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Student Comment

The "Final Blow" to *Bivens*? An Analysis of Prior Supreme Court Precedent and the *Ziglar v. Abassi* Decision

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ABSTRACT

In the wake of September 11, 2001, the FBI and DOJ launched an investigation to prevent any further terrorist attacks on the United States. As a result, thousands of persons with suspected ties to terrorism were questioned and a smaller group deemed to be of "high interest" were detained under harsh conditions. Following his release, a detainee named Javaid Iqbal filed suit against then-Attorney General John Ashcroft and then-FBI Director Robert Mueller pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, a case that created a cause of action against federal employees when they violate a person's constitutional rights. In the landmark decision of Ashcroft v. Iqbal, the Supreme Court held that Iqbal did not plead sufficient facts to plausibly state a claim against Ashcroft or Mueller. Six years later, the United States Court of Appeals for the Second Circuit heard a case brought by Ibrahim Turkmen and other detainees similarly situated to Iqbal. However, as a result of newly discovered information contained in an OIG Report, the Second Circuit held that Turkmen did allege enough facts to proceed with

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his claims. Following this controversial decision, the Supreme Court—for the second time—considered whether Ashcroft, Mueller, and other prison administrators could be held liable for the conditions that the post-9/11 detainees were subjected to. In its recent decision in Ziglar v. Abassi, the Supreme Court answered that question in the negative, reversing and vacating the judgment by the Second Circuit. In light of the Abassi decision, this Comment will examine what the Supreme Court has looked to in determining whether Bivens relief should be afforded. After examining many of the significant Bivens decisions from the inception of the cause of action to the post-9/11 era today, this Comment concludes that the Supreme Court's decision in Abassi was sound. As a result, however, it may have issued the "final blow" to the availability of Bivens relief in the future, absent the very specific circumstances of its early cases.

TABLE OF CONTENTS

"If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house." – Justice Stephen G. Breyer[**]

I. INTRODUCTION

On the morning of September 11, 2001, one of the greatest tragedies in American history occurred.[1] Nineteen men associated with the Islamic extremist group al-Qaeda hijacked four commercial airplanes that were bound for destinations on the west coast of the United States of America.[2] At approximately 8:46 AM, American Airlines Flight 11, which was set to travel from Boston to Los Angeles, struck the north tower of the World Trade Center in New York City.[3] Almost twenty minutes later, United Airlines Flight 175, which was traveling a similar route, struck the south tower.[4] At 9:37 AM, American Airlines Flight 77 collided into the Pentagon in Washington D.C., and less than half an hour later, United Airlines Flight 93 crashed in a field in western Pennsylvania.[5] By the day's end, over 3,000 Americans had died and nearly 10,000 were treated for injuries—many of which were severe.[6] Only six people who were inside the World Trade Center as the towers collapsed lived to tell the tale.[7]

In the days that followed, the Federal Bureau of Investigation (hereinafter "FBI") and other entities within the United States Department of Justice (hereinafter "DOJ") began an investigation in an effort to prevent any further terrorist attacks on American soil.[8] During the investigation, the FBI questioned more than 1,000 people "with suspected links to the [9/11] attacks in particular or terrorism in general."[9] Of those questioned, 762 were held on immigration charges, and a 184-person subset of that group was determined to be of "high interest."[10] One of those "high interest"

[**] Ziglar v. Abassi, 137 S. Ct. 1843, 1884 (2017) (Breyer, J., dissenting).

1. *See 9/11 Attacks*, HISTORY (2010), http://www.history.com/topics/9-11-attacks ("Often referred to as 9/11, the attacks resulted in extensive death and destruction, triggering major U.S. initiatives to combat terrorism and defining the presidency of George W. Bush.") [hereinafter 9/11 Attacks].

2. *Id*.; *See also* CNN Library, *September 11th Fast Facts*, CNN, http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/ (last updated Sept. 8, 2016) [hereinafter September 11th Fast Facts].

3. September 11th Fast Facts, *supra note* 2.

4. *Id*.

5. *Id*.

6. 9/11 Attacks, *supra* note 1.

7. *Id*.

8. *See* Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009).

9. *Id*.

10. *Id*.

persons was Javaid Iqbal, a citizen of Pakistan and a Muslim.[11] According to Iqbal, he—as well as those of similar race, religion, and national origin—was placed in the Administrative Maximum Special Housing Unit (hereinafter "ADMAX SHU") of the Metropolitan Detention Center in Brooklyn, New York.[12] While there, he claimed that the detainees were "kept in lockdown 23 hours a day, [and spent] the remaining time outside their cells in handcuffs and leg irons, accompanied by a four-officer escort."[13]

After Iqbal was released, he filed suit in the United States District Court for the Eastern District of New York against thirty-four current and former government officials and nineteen federal correctional officers[14] pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[15] In his complaint, he alleged that he was designated a person of "high interest" on the basis of his race, religion, and national origin in violation of the First and Fifth Amendments.[16] Further, he alleged that then-Attorney General John Ashcroft and then-FBI Director Robert Mueller were responsible for subjecting him and the other detainees to harsh conditions of confinement.[17] In the landmark decision of *Ashcroft v. Iqbal*, the Supreme Court of the United States held that Iqbal did not plead sufficient facts in his complaint to state a claim of unlawful discrimination against Ashcroft, Mueller, or any of the other federal government officials who had detained him.[18] In other words, for Iqbal, any hope of recovery was lost.[19]

On June 17, 2015—six years after the decision in *Iqbal*—Ibrahim Turkmen, Akhil Sachdeva, and six additional persons argued their case on behalf of all of the 9/11 detainees in the United States Court of Appeals for

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11. *Id*. (citing Iqbal v. Hasty, 490 F.3d 143, 147-48 (2d Cir. 2007) (Javaid Iqbal "was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States.").

12. *Id*. at 667-68.

13. *Iqbal*, 556 U.S. at 668.

14. *Id*.

15. 403 U.S. 388 (1971).

16. *Iqbal*, 556 U.S. at 668-69.

17. *See id*. at 669. More specifically, Iqbal's complaint alleged that 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 . . . Ashcroft and Mueller discussions in the weeks after September 11, 2001." *Id*. at 669. Additionally, Iqbal alleged that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject' him 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 penological interest.'" *Id*. Lastly, Iqbal stated that Ashcroft was the "principal architect" of the policy and that Mueller was "'instrumental in its adoption, promulgation, and implementation.'" *Id*.

18. *Id*. at 687 ("We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners.").

19. *See id*.

the Second Circuit.[20] Similar to Iqbal, Turkmen, Sachdeva, and the others brought their claims pursuant to *Bivens*, alleging violations of their rights under the First, Fourth, and Fifth Amendments because of the conditions that they were subjected to during their confinement.[21] Unlike Iqbal, however, the Second Circuit ruled in favor of Turkmen, Sachdeva, and the other 9/11 detainees in *Turkmen v. Hasty*,[22] stating that they had alleged sufficient facts in their complaint to move forward with their claims against Ashcroft, Mueller, and the other officials working for the federal government at the time.[23]

Following the controversial ruling in *Turkmen*, the Supreme Court granted *certiorari*[24] and heard arguments for *Ziglar v. Abassi*, a case that would settle the question once and for all whether the post-9/11 detainees could recover from the federal government officials and wardens who detained them.[25] In a 4-2 plurality decision, Justice Kennedy—joined by Chief Justice Roberts, Justice Alito, and the concurring Justice Thomas—declared that they could not.[26] After criticizing the Second Circuit's approach in *Turkmen* as being "inconsistent" with prior Supreme Court precedent,[27] the Court went on to reverse all of the "detention policy claims," vacate the judgment on the prisoner abuse claim, and remand the case to the lower courts for further proceedings.[28]

Through these decisions, this Comment will examine what the Supreme Court has looked to when deciding if *Bivens* relief is appropriate. First, this Comment will provide a brief history of *Bivens* by examining the decision that led to the cause of action,[29] as well as those cases that have expanded and limited its availability.[30] Next, it will discuss the decisions in *Iqbal*,

20. *See generally* Turkmen v. Hasty, 789 F.3d 218 (2d Cir. 2015).

21. *Id*. at 225.

22. *See id*. at 264-65.

23. *See id*.

24. In the United States, a case cannot simply be appealed to the Supreme Court of the United States. *See Certiorari*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/certiorari (last visited July 3, 2017). In order to appeal to the Supreme Court, the party that is appealing the decision of a lower court must file a petition for a *writ of certiorari*. *Id*. If four Supreme Court justices agree that the case should be reviewed, the Court grants *certiorari* and the case is heard. *Id*. For more information, visit https://www.law.cornell.edu/wex/certiorari.

25. *See Abassi*, 137 S. Ct. at 1847-51, syllabus (describing the procedural posture of the case).

26. *See id*. at 1869. ("Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of Congressional authorization. For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim . . . the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above.").

27. *Id*. at 1859 (criticizing the Second Circuit's approach as "inconsistent with the analysis in *Malesko*.").

28. *Id*. at 1869.

29. *See infra* Part II.

30. *See infra* Part III.

Turkmen, and *Abassi*, calling attention to the different approaches used in determining whether *Bivens* relief is appropriate in the post-9/11 era.[31] Ultimately, this Comment will conclude that prior to *Abassi*, the Court made it very difficult for plaintiffs to successfully obtain monetary damages pursuant to *Bivens*—especially when the Executive Branch is implicated.[32] As a result of *Abassi*, however, the Court may have just issued the "final blow" to *Bivens* availability in *any* situation—with the exception of claims mirroring the *very* specific facts of its early decisions.[33]

II. THE BIRTH OF THE BIVENS ACTION: BIVENS V. SIX UNKNOWN NAMED AGENTS

A. Majority Opinion

Although it can be argued that *Bivens* claims originated in the United States Supreme Court's decision in *Bell v. Hood*,[34] it was *Bivens* that actually established the cause of action.[35] In that case, Webster Bivens alleged that agents of the Federal Bureau of Narcotics entered into his apartment and arrested him for narcotics violations.[36] In performing the arrest, Bivens alleged that he was handcuffed in front of his wife and children, and that they were threatened with arrest as well.[37] After the apartment was searched, Bivens claimed that he was taken to a courthouse in Brooklyn and was "interrogated, booked, and subjected to a strip search."[38] As a result, he claimed that he suffered "great humiliation, embarrassment, and mental suffering" because of the agent's conduct and sought damages in the amount of $15,000.[39]

Despite the fact that the district court dismissed the case for failure to state a claim and the United States Court of Appeals for the Second Circuit affirmed, the Supreme Court reversed.[40] In an opinion penned by Justice Brennan, the Court made clear that the Fourth Amendment guarantees

