No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE LEGAL HISTORY AND CRIMINAL PROCEDURE LAW PROFESSORS IN SUPPORT OF RESPONDENT

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Amici curiae are university and law school professors of legal history who have expertise in English legal history before 1789 and/or American legal history, or professors of criminal procedure who have expertise in the history of Anglo-American criminal procedure. Ricardo J. Bascuas is a professor of law at the University of Miami School of Law. Donald Dripps is a professor of law at the University of San Diego School of Law. Carolyn B. Ramsey is an associate professor of law at the University of Colorado Law School. George C. Thomas III is the Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at the Rutgers School of Law–Newark. Robert W. Gordon is the Chancellor Kent Professor of Law and Legal History at the Yale Law School. (Amici's titles and institutional affiliations are provided only to identify them properly, not to imply any endorsement of the views expressed herein by amici's institutions.)

Amici curiae have a professional interest in ensuring that this Court is fully and accurately informed about the history of material-witness laws. Amici curiae have no personal, financial, or other professional interest in, and take no position on, the other issues raised in the case at bar.[1]

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[1] No party or counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. No person or entity other than counsel for amici made a monetary contribution to the preparation or

SUMMARY OF THE ARGUMENT

The modern practice of arresting and imprisoning material witnesses, without offering them any opportunity to provide bail or a recognizance to guarantee their appearance at trial, is a major departure from the material-witness laws of the past. It is deeply at odds with the principles and purposes underlying material-witness laws that applied for hundreds of years. In considering the arguments presented in this case, this Court should be aware of the history of the law respecting the means of securing the testimony of material witnesses while also protecting the rights of those witnesses.

Until the late twentieth century, a material witness could not lawfully be detained without first being afforded the opportunity to provide a sworn oath or payment promising to return to testify at the trial. Historical precedents allowed for various forms of guaranty: recognizance (an obligation, made in court, by which a person promises to perform some act or observe some condition); recognizance with surety (a bond, guarantee, or security given to support the recognizance); or bail (a security such as cash or a bond required for release of a detainee who must appear in court at a future time). *See* BLACK'S LAW DICTIONARY 160, 200, 1386 (9th ed. 2009). All of these methods were intended to guarantee a material witness's testimony, with imprisonment reserved only for the exceptional case in which the

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submission of this brief. The parties have consented to the filing of this brief.

witness could not, or would not, provide the recognizance, surety, or bail.

The venerable tradition of ensuring the appearance of material witnesses at trial through the use of recognizances or sureties began in the sixteenth century in England with the Marian bail statutes. Justices of the peace could ask anyone who possessed material information related to a crime to swear an oath that they would appear to testify at trial. Only when the witness refused to provide the recognizance (or subsequently failed to make good on the recognizance) could the witness be detained. This was viewed as an exercise of the court's traditional contempt power.

Subsequent statutes and the common law in England and the United States also allowed for the use of sureties, by which someone other than the witness promised to forfeit certain collateral if the witness failed to appear. By the twentieth century in the United States, most statutes and cases referred simply to bail rather than recognizances or sureties, but the principle remained the same. *See, e.g.*, *Barry* v. *United States*, 279 U.S. 597, 617 (1929) (citing 28 U.S.C. § 659). Until the latter half of the twentieth century, the law remained substantially unchanged: Material witnesses were not supposed to be imprisoned unless they refused to provide a guaranty that they would show up to testify, or reneged on their guaranty.

To the extent that the federal statute at issue in this case, 18 U.S.C. § 3144 (1984), is construed to authorize the detention of material witnesses

without allowing the witness instead to provide a recognizance, surety, or bail, it constitutes a dramatic departure from the common law and from prior state and federal statutes. In enacting that statute, Congress explicitly relied on the constitutional analysis in *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971), a circuit court decision that misunderstood and therefore departed from four centuries of settled Anglo-American law, including the Judiciary Act of 1789. *Bacon* sanctioned a practice that not only had no grounding in the common law or prior statutes, but had in fact been decried as a violation of the rights of witnesses in England and the United States, and as a violation of due process in the United States.

Material witnesses who alleged wrongful imprisonment historically have been allowed to maintain actions against justices of the peace, other government officials, and private actors. In determining whether an official could be held liable, courts have examined the official's purposes and intentions. When those purposes or intentions involved false pretexts or other impropriety, courts have allowed suits for torts like malicious prosecution, malicious abuse of process, trespass, and false imprisonment to proceed in spite of defendants' claims of immunity. Since these types of tort claims were the antecedents of modern suits under § 1983, this Court appropriately looks to them for guidance on claims of immunity under that statute. *Malley* v. *Briggs*, 475 U.S. 335, 340 (1986).

ARGUMENT

I. THE GOVERNMENT'S PRACTICE OF DETAINING MATERIAL WITNESSES WITHOUT THE USE OF RECOGNIZANCES OR SURETIES DOES NOT COMPORT WITH HISTORICAL ENGLISH AND AMERICAN LAW.

A. At Common Law in England, Material Witnesses Were Given Opportunities to Provide Recognizances or Sureties to Avoid Detention by a Justice of the Peace.

