

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN D. ASHCROFT, FORMER :

4 ATTORNEY GENERAL, ET AL., :

5 Petitioners :

6 v. : No. 07-1015

7 JAVAID IQBAL, ET AL. :

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9 Washington, D.C.

10 Wednesday, December 10, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

16 GEN. GREGORY G.GARRE, ESQ., Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Petitioners.

19 ALEXANDER A. REINERT, ESQ., Yonkers, N.Y.; on behalf
20 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1015, Ashcroft versus Iqbal.

General Garre.

ORAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

GENERAL GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns the qualified immunity of high-ranking government officials like the Attorney General of the United States and Director of the FBI and supervisory liability claims under Bivens based on the alleged wrongdoing of much lower level officials.

In concluding that the complaint in this case was sufficient to subject the high-ranking officials, like the Attorney General, to the demands of civil discovery, the court of appeals erred in two fundamental and interrelated respects. First, the court erred in concluding that the complaint stated a violation of clearly established rights by the former Attorney General and Director of the FBI, because under this Court's precedents the complaint fails adequately to plead the personal involvement of those high-ranking

1 officials in the alleged discriminatory acts of lower
2 level officials.

3 Second --

4 JUSTICE GINSBURG: General Garre, clarify
5 one point. You said failed to state enough to overcome
6 qualified immunity. But the pleading is analyzed
7 discreetly. This is a 12(b)(6) motion, is it?

8 GENERAL GARRE: It is a 12(b)(6) motion.

9 JUSTICE GINSBURG: And so that tests just
10 the pleading. Qualified immunity is an affirmative
11 defense which hasn't even been stated formally. So
12 isn't it entirely conceivable that you could have a good
13 complaint judged from the 12(b)(6) point of view, but
14 when the qualified immunity defense is asserted the
15 plaintiff isn't able to come up with enough to stave off
16 a summary judgment motion?

17 GENERAL GARRE: No, for two reasons,
18 Justice Ginsburg. The first is that this Court has
19 recognized that a defense can be a basis for a motion to
20 dismiss under 12(b)(6). It did so most recently in the
21 Jones versus Bott case. And it is established practice
22 in the Federal courts, in part because of this decision,
23 that appeals from the denial of motion to dismiss on the
24 grounds of qualified immunity are appropriate.

25 And second, as the Second Circuit recognized

1 -- and we think it got this right -- the question of
2 whether a complaint adequately pleads the personal
3 involvement of government officials goes directly to the
4 question of qualified immunity. And the court of
5 appeals said that on page 14a of its decision, because
6 it goes to the question of whether these defendants have
7 violated any clearly established rights.

8 And so the question of supervisory liability
9 in this case we think is essential to the question of
10 whether or not the Attorney General and Director of the
11 FBI are entitled to qualified immunity. And in denying
12 the government's -- the Petitioner's motion to dismiss
13 on the ground of qualified immunity, the district court
14 erroneously deprived these Petitioners of the
15 protections of that important defense.

16 JUSTICE SOUTER: Mr. Garre, isn't there more
17 involved here than simply derivative liability for the
18 acts of others? I've got a bunch of excerpts from the
19 complaint, But let me just go to one on section --
20 paragraph, rather, 97. That charges the defendants
21 Ashcroft and Mueller with willfully and maliciously
22 designing a policy. It doesn't sound like respondeat
23 superior. I mean, it seems to charge them directly with
24 coming up with what these people are complaining about.

25 GENERAL GARRE: Well, I think that that is

1 fair, Justice Souter. I mean, I think that there are
2 two general types of allegations in this complaint. One
3 set of allegations says that Petitioners came up with
4 this policy, and if you look at those allegations -- and
5 I think I would point you to paragraph 69 and paragraphs
6 10 and 11 -- those allegations we think describe a
7 policy which is neutral on its face, a policy of holding
8 persons determined by the FBI to be of interest in
9 connection with a terribly important investigation until
10 they have been cleared.

11 And so we think that those allegations can't
12 be enough to sustain these -- to subject these
13 Petitioners to civil discovery.

14 JUSTICE SOUTER: Why don't -- may I just
15 interrupt you there. Why don't you think the reference
16 here in the language I just read to designing a policy
17 includes the policy which is several times described as
18 being one which called for holding Arab Muslim men of
19 certain countries of origin without reference to any
20 penal purpose? I mean, that -- I think that is
21 adequately described in there as part of the policy.

22 GENERAL GARRE: I think if you look at the
23 complaint, that that interpretation doesn't hold up. In
24 particular, I would point you to paragraph page 48,
25 which is on page 164 of the joint appendix -- I'm sorry,

1 the petition appendix. What that paragraph says is that
2 these allegedly discriminatory determinations,
3 classifications, were made by FBI officials in the
4 field, not Petitioners here, the former Attorney General
5 and director of the FBI. And importantly, these
6 determinations were made, quote, and this comes from
7 paragraph 48, "without specific criteria or uniform
8 classification system."

9 So that's what's going on here. You've got
10 a complaint that alleges that specific lower level
11 officials are making these determinations. That's in
12 paragraphs 50 and 51. You've got a complaint alleging
13 that these determinations are being made on the basis of
14 ad hoc criteria. That's page 48. And then you have
15 these overarching allegations that the Attorney General
16 and the Director of the FBI knew about, approved and
17 condoned these discriminatory conduct by much
18 lower-level officials.

19 CHIEF JUSTICE ROBERTS: You don't dispute
20 that, whatever the policy was, that it was approved and
21 condoned by the Attorney General and the Director of the
22 FBI?

23 GENERAL GARRE: We've accepted that at some
24 level that this complaint maintains, and it's in
25 paragraph 69, that there was a policy of holding

1 suspects until they -- the suspects were determined to
2 be of interest by the FBI, until they were cleared by
3 the FBI in connection with this investigation. That
4 policy we have not disputed, and that policy we think is
5 a factually neutral, perfectly lawful law enforcement
6 response to the 9/11 attacks, resulting in --

7 CHIEF JUSTICE ROBERTS: Well, it may -- it
8 may very well be, but isn't it for purposes of the
9 complaint sufficient to raise a due process claim by
10 saying what they say? In other words, you may have a
11 very good defense to it. You may have something that
12 does not ever get beyond -- get them beyond the point of
13 summary judgment. But for them simply to charge that
14 there was a policy in which they picked up people and
15 they held them until they were cleared, i.e., sort of
16 demonstrated to be innocent in some way, that at least
17 on the face of it seems to state a due process problem
18 under the Fifth Amendment, doesn't it?

19 GENERAL GARRE: Not with respect to the
20 Petitioners here, the former Attorney General and the
21 Director of the FBI, because -- and I think in
22 evaluating --

23 JUSTICE SOUTER: Even if, as the Chief
24 Justice said, they knew and condoned the policy?

25 GENERAL GARRE: Well, the question is which

1 policy, what policy? If you look at the complaint, I
2 think the only policy that the allegations bear out with
3 respect to the Attorney General and the Director of the
4 FBI is the policy described in paragraph 69 of holding
5 suspects until cleared.

6 JUSTICE SOUTER: You may be -- I mean, you
7 may be right. I think there is a lot of tension in the
8 allegations here. I grant you that. But isn't the
9 proper way to deal with those tensions at this stage to
10 file a motion for a more definite statement and find out
11 for sure?

12 GENERAL GARRE: No. Certainly that is one
13 option. The Court mentioned that in the Crawford-El
14 case and that's an option. But just as in the Bell
15 Atlantic case, where that was an option, too, and where
16 the defendants in that case did not avail themselves of
17 their opportunity to file a motion for a more definite
18 statement, the Petitioners here did not do so and they
19 were not required to do so. They had a different option
20 under the Federal Rules of Civil Procedure to move for
21 dismissal under 12(b)(6). They exercised that option
22 and the complaint -- the complaint should be dismissed
23 because it fails to state a claim against these
24 individuals.