31. *See infra* Parts IV-VI.
32. *See infra* Part VII.
33. *Id.*
34. 327 U.S. 678 (1946). "In *Bell v. Hood*, [the Supreme Court] reserved the question whether violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Bivens*, 403 U.S. at 389. In *Bivens*, the Court held that it does. *Id.*
35. *See Bivens*, 403 U.S. at 397 ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recovery money damages for any injuries he suffered as a result of the agents' violation of the Amendment.").
36. *Id*. at 389.
37. *Id*.
38. *Id*.
39. *Id*. at 389-90.
40. *Bivens*, 403 U.S. at 397-98.

citizens "an absolute right to be free from unreasonable searches and seizures," regardless of whether or not the state "would prohibit or penalize the identical act if engaged by a private citizen."[41] In support of its position, the Court made several points: (1) first, that a long line of cases rejected the notion the Fourth Amendment "prescribes only such conduct as would, if engaged by private persons be condemned by state law"; (2) second, that the interests protected by state laws regulating trespass and the invasion of privacy may differ from those protected by the Fourth Amendment; and (3) third, that damages have always been an "ordinary remedy" when one's personal liberty interests have been violated.[42] Further, the Court reiterated much of what was stated in the previous decision in *Bell*: that when "legal rights have been invaded and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done."[43] In closing, the Court held that Bivens' complaint stated a valid cause of action under the Fourth Amendment, and that he was entitled to recover damages for any injuries he incurred.[44] As a result, the *Bivens* cause of action was born.[45]

However, although the Court held that Bivens did state a valid claim and could recover monetary damages for his alleged injuries, it also implied that there were two instances where it would refuse to recognize the existence of such causes of action:[46] (1) first, the Court suggested that there would be no cause of action when "special factors counseling hesitation in the absence of affirmative action by Congress" are present,[47] and (2) second, the Court urged that it would not allow for a cause of action if Congress specified an alternative remedy that it believed to be equally effective.[48] Although the Court failed to define what exactly these "special factors" were, it nevertheless found that there were none counseling hesitation here, nor were there any alternative remedies available that were equally effective as monetary damages.[49] As a result, Bivens was allowed

41. *Id*. at 392.
42. *Id*. at 392-95.
43. *Id*. at 396 (citing *Bell*, 327 U.S. at 684).
44. *Id*. at 397-98.
45. *See Bivens*, 403 U.S. at 397-98 (This holding was significant because it created what has subsequently been described as the "federal analogue" to 42 U.S.C. § 1983. Under § 1983—which was passed by Congress in 1871—if an official working for the state violates one's constitutional rights, the injured party is entitled to money damages). *See* Hartman v. Moore, 547 U.S. 250, 254, note 2 (2006).
46. *See Bivens*, 403 U.S. at 396-97.
47. *Id*. at 396.
48. *Id*. at 397 ("For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.").
49. *Id*. at 396-98.

to proceed with his claims for damages against the six agents working for the Federal Bureau of Narcotics.[50]

B. Concurring Opinion

In his concurrence, Justice Harlan agreed that federal courts had the ability to award damages for violations of constitutionally protected interests, and that the traditional judicial remedy of damages was appropriate in such cases.[51] In support of this contention, he made several points, the first being that it did not make sense that Bivens' right to be free from violations of the Fourth Amendment depended on the state in which he resides to afford an appropriate remedy.[52] Next, he disagreed with the notion that just because the interest is protected by the Constitution, "federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy."[53] In closing, he concluded that compensatory relief was both "necessary" and "appropriate" in cases such as Bivens' where the Judiciary has a responsibility to "assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."[54]

C. Dissenting Opinions

Chief Justice Burger, Justice Black, and Justice Blackmun all dissented.[55] In a lengthy opinion, Chief Justice Burger stated that a judicially created remedy such as that afforded to Bivens offends traditional notions of separation of powers, and that a better remedy would be created if the Court recommended a solution to Congress.[56] Justice Black offered a similar argument, noting that if Congress wanted to create a remedy against federal officials who violate the Fourth Amendment in performance of their duties, it could do so.[57] Additionally, he warned that this decision would bring about a number of frivolous claims in a time where courts are already "choked with lawsuits."[58] Lastly, Justice Blackmun stated that he dissented as well, noting that the decision "opens the door for another avalanche of new federal cases" into the courts.[59]

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50. *Bivens*, 403 U.S. at 397-98.
51. *Id.* at 398-99 (Harlan, J., concurring in the judgment).
52. *Id*. at 399-400.
53. *Id*. at 403-04.
54. *Id*. at 407-08.
55. *Bivens*, 403 U.S. at 411-30 (Burger, C.J., Black, J., Blackmun, J., dissenting).
56. *See id*. at 411-12 (Burger, C.J., dissenting).
57. *See id*. at 427-28 (Black, J., dissenting).
58. *Id*. at 428.
59. *Id*. at 430 (Blackmun, J., dissenting).

III. AN ANALYSIS OF PRIOR SUPREME COURT PRECEDENT

A. Expansion Era: Bivens, Davis, & Carlson

1. Revisiting Bivens v. Six Unknown Named Agents

Although the previous discussion of the *Bivens* case covered the basic takeaways from the opinion—such as the creation of the cause of action, the two exceptions, and the views expressed by the concurring and dissenting justices[60]—it is important to revisit the decision for a few significant, and unmentioned, aspects as it pertains to deciding whether a *Bivens* remedy is appropriate. As mentioned above, in introducing the exceptions to the *Bivens* cause of action, the Court failed to define "special factors counseling hesitation in the absence of affirmative action by Congress."[61] However, it was willing to provide a couple of examples of what those special factors could potentially be.[62]

For example, immediately following a reference to its prior decision in *Bell*, the Court in *Bivens* cited *United States v. Standard Oil Co*.,[63] a case where John Etzel, a soldier, was hit and injured by a truck belonging to the Standard Oil Company of California, and the United States sought to recover for payment of his medical expenses.[64] Noting Congress's concerns over the federal purse in *Standard Oil*, the Court stated in *Bivens* that because the case was "not dealing with federal fiscal policy," Bivens' claims would be allowed to proceed.[65] Additionally, the Court also cited *Wheeldin v. Wheeler*,[66] a case that involved a congressional committee investigator who—for the purpose of shaming the recipient—inserted a name on a subpoena without having the authority to do so.[67] Insofar as it related to *Bivens*, the Court stated that a *Bivens* claim was not "to impose liability on a congressional employee . . . said to be in excess of the authority delegated to him by Congress."[68] Thus, from these two off-handed citations, a few additional takeaways emerge from *Bivens*:[69] although the Court was willing to extend the availability of a *Bivens* remedy to the Fourth Amendment, it will defer to Congress and not interfere with

60. *See supra* discussion Part II.

61. *See Bivens*, 403 U.S. at 396 (simply stating "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.").

62. *See id*. at 396-97.

63. 332 U.S. 301 (1947).

64. *Id*. at 302.

65. *Bivens*, 403 U.S. at 396 ("We are not dealing with a question of 'federal fiscal policy' as in *United States v. Standard Oil Co*.").

66. 373 U.S. 647 (1963).

67. *Id*. at 648.

68. *Bivens*, 403 U.S. at 396-97 (citing *Wheeldin*, 373 U.S. at 647).

69. *See id*.

matters dealing with either (1) federal fiscal policy or (2) federal employees acting in excess of their authority.[70]

2. Davis v. Passman

The next major Supreme Court case extending the availability of a *Bivens* cause of action was *Davis v. Passman*.[71] In that case, Otto E. Passman, a Congressman, fired Shirley Davis, his deputy administrative assistant.[72] Despite describing her as "able, energetic, and a very hard worker," Passman ultimately decided that it was "essential" that the position be filled by a man instead of a woman.[73] Upon termination, Davis filed suit in federal district court for damages in the form of backpay, alleging that Passman's conduct amounted to sex discrimination in violation of the Fifth Amendment[74]

Despite the holding of the United States Court of Appeals for the Fifth Circuit that "no right of action may be implied from the Due Process Clause of the Fifth Amendment,"[75] the Supreme Court reversed.[76] Relying heavily on *Bolling v. Sharpe*,[77] the Court held that a *Bivens* cause of action could also be implied under the Due Process Clause of the Fifth Amendment.[78] With respect to the first exception carved out by *Bivens*, the Court acknowledged that Passman's status as a Congressman was a special factor that did counsel hesitation.[79] However, the Court found that those concerns were "co-extensive" with the Speech or Debate Clause, and ultimately found that Passman is bound by the law, just like other ordinary citizens.[80]

With regard to the second exception, the Court found "no *explicit* congressional declaration" that persons like Davis cannot recover for their alleged injuries.[81] Despite the fact that a section was added to Title VII of the Civil Rights Act of 1964 to protect employees from discrimination, the Court found "no evidence that Congress meant . . . to foreclose alternative remedies to those not covered by the statute."[82] Thus, because the Speech or Debate Clause protections were found to be as strong as Passman's status

70. *See id*.
71. 442 U.S. 228 (1979).
72. *Id.* at 230.
73. *Id*.
74. *Id*. at 231.
75. *Id*. at 232.
76. *Davis*, 442 U.S. 248-49.
77. 347 U.S. 497 (1954) (This was a decision where the plaintiffs were ultimately successful in arguing that they were refused admission into public schools on the basis of their race).
78. *Davis*, 442 U.S. at 248-49.
79. *Id*. at 246.
80. *Id*.
81. *Id*. at 246-47 (emphasis supplied).
82. *Id*. at 247.

as a Congressman and there was no *explicit* declaration that Davis could seek other means of redress, she was allowed to bring her claim for damages under the Fifth Amendment.[83]

3. Carlson v. Green

The last case extending the availability of *Bivens* actions was the Supreme Court's decision in *Carlson v. Green*.[84] In that case, a mother brought suit on behalf of her deceased son, James Jones, Jr., alleging that he suffered personal injuries at the hands of several federal prison officials that eventually led to his death.[85] Because the officials failed to give her son the necessary medical attention and care, she argued that they violated his Due Process and Equal Protection rights, as well as his rights under the Eighth Amendment.[86] The district court found that there was a valid *Bivens* action for cruel and unusual punishment under the Eighth Amendment, but dismissed the claim because of the state's wrongful death law and the failure to meet the jurisdictional amount requirement.[87] The United States Court of Appeals for the Seventh Circuit reversed under the belief that the state law would "subvert" allowing a complete vindication of constitutional rights, and would provide an incentive for tortfeasors to kill a person rather than simply injure them.[88]

In a brief opinion penned by Justice Brennan, the Supreme Court affirmed the decision of the Seventh Circuit allowing the claim to proceed.[89] After laying out the two exceptions stated in *Bivens* where a cause of action could be defeated, the Court quickly concluded that there were no special factors that counseled hesitation, and that there was no alternative remedy *explicitly* declared by Congress to be an effective substitute for recovery.[90] Further, after finding that there was nothing in the Federal Tort Claims Act (hereinafter "FTCA") that preempted *Bivens* claims, the Court found that the two could co-exist as "parallel, complimentary causes of action."[91] Thus, because the Court determined that a *Bivens* remedy was, in many ways, superior to the FTCA,[92] and that there was no indication of

