TORTURED PLEADINGS: THE HISTORICAL DEVELOPMENT AND RECENT FALL OF THE LIBERAL PLEADINGS STANDARD

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INTRODUCTION

In the days after the September 11, 2001 attacks, the Justice Department implemented Operation PENTTBOM (Pentagon/Twin Towers Bombing), a massive investigation under the aegis of the Federal Bureau of Investigation (FBI).[1] As part of the investigation, federal law enforcement officials established various policies and procedures that included the arrest of hundreds of Arab and Muslim men, primarily on immigration related charges.[2] The government identified these individuals as "September 11 detainees."[3] These men were subsequently confined to various facilities, including the Metropolitan Detention Center (MDC) in Brooklyn, New York.[4] After a thorough investigation, the Inspector General of the Department of Justice (DOJ) concluded that many detainees were beaten, denied medical treatment, deprived of religious freedoms, and denied due process rights while in custody.[5]

One of these detainees, Javaid Iqbal, sought redress for this treatment through a *Bivens* action[6] brought in the United States District Court for the Eastern District of New York.[7] In response, defendants Attorney General John Ashcroft and FBI Director Robert Mueller argued that the pleadings were too conclusory and thus the case should be dismissed pursuant to Rule 12(b)(6).[8]

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[1] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (2004).

[2] *Id.*

[3] *Id.* at 5.

[4] *Id.* at 5, 22.

[5] *See id.* at 142.

[6] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971). In *Bivens*, the Supreme Court of the United States recognized the right of plaintiffs to recover money damages as a result of Fourth Amendment violations by government actors. *Id.* The Court later extended this principle to other constitutional violations. *See, e.g.*, Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 67–68 (2001).

[7] Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at * 1 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd by* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[8] *See id.* at *12. Pleadings are the legal mechanisms by which an action commences, specifically, the document "sets forth or responds to allegations, claims, denials, or defenses." BLACK'S LAW DICTIONARY 1191 (8th ed. 2004). In the modern era, pleadings serve the purpose of providing the opposing party notice. These pleadings simply require the pleader to give only "a short and

The District Court denied the motion to dismiss, finding in favor of Mr. Iqbal.[9] The United States Court of Appeals for the Second Circuit largely affirmed the district court's ruling, the government appealed, and the Supreme Court granted certiorari and reversed.[10]

Rather than apply various procedural remedies available to respondents in the Federal Rules of Civil Procedure (FRCP), the government in *Ashcroft v. Iqbal* sought to elevate the burden on litigants at the pleadings stage by requiring plaintiffs to assert facts with particularity—a standard reserved for fraud or mistake in the FRCP.[11] The government's position is premised upon the Court's decision in *Bell Atlantic v. Twombly*.[12] There, the Court in an antitrust matter held that the plaintiffs, Twombly and others, failed to articulate plausible facts in support of their position.[13] In *Iqbal*, the Court extended the plausible facts standard to not only pleadings in claims against cabinet level government officials, but to all civil actions,[14] even though *Twombly* repeatedly rejected the application of a heightened pleading standard.[15] The challenge is that this new plausible language contravenes principles of fairness in pleadings, as well as the Supreme Court's seminal decision in *Conley v. Gibson*, where the Court did not qualify the facts and ruled that the purpose of a pleading standard is to provide defendants with notice.[16]

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plain statement of the claim showing that the pleader is entitled to relief" and not a complete detailing of all the facts. FED. R. CIV. P. 8(a)(2).

[9] *Iqbal*, 129 S. Ct. at 1942.

[10] *Id.* at 1942, 1945.

[11] FED. R. CIV. P. 9(b).

[12] *See Iqbal*, 129 S. Ct. at 1955.

[13] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 (2007). *But cf. id.* at 583 (Stevens, J. dissenting) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("[W]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*")).

[14] *See Iqbal*, 129 S. Ct. at 1953.

[15] *See Twombly*, 550 U.S. at 570.

[16] 355 U.S. 41, 47 (1957). Former chief drafter of the FRCP and Second Circuit Judge, Charles E. Clark defined the notice function of Rule 8(a)(2) as:

> that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or

As a result of accepting the petitioner's argument, civil rights plaintiffs must factually prove their cases in their initial pleadings where high-level government officials assert qualified immunity. Through its decision in *Iqbal*, the Court mandates the application of the plausibility standard created in *Twombly* to all civil actions. By adopting a de facto heightened fact pleading standard, the majority in *Iqbal* rebukes seventy years of a liberal pleading standard through judicial fiat rather than through the process established in the Rules Enabling Act of 1934.[17] Thus, Iqbal and all others who seek to challenge the authority and abuse of high level government actors, will be required to establish plausible facts in their initial pleadings to prove constitutionals violation before discovery—indeed, even before an answer is filed.

This note begins by exploring the plausibility of the facts involving Iqbal and the broader policy of holding and adjudicating "September 11 detainees," where the government detained hundreds of individuals without reliable or confirmable leads by supposed terror informants. Next, the fact-specific pleading is reviewed vis-à-vis the construction of the FRCP and the evolution of pleadings as they apply to civil rights litigants—specifically, the history of pleadings, followed by the juxtaposition of earlier pleading standards compared to the FRCP. Then, the note analyzes the commitment of the Supreme Court to a non-heightened liberal pleading standard and the broader implications of a heightened pleading standard on civil rights litigants. In particular, this article addresses the importance of a notice pleading where the government asserts qualified immunity. It will also discuss the devastating consequences of a heightened pleading standard on civil rights litigants. Next, this note reviews the Supreme Court's decision in *Iqbal*—Justice Kennedy's majority opinion and Justice Souter's dissent. And finally, it highlights the Congressional response to the creation

> transaction to be litigated—but not details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.

Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1943). For a better understanding of *Conley*, it is useful to look at the three court of appeals cases Justice Stevens discusses in his dissent that define pleadings contemporaneous to drafting of the Federal Rules: *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Continental Collieries v. Shober*, 130 F.2d 631 (3d Cir. 1942); *Leimer v. State Mutual Life Assurance Co. of Worcester, Massachusetts*, 108 F.2d 302 (8th Cir. 1940). *See Twombly*, 550 U.S. 544, 583.

[17] Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064.

and application of the de facto heightened pleading standard in *Iqbal*.

I. DETENTION AND ALLEGED ABUSE OF JAVAID IQBAL AND GENERAL TREATMENT OF SEPTEMBER 11 DETAINEES

A. The Detention and Abuse of Javaid Iqbal

In order to understand the implications of applying a heightened pleading standard in *Iqbal*, it is important to glean the basis of the cause of action and the broader post-September 11 detainee policy. There are two distinct issues: Iqbal's treatment at MDC and the decisions by policy-makers regarding the treatment of 9-11 detainees.

Law enforcement officials arrested Iqbal, a Pakistani Muslim man who installed cable boxes, and held him in solitary confinement, where he was subjected to horrific abuse for many months.[18] The detention was part of the "hold until clear" policy instituted by then-Attorney General John Ashcroft and FBI Director Robert Mueller that targeted all foreign born Muslim men in the New York area in the months following the September 11 attacks.[19]

Immigration and FBI agents arrested Mr. Iqbal on November 2, 2001.[20] On November 5, 2001 the government transferred Iqbal to the MDC in Brooklyn, New York—to be housed with the general population until his transfer to Administrative Maximum Special Housing Unit (ADMAX SHU)[21] on January 8, 2002.[22]

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[18] *See* First Amended Complaint & Jury Demand ¶¶ 9, 82, Elmaghraby v. Ashcroft, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (No. 04 CV 01809 JG SMG) [hereinafter Complaint], 2004 WL 3756442.

[19] The "hold until clear policy" established by high level officials in the Department of Justice required individuals arrested on immigration charges to be detained, oftentimes for months. The Justice Department deviated from normal INS procedures, detainees "were not allowed to depart or be removed from the United States before FBI clearance, even if an Immigration Judge ordered their removal or the detainees voluntarily agreed to leave." *The Sept. 11 Detainees: Hearing reviewing the treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the Sept. 11 Attacks Before the S. Comm. on the Judiciary*, 108th Cong. 66 (2003) [hereinafter *Detainees*] (testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice). Specifically those detained in the New York area were "deemed 'of interest'" for purposes of the "hold until clear" policy, regardless of the origin of the lead or any genuine indications of a possible connection to terrorism. *Id.* at 4.

[20] Complaint, *supra* note 18, ¶ 80.

[21] *Id.* ¶ 81. Generally, special housing units (SHUs) house inmates who are

Officials detained Iqbal in ADMAX SHU through the end of July 2002, at which time he was moved back to the general population.[23]

As a detainee in ADMAX SHU, Iqbal alleged in his complaint that he was subjected to cruel and inhuman treatment, excessive force, invasive body cavity searches, and denied due process.[24] Specifically, on January 8, 2002, Iqbal alleged that corrections officers threw him against a wall, kicked him in the stomach, punched him in the face, and dragged him across the floor.[25] As a result of this attack, Iqbal bled from his mouth and nose.[26] On March 20, 2002, corrections officers conducted three serial strip and body cavity searches.[27] Iqbal protested when officers sought a fourth consecutive search.[28] In response, officers punched and kicked him in his back and legs.[29] These officers then pulled Iqbal's arm through the slot on his cell door, causing excruciating pain.[30] Furthermore, the complaint alleges that after the assault, corrections officers denied Iqbal medical treatment and left him to suffer in pain for nearly two weeks.[31] Afterwards, another corrections officer allegedly urinated in the toilet in Iqbal's cell and then turned off the water until the next day so he could not flush.[32]

While in ADMAX SHU, Iqbal endured regular and systematic

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disruptive or require greater security. The Bureau of Prisons modified a wing at the MDC for September 11 detainees, known as ADMAX SHU. OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 19. The measures here were the most restrictive and secure conditions permitted by the Bureau of Prisons. *See id.* Eighty-four Muslim detainees were held at the MDC in Brooklyn, New York between September 14, 2001 and August 27, 2002. *Id.* at 111. Those determined to be of "special interest" or "high interest" were housed in ADMAX SHU at MDC. *Id.* However, the September 11 detainees were designated as Witness Security (WITSEC) inmates by the Bureau of Prisons. *Id.* at 115. This classification resulted in MDC officials withholding information from family members and detainees' attorneys. *Id.*

[22] Complaint, *supra* note 18, ¶ 81.

