiple* attempts to

subpoena the witness -- looking for him at work and his home, calling his friends, and twice leaving a subpoena with his employees -- *after* the witness said he would not testify voluntarily. *Id.* at 974. The Ninth Circuit nonetheless concluded that the arrest was invalid, stating that the facts "only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served." *Id.* at 976-77. *See Mayfield v. Gonzales*, 2005 WL 1801679, at *9 (D. Or. July 28, 2005) (applying *Bacon*, denying defendants' motions, and permitting discovery on what information was known to agents who submitted warrant regarding "flight risk" for witness). *See also Perkins v. Click*, 148 F.Supp. 2d 1177, 1183 (D. N.M. 2001) (no probable cause of flight risk where witness had ties to the community and "made no indication to any officer that she would be a reluctant witness").

Under the Ninth Circuit's decisions in *Bacon* and *Arnsberg*, the corrected affidavit in this case does not come close to establishing flight risk. Mr. al-Kidd did not exhibit any "recalcitrance" about testifying – indeed, he was never asked to testify or even alerted to the possibility that he might be needed as a witness. *Bacon* at 944-45. Nor was he ever asked if he would be willing to postpone his trip or relinquish his passport. To the contrary, Mr. al-Kidd had cooperated extensively with the FBI and never refused any subsequent request for his cooperation. In short, Mr. al-Kidd was given absolutely no "opportunity" to testify voluntarily or comply with a subpoena, as required by *Bacon*. *Id.* at 945.

3. Defendants have applied the wrong legal standard.

Notably, defendants mention *Bacon* only in a single sentence. Defs.' Mem. at 18. Indeed, of the close to 50 cases cited by defendants in their discussion of Mace and Gneckow's liability, all but a few involve criminal *defendants*, and the remainder are cited only in passing.

In particular, defendants contend that *United States v. Benevolence Int'l Foundation, Inc.*, 222 F. Supp. 2d 1005 (N.D. Ill. 2002) -- a case involving bail for an individual *charged* with a crime -- sets forth the "appropriate framework" for determining flight risk. Defs.' Mem. at 16. Quoting *Benevolence*, defendants contend that this Court should assess whether Mr. al-Kidd had "the physical means to flee" and whether he had the "mental state (including his motivation to flee) . . . ." *Id.* But *Bacon*, not *Benevolence*, governs the arrest of a *witness*. Consequently, all of defendants' arguments based on *Benevolence* (and other criminal defendant cases) are misplaced.

Defendants contend, for example, that there is no issue as to plaintiff's "physical means of flight" because he was in fact traveling to Saudi Arabia and, among other things, apparently had access to large sums of money. Defs.' Mem. at 18. But as *Bacon* specifically explained, a witness' *capability* to flee does "not support the conclusion that [the witness] would be *likely* to flee or go underground." 449 F.2d at 944 (emphasis in original). The overriding point of *Bacon* is that an innocent *witness* is different than an individual charged with a crime and must be given the "opportunity" to cooperate. *Id.* at 945.[4]

Defendants also claim that Mr. al-Kidd had the "mental state" of someone who would not cooperate and was intending to flee. Defendants assert, for instance, that it "reasonably appeared that he intended to flee because he had scheduled overseas travel in the aftermath of Al-Hussayen's indictment and arrest," and because he "chose Saudi Arabia as his destination, a country that did not have an extradition treaty with the United States." Defs.' Mem. at 16-17. But Mr. al-Kidd was scheduled to *leave* after the date of the indictment. Defendants had no basis

[4] Defendants' only citation to *Bacon* is in this part of their brief, and it is cited for the proposition that a witness' access to large sums of money *is* significant – precisely the opposite of what *Bacon* held. Defs.' Mem. at 18.

then, nor do they now, to imply that Mr. al-Kidd first made plans to travel to Saudi Arabia after Al-Hussayen was arrested. Similarly, although defendants attempt to create the implication that Mr. al-Kidd was seeking to avoid legal process, defendants do not, and could not, state that Mr. al-Kidd chose Saudi Arabia because it lacks an extradition treaty. Not surprisingly, therefore, the affidavit did not state, and could not have stated, that Mr. al-Kidd had chosen Saudi Arabia *because* it lacked an extradition treaty, or that he had first decided to go there *after* hearing that Al-Hussayen had been arrested.[5]

Defendants suggest, however, that they could not have taken a chance that Mr. al-Kidd may not have returned for the trial, and given the lack of an extradition treaty, they could not have forced him to do so. But, under *Bacon*, defendants cannot have him arrested based on the assumption that he *might* not cooperate. And, of course, defendants could have simply asked Mr. al-Kidd if he were willing to postpone his trip and/or voluntarily relinquish his passport. Had defendants done so, Mr. al-Kidd would then have had what *Bacon* requires – an "opportunity" to cooperate before being hauled off and arrested. Here, moreover, the failure to give Mr. al-Kidd a chance to cooperate by postponing his trip was especially egregious since he had already cooperated extensively with the FBI and never stopped cooperating -- the FBI simply stopped contacting him. Yet he was nonetheless arrested at the airport -- never having been told not to travel or that he might be needed as a witness. *See Bacon*, 449 F.2d at 944 (stressing that witness had not demonstrated "recalcitrance").

