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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

1 involvement of those high-ranking officials for the
2 alleged discriminatory acts of lower level officials.

3 And, second --

4 JUSTICE GINSBURG: General Garre, will you
5 clarify one point? You said "fails to state" enough to
6 overcome qualified immunity. But, usually, these -- the
7 pleading is analyzed discretely. This is a 12(b)(6)
8 motion, is it?

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

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

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

1 appropriate.

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

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

19 JUSTICE SOUTER: Well, Mr. Garre, isn't
20 there more involved here than simply derivative
21 liability for the acts of others? I -- I've got a bunch
22 of excerpts from the complaint, but let me just go to
23 one, on section -- paragraph, rather, 97. That charges
24 the defendants Ashcroft and Mueller with willfully and
25 maliciously designing a policy. It doesn't sound like

1 respondeat superior. I mean, it seems to -- to charge
2 them directly with coming up with what these people are
3 complaining about.

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

15 And so we think that those allegations can't
16 be enough to sustain these -- to subject these
17 Petitioners to -- to civil discovery.

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

1 policy.

2 GENERAL GARRE: I think if you look at the
3 complaint, that -- that interpretation doesn't hold up.
4 And in particular, I would point you to paragraph 48,
5 which is on page 164a of the joint appendix -- I'm
6 sorry, the petition appendix. And what that paragraph
7 says is that these allegedly discriminatory
8 determinations, classifications, were made by FBI
9 officials in the field, not Petitioners here, the former
10 Attorney General and director of the FBI. And
11 importantly, these determinations were made, quote, and
12 this comes from paragraph 48, "without specific criteria
13 or uniform classification system."

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

24 CHIEF JUSTICE ROBERTS: You don't -- you
25 don't dispute that, whatever the policy was, that it was

1 approved and condoned by the Attorney General and the
2 Director of the FBI?

3 GENERAL GARRE: We've accepted that at some
4 level that this complaint maintains, and it's in
5 paragraph 69, that there was a policy of holding
6 suspects until they -- the suspects were determined to
7 be of interest by the FBI, until they were cleared by
8 the FBI in connection with this investigation. That
9 policy we have not disputed, and that policy we think is
10 a -- is a factually neutral, perfectly lawful law
11 enforcement response to the 9/11 attacks, resulting in
12 --

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

25 GENERAL GARRE: Not with respect to the

1 Petitioners here, the former Attorney General and the
2 Director of the FBI, because -- and I think in
3 evaluating --

4 JUSTICE SOUTER: Even -- even if, as the
5 Chief Justice said, they knew and condoned the policy?

6 GENERAL GARRE: Well, the question is which
7 policy, what policy? And if you look at the complaint,
8 I think the only policy that the allegations bear out
9 with respect to the Attorney General and the Director of
10 the FBI is a policy described in paragraph 69 of holding
11 suspects until cleared. The --

12 JUSTICE SOUTER: Well, you may be -- you --
13 I mean, you may be right. I think there's -- there's a
14 lot of tension in the -- in the allegations here. I --
15 I grant you that. But isn't the proper way to deal with
16 those tensions at this stage to file a motion for a more
17 definite statement and find out for sure?

18 GENERAL GARRE: No. I mean, certainly that
19 is one option. I mean, the Court mentioned that in the
20 Crawford-El case, and that's an option. But just as in
21 the Bell Atlantic case, where that was an option, too,
22 and where the defendants in that case did not avail
23 themselves of their opportunity to file a motion for a
24 more definite statement, the Petitioners here did not do
25 so and they were not required to do so. They had a

1 different option under the Federal Rules of Civil
2 Procedure to move for dismissal under 12(b)(6). They
3 exercised that option, and the complaint -- the
4 complaint should be dismissed because it fails to state
5 a claim against those individuals.

6 JUSTICE SOUTER: The difference, it -- and
7 maybe this isn't a sufficient difference. But the
8 difference in my mind between this and Bell Atlantic was
9 that, in Bell Atlantic you had a set of allegations in
10 which in -- in effect it was an either-or choice. There
11 were two possibilities consistent with the allegations
12 in Bell Atlantic. One was a conspiracy possibility; one
13 was a -- a lawful parallel conduct possibility. And
14 there just wasn't any way to pick one as being a more
15 probable interpretation of what they were getting at.

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

1 GENERAL GARRE: That's one of the reasons
2 why I think it's important to distinguish between the
3 different sets of claims. I think the general claim of
4 a policy of holding suspects until cleared is much more
5 like the Bell Atlantic situation, where you have got
6 factually neutral allegations, perfectly lawful law
7 enforcement conduct to have a policy that says, FBI
8 agents, if you determine these people are of interest,
9 hold them until they are cleared so that we are not
10 releasing people that are potentially suspects or
11 wrongdoers in this investigation.

12 JUSTICE GINSBURG: General Garre, I think
13 that the Bell Atlantic case -- and -- and I'm sure that
14 Justice Souter will correct me if I'm wrong about this,
15 but most of it is about what it takes -- what are the
16 essential elements of a Sherman section 1 charge. And
17 there's a big mistake that the pleaders are making; that
18 is, there has to be an agreement, and they haven't
19 alleged an agreement.

20 This case seems to be quite different. And
21 I think you have taken Bell Atlantic, frankly, for more
22 than is there. That is, twice -- at least twice in the
23 opinion, the Court says, we are not developing any
24 heightened pleading rules. Form 11 is as good today as
25 it was yesterday. What we are talking about is a

1 missing -- is an essential element to a substantive
2 claim for relief. I thought that's what --

3 GENERAL GARRE: And we're not asking for a
4 heightened pleading standard, Justice Ginsburg. I think
5 what's missing here fundamentally is a substantive
6 requirement of the cause of action -- Bivens -- for
7 supervisory liability which is an affirmative link.
8 Subsidiary allegations suggesting a plausible
9 affirmative link between the discriminatory actions
10 allegedly taken by much lower level officials in the
11 field and the Director of the FBI and the Attorney
12 General of the United States.

13 CHIEF JUSTICE ROBERTS: That -- that sounds
14 like an argument on the merits of the Bivens claim,
15 rather than an argument going to qualified immunity.

16 GENERAL GARRE: It -- it's not -- I mean, in
17 -- in a similar way that this Court considered the scope
18 of a Bivens cause of action in the Wilkie case recently
19 and in the Hartman case recently. In both of those
20 cases the Court recognized that the scope of the Bivens
21 cause of action goes directly to the question of
22 qualified immunity.