[23] *Id.*

[24] *Id.* ¶ 2.

[25] *Id.* ¶¶ 111, 113.

[26] *Id.* ¶ 115.

[27] *Id.* ¶¶ 116–17.

[28] *Id.* ¶ 118.

[29] *Id.* ¶ 119.

[30] *Id.* ¶ 121.

[31] *Id.*¶ 188.

[32] *Id.* ¶ 122.

abuse.[33] Every morning, corrections officers chained and shackled him while they searched his cell.[34] They would then subject him to a body-cavity search.[35] Furthermore, for every visit to the medical clinic, officers conducted three body-cavity searches: once before going and twice after.[36] Prior to court appearances, Iqbal endured two rounds of strip and body-cavity searches before going to court and then again upon return he went through two additional rounds.[37]

In addition, corrections officers employed various sensory deprivation measures that included leaving the lights on in the cell for nearly twenty-four hours a day, running air conditioners in winter months, and heating in summer.[38] The allegations further state that detainees were forced to exercise outside for hours until drenched with sweat in the middle of winter, and that they were then brought to cells with air conditioners on high.[39]

While in MDC, corrections officers routinely obstructed Iqbal's efforts to observe his faith.[40] Officers would bang on the cell doors during prayer, they regularly confiscated his copy of the Quran, and they refused access to join congregational prayer services on Friday.[41] When Iqbal asked about joining the Friday prayer service, officers informed him that there were "[n]o prayers for terrorists."[42]

As a detainee at MDC, detention officials severely restricted, if not outright denied, Iqbal's access to counsel.[43] On occasion, officials permitted contact with his defense attorney, however, MDC guards would stand next to Iqbal to monitor their conversations.[44] Upon any complaint of the conditions of his imprisonment, the phone would be disconnected.[45] Additionally, Iqbal's attorney was turned away from MDC on multiple instances, falsely informed by MDC staff that Iqbal had been

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[33] *Id.* ¶¶ 2–3.
[34] *Id.* ¶ 137.
[35] *Id.* ¶ 138.
[36] *Id.* ¶ 139.
[37] *Id.* ¶ 140.
[38] *Id.* ¶ 84.
[39] *Id.* ¶¶ 88–89.
[40] *See id.* ¶¶ 153–63.
[41] *Id.* ¶ 153.
[42] *Id.* ¶ 154.
[43] *See id.* ¶¶ 165–72.
[44] *Id.* ¶ 168.
[45] *Id.*

transferred.[46] Corrections officers also withheld Iqbal's legal correspondence, sometimes delaying receipt for up to two months.[47]

As a result of his confinement, "Mr. Iqbal lost over 40 pounds," and continues to this day to require medical treatment for the injuries he suffered, which include, "limited hearing, permanent injury to his right leg, gastrointestinal problems, and depression."[48] It is on this basis that Iqbal sought remuneration and accountability from those involved in approving his detention and subsequent treatment.[49] He now resides in Pakistan.[50]

Furthermore, it is important to recognize that although the aforementioned describes the broader practices of abuse carried out by lower level government actors, Iqbal named only Ashcroft and Mueller as defendants for their implementation and oversight of policies and decisions that fell within the scope of their official positions.[51] For example, in paragraph 96 of the complaint, Iqbal alleges that "Defendants ASHCROFT [and] MUELLER . . . each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest."[52] The Second Circuit confirmed the plausibility of these pleadings:

> [T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal

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[46] *Id.* ¶ 171.

[47] *Id.*

[48] *Id.* ¶¶ 91, 126.

[49] *Id.* ¶ 4.

[50] *Id.* ¶ 9.

[51] *See id.* ¶¶ 96–97, 232, 235, 250; *see also* Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents at *16, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4792462.

[52] Complaint, *supra* note 18, ¶ 96. In the district court this action commenced with two plaintiffs, Iqbal and Elmaghraby. *See* Elmaghraby v. Ashcroft, No. 04 CV 1809 JG SMG, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd by* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The government settled with Elmaghraby for $300,000. Linda Greenhouse, *Court to Hear Challenge from Muslims Held After 9/11*, N.Y. TIMES, June 17, 2008, at A16.

> charges in the New York City area and designated "of high interest" in the aftermath of 9/11.[53]

B. Facts Illustrated in Complaint Survive Twombly *"Plausibility" Standard*

This section will demonstrate in greater detail the plausibility that the Attorney General and/or other high level government officials condoned, or at a minimum were aware of, the unconstitutional policies implemented in the arrest and detention of September 11 detainees. Despite the government's assertions, even if *Twombly's* heightened "plausibility" standard is applied, there is sufficient evidence in the DOJ Inspector General's Report on September 11 Detainees to corroborate the plausibility of the allegations made by Mr. Iqbal.

1. High-Level Justice Department Officials Aware of Detention Policies

The Inspector General's report corroborates information provided in Iqbal's complaint and supports the plausibility that Attorney General John Ashcroft and FBI Director Robert Mueller knowingly made decisions that violated the constitutional rights of detainees. According to high-level Justice Department officials, the thrust and purpose of the government's post-September 11 investigation was to detain aliens who were suspected of potential ties to terrorism.[54] In fact, six weeks after the attacks, Ashcroft announced in a speech before the United States Conference of Mayors, "[i]t has been and will be the policy of this Department of Justice to use . . . aggressive arrest and detention tactics in the war on terror."[55] Six days later, on October 31, 2001, he declared:

> Today I'm announcing several steps that we're taking to enhance our ability to protect the United States from the threat of *terrorist aliens*. These measures form one part of the department's concentrated strategy to prevent terrorist attacks by taking *suspected terrorists* off the street.
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> . . . .
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> Aggressive *detention* of lawbreakers . . . is vital to preventing,

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[53] Iqbal v. Hasty, 490 F.3d at 175–76.

[54] OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 12.

[55] *Id.*

disrupting, or delaying new attacks.[56]

Any immigration law violation was sufficient to arouse such suspicion. Subsequently, 762 individuals were detained for violating federal immigration laws.[57] Ashcroft and Mueller established a policy that classified every Arab or Muslim arrested as "of interest," "of high interest," or "of undetermined interest," and required these men to be held without a hearing in high-security federal facilities across the country.[58] The Justice Department did not distinguish between individuals who had simply violated immigration laws as compared to those suspected of actual ties to terrorism.[59] These men were indiscriminately identified as "September 11 detainees," even though they were held on immigration or other non-terror related charges.

As a September 11 detainee, Iqbal endured a multitude of policies intended to prolong the adjudication and the detention process that violated basic constitutional protections. These included practices such as: the "hold until clear" policy that required denial of bond during immigration proceedings, being held in ADMAX SHU, and delays in post-release judgment hearings.[60] These policies were developed and consequently encouraged by the most senior levels of the DOJ.[61] This information was ascertained through the investigation and report prepared by the Inspector General of the Department of Justice.[62]

According to the report, the FBI, as the lead agency,

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[56] John Ashcroft, U.S. Att'y Gen., Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force (Oct. 31, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm (emphasis added).

[57] *Detainees*, *supra* note 19, at 64 (testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice).

[58] *See id.* at 66.

[59] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 47; *see also* Tamar Lewin, *A Nation Challenged: The Charges; Accusations Against 93 Vary Widely*, N.Y. TIMES, Nov. 28, 2001, at B6 (containing a table and discussion of the charges and non-terrorism convictions). In fact, according to the Senior Counsel in the Deputy Attorney General's Office, the "Criminal Division is examining each of the cases [September 11 detainees] to determine whether the person can be detained on criminal charges or on a material witness warrant if the person is ordered released from INS custody." OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 75.

[60] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 37.

[61] *See id.* at 37–38.

[62] *Id.*

implemented the "hold until clear" policy.[63] The Justice Department deliberately proscribed the creation of a written record of this policy.[64] The Department deviated from normal Immigration and Naturalization Service (INS) procedures and thus, as a result, detainees "were not allowed to depart or be removed from the United States before FBI clearance, even if an immigration judge ordered their removal or the detainees voluntarily agreed to leave."[65] As a consequence, the "hold until clear" policy cast a wide net of aspersion, particularly among those detained in the New York area deemed "of interest."[66]

The government held hundreds of individuals "regardless of the origin of the lead or any genuine indications of a possible connection to terrorism."[67] According to the Inspector General, the Office of the Deputy Attorney General maintained responsibility for oversight of immigration issues, and this task was specifically given to Associate Deputy Attorney General Stuart Levey.[68] When asked by the Office of Inspector General (OIG) about the "hold until clear" policy, Levey believed the policy to have emanated from "at least" the Attorney General.[69] Additionally, on September 27, 2001, the Senior Counsel in the Deputy Attorney General's office who worked with Levey sent an email to Attorney General Ashcroft's Chief of Staff, David Ayers, titled "Maintaining Custody of Terrorism Suspects."[70] In her brief, the same lawyer also provided justifications to the Attorney General for the "hold until clear" policy, titled "Potential AG Explanation."[71] Assistant Attorney General Michael Chertoff[72] confirmed discussions regarding the policy of holding September 11 detainees with the participants including the Attorney General, the Deputy Attorney General, and the FBI Director.[73] David Laufman, the Deputy Attorney General's Chief of Staff,

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[63] *See id.* at 37.