25 JUSTICE SOUTER: The difference -- and maybe

1 this isn't a sufficient difference. But the difference
2 in my mind between this and Bell Atlantic was that in
3 Bell Atlantic you had a set of allegations in which in
4 effect it was an either-or choice. There were two
5 possibilities consistent with the allegations in Bell
6 Atlantic. One was a conspiracy possibility, one was a
7 lawful parallel conduct possibility. And there just
8 wasn't any way to pick one as being a more probable
9 interpretation of what they were getting at.

10 Here the problem is not so much an either-
11 or choice as to which we are clueless, but a just
12 vagueness or uncertainty. The talk about the -- the
13 racial criterion go to the policy as devised or the
14 policy as implemented, and so on. And it seems to me
15 that here we are in a kind of conceptually a squishier
16 situation and it might be better to get a more definite
17 statement than to say, well, you've got to make a choice
18 and there's no way to make a choice.

19 GENERAL GARRE: That's one of the reasons
20 why I think it's important to distinguish between the
21 different sets of claims. I think the general claim of
22 a policy of holding suspects until cleared is much more
23 like the Bell Atlantic situation, where you have got
24 factually neutral allegations, perfectly lawful law
25 enforcement conduct to have a policy that says, FBI

1 agents, if you determine these people are of interest,
2 hold them until they are cleared so that we are not
3 releasing people that are potentially suspects or
4 wrongdoers in this investigation.

5 JUSTICE GINSBURG: General Garre, I think
6 that the Bell Atlantic case -- and I'm sure that Justice
7 Souter will correct me if I'm wrong about this -- most
8 of it is about what it takes -- what are the essential
9 elements of a Sherman Section 1 charge. And there's a
10 big mistake that the pleaders are making. That is,
11 there has to be an agreement and they haven't alleged an
12 agreement.

13 This case seems to be quite different. And
14 I think you have taken Bell Atlantic frankly for more
15 than is there. That is, twice, at least twice in the
16 opinion, the Court says, we are not developing any
17 heightened pleading rules. Form 11 is as good today as
18 it was yesterday. What we are talking about is a
19 missing -- is an essential element to a substantive
20 claim for relief. I thought that's what --

21 GENERAL GARRE: And we're not asking for a
22 heightened pleading standard, Justice Ginsburg. I think
23 what is missing here fundamentally is a substantive
24 requirement of a cause for action, Bivens, for
25 supervisory liability, which is an affirmative link.

1 Subsidiary allegations suggesting a plausible
2 affirmative link between the discriminatory actions any
3 allegedly taken by much lower level officials in the
4 field and the Director of the FBI and the Attorney
5 General of the United States.

6 CHIEF JUSTICE ROBERTS: That sounds like an
7 argument on the merits of the Bivens claim rather than
8 an argument going to qualified immunity.

9 GENERAL GARRE: It's not. I mean, in a
10 similar way that this Court considered the scope of the
11 Bivens cause of action in the Wilkie case recently and
12 in the Hartman case recently, in both of those cases the
13 Court recognized that the scope of the Bivens cause of
14 action goes directly to the question of qualified
15 immunity.

16 And here, in order to evaluate whether the
17 pleadings are adequate against the Attorney General and
18 the Director of the FBI, you have to know what the
19 substantive standard under Bivens is for a supervisory
20 liability type of claim. You have to know, just as you
21 did in Bell Atlantic, you had to know the substantive
22 standard of antitrust law, in this kind of context here
23 you have to know the substantive standard of what's
24 required to subject the Attorney General of the United
25 States or the Director of the FBI to potential

1 liability, civil damages, burdens of civil discovery for
2 supervisory liability for the claims of much lower level
3 officials.

4 JUSTICE BREYER: How does -- how does this
5 work in an ordinary case? I should know the answer to
6 this, but I don't. It's a very elementary question.
7 Jones sues the president of Coca-Cola. His claim is the
8 president personally put a mouse in the bottle. Now, he
9 has no reason for thinking that. Then his lawyer says:
10 Okay, I'm now going to take seven depositions of the
11 president of Coca-Cola. The president of Coca-Cola
12 says: You know, I don't have time for this; there is no
13 basis. He's -- I agree he's in good faith, but there is
14 no basis. Okay, I don't want to go and spend the time
15 to answer questions.

16 Where in the rules does it say he can go to
17 the judge and say, judge, his lawyer will say, my client
18 has nothing to do with this, there is no basis for it;
19 don't make him answer the depositions, please? Where
20 does it say that in the rules?

21 GENERAL GARRE: It says that, as this Court
22 interpreted it, in Rule 8 of the rules, Justice Breyer.

23 JUSTICE BREYER: In Rule 8?

24 GENERAL GARRE: Yes, because in Rule 8 --

25 JUSTICE BREYER: I thought Rule 8 was move

1 for a more definite statement.

2 MR. PHILLIPS: No. Rule 8 is a sworn
3 statement showing entitlement for relief. It's the rule
4 interpreted in Bell Atlantic, and there the Bell
5 Atlantic Court said that the plaintiff had the
6 obligation to show a plausible entitlement to relief.

7 JUSTICE BREYER: He shows a plausible
8 entitlement. He says -- there's no doubt it's a claim
9 if the president of Coca-Cola did put the mouse in the
10 bottle. It's just there is no basis for thinking that.
11 So he wants to go to the judge and say: I've set out a
12 claim here; I've copied it right out of the rules, all
13 right. Now, what allows the judge to stop this
14 deposition?

15 GENERAL GARRE: Rule 8 does, as interpreted
16 --

17 JUSTICE BREYER: Where?

18 GENERAL GARRE: -- in Bell Atlantic, because
19 that is not a plausible entitlement of a claim to
20 relief.

21 JUSTICE SOUTER: But Mr. Garre, you are
22 using the word "plausible" or you're taking the word
23 "plausible" out of Bell Atlantic, I think, and you are
24 using it to mean something that probably can be proven
25 to be true. Bell Atlantic drew that distinction. The

1 plausibility there is a plausibility that if they prove
2 what they says they will -- they will establish a
3 violation.

4 GENERAL GARRE: I certainly agree with you.
5 You don't have to show that it probably is, but you have
6 to show facts suggesting above the speculative level.
7 Just as in Bell Atlantic --

8 JUSTICE SOUTER: I think you are right that
9 if somebody makes just a totally bizarre allegation that
10 nobody in the world could take seriously, that -- that,
11 that the issue can be raised.

12 But in Justice Breyer's case, the -- that
13 may be the case if the claim is that the president of
14 Coke was personally putting mouses in bottles. But the
15 claim, it seems to me, that the Attorney General or the
16 Director of the FBI was establishing a policy of no
17 release until cleared or a policy that centered on
18 people with the same characteristics as the hijackers
19 does not have that kind of bizarre character to it and,
20 I think, would not run afoul of the plausibility
21 standard.

22 GENERAL GARRE: Well, we certainly think --
23 I mean, in Bell Atlantic, the Court said common economic
24 experience would support its determination in that case.
25 We think here, and I think the brief filed by former

1 attorney generals from several different administrations
2 makes this point as well, that common government
3 experience would suggest that the Attorney General of
4 the United States is not involved in the sort of
5 microscopic decisions --

6 JUSTICE SOUTER: Well, I would agree, but
7 this is about as far from common government operation as
8 you can get.

9 GENERAL GARRE: The -- and I think that gets
10 to one of the fundamental problems with the Second
11 Circuit decision, is it held the extraordinary context
12 of the 9/11 attacks and the aftermath of those attacks
13 against the Petitioners in this case. And that's
14 problematic, not only from the qualified-immunity
15 perspective of what it's going to be like for officials
16 next time they have to --

17 JUSTICE SOUTER: Oh, I know, but the courts
18 can't --

19 GENERAL GARRE: -- deal with that.

20 JUSTICE SOUTER: The courts can't ignore the
21 extraordinary circumstances, either.

22 GENERAL GARRE: But it's problematic because
23 you have to look at the reality of the job of the
24 Attorney General of the United States and the Director
25 of the FBI. In general, these are people who are

1 responsible not only for the litigating divisions within
2 the Department of Justice, the Federal Bureau of
3 Investigation, the Drug Enforcement Agency, enforcing
4 countless laws. These are people who have
5 extraordinarily busy schedules. And ordinary --

6 JUSTICE BREYER: I'm sorry, I just don't
7 have the answer to my question. I must not have said it
8 properly. Imagine, way before Twombly -- these rules
9 have been in existence for decades. So we go back years
10 ago. Certainly, there have been many cases where, for
11 whatever reasons, the plaintiffs included allegations
12 that were just factually very unlikely. I want to know
13 where the judge has the power to control discovery in
14 the rules. That's -- I should know that. I can't
15 remember my civil procedure course. Probably, it was
16 taught on day 4.

