PLEADING THEIR CASE: HOW ASHCROFT V. IQBAL EXTINGUISHES PRISONERS’ RIGHTS

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How Ashcroft v. Iqbal Extinguishes Prisoners’ Rights

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Abstract:

Ashcroft v. Iqbal, decided on May 18, 2009, increased the evidentiary burden required to survive a Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) motion to dismiss to a strict plausibility standard. While this decision affects almost all civil claims in the federal court system, its impact is particularly troublesome in the realm of prisoners’ rights litigation. For a prisoner, such onerous pre-litigation fact-finding requirements can turn the administration of justice into an unattainable goal. Since prisoners’ claims are often against their captors, government officials, this heightened pleading burden may leave victims of egregious unconstitutional actions by government officials without remedy; consequently placing government officials at an exceptional place before the law.

This Article proposes the establishment of an administrative court to help prisoner-complainants overcome the plausibility pleading standard as expanded in Iqbal. Part I of this Article discusses the pre-Iqbal effort to limit prisoners’ rights litigation to meritorious claims, addresses how the Iqbal holding undermines this goal, and justifies the proposal of this Article. Part II examines the former “notice” pleading requirement from Conley v. Gibson, the Bell Atlantic Corp. v. Twombly decision’s impact on the federal pleading requirement, and the Iqbal decision. Part III of this Article will look at the statutory and common law vehicles available to a prisoner-plaintiff alleging deprivations of constitutionally protected rights. Part IV will address how the statutory requirements, including the statute of limitations and the Prison Litigation Reform Act of 1995 (“PLRA”), negatively impact prisoners’ rights. Part V takes on two tasks. First, it introduces a solution to the problem posed by this new pleading requirement: an administrative in camera fact-finding court to help inmates satisfy the plausibility pleading requirement. Second, it discusses how this response is a well-balanced solution by examining how an administrative court can resolve problems with prisoner’s rights litigation that were identified in the body of the Article.
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"The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away."

- Attorney General Robert Kennedy

INTRODUCTION

Prisoners, a generally unpopular and impoverished group of persons with limited liberty, are often victims of the most egregious violations of civil rights. The incarcerated person is at the mercy of his guards, the prison wardens, and the policies and procedures of the Attorney General. Many times the courts are the only available remedy for an aggrieved prisoner to seek recourse. Increasingly, however, prisoners cannot count on the court system to protect their constitutional rights.

A recent Supreme Court decision greatly alters the pleading requirements laid out in the Federal Rules of Civil Procedure ("Rules"), and threatens the notions of equality and fairness that are at the core of the United States’ values. Ashcroft v. Iqbal, decided on May 18, 2009,
increased the evidentiary burden required to survive a Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") motion to dismiss to a strict plausibility standard. This holding jeopardizes a plaintiff’s ability to sue government officials for deprivations of constitutional rights.

Some see this effort as a filter on the clogged dockets of the federal courts, whereas others view the decision as “a thorn in the side of the plaintiffs[‘] bar,” and a way to throw out otherwise meritorious cases because the complainant lacks access to pre-litigation discovery.

*Iqbal* “puts a Catch 22 on the plaintiff in that he frequently needs discovery after filing suit to establish the plausible facts to fully support his legal theory.” While this decision affects almost all civil claims in the federal court system, its impact is particularly troublesome in the realm of prisoners’ rights litigation. For a prisoner, such onerous pre-litigation fact-finding


6 After the *Iqbal* decision, a plaintiff’s claim must be plausible in order to survive a Rule 12(b)(6) motion to dismiss for a failure to state a claim. 120 S. Ct. at 1949-50 (defining and discussing the plausibility pleading requirement); see generally FED. R. CIV. P. 12(b)(6) (by a motion to the Court, a defendant may assert that the plaintiff “fail[ed] to state a claim upon which relief can be granted” and have the complaint dismissed before filing a responsive pleading). This is because a complaint “does not unlock the doors to discovery” when it only consists of conclusory allegations. *Iqbal*, 129 S. Ct. at 1950; contra Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

7 As a general rule, a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief . . . .” FED. R. CIV. P. 8(a)(2). *Iqbal* interpreted this standard to require a plaintiff’s claim be plausible in order to survive a Rule 12(b)(6) motion to dismiss for a failure to state a claim upon which relief can be granted. *Iqbal*, 129 S. Ct. at 1949 (defining and discussing the plausibility pleading requirement). Since many constitutional claims against government officials require pleading state-of-mind elements, the heightened pleading standard jeopardizes a victim’s ability to sue. See discussion infra Part III.