[64] *Detainees*, supra note 19, at 66 (testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 75.

[69] *Id.* at 38.

[70] *Id.*

[71] *Id.*

[72] Michael Chertoff would later go on to serve as the nation's second Secretary of Homeland Security.

[73] OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 39.

suggested to immigration officials that immigration violations should be "leveraged" against September 11 detainees where there was "insufficient information for criminal [prosecution]."[74] Daniel Levin, Counselor to the Attorney General, acknowledged a "continuous meeting" on the topic of holding detainees until they cleared.[75] The individuals in these conversations included the most senior members of the Justice Department: Attorney General Ashcroft, Deputy Attorney General Thompson, FBI Director Mueller, and Assistant Attorney General Chertoff.[76]

2. Collective Failure to Recollect

When the Inspector General asked about these meetings, Mueller responded that he "did not recall being involved in any discussions about the 'hold until cleared' policy."[77] Deputy Attorney General Thompson remembered the "decision to hold without bond" as well as being "in favor of requiring the clearance process 'within the bounds of the law.'"[78] The Deputy Attorney General explained "that investigating and prosecuting could not be the focus . . . the Department needed to aggressively protect public safety."[79] Attorney General Ashcroft acknowledged that the DOJ "could [not] hold anyone 'forever' without regard to a predicate offense."[80] This implies, however, that it would be acceptable to hold individuals without concern for due process if there was some predicate offense. The Attorney General further stated that "he had no reluctance to" legally detain individuals "who had violated the law."[81]

The INS adopted the term "of interest" to apply to "aliens arrested on immigration violations in connection with [Operation PENTTBOM]."[82] The FBI and INS detained many illegal aliens, irrespective of whether the alien had any terrorist connections, during the course of Operation PENTTBOM.[83] Less than six weeks after the September 11 attacks, on October 22, 2001, an

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[74] *Id.*
[75] *Id.* at 39–40.
[76] *Id.*
[77] *Id.* at 40.
[78] *Id.* (first internal quotation marks omitted).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *See id.*

INS official became concerned about a potential *Bivens* action if the detainees were not timely released.[84] In fact, these sentiments were relayed by Dea Carpenter, the Deputy General Counsel of INS, at a meeting attended by Senior Counsel from the Deputy Attorney General's office, attorneys from the Terrorism and Violent Crime Section, lawyers from the FBI's Office of General Counsel, and other FBI representatives.[85]

According to the Inspector General, the clearance process for a September 11 detainee lasted eighty days on average.[86] These delays were known to senior agency officials. "Chertoff recalled orally raising the issue of the pace of clearance investigations with FBI Director Mueller and Assistant Director Watson."[87] When asked by the Inspector General, Director Mueller again "did not recall hearing about any problems with the clearance policy until the spring or summer of 2002."[88] This is surprising because as early as late September of 2001, news reports from major publications across the country documented delays and the secrecy of the arrest and detention process.[89]

Other high-level government officials expressed concern about the clearance process, including INS Commissioner John Ziglar, who called Director Mueller on October 2, 2001, to discuss challenges the INS faced in obtaining clearances from the FBI. [90] Deputy Director Pickard returned the call and Ziglar shared his views regarding the FBI's ability to investigate detainees of "interest" held by INS.[91] Furthermore, Ziglar informed Pickard that the INS would begin releasing detainees unless the INS received written releases in a timely manner.[92] Deputy Director

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[84] *Id.* at 55. On October 22, 2001, counsel to INS Director Ziglar submitted a memorandum explicitly expressing her concern that INS officials may be subject to *Bivens* liability. *Id.*

[85] *See id.*

[86] *Detainees*, *supra* note 19, at 68 (testimony of Glenn A. Fine, Inspector General, U.S. Department of Justice).

[87] OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 66.

[88] *Id.*

[89] *See* Dan Malone, *800 Detainees Shrouded in Blanket of Secrecy; FBI, INS Aren't Talking; Immigration Courts Ban Families from Hearings*, DALLAS MORNING NEWS, Oct. 21, 2001, at 18A; *see also* Julian Barnes, *No Honeymoon*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 17; Thomas Farragher & Stephen Kurkjian, *Fighting Terror in Detention; Secrecy on Arrests Fuels Rights Debate About 1,000 Held After Terror Attacks*, BOSTON GLOBE, Oct. 29, 2001, at A1.

[90] OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 66.

[91] *Id.*

[92] *Id.*

Pickard had no recollection of the conversation with Ziglar or "of any complaints from the INS regarding the [efficiency] of the FBI clearance process."[93]

On November 7, 2001, Ziglar also shared his concerns about the FBI clearance process with the Attorney General's Deputy Chief of Staff, David Israelite.[94] Israelite failed to recollect his conversation with Ziglar, and could not recall any complaints regarding the clearance process either.[95] Similarly, neither the Attorney General nor the Deputy Attorney General could recollect hearing any complaints concerning the FBI's clearance process.[96]

In an effort to shorten the detention process, INS officials sought to amend the DOJ's "no bond" policy.[97] The inter-agency draft memorandum advised the FBI that because the extent to which the detainee "may be of interest" to the FBI was unknown, "[a]bsent further action on your part, we intend to remove the alien from the United States pursuant to the Order on (date)."[98] Ziglar's Chief of Staff, Victor Cerda, faxed the draft to Associate Deputy Attorney General Stuart Levey on October 9, 2001.[99] The Commissioner informed the OIG that he had a "clear recollection" of Cerda's conversation with Levey.[100] In this communication, Levey insisted that the INS not adopt the memorandum and that there was no need to put the clearance process in writing.[101] Levey could not remember making the comment about documenting the clearance process.[102]

However, he raised the issue of the FBI's failure to provide sufficient and timely information to INS attorneys for bond hearings with Daniel Levin, Counsel to the Attorney General.[103] Levin also informed the OIG that he had no recollection of that

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[93] *Id.*

[94] *Id.* at 66–67.

[95] *Id.* at 67.

[96] *Id.*

[97] *Id.* at 84. Generally, district directors within the INS determine the initial bond for individuals charged with immigration violations. *Id.* at 45 n.41. Due to the Justice Department's "no bond" policy, September 11 detainees were not afforded this process. *Id.*

[98] *Id.* at 84.

[99] *Id.*

[100] *Id.* at 85.

[101] *Id.*

[102] *Id.*

[103] *Id.*

discussion.[104] It was the policy of the DOJ to detain the September 11 detainees for as long as possible.[105] In fact, Attorney General Ashcroft informed the Inspector General that "even though some detainees may have wanted to be released or may have been willing to leave the country, it was in the national interest to find out more about them before permitting them to leave."[106] The Deputy Attorney General further explained that "an individual arrested and detained posed no ongoing threat to the United States, and therefore law enforcement officials could focus on arresting others still at large who did pose a potential threat."[107] Assistant Attorney General Chertoff echoed this historic policy shift—where the government's strategy was to arrest individuals without any particularized suspicion of terrorism—to simply arrest first, ask later.[108]

As stated earlier, INS officials warned the FBI Director and other Justice Department officials of the potential *Bivens* liability by late October of 2001.[109] In fact, by December, multiple detainees had filed habeas corpus petitions.[110] Various witnesses from the FBI, INS, and other divisions confirmed that habeas cases were top priority for the Justice Department and, as such, the Deputy Attorney General's office was aware of the claims and legal issues raised by aliens challenging their detention—contrary to the assertions of Ashcroft and Mueller.[111] FBI General Counsel Larry Parkinson knew that detainees were filing habeas corpus petitions and that members of his staff believed there was limited basis to contest them.[112] Parkinson briefed Director Mueller on this concern.[113] "Director Mueller could not recall this particular briefing, but did not dispute that it occurred."[114]

There is also evidence of direct involvement of senior Justice Department officials instructing Bureau of Prisons officials as to the treatment of September 11 detainees. Bureau of Prisons

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[104] *Id.*
[105] *Id.* at 12.
[106] *Id.* at 74.
[107] *Id.*
[108] *See id.*
[109] *Id.* at 55.
[110] *See id.* at 102.
[111] *Id.* at 100.
[112] *Id.* at 102.
[113] *Id.*
[114] *Id.*

Director, Kathy Hawk Sawyer, received phone calls from the Deputy Attorney General's Chief of Staff, David Laufman, and Principal Associate Deputy Attorney General, Christopher Wray.[115] They sought to restrict the ability of detainees to communicate both outside and inside MDC.[116] They also advised her to "not be in a hurry" to provide September 11 detainees access to counsel or social calls.[117] Laufman and Wray generally "confirmed the substance of the conversations."[118] Subsequently, a communications blackout was implemented for detainees on September 17, 2001, and this policy lasted nearly a month.[119]

Not only are Mr. Iqbal's allegations *plausible*, but the aforementioned facts reveal a disturbing fact: the highest level officials within the Justice Department either knowingly created or, at a minimum, operated a system that violated the constitutional rights of detained individuals. The Department developed a "hold until clear" policy whereby aliens arrested in Operation PENTTBOM were indiscriminately labeled with varying degrees of "interest," regardless of any material connection to terrorism. Then, detainees, including Iqbal, were held for months under conditions that were tantamount to torture. Although Mueller and Ashcroft repeatedly denied knowledge of concerns raised by their deputies and other senior government officials—the Inspector General's report lays a foundation, as recognized by Judge Gleeson of the United States District Court for the Eastern District of New York[120]—and thus Iqbal's pleading ought to have survived even under the heightened standard argued by the government.