Under the original English statutes for the examination of prisoners suspected of felony, material witnesses were not detained without first being given an opportunity to provide a recognizance or surety guaranteeing their appearance at trial. *See* 2 & 3 Phil. & Mar. c. 10, § 2 (1555) (Eng.) (justice of the peace had the authority to "bind all such by Recognizances or Obligation, as do declare anything material to prove the said Manslaughter or Felony, against such Prisoner . . . to appear at the next [sitting of the court] . . . to give evidence against the party . . . .").[2] Justices of the peace had no authority to detain material witnesses without first offering the witness the opportunity to swear an oath to appear at trial. *See id.* If the witness provided the oath, he could not be imprisoned. *See id.*; *see also*

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[2] Notably, the Marian statute gave justices of the peace the express authority only to bind witnesses, not to imprison them. *See* 2 & 3 Phil. & Mar. c. 10, § 2.

JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 258 (1974) (describing the process of "binding over" material witnesses).

Early justice of the peace manuals describe the same limited powers. The offering of a recognizance (sworn oath) and reasonable surety (money promised to ensure appearance by the witness) were the accepted practices at common law. *See, e.g.*, WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF THE PEACE 205-06 (1581); MICHAEL DALTON, THE COUNTREY JUSTICE: CONTEYNING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 259 (1618) (justice of the peace shall "binde all such by Recognizance, as doe declare anything materiall, to proove the felony, to appeare at the next generall Gaole delivery, &c to give in evidence against such offenders"). These manuals from the sixteenth and seventeenth centuries contain no instructions to detain witnesses without offering them the opportunity to provide a recognizance or surety.[3]

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[3] During this time, justices of the peace were crown-appointed officers, tasked with "assisting the private prosecutor [the accuser] to build his case" against the accused. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 43, 46 (2003) ("LANGBEIN, ADVERSARY CRIMINAL TRIAL"). They sometimes helped to identify witnesses, and were required to bind them over to compel their appearance in trial court. *Id.* at 41. The justices of the peace used their "local influence" to investigate crime, encouraging complaining witnesses (victims) and other witnesses to come forward to build the prosecution's case. *See id.* at 46. The system, then, depended upon encouraging witnesses to cooperate in bringing and proving

The same practice continued in England into the eighteenth century. Justices of the peace were required to use the recognizance or surety process and could order a witness imprisoned only upon his refusal to provide the recognizance or surety. Imprisonment was viewed as an exercise of the court's contempt power. *See, e.g.*, THEODORE BARLOW, THE JUSTICE OF PEACE: A TREATISE CONTAINING THE POWER AND DUTY OF THAT MAGISTRATE 188 (1745); 1 JOSEPH SHAW, THE PRACTICAL JUSTICE OF PEACE AND PARISH AND WARD-OFFICER 317-18 (6th ed. 1756); 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 282 (George Wilson ed., new ed. 1778) ("[T]he justices or coroner that take . . . the information of the witnesses, may . . . before the trial bind over the witnesses to appear at the sessions, *and in case of their refusal either to come or to be bound over*, may commit them for their contempt on such refusal . . . .") (emphasis added);[4] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 163, 184 (6th ed. 1787) (noting that the Marian statutes provided justices of the

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charges. If victims and other witnesses had risked being jailed, they would have been reluctant to come forward.

[4] A person is said to be "bound over" when he enters into a bond or recognisance to the Crown to do or abstain from some act. On committal for trial on an indictable offence, the accused person, if he is granted bail, is bound over to appear and stand his trial, and the prosecutor and witnesses (except witnesses as to character) are bound over to appear and prosecute or give evidence, as the case may be . . . .

1 EARL JOWITT, THE DICTIONARY OF ENGLISH LAW 246 (1959).

peace with "authority to bind" witnesses to appear at trial "by recognizance or obligation" but omitting any mention of arrest or commitment of witnesses); *see also* LANGBEIN, ADVERSARY CRIMINAL TRIAL, *supra*, at 53 (noting that defendants requested "'a rule of court to make my witnesses appear'") (quoting *R.* v. *Fitzharris*, 8 St. Tr. 243, 330 (K.B. 1681)); *cf.* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 90 n.73 (1974) (describing the power of English courts to compel the appearance of witnesses in treason trials).

English material-witness law on the eve of the American Revolution thus allowed a justice of the peace "to commit" a material witness "to the publick prison," if the witness "refuse[d] to be examined on oath" without "just cause," and to "bind over any such witness . . . by recognizance . . . to appear and give evidence." 30 Geo. 2, c. 24, § 16 (1757) (Eng.). Thus, the witness had to be given an opportunity to appear voluntarily and was brought before the justice of the peace only if he refused. *Id.* The witness was then afforded an opportunity to offer an oath to appear at trial. *Id.* Only if the witness refused to provide that oath could the witness be detained. *Id.*

B. Recognizances and Sureties Were Used to Ensure the Appearance of Material Witnesses in Colonial America.

Like other colonial laws, those governing material witnesses were generally holdovers from the English common-law tradition. Thus, the

colonists continued to use the recognizance or surety process to ensure the appearance of material witnesses at trial. *See, e.g.*, State of North Carolina, A Complete Revisal of All Acts of the Assembly, Of the Province of North-Carolina, Now in Force and Use, ch. 13, § 3, at 425 (1773) (describing a process of binding over witnesses through recognizance and surety); 3 Col. Laws N.Y., ch. 960, at 1007-08 (1754); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 507-13 & n.99 (1944) (noting use of the preceding statute to bind over witnesses with recognizances, sometimes coupled with sureties or bonds); WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH CAROLINA 100 (1761) (describing a process of binding over witnesses through recognizance and surety); *cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES 294 (1st Am. ed. 1772) (noting that the criminally accused had a broad right to bail following arrest in Founding-Era law); HAWKINS, *supra*, at 297 (a person involved in a crime who chose to confess and to turn crown witness against his confederates was "to be at his liberty, and out of prison" during the time before he was to "make his appeal" (testify against the others)). As in England in this era, material witnesses could not be detained unless they were first offered the opportunity to provide a recognizance or surety, and unless the witness refused to do so.