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[5] As the Complaint specifically states, Mr. al-Kidd was going to Saudi Arabia to study. Am. Compl. ¶¶ 15, 42. It is not reasonable to infer that, in the span of barely more than two weeks, Mr. al-Kidd decided to travel to Saudi Arabia, secured a visa to that country, obtained a scholarship at a well-known university, and made all the arrangements necessary for his departure.

Moreover, even if defendants were unwilling to give Mr. al-Kidd the opportunity to cooperate (as *Bacon* requires), they could simply have seized his passport and thereby prevented him from traveling abroad. Notably, that is precisely what the government did in the Al-Hussayen case with another material witness who was traveling to Saudi Arabia (who, unlike Mr. al-Kidd, *was* a Saudi national). Am. Compl. ¶ 57.

Ultimately, defendants appear to recognize that Mr. al-Kidd's actions cannot be a sufficient basis to infer he was seeking to flee. Defendants thus ask this Court to examine Mr. al-Kidd's actions in light of the "nature and circumstances of the underlying investigation," which, according to defendants, made the "risk of flight much more significant in this case." Defs.' Mem. at 17. Toward this end, defendants outline the indictment against *Al-Hussayen* and state that "[c]riminal investigations into conspiracies potentially related to international terrorism logically present special flight concerns regarding potential witnesses closely associated with the alleged conspiracy." *Id.* In support of that proposition, defendants again rely on the *Benevolence* decision involving a defendant *charged* with a terrorist offense. *Id.* Defendants conclude by stressing that Mr. al-Kidd "was well aware . . . of both the nature of the investigation [surrounding Al-Hussayen] and the FBI's interest in him [al-Kidd]." *Id.*

Thus, although Mr. al-Kidd was never actually charged with a crime, defendants now claim that it was their very *suspicion* of him that established a sufficient basis to presume he was a flight risk for purposes of arresting him as a material witness. In particular, defendants argue that because Mr. al-Kidd might have feared being arrested as a suspect (though he had done nothing wrong), he might have had the motivation to flee rather than testify voluntarily or comply with a subpoena. In other words, defendants are able to manufacture flight risk. They

target an individual, and when they fail to find any basis to bring criminal charges, as with Mr. al-Kidd, they can arrest the individual as a material witness in connection with the underlying investigation because any individual in that situation would, according to defendants, undoubtedly have the motivation to flee. Defendants' position simply cannot be squared with the historically-limited purpose of the material witness law. If, under *Bacon*, a witness who *actually* flees to avoid the FBI is not presumptively a flight risk, then defendants cannot plausibly argue that Mr. al-Kidd should have been considered a flight risk on the ground that he was targeted by the government and *may* have been fearful of arrest and *may* have refused to cooperate *had* he been given an opportunity to do so.

4. The omissions and false statements were plainly relevant to probable cause.

Defendants claim that each of the omissions and false statements is insignificant. But the proper test is not whether each particular omission or false statement, by itself, would vitiate probable cause, but rather, whether *all* of the omissions and false statements, taken together, would have negated probable cause. *See United States v. Stanert*, 76 F.2d 775, 782 (9th Cir. 1985) ("The effect of the misrepresentations and omissions on the existence of probable cause is considered cumulatively"). In any event, defendants' contention that the omissions and false statements were insignificant lacks merit.

(a) Omissions. Defendants argue, for instance, that Mace and Gneckow may reasonably have concluded that it was unimportant to inform Judge Williams about Mr. al-Kidd's prior cooperation with the FBI. But, in the material witness context, the very question before the court is whether the individual would cooperate if given the opportunity to do so. *Bacon* at 944-45. As the Ninth Circuit has explained, "[by] reporting less than the total story, an affiant can

manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." *Stanert*, 762 F.2d at 781. Defendants also argue that Mr. al-Kidd's prior cooperation was of diminished value because the complaint does not state that he "disclosed any information to the FBI that demonstrated his willingness to testify voluntarily." Defs' Mem. at 21. Yet the FBI never asked him if he would testify. Am. Compl. ¶¶ 15, 54. More to the point, Mr. al-Kidd could not have volunteered to testify because there was no indictment at that point, much less a trial scheduled.[6]

Defendants further contend that Mr. al-Kidd's citizenship and substantial family ties were not "determinative" to the probable cause determination. Defs.' Mem. at 20-21. But, even if not by themselves "determinative," those are unquestionably facts that a reasonable person plainly would wish to know in making the probable cause assessment – especially given the post-September 11 focus on non-citizens, the fact that the FBI's asserted basis for flight risk was Mr. al-Kidd's travel, and the fact that he had a roundtrip ticket (not a one-way ticket).