83. *See Davis*, 422 U.S. 246-49.
84. 446 U.S. 14 (1980).
85. *Id*. at 16.
86. *Id.*
87. *Id*. at 17.
88. *Id*. at 17-18.
89. *Carlson*, 446 U.S. at 18.
90. *Id*. at 18-20.
91. *Id.* at 19-20.
92. *See id*. at 20-23 (The Court listed "[f]our additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy . . . ." First, "in addition to compensating victims, [it] serves a deterrent purpose"; second, punitive damages may be awarded in a *Bivens* suit; third, "a plaintiff cannot opt for a jury in a FTCA action as he may in a *Bivens* suit"; and fourth, "an action under the

Congressional intent to preclude a *Bivens* remedy, Jones' mother was successful in enforcing her son's rights under the Eighth Amendment.[93]

B. Limiting Era: Bush, Chappell, Stanley, Schweiker, Meyer, Malesko, & Wilkie

1. Bush v. Lucas

Unlike all of the cases that have been previously discussed with regards to expanding the availability of the *Bivens* cause of action, the Supreme Court's decision in *Bush v. Lucas*[94] is the first in a long line of cases that has subsequently limited it.[95] In that case, Bush, an aerospace engineer who worked for the George C. Marshall Space Flight Center, was re-assigned to two new positions and made a number of public statements that that were "highly critical" of his employer.[96] Because of his statements, Bush was demoted, which included a pay grade reduction.[97] Bush appealed his demotion to the Federal Employee Appeals Authority, and it determined that his statements "exceeded the bounds of expression protected by the First Amendment."[98] Two years after the decision, Bush requested the Civil Service Commission Review Board re-open the proceeding, and after doing so, the Commission found in his favor.[99] While the administrative appeal was pending, he removed a claim to district court seeking to recover damages for defamation and a violation of his First Amendment rights.[100]

Following a ruling against Bush at both the district court and the United States Court of Appeals for the Fifth Circuit, the Supreme Court affirmed.[101] In an opinion written by Justice Stevens, the Court found that federal civil servants like Bush were protected by "an elaborate, comprehensive scheme that encompasses arbitrary action by supervisors and procedures – administrative and judicial – by which improper action may be redressed."[102] Therefore, in the Court's opinion, a new judicial remedy for the constitutional violation at issue was not necessary.[103] Additionally, and

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FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.").

93. *See id*. at 24-25.
94. 462 U.S. 367 (1983).
95. *See infra* discussion Part III.B.
96. *Bush*, 462 U.S. at 369.
97. *Id*. at 370 (Bush's pay grade was lowered from GS-14 to GS-12, decreasing his annual salary by $9,716.00).
98. *Id*.
99. *Id*. at 370-71.
100. *Id*. at 371.
101. *Bush*, 462 U.S. at 390.
102. *Id*. at 385-86.
103. *See id*. at 388-89.

perhaps most significantly, the Court dialed back its holdings in *Davis* and *Carlson*.[104] After briefly summarizing those decisions, the Court stated, "When Congress provides an alternative remedy, it may, of course indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised."[105] Therefore, as a result of *Bush*, the express remedy that was once required in the expansion era cases seemed to no longer be necessary—allowing courts to imply what Congress had intended.[106]

2. Chappell v. Wallace

On the same day of the ruling in *Bush*, the Supreme Court issued another significant *Bivens* decision in *Chappell v. Wallace*.[107] Prior to the decision, five men who had enlisted to serve in the United States Navy sought to recover damages from their commanding officers for allegedly "fail[ing] to assign them desirable duties, threaten[ing] them, g[iving] them low performance evaluations, and impos[ing] penalties of unusual severity" on the basis of race.[108] Because of the commanding officers' actions, they alleged that they were "deprived . . . of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against on the basis of race, color, or previous condition of servitude . . . ."[109]

In a brief opinion penned by Chief Justice Burger, the Supreme Court reversed the decision of the United States Court of Appeals for the Ninth Circuit and held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[110] In reaching this decision, the Court explicitly stated that *Bivens* remedies would not be available when "'special factors counseling hesitation' are present,"[111] implying that the mere existence of special factors *automatically* precludes a remedy, rather than necessitate a further inquiry.[112] Relying on the logic in *Feres v. United States*,[113] the Court then concluded that because "Congress has exercised its plenary constitutional

104. *Compare Bush*, 462 U.S. at 378 (allowing the Court to determine intent by statutory language, legislative history, and/or the remedy itself) *with Carlson*, 446 U.S. at 18-19 (requiring Congress to make an *explicit* declaration as a substitute for recovery).

105. *Bush*, 462 U.S. at 378.

106. *See id*.

107. 462 U.S. 296 (1983).

108. *Id*. at 297.

109. *Id*.

110. *Id*. at 305.

111. *Id*. at 298 ("The Court, in *Bivens* and its progeny, has expressly cautioned however, that such a remedy will not be available when 'special factors counseling hesitation' are present.").

112. *See Chappell*, 462 U.S. at 298 (emphasis added).

113. 340 U.S. 135 (1950).

authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life . . ."[114] a judicially created remedy would only interfere with the "special nature of military life."[115] Thus, in considering the unique disciplinary structure of the military as well as "Congress' activity in the field" as special factors, the Court determined that a *Bivens* remedy should not be made available in that case.[116]

3. United States v. Stanley

Four years after *Chappell*, the Supreme Court was again faced with a *Bivens* claim within the military in *United States v. Stanley*.[117] The facts of the case are as follows: James B. Stanley, a master sergeant in the Army, volunteered to participate in a program testing the effectiveness of protective clothing and equipment as defenses against chemical warfare.[118] Unknown to Stanley at the time, he was secretly administered lysergic acid diethylamide (hereinafter "LSD") in an effort to study the drug's effect on humans.[119] As a result of taking LSD, Stanley suffered hallucinations, periods of incoherence and memory loss, and would even awake from his sleep and beat his wife and children without remembering it had happened.[120] After the Army sent him a letter asking him to participate in a study on the long-term effects of LSD, he was made aware that he had been given the drug and subsequently sued under *Bivens*.[121]

Despite the United States Court of Appeals for the Eleventh Circuit's decision that *Chappell* did not require a dismissal of Stanley's *Bivens* claim, the Supreme Court disagreed.[122] In response to Stanley's argument that the defendants in this case were not Stanley's superior officers, and therefore the holding in *Chappell* did not apply, the Court provided a number of hypothetical "varying levels of generality at which one might apply the 'special factors' analysis."[123] Ultimately, the Court expanded the holding in

114. *Chappell*, 462 U.S. at 302.

115. *Id*. at 304.

116. *See id*. at 304-05. (This case was significant because it implied that the military's internal justice system—an alternative remedy—is also a special factor. Thus, from this holding, it can be said that the Court began to conflate the two different exceptions carved out in the original *Bivens* decision: (1) special factors counseling hesitation and (2) an alternative and equally effective remedy).

117. 483 U.S. 669 (1987).

118. *Id*. at 671.

119. *Id*.

120. *Id*.

121. *See id*. at 672-76.

122. *See Stanley*, 483 U.S. at 686.

123. *See id*. at 679-82. In describing these "varying levels of generality," the Court provided several examples of how the holding in *Chappell* could be interpreted:

Chappell by concluding that the special factor that counseled hesitation was "not the fact that Congress has chosen to afford some similar manner of relief in a particular case, but the fact that . . . uninvited intrusion into military affairs by the judiciary is inappropriate."[124] Thus, in keeping separation of powers at the forefront, the Court seemed to allude to the fact that it was the broad *context* of the military that precluded judicial relief, and not the narrower "chain-of-command" or alternative remedy logic that Stanley had asserted.[125]

4. Schweiker v. Chilicky

Another case that has subsequently limited the availability of a *Bivens* remedy was the Court's decision in *Schweiker v. Chilicky*.[126] Unlike the previous cases that focused on federal employees and members of the military, Spencer Harris, Dora Adelerte, and James Chilicky were ordinary citizens who had their disability benefits terminated pursuant to the Continuing Disability Review program (hereinafter "CDR Program") in 1981 and 1982.[127] Although Harris and Adelerte appealed their determinations and were subsequently awarded full retroactive benefits, Chilicky did not, and filed for a new application for benefits approximately a year and a half after his benefits had been stopped.[128] Despite being awarded one year's full retroactive benefits, Chilicky, as well as Harris and

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> Most narrowly, one might require reason to believe that in the particular case the disciplinary structure of the military would be affected—thus not even excluding all officer-subordinate suits, but allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties. Somewhat more broadly, one might disallow *Bivens* actions whenever an officer-subordinate relationship underlies the suit. More broadly still, one might disallow them in the officer-subordinate situation and also beyond that situation when it affirmatively appears that military discipline would be affected . . . Fourth, as we think appropriate, one might disallow *Bivens* actions whenever the injury arises out of activity "incident to service." And finally, one might conceivably disallow them by servicemen entirely. Where one locates the rule along this spectrum depends upon how prophylactic one thinks the prohibition should be . . . which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be. This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer.

Id. at 681 (internal citations omitted). This paragraph in *Stanley* is significant because it essentially shows that the Supreme Court believed it could exercise its own discretion in determining how broadly or specifically to characterize a prior *Bivens* decision—a point that was later discussed and elaborated on in the Court's decision in *Abassi*.

124. *Id*. at 683.
125. *See id*.
126. 487 U.S. 412 (1988).
127. *Id*. at 417.
128. *Id*.

Adelerte, experienced a delay that lasted many months.[129] Apparently, all of them were wholly dependent on the benefits, and Chilicky was recovering from open-heart surgery when he found that his condition was no longer disabling under the program.[130]

Unfortunately for those whose benefits had been terminated, the Supreme Court precluded a *Bivens* action for their alleged Due Process violation under the Fifth Amendment.[131] In its opinion, the Court expressed its hesitancy "to suggestions that *Bivens* remedies be extended into new contexts,"[132] citing a number of cases where the courts refused to make such remedies available.[133] In summarizing those decisions, the Court concluded that the special factors analysis "has proved to include an appropriate judicial deference to indications that congressional action has not been inadvertent."[134] With regard to Chilicky's case in particular, however, the Court stated, "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [it has] not created additional *Bivens* remedies."[135] Thus, because Congress enacted a comprehensive statutory scheme through the CDR Program and the recipients' constitutional violation could not be separated from the statute, the Court found it was virtually the same as *Bush*, precluding any type of *Bivens* remedy.[136]

5. Federal Deposit Insurance Corporation v. Meyer

Unlike all of the previous *Bivens* cases that have been discussed so far, *Federal Deposit Insurance Corporation v. Meyer*[137] is different, as it involved a suit against an entire federal agency as opposed to an individual officer.[138] In that case, the California Savings and Loan Commissioner seized Fidelity Savings and Loan Assembly, and appointed the Federal Savings and Loan Insurance Company (hereinafter "FSLIC") to serve as

129. *Id*.at 417-18.
130. *Id*. at 418.
131. *Schweiker*, 482 U.S. at 428-29.
132. *Id*. at 421.
133. *See id*. at 421-23 (discussing the holdings in *Bivens v. Six Unknown Named Agents*, *Davis v. Passman*, *Carlson v. Green*, *Bush v. Lucas*, and *Chappell v. Wallace*).
134. *Id*. at 423.
135. *Id*.
136. *See Schweiker*, 482 U.S. at 425-29 (explaining the factual similarities and differences between Chilicky's case and Bush's).
137. 510 U.S. 471 (1994).
138. *See id*. at 473 ("In *Bivens v. Six Unknown Fed. Narcotics Agents*, we implied a cause of action for damages against federal agents who allegedly violated the Constitution. Today we are asked to imply a similar cause of action directly against an agency of the Federal Government. Because the logic of *Bivens* itself does not support such an extension, we decline to take this step.").