23 And here, in order to evaluate whether the
24 pleadings are adequate against the Attorney General and
25 the Director of the FBI, you have to know what the

1 substantive standard under Bivens is for a supervisory
2 liability type claim. You have to know -- just as you
3 did in Bell Atlantic, you had to know the substantive
4 standard of antitrust law in this kind of context. Here
5 you have to know the substantive standard of what's
6 required to subject the Attorney General of the United
7 States or the Director of the FBI to potential
8 liability, civil damages, burdens of civil discovery,
9 for supervisory liability for the claims of much lower
10 level officials.

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

23 Where in the rules does it say he can go to
24 the judge and say, judge -- his lawyer will say -- my
25 client has nothing to do with this; there's no basis for

1 it; don't make him answer the depositions, please?

2 GENERAL GARRE: And I think it would be --

3 JUSTICE BREYER: Where does it say that in
4 the rules?

5 GENERAL GARRE: It -- it says that, as this
6 Court interpreted it, in Rule 8 of the rules, Justice
7 Breyer.

8 JUSTICE BREYER: In Rule 8?

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

10 JUSTICE BREYER: I thought Rule 8 was move
11 for a more definite statement.

12 GENERAL GARRE: No. Rule 8 is the -- is the
13 plain statement showing entitlement to relief. It is
14 the rule interpreted in Bell Atlantic, and there the
15 Bell Atlantic Court said that the plaintiff had the
16 obligation to show a plausible entitlement to relief.
17 And --

18 JUSTICE BREYER: He shows a plausible
19 entitlement. He says -- there's no doubt it's a claim
20 if the president of Coca-Cola did put the mouse in the
21 bottle. It's just there is no basis for thinking that.

22 GENERAL GARRE: It's --

23 JUSTICE BREYER: So he wants to go to the
24 judge and say: I've set out a claim here; I copied it
25 right out of the rules. All right? Now, what allows

1 the judge to stop this deposition?

2 GENERAL GARRE: Rule 8 does, as interpreted

3 --

4 JUSTICE BREYER: Where?

5 GENERAL GARRE: -- in Bell Atlantic, because

6 that is not a plausible entitlement of a claim to relief

7 --

8 JUSTICE SOUTER: But, Mr. Garre, you are

9 using the word "plausible" or you're taking the word

10 "plausible" out of Bell Atlantic, I think, and you are

11 using it to mean something that probably can be proven

12 to be true. Bell Atlantic drew that distinction. They

13 -- the plausibility there is a plausibility that if they

14 prove what they say, they will -- they will establish a

15 violation.

16 GENERAL GARRE: I certainly agree with you.

17 You don't have to show that it probably is, but you have

18 to show facts suggesting -- above the speculative level.

19 And just as in Bell Atlantic --

20 JUSTICE SOUTER: Okay. I -- I think you are

21 right that if somebody makes just a totally bizarre

22 allegation that nobody in the world could take

23 seriously, that -- that the issue can be raised.

24 But in Justice Breyer's case, the -- that --

25 that may be the case if the claim is that the president

1 of Coke was -- was personally putting mouses in bottles.
2 But the claim, it seems to me, that the Attorney General
3 or the Director of the FBI was establishing a policy of
4 no release until cleared or a policy that centered on
5 people with the same characteristics as the hijackers
6 does not have that kind of bizarre character to it and,
7 I think, would not run afoul of the -- of the
8 plausibility standard.

9 GENERAL GARRE: Well, we certainly think --
10 I mean, in Bell Atlantic, the Court said common economic
11 experience would -- would support its determination in
12 that case. We think here, and I think the brief filed
13 by former attorney generals from several different
14 administrations makes this point as well, that common
15 government experience would suggest that the Attorney
16 General of the United States is not involved in the sort
17 of microscopic decisions --

18 JUSTICE SOUTER: Well, I would agree, but
19 this is about as far from common government operation as
20 one can get.

21 GENERAL GARRE: The -- and I think that gets
22 to one of the fundamental problems with the Second
23 Circuit decision, is it held the extraordinary context
24 of the 9/11 attacks and the aftermath of those attacks
25 against the Petitioners in this case. And that's

1 problematic, not only from the qualified-immunity
2 perspective of what it's going to be like for officials
3 next time they have to --

4 JUSTICE SOUTER: Oh, I know, but the courts
5 can't --

6 GENERAL GARRE: -- deal with something like
7 that.

8 JUSTICE SOUTER: The courts can't ignore the
9 extraordinary circumstances, either.

10 GENERAL GARRE: But it's problematic because
11 you have to look at the reality of the job of the
12 Attorney General of the United States and the Director
13 of the FBI. In general, these are people who are
14 responsible not only for the litigating divisions within
15 the Department of Justice, the Federal Bureau of
16 Investigation, the Drug Enforcement Agency, enforcing
17 countless laws. These are people who have
18 extraordinarily busy schedules. And ordinary --

19 JUSTICE BREYER: I'm sorry, I just don't
20 have the answer to my question. I must not have said it
21 properly. Imagine, way before Twombly -- these rules
22 have been in existence for decades. So we go back years
23 ago. Certainly, there have been many cases where, for
24 whatever reasons, the plaintiffs included allegations
25 that were just factually very unlikely. I want to know

1 where the judge has the power to control discovery in
2 the rules. That's -- I should know that. I can't
3 remember my civil procedure course. Probably, it was
4 taught on day 4.

5 (Laughter.)

6 GENERAL GARRE: Well, Rule 26 governs
7 discovery, Justice Breyer.

8 JUSTICE BREYER: Well, I see that. It says
9 a person has a right to go and get discovery. It
10 doesn't say they only control it under certain
11 provisions which don't seem to me to apply to the truly
12 absurd discovery. There must be some power a judge has.

13 And the second question I'm going to ask
14 you, when you tell me what that power is, which
15 apparently I'm not going to find out -- but -- but
16 whatever that power is, which must be there, why doesn't
17 that work to solve your problem?

18 GENERAL GARRE: Well, the power to -- to
19 govern discovery doesn't solve the problem for the same
20 reason that it didn't in Bell Atlantic. The Court
21 specifically said we are not going to rely on district
22 courts to weed out potentially meritless claims because
23 we recognize the burdens that discovery can impose in
24 the civil and in trust contexts. And those burdens are
25 multiplied many times here where you are talking about

1 subjecting to -- subjecting high level government
2 official to the burdens of civil discovery.

3 I think fundamentally we think you don't get
4 to the question of how do district judges control
5 discovery, because they haven't gotten through the
6 gateway of pleading an adequate claim. And if I can
7 give you the substantive rule that we think is on point
8 here -- this Court, in the Rizzo case, which is a
9 section 1983 case, considered the question of claims
10 against high-ranking officials, the Mayor of the City of
11 Philadelphia, the Police Commissioner of the City of
12 Philadelphia, for alleged wrongdoing by individual
13 police officers there.

