

Hearing Before the Senate Committee on the Judiciary
“Has the Supreme Court Limited Americans’ Access to Courts?”
December 2, 2009

Stephen B. Burbank’s Answers to Senator Arlen Specter’s Post-Hearing Questions

1. Why do you believe that the proposed substitute amendment appearing in Appendix A to your prepared statement is preferable to S. 1504, H.R. 4115, or any other legislative proposal that either specifies a standard for pleading complaints or limits the grounds under which a complaint can be dismissed under Rule 12 of the Federal Rules of Civil Procedure?

Answer: The substitute amendment proposed in Appendix A reflects my views that (1) the Court’s decisions in *Twombly* and *Iqbal* resulted from a process that for this purpose was both illegitimate and inadequate, (2) although legislation is a legitimate process for amending the Federal Rules, the Enabling Act process is usually to be preferred and is preferable in this instance (at least as a basis for ultimate congressional judgment), and (3) nonetheless, legislative action is required now to prevent irreparable injury pending the completion of the Enabling Act process.

The process leading to *Twombly* and *Iqbal* – adjudication under Article III – and hence the decisions themselves were illegitimate because they effected consequential changes to the Federal Rules of Civil Procedure without affording Congress the opportunity to review, and if necessary to block, the new policy choices contained in those decisions before they became effective. They thus violated the requirements of the Rules Enabling Act and ignored the Court’s own decisions on the differences between judicial interpretation and judicial lawmaking (see my answer to Question 3 below).

The process and hence the decisions were inadequate because adjudication did not give the Court, and the Justices otherwise lacked, the information, experience, and breadth of perspectives that are necessary for wise prospective lawmaking about matters as fundamental as access to court and the private enforcement of public law.

Congress does not suffer from the deficits in democratic accountability of the Court’s decisions in *Twombly* and *Iqbal*. Rather than itself running the risk of legislating pleading law on the basis of incomplete information and partial perspectives, however, Congress should insist on respect for the process it has prescribed in the Enabling Act, as amended, in delegating legislative power to the Court to make prospective supervisory rules.

Some legislative action is necessary now, however, to forestall the damage that the Court’s decisions could do in the three to four years that it will take the Judicial Conference’s rules committees properly to address the issues under the Enabling Act process. That is, for the reasons suggested in my answer to Question 5 below, the risk of irreparable injury to those who cannot satisfy these decisions’ new standards, as well as to policies underlying statutes that the

enacting Congress intended to be enforced through private litigation, is sufficiently serious to require a return to the status quo existing before *Twombly* was decided.

Finally, although the approach taken in Appendix A would necessarily yield some uncertainty and inconsistency, they could not in my view be any greater than the uncertainty and inconsistency that new statutory standards would engender -- even those that sought a return to *Conley v. Gibson* (see my answers to Questions 2 and 8 below) -- or as great as that which *Iqbal's* capricious complaint-parsing and privileging of “judicial experience and common sense” have already created (see my answer to Question 6 below).

2. What is your response to the contention that *Twombly* and *Iqbal* follow logically from, or at least are consistent with, pre-*Twombly* decisions of the Supreme Court and the lower federal courts—or, as Gregory Garre contends in his prepared statement, that *Twombly* and *Iqbal* are “firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate level . . .” (p. 11). In answering this question, please address whether the decisions of the Supreme Court on which Mr. Garre relies (pp. 11-14) support *Twombly* or *Iqbal*.

Answer: This is a common refrain of those who defend the Court’s decisions, as I learned when engaging in an on-line debate with lawyers seeking to provide the same assurance. See Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf>. But it misrepresents the pre-*Twombly* decisions of the Supreme Court and invests lower court cases – some of which ignored binding Supreme Court precedent – with authority equal to that of the Court’s decisions.

The dubiety of this argument is immediately suggested when one considers that, of the four Supreme Court decisions relating to pleading that Mr. Garre discusses in any detail on the cited pages of his prepared statement, Justice Stevens authored the Court’s opinions in two (*Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) and *Crawford-El v. Britton*, 523 U.S. 574 (1998)). Having dissented in both *Twombly* and *Iqbal*, Justice Stevens would surely be surprised to learn that they were “firmly grounded” in his prior opinions for the Court. He would doubtless have the same reaction to the notion that the (unanimous) decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), or part III of *Papasan v. Allain*, 478 U.S. 265, 283-92 (1986), both of which he joined, were part of the stealth dismantling of *Conley v. Gibson* that this argument posits.