Fidelity's receiver under state law.[139] The same day, the Federal Home Loan Bank Board appointed FSLIC to serve as Fidelity's receiver under federal law as well.[140] In its capacity as receiver, and in an effort to put Fidelity in a "sound solvent condition," the FSLIC terminated John Meyer, a senior officer for Fidelity, through a special representative.[141] Approximately a year later, Meyer brought suit against the special representative and the FSLIC, alleging that his discharge deprived him of his property right to continue working under the Fifth Amendment.[142]

In a brief opinion, the Supreme Court reversed the decision of the United States Court of Appeals for the Ninth Circuit, holding that Meyer had no cause of action for damages against the FSLIC.[143] The Court reasoned that *Bivens* claims were created as a deterrent for *individual* officers, and if suits for damages were allowed against agencies instead of the agents, than the deterrence effect would cease to exist.[144] Additionally, the Court noted that, unlike in *Bivens*, there was a special factor counseling hesitation: "creating a potentially enormous financial burden for the federal government."[145] Thus, because Congress was in a better place to make decisions regarding "federal fiscal policy," and because of the lack of a deterrent effect against an agency as opposed to an individual, Meyer was not allowed to bring his claim.[146]

6. Correctional Services Corporation v. Malesko

A few years after *Meyer,* the Supreme Court issued another *Bivens* ruling in *Correctional Services Corporation v. Malesko*.[147] There, a private corporation named Correctional Services Corporation (hereinafter "CSC") was under contract with the federal Bureau of Prisons (hereinafter "BOP"),[148] and ran a halfway house located in New York City.[149] John E. Malesko, a federal inmate, was sentenced to eighteen months imprisonment under the BOP, and was transferred to the halfway house run by CSC.[150] At this time, Malesko had a heart condition that was treated with prescription

139. *Id*.
140. *Id*.
141. *Id*.
142. *See Meyer*, 510 U.S. at 473-74.
143. *Id*. at 486.
144. *Id*. at 485.
145. *Id*. at 486 (citing *Standard Oil Co.*, 332 U.S. at 311).
146. *See id*.
147. 534 U.S. 61 (2001) (This case is significant—and slightly different from *Meyer*—because it involved a private corporation working under the color of state law through its contract with the federal Bureau of Prisons).
148. *Id*. at 63.
149. *Id*. at 64.
150. *Id*.

medication, but as a result of the condition, he could not participate in some activities—including climbing stairs.[151] While he was at the halfway house, the CSC issued a policy requiring some inmates to use the stairs instead of the elevator depending on the floor they lived on, and Malesko was required to walk.[152] Although Malesko was exempt from the stairs because of his condition, a CSC employee refused to let him use the elevator.[153] As a result, he took the stairs and suffered a heart attack.[154]

Following his injuries, Malesko brought suit against the CSC for negligence, and the district court dismissed his claims entirely.[155] However, the United States Court of Appeals for the Second Circuit allowed Malesko's claim to proceed, citing "*Bivens'* goal of providing a remedy for constitutional violations."[156] The Supreme Court granted *certiorari* and reversed.[157] In an opinion delivered by Chief Justice Rehnquist, the Court emphasized *context*,[158] stating that "[s]ince *Carlson*, we have consistently refused to extend Bivens liability to any new context or new category of defendants."[159] After citing *Bush*, *Chappell*, *Schweiker*, and *Meyer* as examples,[160] the Court went further, stating that this case was exactly the same as *Meyer* because of the lack of a "deterrent effect": if Malesko wanted to bring a *Bivens* action, he should have brought it against the

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151. *Id*.

152. *Malesko*, 534 U.S. at 64.

153. *Id.*

154. *Id*. (In detailing the facts, the Supreme Court stated that the injury from Mr. Malesko's fall was to his left ear).

155. *Id*. at 64-65 (After obtaining counsel, Malesko stated in his complaint that the CSC was "negligent in failing to obtain requisite medication for [Malesko's] condition and were further negligent by refusing [Malesko] the use of an elevator. It also alleged that as a result of their negligence, Malesko injured his left ear and aggravated a pre-existing condition. As a result, Malesko asked for $1,000,000 in compensatory damages, $3,000,000 in anticipated damages, and punitive damages. The district court treated his complaint as raising claims under *Bivens*).

156. *Id*. at 65 (It is important to note that Malesko's claims against the individual employee expired because the statute of limitations had run, leaving only the claims against the CSC).

157. *Malesko*, 534 U.S. at 66 ("We granted certiorari, and now reverse.").

158. *See id*. at 68-70.

159. *Id*. at 68.

160. *Id*. at 68-70. After talking about those holdings in particular, the Court concluded:

> From this discussion, it is clear that the claim urged by respondent is fundamentally different from anything recognized in *Bivens* or subsequent cases. In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for the harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.

Id. at 70.

individual employee and not the corporation itself.[161] Further, with regard to alternative remedies, the Court made a number of points: (1) first, that "federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners . . . in government facilities";[162] (2) second, that Malesko also had access to "remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program";[163] and (3) third, that *Bivens* should never be considered a "proper vehicle for altering an entity's policy" like the CSC's.[164] Thus, the Court found that Malesko was not entitled to a remedy under *Bivens*, and the Second Circuit's judgment was reversed.[165]

7. Wilkie v. Robbins

One of the last significant cases that subsequently limited the availability of a *Bivens* remedy prior to 9/11 was *Wilkie v. Robbins*.[166] In that case, George Nelson, a ranch owner, signed a non-exclusive deed of easement giving the United States the right to use and maintain a road that ran along his property; Nelson then subsequently agreed to sell the property to Frank Robbins.[167] When Nelson eventually sold the property to Robbins, the latter was never made aware of the agreement creating the easement.[168] Further, the Bureau of Land Management failed to record Nelson's deed, thereby giving Robbins title to the property free of any easement under the state law.[169] After Joseph Vessels, an employee working for the Bureau, discovered that the easement had been lost, he demanded a new one from Robbins as a replacement.[170] After Robbins indicated he would be willing to grant one in exchange for something and Vessels replied that "the Federal Government does not negotiate," talks broke down and the Bureau carried out a "campaign of harassment and intimidation aimed at forcing [Robbins] to re-grant the lost easement."[171] As a result, Robbins filed claims pursuant to *Bivens* under both the Fourth and Fifth Amendments.[172]

Despite the holding of the United States Court of Appeals for the Tenth Circuit permitting Robbins to bring his claims, the Supreme Court

161. *Malesko*, 534 U.S. at 70-71 ("This case is, in every meaningful sense, the same [as *Meyer*].").
162. *Id*. at 72-73.
163. *Id*. at 74.
164. *Id*.
165. *See id*.
166. 551 U.S. 537 (2007).
167. *Id*. at 541-42.
168. *Id*. at 542.
169. *Id*.
170. *Id*.
171. *Wilkie*, 551 U.S. at 542-43.
172. *Id*. at 547-48.

reversed.[173] In a lengthy decision, the Court introduced a two-part "familiar sequence" test used to determine whether a *Bivens* remedy is available if employees of the government adversely affect a constitutionally recognized interest:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the judicial branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation."[174]

Under the first step of this new approach, the Court quickly determined that Robbins had a number of means of protecting his interests, such as civil damages, an administrative appeals process, and a judicial review under the American Procedure Act (hereinafter "APA").[175] Despite these, however, the Court acknowledged a lack of one clear remedial scheme, and proceeded on to the second step of the analysis.[176]

With regard to the second step, the Court weighed the reasons "for and against the creation of a new cause of action," considering Robbins' "death by a thousand cuts" at the hands of the government, and alternatively, the "difficulty in defining a workable cause of action."[177] In assessing Robbins' interest, the Court found that there were too many difficulties drawing a line signaling that the defendants "demanded too much and went too far," deeming such an attempt as unreliable.[178] In closing, because the Court found (1) that the employees were acting in their official capacity for the Bureau, (2) that the government successfully defended all of the claims against it, and (3) that Congress was better positioned to determine whether individual officials who go "too far" should be held liable for their actions,

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173. *Id*. at 567-68.
174. *Id*. at 550 (internal citations omitted).
175. *See id*. at 551-54.
176. *See Wilkie*, 551 U.S. at 554.
177. *Id*. at 554-56 ("This, then, is a case for *Bivens* step two, for weighing reasons for and against the creation of a new cause of action, the way common law judges have always done. Here, the competing arguments boil down to one on a side: from Robbins, the inadequacy of discrete, incident-by-incident remedies; and from the Government and its employees, the difficulty of defining limits to legitimate zeal on the public's behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government's employees engage in every day.").
178. *Id*. at 557-61.

it held that a *Bivens* cause of action should not be available in Robbins' case.[179]

IV. THE SUPREME COURT'S FIRST POST-9/11 BIVENS CASE: ASHCROFT V. IQBAL

A. Majority Opinion

Although there were several Supreme Court decisions defining the scope of *Bivens* availability prior to September 11, 2001—as discussed in the previous section—the Court's decision in *Iqbal* was the first in the new post-9/11 setting.[180] The facts of the case are as follows: immediately after the 9/11 attacks, Javaid Iqbal, a Pakistani citizen and a Muslim, was labeled a "high-interest" detainee as part of a national investigation to prevent further terrorist attacks on American soil, and as such, was "held under restrictive conditions" in the ADMAX SHU at the Metropolitan Detention Center in Brooklyn, New York.[181] Iqbal, as well as the other detainees held at the ADMAX SHU, were kept in lockdown for 23 hours a day, spending their remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.[182]

After Iqbal pled guilty to the charges brought against him, served a term of imprisonment, and was removed to Pakistan, he filed a *Bivens* action against thirty-four current and former federal officials, nineteen federal correctional officers, Ashcroft, and Mueller.[183] In his complaint, Iqbal described how he and the other detainees in the ADMAX SHU were treated, alleging they were "kicked in the stomach, punched in the face," dragged across their cells without justification, subjected to strip-searches and body cavity searches, and refused the opportunity to pray.[184] With respect to Ashcroft and Mueller specifically, Iqbal claimed that Mueller arrested and detained thousands of Arab Muslim men as part of the 9/11 investigation; that Ashcroft and Mueller approved holding the detainees in "highly restrictive conditions"; and that both Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject' [the detainees] to harsh conditions of confinement 'as a matter of policy, solely on account of religion, race, and/or national origin and for no legitimate penological interest.'"[185]

179. *See id*. at 561-62.
180. *See generally Iqbal*, 556 U.S. 662.
181. *Id*. at 666-68.
182. *Id*. at 668.
183. *Id*.
184. *Id*.
185. *Iqbal*, 556 U.S. at 668-69.