C. Early American Federal and State Material-Witness Laws Continued to Use Recognizances and Sureties to Procure the Testimony of Material Witnesses.

1. *The Judiciary Act of 1789*

The first federal material-witness statute was contained in the Judiciary Act of 1789, 1 Stat. 73-93, 91 (1789). The Act required that "copies of the process [against the offender] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment." *Id.* Thus, imprisonment was a fallback, to be ordered only following a witness's refusal to provide a recognizance. This was consistent with the tradition of material-witness law that the Founders inherited. The 1789 Act did not even authorize the magistrate to require a surety with the recognizance.

Case law from the Founding Era confirms that detention was used only when witnesses refused to offer a recognizance or provide a reasonable surety. In *United States* v. *Moore*, the federal government jailed a group of sailors who had witnessed a homicide aboard a ship. 26 F. Cas. 1308, 1309 (C.C.D. Pa. 1801) (No. 15,805). In dicta, one of the judges wrote:

> It has been the practice in Pennsylvania to commit to prison such witnesses for the commonwealth as cannot find security for their appearance at court to testify, in cases where the justice does not think their personal recognizance sufficient; *but I find no authority for it.* By the statutes of 1 & 2 Phil. & M. c. 13 and 2 & 3 Phil. & M. c. 10, the justice has power to bind the witnesses by recognizance or obligation to testify, and if they refuse to be bound, to commit them for contempt. The same power is said to be virtually included in their commissions; but *it is no where said that they may be compelled to find security, or be committed*.

Id. at 1309 n.3 (emphases added). Thus even asking for a surety was considered improper; and detention could be imposed only when a witness refused to provide a recognizance, as an exercise of the contempt power.

The limited nature of this power to compel testimony from a material witness was noted in *Voss* v. *Luke*, a civil case that described the material witness process in criminal trials. 28 F. Cas. 1302, 1303 (C.C.D.C. 1806) (No. 17,014). The court noted that the recognizance process was not "compulsory" and that witnesses were free "to forfeit [their] recognizance[s] rather than attend." *Id.*

2. *State Material-Witness Laws*

Justice of the peace manuals from the Founding Era indicate that the lawful practice in the states was to imprison a witness only after he had refused to provide a recognizance or surety. *See, e.g.*, JAMES PARKER, CONDUCTOR GENERALIS 173, 303 (1788) (noting that "if the party shall refuse to be bound, the justice may send him to the gaol"); WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 149, 183 (1st ed. 1795) (stating that "[i]f a witness refuses to enter into a recognizance, he may be committed, or bound to good behaviour"; noting that "[i]n criminal cases, if a witness hath been bound over, and do not appear, he shall forfeit his recognizance," but making no mention of imprisonment in these circumstances); JOHN A. DUNLAP, THE NEW-YORK JUSTICE 7 (1815) (imprisonment was permissible only after a witness refused to provide an affidavit).

State-court case law from the Founding Era also indicates that a witness could be imprisoned only if he refused to swear a recognizance or provide a surety. In *Minor* v. *State*, a woman challenged her detention after she failed to provide a surety. 1 Blackf. 236, 237 n.1 (Ind. 1823). The court justified her incarceration on the ground that women were legally unable to provide a recognizance of their own, and the woman could be imprisoned if she was unable to find someone to post a surety on her behalf. *Id.*

When the Constitution and the Bill of Rights were ratified, the accepted practice for securing the testimony of material witnesses at trial was to require the witnesses to appear before a justice of the peace, or a similar official, to offer a recognizance or surety that they would appear to testify at trial. It was only when the witness refused to provide a recognizance or surety that the witness could be imprisoned.

D. In the Mid-Nineteenth Century, Federal and State Laws Continued to Authorize Imprisonment Only if a Witness Refused to Provide a Recognizance or Surety.

1. *Federal Material-Witness Law*

In the mid-nineteenth century, two federal statutes referred to the detention of material witnesses. One, addressing federal maritime jurisdiction, provided for the use of recognizances and sureties to secure witnesses who would testify on behalf of the accused; this is the first time a federal statute authorized the taking of sureties to secure a witness' attendance. Act of Aug. 23, 1842, 5 Stat. 517 (1842). The other, addressing the detention of material witnesses in federal criminal cases, permitted detention only for those witnesses who "neglect[ed]" or "refuse[d]" to provide a recognizance. Act of Aug. 8, 1846, 9 Stat. 72, 73-74 (1846). Detention was permitted only "until [the witness] shall have given the recognizance required by said judge," or until he testified. *Id.* at 74. Thus, a witness who was imprisoned for failure to recognize

could secure his release by agreeing to give his recognizance.

Federal laws regarding material witnesses did not materially change over the course of the nineteenth century in this regard.