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[115] *Id.* at 112.

[116] *Id.* at 112–13. Although Iqbal was not detained at this time, it is telling that Ms. Hawk Sawyer received such instructions from the Deputy Attorney General's Chief of Staff.

[117] *Id.* at 113.

[118] *Id.*

[119] *Id.*

[120] *See* Elmaghraby v. Ashcroft, No. 04 CV 1809 JG SMG, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd by* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (recognizing that a complaint must not "be viewed in a factual vacuum," specifically citing the Inspector General's report).

II. HISTORY OF PLEADINGS AND THE FEDERAL RULES OF CIVIL PROCEDURE

This section focuses on the rich history of pleadings and the government's efforts to subvert the pleadings system—a system drenched in equity. The government's interpretation of *Twombly*, accepted by the majority in *Iqbal*, requires federal courts to impose a heightened pleading standard, where the plaintiff anticipates that the defense may assert qualified immunity.[121] This view directly disregards the historical evolution of pleadings from the common law to the eventual adoption of the FRCP. Specifically, this section will catalog these developments in pleadings from the rigid common law standard developed in England seven centuries ago through the modern liberal application. It will also analyze the various tools available to both litigants and jurists in managing cases under the Federal Rules and discuss the government's argument that would require plaintiffs to anticipatorily plead for qualified immunity.

A. Common Law Pleading

Prior to the establishment of the FRCP, various forms of pleadings were applied, including the common law pleading and the Field Code.[122] Both of these systems were far more procedurally rigid than the FRCP and required greater particularity in the complaint.[123] Common law pleadings, also known as *issue pleadings* because the primary purpose was the framing of an issue,[124] developed in England in the thirteenth century during the reign of King Edward I.[125] This arcane system required a plaintiff to first obtain the appropriate writ that was a certified "right of action recognized by the King."[126] Upon

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[121] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).

[122] Adopted by New York in 1848, by the late 1930s over half the states in the Union adopted code pleadings. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 100 (1994).

[123] *Id.* at 99–101.

[124] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 56 (2d ed. 1947).

[125] *Id.* at 12–13.

[126] Brooks, *supra* note 122, at 99. Brooks further illustrates that writs were limited "in number and divided into branches, such as the actions of replevin and trespass *vi et armi*s." *Id.* at 99. He goes on to explain that identifying the appropriate writ could be challenging, "[f]or example, if the plaintiff sustained

purchasing the appropriate writ, the plaintiff then had to specify the claim to identify the issues in the cause of action.[127] However, for all the difficulties of the common law standard, the movement to change did not establish a foothold until the middle part of the nineteenth century, when the courts of law and equity began to consolidate.[128] In addition, plagued by these challenges and legal fictions, one nineteenth century scholar explicated that the "incongruit[ies] between . . . procedure and . . . substantive law" paved the groundwork toward the reformation of the common law pleading.[129] Specifically, reformers argued that the common law pleading system failed to adapt to the tremendous growth in substantive rights because it inherently valued form over substance.[130]

B. Birth of Code Pleadings

Although there were several attempts to change pleading standards, New York's adoption of the code pleading in 1848 culminated in the first merger of not only law and equity, but also a much simplified form of pleading in the United States.[131] New York's shift signified a historic change to a five-and-half-century-old pleading system.[132] States that subsequently used code pleadings shared common characteristics, including: (1) a basis of common law procedures; (2) a single form of action; and (3) a limited pleading premised upon facts.[133] Though less cumbersome and rigid than its predecessor, code pleadings still required that a plaintiff's claim "set forth '[t]he material facts on which a cause of action or defense is based.'"[134] Thus, they were referred to as *fact*

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an 'indirect injury,' the appropriate writ was not the ordinary writ of trespass, which offered redress for 'direct injuries' but the writ of trespass on the case." *Id.*

[127] *Id.*

[128] The United States merged the two systems in 1848 followed by England in 1873. CLARK, *supra* note 124, at 19. The state of New York adopted the Code standard in 1848. *Id.*

[129] CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 31 (Lawbook Exchange, Ltd. 2002) (1897).

[130] *Id.*

[131] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 428 (6th ed. 2002).

[132] *See id.*

[133] HEPBURN, *supra* note 129, at 12.

[134] Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not*

pleadings because of the primacy of stating the appropriate facts.[135] The realities of the pleadings under the code system frustrated jurists across the nation. Judge Charles Pratt, in his address before the Ohio Bar Association in 1895, complained that although the Ohio Code "requires the pleading to be in *ordinary and concise language*, . . . no one would suspect from an examination of the files of any of our courts that such provision existed."[136] Even after forty years of code pleadings, the United States had "been constantly refining upon and encumbering them with useless phrases and innumerable repetitions, until our pleadings, instead of being simple statements of fact in ordinary and concise language, have become intricate and complex systems of special pleading[s]."[137] Other critics argued about the contentious nature of code pleadings because facts were not always "definite and certain."[138]

C. The Federal Rules of Civil Procedure and Modern Pleadings

As early as 1921, after visiting the British Bar for three weeks, U.S. Supreme Court Chief Justice William Howard Taft urged reforms by consolidating the federal courts and, consequently, the pleading systems.[139] In a speech later that year, he also supported the American Bar Association's efforts to delegate to the Court the ability to regulate the rules of procedure in suits at law.[140] The Chief Justice clairvoyantly suggested the mechanisms by which to implement the reform;[141] his recommendations would

Adopted the Federal Rules of Civil Procedure, 46 VILL. L. REV. 311, 345 (2001) (quoting 42 PA. CONS. STAT. ANN. § 1019(a) (West 2000)); *see id.* at 345 n.136 (the Field Code required "a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended" (internal quotation marks omitted)).

[135] CLARK, *supra* note 124, at 56.

[136] HEPBURN, *supra* note 129, at xii (internal quotation marks omitted).

[137] *Id.*

[138] CLARK, *supra* note 124, at 57.

[139] *See* William Howard Taft, *Three Needed Steps of Progress,* 8 A.B.A. J. 34, 35–36 (1922) (articulating his concerns regarding reforming procedure in the federal courts).

[140] William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

[141] *Id.* (discussing that the committee could consist of federal judges appointed by the Court).

not be implemented for another thirteen years, however.[142]

In 1935, following the passage of the Rules Enabling Act of 1934, the Supreme Court appointed the Advisory Committee on the Civil Rules.[143] Dean Charles E. Clark served as the Reporter of this committee.[144] In order to understand the development of the FRCP, it is important to recognize that the "underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law." [145] Clark confirmed this in his explanation of the history of pleadings and the adoption of principles used by chancellors to modern pleadings.[146] Due to the hyper-technical nature of common law pleadings, the clergy "who occupied the office of Chancellor . . . [developed] the simpler methods of pleading . . . ."[147] Equity provided complete justice by consolidating multiple issues into one.[148]

The direct consequence of the earlier pleading standards limited the ability of plaintiffs to bring their cases to the federal courts because of the priority of form over substance. The Advisory Committee intended to reverse this concept, whereby procedure would be an instrument of equity and serve as the "'handmaid rather than mistress' of justice."[149] Contrary to the common law and the code—the aforementioned *fact* and *issue* specific pleading standards—the Advisory Committee sought to infuse a "'liberal ethos,' in which the preferred disposition is on

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[142] In 1934, Congress enacted the Rules Enabling Act, fulfilling Chief Justice Taft's vision. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064.

[143] *See* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 273 (1989).

[144] *Id.* at 273. Clark served as dean of Yale Law School and would later become chief judge of the United States Court of Appeals for the Second Circuit. John H. Schlegel, *Legal History Symposium Honoring Professor Wythe Holt: CLS Wasn't Killed by a Question*, 58 ALA. L. REV. 967, 968 (2007).

[145] Tobias, *supra* note 143, at 275 (quoting Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987) (stating, in fact, that the "Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery")) (internal quotation marks omitted).

[146] The principles of equity laid the foundation of the current notice pleading, leaving the chancellor to determine what was "fair and just." *Id.* at 287 (quoting Subrin, *supra* note 145 at 968).

[147] WALTER C. CLEPHANE, HANDBOOK OF THE LAW OF EQUITY PLEADING AND PRACTICE 7 (1926).

[148] *See id.*

[149] CLARK, *supra* note 124, at 54 (quoting *In re* Coles, [1907] 1 K.B. 1 (C.A. 1906)).

the merits, by jury trial, after full disclosure through discovery."[150] This was encapsulated by Clark, who explained that "[p]leading is not an end in itself, but only a means to an end—the working out of justice through the rules of substantive law."[151] Clark's statement is reflective of the paradigm shift in thought—from the aforementioned subordinate function of law to form—to the new ethos rooted in equity.