14 And there -- in that case, the Court held
15 that a plaintiff under section 1983 has to establish, as
16 a matter of law, an affirmative link between the acts of
17 the -- the subordinates and the higher-level officials.
18 And we think that that substantive rule in section 1983
19 at a minimum carries over to the Bivens context.

20 JUSTICE BREYER: Well, what -- I mean, my
21 basic question, which I really want to hear the answer
22 to, is the Attorney General is very busy and what he
23 does is very important. The president of Coca-Cola is
24 very busy. The president of General Motors is very busy
25 -- and very busy at the moment. And what he --

1 (Laughter.)

2 JUSTICE BREYER: What they are doing is very
3 important. There are quite a few people in this country
4 who aren't even in the government, and what they do is
5 very important and they are very busy. And so if there
6 is something in these rules that allows people to bring
7 suits without any factual foundation, even though the --
8 the complaint says there is --

9 JUSTICE GINSBURG: How about --

10 JUSTICE BREYER: I'll bet those people are
11 being harassed --

12 JUSTICE GINSBURG: How about Rule 11 to take
13 care of Justice Breyer's problem? The judge would say
14 to the lawyer: Now, you signed this pleading, and when
15 you made -- you signed it, you made certain
16 representations, and I'm going to read the Riot Act to
17 you if it turns out that this is a frivolous petition.

18 GENERAL GARRE: Sure. That's one
19 protection, Justice Ginsburg. And --

20 CHIEF JUSTICE ROBERTS: Reading the Riot --

21 GENERAL GARRE: And this Court --

22 CHIEF JUSTICE ROBERTS: Reading the Riot Act
23 to the lawyer is protection against the Attorney General
24 and the Director of the FBI after they're hauled in for
25 discovery or subjected to depositions and the judge

1 finds out --

2 GENERAL GARRE: We --

3 CHIEF JUSTICE ROBERTS: I'm sorry, Mr.

4 Garre.

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

8 GENERAL GARRE: It's certainly not adequate
9 protection, Mr. Chief Justice.

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

13 GENERAL GARRE: I would have thought that
14 this Court's decision in Bell Atlantic put an end to
15 those sorts of claims where the court --

16 JUSTICE STEVENS: Well, Mr. Garre, it seems
17 to me you are really arguing -- I am very sympathetic to
18 the argument -- that if there was no plausible claim in
19 Bell Atlantic, in which there was a direct allegation of
20 a conspiracy in violation of section 1, was rejected
21 because the Court thought it implausible, a fortiori
22 this claim is implausible because it's got exactly the
23 same problems in that you don't want to subject these
24 important people to all the inconvenience of discovery.
25 It seems to me these cases are very, very similar.

1 GENERAL GARRE: Absolutely, Justice Stevens.
2 And certainly that's our position. We think it's --

3 JUSTICE STEVENS: Of course, in both of the
4 cases, the job of the district judge would have been
5 made much easier if one of the defendants had filed an
6 affidavit denying those allegations, but nobody has done
7 that in either case.

8 GENERAL GARRE: No one did it in either
9 case, but in both cases the defendants are entitled to
10 dismissal. I think this case is even stronger, not only
11 because we think that the factual allegations are less
12 plausible, but because we have the substantive rule of
13 law that comes from Bivens, that you have to establish
14 the affirmative link of alleged wrongdoing between much
15 lower level officials, the FBI agents in the field here.
16 And the Attorney General of the United States and the
17 Director of the FBI, common experience shows, simply
18 aren't involved in those sorts of granular decisions.

19 JUSTICE KENNEDY: I have two questions -- I
20 have two questions that might be related. You began by
21 saying that you had two points for us.

22 (Laughter.)

23 JUSTICE KENNEDY: You said the first was
24 that the court erred in saying that there was a -- a
25 violation had been alleged.

1 GENERAL GARRE: And --

2 JUSTICE KENNEDY: And I wanted to reach the
3 second, and I was wondering if the second would address
4 this sub-question that I have. If we were to say that
5 Twombly is to be confined to the antitrust and
6 commercial context, would -- would that destroy your
7 case?

8 GENERAL GARRE: Well, let me answer both
9 those questions: First, the second point I wanted to
10 add is interrelated with the first, and that's that the
11 court of appeals applied an overly expansive conception
12 of the supervisory liabilities available under Bivens.
13 And, I think, in order to evaluate the adequacy of the
14 pleadings, this Court has to have in mind the standards
15 of supervisory liability that Bivens applied. And we
16 think the that court of appeals applied an overly
17 expansive concept of that under Rizzo and other -- the
18 other precedents we cite in our case.

19 And second: No, our case would not go away
20 if this Court got rid of Bell Atlantic or if this Court
21 limited Bell Atlantic to the antitrust context. We
22 don't think the Court should do that. When the Court
23 dispensed -- disavowed the broad no-set-of-facts
24 language from Conley v. Gibson, we took the Court to be
25 saying: We are disavowing that for all cases under Rule

1 8; we are not limiting it to parallel conduct in the
2 section 1 of the Sherman Act context.

3 So I think that Bell Atlantic's explication
4 of Rule 8 and the disavowal of the no-set-of-facts
5 language, which, after all, is the test under which the
6 district court had to resort to, to sustain the claims
7 in this case --

8 JUSTICE KENNEDY: I do have the same
9 lingering doubts as Justice -- or concerns or questions
10 as Justice Breyer. It's hard for me to believe we had
11 to wait for Twombly in order to have this, and it seems
12 to me Rule 11 is not applicable here because it simply
13 works after the fact.

14 GENERAL GARRE: Well, we don't think you had
15 to wait for Twombly to get rid of those claims. We
16 think that many of those claims would dismiss. They
17 certainly would have been dismissed in the section 1983
18 context under this Court's decision in Rizzo.

19 And we could talk about what it would be
20 like for claims against the president of Coca-Cola or
21 Ford Motor Company, but really we're here talking about
22 claims against the highest level officials of our
23 government, who everyone agrees are entitled to the
24 doctrine of qualified immunity, a doctrine that was
25 designed, at the end of the day, to protect the

1 effective functioning of our government. These
2 officials are entitled at least to the protections that
3 this Court found appropriate for civil antitrust
4 defendants.

5 JUSTICE GINSBURG: General Garre, there was
6 a reference, I think, in Judge Gleason's decision in the
7 Eastern District to the Office of the Inspector General
8 report on the detainees' treatment at the Metropolitan
9 Detention Center. Is there nothing in those reports
10 that lends some plausibility to Iqbal's claims?

11 GENERAL GARRE: We don't think so,
12 Justice Ginsburg. I mean, most fundamentally,
13 extra-record materials, extra-complaint materials can't
14 make up for the deficiencies in the complaint itself.
15 Plaintiffs had the benefit of that 200-page report when
16 they brought their action in this case. They have
17 amended their complaint twice already. And so, in that
18 respect, they are in a much better position than the
19 typical plaintiffs.

