

ASHCROFT v. IQBAL: THE QUESTION OF A HEIGHTENED STANDARD OF PLEADING IN QUALIFIED IMMUNITY CASES

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I. INTRODUCTION

In *Ashcroft v. Iqbal*, the Supreme Court will decide the pleading requirement that a complainant must meet in order to bring a viable claim against high-ranking government officials¹ for their subordinates' allegedly unconstitutional actions. The case marks an intersection between the liberal pleading rules of federal procedure and the qualified immunity generally provided to high government officials. On June 14, 2007, the Second Circuit affirmed in part and reversed in part a decision by the Eastern District of New York denying the motions to dismiss of several current and former government officials from the Department of Justice ("DOJ"), including Attorney General John Ashcroft, the Federal Bureau of Investigation ("FBI"), including Director of the FBI Robert Mueller, and the Bureau of Prisons ("BOP").²

Following his arrest by the FBI and Immigration and Naturalization Service ("INS"), Iqbal, a Muslim originally from Pakistan, was designated as a "high interest" detainee and separated from the general jail population.³ Despite the four arguments for

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1. Generally, "high-ranking officials" does not have a specific definition, but courts have used their discretion in differentiating these senior officers from those "front-line officials" who have access to less confidential information. Due to their access to sensitive information, district courts subject high-ranking officials only to tightly controlled discovery, and only after discovery of front-line individuals has demonstrated a need for further discovery from higher ranking officials. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

2. *Id.* at 147.

3. *Id.* at 147-48.

reversal put forward by the defendants, the Second Circuit held that Iqbal established a genuine claim that should continue to discovery without meeting the stricter pleading standard the government officials argued was needed to overcome their qualified immunity.⁴

In finding the defendants' "qualified immunity defense" insufficient to justify the case's early dismissal, the Second Circuit made two important holdings. The first holding found that based on conflicting signals between the Supreme Court's *Bell Atlantic Corp. v. Twombly*⁵ holding and that case's progeny,⁶ courts should apply a flexible "plausibility standard" for pleadings. This is not a heightened pleading standard for all cases, but is rather a standard applied at the court's discretion. The court can request that a pleader support his claim with additional factual allegations where the court determines some amplification is needed to make the claim plausible.⁷ Secondly, the court held that for pleading purposes, the supervisors' personal involvement in the harsh treatment of the detainee was sufficient to impute to them knowledge of the policies and procedures concerning the arrest and detention of detainees in the New York federal system.⁸

On June 16, 2008, the Supreme Court granted government officials Ashcroft and Mueller's Petition for Writ of Certiorari to determine whether Iqbal's conclusory complaint that the high-ranking officers' condoned alleged unconstitutional acts committed by their subordinates is sufficient to state a claim against the high-ranking officials or whether the allegation should be dismissed at the preliminary stage because of the policy underlying officials' qualified immunity defense.⁹

4. *Id.* at 178.

5. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2006).

6. *See, e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 69 (1993) (finding the courts have a duty to weed out unmeritorious claims before discovery); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding that plaintiff does not have to present clear and convincing evidence of improper motive in order to defeat an official's motion for summary judgment).

7. *Iqbal*, 490 F.3d at 157-158.

8. *Id.* at 166.

9. *Grant of Writ of Certiorari, Ashcroft v. Iqbal*, 128 S. Ct. 2931 (mem.) (June 16, 2008) (No. 07-1015).

II. FACTS & PROCEDURAL HISTORY

In the months after 9/11, all Arab or Muslim men arrested in the New York City area on criminal or immigration charges were classified as “high interest” until the FBI concluded an investigation of the allegations against them.¹⁰ This practice resulted in several men being detained for months without evidence linking them to 9/11 or any other terrorist plot.¹¹

Plaintiff Iqbal is a Muslim from Pakistan who was arrested a few weeks after the September 11, 2001, terrorist attacks on New York City and Washington, D.C.¹² Following his arrest, Iqbal was placed in the general population of a Brooklyn jail until January 8, 2002, when he was assigned to a special section of the jail reserved for “high interest” detainees. There, he was subjected to the most restrictive type of control available within the jail.¹³

