IN THE SUPREME COURT OF THE UNITED STATES

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JOHN D. ASHCROFT, FORMER :

ATTORNEY GENERAL, ET AL., :

Petitioners :

v. : No. 07-1015

JAVAID IQBAL, ET AL. :

- x

Washington, D.C.

Wednesday, December 10, 2008

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

APPEARANCES:

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

ALEXANDER A. REINERT, ESQ., Yonkers, N.Y.; on behalf 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 officials for the alleged discriminatory acts of lower level officials.

And, second --

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

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

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

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

appropriate.

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

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

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

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

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

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

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

policy.

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

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

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

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

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

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

GENERAL GARRE: Not with respect to the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL GARRE: And I think it would be --

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

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

JUSTICE BREYER: In Rule 8?

GENERAL GARRE: Yes, because in Rule 8 --

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

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

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

GENERAL GARRE: It's --

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

the judge to stop this deposition?

GENERAL GARRE: Rule 8 does, as interpreted --

JUSTICE BREYER: Where?

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

JUSTICE SOUTER: But, Mr. Garre, you are using the word "plausible" or you're taking the word "plausible" out of Bell Atlantic, I think, and you are using it to mean something that probably can be proven to be true. Bell Atlantic drew that distinction. They -- the plausibility there is a plausibility that if they prove what they say, they will -- they will establish a violation.

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

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

But in Justice Breyer's case, the -- that -- that may be the case if the claim is that the president

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

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

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

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

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

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

GENERAL GARRE: -- deal with something like that.

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

(Laughter.)

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

JUSTICE GINSBURG: How about --

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

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

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

CHIEF JUSTICE ROBERTS: Reading the Riot --

GENERAL GARRE: And this Court --

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

finds out --

GENERAL GARRE: We --

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

GENERAL GARRE: And --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: I see.

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

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

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

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

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

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

If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, General.

GENERAL GARRE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Reinert.

ORAL ARGUMENT OF ALEXANDER A. REINERT

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

allege.

MR. REINERT: Well, Justice --

JUSTICE ALITO: And that's the question.

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

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

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

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

here --

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

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

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

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

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

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

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

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

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

MR. REINERT: Well, the difference --

JUSTICE SCALIA: We say you need something

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

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

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

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

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

But those -- both of those possibilities are

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

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

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

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

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

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

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

MR. REINERT: Well, certainly --

JUSTICE BREYER: Can he do that or not?

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

JUSTICE BREYER: Yes, he can.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: When?

MR. REINERT: -- when it occurred --

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

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

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

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

-- what we know about --

JUSTICE SCALIA: Well, we'll -- we'll check that.

JUSTICE SOUTER: Mr. Reinert --

JUSTICE SCALIA: The Solicitor General contests that.

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

(Laughter.)

JUSTICE SOUTER: You can let me know.

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

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

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

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

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

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

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

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

MR. REINERT: I'm sorry.

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

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

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

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

MR. REINERT: Well --

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

MR. REINERT: Well, Justice Stevens --

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

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

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

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

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

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

MR. REINERT: No, certainly not.

(Laughter.)

JUSTICE STEVENS: But the standard theory is that --

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

They were --

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

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

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

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

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

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

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

MR. REINERT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. REINERT: That's correct.

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

MR. REINERT: Well, as to postponing

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

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

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

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

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

MR. REINERT: Certainly not.

JUSTICE GINSBURG: So --

MR. REINERT: Certainly not.

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

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

JUSTICE GINSBURG: Has it?

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

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

MR. REINERT: Well, if this Court --

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

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

way to resolve it.

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

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

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

way of resolving the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. REINERT: That's what we alleged.

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

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

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

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

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

MR. REINERT: Oh --

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

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

MR. REINERT: Well --

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

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

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

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

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

MR. REINERT: Well --

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

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

JUSTICE SCALIA: -- implausible.

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

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

MR. REINERT: These were people --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: You can finish.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Garre, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

GENERAL GARRE: Fair enough, Your Honor.

But certainly, you know, when we think they

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

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

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

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

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

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

GENERAL GARRE: Right.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, General Garre --

GENERAL GARRE: Thank you.

CHIEF JUSTICE ROBERTS: -- Mr. Reinert.

The case is submitted.

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

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