Defendants also note that Mr. al-Kidd had previously traveled abroad for a period of roughly nine months, reasoning that he was thus "capable of a similar stay in Saudi Arabia, which would have enabled him to avoid any involvement in the Al-Hussayen proceedings." Defs' Mem. at 21. Ultimately, the trial did not begin for another 13 months. In any event, under *Bacon*, the government may not legally presume that one who has the *capability* to avoid

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[6] Defendants seek to have it both ways, arguing in the alternative that Mr. al-Kidd's cooperation was of little significance because of the very fact that it *did* occur before the indictment. But Mr. al-Kidd did not stop cooperating with the FBI – they stopped contacting him, and indeed, did not even bother to contact him after the Al-Hussayen indictment.

cooperating is likely to do so. And, again, defendants could have simply asked him to postpone his trip or seized his passport.[7]

Finally, defendants contend that it is simply not "relevant" that the affidavit failed to note that Mr. al-Kidd had never been asked to testify, postpone his trip or relinquish his passport. Defs.' Mem. at 22. In defendants' view, none of this information was material because the affidavit had not created the opposite impression. Defendants thus state that "had the FBI asked plaintiff to assist it by such things as postponing foreign travel or relinquishing his passport, the agents would have made that clear in the affidavit to demonstrate that he was affirmatively uncooperative and had scheduled travel despite their contrary request." *Id.* at 22. But, again, in the material witness context, where the determinative question is the individual's willingness to cooperate, these facts could not have been more critical. *See Vassallo v. Fox*, 2004 WL 2827517, at *5 (E.D. Pa. Dec. 9, 2004) ("omissions are made with reckless disregard for the truth if an officer withholds a fact in his ken that any reasonable person would have known that this was the kind of thing the judge would wish to know").

(b) False Statements. Defendants likewise contend that the misrepresentations regarding Mr. al-Kidd's airline ticket were of little importance. Defendants argue that the only meaningful fact was that Mr. al-Kidd was going to Saudi Arabia, and not whether he was traveling on a one-way, first-class ticket costing roughly $5,000, or as it turned out, a round trip, coach ticket costing roughly $1,700. Yet, in the entire affidavit, there were only four sentences that specifically addressed flight risk (¶¶ 7, 8), and *defendants* chose to include those details about the

[7] Moreover, if they did allow him to travel, they could have issued him a subpoena before he left (or even while in Saudi Arabia). Mr. al-Kidd certainly had an incentive to return to the United States and obey a subpoena, since the failure to do would have potentially subjected him to severe penalties. *See* 28 U.S.C. § 1784; 18 U.S.C. § 401.

ticket. It blinks reality to assume that experienced FBI agents included those details for no reason – especially after September 11th.[8]

In sum, the corrected affidavit did not establish probable cause of flight risk. Defendants simply presumed that Mr. al-Kidd would not cooperate, without ever affording him the opportunity to demonstrate his willingness to do so. That is precisely what *Bacon* held was impermissible.[9]

II. MACE AND GNECKOW ARE LIABLE UNDER THE *MALLEY* TEST.

The *Malley* test looks at the face of the warrant presented to the Court and asks whether it was reasonable for defendants to believe the warrant satisfied probable cause. *See Greenstreet v. County of San Bernadino*, 41 F.3d 1306, 1310 (9th Cir. 1994) (denying qualified immunity to officer who failed to use "reasonable professional judgment"). Even without the corrections to the affidavit, the central point remains: under *Bacon* defendants were required to give Mr. al-Kidd the opportunity to testify voluntarily or comply with a subpoena, or to show evidence of his being unwilling to do so, before arresting him. Thus, even if Mr. al-Kidd had been traveling on a one-way, first class ticket costing roughly $5,000 (as the affidavit incorrectly stated), those facts do not establish that Mr. al-Kidd would not have postponed his trip, relinquished his

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[8] Defendants alternatively argue that "the error *could be* due to negligence or innocent mistake," and that the Complaint fails to include facts showing that defendants knew of the mistake or acted recklessly. Defs.' Mem. at 23 (emphasis added). But, as discussed, *see supra* Section I.A., that argument is misplaced at the motion to dismiss stage. Moreover, in this case, the false statements involved easily-verifiable facts, such as the cost and class of the ticket. Plaintiff is clearly entitled to limited discovery on this issue given the clear inference that defendants were, at a minimum, reckless in getting these types of simple facts wrong.