In *Dura Pharmaceuticals*, the Court held that a plaintiff alleging securities fraud must “prove that the defendant’s misrepresentation (or other fraudulent conduct) proximately caused the plaintiff’s economic loss,” 544 U.S. at 346, rejecting the Ninth Circuit’s view that “‘plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of misrepresentation.’” *Id.* at 340 (internal citation omitted). It is thus not surprising that the Court found insufficient a complaint alleging only “that the plaintiffs ‘paid artificially inflated prices for Dura’s securities’ and suffered ‘damage[s],’” which the Court interpreted as “suggest[ing] that the plaintiffs considered the allegation of purchase price inflation alone

sufficient.” *Id.* at 347. So viewed, *Dura* reflects an application of precedent holding that, in ruling on a motion to dismiss a court “must assume that the [plaintiff] can prove the facts alleged in its complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the [applicable substantive] laws in ways that have not been alleged.” *Associated General Contractors*, 459 U.S. at 526. To be sure, in explaining its holding concerning the insufficiency of the complaint -- under the influence of the Private Securities Litigation Reform Act of 1995 -- the *Dura* Court invoked *Conley’s* gloss on Rule 8 to the effect that a complaint must provide the defendant with “‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” 544 U.S. at 346 (quoting *Conley*, 355 U.S. at 47). *Dura* may therefore have encouraged the *Twombly* Court’s conflation of the two separate parts of the *Conley* decision that I discuss in my answer to Question 8 below. But neither *Dura* nor *Associated General Contractors* suggests a requirement of factual specificity (to survive a Rule 12(b)(6) motion) remotely approximating that which emerges from the complaint-parsing of *Iqbal*. The same is true of *Papasan*, where, in connection with the petitioners’ allegation that they had been deprived of a minimally adequate education, the Court stated that “[a]lthough for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.” 478 U.S. at 286. Moreover, whatever one thinks of the *Twombly* Court retrojecting the concept of “plausibility” as a means to police inferences in antitrust conspiracy cases to the motion to dismiss stage, none of the Court’s prior decisions provides even a hint that in Rule 8’s “showing” lurks the general plausibility requirement that the *Iqbal* Court announced.

Not only is the common refrain evidenced by Mr. Garre’s prepared statement misleading in broad outline. His description of two decisions authored by Justice Stevens is misleading in the particulars. Thus, he states (at page 12) that in *Associated General Contractors* the “Court – in an opinion written by Justice Stevens – held that the district court erred in failing to require the union ‘to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss.’ *Id.* at 528 n.17.” *In fact, the Court held the exact opposite.* Reasoning that “the Court of Appeals properly assumed that such coercion might violate the antitrust laws,” 459 U.S. at 528, the Court observed in the cited footnote (which would have been an odd place for a holding) that “[h]ad the District Court required the union to describe the nature of the alleged coercion before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson* ... too far.” *Id.* at 528 n.17. The Court did go on to suggest that “[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* Not only, however, is this statement dictum (in a footnote); it does not specify the tool(s) to be used for the exercise of the posited power. For that we should look to the second of Justice Stevens’ opinions that is unrecognizable in Mr. Garre’s prepared statement.

According to Mr. Garre (page 14), in *Crawford-El* “the Court has instructed trial courts to ‘insist’ that a plaintiff “‘put forward specific, nonclusory factual allegations” that establish cognizable injury’ before allowing a suit ‘to survive a pre-discovery motion for dismissal or summary judgment.’” This is a surprising account of a decision in which the Court observed that

“our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.” 523 U.S. at 595. As a result of selective quotation and elision, a reader might believe that the *Crawford-El* Court (re)formulated the standard governing Rule 12(b)(6). In fact, however, the Court rejected a lower court’s effort to create a heightened burden of proof of state of mind, applicable at the summary judgment stage and at trial, in cases involving a qualified immunity defense. Calling such an “indirect effort to regulate discovery . . . a blunt instrument,” *id.* at 595, the Court reminded federal trial judges of “some of the existing procedures available . . . in handling claims that involve examination of an official’s state of mind.” *Id.* at 597. In particular, the Court noted that, in a case “against a public official alleging a claim that requires proof of wrongful motive,” *id.* at 597, the “firm application of the Federal Rules of Civil Procedure” referred to in *Butz v. Economu* 438 U.S. 478, 508 (1978), can be achieved through other means, including a court-ordered reply under Rule 7 or the grant of a motion for a more definite statement under Rule 12(e). *See Crawford-El*, 523 U.S. at 597-98.

Finally as to Supreme Court precedent, the *Iqbal* Court’s maiming of Rule 9(b) – which is so critically important in discrimination cases -- was both without precedent in the Court’s decisions and demonstrably inconsistent with the intent of the drafters of the Federal Rules (and hence presumably with the Court’s original understanding). The Advisory Committee Note accompanying Rule 9 in 1938 listed Order 19, Rule 22 of the English Rules as the source or inspiration for Rule 9(b). That source provided: “Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, *it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred*” (emphasis added). Determined to reverse the Second Circuit notwithstanding that court’s measured and thoughtful opinion, the five justice majority in *Iqbal* found it necessary not only to disregard the petitioners’ concession about supervisory liability and change the law of official immunity, but also to rewrite Rule 9(b). In that respect, *Iqbal* is without any grounding or foundation at all.