17 (Laughter.)

18 GENERAL GARRE: Well, Rule 26 governs
19 discovery, Justice Breyer.

20 JUSTICE BREYER: I see that. It says a
21 person has a right to go and get discovery. It doesn't
22 say they only control it under certain provisions which
23 don't seem to me to apply to the truly absurd discovery.
24 So there must be some power a judge has.

25 And the second question I'm going to ask

1 you, when you tell me what that power is, which
2 apparently I'm not going to find out -- but whatever
3 that power is, which must be there, why doesn't that
4 work to solve your problem?

5 GENERAL GARRE: Well, the power to govern
6 discovery doesn't solve the problem for the same reason
7 that it didn't in Bell Atlantic. The Court specifically
8 said we are not going to rely on district courts to weed
9 out potentially meritless claims because we recognize
10 the burdens that discovery can impose in the civil and
11 in trust contexts, and those burdens are multiplied many
12 times here where you are talking about subjecting --
13 subjecting high level government official to the burdens
14 of civil discovery.

15 I think fundamentally we think you don't get
16 to the question of how do district judges control
17 discovery, because they haven't gotten through the
18 gateway of pleading an adequate claim. And if I can
19 give you the substantive rule that we think is on point
20 here, this Court, in the Rizzo case, which is a section
21 1983 case, considered the question of claims against
22 high-ranking officials, the Mayor of the City of
23 Philadelphia, the Police Commissioner of the City of
24 Philadelphia, for alleged wrongdoing by individual
25 police officers there.

1 And there -- in that case, the Court held
2 that a plaintiff under section 1983 has to establish, as
3 a matter of law, an affirmative link between the acts of
4 the -- the subordinates and the higher-level officials.
5 And we think that that substantive rule in section 1983
6 at a minimum carries over to the Bivens context.

7 JUSTICE BREYER: Well, what -- I mean, my
8 basic question, which I really want to hear the answer
9 to, is the Attorney General is very busy and what he
10 does is very important. The president of Coca-Cola is
11 very busy. The president of General Motors is very busy
12 -- and very busy at the moment. And what he --

13 (Laughter.)

14 JUSTICE BREYER: What they are doing is very
15 important. There are quite a few people in this country
16 who aren't even in the government, and what they do is
17 very important and they are very busy. And so if there
18 is something in these rules that allows people to bring
19 suits without any factual foundation, even though the
20 complaint says there is --

21 JUSTICE GINSBURG: How about the --

22 JUSTICE BREYER: And if those people are
23 being harassed --

24 JUSTICE GINSBURG: How about Rule 11? To
25 take care of Justice Breyer's problem, the judge would

1 say to the lawyer: Now, you signed this pleading, and
2 when you made -- you signed it, you made certain
3 representations, and I'm going to read the Riot Act to
4 you if it turns out that this is a frivolous petition.

5 GENERAL GARRE: Sure. That's one
6 protection, Justice Ginsburg.

7 CHIEF JUSTICE ROBERTS: Reading the Riot --

8 GENERAL GARRE: And the Supreme Court --

9 CHIEF JUSTICE ROBERTS: Reading the Riot Act
10 to the lawyer is protection against the Attorney General
11 and the Director of the FBI after they're hauled in for
12 discovery or subjected to depositions and the judge
13 finds out --

14 GENERAL GARRE: We --

15 CHIEF JUSTICE ROBERTS: I'm sorry, Mr.
16 Garre.

17 -- the judge finds out that there wasn't in
18 fact a sufficient basis for it, and now that will show
19 them, if they get read the Riot Act by a judge?

20 GENERAL GARRE: It's certainly not adequate
21 protection, Mr. Chief Justice.

22 JUSTICE GINSBURG: I was responding to
23 Justice Breyer's Coca-Cola president. I think Rule 11
24 would work quite well to answer that.

25 GENERAL GARRE: I would have thought that

1 this Court's decision in Bell Atlantic put an end to
2 those sorts of claims where the court --

3 JUSTICE STEVENS: Well, Mr. Garre, it seems
4 to me you are really arguing -- I am very sympathetic to
5 the argument -- that if there was no plausible claim in
6 Bell Atlantic, in which there was the direct allegation
7 of a conspiracy in violation of section 1, was rejected
8 because the Court thought it implausible, a fortiori,
9 this claim is implausible because it's got exactly the
10 same problems in that you don't want to subject these
11 important people to all the inconvenience of discovery.
12 It seems to me these cases are very similar.

13 GENERAL GARRE: Absolutely, Justice Stevens.
14 And certainly that's our position. We think --

15 JUSTICE STEVENS: In fact, in both of the
16 cases, the job of the district judge would have been
17 made easier if one of defendants had filed an affidavit
18 denying those allegations, but nobody has done that in
19 either case.

20 GENERAL GARRE: No one did it in either
21 case, but in both cases the defendants are entitled to
22 dismissal. I think this case is even stronger, not only
23 because we think that the factual allegations are less
24 plausible, but because we have the substantive rule of
25 law that comes from Bivens that you have to establish

1 the affirmative link of alleged wrongdoing between much
2 lower-level officials, the FBI agents in the field here,
3 and the Attorney General of the United States and the
4 Director of the FBI common experience shows simply
5 aren't involved in those sorts of granular decisions.

6 JUSTICE KENNEDY: I have two questions: I
7 have two questions that might be related. You began by
8 saying that you had two points for us.

9 (Laughter.)

10 JUSTICE KENNEDY: You said the first was
11 that the court erred in saying that there was a -- a
12 violation had been alleged.

13 GENERAL GARRE: And --

14 JUSTICE KENNEDY: And I wanted to reach the
15 second, and I was wondering if the second would address
16 this sub-question that I have. If we were to say that
17 Twombly is to be confined to the antitrust and
18 commercial context, would -- would that destroy your
19 case?

20 GENERAL GARRE: Well, let me answer both
21 those questions: First, the second point I wanted to
22 add is interrelated with the first, and that's that the
23 court of appeals applied an overly expansive conception
24 of the supervisory liabilities available under Bivens.
25 And, I think, in order to evaluate the adequacy of the

1 pleadings, this Court has to have in mind the standards
2 of supervisory liability that Bivens applied, and we
3 think the that court of appeals applied an overly
4 expansive concept of that under Rizzo and the other
5 precedents we cite in our case.

6 The second: No, our case would not go away
7 if this Court got rid of Bell Atlantic or if this Court
8 limited Bell Atlantic to the antitrust context. We
9 don't think the Court should do that. When the Court
10 dispensed -- disavowed the broad no-set-of-facts
11 language from Conley v. Gibson, we took the Court to be
12 saying: We are disavowing that for all cases under Rule
13 8; we are not limiting it to parallel conduct in section
14 1 of the Sherman Act context.

15 So I think that Bell Atlantic's explication
16 of Rule 8 and the disavowal of the no-set-of-facts
17 language, which, after all, is the test under which the
18 district court had to resort to, to sustain the claims
19 in this case --

20 JUSTICE KENNEDY: I do have the same
21 lingering doubts as Justice -- or concerns or questions
22 as Justice Breyer. It's hard for me to believe we had
23 to wait for Twombly in order to have it, and it seems to
24 me that Rule 11 is not applicable here because it simply
25 works after the fact.

1 GENERAL GARRE: Well, we don't think we had
2 to wait for Twombly to get rid of those claims. We
3 think that many of those claims would dismiss. They
4 certainly would have been dismissed in the section 1983
5 context under this Court's decision in Rizzo.