1. Heightened Pleadings in the Federal Rules of Civil Procedure

"The drafters of the Federal Rules expressly rejected the code pleading requirement that complaints set forth facts sufficient to state a cause of action."[152] The modern pleading system emanates from Rule 8 of the FRCP, specifically 8(a)(2).[153] Oftentimes referred to as the keystone to the federal rules, this rule replaced the Code pleading that required facts constituting a cause of action with simply "a short and plain statement of the claim showing that the pleader is entitled to relief."[154]

The Court articulated the meaning and overarching purpose of pleadings and Rule 8(a)(2) in *Conley v. Gibson*.[155] In this decision the Court "placed its imprimatur on the liberal, flexible pleading regime."[156] Without mincing words, the Court held 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."[157] The first court to deviate from this standard and adopt a heightened pleading standard in a civil rights case was a district court in Connecticut in 1968.[158] Since then, various

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[150] Tobias, *supra* note 143, at 274 (quoting Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986)).

[151] CLARK, *supra* note 124, at 54.

[152] Main, *supra* note 134, at 327.

[153] WRIGHT, *supra* note 131, at 470.

[154] FED. R. CIV. P. 8(a)(2). For a discussion comparing the FRCP with the Field Code, see Christopher M. Fairman, *Heightened Pleadings*, 81 TEX. L. REV. 551, 554–59 (2002).

[155] 355 U.S. 41 (1957).

[156] Tobias, *supra* note 143, at 297.

[157] *Conley*, 355 U.S. at 45–46.

[158] *See* Valley v. Maule, 297 F. Supp. 958, 960–61 (D.C. Conn. 1968) (contending that as an important part of public policy, courts must "weed out the frivolous and insubstantial [civil rights] cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate

circuit courts have applied heightened pleadings, despite the Supreme Court's repeated commitment to the notice standard. Over the past two decades, the Court struck down circuit decisions that imposed heightened standards on at least five occasions.[159]

In 1993, the Court, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, rejected the Fifth Circuit's adoption of a heightened pleading standard involving civil rights cases alleging municipal liability under § 1983.[160] Five years later, confronted with a prisoner's § 1983 claim in *Crawford-El v. Britton*, the Court reminded us that:

> [i]n the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense . . . or requiring pleadings of heightened specificity in cases alleging municipal liability.[161]

In *Swierkiewicz v. Sorema N. A.*, the plaintiff-employee alleged that he had been fired on account of his national origin.[162] Here, the Court reversed the Second Circuit's heightened standard that required a plaintiff to establish a prima facie case of discrimination.[163] In rejecting the heightened standard, the Court recognized that this would require a plaintiff to make a prima facie case without direct evidence at the filing of the complaint, before the opportunity of discovery.[164] Furthermore, Justice Thomas, writing for a unanimous Court, acknowledged that it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered."[165]

In *Twombly*, an anti-trust case, the rationale that formed the basis of the government's argument in *Iqbal*, the Court concluded

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claims").

[159] *See* Erickson v. Pardus, 551 U.S. 89 (2007); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Crawford-El v. Britton, 523 U.S. 574 (1998); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[160] 507 U.S. at 164.

[161] 523 U.S. at 595 (citation omitted).

[162] 534 U.S. at 509.

[163] *Id.* at 509–10.

[164] *Id.* at 511.

[165] *Id.* at 511–12.

that it would not adopt a heightened pleading standard.[166] However, despite this, the Court inserted the additional qualification of "plausible" to the facts a party pleads.[167] In reaching this conclusion, the Court reconciled *Twombly* with prior precedent by holding that the plaintiff failed to allege sufficient facts to "state a claim to relief that is *plausible* on its face."[168] The far reaching consequences of this have effectively overturned the *Conley* standard which proscribed a motion to dismiss 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."[169]

Most recently, in *Erickson v. Pardus*, a case involving a prisoner § 1983 claim, the Court overturned the Tenth Circuit.[170] The circuit court determined that the prisoner's pleading was conclusory because he had merely alleged that his Eighth Amendment right was violated by a deliberate indifference to a serious medical need.[171] In *Erickson*, the Supreme Court cited to both *Twombly* and *Conley* as the basis for interpreting Rule 8(a)(2) of the FRCP.[172] Though, unlike *Twombly*, the Court did not discuss the "plausible" qualification to facts in plaintiff's pleading.

Various federal courts continue to apply heightened pleading standards as the norm, carving out exceptions by narrowly interpreting the cases decided by the Supreme Court. Generally, these courts rationalize the fact-specific standard because of: "(1) the higher standard discouraged frivolous litigation and abuse; (2) the higher standard encouraged civil rights cases to be filed in state courts; and (3) the increasingly large volume of cases."[173] All this while the FRCP already requires heightened pleadings in the limited circumstances enumerated in Rule 9, discussed below.[174] Jack B. Weinstein, former chief judge of the U.S. District Court for the Eastern District of New York, noted that the aforementioned justifications for a heightened pleading contradict the purpose of the Federal Rules: in 1938, the Rules were

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[166] *Twombly*, 550 U.S. at 570.

[167] *Id.*

[168] *Id.* (emphasis added).

[169] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

[170] 551 U.S. 89, 90 (2007).

[171] Erickson v. Pardus, 198 Fed. App'x 694, 698 (10th Cir. 2006).

[172] *Erickson*, 551 U.S. at 93 (citing *Twombly*, 550 U.S. at 545 (quoting *Conley*, 355 U.S. at 47)).

[173] Main, *supra* note 134, at 332.

[174] *See infra* notes 188–90 and accompanying text.

"optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter."[175]

2. Existing Mechanisms in the Federal Rules of Civil Procedure to Address Pleading Insufficiencies

In *Iqbal*, the petitioners, Ashcroft and Mueller, contended that the Supreme Court should grant their motion to dismiss because the facts were insufficient to survive a qualified immunity defense.[176] The discussion of qualified immunity will be detailed below. However, it is important to note the strategy employed by the petitioners, an issue raised by the Justices during oral argument.[177] Rather than seek other remedies available in the FRCP, the petitioners sought to require the Court to create a narrow heightened pleading exception for cabinet and high-level government officials.[178]

The FRCP permits various remedies and mechanisms for both litigants and judges. In circumstances where the pleadings fail to specify allegations, so that the defendant is not afforded adequate notice, the defendant may move for a more definite statement pursuant to Rule 12(e).[179] Furthermore, the rules permit defendants to file a motion for summary judgment if the claims lack merit.[180] Under Rule 7(a)(7), the district judge may order a reply to an answer where defendant asserts qualified immunity, by requiring plaintiff to respond with a more definite statement.

Challenges arise when defendants seek to apply a heightened pleading standard. Frustrated by the majority's decision in *Twombly*, Justice Stevens extensively discussed the various options available in his dissent.[181] Court precedent explains that

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[175] Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 2–3 (1988).

[176] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

[177] *See* Transcript of Oral Argument at 3–7, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

[178] *See Iqbal*, 129 S. Ct. at 1944.

[179] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (discussing the multitude of options afforded in the FRCP to manage pleadings).

[180] FED. R. CIV. P. 56(b).

[181] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 595 n.13 (2007) (Stevens, J., dissenting).

"[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[182] These mechanisms were created in a conscious effort by the drafters of the FRCP to avoid the shortcomings of code and common law pleadings, where a simple error in the pleading resulted in dismissal of a case. Unlike its predecessors, the principles of equity are paramount in the Federal Rules.

3. Federal Rules of Civil Procedure Amended Pursuant to Rule-Making Process

While reversing the heightened pleadings requirements of the circuit courts, the Supreme Court has repeatedly reminded us that requiring greater specificity in pleadings cannot be effected by the courts;[183] rather, it must be achieved through the

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[182] Hishon v. King, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). Justice Stevens, in *Twombly*, expressed concerns, specifically:

> The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant's answer . . . . Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," Rule 16(c)(1); "the necessity or desirability of amendments to the pleadings," Rule 16(c)(2); "the control and scheduling of discovery," Rule 16(c)(6); and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," Rule 16(c)(12). Subsequently, Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. Indeed, Rule 26(c) specifically permits a court to take actions "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

Twombly, 550 U.S. at 595 n.133 (citations omitted).

[183] *See* Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515 (2002); *see also Twombly*, 550 U.S. at 569 n.14 (affirming the prior precedent regarding amending the FRCP, though not reversing the Second Circuit); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

statutorily mandated rule-making process.[184] In fact, the Court articulated the process in *Amchem Products, Inc. v. Windsor*:

> Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. . . . Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right."[185]

Since the adoption of the FRCP, Congress has approved various amendments to adjust to the circumstances and needs of the federal judiciary, yet Rule 8(a)(2) has not been amended. The only recommendation made would require that plaintiffs produce a "'short and plain statement of the claim' that allege facts sufficient to establish a *prima facie* case in employment discrimination."[186] This proposed amendment failed.[187]

Furthermore, the FRCP already contains limited circumstances where the plaintiff is required to plead the facts with particularity;[188] for example, Rule 9(b) is limited to averments of fraud or mistake.[189] In rejecting the application of a heightened pleading standard to situations beyond those enumerated in Rule 9, the Court repeatedly reiterated the maxim "[*e*]*xpressio unius est exclusio alterius*."[190] Thus, the Court

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[184] 28 U.S.C. §§ 2071–74 (2006); Jones v. Bock, 549 U.S. 199, 224 (2007) ("We once again reiterate, however-as we did unanimously in *Leatherman, Swierkiewicz,* and *Hill*-that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.").