[9] The corrected affidavit also failed to satisfy the second prong of the showing necessary to arrest a witness – that Mr. al-Kidd had information "material" to the Al-Hussayen trial. That argument is addressed below in the discussion of the *Malley* test. *See, infra,* Section II.

passport, or otherwise complied with a subpoena had he been given a chance to do so. As long as the affidavit did not state that Mr. al-Kidd had evaded judicial process or been affirmatively uncooperative (which it did not), it did not establish probable cause, and Mr. al-Kidd should have been afforded the opportunity to cooperate before being arrested.

The affidavit on its face also failed to establish that Mr. al-Kidd had information material to the Al-Hussayen case. Indeed, although the affidavit stated that Mr. al-Kidd had "crucial" information for the prosecution, the government never called him as a witness. Moreover, the affidavit did not specifically explain the information Mr. al-Kidd supposedly had that was crucial to the prosecution. Defendants not surprisingly attempt to fill in the gaps in their brief and assert that Mr. al-Kidd could have testified that Al-Hussayen was engaging in "business activities" in violation of his visa. Defs.' Mem. at 14-15. But defendants cannot fill in the missing parts after the fact. Furthermore, the government could have obtained Mr. al-Kidd's supposedly crucial information from numerous sources. Thus it is hardly surprising that Mr. al-Kidd was never called to testify. If the protections of the material witness statute and the Fourth Amendment are to have any meaning, they must prohibit the government from locking up a United States citizen for marginal, cumulative testimony - testimony so marginal and cumulative that it is ultimately never even required.[10]

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[10] Notably, the Justice Department's own definition of a "material witness" is one who has "significant" information about a criminal prosecution that is "necessary" to resolve the matter. *See* DOJ, Bureau of Justice Statistics, "Compendium of Federal Justice Statistics, 2003" at 124.

III. MACE AND GNECKOW'S ACTIONS ARE NOT IMMUNIZED BECAUSE THE COURT APPROVED THE WARRANT.

The government contends that even if there was no probable cause under the *Franks* or *Malley* tests, Mace and Gneckow are entitled to qualified immunity because a United States Attorney and the Court approved of the arrest. Defs.' Mem. at 24-25. This argument is wholly misplaced with respect to the *Franks* inquiry and was squarely rejected in *Malley* itself.

1. *Malley* Test. The Supreme Court in *Malley* unequivocally rejected the very argument defendants are making here. *Malley*, 475 U.S. at 346 n.9 (rejecting officer's argument that Court's issuance of warrant "broke the causal chain"). *See also KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004) ("[t]he fact that a judge and a prosecutor had approved the warrant does not make Hall's reliance on it reasonable"); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1368 (9th Cir. 1986) (holding that officers who unreasonably submit affidavits devoid of probable cause are not shielded from liability by magistrate's issuance of a warrant).[11]

2. *Franks* Test. Defendants do not make clear whether they are making this immunization-type argument with respect to plaintiff's *Franks* claim, but insofar as they are, the contention is plainly wrong. The *Franks* inquiry examines probable cause based on facts that were omitted from, or incorrectly stated, in the affidavit. Logically, Judge Williams could not have signed off on facts that were wrong or were never presented to him. Defendants' argument simply has no relevance in a *Franks* inquiry. *See Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st

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[11] Defendants erroneously rely on *Arnsberg*, 757 F.2d at 981, in support of their argument on this point. Defs.' Mem. at 25. But *Arnsberg* was decided before *Malley*, and in any event, *Arnsberg* is not remotely similar on its facts. The plaintiff in *Arnsberg* challenged only the *execution* of a slightly defective warrant, and not the preparation and submission of the affidavit accompanying the warrant. The Court in *Arnsberg* simply noted that it was not unreasonable for the officers to have *executed* the warrant without second guessing its validity.

Cir. 2005) ("a court owes no deference to a magistrate's decision to issue an arrest warrant . . . where officers procuring a warrant have deliberately misled the magistrate about relevant information") (internal citations omitted).[12]

IV. THE ARREST AND DETENTION WERE UNCONSTITUTIONAL IF DONE FOR THE PURPOSE OF INVESTIGATION OR PREVENTIVE DETENTION.

As discussed above, there was no probable cause, under *Franks* or *Malley*, to arrest and detain Mr. al-Kidd as a material witness. But, even if there had been probable cause, the arrest and detention would have been unconstitutional for the independent reason that it was done for the purpose of detaining and investigating Mr. al-Kidd as a potential criminal suspect, and not to secure his testimony. Am. Compl. ¶¶ 56, 57, 112.