6 And we could talk about what it would be
7 like for claims against the president of Coca-Cola or
8 Ford Motor Company, but really we're here talking about
9 claims against the highest-level officials of our
10 government, who everyone agrees are entitled to the
11 doctrine of qualified immunity, a doctrine that was
12 designed, at the end of the day, to protect the
13 effective functioning of our government. These
14 officials are entitled at least to the protections that
15 this Court found appropriate for civil antitrust
16 defendants.

17 JUSTICE GINSBURG: General Garre, there was
18 a reference, I think, in Judge Gleason's decision in the
19 Eastern District to the Office of the Inspector General
20 report on the detainees' treatment at the Metropolitan
21 Detention Center. Is there nothing in those reports
22 that lends some plausibility to Iqbal's claims?

23 GENERAL GARRE: We don't think so,
24 Justice Ginsburg. I mean, most fundamentally,
25 extra-record materials, extra-complaint materials can't

1 make up for the deficiencies in the complaint itself.
2 Plaintiffs had the benefit of that 200-page report when
3 they brought their action in this case. They have
4 amended their complaint twice already. And so, in that
5 respect, they are in a much better position than the
6 typical plaintiffs.

7 And, secondly, if you look at that report,
8 if you want to go outside the record and look at that
9 report, I would urge you to look at page 70 of the
10 report, which says that "we found" -- and I am quoting
11 from the report -- "we found that the information
12 provided to high-level officials suggested this
13 'hold-until-cleared' policy was being applied to persons
14 suspected of being involved in the 9/11 attacks," a
15 perfectly lawful law enforcement program. And it goes
16 on to say "that in practice the policy may have been
17 applied differently in the field. "

18 And the other pages I would point
19 you to are pages 18, 40, 47, and 158, which make clear
20 that this -- the alleged discriminatory acts were --
21 were taken on an ad hoc basis. That's what the
22 complaint in this case says on page 48, where it says
23 that FBI officials far removed from the Attorney General
24 and the Director of the FBI were making these
25 determinations without criteria, without a uniform

1 classification system.

2 And we think that to go back up
3 the chain to suggest that the Attorney General of the
4 United States and the Director of the FBI may be
5 potentially subject to civil liability and the burdens
6 of civil litigation goes far beyond Rule 8 as it's
7 described in Bell Atlantic, far beyond this Court's
8 qualified immunity --

9 JUSTICE STEVENS: Mr. Garre, can I ask you a
10 factual question because I really don't know? Assume
11 that -- that they had to go to trial on this case, which
12 may not be the case. Would they be entitled to be
13 defended by the Department of Justice or would they have
14 to get private counsel?

15 GENERAL GARRE: They are being defended by
16 the Department of Justice, the -- the Attorney General
17 and Director of the FBI.

18 JUSTICE STEVENS: That applies even if there
19 would be a trial later on?

20 GENERAL GARRE: Yes, and that's a
21 discretionary -- a discretionary determination that's
22 been made in this case.

23 JUSTICE GINSBURG: Is there other
24 litigation, General Garre, pending with respect to the
25 detentions.

1 GENERAL GARRE: Yes, there are other claims.
2 There are also claims that have been made. And we cite
3 one of these cases, the Twitty case, which we cite in
4 our reply.

5 This case involved a prisoner who claimed
6 that he was transferred one -- from one prison to the
7 next for a retaliatory motive. They included a claim
8 against the Attorney General of the United States. And
9 the district court said: Well, under the Iqbal
10 claim that -- under the Iqbal case that case can go
11 forward, and potentially the Attorney General can be
12 subject to civil damages -- civil discovery, which I
13 think underscores Judge Cabranes' point that the decision
14 in this case is a blue point -- is a blueprint for civil
15 plaintiffs who are challenging the implementation of
16 important law-enforcement policies to subject the
17 Attorney General, the Director of the FBI, or other
18 high-level officials to civil discovery based on
19 conclusory and generally -- and general and inadequate
20 allegations.

21 JUSTICE GINSBURG: Is there a Tort Claims
22 Act action pending -- or I don't know where I got that
23 impression -- arising out of these detentions?

24 GENERAL GARRE: There are Tort Claims,
25 Federal Tort Claims Acts, asserted in this case and

1 there is other parallel litigation going on in the
2 Second Circuit, Justice Ginsburg.

3 If I could reserve the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, General.

5 GENERAL GARRE: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Reinert.

7 ORAL ARGUMENT OF ALEXANDER A. REINERT

8 ON BEHALF OF THE RESPONDENTS

9 MR. REINERT: Mr. Chief Justice, and may it
10 please the Court:

11 I think I should start with paragraph 69 of
12 the complaint because I think Petitioners' treatment of
13 paragraph 69 shows why they have no coherent theory of
14 what a conclusory allegation is and what it's not.
15 Because what does paragraph 69 do? It sets out a policy
16 and it says that Petitioners approved the policy.
17 Paragraph 96 does exactly the same thing. Paragraph 69
18 you can find at 168 of the appendix; paragraph 96 you
19 can find at 172 to 173.

20 In both -- in both cases it does the same
21 thing. We have Petitioners approving a policy. Now,
22 Petitioners here conceded at oral argument, contrary to
23 their reply brief but consistent with their opening
24 brief, that paragraph 69 states a factual allegation.
25 So if paragraph 69 states a factual allegation that is

1 entitled to be considered true, then paragraph 96 states
2 a factual allegation that is entitled to be considered
3 to be true.

4 This isn't -- this case is not about ad hoc
5 decisions made at the low level of the Department of
6 Justice. This is about a policy approved with the
7 knowledge of Petitioners that discriminated against
8 detainees.

9 JUSTICE ALITO: General Garre said there is
10 no question that there was a policy, and that it was
11 known by and approved by the Petitioners here, but that
12 the policy is different from the policy that you allege.
13 And that's the question.

14 Where -- what do you think is the most
15 specific allegation in your complaint as to the
16 Petitioners' knowledge and approval of the -- of an
17 illegal policy?

18 MR. REINERT: Well, paragraph 96
19 specifically alleges knowledge, and Rule 9(b) says you
20 can allege knowledge generally. So that -- we have
21 established knowledge of the policy. The policy is
22 described between paragraphs 47 and 94 of the complaint.

23 JUSTICE ALITO: As to paragraphs 96 and 97,
24 which did seem to be the most specific, are those based
25 on any specific information that you have concerning

1 Petitioners, or are they based on inferences that you
2 think you can draw from your allegations about what
3 happened and the nature of the responsibilities of the
4 Petitioners?

5 MR. REINERT: They are based in -- they are
6 based in part on the Office of Inspector General's
7 report about what happened after September 11th. They
8 also are based on other information that we gathered in
9 advance of filing the -- the complaint. But, Your
10 Honors, what we think Petitioners are asking us to do
11 here --

12 JUSTICE ALITO: I'm not sure that really
13 answered my question. Are they based on anything
14 specific that you know about what the Petitioners did?

15 MR. REINERT: Yes. We know that Petitioners
16 ordered a -- ordered to have certain groups targeted for
17 questioning, for detention. That's all that -- some of
18 that is in the Office of the Inspector General's report.
19 Some of that is -- is in public documents referred to by
20 some of the amicus briefs. I think --

21 JUSTICE GINSBURG: Are you contesting
22 General Garre's statement he just made to us that there
23 is nothing in the Office of the Inspector General's
24 report that suggests that the Attorney General or the
25 head of the FBI were engaged in any wrongdoing?

1 MR. REINERT: Oh, I don't think that's
2 correct, Your Honor. I mean, the Office of the
3 Inspector General's report says that from the -- from
4 the Department of the Attorney General -- from the
5 Attorney General's Office, there was a direction to make
6 the conditions of confinement as harsh as possible.

7 That was -- that was directed to the -- the
8 BOP Director Sawyer. It said: We -- we don't want them
9 to be able to get access to Johnny Cochran, for
10 instance. That statement was made.

11 CHIEF JUSTICE ROBERTS: That's a little bit
12 different, if I could interrupt you, than saying: Make
13 the conditions of confinement as harsh as possible.
14 It's saying: Make the conditions of confinement such
15 that they will not be able to communicate with
16 alleged -- alleged other prisoners that -- that might be
17 part of the same group connected with the activities on
18 9/11.