Iqbal’s complaint alleges that during his time in the high-security section of the prison, he was kept in solitary confinement, was not supplied with adequate food, was left in the rain for extended periods of time, had his prayers interrupted, had his conversations with an attorney interrupted, and was brutally beaten by guards when he protested a fourth consecutive strip and body cavity search.¹⁴ Iqbal spent six months in the prison’s high-security ward before being released back into the general prison population after ultimately pleading guilty to two conspiracy charges.¹⁵

In 2004, Iqbal¹⁶ sued Attorney General Ashcroft, Director of the FBI Mueller, seven other federal officials, various prison staff, and the United States for twenty-one claims, including religious discrimination, ethnic discrimination, and various Eighth Amendment claims such as interference with his conferences with counsel.¹⁷ The defendants moved to dismiss Iqbal’s action for four reasons: (1) the

10. *Iqbal*, 490 F.3d at 148.

11. *Id.*

12. *Id.*, at 147–48.

13. *Id.* at 148.

14. *Id.* at 149.

15. *Id.*

16. Following the Eastern District’s ruling on the motion to dismiss, co-plaintiff Elmaghraby’s claims against the United States were settled for \$300,000. Thus, Elmaghraby’s claims will not be at issue in the appeal. *Id.* at 147.

17. *Id.* at 149–50 n.3.

action was “precluded by special factors,” namely the post-9/11 context; (2) the defendants were all protected by “qualified immunity”; (3) the doctrine of *respondeat superior* did not extend to the supervisory defendants; and (4) some of the defendants were not subject to personal jurisdiction in the state of New York.¹⁸

The district court denied Ashcroft’s and Mueller’s motions to dismiss and they appealed on the basis of the second argument—qualified immunity.¹⁹ The two officers appealed to the Second Circuit Court of Appeals, which held that Iqbal’s complaint sufficiently stated a claim against the federal officials.²⁰ Defendants Ashcroft and Mueller then appealed to the Supreme Court.²¹

III. LEGAL BACKGROUND

Ashcroft v. Iqbal has a complicated genealogy due to the breadth of the issues on appeal. The first issue is the applicability of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, which allows private causes of action against government officials for violating certain constitutional rights.²² The “*Bivens* suit” is a unique cause of action stemming from the fact that officials inherently pose a greater threat to individuals’ rights than do private persons, thus justifying the federal courts’ use of broad discretion crafting relief to remedy constitutional wrongs at the hands of government officials.²³ As the *Bivens* opinion notes, because the availability of a qualified immunity defense was not decided by the Court of Appeals, the Supreme Court did not address the applicability of the defense.²⁴ But, as the majority implied, the qualified immunity defense question would eventually require discussion.²⁵

A line of cases followed that considered whether a plaintiff must meet an enhanced pleading standard—beyond that of the notice

18. *Id.* at 150.

19. *Elmaghraby v. Ashcroft*, 2005 WL 2375202 (E.D.N.Y. 2005).

20. *Iqbal*, 490 F.3d at 143.

21. *Id.* at 151.

22. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that a search and arrest of plaintiffs’ private residence made without probable cause and by federal agents acting under the color of his authority gives rise to a private cause of action for damages due to the agents’ unconstitutional conduct).

23. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

24. *Bivens*, 403 U.S. at 397–98.

25. *Id.*

pleading dictated by the Federal Rules of Civil Procedure²⁶—in order to defeat the presumption of qualified immunity that typically protects government officials.²⁷ The qualified immunity discussions in these cases tended to reach similar conclusions: where a supervisory position is sufficient to absolve a defendant of liability based on qualified immunity, efforts to expand pleading requirements in any manner without a congressional amendment to the Federal Rules have failed.²⁸

A. *The Basics of Bivens Suits*

The resolution of *Iqbal*'s issue of whether conclusory allegations fulfill the pleading standards against high-ranking officials will greatly aid federal courts in defining the outermost borders of a *Bivens* cause of action.²⁹ Though the holding in *Bivens* dealt specifically with establishing a private cause of action against federal officers for violations of Fourth Amendment rights,³⁰ the Court has also allowed *Bivens* suits in cases involving violations of the Eighth Amendment.³¹ Generally, the facts required in pleadings are governed by Rule 8(a)(2) of the Federal Rules of Civil Procedure. Under Rule 8(a)(2), conclusory allegations are sufficient to overcome a motion to dismiss.³² The law remains unsettled, however, as to whether a heightened pleading standard is required in *Bivens* actions, particularly when the defendant establishes a “qualified immunity defense” and the allegations are limited to supervisory involvement, racial or religious animus, or conspiracy.³³

Establishing the pleading requirements in a qualified immunity case is necessary to preserve the very existence of the doctrine, the

26. A pleading that states a claim for relief must contain, in relevant part, “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2).

27. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

28. *Bell Atlantic Corp.*, 550 U.S. at 554.

29. Petition for Writ of Certiorari, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (Feb. 6, 2008) (No. 07-1015).

30. *Bivens*, 403 U.S. at 397.

31. See *Carlson v. Green*, 446 U.S. 14, 19 (1980) (finding that a *Bivens* action was allowed in an Eighth Amendment case, even where it would not be sustained under normal tort law).

32. *Supra*, note 26.

33. *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007).

purpose of which is to protect high-level government officials from unnecessary interference with the performance of their duties.³⁴ Rather than creating a mere defense to liability, qualified immunity is an affirmative defense to a law suit even being entertained by a court, but it is waived if not asserted during the preliminary proceedings of a trial.³⁵ Because the Court has not clearly delineated how the *Bivens* doctrine and qualified immunity interact, the Second Circuit dealt with seemingly conflicting precedent when it analyzed whether conclusory allegations in a pleading suffice to overcome the qualified immunity defense.³⁶

This unsettled gap in the law is evident when one considers the Second Circuit's application of *Colon v. Coughlin*³⁷ in the case at hand. In *Colon*, the Second Circuit allowed a prisoner to assert a private cause of action against a state prison commissioner alleging a conspiracy by local prison officials.³⁸ The court permitted the action even though the complaint set forth no facts connecting the prison commissioner to the supposed conspiracy or suggesting deficient training of the prison officials.³⁹ The court held that the personal involvement of a supervisor can be established with evidence that the supervisor "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom . . . or the [supervisor] exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring."⁴⁰

Similarly, the Second Circuit allowed Iqbal to use a constructive notice theory to sue high-level government supervisors for their subordinates' unconstitutional actions. This theory enabled Iqbal to establish Ashcroft and Mueller's personal involvement in the actions based solely on their positions of authority and, according to Iqbal, take them outside the aegis of the qualified immunity doctrine.

34. *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J. concurring).

35. *Id.*, at 526.

36. *Hasty*, 490 F.3d at 155–57.

37. *Colon v. Coughlin*, 58 F.3d 865, 867 (2d Cir. 1995).

38. *Id.*

39. *Id.* at 873.

40. *Id.*; *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir. 1986).

B. The Supreme Court's Treatment of a Heightened Pleading Standard Requirement

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Supreme Court found that it would be “impossible to square [a] ‘heightened pleading standard’ [for qualified immunity] . . . with the liberal system of ‘notice pleading’ set by the Federal Rules.”⁴¹ *Leatherman* recognized that the Federal Rules provided specific instances in which greater particularity than the “short plain statement” could be required in a complaint. Because neither of the specific instances involved the claim brought by the claimants, the Court refused to apply the greater particularity standard.⁴² Emphasizing the Court’s history of refusing to interpret the federal pleading rules beyond their express language,⁴³ Justice Rehnquist’s majority opinion stressed the federal courts’ role in using summary judgment and control of discovery to “weed out” unmeritorious claims.⁴⁴ This characterization of the judiciary’s role in controlling litigation can be extended to support the maintenance of the qualified immunity doctrine’s integrity via summary judgment and discovery, thus sidestepping the specific procedure of amending the Federal Rules.

Five years later, the Supreme Court addressed the question again in *Crawford-El v. Britton* and rejected a heightened pleading standard for a prisoner’s claim seeking damages from a correctional officer for a constitutional claim requiring proof of improper motive—malice.⁴⁵ The Court determined that the complainant does not have to produce evidence of improper motive at the pleading stage to defeat a motion of summary judgment. Instead, the Court opted to protect government officials at a later stage in the proceedings by requiring a heightened standard of *proof* for cases based solely on malice, thereby emphasizing the courts’ abilities to tailor discovery under Rule 26 rather than their power to dismiss a claim in summary judgment.⁴⁶ The Court’s holding that “‘bare allegations of malice’ cannot overcome

41. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

42. *Id.*

43. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

44. *Leatherman*, 507 U.S. at 168.