Since lower federal courts lack the power to overrule the Supreme Court, their decisions on these questions are of little interest. It is true that few courts took literally the “no set of facts” language in *Conley*. Yet, as I discuss in my prepared statement and in response to Question 8 below, that is hardly surprising given that there was widespread misunderstanding (even if self-induced) of the role that language was intended to play, and, as suggested in *Conley* itself (see also *Crawford-El, supra*), a remedy for a “the defendant wronged me” type of complaint was always available under Rule 12(e) – the requirement of “fair notice.”

It is also true that some post-*Conley* lower court decisions refused to accord the presumption of truth to “legal conclusions,” which the Court itself had done. *See Papasan, supra*. As the string cites on pages 15-19 of Mr. Garre’s prepared statement reveal, however, many of them went further, indirectly requiring fact pleading. They did so without authority in Supreme Court decisions. Moreover, during a decade in which many of the cited decisions were rendered, the Court twice found it necessary to reverse attempts directly to impose fact pleading outside of the Enabling Act process – most recently in 2002. This is why in my prepared statement (at 19) I observed that what some defenders of *Twombly* and *Iqbal* represent as a

conversation or debate between the Supreme Court and the lower federal courts (culminating in the Court's recent decisions) is "akin to that between a parent and a serially wayward child."

Even if some lower court decisions presaged the level of complaint-parsing in which the *Iqbal* Court indulged, and even if they did so without flouting governing Supreme Court authority, the resulting arbitrary distinctions – between "facts," "threadbare allegations," and "conclusions" -- are demonstrably inconsistent with a fundamental premise of the system of notice pleading that the drafters of the Federal Rules intended to implement in 1938, that the Court embraced in 1947 (in *Hickman v. Taylor*), and that it reaffirmed in 1957 (in *Conley*).

3. Did the Supreme Court in *Twombly* or *Iqbal* cross the line between (permissibly) interpreting (or reinterpreting) and (impermissibly) amending the Federal Rules of Civil Procedure? If you answer "yes," please explain.

Answer: Yes. My answer to the previous question, both in general and with specific reference to the institution of a general plausibility requirement and the Court's rewriting of Rule 9(b), demonstrates why it is impossible to defend those decisions as mere interpretations (or reinterpretations) of the Federal Rules, at least if that term implies continuity with the past. Even before *Iqbal*, a number of conservative judges and scholars appeared to agree *See, e.g.,* *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific*, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., joined by Posner, J., concurring in denial of reh'g en banc) ("In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier."); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL'Y 61, 64 (2007) ("*Twombly* ... can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases.").

Nor can they be saved from the charge of judicial lawmaking (here, judicial amendment) by the insight that judicial interpretation and judicial lawmaking shade into each other. The Court itself has provided an objective standard for distinguishing the two when a Federal Rule promulgated under the Enabling Act is in question. Thus, in order to protect the Enabling Act process, that statute's limitations on rulemaking, and the power it accords Congress to review and, if necessary to block, prospective procedural policy choices, the Court has foreclosed from treatment as mere interpretation (or reinterpretation) giving meaning to a Federal Rules that is different from the meaning the Court understood "upon its adoption." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). *See also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and amended limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge ... any substantive right'" (quoting 28 U.S.C. § 2072(b) (2000))). In my prepared statement (at 17-18), I marshal powerful evidence, in addition to *Hickman* and *Conley*, of the Court's likely original understanding of pleading and motions to dismiss under the Federal Rules. Finally, apart from the formal illegitimacy and patent inadequacy of the course pursued in *Twombly* and *Iqbal*, those decisions have undermined (by drastically altering) a key architectural element of the infrastructure for the private

enforcement of public law upon which Congress may reasonably be deemed to have relied when passing numerous post-1938 statutes containing pro-plaintiff fee-shifting and/or multiple damages provisions (which are clear signals of the perceived importance of private enforcement).

4. What is your response to Mr. Garre's contention in his prepared statement (p. 38) that "any necessary response" to *Twombly* and *Iqbal* "should be addressed through" the process for amending the Federal Rules of Civil Procedure established by the Rules Enabling Act?

Answer: In addition to the responses contained in my answers to Questions 1 and 3 above and in my prepared statement (at 19-20), I would only point out that this plea for respect of the Enabling Act process should have been addressed to the Supreme Court. Since, however, it is too late for that, it falls to Congress to insist on the exclusivity of that process for judicial amendments to the Federal Rules. That is the first goal of the substitute amendment proposed in Appendix A. The second is to ensure that Congress does not repeat the Court's mistakes and thus that it waits for the results of the informed, thorough and open process upon which the rules committees have embarked before deciding whether legislation prescribing different pleading standards is required. The third goal is to ensure that, pending the results of the Enabling Act process, the Court's improvident decisions do not cause irreparable injury either to those without the ability to satisfy their requirements or to federal statutory provisions designed for private enforcement.