19 MR. REINERT: Well -- and certainly, Your
20 Honor, we have also -- we -- we have -- this case is at
21 a funny posture, right, because we have all this
22 discovery that we have obtained since the complaint was
23 filed which, we think, confirms the allegations in this
24 complaint.

25 Now, we think Petitioners' position would

1 require us to allege facts at the complaint stage that
2 we could only obtain through discovery. But, Your
3 Honors, some of --

4 JUSTICE SCALIA: You -- you could have said
5 the same thing about the existence of a conspiracy in --
6 in the antitrust case. I mean, that was the argument.
7 How can we prove an agreement until we have discovery?

8 MR. REINERT: Well, the difference --

9 JUSTICE SCALIA: We say you need something
10 more in order to go forward, something more than, you
11 know, you prevented these people from talking to Johnny
12 Cochran. That's not going to do it.

13 MR. REINERT: Well, but, Justice Scalia, the
14 difference between this case and Bell Atlantic is
15 exactly what Justice Souter alluded to in his colloquy
16 with General Garre, which is that in -- in Bell Atlantic
17 there were two possible -- there were two possibilities.
18 A review in court was basically left in equipoise,
19 looking at the complaint in Bell Atlantic.

20 JUSTICE SCALIA: Well, there are two
21 possibilities here. Number one is the possibility that
22 there was a general policy adopted by the high-level
23 officials which was perfectly valid and that whatever
24 distortions you are complaining about was in the
25 implementation by lower-level officials. That's one

1 possibility.

2 The other possibility, which seems to me
3 much less plausible, is that the -- the high-level
4 officials themselves directed these -- these
5 unconstitutional and unlawful acts.

6 MR. REINERT: Well, Your Honor, we have two
7 different theories, right. One is knowledge of and
8 approval of, and the other is direction.

9 But those -- both of those possibilities are
10 unlawful possibilities. The question is: Who is
11 responsible? Now, Bell Atlantic doesn't -- doesn't
12 prohibit the plaintiffs from pleading cases in the
13 alternative. And if you are going to plead cases in the
14 alternative, it's possible, of course, that some people
15 will ultimately be held responsible and some won't.

16 CHIEF JUSTICE ROBERTS: Do you agree that --
17 just to follow up on Justice Breyer's questioning of
18 General Garre, do you believe that the same pleading
19 standards apply in the action against the president of
20 Coca-Cola as apply to the actions of the Attorney
21 General and the Director of the FBI on the evening of
22 September 11, 2001?

23 MR. REINERT: Certainly, Your Honor, I think
24 the same pleading standards apply.

25 CHIEF JUSTICE ROBERTS: I'm sorry?

1 Certainly or certainly not?

2 MR. REINERT: Certainly, Your Honor, I think
3 the same pleading standards apply. To the extent the
4 Petitioners seek protection, the protection is through
5 the -- through the doctrine of qualified immunity. And
6 they have that protection.

7 JUSTICE BREYER: Well, why -- why is the
8 protection -- I have the number of the rule I want.
9 Maybe I am not understanding it. But Rule 26, I think,
10 (e)(2), says -- says, among other things, that the judge
11 can change the number of depositions you get. He could
12 reduce them to zero if, for example, he decides the
13 burden or the expense outweighs the likely benefit.
14 Can't he do that whether you are the president of Coca-
15 Cola or whether you are the president of Ford or whether
16 you are the President, or you are the Attorney General?

17 MR. REINERT: Well, certainly --

18 JUSTICE BREYER: Can he do that or not?

19 MR. REINERT: No -- Justice Breyer, yes, a
20 district court judge can do that.

21 JUSTICE BREYER: Yes, he can do that.

22 MR. REINERT: In fact, the Second Circuit
23 directed the district court to do that here. I mean,
24 Petitioners argue as if discovery is impending against
25 them. In fact, the Second Circuit's opinion quite

1 clearly says you don't get discovery against Petitioners
2 unless you get discovery from lower-level officials that
3 confirm the need to have discovery from Petitioners.

4 JUSTICE SCALIA: Well, I mean, that's
5 lovely: That the ability of the Attorney General and
6 the Director of the FBI to -- to do their jobs without
7 having to litigate personal liability is dependent upon
8 the discretionary decision of a single district judge.
9 I mean, I thought that the protection of qualified
10 immunity gave them -- gave them more than that.

11 MR. REINERT: Your -- Your Honor, it gives
12 them quite a bit, Justice Scalia, and --

13 JUSTICE SCALIA: It doesn't give them money,
14 if that's all it gives them.

15 MR. REINERT: Well, Justice Scalia, in this
16 case what they were permitted to argue was that the law
17 was not clearly established: they argued that; they
18 lost that. They were permitted to argue that they acted
19 objectively reasonably. They argued that; they lost
20 that. They didn't petition for cert on either of those
21 questions. So they have been given the protections
22 afforded by qualified immunity. What they don't get
23 because of qualified immunity is extra protections not
24 described in the rules, not approved by Congress, not
25 referred to by this Court in any -- in any way.

1 CHIEF JUSTICE ROBERTS: So the pleadings
2 standard -- let's leave the president of Coca Cola out
3 of it. The local manager of the Coca Cola distribution
4 center, you can state that the same rigor required in
5 the complaint that applies to him also applies to the
6 Attorney General and the Director of the FBI in the wake
7 of 9/11?

8 MR. REINERT: Your Honor --
9 Mr. Chief Justice, the pleading standard isn't
10 different. The substantive standard of liability may be
11 different, and that's certainly true. I mean, one has
12 to allege much more to allege a claim on --

13 CHIEF JUSTICE ROBERTS: But your -- your
14 response focuses solely on the merits of the underlying
15 claim, not any requirement of -- of heightened pleading.

16 MR. REINERT: That's correct, Your Honor,
17 and we think that this Court has rejected heightened
18 pleading at every instance. I mean, even in Bell
19 Atlantic this Court rejected heightened pleading, and
20 this Court has rejected heightened pleading even --

21 CHIEF JUSTICE ROBERTS: Well I thought, and
22 others may know better in connection to Bell Atlantic,
23 but I thought in Bell Atlantic what we said is that
24 there's a standard but it's an affected by the context
25 in which the allegations are made. That was a context

1 of a particular type of antitrust violation and that
2 affected how we would look at the complaint. And here,
3 I think you at least accept, don't you? Or I understood
4 from your answers to the question on Coca Cola that
5 maybe you don't -- that because we're looking at
6 litigation involving the Attorney General and the
7 Director of FBI in connection with their national
8 security responsibilities, that there ought to be
9 greater rigor applied to our examination of the
10 complaint.

11 MR. REINERT: Well, Mr. Chief Justice, there
12 is no reference to that in the rules. We think
13 qualified immunity provides the protection that
14 petitioners are seeking. And we think what the Second
15 Circuit did was balance a very difficult -- difficult --

16 CHIEF JUSTICE ROBERTS: You disagree with
17 the notion that Bell Atlantic at least established that
18 the level of pleading required depends on the context of
19 the claim -- the context of the particular case?

20 MR. REINERT: I don't -- I don't understand
21 Bell Atlantic to argue that the level of pleading
22 requires -- depends on the context of the case, but that
23 the substantive liability that is in the background of
24 the case affects what you have to plead. And what
25 Petitioners are asking is to take the substantive

1 background of an affirmative defense and make that
2 affect the ability -- what you have to plead.

3 JUSTICE SCALIA: They pleaded a conspiracy;
4 they pleaded a conspiracy in Bell Atlantic. It wasn't a
5 matter of not -- not setting forth in the complaint the
6 substance of what produced liability. They pleaded
7 conspiracy.

8 MR. REINERT: What this Court -- Justice
9 Scalia, what this Court said in Bell Atlantic to the
10 extent it disregarded the allegation about agreement; it
11 said the problem with the agreement was that it didn't
12 allege what, it didn't allege who, it didn't allege
13 when; and I don't think it could be said about this
14 complaint. This alleges who, this alleges what it
15 was --

16 JUSTICE SCALIA: When?

17 MR. REINERT: It --

18 JUSTICE SCALIA: Does it say when?

19 MR. REINERT: After September 11th.

20 JUSTICE SCALIA: I don't know on what any
21 basis any of these allegations against the high level
22 officials are made.