45. *Crawford-El v. Britton*, 523 U.S. 574, 577 (1998).

46. *Id.* at 588 (citing *Harlow v. Fitzgerald*, 547 U.S. 800, 817–18 (1982)).

the qualified immunity defense” maintained the protection afforded officials by employing the very tools Chief Justice Rehnquist outlined in *Leatherman*.

More recently the Court made its most direct ruling on the pleading standard for qualified immunity cases in *Swierkiewicz v. Sorema*. In *Swierkiewicz*, the Court not only held that a heightened pleading standard was inapplicable to an employment discrimination plaintiff, but also that a “requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”⁴⁷ This holding continues to emphasize the concerns put forward by Chief Justice Rehnquist in *Leatherman* and the Court’s commitment to respecting the traditional Rules’ amendment process before the Court imposes a higher pleading standard than the standard currently required.⁴⁸ Although the Court has not reconsidered its position since *Swierkiewicz*, a circuit split regarding the pleading required to overcome the qualified immunity remains.

C. “Plausibility” and *Bell Atlantic Corp. v. Twombly*

The Court’s most recent developments regarding the standard for assessing the adequacy of pleadings occurred in *Bell Atlantic Corp. v. Twombly*, which involved the dismissal, for failure to state a claim, of an antitrust case brought by consumers against incumbent local phone companies.⁴⁹ The question in *Bell Atlantic* was whether a Section 1 Sherman Act antitrust complaint requires a heightened pleading standard.⁵⁰ Generally, liability under the Sherman Act requires a conspiracy in restraint of trade. The complaint, however, alleged only “consciously parallel behavior” between the defendants, suggesting that a conspiracy was likely.⁵¹ The Court held that to withstand a motion to dismiss the underlying pleading must contain enough facts to suggest that a conspiracy to restrict trade existed.⁵² The Court averred that this holding did not impose a heightened

47. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) (internal quotation marks omitted).

48. *Id.*

49. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 544 (2007).

50. *Id.*

51. *Id.*

52. *Id.*

pleading standard counter to precedent, but instead fulfilled the intentions of the Federal Rules by only allowing claims with “enough facts to state a claim to relief that is plausible on its face.”⁵³

Despite the Court’s assurance that it did not make a substantive change to the pleading standard and its suggestion that *Bell Atlantic* may be inapplicable to cases outside of antitrust, the use of a new “plausibility” standard, rather than the more objective “short, plain statement,” involved an interpretation of the Federal Rules in general.⁵⁴

Unfortunately, the Court has not fully defined what facts make a claim “plausible” except by stating that it is not the heightened standard specifically rejected in *Swierkiwicz*.⁵⁵ Because the Court chose to define the “plausibility” in general and negative terms, the scope of *Swierkiwicz*’s application to non-antitrust pleadings, including how the courts should use the “plausibility” standard during the preliminary proceedings of *Bivens* claims, remains undefined. Certainly, questions remain as to how the Court may apply “plausibility” without judicial rulemaking.

IV. HOLDING

In *Iqbal v. Hasty*,⁵⁶ the Second Circuit held that Iqbal’s complaint stated a substantive due process claim against the federal officials involved, including Attorney General Ashcroft and FBI Director Mueller, sufficient to survive a motion to dismiss.⁵⁷ The defendant government officers argued that Iqbal’s allegations did not allege they acted with sufficient “personal involvement” and that the allegations were too conclusory to overcome the qualified immunity defense.⁵⁸

53. *Id.*

54. *Id.*

55. *Id.*

56. The district court dismissed the claims against Hasty and the other BOP defendants. Therefore, Hasty and the others were not parties to the Supreme Court appeal.