2. *State Material-Witness Laws*

Nineteenth-century state cases and statutes also continued to follow the accepted rule of first affording the witness an opportunity to provide a recognizance or surety, and using detention only after instances of non-compliance. In *Bickley* v. *Commonwealth*, the Kentucky Court of Appeals granted a habeas petition on behalf of a witness who had been detained after failing to provide a $500 surety. 25 Ky. 572 (1829). The court noted that it had not "been able to find any statute, which authorizes the circuit court, to compel witnesses to enter into recognizances with surety, and on their failure, to commit them to jail." *Id.* The *Bickley* court said the circuit court could have used a recognizance, but not a surety, to compel testimony. *Id.* The court therefore declared the witness's detention illegal. *Id.* *Cf.* Ill. Crim. Code ch. 38, § 364 (1874) (providing that "no . . . witness shall be required to give other security than his own recognizance for [his] appearance"). *See generally* Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 690-91 (2009) (discussing limits on the statutory power to detain material witnesses in late nineteenth-century Illinois).

In New York in the mid-nineteenth century, the applicable law continued to allow material witnesses to offer recognizances (and later bail) as a means of ensuring their appearance at trial. N.Y. Rev. Stat. pt. 4, tit. 2, §§ 21-22 (1829). The New York law allowed witnesses either to give their recognizance or to post a surety, at the discretion of the judge. *Id.* The extensive use of high bail amounts in New York, which often led to the imprisonment of witnesses, produced public outcry at this deviation from historical practice. *See, e.g., A Disgusted Hebrew*, N.Y. TIMES, Jan. 23, 1878, at 3 (reporting that witness-victim was required to put up $300 bail after he reported the theft of his own money totaling $35). Public concern about the hardship faced by indigent material witnesses who were held because they could not give sureties was expressed in other states, such as California and Illinois, as well. *See* Ramsey, *supra*, at 704.

While state material witness statutes sometimes were used to detain individuals who were suspected of criminal activity, the material-witness statutes upon which the police and magistrates relied did not deviate from the traditional law allowing witnesses to avoid imprisonment by offering a recognizance or bail. *See, e.g.*, N.Y. Rev. Stat. pt. 4, tit. 2, § 21; *see also* Ramsey, *supra*, at 690-92. Although, in practice, material witnesses were sometimes imprisoned without being offered the opportunity to post bail or give their recognizance, that practice contravened statutory authority. *See* Ramsey, *supra*, at 686-89, 692.

E. From the Reconstruction Era to the Mid-Twentieth Century, Material-Witness Laws Continued to Allow Witnesses to Make a Recognizance and Post Bail; and Those Laws Reflected an Understanding of the Requirements of Due Process.

During the Reconstruction Era and through 1944, the process of imprisoning a material witness only after either failure to give a recognizance, failure to provide a surety, or failure to abide by a recognizance, continued at both the federal and state levels. Some states expressly sought to reduce the hardship on poor witnesses by encouraging an alternative statutory procedure by which a witness might be deposed, instead of imprisoned, if he could not provide sureties. *See id.* at 692 & n.58 (discussing California law). Evidence at the federal and state levels indicates that failure to allow for the use of a recognizance or a surety, rather than imprisonment, was believed to be a departure from the common law and a violation of due process protections.

1. *Federal Material-Witness Law*

In 1878, Congress passed revised statutes that synthesized the 1789, 1842, and 1846 laws governing material witnesses. 1 Rev. Stat. 166, 166-67 (1878).[5]

[5] The 1878 Revised Statutes were intended to be a codification of all Statutes at Large, including any laws passed after publication of the first edition. The act authorizing this codification provided that the President would appoint a

The statutes continued to allow for the imprisonment of a witness only if he refused to provide a recognizance or surety.

Section 879 of the 1878 law authorized a judge *sua sponte* to require a recognizance from a witness, with or without sureties, on behalf of the United States, or in cases arising under maritime jurisdiction, on behalf of any party. 1 Rev. Stat. 166, 166-67, § 879. Section 881 provided that the district attorney could request a judge to require a recognizance "with or without sureties" of a witness after proving that that testimony was competent and "necessary." The witness could be imprisoned only if he refused to provide the "recognizance required by said judge," and he could secure his release at any time by providing that recognizance. 1 Rev. Stat. 166, 167, § 881.

Debates over enactment of the Anti-Polygamy Act in 1887 reflected the late-nineteenth-century understanding of both the traditional limits on material-witness detentions and why the absence of such limits could raise constitutional concerns. The material-witness provision eventually enacted as part of the Anti-Polygamy Act provided that a witness in a polygamy or bigamy case could be immediately detained without use of a subpoena process, but could secure his "discharge" by

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commissioner to do the work, and the final product would be examined and approved by the Secretary of State. Act of Mar. 2, 1877, 19 Stat. 268 (1877). The commissioner had no authority to change the substance of the law. *Preface*, 1 Rev. Stat. v (1878).

providing a recognizance with surety. 24 Stat. 635 (1887).

The text of this provision changed over the course of congressional debate, mostly due to concerns about the constitutional implications of detaining a witness based solely on the oaths of the parties or upon the belief of the judge. An earlier provision included no requirement for an "oath or affirmation" of the reasonable grounds to believe the witness would not obey the subpoena. 17 CONG. REC. 513 (Jan. 7, 1886); 18 CONG. REC. 581 (Jan. 12, 1887). The same version required that no witness could be held in custody for longer than ten days. 17 CONG. REC. 513 (Jan. 7, 1886); 18 CONG. REC. 581 (Jan. 12, 1887). At the House conference, a requirement that the oath or affirmation be "of at least two credible persons in writing" was removed because "it being thought best to leave to the court the quantum of evidence necessary to show the unwillingness of a witness to appear." 18 CONG. REC. 1787 (Feb. 15, 1887).