In a landmark decision, the Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit, holding that Iqbal's complaint did not contain sufficient facts to state a claim for purposeful and unlawful discrimination against Ashcroft and Mueller.[186] In coming to this conclusion, the Court—whose opinion was written by Justice Kennedy—made a few points that are worth noting.[187] First, the Court addressed context, stating, "[b]ecause implied causes of action are disfavored, [it] should be reluctant to extend *Bivens* liability to 'any new context or any new category of defendants.'"[188] Relying on several previous decisions regarding *Bivens* claims, the Court concluded that it would consider Iqbal's Due Process claim under the Fifth Amendment, but it would not consider his Free Exercise Clause claim under the First Amendment, as it had consistently refused to do so in the past.[189]

Next, in addressing Iqbal's Due Process claim against Ashcroft and Mueller specifically, the Court stated that the officials could not be held liable for actions taken by their subordinates under the doctrine of *respondeat superior*.[190] This meant that in order to find Ashcroft and Mueller liable, Iqbal had to allege in his complaint that they were both responsible for the alleged constitutional violations through their own individual actions; not those of their subordinates or employees.[191] Furthermore, in order for Ashcroft and Mueller to be held liable, Iqbal needed to "plead and prove that the defendant[s] acted with discriminatory purpose."[192] Because this was defined as "undertaking a course of action 'because of' not merely 'in spite of' adverse effects upon an identifiable group," Iqbal had to plead "sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral investigative reason, but for the purpose of discriminating on the basis of race, religion, and/or national origin."[193]

Lastly, the Court re-examined the plausibility standard that was first articulated in the Court's decision in *Bell Atlantic Corporation v.*

186. *Id*. at 687.

187. *See infra* notes 62-73 and accompanying text.

188. *Iqbal*, 556 U.S. at 675-76 (citing *Malesko*, 534 U.S. at 68).

189. *Id*. at 675 ("For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause." (internal citations omitted)).

190. *Id*. at 676. The term *respondeat superior* is Latin for "[l]et the master answer." Under the legal doctrine of *respondeat superior*, a principal/employer is responsible for the actions taken by his or her agent/employee within the scope of the agency/employment relationship. *See Respondeat Superior*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/certiorari (last visited July 3, 2017).

191. *See Iqbal*, 556 U.S. at 676. As will be discussed later in the next section, the OIG Report not available to Iqbal at the time contained information that Ashcroft and Mueller were responsible because they merged the INS and New York Lists.

192. *Id*.

193. *Id*. at 676-677.

Twombly,[194] which held that plaintiffs needed to allege "enough facts to state a claim for relief that is plausible on its face."[195] In interpreting that plausibility standard, the Court in *Iqbal* created a two-pronged test: (1) first, the courts must accept all allegations contained in the complaint as true and discard all legal conclusions;[196] and (2) second, by drawing on its judicial experience and common sense, the courts are to look at the remaining allegations in the complaint to determine whether or not "the complaint states a plausible claim for relief [that] survives a motion to dismiss."[197] Under this new plausibility standard, the Court ruled against Iqbal, finding that he did not "'nudge [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[198] In other words, because Iqbal could not plausibly plead a sufficient amount of facts in his complaint showing that Ashcroft and Mueller themselves acted with a discriminatory intent, his claims were dismissed.[199] As a result, Iqbal could not recover damages from the named government officials for what had happened to him while he was detained.[200]

B. Dissenting Opinions

Justices Souter, Stevens, and Ginsburg all dissented, with Justice Breyer writing separately.[201] In his dissent, Justice Souter stated that he parted ways with the majority on two points: (1) supervisory liability and (2) the majority's opinion that Iqbal's complaint failed to meet the pleading standard under Federal Rule of Civil Procedure 8(a)(2).[202] With respect to his first point, Justice Souter stated that it was inappropriate for the Court to consider the scope of supervisory liability as it applied to *Bivens* actions for three reasons: (1) first, both Ashcroft and Mueller conceded that a

194. 550 U.S. 554 (2007) (In *Bell Atlantic Corp v. Twombly*, the Supreme Court overruled *Conley v. Gibson*, 355 U.S. 41 (1957) (holding 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") and replaced it with the plausibility standard. The effect of *Twombly* was that it retired the "notice pleading" standard that was generally easier to meet and now required plaintiffs to show enough facts to plausibly state a claim for relief).

195. *Id*. at 570.

196. *Iqbal*, 556 U.S. at 678 ("First . . . a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

197. *Id*. at 679 ("Second, only a complaint that states a plausible claim for relief survives a motion to dismiss."). Put simply, the Court required two steps to be taken: (1) first, discard all legal conclusions and look solely at the facts, then (2) second, determine whether the remaining facts in the complaint state a plausible claim for relief.

198. *Id*. at 680.

199. *Id*. at 686-87.

200. *See id*.

201. *Iqbal*, 556 U.S. at 687 (Souter, J., dissenting).

202. *Id*. at 687-88.

supervisor's knowledge of a subordinate's conduct and subsequent indifference to that conduct are grounds for liability;[203] (2) second, because of the concession, there were no briefings to make a decision on the scope of supervisory liability;[204] and (3) third, that the Court's approach was unfair to Iqbal.[205] With regard to the plausibility standard, Justice Souter argued that Iqbal's complaint did in fact satisfy Rule 8(a)(2), and that the majority misapplied the standard as it was set out in *Twombly* in a way that made it more difficult for Iqbal to meet.[206]

In a short dissenting opinion, Justice Breyer stated that he agreed with Justice Souter.[207] However, he wrote separately to state that, while he believed in not interfering with the work of the government, this reason alone did not justify the Court's interpretation of the plausibility standard as articulated in *Twombly*.[208] In support of his position, Justice Breyer stated that there were a number of "other legal weapons designed to prevent unwarranted interference" in government work, such as structuring discovery in a manner that does not burden government officials.[209] In closing, he concluded that for the reasons stated in both his and Justice Souter's dissents, he would have found for Iqbal and affirmed the ruling of the Second Circuit.[210]

V. THE SECOND CIRCUIT'S SPLIT DECISION: TURKMEN V. HASTY

A. Majority Opinion

Six years after the Supreme Court's decision in *Iqbal*, the Second Circuit was faced with deciding another case whose facts stemmed from the national 9/11 investigation in *Turkmen v. Hasty*.[211] In that case, Ibrahim Turkmen, Akhil Sachdeva, and six other plaintiffs who were detained in the ADMAX SHU filed a complaint alleging that they were subject to "severe"

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203. *Id*. at 691-92.
204. *Id*. at 692.
205. *Id*.
206. *Iqbal*, 556 U.S. at 694-99 ("*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be . . . Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*'s words, a plaintiff must 'allege facts' that, taken as true, are 'suggestive of illegal conduct.'"). Under this approach, Justice Souter believed that Iqbal's allegations were not "non-conclusory" statements, but rather, statements "linking Ashcroft and Mueller to the discriminatory practices of their subordinates." *Id*. at 697-98.
207. *Id*. at 699 (Breyer, J., dissenting).
208. *Id*. at 699-700.
209. *Id*. at 700.
210. *Iqbal*, 556 U.S. at 700 (Breyer, J., dissenting).
211. *See generally Turkmen*, 789 F.3d at 224.

conditions similar to those described by Iqbal.[212] However, the complaint also included new factual allegations supplemented by reports from the Office of the Inspector General (hereinafter "OIG").[213] These allegations included that the detainees were subject to "highly degrading and offensive comments," "constructively denied recreation," "denied access to basic hygiene items," deprived of sleep, and subjected "to frequent physical and verbal abuse" in a number of different forms.[214]

Additionally, the complaint also provided new details on how individuals were categorized "of interest" for purposes of the 9/11 investigation.[215] In short, if a person was determined to be "of interest," they were placed on an "INS List," subject to the hold-until-cleared policy, and required FBI clearance to be released or removed out of the United States.[216] Furthermore, the OIG Report indicated that there was a separate "New York List" containing names that were not on the INS List because it could not be determined if they were connected to terrorist activity.[217] After several meetings held by senior government officials, a decision was made to merge the New York List with the INS List, resulting in the confinement of several individuals who had no connection to the terrorist attacks of 9/11.[218]

In a lengthy majority opinion written by Judges Pooler and Wesley, the court began by acknowledging that *Iqbal*'s plausibility standard was controlling, and that *Bivens* relief is only available against those officials

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212. *See id*. at 228 (describing the conditions of the ADMAX SHU, which was very similar to what Iqbal described in his complaint).

213. *Id*. at 225-26 ("Plaintiffs supplemented the factual allegations in their amended complaints with information gleaned from two sets of reports by the Office of the Inspector General of the United States Department of Justice (the "OIG Reports") that documented the federal law enforcement response to 9/11 and conditions at the MDC and Passaic . . . Primarily, the OIG reports provide invaluable context for the unprecedented challenges following 9/11 and the various strategies federal agencies employed to confront these challenges.").

214. *Id*. at 228. (Although Iqbal's complaint was dismissed for failure to state a claim for which relief could be granted, it seems that Turkmen's claims stemming from the incident did in fact cross the line from "conceivable" to "plausible" because of these new details regarding the detention of "high interest" individuals. Had Iqbal had the information contained in the OIG Report available to him at the time when he filed suit discussed above, perhaps the Supreme Court would have been less likely to rule the way that it did).

215. *See id*. at 231-32 ("IV. The New York List and the "Of Interest" Designation").

216. *Turkmen*, 789 F.3d at 231 (It is important to note that in many instances, the FBI did not even try to figure out whether the alien in question was suspected of terrorism. It follows that many aliens were arrested and detained and not released until it was determined that they had no ties or connection to any terrorist activity).

217. *Id*. at 232.