[185] 521 U.S. 591, 620 (1997) (citing 28 U.S.C. §§ 2072–74 (2006)). Warning the majority in *Twombly*, Justice Stevens argued, "I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so." *Twombly*, 550 U.S. at 579.

[186] ADVISORY COMM. ON CIVIL RULES, CIVIL RULES SUGGESTIONS DOCKET (HISTORICAL) 6 (2008), http://www.uscourts.gov/rules/Civil_Docket.pdf (the docket contains the suggested changes to the FRCP by the Advisory Committee since 1992).

[187] *Id.* (revealing that the Advisory Committee declined to take action on the proposed change to Rule 8(a)(2)).

[188] *See Swierkiewicz*, 534 U.S. at 513.

[189] FED. R. CIV. P. 9(b).

[190] *Twombly*, 550 U.S. at 576 n.3; *Swierkiewicz*, 534 U.S. at 513; Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). *Expressio unis est exclusio alterius* is defined in Black's Law Dictionary as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

recognized the drafters' intent to restrict the usage of the heightened pleading standard.

4. Qualified Immunity and Pleading Standard

In *Iqbal*, the government asserted qualified immunity and thus sought relief contending that Iqbal's initial pleadings failed to anticipate such a defense. They successfully shifted the burden upon plaintiffs who asserted civil rights claims against high level government officials. In making this claim, the government asked the Supreme Court to directly contravene centuries-old precedent of fairness and equity in pleadings in order to prevent discovery.[191] In *Louisville & Nashville Railroad Company v. Mottley*, the Court acknowledged that the federal courts did not have jurisdiction where the plaintiff failed to allege the basis of the federal jurisdiction and that, although the defendant may assert a federal claim, it does not establish federal jurisdiction.[192] Similarly, in *Boston & Montana Consolidated Copper & Silver Mining Co. v. Montana Ore Purchasing Co.*, Justice Peckham warned:

> It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up, and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it *before* the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading . . . and is improper.[193]

In *Jones v. Bock*, a case decided in the same term as *Twombly*, the Court rejected the government's proposition in *Iqbal*, concluding that a pleader need not anticipate nor negate an affirmative defense—in order to produce a short and plain statement—where defendant asserts qualified immunity for § 1983 or *Bivens* claims.[194] In *Bock*, a prisoner alleged that his constitutional rights were violated for deprivation of medical

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[191] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (citing Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894)).

[192] *Id.* at 153 ("A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under the Constitution or those laws." (internal quotation marks omitted)).

[193] 188 U.S. 632, 638–39 (1903) (emphasis added).

[194] 549 U.S. 199, 212 (2007).

treatment. In response, the warden argued that the plaintiff's pleadings were too conclusory, but the Supreme Court held that the prisoner plaintiff did not have the burden of pleading an affirmative defense.[195] Contrary to the government's efforts in *Iqbal* to shift the burden to the prisoner plaintiff, the Court rejected similar assertions in *Gomez v. Toledo*, stating that "[i]t is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith."[196]

III. IMPLICATIONS OF A HEIGHTENED PLEADING STANDARD—DEATH KNELL TO CIVIL RIGHTS LITIGANTS

The imposition of the heightened pleading standard effectively forecloses judicial recourse to civil rights plaintiffs. The Supreme Court's holdings in *Leatherman*, *Swierkiewicz*, *Erickson*, and *Bock* rejected the application of a heightened pleading to weed out frivolous civil rights claims, especially in light of the procedural tools of discovery and summary judgment for this purpose.[197] Consequently, the adoption of the government's pleading standard overruled *Leatherman* and will require federal courts to apply pleading standards aimed specifically at civil rights plaintiffs that would keep out of court all but the most particularly plead violations determined to be "plausible."

Historically, civil rights challenges have served as the bedrock mechanism through which civil rights plaintiffs have protected their constitutional rights and transformed American society.[198] Law Professor Eric K. Yamamoto has questioned, "would Korematsu . . . have filed the *coram nobis* petition if such litigation posed risks beyond the stigma of losing and the commitment of countless hours of volunteer time?"[199] Inspired by Korematsu's success, two other individuals were successful in

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[195] *Id.* at 207.

[196] 446 U.S. 635, 640 (1980).

[197] Erickson v. Pardus, 551 U.S. 89, 94 (2007); *Bock*, 549 U.S. at 224; Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993).

[198] Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L REV. 341, 420 (1990) (highlighting the beneficial societal impact of civil rights litigation).

[199] *Id.* at 343.

their petitions for *coram nobis*, which eventually served as a catalyst for the government's payment of $1.2 billion dollars in reparations to Japanese Americans internees.[200]

Already, as Judge Weinstein notes, through judicial activism judges have erected barriers to the courtroom "under the guise of procedural efficiency."[201] The dangers of these "'procedural machinations' . . . [will] 'have the effect of denying substantive rights, but without any of the procedural safeguards attached to public and legislative decision-making.'"[202] Although those in favor of a heightened pleading standard contend that this burden would be shared equally amongst all plaintiffs, in reality, minorities are ten times more likely to seek civil rights litigation redress.[203] Additionally, a heightened standard will burden most civil rights plaintiffs, who generally have fewer resources and less information than the governmental defendant.[204]

Under the guise of our national security, the government in *Iqbal* sought to establish a heightened pleading standard that neither the FRCP nor the Court's precedent permitted. The adoption of a heightened pleading standard undeniably sounds the death knell to civil rights plaintiffs, indeed all plaintiffs, by raising the bar. In the post-*Twombly* era, there is evidence that courts are justifying a heightened pleading standard in civil rights litigation.[205] There are further indicia that the federal interpretation of the pleading standard has had a corollary

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[200] *Id.* at 342.

[201] Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 107 (2008).

[202] *Id.*

[203] *See* Brooks, *supra* note 122, at 108 (discussing the disparate impact of pleading standards through the lens of critical race theory).

[204] Tobias, *supra* note 143, at 300–01 (1989) (explaining that a heightened standard would disproportionately impact civil right litigants by requiring specificity in their complaints because they may lack the financial resources to meet the higher standard).

[205] *See* Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(B)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1846 (2008). Furthermore, in the few shorts months since *Iqbal*, over 1,600 cases have cited to it in dismissing plaintiff claims. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Access to Courts Hearing*] (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), *available at* 2009 WL 4303979; *see also* Adam Liptak, *Case About 9/11 Could Bring Broad Shift in Civil Suits*, N.Y. TIMES, July 29, 2009, at A10.

impact on pleading requirements among the states.[206] Thus, the Supreme Court's adoption of a heightened pleading standard not only inhibits civil rights plaintiffs from finding relief in federal courts, but many states may be inclined to follow, further limiting aggrieved individuals' access to the courts.

IV. THE SUPREME COURT'S EXTENSION OF THE PLAUSIBILITY STANDARD AND THE RESPONSE BY CONGRESS

A. Justice Kennedy's Decision

Despite the aforementioned arguments, the Court reversed the Second Circuit in *Iqbal*, concluding that Iqbal's pleadings failed to satisfy the plausibility standard set forth in *Twombly*.[207] Although there were two grounds upon which the Supreme Court granted *certiorari*, the discussion below will focus on the Court's analysis regarding the pleading standard.

1. Framing the Standard in Iqbal

Justice Kennedy, writing for the majority, deconstructed Iqbal's pleading by announcing that vicarious liability is not applicable to *Bivens* and § 1983 claims. Thus, "plaintiff[s] must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[208] Where a plaintiff asserts a claim of invidious discrimination in violation of the First and Fifth Amendments, he continued, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose."[209] He explained that discriminatory purpose requires more than a showing of "intent as volition or intent as awareness of consequences."[210] Rather, according to precedent, the government actor's actions must have been taken "'because of' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group."[211] Consequently, the burden rests upon Iqbal to "plead sufficient factual matter to show that

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[206] Hannon, *supra* note 205, at 1836–38.

[207] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1945 (2009).

[208] *Id.* at 1948.

[209] *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993); Washington v. Davis, 426 U.S. 229, 240 (1976)).

[210] *Id.* (internal quotation marks omitted) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

[211] *Id.*

petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[212] Additionally, the majority rejected Iqbal's argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose" qualifies as a constitutional violation.[213]

2. Defining Plausibility

The Court then embarked on an effort to explain the creation of the plausibility standard in *Twombly* and its application to *Iqbal*. The Court began by affirming the language of Rule 8(a)(2): "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'"[214] However the pleading must have more than a simple "the-defendant-unlawfully-harmed-me accusation," and "a formulaic recitation of the elements of a cause of action will not do."[215] As an added qualification, in order to survive a motion to dismiss, the complaint must contain facts that "state a claim to relief that is plausible on its face."[216] A pleading satisfies the plausibility standard "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[217] The Court then elucidates that plausible pleadings require more than a "sheer possibility" of wrongful conduct by defendant, concluding by drawing a distinction between pleadings that "stop[] short of the line between possibility and plausibility."[218]

Interestingly, the majority in *Iqbal*, including those who adhere to strict constructionist ideology, in one brief sentence, dismisses the historical evolution of pleadings, the intent of the drafters of the FRCP, the role of Congress to amend the Rules, and the half-century of precedent discussed in detail above. The majority

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[212] *Id.* at 1948–49.

[213] *Id.* at 1949.