During the debates over the Anti-Polygamy Act, several members of Congress expressed concern that allowing judges to detain witnesses based solely upon the oaths of other parties or a judge's belief would be unconstitutional and had never existed at common law. For example, Representative Bennett objected that the material-witness provision "invests the officers of the Territory with powers—and I have weighed the words—*such as no judicial officer ever possessed at common law*." 18 CONG. REC. 1879 (Feb. 17, 1887) (statement of Rep. Bennett)

(emphasis added). He noted the importance of "safeguards in favor of the personal liberty of the citizen" and that "due proof" should be required of the "recusancy of the witness." *Id.*

Similarly, Senator Teller stated that "under this section, if the court should conclude that the witness may not appear, he may be arrested and held for ten days and no longer. . . . I know there is a similar statute in the States with reference to the holding of witnesses to bail, but I know that is a *dangerous power to put in the hands of anybody at any time*, much less in such states of excitement as will and must necessarily exist in the execution of these laws." 17 CONG. REC. 513 (Jan. 7, 1886) (statement of Sen. Teller) (emphasis added).

Senator Call also questioned the constitutionality of the Anti-Polygamy Act's material-witness provision. He argued that allowing witnesses to be imprisoned solely on the basis of a judge's belief would be a "violation of the right of personal liberty guaranteed in the Constitution, the right to be free except under due and proper process of law . . . ." 18 CONG. REC. 1900 (Feb. 18, 1887) (statement of Sen. Call).

Defenders of the provision clarified that the absence of a subpoena process would not result in the witness's immediate imprisonment, but would merely bring him before the court, which would then take the witness's recognizance. Representative Hammond stated that the "whole purpose is that if a witness is needed immediately he shall be brought

immediately before the court, and then, if the cause is continued or laid over for a day, the court will take his recognizance for his appearance when required." 18 CONG. REC. 1881 (Feb. 17, 1887) (statement of Rep. Hammond).

Until 1948, two federal criminal statutory provisions authorized the arrest of material witnesses in non-polygamy cases. One authorized judges or other officers to "require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case." 28 U.S.C. § 657 (1940) (repealed 1948). The other authorized the district attorney to request the arrest, recognizance and potential imprisonment of a witness. 28 U.S.C. § 659 (1940) (repealed 1948). Neither provision, however, authorized the imprisonment of a material witness without the use of a recognizance or the availability of bail. As before, the statute made clear that detention was authorized only "until [the witness] gives the recognizance required by said judge." *Id.*

In 1944, Congress passed Rule 46 of the Federal Rules of Criminal Procedure. The Advisory Committee Notes stated that Rule 46(b) was considered "substantially a restatement of 28 U.S.C. § 657." Fed. R. Crim. P. 46 advisory committee's notes (1944). The rule itself provided no power to detain material witnesses. Thus, between 1948 (when former § 657 and § 659 were repealed) and 1966 (when Congress enacted the Bail Reform Act), there may have existed "no formal authority to

arrest material witnesses because the newly enacted Federal Rules of Criminal Procedure did not mention such arrests." 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, 491 (2002).

2. *State Material-Witness Laws*

State case law concerning material-witness detentions from Reconstruction through the mid-twentieth century reflected the view that imprisoning a witness without giving him the alternative of providing a recognizance or surety violated the common law and due process. State courts variously imposed limitations on the government's authority to detain material witnesses, to require unreasonable sureties, and to detain witnesses for unreasonable periods of time. *See, e.g.*, *State* v. *Grace*, 18 Minn. 398 (1872) (releasing detained witnesses on writ of habeas corpus because there was no finding that the witnesses had "any intention of not appearing"); *Ex Parte Shaw*, 61 Cal. 58 (1882) (releasing a material witness who had not been offered an opportunity to provide a recognizance); *Howard* v. *Beaver County*, 6 Pa. C.C. 397 (1889) (noting that magistrate was required to find that witness did not intend to appear before detaining the witness); *Hall* v. *Commissioners*, 34 A. 771, 772 (Md. 1896) (witness could be detained only "after [he] fails to give such reasonable security for his appearance as may be demanded of him"); *People* v. *Pettit*, 44 N.Y.S. 256 (Sup. Ct. 1897) (recognizance was sufficient to prevent detention); *In*

re Yasutaro, 15 Haw. 667 (1904) (releasing witnesses on writ of habeas corpus after prosecution sought to detain them during appeals process); *Ex parte Grissett*, 149 P. 1195 (Okla. Crim. App. 1915) (recognizance was sufficient when witnesses were unable to pay surety); *Ex parte Grzyeskowiak*, 255 N.W. 359, 361 (Mich. 1934) (finding a four-month detention period unreasonable and releasing witness); *Lowe* v. *Taylor*, 180 S.E. 223, 226 (Ga. 1934) ("No court should ever order a witness to be imprisoned . . . except from grave necessity.").

F. Material-Witness Laws Since 1966 Are Based on an Incorrect Understanding of Material-Witness Precedents.

Only since the late twentieth century has federal law allowed the arrest and detention of a material witness without first issuing a subpoena and then allowing the witness to provide a recognizance or surety as an alternative to detention. This is a departure from the law during the Founding and Reconstruction Eras, as well as at common law.