20 And, secondly, if you look at that report,
21 if you want to go outside the record and look at that
22 report, I would urge you to look at page 70 of the
23 report, which says that "we found" -- and I am quoting
24 from the report -- "we found that the information
25 provided to high-level officials suggested this 'hold

1 until cleared' policy was being applied to persons
2 'suspected of being involved in the'" 9/11 attacks, a
3 perfectly lawful law enforcement program. And it goes
4 on to say that "in practice the policy may have been
5 applied differently in the field. "

6 And the other pages I would point you to are
7 pages 18, 40, 47, and 158, which make clear that this --
8 the alleged discriminatory acts were -- were taken on an
9 ad hoc basis. That's what the complaint in this case
10 says on page 48, where it says that FBI officials, far
11 removed from the Attorney General and the Director of
12 the FBI, were making these determinations without
13 criteria, without a uniform classification system.

14 And we think that to go back up the chain to
15 suggest that the Attorney General of the United States
16 and Director of the FBI may be potentially subject to
17 civil liability, the burdens of civil litigation goes
18 far beyond Rule 8 as it's described in Bell Atlantic,
19 far beyond this Court's qualified immunity cases.

20 JUSTICE STEVENS: Mr. Garre, can I ask you a
21 factual question because I really don't know? In the --
22 assume that -- that they had to go to trial on this
23 case, which may not be the case. Would they be entitled
24 to be defended by the Department of Justice or would
25 they have to get private counsel?

1 GENERAL GARRE: They are being defended by
2 the Department of Justice, the -- the Attorney General
3 and Director of the FBI.

4 JUSTICE STEVENS: And that applies even if
5 there would be a trial later on?

6 GENERAL GARRE: Yes, and that's a
7 discretionary determination that has been made in this
8 case.

9 JUSTICE STEVENS: I see.

10 JUSTICE GINSBURG: Is there other
11 litigation, General Garre, pending with respect to the
12 detentions?

13 GENERAL GARRE: Yes, there are other claims.
14 There are also claims that have been made. And we cite
15 one of these cases, the Twitty case, which we cite in
16 our reply.

17 This case involved a prisoner who claimed
18 that he was transferred one -- from one prison to the
19 next for a retaliatory motive. They included a claim
20 against the Attorney General of the United States. And
21 the district court said: Well, under the Iqbal
22 claim that -- under the Iqbal case, that case can go
23 forward, and potentially the Attorney General can be
24 subject to civil -- to civil discovery, which I think
25 underscores Judge Cabranes's point that the decision in

1 this case is a blue point -- is a blueprint for civil
2 plaintiffs who are challenging the implementation of
3 important law enforcement policies to subject the
4 Attorney General, the Director of the FBI, or other
5 high-level officials to civil discovery based on
6 conclusory and generally -- and general and inadequate
7 allegations. If I could --

8 JUSTICE GINSBURG: Is there -- is there a
9 Tort Claims Act action pending or -- I don't know where
10 I got that impression -- arising out of these
11 detentions?

12 GENERAL GARRE: There are tort claims,
13 Federal Tort Claims Acts, asserted in this case, and
14 there's other parallel litigation going on in the Second
15 Circuit, Justice Ginsburg.

16 If I could reserve the remainder of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, General.

18 GENERAL GARRE: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Reinert.

20 ORAL ARGUMENT OF ALEXANDER A. REINERT

21 ON BEHALF OF THE RESPONDENTS

22 MR. REINERT: Mr. Chief Justice, and may it
23 please the Court:

24 I think I should start with paragraph 69 of
25 the complaint because I think Petitioners' treatment of

1 paragraph 69 shows why they have no coherent theory of
2 what a conclusory allegation is and what it's not.
3 Because what does paragraph 69 do? It sets out a
4 policy, and it says that Petitioners approved the
5 policy. Paragraph 96 does exactly the same thing.
6 Paragraph 69 you can find at 168 of the appendix;
7 paragraph 96 you can find at 172 to 173.

8 In both -- in both cases it does the same
9 thing. We have Petitioners approving a policy. Now,
10 Petitioners here conceded at oral argument, contrary to
11 their reply brief but consistent with their opening
12 brief, that paragraph 69 states a factual allegation.
13 So if paragraph 69 states a factual allegation that is
14 entitled to be considered true, then paragraph 96 states
15 a factual allegation that is entitled to be considered
16 to be true.

17 This isn't -- this case is not about ad hoc
18 decisions made at the low level of the Department of
19 Justice. This is about a policy approved with the
20 knowledge of Petitioners that discriminated against
21 detainees.

22 JUSTICE ALITO: Well, General Garre said
23 there's no question that there was a policy, and that it
24 was known by and approved by the Petitioners here, but
25 that the policy is different from the policy that you

1 allege.

2 MR. REINERT: Well, Justice --

3 JUSTICE ALITO: And that's the question.

4 Where -- what do you think is the most
5 specific allegation in your complaint as to the
6 Petitioners' knowledge and approval of the -- of an
7 illegal policy?

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

13 JUSTICE ALITO: As to paragraphs 96 and 97,
14 which did seem to be the most specific, are those based
15 on any specific information that you have concerning
16 Petitioners, or are they based on inferences that you
17 think you can draw from your allegations about what
18 happened and the nature of the responsibilities of the
19 Petitioners?

20 MR. REINERT: They are based in -- they are
21 based in part on the Office of Inspector General's
22 report about what happened after September 11th. They
23 also are based on other information that we gathered in
24 advance of filing the -- the complaint. But, Your
25 Honors, what we think Petitioners are asking us to do

1 here --

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

5 MR. REINERT: Yes. We know that Petitioners
6 ordered a -- ordered to have certain groups targeted for
7 questioning, for detention. That's all in -- some of
8 that's in the Office of the Inspector General's report;
9 some of that is in public documents referred to by some
10 of the amicus briefs. We think --

11 JUSTICE GINSBURG: Are you suggesting
12 General Garre's statement he just made to us -- he said
13 there's nothing in the Office of the Inspector General's
14 report that suggests that the Attorney General or the
15 head of the FBI were engaged in any wrongdoing?

16 MR. REINERT: Oh, I don't think that's
17 correct, Your Honor. I mean, the Office of the
18 Inspector General's report says that from the -- from
19 the Department of the Attorney General -- from the
20 Attorney General's Office, there was a direction to make
21 the conditions of confinement as harsh as possible.

22 That was -- that was directed to the -- BOP
23 Director Sawyer. It said, we don't want them to be able
24 to get access to Johnny Cochran, for instance. That
25 statement was made.