218. *Id*. (Despite concerns that the New York List contained aliens with no suspected links to terrorism, the two lists were nonetheless merged. This piece of information is critical with regard to Iqbal's *respondeat superior* problem because it showed that the high-level government officials in question *did* act by merging the lists).

who were personally liable for the alleged misconduct.[219] The court then outlined a two-step process for determining when a *Bivens* remedy was available:

> First, the court must determine whether the underlying claims extend Bivens into a 'new context.' If, and only if, the answer to the first step is yes, the court must then consider (a) whether there is an alternative remedial scheme available to the plaintiff and, even if there is not (b) whether special factors counsel hesitation in creating a new Bivens remedy. As *Arar* noted, case law provides limited guidance on how to determine whether a claim presents a new context for *Bivens* purposes. Thus, we construed the word context as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components.[220]

Relying heavily on its decision in *Arar v. Ashcroft*,[221] the court also stated that when making a determination of whether the context is appropriate for *Bivens* relief, it should look to both the rights injured and the mechanism of the injury in order to determine the context of the claim.[222]

With regard to context, the defendants (i.e., the government officials) urged that this case did not fall into an established *Bivens* setting because it was in "response to an unprecedented terrorist attack"[223] or alternatively, dealt with illegal immigrants.[224] However, the court disagreed.[225] Acknowledging that 9/11 did present "unrivaled challenges and severe exigencies," the court stated that 9/11 did not change the "context" of the plaintiffs' claims because their rights did not "vary with surrounding circumstances, such as the right to not be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right to not be subjected to ethnic or religious discrimination."[226] Thus, although the court stated that a *Bivens* remedy

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219. *Id*.

220. *Id*. at 234 (internal citations omitted).

221. 585 F.3d 559 (2d Cir. 2009) (en banc). (*Arar v. Ashcroft* is a case from the United States Court of Appeals for the Second Circuit whereby Maher Arar filed suit against then-Attorney General John Ashcroft, then-Secretary of Homeland Security Tom Ridge, and then-FBI Director Robert Mueller, among others under the TVPA. In his complaint, Arar alleged that while he was changing planes at the Kennedy airport at New York, he was detained, mistreated while in custody, and was to be removed to Syria with the understanding he would be interrogated under torture. In short, the court refused to recognize a *Bivens* action because rendition was a special factor counseling hesitation).

222. *Turkmen*, 789 F.3d at 234-35 (citing *Arar*, 585 F.3d at 572).

223. *Id*. at 234.

224. *Id*. at 236.

225. *See id*. at 234-36.

226. *Id*. at 234-35.

was not available under the First Amendment, it did find remedies were available under both the Fourth and Fifth Amendments.[227]

After the court determined that a *Bivens* remedy was available for the plaintiffs' condition of confinement claims under the Due Process and Equal Protection Clauses of the Fifth Amendment, as well as the unreasonable and punitive strip searches claim of the Fourth Amendment, each was addressed in turn.[228] With regard to the Due Process claim under the Fifth Amendment, the court found that the allegations in the complaint, as well as the OIG Report, indicated that the government officials—despite their arguments that they did not "require or specify any of the particular conditions of the confinement" themselves—knew of the conditions of the detainees' confinement.[229] Although the officials argued that they were compelled by national security, the court found that those concerns were not reasonably related to a legitimate goal, as they "d[id] not justify detaining individuals solely on the basis of an immigration violation and their perceived race or religion . . . ."[230] Thus, the court found that it was plausible that (1) Ashcroft knew of and approved of Turkmen's confinement under severe conditions, and (2) Mueller and former Immigration and Naturalization Service Commissioner James Ziglar were fully informed of the decision and complied with it.[231]

With respect to Dennis Hasty, the former Metropolitan Detention Center Warden, and James Sherman, the former Associate Warden—who were also named in the complaint—the court found that Hasty ordered the creation of the conditions of the ADMAX SHU and directed his subordinates to design "extremely restrictive conditions of confinement."[232] In analyzing these conditions, the court found them to not just be restrictive, but punitive, and therefore, not related to any legitimate government purpose.[233] Additionally, the court found that Hasty and Sherman knew that there was a lack of individualized suspicion for many of the detainees, and had gone so far as to approve a document falsely stating that "executive staff at MDC had classified the 'suspected terrorists' as 'high security'" based on an individualized assessment.[234] Thus, because of their actions,

227. *Turkmen*, 789 F.3d at 237 (Unlike the Fourth and Fifth Amendment claims, the court deemed that the plaintiffs' free exercise claim would require extending *Bivens* into a new context).

228. *See id*. at 237-62.

229. *See id*. at 239-40 ("At a minimum, a steady stream of information regarding the challenged conditions flowed between the BOP and senior DOJ officials. Given the MDC Plaintiffs' allegations, the media coverage . . . , and the DOJ Defendants' announced central roles in PENTTBOM, it seems to us plausible that the information . . . reached the DOJ Defendants.").

230. *Id*. at 245-46.

231. *Id*. at 246.

232. *Turkmen*, 789 F.3d at 247.

233. *Id*. at 248.

234. *Id*. at 248-49.

the court found Hasty and Sherman liable for damages under the Due Process Clause of the Fifth Amendment.[235]

Next, the court turned to the Equal Protection Clause claim.[236] Similar to its Due Process analysis, the court found that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the "New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists" themselves, thereby ensuring that the detainees would be subject to the harsh conditions of the ADMAX SHU.[237] In response to the dissenters' argument that this case was like *Iqbal* because there were other "more likely explanations" such as *possible* connections to terrorism, the court quickly dismissed it, as the plaintiffs plausibly pled that they were detained "without *any* suspicion of a link to terrorist activity."[238] With respect to Hasty and Sherman, the court concluded that they also acted with discriminatory intent through approving the false document, allowing staff to use "racially, ethnically, and religiously charged language" to describe the detainees, and in Hasty's case, even fostered the use of such language.[239] Thus, the Court found violations of the Equal Protection Clause of the Fifth Amendment as well.[240]

Last, the court addressed the plaintiffs' unreasonable and punitive strip searches claim under the Fourth and Fifth Amendments.[241] Relying heavily on the Supplemental OIG Report, the court found that the MDC staff "inappropriately used strip searches to intimidate and punish detainees."[242] Furthermore, the court found evidence that Hasty ordered this policy, and both he and Sherman approved and implemented it.[243] Thus, the court found that the government officials were liable for a violation of the Fourth Amendment as well.[244]

B. Concurring and Dissenting Opinion

In a lengthy opinion, Judge Raggi concurred in part and dissented in part, criticizing the majority as being "the first to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials . . . for policies propounded to safeguard the nation in the

235. *See id*. at 252.
236. *Id*. at 252.
237. *Turkmen*, 789 F.3d at 254.
238. *Id*. at 254-55.
239. *Id*. at 257-59.
240. *See id*. at 258-59.
241. *Id*. at 259 ("V. Claim 6: Unreasonable and Punitive Strip Searches.").
242. *Turkmen*, 789 F.3d at 260.
243. *Id*.
244. *See id*. at 262.

immediate aftermath of . . . September 11, 2001."[245] In general, she argued that when the challenge is to official Executive policy pertaining to national security, it is Congress—not the Judiciary—that should decide whether the detainees should be allowed to sue Executive policymakers for money damages.[246]

At the beginning of her dissent, Judge Raggi noted that the Supreme Court had only allowed private damages actions against federal officers on three occasions, and that the decision to extend *Bivens* should focus not on the "merits of the particular remedy sought," but rather, on "who should decide whether such a remedy should be provided," particularly, the Legislature or the Judiciary.[247] Because Turkmen's claims challenged an Executive policy that confined lawfully arrested illegal aliens in the aftermath of 9/11, it presented a claim based in a new context that did not fall within the narrow category of cases where *Bivens* actions were allowed.[248] In her view, since the majority could not, and did not, cite to a single case that afforded a *Bivens* remedy in a scenario that was legally and factually similar to Turkmen's, relief should not be granted here.[249]

Next, Judge Raggi provided a list of factors that counseled against extending *Bivens* actions to Turkmens' policy challenging claims.[250] First, she reiterated that there has never been a case affording a *Bivens* remedy in the context of a constitutional challenge to Executive Branch policy—especially one made at the cabinet level.[251] Because *Bivens* actions have "never been considered a 'proper vehicle for altering the entity's policy,'" and the confinement policy was not carried out by rogue actors, but rather, persons charged by the President of the United States with primary responsibility for homeland defense, she was of the opinion that Congress should decide whether a damages action was appropriate.[252]

Second, Judge Raggi stated that this case implicated the Executive's immigration authority.[253] Because "any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," she argued that it should be left free from

245. *Id*. at 265 (Raggi, J., concurring in part, dissenting in part).
246. *Id*.
247. *Turkmen*, 789 F.3d at 267 (quoting *Bush*, 462 U.S. at 380).
248. *Id*. at 267-68.
249. *Id*. at 269-70.
250. *Id*. at 272 ("C. Factors Counseling Against Extending *Bivens* to Plaintiffs' Policy-Challenging Claims.").
251. *Id*.
252. *Turkmen*, 789 F.3d at 272-74.
253. *Id*. at 274 ("2. Implicating Executive's Immigration Authority.").

any judicial interference.[254] Despite the majority's argument that illegal aliens have the same rights as citizens, and thus, a new context is not presented, Raggi argued that the relevant question is not whether the Constitution affords them with protections, but whether the Judiciary is in the best position to enforce those rights when the person is an alien and not a U.S. citizen.[255]

Third, Judge Raggi addressed the implication of the Executive's national security authority, which she categorized as "an unprecedented *Bivens* category that strongly counsels hesitation."[256] Contrary to the majority's view, she argued that the legitimate goal at issue in this case was national security, and that the Supreme Court has never afforded a remedy to challenges on these matters.[257] Additionally, she noted that that because the Judiciary has limited competency and may not be best qualified to make national security assessments, particularly when the conflict "does not admit easy answers," it would be best if the matter was left to Congress.[258]

Lastly, Judge Raggi discussed Congress's failure to provide a damages remedy.[259] Understanding that the Judiciary will not afford a *Bivens* remedy when Congress has provided adequate alternative remedial mechanisms or when Congress's inaction was not inadvertent, she took the position that Congress intentionally did not afford a remedy, despite being aware that illegal immigrants were being arrested and detained in response to 9/11.[260] In proving Congress' awareness, she noted that Ashcroft and Mueller had testified on the matter in front of Congress, that Congress was aware it would press constitutional bounds in defending the country, and that Congress's attention to the matters in the OIG Report was well-documented in the public record.[261] Thus, because there was never any law passed providing these detainees a remedy, she argued that this must have been intentional, therefore precluding any *Bivens* relief.[262]

VI. THE SUPREME COURT'S SECOND LOOK: ZIGLAR V. ABASSI

A. Majority Opinion

Almost two years after the Second Circuit's decision in *Turkmen*, the Supreme Court delivered its opinion in *Ziglar v. Abassi*, which would

254. *Id*.
255. *Id*. at 274-75.
256. *Id*. at 275 ("3. Implicating Executive's National Security Authority.").
257. *Turkmen*, 789 F.3d at 275-76.
258. *See id*. at 276-77.
259. *Id*. at 278 ("4. Congress's Failure to Provide a Damages Remedy.").
260. *See id*. at 278-80.
261. *Id*. at 278-79.
262. *See Turkmen*, 789 F.3d at 279-80.

answer once and for all whether post-9/11 detainees like Turkmen could recover from a few of the highest-ranking government officials in the wake of a major terrorist attack.[263] Justice Kennedy delivered the majority opinion, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas—who concurred in the judgment.[264] After summarizing the facts of the case, the Court stated that *Bivens* and the two cases that subsequently expanded its availability—*Davis* and *Carlson*—were more or less "a product of their time."[265] That is, the early *Bivens* cases were decided during a period where creating an implied cause of action was favored, and that because of later considerations following *Bivens*, *Davis*, and *Carlson*, they "might have been different if they were decided today."[266]

Next, the Court stated that, when creating an implied cause of action under the Constitution, the question of "who decides?" under the doctrine of separation of powers is paramount.[267] In the next sentence, it stated that, more often than not, Congress will be that entity.[268] In explaining the reason for providing so much deference to Congress, the Court stated, "[w]hen an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'"[269] As a result, the Court urged it should be hesitant to extend *Bivens* into a new context, and that a remedy should not be available when special factors counseling hesitation are present.[270]

With regard to the "special factors" exception, the Court—for the first time since its decision in *Bivens*—attempted to provide more clarity as to what exactly these elusive "special factors" are:

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263. *See generally Abassi*, 137 S. Ct. 1843.