1. The 1966 amendment to Rule 46 of the Rules of Criminal Procedure continued to reflect Congress's intent to avoid the unnecessary detention of material witnesses. The amendment added subdivision (h), which provided that "[t]he court shall exercise supervision over the detention of defendants and witnesses within the district pending trial *for the purpose of eliminating all unnecessary*

detention." Fed. R. Crim. P. 46(h) (1966) (emphasis added). The Advisory Committee Notes reflect this intent, stating that the purpose of the Amendment is "to place upon the court in each district the responsibility for supervising the detention of defendants and witnesses and for *eliminating all unnecessary detention*." *Id.* advisory committee's note (1966) (emphasis added).

In June 1966, Congress departed from centuries of prior precedent when it enacted the Bail Reform Act of 1966, 18 U.S.C. §§ 3146-52, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not be needlessly detained[.]" 80 Stat. 214. In spite of this salutary purpose, the material-witness provision of the Act made no mention of recognizances, sureties, or even bail. This was the first time a federal statute had authorized detention not expressly conditioned upon the witness's refusal or failure to provide assurances for his appearance. Despite the lack of these explicit provisions, statements made during consideration of the Act suggest that Congress maintained the view that material witnesses should be detained only in exceptional cases. As Deputy Attorney General Ramsey Clark stated, the material-witness provision "puts much greater emphasis on release. . . . Congress feels that you should ordinarily not detain material witnesses. They have committed no crime, except to have been at the wrong place at the wrong time. . . ." *Federal Bail Reform: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th

Cong. 29 (1966) (statement of Ramsey Clark, Deputy Attorney General). He further noted that federal material witnesses were committed "fairly infrequent[ly]," and often "primarily for the protection of the witness himself," as in cases involving organized crime. *Id.* at 30.

2. A decision of the Ninth Circuit in 1971 changed the federal process. It allowed the detention of a witness without first attempting to secure her testimony by subpoena, based largely on the incorrect view that such a detention not only was constitutional but was a historically accepted practice. *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971). The *Bacon* court relied upon a fundamental misinterpretation of the 1789 Judiciary Act, and subsequent federal legislation, in support of its conclusion that the Founding Fathers authorized the arrest and detention of material witnesses in the first instance. The court ignored the fact that the Judiciary Act of 1789, and subsequent federal legislation, authorized only the taking of recognizances from witnesses, and the possibility of imprisonment only after the failure to give a recognizance. In *Bacon*, bail was set for the witness at $100,000, even though the Judiciary Act of 1789, and subsequent federal legislation, had not authorized the setting of bail. The court failed to acknowledge the essential distinction between detaining a witness who refused to promise to appear in court, or reneged on his promise (making imprisonment an exercise of the court's contempt power), and detaining a witness who promised to appear in court. *See id.* at 938 (stating that

Congress had not intended the Bail Reform Act to abandon the "long-standing authority to arrest material witnesses" that began with the Judiciary Act of 1789); *see also* Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 706-13 (2005). Instead, the court conflated the immediate, unconditional detention of a material witness with the power to subpoena a material witness who would then be asked to provide a recognizance or sureties, and would face detention only upon refusal to do so.

Relying on Federal Rule of Criminal Procedure 46(b) and now-former § 3149, the *Bacon* court misinterpreted historical precedent to find an implied right to imprison material witnesses. Both authorities, however, merely provided that if a person could provide testimony material to a criminal proceeding and could not practicably be served by subpoena, a court could require a person to give bail for his appearance. *See Bacon*, 449 F.2d at 937. To find an implied right, the court mistakenly concluded that the power to arrest "was expressly provided for by statute until 1948." *Id.* at 938. However, in neither the Founding Era nor the Reconstruction Era could a witness legally have been imprisoned without first being given the opportunity to provide a recognizance or surety. Each version of the material-witness law before *Bacon* expressly limited judicial authority to imprison a witness to instances in which he willfully refused to promise to appear. Any other policy would have been a sharp

deviation from the common law and statutory authority.

In addition to its mistaken interpretation of historical precedent, the Ninth Circuit also redefined "probable cause" for arrest and detention under a material-witness arrest warrant. *Id.* at 942. The court relied on Rule 46(b) and § 3149 to hold that an arrest of a material witness is "reasonable" upon a showing of two statutory criteria: (1) "that the testimony of a person is material" and (2) "that it may become impracticable to secure his presence by subpoena." *Id.* at 943. The *Bacon* court removed the substantive standard of "probable cause" to arrest based on a reasonable belief of guilt or criminal activity, *see*, *e.g., Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949), and substituted two statutory conditions far short of criminal wrongdoing to justify the arrest and detention of a material witness even when he or she has *not* refused to testify.

The Ninth Circuit's decision in *Bacon* thus deviated from historical precedent and from Fourth Amendment requirements. Congress and the federal courts have since relied on *Bacon* to presume the constitutionality of detaining material witnesses without recognizance, sureties, or bail. That single, historically incorrect decision had a "singularly far-reaching influence on the acceptance of 'material witness' detentions." Bascuas, *supra*, at 704.

3. Congress explicitly relied on *Bacon* in passing the Bail Reform Act of 1984, which is the current material-witness statute. Section 3144 provides that "if it is shown that it may become

impracticable to secure the presence of a person by subpoena, a judicial officer may order the arrest of the person. . . ." 18 U.S.C. § 3144. The legislative history of § 3144 cites *Bacon* as the exclusive legal authority for the statute:

> [T]he Ninth Circuit found the power to arrest a material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. § 3149. In its research on the law, the court discovered that specific arrest authority existed in federal law from 1790 to 1948. The court concluded that the dropping of the authority in the 1948 revision of federal criminal laws was inadvertent. The committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judicial officer to release on conditions that is set forth in 18 U.S.C. § 3149.