5. What is the state of research on the question whether *Twombly* or *Iqbal* have limited access to the federal courts? Please comment, in particular, on the memorandum prepared for the Advisory Committee on Civil Rules to which Mr. Garre refers in his prepared statement (pp. 20-22, 34).

Answer: Alas for those anxious to make Ms. Kuperman, the author of the memorandum in question, not only the most famous law clerk in the country but the youngest member of the Advisory Committee, (1) she is just a law clerk (although a very nice and bright one), (2) her memorandum is not a study but rather a summary of post-*Iqbal* appellate decisions and a non-random sample of district court decisions, (3) the unsupported characterizations in the brief prefatory section of the memorandum are her opinions, and (4) they are highly contestable.

Indeed, Ms. Kuperman's memorandum led me to many of the cases that are cited in Appendix B to my prepared statement. These are cases that either suggest or explicitly state that *Iqbal* has caused the dismissal of complaints that would not have been dismissed in the pre-*Twombly* era. They thus answer the only question about dismissed cases discussed at the hearing that makes sense (once Senator Leahy pointed out that, without discovery, one cannot determine whether complaints that have been dismissed under *Twombly* and *Iqbal*, but that would have survived under prior law, had merit, which was, of course an animating insight of those who framed the Federal Rules). In sum, even if the cases in Appendix B and other similar cases do

not signal what Mr. Garre referred to as “wholesale dismissal of complaints” (pg. 22, without defining that term), they do signal a loss of access for a substantial number of people.

It is convenient for supporters of *Twombly* and *Iqbal* to conflate Ms. Kuperman’s memorandum with the broader effort to reconsider pleading, motions to dismiss and discovery that the Advisory Committee has undertaken, an ambitious effort that includes original empirical investigations by the Federal Judicial Center. That work, which involves a number of quantitative and qualitative projects that merit the term “study,” will take time. Moreover, as to pleading and motions to dismiss, it will be of limited inferential value, at least if the goal is, as it should be, to compare the costs and benefits of the system of notice pleading and broad discovery with the costs and benefits of systems proposed to replace it. See my answer to Question 6 below.

In the meanwhile, we have very limited data. A few law review articles include analyses of slices of post-*Twombly* and/or post-*Iqbal* experience based on published opinions. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011. Contrary to Mr. Garre’s assertion (pg. 34), “the most comprehensive study to date” is not the Kuperman memorandum but rather a study (using econometric techniques) of some 1200 cases by Professor Patricia Hatamyar that is cited at page 7 note 3 of my prepared statement. This study also suffers from the biases that afflict work based on published decisions (even after the advent of computerized data bases). But it is probably the best we have for now, and it suggests that what I have called “the usual victims of ‘procedural’ reform” are being differentially and adversely affected by *Twombly* and especially *Iqbal*. Thus, Professor Hatamyar concluded that “the largest category of cases in which 12(b)(6) motions are filed was constitutional civil rights. Motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in cases overall (49%), and the rate of granting 12(b)(6) motions in constitutional civil rights cases increased in the cases selected from Conley (50%) to *Twombly* (55%) to *Iqbal* (60%).”

6. What is your response to Mr. Garre’s contention in his prepared statement that a statute overruling *Twombly* and *Iqbal* would “exact enormous costs” (p. 24), both for government officials (pp. 25-29) and for civil defendants and society (pp. 29-33).

Answer: I address the question as to government officials in my answer to Question 7 below. As for “civil defendants and society,” I do not understand the predicate for Mr. Garre’s assertion (pg. 24) that the alternative to *Twombly* and *Iqbal* is “a system in which courts permitted conclusory and implausible claims to go forward.” I thought he believed that the pre-*Twombly* landscape (which is what the proposed substitute amendment in Appendix A would restore) was one in which appellate courts, in dialogue with the Supreme Court, were moving seamlessly toward the point staked out in those decisions. (But see my answer to Question 2 above).

I agree, however, that rational public policy in this area must reflect a comparative evaluation of the costs of alternative pleading (and discovery) regimes. Rational public policy

must also attend, however, to the benefits of the alternatives – a dimension simply absent from Mr. Garre’s prepared statement and testimony. Moreover, in a system like ours that has depended heavily on private civil litigation to enforce public law, rational public policy must consider what would replace litigation (and how it would be funded) if one or more of the alternatives portended a substantial decrease in enforcement through litigation. Thus, for instance, do Americans really want the SEC or FTC sufficiently well-funded (through taxpayer dollars) and powerful to pick up the slack? Or is the real goal here, at the end of the day, no enforcement?