23 MR. REINERT: Justice Scalia, they are made
24 on the basis of the information that we garnered from
25 the Office of Inspector General's report. What we know

1 -- what we know about --

2 JUSTICE SCALIA: Well, we will check that.
3 The Solicitor General contests that.

4 JUSTICE SOUTER: I want to throw you a
5 question. I'm not sure it's a softball question. You
6 can let me know.

7 I -- I'm starting with the assumption, which
8 I think is in Bell Atlantic, that what we are concerned
9 with in context is that the context tells us how
10 specific you've got to be versus how conclusory you have
11 got to be; and the reason it does so is that some
12 allegations are -- are more likely to be true than
13 others depending on the context.

14 Is it fair to say, going back to Justice
15 Breyer's question, is it fair to say, that your basic
16 pleading here rests on the following assumption, that it
17 is more plausible that the Attorney General of the
18 United States and the Director of the FBI were in fact
19 directly involved in devising a policy with the racial
20 characteristics of the coercive characteristics that you
21 claim, than that the President of Coca Cola was putting
22 mouses in bottles?

23 MR. REINERT: Well, I think that -- I think
24 that is our contention, Your Honor, because it's a --
25 it's an allegation about a policy.

1 JUSTICE SOUTER: So you would say -- to the
2 Coke question you would say, yes, they've got to get
3 more facts there, this is just -- this is just crazy to
4 think that the president is putting mice in the bottles.

5 But you're saying that so far as the close
6 involvement of the Attorney General and the FBI
7 director, it's not crazy to assume what you say, and
8 therefore, you don't have to get into more detail in
9 order to have an adequate claim here? Is that --

10 MR. REINERT: We certainly don't think it's
11 absurd or bizarre, which is the argument that the
12 Petitioners raise below.

13 JUSTICE SCALIA: But not the -- I'm sorry.

14 CHIEF JUSTICE ROBERTS: Absurd and bizarre
15 is also not the pleading standard, and how are we -- to
16 follow up on Justice Souter's question, how are we
17 supposed to judge whether we think it's more unlikely
18 that the president of Coca Cola would take certain
19 actions as opposed to the Attorney General of the United
20 States?

21 MR. REINERT: I think it's a problem posed
22 by that interpretation of Bell Atlantic but I don't
23 think it's a problem that's posed by this particular
24 case, Mr. Chief Justice. I think --

25 JUSTICE STEVENS: The problem with the

1 president of the Coca Cola is the allegation probably
2 would be that the Coca Cola Company has adopted sloppy
3 procedures in its manufacturing lines, and the president
4 is responsible for those procedures and that's why the
5 bottles are filled with rats.

6 MR. REINERT: Well --

7 JUSTICE STEVENS: That's the way you allege
8 it. You wouldn't say he did it personally.

9 MR. REINERT: Well --

10 JUSTICE STEVENS: And then you have the
11 similar question.

12 MR. REINERT: You probably wouldn't say he
13 did it personally, and there might be a respondeat
14 superior theory there, for liability, that we don't have
15 access to in the Bivens arena, which we concede; we have
16 to establish a link between the unconstitutional conduct
17 and -- and the actions of the Petitioners. So that may
18 be how it's pleaded, and that might get it closer if
19 there were -- certainly if there were a policy of
20 putting mice in Coke bottles, that would certainly get
21 it closer.

22 JUSTICE STEVENS: No, this is a policy of
23 being derelict in the sanitary conditions in the plant
24 and so forth and so on; therefore mice are getting in
25 bottles with undue frequency, and the president is

1 responsible for that. I don't see that that is a
2 fanciful allegation.

3 MR. REINERT: I don't know that it is
4 fanciful.

5 JUSTICE STEVENS: I'm not suggesting that
6 Coca Cola really does that. Of course not, but --

7 MR. REINERT: No, certainly not.

8 (Laughter.)

9 JUSTICE STEVENS: That's the standard
10 theory. It doesn't need --

11 MR. REINERT: I mean, the essential point in
12 this case is that the Second Circuit was faced with a
13 dilemma. I mean, there is a liberal pleading standard
14 and there is qualified immunity; and the Second Circuit
15 tried to resolve it, did a very good job of resolving it
16 with all the interests -- all of the interests that
17 Petitioners are concerned about.

18 JUSTICE ALITO: I think "all" completely --

19 CHIEF JUSTICE ROBERTS: I'm saying the
20 difficulty with wrestling with the case through the
21 perspective of the hypothetical of the mice in the
22 bottles is that it -- it's by its nature particularly
23 absurd; but what if the allegation is that the president
24 of Coca Cola is individually involved in a particular
25 price fixing scheme? Then does this case seem so

1 terribly different from the level of specificity Bell
2 Atlantic would require?

3 MR. REINERT: Well, I guess I want to
4 distinguish that allegation from the allegations here.
5 We are not alleging that the Petitioners individually
6 identified particular detainees as of interest or as of
7 high interest. We are alleging that they either created
8 the policy or they knew of and approved of it. Now we
9 could talk about "knew of and approved," as I said,
10 under rule 9(b), "knew of" is established by a saying
11 that they knew it; we can't read 9(b) any other way, and
12 Petitioners don't suggest that we do.

13 So then we have "approved." Now if they
14 knew it, right, if we accept that they knew about this
15 policy, and we also accept paragraph 69 as Petitioners
16 concede we must accept it, to be true, then we know that
17 they knew that there was a policy occurring and they
18 approved the policy of not releasing them --

19 CHIEF JUSTICE ROBERTS: But that's easy. I
20 hope the Attorney General and Director of FBI -- of the
21 FBI knew of and approved whatever the policy was. What
22 you have to show is some facts, or at least what you
23 have to allege are some facts, showing that they knew of
24 a policy that was discriminatory based on ethnicity
25 and country of origin.

1 MR. REINERT: And I was -- I was trying to
2 get there, Mr. Chief Justice, and the way I would say it
3 is this: We've alleged that they knew, in paragraph 96,
4 that the policy was discriminatory. That is clearly
5 alleged in paragraph 96. We've also alleged that they
6 approved the policy.

7 So to the extent that approval is not
8 sufficient for this Court, the link between approval in
9 96 and an allegation is paragraph 69; because if they
10 knew that these individuals were being detained in
11 restrictive conditions of confinement because of their
12 race, religion and national origin, as we alleged in 96,
13 and they also approved that they should not be released
14 until cleared, then they are approving them being held
15 in restrictive conditions of confinement based upon
16 race, religion and national origin.

17 JUSTICE BREYER: No, but they didn't -- that
18 isn't what 96 says. What 96 says, which I think is
19 important, is it says that they knew of and agreed to
20 subject the plaintiffs to these harsh conditions solely
21 on account of their religion, race, and national origin,
22 and for no legitimate penological interest. If they are
23 looking for suspects from 9/11, given the people they
24 found, it's not surprising that they might look for
25 people who looked like Arabs -- or that isn't surprising

1 to me, because that was what the suspects looked like.
2 So, they wanted to say, yes, that was part of it, but
3 it's not for no legitimate penological interest; it was
4 for every good reason: We didn't want more bombs to go
5 off.

6 Now, suppose that's their view. Suppose
7 also -- I'm just -- hypothetically, they never, and they
8 know this, ever had a conversation where they said, "Go
9 look for people of Arabic descent alone." They never
10 said that. They said, "Look for those people who have
11 other connections and had something we reasonably
12 believe is 9/11-connected. They might be dangerous."
13 Suppose that's what they thought. So they read this,
14 and they think, "Judge, I want to tell Judge that you
15 have no evidence to show anything other than what I just
16 said, which sounds as if it might be reasonably
17 connected to the 9/11 investigation." What is open to
18 our two defendants, if you win this case? If they're
19 right, how do they prevent lots of depositions from
20 coming in and taking their time? How do they prevent
21 this case dragging on and taking their time? If the
22 facts are what I just said, rather than what you think?