57. *Iqbal v. Hasty*, 490 F.3d 143, 147 (2d Cir. 2007). The Second Circuit also made several other holdings that were not considered by the Supreme Court: (1) 9/11 and the emergency circumstances surrounding Iqbal’s detention did not lessen his established constitutional rights; (2) Iqbal’s procedural due process rights were not clearly established; and (3) the prison warden was not entitled to qualified immunity defense for certain aspects of the complaint. *Id.*

58. *Id.* at 151. Again, the appeal also dealt with the qualified immunity defense on the basis that the allegations “do not allege the violation of a clearly established right,” and “the defendants actions were objectively reasonable.” *Id.* While a finding of either of these bases

The argument, however, was unsuccessful due to the court's interpretation of *Bell Atlantic v. Twombly*'s "plausibility standard." The Second Circuit found *Bell Atlantic* provided an insufficient basis for the defendants' argument that a heightened pleading standard is required when the qualified immunity defense has been invoked.⁵⁹

First, the court explicitly denied that the *Bell Atlantic* "plausibility" requirement creates a universal standard of heightened pleading. Instead, the standard allows a court, on a case-by-case basis, to request a pleader to add facts to the claim if the court finds such amplification needed to render the claim *plausible*.⁶⁰ Even though the court held that *Bell Atlantic*, in "its full force, is limited to the antitrust context,"⁶¹ it found that the language of the opinion, when taken as a whole, suggested a desire by the Supreme Court to alter pleading standards, although in a limited fashion.⁶² Therefore, the Second Circuit chose to adopt *Bell Atlantic* as applicable to *Iqbal*.⁶³

The court went on to hold that the allegations against the government officers were sufficient to establish their personal involvement in the alleged discriminatory conduct because the officers "condoned the [challenged] policy."⁶⁴ Essentially, the court again attempted to apply *Bell Atlantic* by stating "it is *plausible to believe* that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers."⁶⁵ The court held that it was also plausible that the senior officials "would know about, condone, or otherwise have personal involvement" in the manner in which these detention policies were actually enforced.⁶⁶

Although the court applied *Bell Atlantic* in its attempt to find "plausibility," its use of the phrase "personal involvement" invokes the Second Circuit's earlier holding in *Colon v. Coughlin*, which defined the rules for establishing personal involvement—*i.e.*, creating

would be dispositive, neither is being considered on *certiorari*. Petition for Writ of Certiorari, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (Feb. 6, 2008) (No. 07-1015), *cert granted*.

59. *Iqbal*, 490 F.3d at 158.

60. *Id.* at 157–58 (emphasis in original).

61. *Id.* at 157.

62. *Id.* at 155–56.

63. *Id.* at 157–58.

64. *Id.* at 165.

65. *Id.* at 166 (emphasis added).

66. *Id.* at 166.

a policy under which unconstitutional practices occurred or exhibiting deliberate indifference to the inmates' rights).⁶⁷ These precedents are not necessarily mutually exclusive, but the attempt in one sentence to combine the *Bell Atlantic* and *Colon* lines of cases only emphasizes the gap between them.⁶⁸

Despite acknowledging that neither Ashcroft nor Mueller were personally involved in the decision to classify Iqbal as a "high interest" detainee, the court determined that their lack of actual decision-making did not insulate the two supervisory officials from liability.⁶⁹ As a result, Iqbal could sue Ashcroft and Mueller, despite their qualified immunity defenses, without even implying that either official was actually involved in the decisions that violated his constitutional rights.⁷⁰ This determination was made despite *Harlow v. Fitzgerald's* requirement that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."⁷¹ Rather than relying on the language of *Harlow*, the court emphasized the language of *Crawford-El v. Britton*, distinguishing *Harlow* on the basis that there is no malice alleged in or required by Iqbal's claim and observing that other mechanisms exist to protect higher officials.⁷² As a result, the court held that *Harlow* did not impose a heightened pleading standard for persons making *Bivens* claims.⁷³

The Second Circuit recognized the general need for the qualified immunity defense and the potential threat to that defense posed by adhering to the Federal Rules of Civil Procedure rather than using a heightened pleading standard.⁷⁴ The court emphasized that, upon remand, the district court "must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."⁷⁵ Essentially, the Second Circuit sought to make

67. See *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995) (allowing a private cause of action against high-ranking government officials based on a constructive notice theory).