Contentions about the “enormous costs” of the system of notice pleading and broad discovery are not just a talking point for defenders of *Twombly* and *Iqbal*. They are a talking point that the business community and others intent on dismantling private civil litigation as a means of securing compensation for injury and enforcing public laws have been repeating for decades, hoping (alas, not without reason) that constant repetition of myths will weaken any inclination to doubt them. For thoughtful, empirically based responses to this and other similar litigation myths, I refer the Committee to the submissions of Professors Theodore Eisenberg and Steven Croley.

Like his predecessors in this campaign, Mr. Garre ignores decades of systematic empirical research showing that discovery is not a ubiquitous problem but rather that it is a problem in only a small slice of litigation—typically, high stakes, complex cases. A recent preliminary report of the Federal Judicial Center is to the same effect. *See* Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report (Oct. 2009).

Mr. Garre also ignores, for purposes of comparison, the burdensome costs associated with administering the Court's newly expanded definition of a “conclusory” allegation. Following *Twombly* and *Iqbal*, a great deal turns on the trial court's determination whether an allegation is “conclusory” in nature. That determination will dictate whether the allegation is entitled to a presumption of truth, and it will weigh heavily in any subsequent plausibility analysis that the court conducts. But the Supreme Court has given lower courts absolutely no guidance in determining when an allegation is, in fact, “conclusory”. Under *Twombly*, the magnitude of this problem was not immediately apparent, as the allegation of conspiracy that was found to be “conclusory” basically took the form of a pure recitation of an element of the plaintiff's claim, suggesting that the Court's holding on this point would be limited to allegations fitting that description and/or not providing “fair notice” to defendants. In *Iqbal*, however, the majority dismissed as “conclusory” two allegations that were much more specific in nature, as to which there could be no problem of inadequate notice: one in which the plaintiff claimed that the Attorney General was the “principal architect” of the specific policies challenged, and another claiming that the FBI Director was “instrumental in [their] adoption, promulgation, and implementation.” By holding that these allegations -- which go much further than mere recitations of elements -- were nonetheless “conclusory” in nature, the majority raised the stakes considerably. But it said nothing about how courts and litigants are supposed to determine whether allegations are “conclusory,” instead behaving as though the answer to the question was self-evident. It was certainly not self-evident to the dissenters, who disagreed with the majority

that these allegations were “conclusory” and would have accorded them a presumption of truth. The result is a standard that lacks predictability, rationality or fairness. Allowing such an unguided and arbitrary standard to define the capacity of litigants to obtain remedies for their injuries will impose heavy transaction and social costs.

At least, however, discussion of the alleged costs of the system that *Twombly* and *Iqbal* replaced should focus attention on the fact that the perceived problem is not pleading, but rather discovery. Moreover, even if attention were paid only to costs, denying court access to civil rights plaintiffs so that large business corporations engaged in high stakes, complex commercial cases could be spared what Judge Easterbrook called “impositional discovery,” would seem doubly feckless: first, because it targeted the wrong part of the litigation process, and second, because it did so in all cases, when only a small proportion of cases posed the problem to be addressed. The latter is a major cost of insisting upon the same rules of procedure across the landscape of substantive law, so-called trans-substantive procedure. In that regard, it may be that Congress should amend the Rules Enabling Act to authorize the proposal of substance-specific rules when necessary to avoid such costs. If it were to do so, however, Congress should prescribe that proposed substance-specific rules would become effective only if adopted by legislation (rather than under the normal report-and-wait provision of the Enabling Act).

Finally and again, if one is to examine the costs of discovery, the quest for wise public policy requires that one also consider the benefits of discovery. In that regard, it is no coincidence that the chief architect of the 1938 Federal Rules on discovery, Professor Edson Sunderland, was a progressive well acquainted with that movement’s emphasis on “legibility” (transparency) as a necessary condition for effective regulation. As Judge Patrick Higginbotham put it:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. *Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.*

Patrick Higginbotham, *Foreword*, 49 ALA. L. REV.1, 4-5 (1997) (emphasis added). *See also* Statement of Stephen N. Subrin.

7. Would legislation overruling *Twombly* and *Iqbal* invite frivolous and vexatious litigation against government officials by terrorists and others? In particular, should Congress be concerned that such legislation would render government officials more vulnerable to the costs, including distraction, of discovery?

Answer: The argument prompting this question is flawed for five reasons. First, there is no evidence that pre-*Twombly/Iqbal* litigation imposed on the government officials who are presumably of interest for this purpose – high government officials involved in matters affecting national security -- the sort of costs that the defense of official immunity, and the panoply of procedural protections undergirding it, seek to prevent. There is thus no evidence that that the

then-governing law (which the proposed substitute amendment in Appendix A would restore) permitted such costs to be imposed. Second, the argument ignores, as the Supreme Court ignored in *Iqbal*, the meticulous guidance that the Second Circuit gave to the district court in order to protect against such costs. Third, like the argument addressed in my answer to Question 6, single-minded attention to costs pretermits consideration of the benefits of litigation against government officials. Fourth, those who profess concern about encouraging “terrorists” to sue government officials seem not to have considered the additional roadblocks that *Twombly/Iqbal* may pose for the *victims of terrorism* to pursue terrorists and the funders of terrorism in American courts. Fifth, as with the argument addressed in my answer to Question 6, even if *Iqbal* had been a response to actual problems, it would have been a feckless and unnecessary response, again illustrating a major cost of trans-substantive procedure.