Defendants contend, however, that the Court may not look at their actual purpose. Defs.' Mem. at 23-24. They contend that the arrest would be lawful even if it were shown through discovery that they arrested Mr. al-Kidd for the purpose of detaining and investigating him as a criminal suspect, thereby circumventing the Fourth Amendment's requirement that a criminal suspect be arrested only on probable cause of wrongdoing. Not surprisingly, defendants cite no case that establishes that remarkable principle. As the Second Circuit pointedly stated in *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003), "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause had not yet been established."

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[12] Defendants' argument is similarly misplaced insofar as they are also claiming that their actions are immunized because an AUSA applied for the warrant. *See, e.g., Mendocino Environmental Center*, 192 F.3d at 1294 n.8. And, moreover, defendants have not provided an affidavit that the AUSA knew that the agents were submitting incorrect information or omitting critical facts, and yet still submitted the agents' affidavit.

The only material witness case cited by defendants in support of their argument is *In re Alberto de Jesus Berrios*, 706 F.2d 355 (1st Cir. 1983), Defs.' Mem. at 24, but that case actually supports *plaintiff's* position. There, the First Circuit did not suggest, much less hold, that the government could use the material witness statute for the purpose of arresting suspects, but instead found that there had not been any showing of "subterfuge" or that the arrest had been made for the impermissible purpose of bringing a "target before the grand jury." *Id.* at 358.

The other cases cited by defendants, such as *Whren v. United States*, 517 U.S. 806, 813 (1996), and *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), do not involve material witness arrests and are thus inapposite. Defs.' Mem. at 24. In those cases, involving "ordinary, probable cause Fourth Amendment analysis," *Whren* at 813, the Supreme Court held only that a criminal arrest supported by probable cause would not be invalidated on the basis of the officer's motivations, thereby ensuring that officers on the street would not be constantly second-guessed about their underlying motives. That is hardly the same as the situation here.

In this case, defendants ask this Court to hold – as a matter of law – that there are no Fourth Amendment concerns raised where (1) FBI officers prepare and submit a material arrest warrant for the purpose of arresting a criminal suspect for whom probable cause of wrongdoing is lacking, or (2) the Attorney General of the United States adopts a policy of using the material witness law to arrest criminal suspects for the purpose of preventively detaining and investigating them, despite the lack of probable cause to arrest them on criminal charges. Defendants' sweeping argument should be rejected.

Defendant Ashcroft

Defendant Ashcroft argues that (1) the Court lacks jurisdiction over him, (2) he has no connection to the events of this case, and (3) he has *absolute* immunity. All three arguments should be rejected. At the pleading stage, plaintiff's allegations are more than sufficient.

V. DEFENDANT ASHCROFT IS SUBJECT TO THE COURT'S JURISDICTION.

Plaintiff need only make a prima facie showing where a Rule 12(b)(2) motion is based on written materials. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). The Complaint's uncontroverted allegations must be taken as true. *See id.* If facts bearing on jurisdiction are disputed or "a more satisfactory showing of the facts is necessary," discovery should be granted. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (citation omitted).

The test for specific jurisdiction is met here, because plaintiff has adequately alleged "purposeful direction" on the part of defendant Ashcroft. *Lake v. Lake,* 817 F.2d 1416, 1421 (9th Cir. 1987).[13] For "purposeful direction," the defendant must have (1) committed an intentional act; (2) expressly aimed at the forum state; (3) causing harm that the defendant knew was likely to be suffered in the forum state. *See Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (test satisfied "even by a defendant whose only contact with the forum state is the purposeful direction of a foreign act having effect in the forum state") (internal quotations and citations omitted).

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[13] Defendant Ashcroft does not challenge plaintiff's ability to satisfy the other two elements for specific jurisdiction – whether a claim "arises out of or relates to" contacts with the from and whether the exercise of jurisdiction is reasonable. *Lake*, 817 F.2d at 1421.

On a motion to dismiss involving a non-resident supervisor, the jurisdictional issue "overlaps" with whether the defendant had sufficient involvement to be held liable on the merits. *Elmaghraby v. Ashcroft*, 2005 WL 2375202, at *10 (E.D.N.Y. 2005). Where personal involvement "is adequately alleged and discovery is required to determine the extent of personal involvement, such discovery will likewise resolve the jurisdictional question as well." *Id.* (denying Ashcroft's Rule 12(b)(2) and (b)(6) motions in challenge to post-September 11 detention policies, finding that discovery is necessary to determine the extent of defendant's involvement). Accordingly, to avoid repetition, plaintiff refers the Court to the discussion immediately below regarding defendant Ashcroft's connection to this case.