1 CHIEF JUSTICE ROBERTS: Well, that's a
2 little bit different -- if I could interrupt you -- than
3 saying, make the conditions of confinement as harsh as
4 possible. It's saying, make the conditions of
5 confinement such that they will not be able to
6 communicate with alleged -- alleged -- other prisoners
7 that -- that might be part of the same group connected
8 with the activities on 9/11.

9 MR. REINERT: Well -- and certainly, Your
10 Honor, we have also -- I mean, we have -- this case is
11 at a funny posture, right, because we have all this
12 discovery that we have obtained since the complaint was
13 filed which, we think, confirms the allegations in this
14 complaint.

15 Now, we think Petitioners' position would
16 require us to allege facts at the complaint stage that
17 we could only obtain through discovery. But, Your
18 Honors, some of --

19 JUSTICE SCALIA: Well, you -- you could have
20 said the same thing about the existence of a conspiracy
21 in -- in the antitrust case. I mean, that was the
22 argument. How can we prove an agreement until we have
23 discovery?

24 MR. REINERT: Well, the difference --

25 JUSTICE SCALIA: We say you need something

1 more in order to go forward, something more than, you
2 know, you prevented these people from talking to Johnny
3 Cochran. That's not going to do it.

4 MR. REINERT: Well, but, Justice Scalia, the
5 difference between this case and Bell Atlantic is
6 exactly what Justice Souter alluded to in his colloquy
7 with General Garre, which is that in -- in Bell Atlantic
8 there were two possible -- there were two possibilities.
9 A reviewing court was basically left in equipoise,
10 looking at the complaint in Bell Atlantic.

11 JUSTICE SCALIA: Well, there are two
12 possibilities here. Number one is the possibility that
13 there was a general policy adopted by the high-level
14 officials which was perfectly valid and that whatever
15 distortions you are complaining about was in the
16 implementation by lower level officials. That's one
17 possibility.

18 The other possibility, which seems to me
19 much less plausible, is that the -- the high-level
20 officials themselves directed these -- these
21 unconstitutional and unlawful acts.

22 MR. REINERT: Well, Your Honor, we have two
23 different theories, right. One is knowledge of and
24 approval of, and the other is direction.

25 But those -- both of those possibilities are

1 unlawful possibilities. The question is who is
2 responsible? Now, Bell Atlantic doesn't -- doesn't
3 prohibit plaintiffs from pleading cases in the
4 alternative. And if you are going to plead cases in the
5 alternative, it's possible, of course, that some people
6 will ultimately be held responsible and some won't. But
7 the --

8 CHIEF JUSTICE ROBERTS: Do you agree that --
9 to follow up on Justice Breyer's questioning of General
10 Garre, do you believe that the same pleading standards
11 apply in the action against the president of Coca-Cola
12 as apply to the actions of the Attorney General and
13 Director of the FBI on the evening of September 11,
14 2001?

15 MR. REINERT: Certainly, Your Honor, I think
16 the same pleading standards apply.

17 CHIEF JUSTICE ROBERTS: I'm sorry?
18 Certainly or certainly not?

19 MR. REINERT: Certainly, Your Honor, I think
20 the same pleading standards apply. To the extent
21 Petitioners seek protection, the protection is through
22 the -- through the doctrine of qualified immunity. And
23 they have that protection.

24 JUSTICE BREYER: Well, why -- why isn't the
25 protection -- I have the number of the rule I want.

1 Maybe I am not understanding it. But Rule 26(e)(2),
2 says -- says, among other things, that the judge can
3 change the number of depositions you get. He could
4 reduce them to zero if, for example, he decides the
5 burden or the expense outweighs the likely benefit.
6 Can't he do that whether you are the president of Coca-
7 Cola or whether you are the president of Ford or whether
8 you are the President, or you are the Attorney General?

9 MR. REINERT: Well, certainly --

10 JUSTICE BREYER: Can he do that or not?

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

13 JUSTICE BREYER: Yes, he can.

14 MR. REINERT: In fact, the Second Circuit
15 directed the district court to do that here. I mean,
16 Petitioners argue as if discovery is impending against
17 them. In fact, the Second Circuit's opinion quite
18 clearly says, you don't get discovery against
19 Petitioners unless you get discovery from lower level
20 officials that confirm the need to have discovery from
21 Petitioners.

22 JUSTICE SCALIA: Well, I mean, that's
23 lovely, that -- that the -- the ability of the Attorney
24 General and Director of the FBI to -- to do their jobs
25 without having to litigate personal liability is

1 dependent upon the discretionary decision of a single
2 district judge. I mean, I thought that the protection
3 of qualified immunity gave them -- gave them more than
4 that.

5 MR. REINERT: Your -- Your Honor, it gives
6 them quite a bit, Justice Scalia, and they got --

7 JUSTICE SCALIA: It doesn't give them much,
8 if that's all it gives them.

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

21 CHIEF JUSTICE ROBERTS: So the pleading
22 standard -- let's leave the president of Coca-Cola out
23 of it. The local manager of the Coca-Cola distribution
24 center, you can state that the same rigor required in
25 the complaint that applies to him also applies to the

1 Attorney General and the Director of the FBI in the wake
2 of 9/11?

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

8 CHIEF JUSTICE ROBERTS: But your -- your
9 response then focuses solely on the merits of the
10 underlying claim, not any requirement of -- of
11 heightened pleading.

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

17 CHIEF JUSTICE ROBERTS: Well I thought --
18 and others may know better in connection to Bell
19 Atlantic, but I thought in Bell Atlantic what we said is
20 that there's a standard, but it's an affected by the
21 context in which the allegations are made. That was a
22 context of a particular type of antitrust violation and
23 that affected how we would look at the complaint. And
24 here, I think you at least accept, don't you -- or I
25 understood from your answers to the question on Coca

1 Cola that maybe you don't -- that because we're looking
2 at litigation involving the Attorney General and the
3 Director of FBI in connection with their national
4 security responsibilities, that there ought to be
5 greater rigor applied to our examination of the
6 complaint.

7 MR. REINERT: Well, Mr. Chief Justice,
8 there's no reference to that in the rules. We think
9 qualified immunity provides the protection that
10 Petitioners are seeking. And we think what the Second
11 Circuit did was balance a very difficult -- difficult
12 principles on both sides.

13 CHIEF JUSTICE ROBERTS: Do you -- do you
14 disagree with the notion that Bell Atlantic at least
15 established that the level of pleading required depends
16 on the context of the claim -- the context of the
17 particular case?

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

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

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

14 JUSTICE SCALIA: When?

15 MR. REINERT: -- when it occurred --

16 JUSTICE SCALIA: Does it say when? Does it
17 say what basis?

18 MR. REINERT: In the weeks after September
19 11th.

20 JUSTICE SCALIA: I don't know on what basis
21 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'll -- we'll check
3 that.