First, since the Supreme Court rejected the argument that national security concerns warranted according the defense of absolute immunity to the Attorney General in 1985, I am aware of no evidence that the pre-*Twombly/Iqbal* system of notice pleading has permitted frivolous cases to go forward, thus subjecting high government officials to the costs, including distraction, that broad discovery could impose. Indeed, with the exception of *Clinton v. Jones* – a case that defenders of *Twombly* and *Iqbal* may regard differently – I am not aware of any case in which high level officials have been subjected to discovery. In particular, I do not believe that any Attorney General has ever been subjected to discovery in a lawsuit seeking to hold him or her personally accountable for constitutional violations. Similarly, I do not believe that any Attorney General has ever had to pay attorney’s fees, let alone damages, in any civil case in which that individual was a defendant. Citing and selectively quoting from Bennett Boskey’s book, *Some Joys of Lawyering* (2007), Mr. Garre (at pg. 27) neglects to mention that the same source reports that Attorney General Levi was rarely even informed that he had been sued (because his subordinates were so confident that he would be dismissed from the case). *See Joys* at 113. He also does not mention Mr. Boskey’s acknowledgment that all of the lawsuits were resolved without Attorney General Levi having to testify, “even in a deposition, although in a couple of cases it was prudent to file an affidavit by him showing his total non-connection with the matter in controversy.” *Id.* at 114. The reason, of course, is that the lower federal courts had (and have) ample tools to prevent unwarranted imposition, both those available in all cases (some of which are well described in the statement submitted by Professor Tobias Wolff) and those specially crafted to protect the defense of official immunity.

Second, and as a good example of such tools, consider the guidance that the Second Circuit gave to the district court in *Iqbal*, guidance reflecting existing tools and powers that the Supreme Court chose to ignore.

In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct. In a case such as this

where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98, 118 S. Ct. 1584 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. See *Harlow*, 457 U.S. at 821, 102 S. Ct. 2727 (Brennan, J., concurring) ("[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

Iqbal v. Hasty, 490 F.3d 143, 158-59 (2d Cir. 2007), *rev'd*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Third, understandable concern to protect against unwarranted imposition upon government officials trying to do their jobs should not be allowed to shut from view the benefits of litigation even in this sensitive domain. Put otherwise, rendering such litigation effectively impossible or very difficult -- as *Iqbal* does -- may impose a cost of its own, namely, regression to a society that lacks the will to hold government officials, high or low, accountable for violations of civil rights, civil liberties, and other interests that the law (supposedly) protects. Indeed, whatever the proper balance between false positives and false negatives that pleading law should seek to achieve in general, special care should be taken not to tip the balance too much against those seeking redress of their grievances against the government and its agents in litigation. The Second Circuit observed:

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed

constitutional limits in normal times. . . . But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

Iqbal, 490 F.3d at 159.

Fourth, although the considerations discussed above suggest that expressed concerns about frivolous and vexatious suits by “terrorists” against government officials have no basis in experience, the Committee has before it evidence of current efforts by those defending alleged terrorists and funders of terrorists to leverage *Twombly* and *Iqbal* into a get-out-of-court-free card in litigation brought on behalf of the victims of 9/11. See Letter from Sean P. Carter, Esq. to Senator Arlen Specter (Dec. 9, 2009).¹ Having described those efforts, which are documented in exhibits, Mr. Carter observes:

Nevertheless, the arguments these defendants have raised on the basis of *Twombly* and *Iqbal* raise significant concerns about the impact of those decisions on the ability of future terrorism victims to sustain claims against knowing and intentional sponsors of terrorism. In this regard, it is important to note that the September 11th plaintiffs and their counsel invested millions of dollars in pre-suit investigations into the sources of al Qaeda's financial and logistic support, before even bringing claims against any party. That investment was undertaken in recognition of the strong public interest in the circumstances which gave rise to the September 11th Attacks, and sadly made possible by the horrific scale of those Attacks.

It is unreasonable to expect that future victims of terrorism will be able to marshal similar resources in investigating potential claims against alleged terror sponsors. Because the financial and logistic infrastructures of terrorist organizations are by their very nature covert, the heightened pleading standards announced by the Supreme Court in *Twombly* and *Iqbal* may well foreclose such victims from sustaining meritorious claims against parties who have in fact sponsored terrorism against the United States and its citizens.