VI. PLAINTIFF HAS ALLEGED A LEGALLY SUFFICIENT CONNECTION BETWEEN DEFENDANT ASHCROFT AND THIS CASE.

Contrary to defendant Ashcroft's suggestion, Mr. al-Kidd does not contend that he is vicariously liable for the constitutional violations, but directly and personally responsible based on his own actions as a supervisor. And, as defendant concedes, it is well settled that supervisory liability can attach in several ways, including where a supervisor adopts a policy that leads to the deprivation of constitutional rights. *See* Defs.' Mem. at 26-27. Indeed, the Ninth Circuit has stressed that the "requisite causal connection [for supervisory liability] can be established . . . by *setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury*." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978) (emphasis added). The Ninth Circuit has further stressed that supervisors can be held liable for their "acquiescence in the constitutional deprivation of which the complaint is made . . . or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citations omitted). Furthermore,

a supervisor may be held liable for failure to take necessary *corrective* action. *Id.* at 646. As the Ninth Circuit has generally emphasized, a "supervisor will rarely be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury." *Id.* at 645.

1. Defendant Ashcroft contends that plaintiff's allegations are "boilerplate," "insubstantial" and "devoid of any factual content." Defs.' Mem. at 25. But defendant erroneously relies on cases imposing a *heightened* pleading standard on plaintiffs to survive a motion to dismiss – a standard that has been definitively repudiated by the Supreme Court and the Ninth Circuit. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514-15 (2002) (rejecting the argument that complaint could not go forward with "conclusory allegations," emphasizing that a "requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (quotations omitted); *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) (rejecting "heightened pleading standard"); *Walker v. Thompson*, 288 F.3d 1005, 1008 (7th Cir. 2002) ("Cases . . . which say that 'conclusory allegations' . . . are not enough to withstand a motion to dismiss cannot be squared with . . . *Swierkiewicz*"); *Elmaghraby*, 2005 WL 2375202, at *12 (heightened pleading requirements are "foreclosed by *Swierkiewicz*").[14]

As the Supreme Court has explained, the concerns embodied in the qualified immunity doctrine can be addressed through summary judgment because a district court has "broad

[14] Thus, defendant's heavy reliance on *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989), and *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), is misplaced. Defs.' Mem. at 27-28. Both of those decisions explicitly relied on the discredited heightened pleading requirement. *See Nuclear Transport & Storage*, 890 F.2d at 1355 ("We see no reason why the heightened pleading requirement . . . should not apply to a *Bivens* action brought against a federal official."); *Gonzalez*, 325 F.3d at 1235.

discretion to tailor discovery narrowly and to dictate the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998). That is especially true where, as here, the information necessary to establish jurisdiction or liability is within the control of the defendants themselves. *See Strong v. Director of the State of Idaho Dep't of Correction*, 2005 WL 1421445, at *4 (D. Idaho June 15, 2005) ("[P]laintiffs may propound discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the defendant official actually took, if such information is unknown to plaintiffs") (quotations omitted); *Elmaghraby*, 2005 WL 2375202, at * 21 (denying Ashcroft's motion to dismiss and ordering discovery, stating that plaintiffs should not be "penalized for failing to assert more facts [about post 9-11 policies] where, as here, the extent of defendants' involvement is peculiarly within their knowledge").

2. In any event, plaintiff's allegations are hardly "boilerplate," as defendant asserts. As the Amended Complaint alleges:

(a) after September 11, the Justice Department under defendant Ashcroft adopted a new policy and practice under which the material witness statute was used as "a pretext to arrest and hold individuals whom the government lacked probable cause to charge with a crime but nonetheless wished to detain preventively and/or to investigate for possible criminal wrongdoing (*i.e.*, to arrest 'suspects')." ¶ 111. *See id.* ¶¶ 112-113, 115-126;

(b) this new policy sought the arrest of suspects regardless of whether there was "reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena." ¶ 127;

(c) the new material witness policy was part of a "broader set of policies and practices concerning individuals whom the government lacked probable cause to arrest on criminal charges

but wished to hold preventively and/or to investigate for criminal wrongdoing." ¶ 113. The Justice Department's own OIG report labeled it a "hold until cleared" policy. ¶¶ 114, 115, 118, 119, 131 (referencing OIG Report);

(d) the Justice Department devised and implemented its new material witness policy largely in secret, refusing to provide Congress with specific information and "routinely requesting that records of material witness proceedings be sealed . . . ." ¶ 135. Indeed, the transcript of at least one of the hearings in Mr. al-Kidd's case was sealed;