8 David Ingram, *Supreme Court’s ‘Iqbal’ Ruling to Get Congressional Hearing*, NATIONAL LAW JOURNAL, Oct. 26, 2006, available at http://www.law.com/newswire/ (type “Supreme Court’s ‘Iqbal’ Ruling to Get Congressional Hearing” in the “Search” field; click “Go;” and follow the “Supreme Court’s ‘Iqbal’ Ruling to Get Congressional Hearing” hyperlink).


10 Although *Iqbal* effects all federal civil litigation, it is interesting to note that the Respondent in the Supreme Court decision was complaining of the alleged deprivation of constitutionally protected rights while incarcerated. *See Iqbal*, 129 S. Ct. at 1942-44.
requirements can turn the administration of justice into an unattainable goal. Since prisoners’ claims are often against their captors, government officials, this heightened pleading burden may leave victims of egregious unconstitutional actions by government officials without remedy; consequently placing government officials at an exceptional place before the law. Indeed, \textit{Iqbal} might be “one of the most infamous and harmful [decisions] to American jurisprudence and individual rights of this generation.”

In \textit{Iqbal}’s aftermath, several theories emerged to restore the Rules. For example, Senator Arlen Spector introduced a Bill in July 2009 that seeks to undo the Supreme Court’s holding by amending the Rules. However, even if such an amendment passes, the slow legislative process exposes more valid claims than necessary to the perils of dismissal under the plausibility standard. Additionally, due to the Supreme Court’s interpretation of the complaint-drafting requirements in \textit{Iqbal}, any legislative amendment to the Rules might be ignored by the Court. Rather than altering the Rules, this Article proposes the establishment of an administrative court to help prisoner-complainants overcome the plausibility pleading standard as expanded in

\____\footnote{11} The administration of justice is the main function of the courts. \textit{See BLACK’S LAW DICTIONARY} 405 (9\textsuperscript{th} ed. 2009) (a court is “[a] governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice’’); \textit{see also WILLIAM J. HUGHES, FEDERAL PRACTICE, JURISDICTION & PROCEDURE }§ 7, at 8 (1931). Denying access to the courts is, in effect, denying access to justice. \textit{See, e.g., WRIGHT & MILLER, supra note 2.}

\footnote{12} \textit{See supra note 6.}


\footnote{14} Notice Pleading Restoration Act of 2009, S. 1, 111th Cong. (as introduced by Sen. Specter to the S. Comm. On the Judiciary, July 23, 2009) (“To provide the [f]ederal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in \textit{Conley} v. Gibson [sic], 355 U.S. 41 (1957).”); \textit{see also Ingram, supra note 9; and Conley v. Gibson, 355 U.S. 41 (1957) (establishing a liberal “notice” pleading requirement). See infra Part II.A for a discussion of the \textit{Conley} pleading standard.}

\footnote{15} As time passes, an increasing number of complaints are evaluated under this new plausibility standard and therefore in jeopardy of dismissal. For example, the Supreme Court decided \textit{Iqbal} on May 18, 2009, and by October 27, 2009, defendants filed nearly one thousand Iqbal Motions in the federal courts. \textit{See infra note 40 and accompanying text.}

\footnote{16} \textit{See generally, supra note 14.}
The administrative court, called the Prison Litigation Administrative Court (PLAC), will engage in an in camera review of evidence after a government official defendant files a Rule 12(b)(6) motion to dismiss a prisoners’ rights complaint.