68. See *supra* Part III.A (describing the uncertainty surrounding the application of qualified immunity in *Bivens* suits).

69. *Iqbal*, 490 F.3d at 166.

70. *Id.*

71. *Id.* at 154 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)).

72. *Id.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 588–89 (1998)).

73. *Id.*

74. *Id.* at 159.

75. *Id.* (quoting *Crawford-El*, 523 U.S. at 597–98) (emphasis in original)).

summary judgment readily available to high-level officials, but not at the pleading stage.⁷⁶

V. ANALYSIS

The *Iqbal v. Hasty* decision poses several theoretical and practical problems. First, the Second Circuit's decision to expand *Bell Atlantic v. Twombly* beyond its literal antitrust scope to create a general pleading rule contradicts the policy represented by the less explicit and less burdensome pleading requirements permitted to establish supervisors' personal liability in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. Without delving into the details of *Bivens* and its progeny, the court's decision evinces the legal complications that the panel faced in applying the holding in *Bell Atlantic* to *Iqbal*. Rather than applying *Harlow v. Fitzgerald* and limiting *Crawford-El v. Britton* to its facts, the court invoked the Supreme Court's language used to distinguish *Harlow* from *Crawford-El* to hold both that other mechanisms exist to protect high-ranking officials from unmeritorious action besides early dismissal and that *Harlow* sought only to protect against "broad-reaching" discovery.⁷⁷ Unfortunately, the Supreme Court provided no guidance to help determine the difference between the "broad-reaching" discovery against which courts are supposed to protect government officials and "broad discretion" in the discovery process that is supposedly a more equitable method by which to balance competing interests.⁷⁸

The application of *Crawford-El* to the facts of *Iqbal* results in two problematic outcomes. First, by imposing an ambiguous plausibility standard and by putting greater weight on the need for discovery than on the potential damage to the ability of higher officials to perform their national security duties, the Second Circuit risks stripping the implied immunity defense of much of its protective powers. Second, by ordering the district court to limit discovery on remand, the Second Circuit lengthens the discovery process, thereby increasing the cost to the parties. Considering the difficulty of establishing a case against supervisory parties, there seems to be no need to increase

76. *Id.*

77. *Id.* at 154.

78. *Id.* at 154-55.

costs. Because of the limitations on discovery against high-ranking official, the process is not likely to lead to any facts clearly establishing personal involvement without risking substantial interference with Ashcroft's or Mueller's ability to perform their duties. There is also the risk that highly sensitive information may be leaked as a result of the discovery process.

This decision could have the practical consequence of permitting unsubstantiated allegations of constructive knowledge to defeat the qualified immunity defense and, even more worrisome to the nation's national security, could lead to inquiry into the subjective motives of high-officials in privileged positions. Not only is national security a major concern, but the high-ranking officials entrusted with maintaining this security are particularly susceptible targets for litigation. Therefore, the Second Circuit's holding, once applied, would be difficult to limit to this case's facts, leading to a significant increase in litigation involving high-profile government officials. These problems could be contained somewhat if *Iqbal* stands for the proposition that trial courts must limit discovery in these cases, but this seems to be a poor solution when one considers the potential risks should any privileged information guarded by the offices of the Attorney General or Director of the FBI leak to the general public.

Second, the Circuit Court's interpretation of *Bell Atlantic* creates more confusion than it remedies. Rather than taking the Supreme Court at its word and dismissing cases when the complaint contained no more than bare allegations and legal conclusions, the Second Circuit lifted various quotations from *Bell Atlantic*, took them out of context, and split them into two categories: one pointing toward a heightened pleading standard and the other limiting *Bell Atlantic* to establishing a plausibility standard.⁷⁹ Although it used these categories, the Second Circuit decided to follow *Bell Atlantic* but not technically classify it as a heightened pleading standard;⁸⁰ therefore it did not entirely accept either of the two categories it delineated.

The most troubling question is whether the *Bell Atlantic* "plausibility" standard actually requires more specific pleadings than the Federal Rules of Civil Procedure require. Though *Iqbal* emphasized that *Bell Atlantic* does not impose a more demanding

79. *Id.* at 155–57.