(e) the Justice Department has "unreasonably prolonged the period of detention for material witnesses," ¶ 133, and "routinely" held them "in high security detention conditions, further highlighting their status as terrorism suspects, rather than true witnesses," ¶ 129. *See* ¶ 131 (citing DOJ report that the Bureau of Prisons often "did not distinguish between detainees who . . . posed a security risk and those detained aliens who were uninvolved witnesses");

(f) finally, the Complaint alleges a direct connection between defendant Ashcroft, the Justice Department, the new material witness policy and the events of this case, including allegations that:

-- defendant Ashcroft was a "principal architect of, authorized and set into motion, these policies and practices . . . and had responsibility for their implementation and administration," ¶ 137;

-- the "harm and legal wrong suffered by Mr. al-Kidd was a product of, and caused by" the new policies, ¶ 109;

-- defendant "Ashcroft knew or reasonably should have known that the manner in which the material witness statute was being used would foreseeably result in the unlawful arrest and detention of material witnesses (such as Mr. al-Kidd);" ¶ 138;

-- defendant Ashcroft "acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference, towards the constitutional and legal rights of individuals arrested and detained under the policies and/or practices (including Mr. al-Kidd)," ¶ 141;

-- in the face of widespread reports of abuse, defendant Ashcroft did not take the necessary corrective action. Am. Compl. ¶ 141; *id.* ¶ 136 ("Upon information and belief, the Justice Department has issued apologies to 10-12 individuals who were improperly arrested as material witnesses"), *id.*

Furthermore, and critically, any attempt by defendant Ashcroft to claim that this case was not being addressed at the highest levels of the Justice Department flies in the face of numerous pieces of evidence. FBI Director Mueller's congressional testimony, given eleven days after plaintiff's arrest, specifically stated that Mr. al-Kidd's arrest was one of the notable recent "successes" in the war on terrorism. Director Mueller further stated that the FBI had arrested three other men in "the *Idaho* probe," and that the FBI was examining links between the *Idaho* probe and "individuals in six other jurisdictions" *See* Am. Compl. ¶¶ 8, 100 (citing testimony, emphasis added). In addition, defendant Ashcroft issued a press release specifically touting the Al-Hussayen indictment. *See* Press Release, Dep't of Justice, (Feb. 26, 2003), *at* www.usdoj.gov; *see also* John M. Hubbell, "Federal raid in Idaho town creates anxiety for Muslims; 100 agents arrest Saudi grad student, question others," *S.F. Chron.* (Mar. 10, 2003).

Thus, there was absolutely no question that the "Idaho probe" in general, and the al-Kidd and Al-Hussayen cases in particular, were being addressed at the highest levels of the Justice Department, including specifically by defendants Ashcroft and FBI Director Mueller. That is consistent with the finding of the Justice Department's own internal OIG report, which specifically noted defendant Ashcroft's involvement in devising and implementing the post-9/11 policies for holding potential suspects by any means necessary, including material witness warrants, immigration violations or minor criminal charges. *See Elmaghraby*, 2005 WL 2375202, at *20 n.20 (stating that the OIG Report "suggests the involvement of Ashcroft" in post-September 11 policies); *id.* (noting that the OIG Report discussed senior Justice Department officials who "thought the ['hold until cleared'] policy came from 'at least' the Attorney General"); *see also* DOJ's OIG Report at 39 (noting that September 11 detention policies "stemmed from discussions at the highest levels of the Department"). *See* Am. Compl. ¶¶ 118, 119 (citing DOJ report).[15]

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[15] Defendant Ashcroft has submitted an affidavit from AUSA Lindquist *limited to his Rule 12(b)(2) motion*; otherwise it would convert his Rule 12(b)(6) motion into a summary judgment motion. The affidavit states that defendant Ashcroft had no involvement in Mr. Lindquist's decision to seek Mr. al-Kidd's arrest. But Mr. al-Kidd's claim is not that defendant Ashcroft specifically directed each U.S. Attorney's office to seek warrants. More importantly, the affidavit is silent regarding, among other things, defendant Ashcroft's involvement in the (1) FBI's investigation of al-Kidd, (2) FBI's conduct in seeking the material witness warrant, and (3) policies and supervisory failures controlling the conditions of al-Kidd's confinement. The affidavit also states (¶ 8) that it is Mr. Lindquist's "understanding that general policy guidance on the use of the material witness statute has been provided by the Justice Department, [but] that guidance was issued after al-Kidd had been released from detention and, as such, did not influence the decision to apply for the material witness warrant in regard to al-Kidd." Plaintiff is certainly entitled to limited discovery to probe this and other general statements in the affidavit. But, even on its face, the statement supports one of plaintiff's primary contentions – that defendant Ashcroft took no corrective measures, including issuing critically needed guidance, despite the mounting evidence of the statute's misuse after September 11. *See, e.g.*, Am. Compl. ¶ 136 (upon information and belief, government has apologized to 10-12 material witnesses).