23 MR. REINERT: Justice Breyer, if those are
24 the facts, then those are facts that have to be
25 established in discovery. They cannot be established at

1 the pleadings stage. I would think we could all agree
2 on that. And that's their -- and they can do that
3 through discovery.

4 Now, at the pleadings stage, if they don't
5 want to file an answer and deny the facts, they can move
6 to dismiss on qualified-immunity grounds as they have.

7 JUSTICE BREYER: Now, they will deny the
8 facts; then you'll say there's a factual matter. And
9 suppose hypothetically, but not what you think, but you
10 have no reason at all hypothetically, imagine, for
11 believing that they did this solely for racial reasons
12 unrelated to the investigation of 9/11. Suppose you
13 don't have any information that shows that, and they are
14 going to say everything else is covered by qualified
15 immunity, and you have nothing else. Then what do they
16 do to get out of ten years of discovery?

17 MR. REINERT: Well, the Second Circuit gives
18 a clear path for defendants in that situation,
19 Justice Breyer, and the answer is, if you want to make a
20 Rule 12(e) motion, make it; it was referred to in
21 Crawford-El. But, more importantly, we don't get
22 discovery of them. We don't get to drag them through
23 discovery. I mean --

24 JUSTICE STEVENS: May I just interrupt?
25 There are a whole bunch of other defendants in this

1 case. As I understand it, they're still in the case.

2 MR. REINERT: That's correct.

3 JUSTICE STEVENS: So you do have discovery
4 of maybe 25 to 30 officials who would have a lot of
5 information about this case. It seems to me it's
6 entirely possible that you could either postpone
7 discovery and dismiss the two principal defendants for
8 now and then bring them in later, if the facts you
9 develop from the other discovery would prove what you
10 have alleged.

11 MR. REINERT: Well, as to postponing
12 discovery, that's exactly what the Second Circuit
13 directed the district court to do. So that's been done,
14 Your Honor.

15 As to dismissing them and re-filing later,
16 the problem with that is there could be a statute of
17 limitations problem. So that's just not a solution. I
18 mean, that -- that's a solution that might result
19 ultimately in absolute immunity in these kinds of cases.

20 JUSTICE GINSBURG: What is the statute of
21 limitations that you apply?

22 MR. REINERT: It's three years here, Your
23 Honor. And so we've obtained discovery. Now, if it had
24 been -- if this --

25 JUSTICE GINSBURG: You do not have discovery

1 from the Attorney General or --

2 MR. REINERT: Certainly not.

3 JUSTICE GINSBURG: So --

4 MR. REINERT: Certainly not.

5 JUSTICE GINSBURG: So it's as though
6 discovery with respect to those two defendants was
7 stayed pending your discovery from the lower-level
8 defendants?

9 MR. REINERT: In fact, it has been formally
10 stayed, Justice Ginsburg, and the Second Circuit
11 decision confirms that. I mean --

12 JUSTICE ALITO: Well, that may be what
13 happened here, but if -- if the Second Circuit is
14 affirmed, there may be other suits that are like this.
15 And what is the protection of the high-level official
16 with qualified immunity with respect to discovery if the
17 official cannot get dismissal under qualified immunity
18 at the 12(b)(6) stage? How many district judges are
19 there in the country? Over 600. One of the district
20 judges has a very aggressive idea about what the
21 discovery should be. What's the protection there?

22 MR. REINERT: Well, if this Court --

23 JUSTICE ALITO: It's a discretionary
24 decision, interlocutory discretionary decision by the
25 trial judge.

1 MR. REINERT: Well, Justice Alito, if this
2 Court in affirming the Second Circuit outlines and says
3 the Second Circuit took the proper steps -- this is what
4 the district court should do -- then if any district
5 court disregards that, then there could be a petition
6 for mandamus. And that's -- and I think courts of
7 appeals would respect this Court's opinion if this Court
8 said, look, here's the dilemma, here's the best way to
9 resolve it.

10 I do want to make a point about the -- I do
11 want to make one jurisdictional point, Your Honors, and
12 that is, if Petitioners had raised these arguments in
13 the context of a motion to dismiss for failure to state
14 a claim, and they had lost, we wouldn't be here today,
15 right? There would be no jurisdiction, and Johnson v.
16 Jones, I think, makes clear that you can't bootstrap
17 jurisdiction by referring to qualified immunity. And,
18 in fact, if you look at Petitioners' Notice of Motion to
19 Dismiss, point 1 is dismiss for qualified immunity;
20 point 2 is dismiss because it does not sufficiently
21 allege personal involvement. That is, in their notice
22 of motion itself, they separated out these two issues.

23 Now, in their briefing at all lower courts
24 and in this Court, they've elided them. But our
25 position on discovery -- on jurisdiction is that there

1 is no -- there is no appellate jurisdiction to -- to
2 deal with this question, and in fact Petitioners' own
3 motion suggests that these two issues are separable and
4 that the only issue here is whether or not clearly
5 established law applied and the objective reasonableness
6 of Petitioners' conduct. And that, we think, is another
7 way of resolving the case.

8 JUSTICE SOUTER: May I ask you this
9 question? And I ask it, you know, mindful of what
10 you've just said, but I'm not sure that the two issues
11 can be kept as separated as you suggest.

12 Another avenue to responding to the problem,
13 I think, that Justice Breyer's last hypo raised would be
14 as follows, and then I'll tell you the difficulty that I
15 have with it, and I was going ask you to comment on the
16 difficulties.

17 He said that the allegation -- one way to
18 read the allegation, and I think it's their way, is to
19 say that the Attorney General and the Director of the
20 FBI devised a policy and condoned implementation of a
21 policy that was based on racial and religious grounds
22 with no penological purpose. Well, under the
23 circumstances of immediate post-9/11, it is not
24 surprising necessarily that they have devised a policy
25 that had reference to religion and national origin and

1 so on, given what we knew about the hijackers.

2 What is not so easy to accept, as a matter
3 of adequate pleading, is the claim that there was no
4 penological interest involved in the decision of how
5 to and how long to hold the individuals who were picked
6 up.

7 One answer to that, which I think is in your
8 pleadings, is that you refer to specific individuals and
9 in particular to your own client, who was in the
10 position of being held under these conditions for a
11 considerable period of time, and it turns out there's no
12 indication that there was ultimately a justified
13 penological interest.

14 So that might be your answer to
15 Justice Breyer's question. There's enough in here about
16 specific detentions to make it plausible for pleading
17 standards that they were being held without any
18 penological interest.

19 The difficulty I have with that line of
20 thinking is this: You also allege in there that
21 lower-level officials were making decisions on an ad hoc
22 basis without adequate criteria as to how they should
23 make them. And that particular line of allegations
24 suggests that what was really going on here, including
25 what was happening to your client, wasn't the result of

1 clear policy decisions made by the Attorney General and
2 the Director of the FBI, but they were just being
3 scattered. So, what in the context of your whole
4 pleading makes it adequate simply to charge on a
5 conclusory basis that these two defendants were devising
6 a policy that had -- that was intended to have an effect
7 of no penological interest?

8 MR. REINERT: Well, Your Honor,
9 Justice Souter, I do think that in this way the OIG
10 report is very instructive. It basically confirms that
11 none of the folks who were held as of interest or as
12 high interest were ever charged or suspected of being
13 involved in terrorism. That was well over 700 people.
14 As for paragraph 98 --

15 JUSTICE SOUTER: You'll have to help me out.
16 Did you allege that?

17 MR. REINERT: We alleged that many -- like
18 many -- plaintiffs, like many detainees, were held for
19 no reason.

20 JUSTICE SOUTER: Okay. That's what you
21 alleged.

22 MR. REINERT: That's what we alleged.

23 And in paragraph 48, I just want to say that
24 does not support the view that there was no racial
25 criteria here. What it -- paragraph 48 is immediate

1 many followed by paragraph 49, which says the
2 classifications were made because of race. Paragraph 48
3 is saying the distinction between "of interest" and "of
4 high interest" was totally arbitrary. But that's just a
5 way of saying that this was a racial classification
6 policy. It was a racial classification policy that
7 resulted in harsh conditions of confinement for our
8 client and for many individuals. And now we have
9 alleged Petitioners' connection to that. You know, we
10 could say --

11 JUSTICE SOUTER: Are you saying that the --
12 that the claim that there was no penological interest
13 for certain decisions goes simply to the distinction
14 between the decision whether to classify as "of
15 interest" versus as "of high interest"?