264. *Id*. at 1851. (This was a 4-2 decision was made by a six-justice Court. Justice Kennedy, Chief Justice Roberts, Justice Alito, and Justice Thomas—who concurred in the judgment—made up the plurality. Justice Breyer dissented, and was joined by Justice Ginsburg. Justice Sotomayor and Justice Kagan recused themselves from the case and Justice Gorsuch, President Donald J. Trump's recent appointee, had not yet taken his seat on the Court).

265. *See id*. at 1855 ("In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this '*ancien regime*,' the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose.' Thus, as a routine matter, with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself." (internal citations omitted)).

266. *See id*. at 1856 ("For these and other reasons, the Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today.").

267. *Id*. at 1857.

268. *Abassi*, 137 S. Ct. at 1857.

269. *Id*. (quoting United States v. Gilman, 347 U.S. 507, 512-13 (1954)).

270. *Id*. ("As a result, the Court has urged 'caution' before 'extending *Bivens* remedies into any new context' . . . The Court's precedents now make clear that a *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the affirmative action by Congress." (internal citations omitted)).

> This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counseling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.[271]

Although the Court did not think it was necessary to establish "whole categories of cases," it did note that it must consider the "impact on government operations systemwide," which includes the burdens and projected costs on the government.[272] In sum, the Court stated that if (1) there is reason to believe that "Congress might doubt the necessity of a damages remedy" or, "in a related way," (2) an "alternate remedial structure" would be present, those alone may be enough to "limit the power of the Judiciary to infer a new *Bivens* cause of action."[273]

With that background, the Court then turned to the detainees' "detention policy claims" that the officials violated (1) their due process and equal protection rights by holding them in confinement, and (2) their Fourth and Fifth Amendment rights by subjecting them to strip searches.[274] In addressing these, the Court rejected the approach used by the Second Circuit in *Turkmen*, criticizing it as "inconsistent" with the holding in *Malesko*:

> To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, [the Second Circuit] asked whether the asserted constitutional right was at issue in a previous *Bivens* case. Second, it asked whether the mechanism of the injury was the same mechanism of injury in a previous *Bivens* case. Under the court of appeals' approach, if the answer to both the questions is "yes" then the context is not new and no special factors analysis is required. That approach is inconsistent with the analysis in *Malesko*.[275]

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271. *Id*. at 1857-58.

272. *Id*. at 1858.

273. *Abassi*, 137 S. Ct. at 1858 (Put simply, the Court just reiterated the two different exceptions that would preclude the availability of *Bivens* relief: (1) special factors counseling hesitation and (2) an alternative remedial system).

274. *Id*. ("It is appropriate now to turn to the first of the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. The Court will refer to these as the 'detention policy claims.'").

275. *Id*. at 1859 (internal citations omitted).

As an example, the Court compared its decisions in *Malesko* and *Carlson*.[276] It noted that, "In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment."[277] However, it had concluded that the contexts in those two cases were different, and that because there were special factors counseling hesitation present in *Malesko*, *Bivens* relief was unavailable, despite being previously available in *Carlson*.[278] In a similar manner, it compared the holdings of *Davis* and *Chappell*—cases that both dealt with discrimination—but also concluded that the "context" in both cases were different (i.e., *Davis* was a discrimination against a Congressman, whereas *Chappell* was against military officers), and therefore *Bivens* relief was inappropriate.[279]

The Court then announced the "proper" test for determining whether a case presents a new *Bivens* context: "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, the context is new."[280] It then went on to provide some "instructional" examples of what may distinguish one context from another:

> (1) the rank of the officer involved; (2) the constitutional right at issue; (3) the generality of specificity of the action; (4) the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; (5) the statutory or other legal mandate under which the officer was operating; (6) the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or (7) the presence of potential special factors that previous *Bivens* cases did not consider.[281]

Unlike the Second Circuit in *Turkmen*—which categorized the context more broadly—the Court characterized the detainees' detention policy claims as "challeng[ing] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a terrorist

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276. *Id*.

277. *Id*.

278. *Abassi*, 137 S. Ct. at 1859 ("Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special factors inquiry. That, however, was not the controlling analytic framework in *Malesko*. Even though the right and the mechanism of injury were the same as they were in *Carlson*, the Court held that the contexts were different. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable").

279. *See id*. (comparing the holdings of *Davis* and *Chappell*).

280. *Id.*

281. *Id*. at 1860.

attack on American soil."[282] Because this narrow characterization bore very few similarities to the facts of the early cases of *Bivens*, *Davis*, and *Carlson*, the Court said that the Second Circuit should have categorized this as a "new" *Bivens* context and not one where relief would be available.[283]

With regard to the issue of indirectly challenging a policy set forth by the Executive Branch, the Court cited the *Malesko* decision, which stated that a "*Bivens* action is not 'a proper vehicle for altering an entity's policy.'"[284] As it applied here, the Court first noted that claims like those brought by the 9/11 detainees would not just challenge the officers' actions pursuant to the policy, but also the policy itself and those discussions and deliberations that went into forming it.[285] Additionally, it reasoned that allowing a *Bivens* claim to proceed would lead to a challenge of the government's *entire* response to 9/11; not just the actions or policy themselves.[286] Similarly, the Court claimed that a *Bivens* action would interfere with national security, a matter clearly committed to both the Executive Branch and Congress.[287] Last, it noted that allowing a *Bivens* action to proceed would cause the high-level government officials being sued to second-guess difficult but necessary decisions in a time of crisis.[288] Because all of these constituted "special factors counseling hesitation" in awarding a remedy, the Court concluded that it was inappropriate for *Bivens* relief to be afforded here.[289]

Furthermore, with respect to the "detention policy claims," the Court discussed the significance of Congress' silence on the matter.[290] It noted that in the sixteen years since the September 11 attacks, the government's response has been "well documented" and the subject of "frequent and

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282. *Id*.

283. *See Abassi*, 137 S. Ct. at 1860.

284. *Id*. (citing *Malesko*, 534 U.S. at 74).

285. *Id*. ("Even if the action is confined to the conduct of the particular Executive Officer in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged.").

286. *Id*. at 1861 ("They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security.").

287. *Id*. ("National-security policy is the prerogative of the Congress and the President. Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" (internal citations omitted)).

288. *Abassi*, 137 S. Ct. at 1861 ("The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.").

289. *See id*. at 1861-62. ("The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than inadvertent. This possibility counsels hesitation 'in the absence of affirmative action by Congress.'").

290. *Id*. at 1862 ("Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling.").

intense" interest.[291] Thus, in its view, the fact that Congress never created a damages remedy made it "much more difficult to believe that 'congressional inaction' was 'inadvertent.'"[292] Further, the Court noted that there were a number of alternative remedies available to the detainees that would have actually been more effective than the current suit, such as injunctive relief or a petition for a *writ of habeas corpus*.[293] Because these other means were available, the Court reasoned, a *Bivens* claim was not appropriate.[294]

Last, with respect to the prisoner abuse claim against Warden Hasty, the Court quickly concluded that the allegations plausibly showed he acted with "deliberate indifference to the abuse" of the detainees.[295] However, despite the similarities in context between the detainees' claims and *Carlson*—which also dealt with prisoner mistreatment—the Court held that "even a modest extension [of Bivens] is still an extension" and therefore, a remedy should not be available.[296] In closing, the Court noted that although it could perform a "special factors" analysis on this claim, it would be better for the lower courts to do so.[297] As a result, it vacated the judgment below and remanded the case back to the lower courts for further proceedings.[298]

B. Dissenting Opinion

Justice Breyer wrote the lone dissenting opinion, with whom Justice Ginsburg joined.[299] In his opinion, Justice Breyer stated that he would have affirmed the Second Circuit's decision in *Turkmen*, and that the majority was wrong to think that its decision would extend *Bivens* into a new "context."[300] In making this point, he claimed that the context was not "new" or "fundamentally different" from past *Bivens* decisions for a few

291. *Id*.

292. *Id*. ("This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was inadvertent.").

293. *Abassi*, 137 S. Ct. at 1862-63.

294. *Id*. at 1863 ("In sum, respondents had available to them 'other alternative forms of judicial relief.' And when alternative methods of relief are available, a *Bivens* remedy usually is not.").

295. *Id*. at 1864 ("These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden's deliberate indifference to the abuse.").

296. *Id*. at 1864-65 ("Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context.").

297. *Id*. at 1865 ("Given the absence of comprehensive presentation by the parties and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself.").

298. *Abassi*, 137 S. Ct. at 1865 ("The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.").

299. *Id*. at 1851.

300. *Abassi*, 137 S. Ct. at 1873 (Breyer, J., dissenting) ("For those reasons, I would affirm the judgment of the Court of Appeals . . . The Court, in my view, is wrong to hold that permitting a constitutional tort action here would "extend" *Bivens*, applying it in a new context.").

reasons:[301] (1) first, the plaintiffs are civilians that are afforded the protections under the Constitution—regardless of whether they are present here legally or illegally;[302] (2) second, the defendants are federal government officials and wardens—both of whom who have been defendants in *Bivens* actions before;[303] and (3) third, the injuries here are similar to those afforded in the first three *Bivens* cases.[304] Lastly, Justice Breyer noted that he did not believe that the circumstances surrounding the detention—such as the post-9/11 investigation, national security, or the high rankings of the officials involved—were enough to extinguish the availability of the *Bivens* action to the detainees.[305] In his opinion, although the Constitution commits to the Executive Branch and Congress the responsibility of national security, it also grants to the Judiciary the right to protect an individual's constitutional rights when they are violated.[306] When those come into conflict, he opined, "the Court has a role to play" in redressing such violations.[307]

VII. WAS ABASSI THE "FINAL BLOW" TO BIVENS RELIEF?

As one can see from an analysis of Supreme Court jurisprudence dating from the creation of the cause of action to the post-9/11 era, the Court has progressively become more and more hesitant to afford a *Bivens* remedy to persons seeking damages for alleged constitutional violations.[308] In the

301. *See id*. at 1876.