Significantly, through the Anti-Terrorism Act, 18 U.S.C. § 2333 et seq, Congress created a substantive cause of action under federal law for the benefit of terrorism victims against persons who knowingly provide material support or resources to the terrorist organization responsible for their injuries. In doing so, Congress made clear its view that civil actions by terror victims should play an important role in deterring the sponsorship of terrorism, and thereby promoting our national security. This approach makes good sense, as terrorist sponsors often lay beyond the reach of U.S. prosecutors and their own states frequently lack the political will to pursue criminal proceedings or economic sanctions, even where the evidence is clear. Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey highlighted this problem in testimony presented to the Senate Committee on Finance on April 30, 2008, explaining that:

One of our greatest challenges will be to foster the political will

¹ I am one of the counsel for the plaintiff victims in this litigation.

required to deter terrorist financiers more consistently and effectively. It has proven difficult to persuade officials in some countries to identify and to hold terrorist financiers publicly accountable for their actions. This lack of public accountability undermines our ability to deter other donors."

Testimony of Under Secretary for Terrorism and Financial Intelligence Stuart Levey Before the Senate Committee on Finance, April 1, 2008, available at <http://www.treas.gov/press/releases/hp898.htm>.

For those very reasons, civil claims will often represent the only effective means to hold terrorist sponsors accountable for their deliberate targeting of the United States, and thereby deter the financing of terrorism by other would be donors. *See Boim v. Holyland Foundation for Relief and Development*, 549 F.3d 685, 691 (7th Cir. 2008) (*en Banc*) ("suits against financiers of terrorism can cut the terrorists' lifeline"). Unfortunately, the Supreme Court's rulings in *Twombly* and *Iqbal* threaten the vitality of that important tool for promoting our national security.

Id. at 2-3.

Fifth, accepting for purposes of argument that the problems to which the *Iqbal* Court responded were real, the remedy was, again, demonstrably overbroad. Moreover, here the Court should not be allowed to hide behind the supposed requirement of the Enabling Act's reference to "general rules" that Federal Rules be trans-substantive. For as I have pointed out, the Court could have required fact pleading in cases involving government officials entitled to the defense of official immunity (or some subset thereof) as a matter of substantive federal common law (the source of the official immunity defense). See my prepared statement at pages 9, 21 n.74; Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 555-56, 558. Finally, for those who still believe (contrary to the evidence) that a return to the status quo ante would unleash a (literally) unprecedented wave of frivolous litigation against such officials and that existing tools would be inadequate to nip those cases in the bud, there is similarly an easy, targeted response at hand. Congress could carve them out of legislation such as the proposed substitute amendment in Appendix A.

8. In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court wrote: "In appraising the sufficiency of a complaint we follow of course the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." How should this statement be interpreted? How did the Supreme Court interpret it before *Twombly*?

Answer: In my prepared statement, I observed:

The architecture of *Iqbal's* mischief -- undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal* -- is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley's* "no set of facts" language concerned the former question, not the latter, with the result that even if post-

Conley courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court “retired” the “no set of facts” language, it did not retire, but rather perpetuated and exacerbated, this mistake.

Prepared Statement at 11.

In addition, discussing the attempt by defenders of *Twombly* and *Iqbal* to “normalize [those decisions] from an institutional perspective,” I commented:

A variation of the argument that the Court didn’t really change the Federal Rules in question, but rather merely reinterpreted them, is the argument that, prior Supreme Court decisions aside, *Twombly* and *Iqbal* didn’t really change the law that was applied in the lower federal courts. There is a grain of truth in this argument, since it is probably true that very few courts took *Conley*’s “no set of facts” language literally. This is hardly a surprise both because, as I discussed above, that language was not intended to speak to the question of factual specificity and (relatedly) because a Rule 12(e) motion (for a more definite statement) has always been available to deal with a “the defendant wronged me” type of complaint.

Id. at 18-19.

That this interpretation of the “no set of facts” language is an accurate description of the *Conley* Court’s intended meaning is supported by the facts of that case and the architecture of the Court’s opinion, and it is confirmed by reading the three cases that the Court cited in support of “the accepted rule” that the language formulates.

The question tested by the defendants’ motion to dismiss in *Conley* was whether the plaintiffs could recover under the Railway Labor Act for the discrimination in union representation that they alleged. Drawing on “the general principles laid down in [three of its prior decisions],” 355 U.S. at 45, and noting that the ability of employees to file “their own grievances with the Adjustment Board or sue their employer for breach of contract ... furnish[ed] no sanction for the Union’s alleged discrimination,” *id.* at 47, the Court deemed it unnecessary to “pass on the Union’s claim that it was not obliged to handle any grievances at all because [the justices were] clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.” *Id.*

The *Conley* Court treated separately the defendants’ objection “that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal [was] therefore proper.” *Id.* Reasoning that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts on which he bases his claim,” and that “all the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests,” *id.*, and adducing in support the “illustrative forms appended to the Rules,” the Court concluded that “[s]uch simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial

procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Id.* at 47-48. In a footnote to the last quoted language, the Court cited Rule 12(e), Rule 12(f), Rule 12(c), Rule 16, Rules 26-37, Rule 56, and Rule 15. *See id.* at 48 n.9.