In sum, defendant's argument is premised on an impermissibly cramped reading of the Complaint. The allegations here are legally sufficient to establish personal jurisdiction and supervisory liability. Indeed, they are as specific as they reasonably could be at this pre-discovery stage, especially given that the information is uniquely within defendant's control (*Strong*; *Elmaghraby; Mayfield*), and the extensive secrecy surrounding the use of the material witness statute, Am. Compl. ¶ 135. At a minimum, plaintiff is entitled to targeted discovery in light of the Justice Department's own internal report, defendant Ashcroft's press release regarding the Al-Hussayen indictment, and Director Mueller's testimony specifically singling out the al-Kidd case and the "Idaho probe."

Notably, the Justice Department has recently announced that it has found a sufficient basis to begin an internal investigation into 21 post-September 11th material witness cases. *See* OIG Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, Mar. 8, 2006, *at* www.usdoj.gov/oig.

VII. DEFENDANT ASHCROFT IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

Defendant Ashcroft does not enjoy absolute immunity for Mr. al-Kidd's unconstitutional arrest because the allegations are that he used the material witness law as an *investigatory law enforcement* tool, and was not performing prosecutorial functions. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citations and quotations omitted).[16]

An official seeking absolute immunity bears the burden of demonstrating that his activities warrant such complete immunity. *See, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 269

[16] Defendant Ashcroft does not contend that he has absolute immunity regarding plaintiff's *conditions* claims. *See, e.g.*, *Elmaghraby*, 2005 WL 2375202, at *17-21 (denying Attorney General's motion to dismiss claims challenging conditions of confinement for September 11th detainees).

(1993); *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). Moreover, because qualified immunity already protects officials except when they act unreasonably, the Supreme Court has been "'quite sparing' in [its] recognition of absolute immunity." *Burns*, 500 U.S. at 487 (citation omitted); *Genzler v. Longanbach*, 410 F.3d 630, 636-37 (9th Cir. 2005); *see also Milstein v. Cooley*, 257 F.3d 1004, 1009 (9th Cir. 2001) (noting "limited availability of absolute immunity").

Defendant Ashcroft does not, and could not, argue that a prosecutor is automatically entitled to absolute immunity for all his actions, nor does he argue that the Attorney General is entitled to such immunity by virtue of his position. *Buckley*, 509 U.S. at 273 (the "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor"); *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (finding that Attorney General is not absolutely immune for authorizing warrantless wiretap, even in national security context).

Rather, it is settled that courts must "examine 'the nature of the *function performed*, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (citation omitted and emphasis added). Under this functional approach, a prosecutor is entitled to absolute immunity only when he "engages in activities 'intimately associated with the judicial phase of the criminal process.'" *Broam*, 320 F.3d at 1028 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). When, however, a prosecutor is "performing investigatory or administrative functions, or is essentially functioning as a police officer or detective," he is afforded only qualified immunity. *Id.* (citing *Buckley*, 509 U.S. at 273); *see, e.g.*, *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005). In fact, a prosecutor is not entitled to absolute immunity even for giving "legal advice" to police officers regarding whether probable cause exists in a given case. *See Burns*, 500 U.S. at 493 ("We do not believe, however, that advising the police in the

investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process,' that it qualifies for absolute immunity") (citation omitted).

Here, the allegations are that defendant Ashcroft directed and oversaw an *investigative* law enforcement policy and that he used the material witness statute to preventively detain and investigate *suspects.* Am. Compl. ¶¶ 111-113, 116-117, 121, 123, 125. *Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested").[17]

Indeed, unlike a regular prosecutor, the Attorney General directs law enforcement policy as the head of the Justice Department and thus the FBI. Notably, there is no suggestion that agents Mace and Gneckow have any claim to absolute immunity. Defendant Ashcroft should enjoy no greater immunity than the individual agents who had to implement his law enforcement policies. *See Burns,* 500 U.S. at 495 ("Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice"). Defendant Ashcroft's claim for absolute immunity should accordingly be rejected.

CONCLUSION

The motions to dismiss filed by defendants Mace, Gneckow and Ashcroft should be denied.

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[17] Significantly, even "a determination of probable cause does not guarantee a prosecutor absolute immunity for all actions taken afterwards" because even then "a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley*, 509 U.S. at 274 n.5 (citation omitted); *see Genzler*, 410 F.3d at 639.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of March, 2006, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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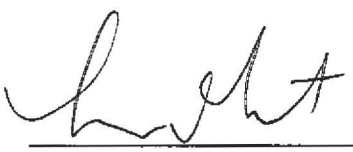

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