To fully appreciate the *Iqbal* holding’s detrimental impact on prisoners’ rights, one must understand how this holding combines with pre-existing limitations on prisoner litigation to keep worthy prisoners’ rights claims out of the courts. To achieve this end, the body of this Article will identify a number of problems faced by prisoner-complainants, while the conclusion will address how each of these problems could be resolved by establishing the PLAC. Part I of this Article discusses the pre-*Iqbal* effort to limit prisoners’ rights litigation to meritorious claims, addresses how the *Iqbal* holding undermines this goal, and justifies the proposal of this Article. Part II examines the former “notice” pleading requirement from *Conley v. Gibson*, the *Bell Atlantic Corp. v. Twombly* decision’s impact on the federal pleading requirement, and the *Iqbal* decision. Part III of this Article will look at the vehicles available to a prisoner-plaintiff alleging deprivations of constitutionally protected rights. Part IV will address how the statutory requirements, including the statute of limitations and the Prison Litigation Reform Act of 1995 (“PLRA”), negatively impact prisoners’ rights. Part V takes on two tasks. First, it introduces a solution to the problem posed by this new pleading requirement: an administrative in camera fact-finding court to help inmates satisfy the plausibility pleading requirement. Second, it discusses how this response is a well-balanced solution by examining how the PLAC can resolve problems with prisoner’s rights litigation that were identified in the body of the Article.

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18 The Supreme Court’s holding, although discussed primarily in the context of a prisoner-plaintiff suing a high-ranking government official, applies to all federal civil cases. See *Iqbal*, 129 S. Ct. 1937 (2009). This Article will discuss the application of the *Iqbal* Court’s holding to prisoner-plaintiffs suing government officials.

I. PURPOSE AND JUSTIFICATION: HOW IQBAL UNDERMINES RECENT JURISPRUDENCE

Before *Iqbal*, there was a movement to curb frivolous prisoner litigation. Almost fifteen years before *Iqbal*, the legislative branch implemented the PLRA as a means of, at least ostensibly, keeping frivolous prisoner claims out of the federal courts.\(^{20}\) In *Twombly*, the civil procedure predecessor to *Iqbal*, the Supreme Court complimented the goals of the PLRA by introducing a “light”\(^ {21}\) version of the plausibility pleading standard.\(^ {22}\) This light standard sought to keep non-meritorious claims off the federal docket while permitting other cases to proceed with litigation.\(^ {23}\) This Part discusses how the *Iqbal* decision undermines the purpose of the PLRA and *Twombly* by dismissing otherwise meritorious claims on the grounds that the plaintiff has not conducted sufficient pre-filing fact-finding.

Congress passed the PLRA with the dual intent of reducing the number of civil complaints filed by prisoners and limiting successful prisoner-complainants to those who have meritorious claims.\(^ {24}\) Before the passage of the PLRA, horror stories of “top-ten” frivolous

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\(^{20}\) The PLRA creates a variety of requirements unique to a prisoner-plaintiff, designed to keep frivolous claims off the federal docket. See, e.g., 42 U.S.C. § 1997e(a) (2009); see also discussion infra Part IV.B.

\(^ {21}\) The phrase “light” is used in this Article to identify the less-rigorous application of the plausibility standard from *Twombly*, whereas the phrase “strict” is used in conjunction with the two-prong analysis from *Iqbal*. Compare *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (introducing a plausibility standard for federal pleadings that requires a complaint, taken as a whole, demonstrates a plausible claim for relief); with *Iqbal*, 129 S. Ct. at 1950 (re-interpreting the plausibility standard from *Twombly* as a two-prong analysis, thus imposing a stricter requirement for a plaintiff at the pleading stage, and dismissing meritorious suits because the trial court judge concluded that the plaintiff’s case was “weak”); see also Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799) (discussing how *Iqbal* took *Twombly*’s idea of docket-clearing too far by creating a “thick screening” standard that dismisses otherwise meritorious cases because they are “weak,” or may lose at trial).

\(^ {22}\) See *Twombly*, 550 U.S. at 556 (discussing the Supreme Court’s interpretation of the Rules as requiring a claim be facially plausible).

\(^ {23}\) See generally *Twombly*, 550 U.S. 544 (heightened plausibility pleading standard); and Bone, supra note 21, at 876-78.

prisoner lawsuits clogged the airwaves and the minds of members of Congress. Senator Orrin Hatch, a main proponent of the PLRA, summed up the need for the PLRA as follows:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation. . . . While prisoner [sic] conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation’s prisons.