[214] *Id.*

[215] *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (second internal quotation marks omitted).

[216] *Id.* (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).

[217] *Id.* (citing *Twombly,* 550 U.S. at 556).

[218] *Id.* (internal quotation marks omitted) (quoting *Twombly,* 550 U.S. at 557) (drawing the clearest difference between the departure from the *Conley* "no set of facts" pleading standard and the plausible standard adopted in *Twombly*).

acknowledges that although Rule 8 provides a "notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[219] Justice Kennedy wrote, the plausibility standard is "context-specific," requiring courts to rely on their "judicial experience and common sense."[220] In order to accomplish this, courts must engage in a two-step process to determine whether a plaintiff is entitled to relief: (1) there must be well-pleaded factual allegations; then (2) the court must determine whether the allegations are plausible for the relief.[221] The Court instructs that "where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has [only] alleged—but . . . not 'show[n]'—'that the pleader is entitled to relief.'"[222]

3. The "Implausibility" of Iqbal's Claims

Applying the *Twombly* pleading standard, the majority concluded that Iqbal's pleading of invidious discrimination failed to "'nudge[] his claims' . . . 'across the line from conceivable to plausible.'"[223] In reaching this conclusion, the Court examined Iqbal's complaint applying the two-step plausibility analysis. The pleading alleged that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate

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[219] *Id.* at 1950.

[220] *Id.*

[221] *Id.* at 1949–50.

[222] *Id.* at 1950 (citing FED. R. CIV. P. 8(a)(2)).

[223] *Id.* at 1951. *But cf.* al-Kidd v. Ashcroft, 580 F.3d 949, 974–75 (9th Cir. 2009) (concluding that Ashcroft may be held liable in a case involving similar facts where the government detained individuals based upon the material witness statute). The Ninth Circuit attempts to distinguish *al-Kidd* from *Iqbal*, however, facts and allegations remain eerily alike. The primary rationale for the plausibility of al-Kidd's allegations rests upon quotations by Ashcroft, Mueller, and other DOJ officials in the complaint. *See id.* However, not dissimilar statements from the OIG Report were part of the Record in *Iqbal*. *See, e.g.*, Elmaghraby v. Ashcroft, No. 04 CV 1809 JG SMG, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd by* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

penological interest.'"[224] Additionally, Iqbal claimed that Ashcroft was the "principal architect"[225] of the policy and Mueller was "instrumental"[226] in its application. The Court described these claims as "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[227] According to Justice Kennedy, the complaint failed to show that Ashcroft and Mueller adopted a discriminatory policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"[228] and thus, the pleadings were "conclusory and not entitled to be assumed true."[229] Notably, the majority paused here to emphasize that the claim was not rejected at this step because the allegations were "unrealistic or nonsensical," but due to their "conclusory nature."[230]

In the second step of the plausibility test, the Court determined whether the allegations, in fact, plausibly suggested an entitlement to relief. The analysis in *Iqbal* rests on two paragraphs of respondent's complaint, namely 47 and 69. The Court commenced with Iqbal's allegation that "the [FBI], under the direction of Defendant M[ueller], arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."[231] The complaint also alleged that "[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants A[shcroft] and M[ueller] in discussions in the weeks after September 11, 2001."[232] Although, the majority found the assertions to be consistent with Iqbal's claim of purposeful discrimination, they concluded that there are "more likely explanations" of the detention policies and thus Iqbal's claims "do not plausibly establish this purpose."[233]

Justice Kennedy contended that the primary alternate and more plausible purpose relates to the legitimate law enforcement

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[224] *Iqbal*, 129 S. Ct. at 1951 (citing Complaint, *supra* note 18, ¶ 96).

[225] *Id.* (quoting Complaint, *supra* note 18, ¶ 10).

[226] *Id.* (quoting Complaint, s*upra* note 18, ¶ 11).

[227] *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[228] *Id.* (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 256, 279 (1979)).

[229] *Id.* (citing *Twombly*, 550 U.S. at 554–55).

[230] *Id.*

[231] *Id.* (quoting Complaint, *supra* note 18, ¶ 47).

[232] *Id.* (quoting Complaint, s*upra* note 18, ¶ 69).

[233] *Id.*

policy to arrest and detain individuals allegedly linked to the September 11 attacks.[234] He continued, "[i]t should come as no surprise" that the government's response "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[235] Therefore, the majority determined that the arrests were legitimate because Director Mueller merely sought to detain those in the United States illegally with potential ties to terrorism. In evaluating the two explanations for the actions of Ashcroft and Mueller, the Court concluded that the "invidious discrimination" argued by Iqbal was "not a plausible conclusion."[236]

The analysis does not end here, however. In the absence of Iqbal challenging the constitutionality of his arrest, the claim still fails because the complaint did not state plausible facts showing that Ashcroft and Mueller "purposefully adopted a policy of classifying post–September–11 detainees as 'of high interest' because of race, religion, or national origin."[237] Furthermore, the Court disregarded Iqbal's factual allegation accusing Ashcroft and Mueller of approving a policy of holding detainees "until they were cleared by the FBI."[238] The Court justified this policy by asserting that "[a]ll it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[239] In the eyes of the Court, Iqbal's complaint did not cross the arbitrary and subjective line that differentiates a claim from conceivable to plausible.[240]

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 1951–52. Not only did the Court not find it plausible but, during oral argument, Justice Scalia minimized the fact that merely hundreds of individuals had been detained without due process.

[237] *Id.* at 1952.

[238] *Id.* (internal quotation marks omitted).

[239] *Id.*

[240] *See id.* at 1954 (Souter, J., dissenting). It is important to note following the discussion on the pleading standard, the majority also minimized the utility of the other mechanisms available to district judges in managing discovery by emphasizing the importance of qualified immunity and therefore justifying Ashcroft and Mueller's actions within the context of the trauma of the September 11th attacks.

B. Justice Souter's Dissent

Justice Souter's dissent criticized the majority's application of the pleading standard developed in *Twombly*.[241] He began by challenging the Court's analysis regarding the issue of supervisory liability and concluded that "Ashcroft and Mueller [concede] that an officer may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat superior*."[242] Thus, in light of this concession, he argued that Iqbal's complaint comported with Rule 8(a)(2).[243] Justice Souter illustrated that under the aforementioned standard, Ashcroft and Mueller were liable because they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination."[244] He then assembled various elements of Iqbal's complaint that not only alleged that Ashcroft and Mueller "knew of and condoned the discriminatory policy" but that they "affirmatively acted to create the discriminatory detention policy."[245]

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[241] *Id.* at 1955.

[242] *Id.* at 1954–55.

[243] *Id.* at 1958.

[244] *Id.*

[245] *Id.* at 1959. These allegations are discussed in greater detail above, but Souter, J., outlined certain allegations in the wake of the Sept. 11 attacks, namely:

> 1. The FBI "arrested and detained thousands of Arab Muslim men," and that "many of these men were designated by high-ranking FBI officials as being 'of high interest'" and that Iqbal and others were assigned this designation "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity." *Id.* (quoting Complaint, *supra* note 18, ¶¶ 47–50) (first and last internal quotation marks omitted).
>
> 2. Attorney General Ashcroft "was the 'principal architect of the policies and practices challenged.'" *Id.* (quoting Complaint, *supra* note 18, ¶ 10).
>
> 3. FBI Director Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged." *Id.* (quoting Complaint, *supra* note 18, ¶ 11) (internal quotation marks omitted).
>
> 4. Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* (quoting Complaint, *supra* note 18, ¶ 96) (internal quotation marks omitted).

As the author of *Twombly*, Justice Souter rejected the majority's interpretation and application of the "plausibility standard" to the allegations in Iqbal's complaint. He argued that "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true."[246] In fact, rather than a narrower standard, he articulated that precedent demands a more generous standard.[247] The only exceptions are "allegations that are sufficiently fantastic to defy reality as we know it . . . [and] [t]hat is not what we have here."[248] The proper analysis under *Twombly* requires asking if "the factual allegations are true, [whether] the plaintiff has stated a ground for relief that is plausible."[249] In other words "a plaintiff must 'allege facts' that, taken as true, are 'suggestive of illegal conduct.'"[250]

He then juxtaposed the application of the plausibility standard in *Twombly* to the facts in *Iqbal*. In *Twombly*, the allegations of conspiracy in an anti-trust case were "as much in line with a wide swath of rational and competitive business strategies unilaterally prompted by common perceptions of the market."[251] Thus, in those limited circumstances, the plaintiff who seeks relief must provide "some further factual enhancement."[252] By comparison, the facts in *Iqbal*, Souter found, were sufficiently well-plead and entitled respondent to relief.[253] He stated that the failure, indeed "the fallacy of the majority's position . . . lies in looking at the relevant assertions in isolation."[254] Contrary to the majority's claim, in viewing the allegations *in toto*, Justice Souter found that Iqbal's allegations were not "conclusory," nor merely a "'formulaic

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[246] *Id.* at 1959.

[247] *See id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (highlighting that "a court must proceed 'on the assumption that all the allegations in the complaint are true (even if doubtful in fact)'")); *see also id.* (citing *Twombly*, 550 U.S. at 556) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable."); *id.* (citing Neitzke v. Williams, 490 U.S. 319, 327 (1989)) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's belief of a complaint's factual allegations.").

[248] *Id.*

[249] *Id.*

[250] *Id.* (quoting *Twombly*, 550 U.S. at 564 n.8).

[251] *Id.*

[252] *Id.* at 1960.