4 JUSTICE SOUTER: Mr. Reinert --

5 JUSTICE SCALIA: The Solicitor General
6 contests that.

7 JUSTICE SOUTER: I want to throw you a
8 question. I'm not sure it's a softball question. You
9 can --

10 (Laughter.)

11 JUSTICE SOUTER: You can let me know.

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

19 Is it fair to say -- going back to Justice
20 Breyer's question, is it fair to say that your basic
21 pleading here rests on the following assumption: That
22 it is more plausible that the Attorney General of the
23 United States and the Director of the FBI were in fact
24 directly involved in devising a policy with the racial
25 characteristics and the coercive characteristics that

1 you claim, than that the President of Coca Cola was
2 putting mouses in bottles?

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

6 JUSTICE SOUTER: So you would say, if -- to
7 the Coke question you would say, yes, they've got to get
8 more facts there, this is just -- this is just crazy to
9 think that the president is putting mice in the bottles.

10 But you're saying that, so far as the close
11 involvement of the Attorney General and the FBI
12 director, it's not crazy to assume what you -- what you
13 say, and, therefore, you don't have to get into more
14 detail in order to have an adequate claim here. Is
15 that --

16 MR. REINERT: We certainly don't think it's
17 absurd or bizarre, which is the argument that the
18 Petitioners raised below --

19 CHIEF JUSTICE ROBERTS: But that's also not
20 the --

21 MR. REINERT: I'm sorry.

22 CHIEF JUSTICE ROBERTS: Absurd and bizarre
23 is also not the pleading standard, and how are we -- to
24 follow up on Justice Souter's question -- how are we
25 supposed to judge whether we think it's more unlikely

1 that the president of Coca-Cola would take certain
2 actions as opposed to the Attorney General of the United
3 States?

4 MR. REINERT: I think it is a problem posed
5 by that interpretation of Bell Atlantic. I don't think
6 it's a problem that's posed by this particular case, Mr.
7 Chief Justice. I think --

8 JUSTICE STEVENS: Of course, the problem
9 with the president of the Coca-Cola is the allegation
10 probably would be that the Coca-Cola Company has adopted
11 sloppy procedures in its manufacturing lines, and the
12 president is responsible for those procedures, and
13 that's why the bottles are filled with rats.

14 MR. REINERT: Well --

15 JUSTICE STEVENS: That's the way you would
16 allege it. You wouldn't say he did it personally.

17 MR. REINERT: Well, Justice Stevens --

18 JUSTICE STEVENS: And then you would have a
19 similar question.

20 MR. REINERT: You probably wouldn't say he
21 did it personally, and there might be a respondeat
22 superior theory there, for liability, that we don't have
23 access to in the Bivens arena, which we concede; we have
24 to establish a link between the unconstitutional conduct
25 and -- and the actions of the Petitioners. So that may

1 be how it's pleaded, and that might get it closer if
2 there were -- certainly if there were a policy of
3 putting mice in Coke bottles, that would certainly get
4 it closer.

5 JUSTICE STEVENS: No, this is a policy of
6 being derelict in the sanitary conditions in the plant
7 and so forth and so on; therefore, mice -- mice are
8 getting into bottles with undue frequency, and the
9 president is responsible for that. I don't see that
10 that's a fanciful allegation.

11 MR. REINERT: It -- I -- I don't know that
12 it is fanciful, Justice Stevens. I think --

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

15 MR. REINERT: No, certainly not.

16 (Laughter.)

17 JUSTICE STEVENS: But the standard theory is
18 that --

19 MR. REINERT: I think -- I mean, the
20 essential point in this case is that the Second Circuit
21 was faced with a dilemma. I mean, there's a liberal
22 pleading standard and there's qualified immunity. And
23 the Second Circuit tried to resolve it, did I think a
24 very good job of resolving it with the interests -- all
25 of the interests that Petitioners are concerned about.

1 They were --

2 JUSTICE ALITO: Well, they weren't "all"
3 completely -- they were not --

4 CHIEF JUSTICE ROBERTS: I was just going to
5 say the -- the difficulty with wrestling with the case
6 through the perspective of the hypothetical of the mice
7 in the bottles is that it's -- it's by its nature
8 particularly absurd, but what if the allegation is that
9 the president of Coca Cola is individually involved in a
10 particular price-fixing scheme? Then does this case
11 seem so terribly different from the level of specificity
12 Bell Atlantic would require?

13 MR. REINERT: Well, I guess I want to
14 distinguish that allegation from the allegations here.
15 We are not alleging that the Petitioners individually
16 identified particular detainees as of interest or as of
17 high interest. We are alleging that they either created
18 the policy or they knew of and approved of it.

19 Now -- now, we could talk about "knew of and
20 approved." As I said, under Rule 9(b), "knew of" is
21 established by a saying that they knew it; we can't read
22 9(b) any other way, and Petitioners don't suggest that
23 we do.

24 So then we have "approved." Now, if they
25 knew it, right, if we accept that they knew about this

1 policy, and we also accept paragraph 69 as Petitioners
2 concede we must accept it to be true, then we know that
3 they knew that there was this policy occurring and they
4 approved the policy of not releasing them --

5 CHIEF JUSTICE ROBERTS: But that's easy. I
6 hope that the Attorney General and the Director of FBI
7 -- of the FBI knew of and approved whatever the policy
8 was. What you have to show is some facts, or at least
9 what you have to allege are some facts, showing that
10 they knew of a policy that was discriminatory --

11 MR. REINERT: Yes.

12 CHIEF JUSTICE ROBERTS: -- based on
13 ethnicity and country of origin.

14 MR. REINERT: And I think I was -- I was
15 trying to get there, Mr. Chief Justice, and the way I
16 would say it is this: We've alleged that they knew, in
17 paragraph 96, that the policy was discriminatory.
18 That's clearly alleged in paragraph 96. We've also
19 alleged that they approved the policy.

20 The link -- to the extent that approval is
21 not sufficient for this Court, the link between approval
22 in 96 and an allegation is paragraph 69, because if they
23 knew that these individuals were being detained in
24 restrictive conditions of confinement because of their
25 race, religion, and national origin, as we alleged in

1 96, and they also approved that they should not be
2 released until cleared, then they are approving them
3 being held in restrictive conditions of confinement
4 based upon race, religion, and national origin.

5 JUSTICE BREYER: No, but they didn't -- that
6 isn't what 96 says. What 96 says, which I think is
7 important, is it says that they knew of and agreed to
8 subject the plaintiffs to these harsh conditions solely
9 on account of their religion, race, and national origin,
10 and for no legitimate penological interest. Because, if
11 they are looking for suspects from 9/11, given the
12 people they found, it's not surprising that they might
13 look for people who looked like Arabs. All right? That
14 isn't surprising to me, because that was what the
15 suspects looked like.