Congress claimed that the PLRA would act as a filter of inmates’ claims by allowing the meritorious to proceed to the judiciary while removing the frivolous from the system. It is important to note that, although prisoner claims often receive negative press, not all of their claims lack merit. After all, “[p]risoners have, among other things, been raped, shot, and beaten to death by guards.” Victims of such egregious wrongs certainly deserve their day in court.

To reduce frivolous lawsuits, the PLRA imposes restrictions on prisoner litigation. Although this legislation is often criticized for its overbreadth, the effectiveness of the statute is hard to ignore. The year before the PLRA passed, inmates filed lawsuits approximately thirty-five times more often than non-inmates. In the five year period after the enactment of the PLRA, inmate filings reduced by forty-three percent.

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25 Before the enactment of the PLRA, a newspaper in every U.S. State reported on the frivolous lawsuits streaming from prisons. See, e.g., Schlanger, supra note 2 at 1555, n.38 (listing newspaper articles from all fifty states that discuss frivolous inmate claims).
26 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); see also Schlanger, supra note 2, at n.26 (“Hatch was introducing S. 1279, a bill version nearly identical to the enactment statute.”). Although parts of this statement are misleading (e.g., the implication that federal court judges are letting prisoners out of prison early as a result of civil lawsuits against the prisons) the general message of Sen. Hatch’s speech clarifies the intent to reduce frivolous lawsuits. See id.
27 See generally Schlanger, supra note 2, at 1644 (“The statute's goal was, after all, not supposed to be simply litigation reduction but litigation improvement.”) (emphasis added).
29 See discussion infra Part IV.B.
30 Schlanger, supra note 2, at 1559-60.
31 Id. at 1576.
32 Id. at 1559-60.
The judicial branch shares the desire to “screen meritless suits” with the legislature.\footnote{Bone, supra note 21, at 867.} Two years before \textit{Iqbal}, the Supreme Court tightened federal pleading standards by introducing the light plausibility requirement in \textit{Twombly}.\footnote{Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).} Professor Robert Bone views \textit{Twombly}’s plausibility standard as the Supreme Court’s method of weeding out “truly meritless suits.”\footnote{Bone, supra note 21, at 851, 870.} However, \textit{Iqbal} permits the screening-out of “weak” claims, or lawsuits with a “low . . . probability of trial success[.]”\footnote{Id. at 870.} This negates the purpose of the PLRA and \textit{Twombly} by dismissing meritorious claims, consequently thwarting the PLRA’s intended effect of keeping frivolous claims out of the courts while keeping meritorious claims on the dockets.\footnote{It should be noted the majority opinion in \textit{Twombly} was authored by Justice Souter, who found himself leading a strong dissent in \textit{Iqbal}. \textit{Compare Twombly}, 550 U.S. 544, \textit{with Ashcroft v. Iqbal}, 129 S. Ct. 1937 (2009) (Souter, J., dissenting). This movement from the majority to the dissent signals how the other Justices on the Court misinterpreted Justice Souter’s core intent of \textit{Twombly}: to weed out claims that lack merit. \textit{See infra Part II.C.3.B for a discussion of the dissenting opinion in \textit{Iqbal}.}} In the words of Representative Jerrold Nadler, “[t]he \textit{Iqbal} decision will effectively slam shut the courthouse door on legitimate plaintiffs based on the judge’s take on the plausibility of a claim, rather than on the actual evidence, which has not even been put into court yet or even discovered . . . .”\footnote{Access to Justice Denied -- Ashcroft v. Iqbal: \textit{Hearing of the Constitution, Civil Rights and Civil Liberties Subcomm. of the H. Comm. on the Judiciary}, 111th Cong. 1 (Oct. 27, 2009) (statement of Rep. Jerrold Nadler, Chairperson, Civil Rights and Civil Liberties Subcomm. of the H. Comm. on the Judiciary).} \textit{Iqbal}’s pleading standard ends a potentially successful prisoners’ rights claim at the earliest point in the lawsuit: the Rule 12(b)(6) motion to dismiss.\footnote{\textit{Fed. R. Civ. P. 12(b)(6)} (defining the pre-answer motion to dismiss for failure to state a claim); \textit{see discussion infra Part II.C. In essence, \textit{Iqbal} requires a complainant to include sufficient concrete evidence in his or her complaint if it is to survive a Rule 12(b)(6) motion to dismiss. \textit{See Iqbal}, 129 S. Ct. 1937. This interpretation of Rule 12(b)(6) perhaps encroaches on the territory of Federal Rule of Civil Procedure 56’s Summary Judgment by basing the dismissal on the facts presented, rather than on the law alleged. \textit{Compare Fed. R. Civ. P. 12(b)(6)} (motion to dismiss for failure to state a claim), and \textit{Fed. R. Civ. P. 12(d)} (“If, on a motion under Rule 12(b)(6) . . . , matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”); \textit{with Fed. R. Civ. P. 56} (Summary judgment requires the court to “examin[e] the pleadings and \textit{evidence} before it” (emphasis added)).} These strictly-interpreted motions (hereinafter “\textit{Iqbal Motions}”) have sprouted and spread across the federal
court system. During the five month period from the Supreme Court’s decision in *Iqbal* on May 18, 2009 until August 9, 2010, defendants filed approximately four thousand *Iqbal* Motions in the federal courts.\(^{40}\)