16 MR. REINERT: No, Your Honor, I think
17 it's -- I think it's very difficult for us to say in a
18 complaint anything other than no -- no legitimate
19 penological interest, because we couldn't go through the
20 complaint proving all the negatives. The fact is our
21 client posed no threat that connected to 9/11. We
22 allege that. We allege that's true of multiple
23 detainees, and we think that's sufficient to say that
24 there was no penological interest. Now Petitioner --

25 JUSTICE SCALIA: Is no penological interest

1 enough?

2 MR. REINERT: Well --

3 JUSTICE SCALIA: Is that the only basis --
4 after an attack on this country of the magnitude of
5 9/11, is that the only basis on which people can be
6 held? Namely that these people are the -- are the
7 guilty culprits, and we are going to put them in jail?

8 MR. REINERT: Well --

9 JUSTICE SCALIA: Surely for at least a
10 period, you can hold people just -- just to investigate?

11 MR. REINERT: Well, Justice Scalia, I don't
12 think for a period it's constitutional available to hold
13 them solely based on their race, religion and national
14 origin. And this --

15 JUSTICE SCALIA: Well, it's not solely on
16 that.

17 MR. REINERT: Well, that is the allegation.
18 If it is, that's an issue to be dealt on the merits
19 exactly as this Court did on Johnson v Jones.

20 JUSTICE SCALIA: But the net surely was not
21 cast wide enough, if anybody of that race, religion was
22 -- was swept in.

23 MR. REINERT: Well --

24 JUSTICE SCALIA: I mean, if it's solely for
25 that reason, there would have been hundreds of thousands

1 of others.

2 MR. REINERT: Justice Scalia, that is the
3 allegation of the complaint, that as individuals were
4 being --

5 JUSTICE SCALIA: Impossible.

6 MR. REINERT: We respectfully disagree about
7 that, Justice Scalia. But I would say that --

8 JUSTICE GINSBURG: Wasn't it limited to
9 people who were already indicted on other charges?

10 MR. REINERT: These were people --

11 JUSTICE GINSBURG: We're not dealing with
12 the universe of men who were of a certain national
13 origin, we are dealing with only ones who were
14 incarcerated for an offense that has nothing to do with
15 terrorism.

16 MR. REINERT: Justice Ginsburg, these were
17 individuals who were swept up either in the immigration
18 detention system or in the justice criminal detention
19 system and that's where the classification was made.
20 But -- but I do --

21 CHIEF JUSTICE ROBERTS: I'm sorry -- swept
22 up; you mean they were in -- in prison because they had
23 violated immigration and other laws, right?

24 MR. REINERT: That's correct,
25 Mr. Chief Justice, that's correct. We don't dispute

1 that.

2 But I think this Court's decision in Johnson
3 v California and in Parents Involved is instructive,
4 because there the Court says look, if there is a racial
5 classification it has to be judged under strict
6 scrutiny; and even in Johnson v California where the
7 Court said the State's power was at its apex, which is
8 in the context of their prisons, and even where there is
9 an argument that we have gang violence; we know that
10 racial identity goes to gang violence to some extent,
11 still the State was put to its burden of proof of a
12 compelling State interest; and even though that was a
13 case that involved damages it was a qualified immunity
14 case.

15 And Johnson v California is in many respects
16 no different from this case. Yes, the 9/11 context
17 makes a difference and Petitioners were able to rely --
18 I'm sorry, Your Honor.

19 CHIEF JUSTICE ROBERTS: You can finish.

20 MR. REINERT: The Petitioners were allowed
21 to rely on the 9/11 context in making their argument
22 about qualified immunity, about the objective
23 reasonableness of their conduct and about whether the
24 law was clearly established; but that does not mean --
25 thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Mr. Garre, you have three minutes remaining.

3 REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE

4 ON BEHALF OF THE PETITIONERS

5 GENERAL GARRE: Thank you, Mr. Chief

6 Justice. And first, let me clarify the record on

7 discoveries.

8 The Second Circuit didn't hold that

9 discovery could not go forward against these

10 Petitioners. It held that the district court might.

11 That's the word it used on page 67a of the petition

12 appendix, postpone or limit discovery.

13 JUSTICE GINSBURG: But it -- it did happen.

14 GENERAL GARRE: Through the grace of the

15 district court, that's right, and I think Judge Cabranes

16 emphasized the -- the concerns of potentially vexatious

17 discovery in this context and we certainly

18 wholeheartedly agree with that.

19 Second, I think Mr. Reinert made an

20 important concession when he acknowledged that

21 substantive standards of law affect what you have to

22 plead, and here there are two substantive standards --

23 two substantive issues that are key.

24 One is the standard for supervisory

25 liability under Bivens, which requires that the

1 plaintiff show an affirmative link between the
2 wrongdoing alleged by lower level officials and the
3 potential wrongdoing on the part of higher level
4 officials like the Attorney General. The complaint in
5 this case has no subsidiary facts on which a reasonable
6 person could affirm that type of affirmative link.

7 And second, the Attorney General is much
8 different than the president of Coca Cola in that he is
9 entitled to a presumption of regularity of his actions,
10 so that -- that standard itself ought to affect how one
11 views the complaint.

12 JUSTICE STEVENS: Mr. Garre, I just wanted
13 to -- would you say that the -- the Attorney General
14 might be subject to taking a deposition, even if he's
15 not a defendant?

16 GENERAL GARRE: No, certainly we would -- we
17 would oppose that. It's conceivable they could try to
18 get that in discovery.

19 JUSTICE STEVENS: Is there any -- some
20 standard rule of law that government officials don't
21 have to testify at proceedings?

22 GENERAL GARRE: I don't know that there is
23 that standard, Your Honor. The same concerns --

24 JUSTICE STEVENS: I certainly didn't think
25 there was when I wrote Clinton v Jones.

1 (Laughter.)

2 GENERAL GARRE: Fair enough, Your Honor.

3 But certainly, you know, when we think they
4 are parties to the case the potential demands of civil
5 discovery and the burdens of civil litigation are much
6 greater.

7 JUSTICE BREYER: And the reason you can't
8 make this argument under 26(b)(2)(C) is?

9 GENERAL GARRE: Well, we are in the realm of
10 discovery, and when we are in the realm of relying --

11 JUSTICE BREYER: The judge there is supposed
12 to weigh burdens versus desirability of going forward.
13 And so why don't you make this argument right at that
14 point? If you are right you win, if not, you lose.

15 GENERAL GARRE: For the reason this Court
16 gave in Bell Atlantic; we don't rely on district court
17 judges to weed out potentially meritless claims through
18 discovery. We apply faithfully the pleading standards.

19 JUSTICE SCALIA: If you are right, you win
20 assuming you get a district judge who is also.

21 GENERAL GARRE: Right.

22 JUSTICE BREYER: And that's also true, I
23 guess, of complaints, and every other legal question.

24 GENERAL GARRE: We think that Bell Atlantic
25 answered that question correctly, Your Honor.

1 Third, context does matter. The Chief
2 Justice is right about that. In evaluation the claim,
3 you have to look at the context in which it arises.
4 Here the fact it arises in the qualified immunity
5 context with respect to high level officials is very
6 important. The higher up the chain of command you go,
7 the less plausible it is that the high level official
8 like the Attorney General is going to be aware of and
9 know about the sort of microscopic decisions here:
10 mistreatment in the Federal detention facility in
11 Brooklyn, alleged discriminatory applications made by
12 FBI agents in the field.

13 These are not matters that one would
14 plausibly assume that the Attorney General of the United
15 States has time out of his day -- busy day to concern
16 himself with. The Second Circuit decision should be
17 reversed.

18 CHIEF JUSTICE ROBERTS: Thank you General
19 Garre, Mr. Reinert. The case is submitted.

20 (Whereupon, at 11:05 a.m., the case in the
21 above-entitled matter was submitted.)

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23
24
25

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