[253] *Id.* (citing *Twombly*, 550 U.S. at 570).

[254] *Id.* (reviewing the specific allegations involving the actions of senior FBI officials in New York).

recitation of the elements' of a constitutional discrimination claim."[255] Rather, Iqbal had specifically articulated a "particular, discrete, discriminatory policy" and the respective roles played by Ashcroft and Mueller, in his complaint.[256] Thus, Souter concluded—returning to the purpose of pleadings articulated by the drafters of the rule—Iqbal's complaint provided the petitioners "fair *notice* of what the . . . claim is and the grounds upon which it rests."[257]

C. Congressional Concern over the Decision

Disturbed by the Court's logic and interpretation of the pleading standard enumerated in Rule 8(a)(2), the former chair of the Senate Judiciary Committee, Arlen Specter introduced S. 1504, the Notice Pleading Restoration Act of 2009.[258] The bill seeks to revert the standard for dismissal under Rule 12(b)(6) or (e) to *Conley*. In his floor statement, Senator Specter highlighted that the Supreme Court in *Twombly* "jettisoned the standard set forth in Conley and announced that henceforth it would require not only factual specificity in complaints not previously required of plaintiffs, but also that a complaint's allegation of wrongdoing appear 'plausible' to the court."[259] Furthermore, in *Iqbal*, Specter explained the Court's decision "significantly expanded upon Twombly . . . effectively authorizing federal judges to indulge their 'subject judgments' in evaluating an allegation's plausibility."[260]

Specter then emphasized the role of Congress in amending the FRCP pursuant to the Rules Enabling Act.[261] In his criticism of *Twombly* and *Iqbal*, Specter contended that the Court "effectively end ran that process."[262] Consequently, many "meritorious claims" will never be heard in court due to the subjective nature of the Court's new standard.[263] Senate Judiciary Chair, Patrick

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[255] *Id.* at 1960–61.

[256] *Id.* at 1961.

[257] *Id.* (emphasis added) (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted).

[258] 155 CONG. REC. S7890 (daily ed. July 22, 2009) (statement of Sen. Specter).

[259] *Id.* at S7891.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

Leahy, similarly voiced his displeasure with *Iqbal* because the new pleading standard fundamentally undermines a plaintiff's ability to seek redress, reminding us "that a right without a remedy is no right at all."[264]

Some scholars have expressed concern regarding Senator Specter's approach for not conforming to the procedures set forth in the Rules Enabling Act.[265] Senator Specter's general counsel to the Judiciary Committee responds:

> [I]n Twombly and Iqbal the Supreme Court effectively end-ran the Rules Enabling Act by amending long-standing rules of pleading. Senator Specter's [bill] would restore those rules and require the Court to observe the procedures set forth in the Act if it is of the view they should be amended. Note that Senator Specter's bill, unlike some other proposals, leaves the Court free to amend the pleading rules in accordance with the Rules Enabling Act.[266]

It is important to note that Congress has previously amended the Rules on various occasions beyond the process set forth in the Rules Enabling Act.[267]

Recently, the House Judiciary Committee has taken a keen interest in the new pleading standard articulated in *Iqbal*. Both the Constitution and the Court subcommittees have conducted hearings on the implications of the new plausibility standard.[268] Jerrold Nadler, Constitution, Civil Rights, and Civil Liberties Subcommittee Chair, in his opening statement, expressed not

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[264] *Access to Courts Hearing*, *supra* note 205 (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

[265] *See, e.g.*, *id.* (statement of Stephen B. Burbank, Professor of Law, University of Pennsylvania), *available at* http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf.

[266] E-mail from Matthew Wiener, General Counsel to Senator Arlen Specter, Senate Committee on the Judiciary, to Muhammad Umair Khan (Sept. 14, 2009, 19:07 EST) (on file with author).

[267] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7047(b), 102 Stat. 4181, 4401 (amending FED. R. CIV. P. 35); Equal Access to Justice Act, Pub. L. No. 96-481, § 205(a), 94 Stat. 2325, 2330 (1980) (repealing former subsection (f) of FED. R. CIV. P. 37). Congress has also rejected proposed amendments promulgated by the Judicial Conference and enacted substitute amendments in the instance of Rule 4 regarding procedures governing delivery of a summons. *See* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

[268] *Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Access to Justice Hearing*]; *Open Access to the Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009).

only his concern, but the need for Congress to respond.[269] Specifically, he introduced the Open Access to Courts Act of 2009[270] with Courts Subcommittee Chair, Hank Johnson, and Judiciary Chair, John Conyers, Jr., "to correct this misreading of the rules, and restore the standard followed . . . since the Supreme Court's decision in *Conley*."[271] Additionally, Chairman Nadler, like Senator Specter, recognizes that the *Iqbal* standard "will reward any defendant who succeeds in concealing evidence of wrongdoing . . ." and thus the decision "will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge's take on the plausibility of a claim."[272] Sharing these sentiments, Chairman Conyers expressed his worries over the impact of the plausibility standard because *Iqbal*, he argued makes it "harder for people to enforce their rights in court. The progress that had been made to open the courthouse doors to everyone is slowly being undone."[273] He concluded, "'Congress is now tasked with fixing *Iqbal*' in a manner that will 'restor[e] justice in the courts.'"[274] When asked about the significance of the legislation, Rep. Mike Honda, co-sponsor and chair of the Congressional Asian Pacific American Caucus explained:

> "Open access to courts is a fundamental principle in our justice system . . . ." "Allowing these decisions [*Twombly* and *Iqbal*] to stand will weaken the enforcement of our laws, including our nation's treasured civil rights laws. Asian American and Pacific Islander communities have long fought for equality in many domestic areas, including citizenship laws, enforcement against hate crimes, the protection of voting rights, and the rights of English language learners in our education system. As a Japanese American whose family was interned during World War II solely based on race, I know that we must restore the notice pleading standard to ensure that the most vulnerable in our communities may obtain redress in America's courts."[275]

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[269] *Access to Justice Denied: Hearing*, *supra* note 268 (statement of Rep. Jerrold Nadler).

[270] H.R. 4115, 111th Cong. § 2 (2009). This legislation accomplishes two important goals: (1) the bill revives the "no set of facts" standard for motions to dismiss; and (2) it proscribes the application of the "plausibility" framework.

[271] E-mail from Kanya Bennett, Counsel, House Committee on the Judiciary, to Muhammad Umair Khan (Nov. 13, 2009, 13:57 EST) (on file with author) (internal quotation marks omitted).

[272] *Id.* (internal quotation marks omitted).

[273] *Id.* (internal quotation marks omitted).

[274] *Id.*

[275] E-mail from Gloria Chan, Executive Director of the Congressional Asian

CONCLUSION

The FRCP are based in equity,[276] and the primary purpose of the drafters of Rule 8 was to provide notice to the defendant.[277] The authors of the Federal Rules eliminated the need to plead facts as required in the code pleadings or the arcane common law. Consequently, the question for the Court should be simply, did the pleadings asserted by Iqbal in his complaint provide the defendants notice as to the claims against them? Applying any other measure betrays not only the letter of Rule 8(a)(2), but also violates its spirit.

Iqbal adds another dimension by requiring the plaintiff to challenge policies set forth by the highest level officials in our government. The founders of this nation were distrustful of power. The debates during the Constitutional Convention of 1787 are rich with examples of their suspicion of the consolidation and abuse of power.[278] By finding for Ashcroft and Mueller, the Court significantly foreclosed the ability of individuals wronged by the government to challenge the actions of government officials.[279] The Court's approval of the petitioner's argument shields high-level government officials because plaintiffs are now required to plead facts that are hidden behind the shrouds of security classifications. In effect, *Iqbal* creates another standard of immunity, even though the Supreme Court has already concluded that high level government officials are not entitled to absolute immunity.[280] Perhaps most disconcerting is that in *Iqbal*, the plaintiffs had the benefit of an Inspector General's Report mandated by Congress in the USA PATRIOT Act, which provided

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Pacific American Caucus, to Muhammad Umair Khan (Dec. 15, 2009, 15:51 EST) (on file with author).

[276] *See* Subrin, *supra* note 145, at 922.

[277] Weinstein, *supra* note 201, at 108 ("[T]he function of the pleading was not to prove the case," rather it was intended to "restrict the pleadings to the task of general notice-giving and invest in the deposition-discovery process with a vital role in the preparation for trial." (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)) (internal quotation marks omitted)).

[278] *See generally* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 64–66 (W.W. Norton & Co., Inc. 1969) (1966) (revealing the general mistrust of a powerful executive and fear of creating an elective monarchy).

[279] *But see* Butz v. Economou, 438 U.S. 478, 504 (1978) (explaining that *Bivens* damages can "be a vital means of providing redress for persons whose constitutional rights have been violated").

[280] Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982).

a plausibility framework. Others will not be as fortunate.

Lastly, the Court's decision reverses centuries-old precedent in the evolution of pleadings and abrogates the rights of individuals to challenge unconstitutional actions of high-level government officials. The subjective plausible standard advanced by the Court will lead to greater inconsistency in the administration of justice as judges are asked to determine whether a pleading is plausible. As Senator Specter has observed, the majority of the Court has paid lip service to the notice pleading standard, meanwhile reverting to a fact pleading. The Court sought to change the rule but they failed to adhere to appropriate process set forth in the Rules Enabling Act, meanwhile re-writing the pleading requirements, leaving both litigants and jurists unclear as to the new standard.