The prevalence of the *Iqbal* Motion causes concern. Under the *Iqbal* standard, a complaint will not survive an *Iqbal* Motion unless the plaintiff has engaged in pre-litigation discovery;\(^{41}\) an expensive and cumbersome task that may be exacerbated if a defendant claims confidentiality in the information sought.\(^{42}\) Indeed, a plaintiff cannot survive an *Iqbal* Motion under this strict standard without entering the litigation with a “smoking gun . . . in hand[.]”\(^{43}\) This new interpretation of the Rules makes it exceptionally more arduous for a prisoner-plaintiff to file a sufficient complaint than under the former pleading standard.

**II. THE PLEADING STANDARD: HOW THE SUPREME COURT BUILT A HIGHER HURDLE**

An overview of the past sixty years of pleading jurisprudence demonstrates the contrast between the Supreme Court’s past pleading requirements and *Iqbal*. Before the Supreme Court reinterpreted the Rules, a plaintiff’s complaint would not be dismissed under a Rule 12(b)(6) motion “unless it appear[s] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\(^{44}\) This liberal pleading standard was replaced by the plausibility pleading requirement defined in *Twombly* and expanded in *Iqbal*.\(^{45}\)

\(^{40}\) Using Westlaw’s online search engine, entering “‘Ashcroft v. Iqbal’ /255 ‘failure to state a claim’” in the federal cases database retrieved 4,105 federal cases on Aug. 9, 2010.

\(^{41}\) *See generally, Iqbal* 129 S. Ct. 1937 (holding that a complaint requires evidence to prove a plausible claim for relief); *see supra* note 38.


\(^{44}\) *Conley*, 355 U.S. 45-46; *cf. Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted).*

\(^{45}\) The notice pleading standard from *Conley* was replaced by the plausibility standard in all federal complaints in *Iqbal*. *Compare* Ashcroft v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (discussing the plausibility pleading standard); *with*
This section will provide a brief overview of the liberal notice pleading requirement defined in *Conley*. Next, the discussion will turn to *Twombly*, where the Supreme Court interpreted a light plausibility pleading standard for antitrust cases. The Article will then address the holding in *Iqbal* by looking to the complaint itself and the intermediate court’s application of the light plausibility pleading requirement. This Part will end by examining the strict application of the *Twombly* standard in the Supreme Court’s analysis in *Iqbal*.


In *Conley*, the Supreme Court held what would become the longstanding liberal pleading definition under Federal Rule of Civil Procedure 8(a) (“Rule 8(a)”).

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

This liberal pleading requirement emphasizes that a complaint need only provide “a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” This notice pleading standard is consistent with the liberal discovery opportunities available to the parties during litigation.

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*Twombly*, 550 U.S. 544 (interpreting a plausibility pleading standard for antitrust cases).

*Conley*, 355 U.S. 47; *cf. FED. R. CIV. P. 8(a) (claim for relief pleading requirements).*

*Conley*, 544 U.S. at 46 (citing *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302 (8th Cir. 1940); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944); *Cont’l Collieries, Inc. v. Shober*, 130 F.2d 631 (3d Cir. 1942)) (emphasis added).