16 So, they want to say, yes, that was part of
17 it, but it's not for no legitimate penological interest;
18 it was for every good reason: We didn't want more bombs
19 to go off.

20 Now, suppose that's their view. Suppose
21 also -- I'm just hypothetically -- they never, and they
22 know this, ever had a conversation where they said, go
23 look for people of Arabic descent alone. They never
24 said that. They said, look for those people who have
25 other connections and had something we reasonably

1 believe is 9/11-connected; they might be dangerous.
2 Suppose that's what they thought. So they read this,
3 and they think, Judge, I want to tell Judge that you
4 have no evidence to show anything other than what I just
5 said, which sounds as if it might be reasonably
6 connected to the 9/11 investigation. What is open to
7 our two defendants, if you win this case? If they're
8 right, how do they prevent lots of depositions from
9 coming in and taking their time? How do they prevent
10 this case dragging on and taking their time? If the
11 facts are what I just said, rather than what you think?

12 MR. REINERT: Well, Justice Breyer, if those
13 are the facts, then those are facts that have to be
14 established through discovery. They cannot be
15 established at the pleading stage. I would think we
16 could all agree on that. And that's their -- and they
17 can do that through discovery.

18 Now, at the pleading stage, if they don't
19 want to file an answer and deny the facts, they can move
20 to dismiss on qualified-immunity grounds as they have.

21 JUSTICE BREYER: They'll -- they'll deny the
22 facts; then you'll say there's a factual matter. And
23 suppose hypothetically -- not what you think -- but you
24 have no reason at all hypothetically, imagine, for
25 believing that they did this solely for racial reasons

1 unrelated to the investigation of 9/11. Suppose you
2 don't have any information that shows that, and they are
3 going to say everything else is covered by qualified
4 immunity, and you have nothing else. Then what do they
5 do to get out of 10 years of discovery?

6 MR. REINERT: Well, the Second Circuit gives
7 a clear path for defendants in that situation,
8 Justice Breyer, and the answer is, if you want to make a
9 Rule 12(e) motion, make it; it was referred to in
10 Crawford-El. But, more importantly, we don't get
11 discovery of them. We don't get to drag them through
12 discovery unless --

13 JUSTICE STEVENS: May I just interrupt?
14 There are a whole bunch of other defendants in this
15 case. As I understand it, they're still in the case.

16 MR. REINERT: That's correct.

17 JUSTICE STEVENS: So you do have discovery
18 of maybe 25 to 30 officials who would have a lot of
19 information about this case. It seems to me it's
20 entirely possible that you could either postpone
21 discovery and dismiss the two principal defendants for
22 now and then bring them in later, if the facts you
23 develop from the other discovery would prove what you
24 have alleged.

25 MR. REINERT: Well, as to postponing

1 discovery, that's exactly what the Second Circuit
2 directed the district court to do. So that's been done,
3 Your Honor.

4 As to dismissing them and re-filing later,
5 the problem with that is there could be a statute of
6 limitations problem, and that -- so that's just not a
7 solution. I mean, that's -- that was a solution that
8 might result ultimately in absolute immunity in these
9 kinds of cases.

10 JUSTICE GINSBURG: What is the statute of
11 limitations that would apply?

12 MR. REINERT: It's 3 years here, Your Honor.
13 And so we've -- we've obtained discovery. Now, if it
14 had been -- if this --

15 JUSTICE GINSBURG: You have -- you have not
16 had discovery from the Attorney General or --

17 MR. REINERT: Certainly not.

18 JUSTICE GINSBURG: So --

19 MR. REINERT: Certainly not.

20 JUSTICE GINSBURG: So it's -- it's as though
21 discovery with respect to those two defendants was
22 stayed pending your discovery from the lower level
23 defendants?

24 MR. REINERT: In fact, it has been formally
25 stayed, Justice Ginsburg --

1 JUSTICE GINSBURG: Has it?

2 MR. REINERT: And the Second Circuit's
3 decision confirms that. I mean, the --

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

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

15 JUSTICE ALITO: It's a discretionary
16 decision, interlocutory discretionary decision by the
17 trial judge.

18 MR. REINERT: Well, if -- Justice Alito, if
19 this Court in affirming the Second Circuit outlines and
20 says the Second Circuit took the proper steps -- this is
21 what the district court should do -- then if any
22 district court disregards that, then there could be a
23 petition for mandamus. And that's -- and I think courts
24 of appeals would respect this Court's opinion if this
25 Court said, look, here's the dilemma, here's the best

1 way to resolve it.

2 I do want to make a point about the -- I do
3 want to make one jurisdictional point, Your Honor --
4 Your Honors, and that is, if Petitioners had raised
5 these arguments in the context of a motion to dismiss
6 for failure to state a claim, and they had lost, we
7 wouldn't be here today, right? There would be no
8 jurisdiction. And Johnson v. Jones, I think, makes
9 clear that you can't bootstrap jurisdiction by referring
10 to qualified immunity.

11 And, in fact, if you look at Petitioners'
12 Notice of Motion to Dismiss, point 1 is dismiss for
13 qualified immunity; point 2 is dismiss because it does
14 not sufficiently allege personal involvement. That is,
15 in their notice of motion itself, they separated out
16 these two issues.

17 Now, in their briefing at all the lower
18 courts and in this Court, they've elided them. But our
19 position on -- on jurisdiction is that there is no --
20 there is no appellate jurisdiction to -- to deal with
21 this question, and in fact Petitioners' own motion
22 suggests that these two issues are separable and that
23 the only issue here is whether or not clearly
24 established law applied and the objective reasonableness
25 of Petitioners' conduct. And that, we think, is another

1 way of resolving the case.

2 JUSTICE SOUTER: May I ask you this
3 question? And -- and I ask it, you know, mindful of
4 what you've just said, but I -- I'm not sure that the
5 two issues can be kept as -- as separated as you
6 suggest.

7 Another avenue to responding to the problem,
8 I think, that Justice Breyer's last hypo raised would be
9 as follows -- and then I'll tell you the difficulty that
10 I have with it, and I was going ask you to comment on
11 the difficulty.

12 He said that the -- the allegation -- one
13 way to read the allegation, and I think a fair way, is
14 to say that the Attorney General and the Director of the
15 FBI devised a policy and condoned the implementation of
16 a policy that was based on racial and religious grounds
17 with no penological purpose. Well, under the
18 circumstances of immediate post-9/11, it is not
19 surprising necessarily that they -- they devised a
20 policy that had reference to religion and national
21 origin and so on, given what we knew about the
22 hijackers.

23 What is not so easy to accept, as a matter
24 of adequate pleading, is the claim that there was no
25 penological interest involved in the decision of how

1 to and how long to hold the individuals who were picked
2 up.