80. *Id.* at 158.

pleading standing,⁸¹ the Second Circuit seemed to acknowledge that, in some circumstances, the plausibility standard requires plaintiffs to “supplement” normal notice pleading under the Federal Rules and *Conley v. Gibson*.⁸² If a “supplement” to the default standard does not heighten the standard, what does?

VI. ARGUMENTS AND DISPOSITION

A. *Strengths & Weaknesses of Defendants’ Case*

The strengths of the defendants’ case are largely outlined above. Essentially, their arguments emphasized increasing efficiency, creating unity across the circuits, and maintaining the strength of the qualified immunity defense for national security reasons, particularly in light of the War on Terrorism and the weaknesses in national security shown by the 9/11 attacks.

The defendants focused on the merits of a heightened pleading standard emphasized by the Second Circuit’s decision: first, that the heightened standard is essential to allow officials to carry out their roles without fear of constant litigation, particularly in fact patterns such as in *Iqbal v. Hasty* where the only connection petitioners have to the alleged action is constructive notice; and second, that allowing these cases to go forward facilitates the broad-ranging discovery that the qualified immunity defense is meant to prevent.⁸³

Despite the strong set of interests presented by Ashcroft and Mueller, the Court must consider the competing interests that supports denying a heightened pleading standard in qualified immunity situations. Unlimited immunity would free government officials to indirectly order subordinates to commit constitutional violations and would support less oversight by these officials when supervising their various branches.

B. *Strengths & Weaknesses of Iqbal’s Case*

The strength of Iqbal’s case stems primarily from the constitutional claims at issue. Iqbal’s complaint alleges violations of

81. *Id.*

82. *Id.* at 177.

83. *Id.* at 158.

his freedom to practice his religion, his right to an attorney, and various other types of discrimination that violate rights considered fundamental to the American ideal.⁸⁴ Complainants like Iqbal, who are kept in solitary confinement and have very little access to information, would find it incredibly difficult to reach discovery if they had to allege information directly implicating officials like Ashcroft and Mueller whose personal involvement can only be established through the creation or condoning of a general policy.

Iqbal can argue that by refusing to allow these types of cases to progress to discovery, the Court would have to find that higher officials are granted *carte blanche* discretion when creating unconstitutional policies as long as their subordinates actually institute the offending policies. Iqbal's argument would, however, face the difficulty that the Second Circuit did not rely heavily on *Colon v. Caughlin*—allowing a private suit of action against high-ranking government officials based on a constructive notice theory—in making its holding in *Iqbal*, so it is less likely that the Supreme Court will rely on *Colon* to resolve Iqbal's case. Generally, the weaknesses of the plaintiff's case mirror the strengths of the defendants' case.

C. Likely Disposition

As of April 12, 2009, the Supreme Court had still not reached a decision on *Ashcroft v. Iqbal*, although oral argument was heard on December 10, 2008.⁸⁵ It is likely the Supreme Court will hold that the complaint was not sufficient to defeat the defense of qualified immunity held by high-level government officials acting in their official capacities. Because of the very high rank of the officers in question and the sensitive nature of their duties, the Court probably will find that allowing this case to advance to further discovery would more likely expose confidential information to the public than reveal Ashcroft's or Mueller's actual knowledge of the unconstitutional behavior of their subordinates. This balance of interests comprises the very reason for maintaining a qualified immunity defense.

Although the Supreme Court limited the application of *Harlow v. Fitzgerald* in *Crawford-El v. Britton*, the broad concept of supervisory

84. *Id.* at 149–50, n.3.

85. Transcript of Oral Argument, *Ashcroft v. Iqbal*, 128 U.S. 2931 (Dec. 10, 2008) (No. 07-1015).

liability under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* coupled with the lenient pleading standard suggested by the Second Circuit would undermine the qualified immunity defense to a degree that would be counter to previous decisions by the Supreme Court. The Second Circuit succeeded in creating a confusing pleading standard that is not universally “heightened” beyond the Federal Rules’s standard, but one that can be essentially heightened at the judge’s discretion. That the Second Circuit did not decide that a heightened pleading standard should be imposed on claims facing a qualified immunity defense will likely allow the Court to maintain the boundaries of qualified immunity defense, at least in this limited context.