*Id. at 47; see also FED. R. CIV. P. 8(a) (standards for pleading a complaint include a “short and plain statement” of the claim).*

*Conley*, 544 U.S. at 47-48 (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose . . . the basis of both claim and defense and to define more narrowly the disputed facts and issues.”).
b. Bell Atlantic Corp. v. Twombly: The Light Plausibility Standard

After sixty years of liberal notice pleading jurisprudence, the Supreme Court altered the pleading standard. In 2007, the Supreme Court interpreted Rule 8(a) as a heightened plausibility pleading standard.\(^{51}\) Although some doubted its importance, Professor Steven H. Steinglass, a nationally known expert on civil rights litigation, refers to this decision as the Court’s “most important pleading decision in 50 years.”\(^{52}\) *Twombly* held that an antitrust complaint requires a heightened pleading standard.\(^{53}\)

The Court specified that it was not re-writing the pleading standard in any way, but rather it was interpreting the Rules as intended: allowing the trial court to evaluate claims on a case-by-case basis to ensure they have “enough facts to state a claim to relief that is plausible on its face.”\(^{54}\) Although the Court denies re-drafting the Rules, this new plausibility requirement deviates from the previous notice requirement of *Conley*. In *Twombly*, the Court held that *Conley*’s pleading requirements, interpreted correctly, would not allow a plaintiff to merely plead conclusory allegations.\(^{55}\) Instead, *Twombly* interprets *Conley* as requiring the allegations in a

\(^{51}\) The *Twombly* decision discusses a heightened plausibility requirement under the Rules. *Twombly*, 550 U.S. at 556-57. The Court in *Twombly* claims to merely interpret the Rules properly. *Id*. at 557. Before the Supreme Court’s holding in *Iqbal*, there was much debate as to whether the *Twombly* plausibility standard applied only to antitrust litigation, or if it applied broadly to all federal complaints. *See* Klein, supra note 43, at 263 (*see*, *e.g.*, *Iqbal* v. *Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *cert. granted sub nom* *Ashcroft* v. *Iqbal*, 128 S. Ct. 2931 (June 16, 2008) (No. 07-1015) (“Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*.”)).

\(^{52}\) *STEVEN H. STEINGLASS*, SECTION 1983 LITIGATION IN STATE COURTS § 12:2 (2009).

\(^{53}\) *Twombly*, 550 U.S. 544. Antitrust actions require a heightened pleading standard in part due to the threat of extortion created by an antitrust lawsuit: since antitrust lawsuits were (pre-*Twombly*) easy and inexpensive to plead, but complicated and expensive to defend, defendants faced with conclusory pleadings could feel pressured to settle meritless claims to avoid engaging in pricey defense litigation. *See* *id*. at 557-59.

\(^{54}\) *Id*. at 570 (emphasis added).

\(^{55}\) *Id*. at 556-57.
pleading to be “plausible.” In essence, *Twombly* “retired” the “no set of facts” standard set forth in *Conley*, and replaced the standard with a plausibility requirement.

Scholars disputed the effect of *Twombly* and whether its application was limited only to antitrust cases, or perhaps its impact on the Rules was minimal. However, “to America’s civil-procedure professors, the effect of *Twombly* was akin to releasing a live ferret amid the Federal Rules of Civil Procedure.” Two years after releasing the “ferret,” the Supreme Court proclaimed the plausibility standard’s universal application in *Iqbal*.

c. *Ashcroft v. Iqbal: The Strict Plausibility Pleading Requirement*

The Supreme Court’s holding in *Iqbal* changed the pleading requirement, making it more difficult for a plaintiff to draft a sufficient complaint. This section discusses Plaintiff Iqbal’s initial civil complaint and the Defendants’ Rule 12(b)(6) motion to dismiss, the holding from the Second Circuit Court of Appeals, and the Supreme Court’s decision.