S. REP. NO. 98-225, at 28-29 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3211-12.

Both *Bacon* and § 3144 misinterpreted the statutory authority from the Founding Era through the mid-twentieth century. Those laws authorized the detention of a witness only when the witness failed to provide a recognizance or surety. Moreover, the historical record after the Founding Era contains ample evidence that the provision of alternatives to

detention to secure a witness's testimony, in the form of recognizances, sureties, and bail, were considered necessary to ensure that such practices would comport with due process.

II. HISTORICALLY, PROSECUTORS HAVE NOT HAD ABSOLUTE IMMUNITY FROM CLAIMS OF WRONGFUL IMPRISONMENT OR FOR ABUSING THE WITNESS-DETENTION PROCESS.

This Court has declined to find absolute immunity for actions that did not enjoy such immunity from tort suits "at common law when the Civil Rights Act was enacted in 1871." *Malley*, 475 U.S. at 340 (quoting *Tower* v. *Glover*, 467 U.S. 914, 920 (1984)). As the Court explained in *Malley*, "[o]ur initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." *Id.* at 339-40.[6]

At common law, prosecutors and others who played a prosecutorial role were not immune from wrongful imprisonment suits based on actions taken for improper reasons. Jailing someone as a "material witness" without a real intention to have him testify would qualify as such a reason.

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[6] And even if "an official was accorded immunity from tort actions at common law," immunity can still be denied. *Malley*, 475 U.S. at 340.

A. The Common Law of False Imprisonment Allowed Tort Suits Against Justices of the Peace Who Imprisoned Individuals for Impermissible Reasons.

The role of the English justice of the peace in the seventeenth to nineteenth centuries was not what it is today in the United States. English criminal prosecutions, especially early in this era, were conducted without the reliance on counsel that eventually became more typical in American practice. England moved to a more adversarial process over the course of the eighteenth century. *See generally* LANGBEIN, ADVERSARY CRIMINAL TRIAL, *supra* (explaining the transition from an inquisitorial criminal trial system to the modern adversarial model). Private parties would initiate private prosecutions on criminal charges, and justices of the peace were responsible for conducting investigations and ensuring that the parties and witnesses appeared at trial before the higher court. *See generally* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 317-24 (1973). In this sense, justices of the peace acted as "back-up prosecutors." *Id.* at 323.

English justices of the peace could be held liable for tortious acts committed in the process of conducting this type of investigation, including the wrongful binding over of witnesses. Justices of the peace did not enjoy the immunity afforded to judges for erroneous acts. *See* 21 Jac. I c. 12 (1623-24) (Eng.) (permitting justices of the peace and other

officers to plead the general issue (a general denial rather than a specific defense) in answer to false-imprisonment actions brought against them, thus confirming that such liability existed).

There is extensive English case law holding that justices of the peace and other ministerial officers could be sued for false imprisonment. *See, e.g.*, *Casbourn* v. *Ball*, 96 Eng. Rep. 507 (C.P. 1773); *Hill* v. *Bateman*, 93 Eng. Rep. 800 (K.B. 1725) .

Evans v. *Rees* is a classic example of a case where a justice of the peace was found liable in trespass for the detention of a material witness. 113 Eng. Rep. 732, 734 (K.B. 1840). There, a warrant had issued to detain a witness, based on other parties' statements that the witness said he would not appear at trial. *Id.* at 733. The witness was not given the opportunity to provide a recognizance. *Id.* at 734. The court held that it was improper for the justice of the peace to detain a witness based on the testimony of others and the justice of the peace could be held liable for damages for the imprisonment. *See id.* at 734-35; *see also id.* at 733-34 (Lord Denman, C.J., quoting D'Oyly & Williams's edition of Burn's *Justice of the Peace*: "'The practice of committing witnesses unable to find sureties for their appearance is clearly repugnant to every principle of the English law'"). Justices of the peace exercised only limited statutory authority to detain witnesses and even the accused, and when they acted contrary to statute, they could be held liable. Even when acting within their office, justices of the peace could be held liable in tort for malicious or corrupt action.

See, e.g., Justices' Protection Act (Jervis Act), 1848, 11 & 12 Vict. c. 44 (Eng.) (providing that an action on the case lies against a justice for malicious actions taken in the execution of his duties as justice); HAWKINS, *supra*, at 133.

B. Historically, the Intentions of Public Officials Have Been Important Considerations in Deciding Whether an Official Is Entitled to Immunity.

Both before and after 1871, justices of the peace in the United States have been held liable for the improper detention of witnesses. In *Marsh* v. *Williams*, for example, a witness was compelled to testify by subpoena, but failed to do so. 1 Howard 132 (Miss. 1834). The court found that the commissioner in chancery had no power to detain the witness even though he had refused to testify; that to do so would be illegal; and that all involved in such an imprisonment would be liable as trespassers. *Id.*

In *Bates* v. *Kitchel*, a justice of the peace imprisoned a witness who could not make bail for his failure to post bail, and the witness sued the party who urged his commitment for false imprisonment. 160 Mich. 402, 403-04 (1910). The court found in favor of the witness, holding that the party was liable because the justice of the peace, too, would have been liable for committing the witness: stating that "[u]nder the terms of the [Michigan witness] statute, neither the commissioner nor the justice had any jurisdiction for imprisoning the defendant, and

in attempting to do so they were . . . clearly acting outside of their jurisdiction." *Id.* at 408.