302. *Id*. at 1876-77 ("First, the plaintiffs are civilians; not members of the military. They are not citizens, but the Constitution protects noncitizens against serious mistreatment, as it protects citizens. Some or all of the plaintiffs here may have been illegally present in the United States. But that fact cannot justify physical mistreatment.").

303. *Id*. at 1877 ("Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons; the defendant in *Davis* was a Member of Congress.").

304. *Id*. ("These clamed harms are similar to, or even worse than, the harms plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment.").

305. *See Abassi*, 137 S. Ct. at 1878-79 (Breyer, J., dissenting). Although Justice Breyer gives a lengthy response regarding the majority's approach to *Bivens* claims during times of national security, it can be boiled down to two main claims. First, he opined that grave violations of one's constitutional rights should be treated the same—regardless of whether the nation is in a time of peace or war. *Id*. at 1882-83. Second, he listed several safeguards "designed to prevent the courts from interfering with Executive and Legislative branch activity" such as (1) the warrant requirement for the Fourth Amendment, (2) the qualified immunity defense, and (3) the plausibility standard—which was perhaps best illustrated by the Court's decision in *Iqbal*, and (4) tailoring discovery orders. *Id*. at 1883-84.

306. *Id*. at 1882 ("As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights.").

307. *Abassi*, 137 S. Ct. at 1882 (Breyer, J., dissenting) ("Hence, when protection of those rights and a determination of security needs conflict, the Court has a role to play.").

308. *See supra* discussion Parts III-IV.

early decisions of *Bivens*, *Davis*, and *Carlson*, the Court extended the cause of action under the Fourth, Fifth, and Eighth Amendments, respectively, and seemed to focus more on the nature of the constitutional right than maintaining the separation of powers between the Judiciary and the Legislature.[309] In keeping persons' constitutional rights at the forefront, the Supreme Court kept the two situations that precluded *Bivens* relief separate from one another, required an *express* declaration from Congress that plaintiffs were not allowed to seek recovery for damages, and only recognized a few "special factors counseling hesitation" in determining when a *Bivens* remedy should be permitted: (1) federal fiscal policy, (2) federal personnel matters, and (3) a person's status as a Congressman—which was ultimately not enough to overcome the rights afforded by the Speech or Debate Clause.[310]

However, as noted in *Abassi*, the Court's attitude shifted after *Carlson*, focusing less on the nature of the plaintiff's constitutional right and more on ensuring separation of powers between the Legislature and Judiciary.[311] The first indication of this movement was the Court's statement in *Bush* that it was no longer necessary that Congress *explicitly* state if an alternative remedy was available, thus allowing courts to determine Congress' intent by looking at what it implied through statutes, legislative history, and perhaps even the remedy itself.[312] The second was when the Court in *Chappell* began to conflate the two exceptions that precluded the availability of *Bivens* relief, treating the existence of an "alternative remedy that it believed to be equally effective" as a "special factor that counseled hesitation."[313] Third, the Court gave much greater weight to the "special factors" analysis.[314] In addition to implying that the existence of a "special factor counseling hesitation" automatically precluded a *Bivens* remedy,[315] the Court was more willing to find "special factors" with each case, which included the "unique" nature of the military, pre-existing regulatory and statutory schemes, the financial burden on the government, the Court's inability to define a workable cause of action when government officials go "too far," and more.[316] Lastly, in *Iqbal*, the Court seemed to extend the holdings of *Meyer* and *Malesko*, making clear that it must be the

309. *See supra* discussion Part III.A.
310. *See id*.
311. *See supra* discussion Part III.B.
312. *Bush*, 462 U.S. at 378.
313. *Chappell*, 462 U.S. at 304-305 (holding that the "special nature of military life"—which included the military's own internal justice system—was a special factor that counseled hesitation).
314. *See supra* discussion Part III.B.
315. *Chappell*, 462 U.S. at 298.
316. *See supra* discussion Part III.B.

individual's *own* acts that are the subject of *Bivens* actions, not those of their subordinates or the agency he or she is a part of.[317]

Given all of the decisions from *Bivens* to the present, it is hard to argue that the Supreme Court was incorrect in deciding *Abassi*. In addition to what was already stated above regarding the shift to being more hesitant in affording a remedy, a number of the holdings even before *Iqbal* was decided lent themselves perfectly to denying *Bivens* relief in *Abassi*. For example, in *Davis*, the Court found that the ranking of government officials—like Otto Passman's status as a Congressman—was a special factor counseling hesitation.[318] It seems that using John Ashcroft and Robert Mueller's positions as the Attorney General or FBI Director, respectively, as special factors seem like a natural extension of that decision. Later, in both *Chappell* and *Stanley*, the Court showed that it was unwilling to intrude in matters involving the military.[319] It is not a surprise then, that the Court expressed similar feelings when it came to matters of national security committed to the Executive Branch. Next, in *Malesko*, the Court made explicitly clear that *Bivens* was not the proper vehicle for altering any type of policy.[320] As noted in *Abassi*, because challenges to the actions of Executive Branch officials like Ashcroft and Mueller inevitably raise questions regarding the very policies that they are tasked with carrying out,[321] it would seem that they have more latitude in performing their respective roles. Lastly, in *Wilkie*, the Court held that a *Bivens* remedy would not be available against government officials who went "too far" in carrying out a "campaign of harassment and intimidation" aimed at recovering a lost easement.[322] As that holding applies to the post-9/11 investigation, it would not be a stretch to say that Ashcroft, Mueller, Hasty, or Ziglar mistakenly went "too far" in preventing further terrorist attacks in the United States during a time of war. In fact, the Court in *Abassi* utilized a balancing test similar to that used in *Wilkie* and even *Davis*,[323] concluding that it was up to Congress—not the Judiciary—to decide on such matters.[324]

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317. *Iqbal*, 556 U.S. at 676.

318. *Davis*, 442 U.S. at 246.

319. *Chappell*, 462 U.S. at 304-05; *Stanley*, 483 U.S. at 683.

320. *Malesko*, 534 U.S. at 74.

321. *Abassi*, 137 S. Ct. at 1860-1861.

322. *Wilkie*, 551 U.S. at 555-557 (discussing how it was too difficult to draw the line when the government officials working for the Bureau of Land Management "simply demanded too much and went too far.").

323. *Id*. at 554 (discussing the strengths of Wilkie's argument as well as that of the government in creating a *Bivens* cause of action); *Davis*, 422 U.S. 246-49 (holding that although Passman's status as a Congressman did constitute a special factor counseling hesitation, it was not enough to deny *Bivens* relief to Ms. Davis).

324. *Abassi*, 137 S. Ct. at 1863. The Court stated in *Abassi*:

Thus, as a result of all of the prior decisions made by the Supreme Court, it would seem that all of the pieces were in place to lead to the result that the majority came to in *Abassi*. However, as a result of the decision, one has to wonder: has the Judiciary just issued the "final blow" to the availability of *Bivens* actions for good? Although the Court did provide more clarification as to what constitutes a "special factor counseling hesitation,"[325] stated the "proper" test for determining whether a *Bivens* claim was appropriate,[326] and provided some instructional examples as to whether or not a case entered into the realm of a new "context,"[327] it is a serious question to consider. For instance, in *Abassi*, the Court made clear through its comparisons of *Carlson* and *Malesko* that merely asserting the same constitutional right (i.e., Eighth Amendment) and mechanism of injury (i.e., a failure to provide medical treatment) as one of the first three *Bivens* cases is no longer enough.[328] Additionally, one can conclude that the plaintiffs' claims were characterized very specifically (i.e., a challenge to "the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a terrorist attack on American soil")[329] and not more generally, as argued for by the dissent (i.e., U.S. citizens and non-citizens wrongfully detained and subject to invasive searches by federal government officials and prison wardens).[330] Given the Court's commitment to looking at the "context" of each case more narrowly,[331] it is hard to imagine any plaintiff succeeding in a *Bivens* suit in this post-9/11 era without alleging the *exact* same set of facts as the early decisions of *Bivens*, *Davis*, or *Carlson*.

> There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office. On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress for injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the nation in times of great peril.

Id.

325. *Id*. at 1857-58.
326. *Id*. at 1859.
327. *Abassi*, 137 S. Ct. at 1859-60.
328. *Id*. at 1859.
329. *Id*. at 1860.
330. *See Abassi*, 137 S. Ct. at 1882-84 (Breyer, J., dissenting).
331. *See Abassi*, 137 S. Ct. at 1864.

VIII. CONCLUSION

As a result of the Supreme Court's decision in *Bivens*, the Judiciary, for the first time, created a cause of action that allowed individuals to seek money damages for violations of their constitutional rights by federal government actors.[332] In the cases that immediately followed, the Court extended that right, allowing persons to bring their claims for violations arising under the Fourth, Fifth, and Eighth Amendments.[333] However, beginning with the decision in *Bush*, the focus of the Court seemed to change from compensating the aggrieved individual citizen to one that was set on ensuring that the Judiciary did not intrude into matters belonging to the Legislature.[334] As a result, the "special factor counseling hesitation" exception became the rule, and the Court has used it to limit the availability of *Bivens* relief in a number of different contexts, ranging from the military to retaliatory campaigns over land disputes.[335]

As a result of the tragic events of 9/11 and subsequently, the national investigation to prevent any further attacks against the people of the United States, the Supreme Court has been faced with the same difficult question on two occasions: can detainees who were confined in harsh conditions at the hands of senior government officials seek relief pursuant to *Bivens*?[336] As a result of the recent decision in *Abassi*, it is clear that they cannot.[337] However, this decision may have a much larger impact than intended.[338] Unless a plaintiff pleads the exact same set of facts as those set out in the early *Bivens* decisions, perhaps the Supreme Court has struck the "final blow" to the availability of the remedy for good.

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332. *Bivens*, 403 U.S. at 397-98.

333. *See supra* discussion Part III.A.

334. *See supra* discussion Part III.B.

335. *See id*. (The idea of the exception becoming the rule or "swallowing the rule" refers to those rules that has a vast number of exceptions to it. Another example of this in the law is the exceptions and exclusions to hearsay under the Federal Rules of Evidence).

336. *See generally Iqbal*, 556 U.S. 562; *see also Abassi*, 137 S. Ct. 1843.

337. *Abassi*, 137 S. Ct. 1843.

338. *See supra* discussion Part VII.