1. The Complaint

Plaintiff Iqbal – a native Pakistan citizen and practicing Muslim – was arrested in New York on November 2, 2001 on charges related to identity theft. In early January, Plaintiff Iqbal

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56 Id.
57 See STEINGLASS, supra note 52.
58 Id. at n.65 (likening the effect of *Iqbal* as *Conley*’s “epitaph”).
60 Two weeks after reaching the *Twombly* decision, the Supreme Court hinted that *Twombly* was limited to antitrust cases by reverting back to the former notice requirement in *Erickson v. Pardus*. See Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam) (relying on the fact that the plaintiff was pro se, the court reverted back to the notice requirement and the liberal construction of the pleading standard). However, the *Erickson* decision was an anomaly and the Supreme Court’s holding in *Twombly* did in fact create a universal heightened pleading standard under the Rules. See id.; but see Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (using a plausibility standard).
61 See Klein, supra note 43, at n.11.
63 *Iqbal*, 129 S. Ct. 1937.
64 Id.
was moved to the Administrative Maximum (ADMAX) Special Housing Unit (SHU). The ADMAX SHU was a special housing unit created for post-9/11 detainees. Plaintiff Iqbal and the other Plaintiffs alleged they were classified as persons of “high interest” and sent to ADMAX SHU based on their race, religion, and national origin, rather than any legitimate penological purpose. The Plaintiffs further alleged that the detainees in ADMAX SHU experienced “highly restrictive conditions of confinement” that were “markedly different from the conditions in the [prison]’s general population[.]”

The twenty-one allegations in the complaint are egregious. Plaintiff Iqbal described mistreatment ranging from unnecessary strip and body cavity searches, to the denial of basic medical care and hygiene, to verbal abuse and racial epithets. The constitutional violations alleged by Plaintiff Iqbal included that “Ashcroft and Mueller violated the First Amendment by subjecting Iqbal to harsher conditions of confinement because of his religious beliefs, and the equal protection guarantee of the Fifth Amendment by subjecting him to harsher conditions of confinement because of his race.” A gravamen of the complaint against Ashcroft and Mueller was that the designation of Plaintiff Iqbal as a person of “high interest” was a policy behind which Ashcroft was a “principal architect,” and of which Mueller was “instrumental in the adoption, promulgation, and implementation[.]”

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66 See Compl. at ¶¶ 51, 81; see also Sidhu, supra note 13, at 429.
67 See Compl. at ¶ 81; see also Sidhu, supra note 13, at 429.
68 See Compl. at ¶¶ 3, 52, 96; see also Sidhu, supra note 13, at 430.
69 See Compl. at ¶¶ 60, 63; see also Sidhu, supra note 13, at 430.
70 See Compl. at ¶¶ 201-70.
71 See id. at ¶¶ 82-89; see also Sidhu, supra note 13, at 430-31 (describing abuse including solitary confinement, body cavity and strip searches, denial to medical care, denial to access to legal counsel, denial of exercise and basic nutrition, kept in a cell with the lights on for nearly 24 hours per day, lack of adequate bedding, and other forms of allegedly cruel and unusual punishment).
72 Sidhu, supra note 13, at 432-33.
73 See Compl. at ¶¶ 10-11; Sidhu, supra note 13, at 432.
The United States concedes that the Federal Bureau of Investigation ("FBI") and Immigration and Naturalization Service ("INS") erred in their treatment of post-9/11 detainees. The Department of Justice ("DOJ") conducted a review of 762 cases of post-9/11 detainees. In this review, the DOJ determined that the FBI and INS “made little attempt” to distinguish detainees tied to terrorism from others. Despite the DOJ review, the Defendants moved to dismiss the case for failure to state a claim upon which relief can be granted under Rule 12(b)(6). The Defendants claimed that the Plaintiffs’ complaint was insufficient to overcome a claim of qualified immunity as an affirmative defense. Applying Conley’s liberal interpretation of Rule 8(a), the District Court denied the Rule 12(b)(6) motion. The Defendants filed an interlocutory appeal.

2. The Intermediate Court’s Holding

To understand the Supreme Court’s interpretation in Iqbal, it is important to look at the intermediate court’s decision. Since the Supreme Court decided Twombly between the filing of the interlocutory appeal in Iqbal and the Second Circuit’s decision, the Court of Appeals needed

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74 See THE SEPTEMBER 11 DETAINES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, Office of the Inspector Gen., U.S. Dep’t of Justice, (Apr. 2003) (hereinafter “OIG Report”). The OIG Report details how the United States handled the national security crisis that followed the attacks on September 11, 2001. See id. To conduct the review, the OIG Report examined “two detention facilities[.]” Id. at 5. One of these two facilities was the MDC in Brooklyn: the facility that housed Mr. Iqbal. Id. at 5; see also Am. Compl. at ¶ 60; Sidhu, supra note 13.