A pair of Massachusetts cases similarly allowed for liability for false imprisonment of witnesses who had been wrongfully detained in contempt proceedings. *See Clarke* v. *May*, 68 Mass. 410, 412 (1854) (holding that a justice of the peace was liable for the detention of a witness where trial had ended); *Piper* v. *Pearson*, 68 Mass. 120, 122-23 (1854) (holding that a justice of the peace who, in the course of the trial in a case of which a local police court had exclusive jurisdiction by statute, committed a witness to prison for contempt was liable to an action by the witness). While both of these suits arose out of civil trials, they state the general principle that justices of the peace, when not acting in strict compliance with statute, could be sued for damages. *See also Call* v. *Pike*, 66 Me. 350 (1876) (justice of the peace was liable in trespass for committing a witness who refused to be sworn for a deposition; justice was related to one of the parties in the pending suit, and so was statutorily disqualified from examining the witness); *Grumon* v. *Raymond*, 1 Conn. 40 (1814) (justice of the peace who detained suspects in a stolen-property case by issuing an arrest warrant that did not name any particular party was liable to arrestee); *Johnson* v. *Tompkins*, 13 F. Cas. 840, 854 (C.C.E.D. Pa. 1833) (No. 7,416) ("If an illegal act is done under colour of legal authority or process, from an officer who had no jurisdiction of the subject matter, or whose order or process is made or issued in violation of the law, the judge or justice, and party procuring it, are

trespassers, so is the officer and all who act under him . . . ."); *Robinson* v. *Dow*, 20 F. Cas. 1005 (C.C.D.C. 1846) (No. 11,950) (issuing an arrest warrant outside of his territorial jurisdiction would expose a justice of the peace to tort liability). As these cases demonstrate, justices of the peace were subject to strict statutory constraints on their powers with respect to witnesses and parties, and if they acted contrary to the terms of the authorizing statute, they could be held liable.

Additionally, when justices of the peace issued summonses, bound individuals over for trial, or took other non-adjudicatory actions against witnesses or parties, they were liable if they acted maliciously or from corrupt motives. *See, e.g.*, *Head* v. *Levy*, 52 Neb. 456 (1897) (justice of the peace who issued an order of attachment against plaintiff without first requiring the complaining witness to execute an undertaking, and who maliciously summoned additional witnesses specifically for the purpose of increasing the plaintiff's court fees, was liable for damages); *Fisher* v. *Deane*, 107 Mass. 118, 121 (1871) (justice of the peace who maliciously arrested plaintiff on a post-judgment execution warrant was liable, and plaintiff properly presented "evidence . . . that the warrant was issued for a corrupt and dishonest purpose, namely, to extort money from him, and under a threat to make trouble for him if he did not pay the money demanded"); *see also Chambers* v. *Oehler*, 104 Iowa 278 (1897) (allowing lawsuit to proceed against a justice of the peace who allegedly "malicious[ly] . . . and for the purpose of oppressing and annoying the plaintiff, and to extort

money from him" arrested a witness for disobeying a subpoena; not questioning whether the complaint stated a cause of action against the justice or other defendants).

Private litigants, too, could be held liable for their role in actions taken against witnesses. Such liability could be based on trespass or false imprisonment, as in *Bates* v. *Kitchel*, 160 Mich. 402, and *Marsh* v. *Williams*, 1 Howard 132. *See also Lovick* v. *Atl. Coast Line R.R.*, 129 N.C. 427 (1901) (upholding jury verdict in favor of plaintiff in suit against private company for its role in procuring the arrest of a witness). Liability could also be based on malicious abuse of process, whenever process is "willfully made use of for a purpose not justified by the law."[7] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 220 (2d ed. 1888). A New York case, *Dishaw* v. *Wadleigh*, 44 N.Y.S. 207 (N.Y. App. Div. 1897), involved a malicious abuse of process claim for issuing a subpoena under false pretenses. There, the plaintiff had been subpoenaed, ostensibly to obtain his testimony, but in fact to get

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[7] At the time of the passage of the Civil Rights Act of 1871, many prosecutions were brought by private individuals. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995). These private prosecutors could be held liable for malicious prosecution, but were protected by a probable-cause defense. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 107-15. Absolute prosecutorial immunity is a more recent development, first appearing in case law in 1896. *Id.* at 55 n.14; *Griffith* v. *Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896).

him to pay an outstanding debt. *Id.* The court described the use of the subpoena process in this manner as having been "sought by trickery and cunning to pervert the processes of the law from their proper use and design, in order to reach a result which it was thought could not be arrived at by ordinary and legitimate procedure of the courts." *Id.* at 209. The court considered it proper, therefore, to look beyond the stated reasons for the subpoena, even if they appeared to be legitimate, to inquire into the real purpose of the party requesting the subpoena. *Id.* at 210.

Thus, questions of statutory authorization and intent historically were important elements in the inquiry whether a public official or private litigant could be liable in tort. Courts recognized liability for a range of traditional tort claims that could be brought by a witness who allegedly had been improperly detained (including trespass, malicious prosecution, malicious abuse of process, and false imprisonment).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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