Any residual doubt that the “no set of facts” language in *Conley* referred not to the factual specificity of the complaint but rather to the ability of a plaintiff, even a plaintiff alleging the most egregious facts, to recover under the governing substantive law, is dispelled by reading the three cases cited in support of “the accepted rule.” *See id.* at 46 n.5. Although *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), is the most famous of the three, in part because it was authored by Judge Charles Clark, the Reporter of the original Federal Rules and the primary drafter of the pleading rules, and in part because of the lengths to which that court was willing to go in preserving from dismissal the pro se complaint of an Italian immigrant, it is not the most informative. To be sure, the Second Circuit stated that “[u]nder the new rules of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be a ‘short and plain statement of the claim showing that the pleader is entitled to relief’ ... and the motion for dismissal under Rule 12(b) is for failure to state ‘a claim upon which relief can granted.’” *Id.* at 775. Moreover, the Court went on to conclude that “however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced – and, indeed, required by [federal law].” *Id.* For crystal clear doctrinal guidance concerning the meaning of *Conley*’s “no set of facts” language, however, one should turn to the first case cited by the *Conley* Court, *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940).

In reversing the dismissal of an amended complaint under Rule 12(b)(6), the Eighth Circuit drew on its prior decisions concerning motions to dismiss bills of complaint for want of equity to give meaning to the new Federal Rule. Citing one of those decisions for the proposition that “[t]o warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated,” *id.* at 305, the *Leimer* court observed that a motion under Rule 12(b)(6) “t[ook] the place of the former demurrer in an action at law or motion to dismiss a bill of complaint for want of equity.” *Id.* The court continued:

A demurrer or a motion to dismiss for want of equity admitted, for the purposes of the demurrer or motion, all facts well pleaded in the complaint. Under the present practice, we think, the making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by limitations.

In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12(e) and thereafter applying for judgment on the pleadings under Rule 12(h)(1), or by moving for a summary judgment under Rule 56, we think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

Id. at 305-06.²

Whatever else one can say about *Conley*, neither the opinion in that case nor the Court that decided it can fairly be taxed with the confusion that the *Twombly* Court ascribed to the “no set of facts” language. Moreover, as my prepared statement and answer to Question 2 above demonstrate, responsibility for most of that “confusion” resided with the lower federal courts, not with the Supreme Court,³ and much of it was not confusion at all but rather a disguised attempt to circumvent the Enabling Act and the Court’s repeated rejection of attempts to impose heightened pleading requirements in certain categories of cases deemed to be problematic. In particular, consciously or unconsciously, the complaint-parsing that was barely evident in post-*Conley*, pre-*Twombly* Supreme Court opinions, but all too common in lower federal court cases, went far to restore the pre-Federal Rules demurrer or motion to dismiss for want of equity as described by the *Leimer* court in the first paragraph quoted above, effectively blurring the distinction noted by that court, as by the Court in *Conley*, between the function of a Rule 12(b)(6) motion and the various means by which to require or achieve greater factual specificity, including Rule 12(e). By “retiring” the “no set of facts” language in *Conley*, and relying (for the first time) on the “showing” language in Rule 8 and (for a purpose for which it was not intended) on the “fair notice” language of *Conley* as linguistic props for a plausibility requirement, the *Twombly* Court completed the process of conflating what the *Conley* Court saw as two analytically distinct requirements (virtually assuring the retirement of Rule 12(e) motions), at least in antitrust conspiracy cases. *Iqbal* both made it clear that this corruption of the original understanding of the Federal Rules was total corruption and, by the example of complaint-parsing that was both unusually aggressive and manifestly arbitrary, brought the Federal Rules perilously close to that which the drafters had repudiated. In considering the costs of the resulting system of fact pleading, it is essential to keep in mind that its rejection in 1938 was animated as much by the perception that it was unjust as it was by concern for the transaction costs of motion practice in search of elusive distinctions.

² The third decision cited by the *Conley* Court, *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (3d Cir. 1942), relies heavily on *Leimer*. See *id.* at 635.

³ This occasion does not permit me to develop in greater detail the treatment of *Conley* in Supreme Court decisions prior to *Twombly*. However, I believe that I have examined every Supreme Court decision quoting *Conley*, and I am satisfied that Justice Stevens’ account of that history is well-founded. See *Twombly*, 550 U.S. at 577 with n. 4 (Stevens, J., dissenting). Of course, as my answer to Question 2 above suggests, Justice Stevens has repeatedly demonstrated an awareness of the different roles of Rule 12(b)(6) and 12(e) that some of his colleagues may not have had in mind when invoking *Conley*.