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

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

15 The difficulty I have with that line of
16 thinking is this: You also allege in there that lower
17 level officials were making decisions on an ad hoc basis
18 without adequate criteria as to -- as to how they should
19 make them. And that particular line of allegations
20 suggests that what was really going on here, including
21 what was happening to your client, wasn't the result of
22 -- of clear policy decisions made by the Attorney
23 General and the Director of the FBI, but they -- they
24 were just being scattered. So, what in the context of
25 your whole pleading makes it adequate simply to charge

1 on a conclusory basis that these two defendants were
2 devising a policy that had -- that was intended to have
3 an effect of no penological interest?

4 MR. REINERT: Well, Your Honor,
5 Justice Souter, I do think that in this way the OIG
6 report is very instructive. It basically confirms that
7 none of the folks who were held as of interest or as
8 high interest were ever charged or suspected of being
9 involved in terrorism. That was well over 700 people.
10 As for paragraph 48 --

11 JUSTICE SOUTER: Did -- you'll have to help
12 me out. Did you allege that?

13 MR. REINERT: We alleged that many -- like
14 many -- plaintiffs, like many detainees, were held for
15 no reason.

16 JUSTICE SOUTER: Okay. That's what you're
17 saying --

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

19 And in paragraph 48, I just want to say that
20 does not support the view that there was no racial
21 criteria here. What it -- paragraph 48 is immediately
22 followed by paragraph 49, which says the classifications
23 were made because of race. Paragraph 48 is saying the
24 distinction between "of interest" and "of high interest"
25 was totally arbitrary. But that's just a way of saying

1 that this was a racial classification policy. It was a
2 racial classification policy that resulted in harsh
3 conditions of confinement for our client and for many
4 individuals. And now we have alleged Petitioners'
5 connection to that. You know, we could say --

6 JUSTICE SOUTER: Are you -- are you saying
7 that the -- that the claim that there was no penological
8 interest for certain decisions goes simply to the
9 distinction between the decision whether to classify as
10 "of interest" versus as "of high interest"?

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

20 JUSTICE SCALIA: Is -- is no penological
21 interest enough?

22 MR. REINERT: Oh --

23 JUSTICE SCALIA: I mean, is that the only
24 basis -- after an attack on the country of the magnitude
25 of 9/11, is that the only basis on which people could be

1 held? Namely that these people are the -- are the
2 guilty culprits, and we are going to put them in jail?

3 MR. REINERT: Well --

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

6 MR. REINERT: Well, Justice Scalia, I don't
7 think for a period it's constitutional to hold them
8 solely based on their race, religion, and national
9 origin. And if it is --

10 JUSTICE SCALIA: Well, it wasn't solely on
11 that.

12 MR. REINERT: Well, that is the allegation.
13 If it is, that's an issue to be dealt on the merits,
14 exactly as this Court did in Johnson v. California.

15 JUSTICE SCALIA: But the net was surely not
16 cast wide enough if anybody with that race, religion was
17 -- was swept in.

18 MR. REINERT: Well --

19 JUSTICE SCALIA: I mean, if it's solely for
20 that reason, there would have been hundreds of thousands
21 of others.

22 MR. REINERT: Justice Scalia, that is the
23 allegation in the complaint, that as individuals were
24 encountered --

25 JUSTICE SCALIA: -- implausible.

1 MR. REINERT: We respectfully disagree with
2 -- about that, Justice Scalia. But I would say
3 that with --

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

6 MR. REINERT: These were people --

7 JUSTICE GINSBURG: We're not dealing with
8 the universe of men who are of a certain national
9 origin; we are dealing with only ones who were
10 incarcerated for an offense that has nothing to do with
11 terrorism.

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

17 CHIEF JUSTICE ROBERTS: I'm sorry -- swept
18 up? You mean they were in -- in prison because they had
19 violated immigration and other laws, right?

20 MR. REINERT: That's correct,
21 Mr. Chief Justice, that's correct. We don't dispute
22 that.

23 But I think this Court's decision in Johnson
24 v. California and in Parents Involved is instructive,
25 because there the Court says, look, if there is a racial

1 classification, it has to be judged under strict
2 scrutiny. And even in Johnson v. California, where the
3 Court said the State's power was at its apex, which is
4 in the context of their prisons, and even where there is
5 an argument that we have gang violence -- we know that
6 racial identity goes to gang violence to some extent --
7 still the State was put to its burden of proof of a
8 compelling State interest, and even though that was a
9 case that involved damages, it was a qualified immunity
10 case.

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

15 CHIEF JUSTICE ROBERTS: You can finish.

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Garre, you have 3 minutes remaining.

24 REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE

25 ON BEHALF OF THE PETITIONERS

1 GENERAL GARRE: Thank you, Mr. Chief
2 Justice. And, first, let me clarify the record on
3 discoveries.

4 The Second Circuit didn't hold that
5 discovery could not go forward against these
6 Petitioners. It held that the district court might --
7 that's the word it used on page 67a of the petition
8 appendix -- postpone or limit discovery. So --

9 JUSTICE GINSBURG: But it -- it did happen?
10 At least it did --

11 GENERAL GARRE: To the grace of the district
12 court, that's right, and I think Judge Cabranes
13 emphasized the -- the concerns of potentially vexatious
14 discovery in this context, and we certainly
15 wholeheartedly agree with that.

16 Second, I think Mr. Reinert made an
17 important concession when he acknowledged that
18 substantive standards of law affect what you have to
19 plead. And here there are two substantive standards --
20 two substantive issues that are key.

21 One is the standard for supervisory
22 liability under Bivens, which requires that the
23 plaintiff show an affirmative link between the
24 wrongdoing alleged by lower level officials and the
25 potential wrongdoing on the part of higher level

1 officials like the Attorney General. The complaint in
2 this case has no subsidiary facts on which a reasonable
3 person could affirm that kind of affirmative link.

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

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

13 GENERAL GARRE: Certainly we would -- we
14 would oppose that. It's conceivable they could try to
15 get that discovery.

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

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

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

23 (Laughter.)

24 GENERAL GARRE: Fair enough, Your Honor.

25 But certainly, you know, when we think they

1 are parties to the case the potential demands of civil
2 discovery and the burdens of civil litigation are much
3 greater. Third --

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

6 GENERAL GARRE: Well, we are in the realm of
7 discovery, and we are in the realm of relying on the
8 district court --

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

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

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

19 GENERAL GARRE: Right.

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

22 GENERAL GARRE: We think that Bell Atlantic
23 answers that question correctly, Your Honor.

24 Third, context does matter. The Chief
25 Justice is right about that. In evaluating the claim,

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, General
16 Garre --

17 GENERAL GARRE: Thank you.

18 CHIEF JUSTICE ROBERTS: -- Mr. Reinert.
19 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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