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AT URGING OF FORMER AGs AND FBI HEADS, COURT AGREES TO REVIEW CASE SEEKING DAMAGES FROM HIGH-LEVEL OFFICIALS

(Ashcroft v. Iqbal, No. 07-1015)

The U.S. Supreme Court agreed yesterday to review an appeals court decision that permits a damages action raising sensitive national security issues to proceed through discovery against former Attorney General John Ashcroft and current FBI Director Robert Mueller.

The decision was victory for the Washington Legal Foundation (WLF), which filed a brief on behalf of a group of former Attorneys General and FBI Directors, urging that review be granted. The group argued that allowing the case -- which is essentially a political challenge to Bush Administration anti-terrorism policies -- to proceed through discovery threatens to interfere with the ability of high-level government officials to carry out their jobs effectively.

The former senior Executive Branch officials who signed WLF's brief were former Attorneys General William P. Barr, Edwin Meese III, and Richard Thornburgh; and former FBI Directors William S. Sessions and William H. Webster. The brief was filed in support of a Supreme Court certiorari petition filed in February by the Solicitor General on behalf of Ashcroft and Mueller. The petition argued that the U.S. Court of Appeals for the Second Circuit in New York erred in affirming the denial of a motion to dismiss based on qualified immunity.

Now that the Supreme Court has agreed to review the case, WLF has pledged to file a brief on the merits, urging the Court to dismiss the case. WLF will file its brief on behalf of former high-level Justice Department officials in either August or September.

The underlying lawsuit was filed by Javaid Iqbal, a Pakistani citizen who was arrested in New York City in November 2001 on charges of defrauding the United States. He was later designated a person of "high-interest" in the Justice Department's (DOJ) investigation of the 9/11 terrorism attacks. As a result of that designation, Iqbal was placed in a special high-security unit of a Brooklyn detention facility, a unit with harsh living conditions. He remained there for six months until June 2002, when he was cleared of involvement in terrorism. Iqbal pleaded guilty to the criminal charges lodged against him; following completion of his sentence, he was deported to Pakistan. He thereafter filed a suit for damages against Ashcroft, Mueller, and numerous other federal prison and law-enforcement personnel. He claimed that

they violated his First and Fifth Amendment rights to equal protection of the laws by subjecting him to harsh treatment solely because of his religion (Islam) and nationality and not because they had any reason to believe that he was involved in terrorism. Although the only allegations against Ashcroft and Mueller were conclusory in nature and did not cite facts suggesting that they had any involvement in his detention, the lower courts denied their motions to dismiss the case based on qualified immunity and allowed the case to proceed to discovery.

"The qualified immunity doctrine is supposed to protect government officials from the burdens of litigation, not simply provide them with a defense to liability," said WLF Chief Counsel Richard Samp in response to yesterday's Supreme Court order. "But the appeals court decision, by permitting discovery against high-level government officials based on the barest of conclusory allegations, deprives the doctrine of meaningful substance. The Second Circuit's ruling is particularly inappropriate given that our nation's security is on the line," Samp said.

WLF's brief argued that the ruling conflicts with the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*. *Twombly* held that Fed.R.Civ.P. 8(a) requires a complaint to include sufficient factual matter to provide "plausible grounds" to infer that the allegations of the complaint are true. WLF argued that Iqbal's complaint included *no* factual allegations to support his conclusory allegations that Ashcroft and Mueller were somehow directly involved in the decision to hold him under harsh conditions. WLF argued that given the vast size of DOJ, there are no "plausible grounds" for concluding -- in the absence of specific factual allegations -- that Ashcroft and Mueller were directly involved in determining the conditions of Iqbal's confinement.

"The ruling below is particularly inappropriate in a case raising national security issues; it threatens to interfere with the ability of officials to perform their duties without the distraction of having to defend against claims for money damages," said WLF's Samp. "This case should be a good test of whether the tougher pleading standards announced in *Twombly* will be applied outside the context of antitrust litigation," Samp said. WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared in the federal courts to support tort reform efforts.

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