75 See OIG Report at 69; Sidhu, supra note 13.

76 See Reply Brief for Petitioners at 9, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5009266 (summarizing the question of whether dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6)); see also FED. R. CIV. P. 12(b)(6); Sidhu, supra note 13, at 433.

77 See supra note 76. See discussion infra note 130 (Qualified Immunity).

78 At the time the District Court ruled on the Rule 12(b)(6) motion to dismiss, the Supreme Court had not yet decided Twombly. Therefore, the Conley “notice” standard was the controlling law. See Elmaghraby v. Ashcroft, No. 04-01809, 2005 WL 2375202, at *9 (E.D.N.Y. Sept. 27, 2005), aff’d sub nom. Iqbal v. Hasty, 490 F.3d 143 (2007), rev’d sub nom. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); see also Conley v. Gibson, 355 U.S. 41 (1957); see discussion supra Part II.A.

79 Elmaghraby, 2005 WL 2375202 at *35; Sidhu, supra note 13, at 434-35.

to address whether *Twombly* was applicable outside of the antitrust context. In *Iqbal v. Hasty*, the court interpreted the plausibility pleading standard from *Twombly* as a flexible requirement that federal courts should apply to all civil complaints at their discretion. Using *Twombly*’s light plausibility standard, the Court of Appeals held that the complaint was sufficient under Rule 8(a) and therefore survived a Rule 12(b)(6) motion to dismiss.

Using the light analysis, the Court of Appeals applied the plausibility standard to Mr. Iqbal’s complaint, and emphasized the need for a fact-based case-by-case analysis, or “careful case management.” The Court of Appeals – recognizing the importance of post-complaint discovery – wanted “to make summary judgment . . . available to high-level government officials, but not at the pleading stage.” Rather, the intermediate court emphasized that the trial court, on remand, “must exercise its discretion . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.” In lieu of dismissing a complaint under Rule 12(b)(6), *Twombly* allows a trial court to request “a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”

The Court of Appeals held that, when accepting the alleged facts as true, “it is plausible” that the Defendants “would be aware of policies concerning the detention of those arrested by federal officers . . . in the aftermath of 9/11 and would know about, condone, or otherwise have

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81 See Sidhu, supra note 13, at 435.
83 See discussion supra note 21.
84 *Hasty*, 490 F.3d at 157-58.
85 Id. at 157-58.
87 Id. at 385 (quoting *Hasty*, 490 F.3d at 259 (quoting Crawford-El v. Britton, 523 U.S. 573, 597-98 (1998)) (emphasis in original)).
88 *Hasty*, 490 F.3d at 157-58; Sidhu, supra note 13, at 437.
personal involvement in the implementation of those policies[.]” 89 Therefore, the complaint satisfies \textit{Twombly}'s interpretation of Rule 8(a)(2). 90 Furthermore, the allegations “are sufficient to state a violation when combined with the Plaintiff's allegation that, under the policy created and implemented by the Defendants, he was singled out for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics.” 91 The Court of Appeals affirmed (in relevant part) the District Court’s finding that the complaint was sufficient to overcome a Rule 12(b)(6) motion to dismiss. 92

3. The Supreme Court’s Interpretation: the Expansion of \textit{Twombly} Through \textit{Iqbal}

In a 5-4 decision, the Supreme Court held that the inmate-Plaintiff’s pleadings were not sufficient to state a claim that the high-ranking government official Defendants “deprived him of his clearly established constitutional rights.” 93 The Supreme Court rejected the flexible pleading standard used by the Court of Appeals and held that \textit{Twombly}'s plausibility standard strictly applies to all federal claims. 94 The impact of this decision is monumental; “provid[ing] a federal judge with a new bigger hammer to knock down a case right from the beginning.” 95 In the realm of prisoner litigation, this decision further restricts the already difficult standards faced by a prisoner-plaintiff. 96

The Court of Appeals and the Supreme Court applied the same set of facts to the purportedly same plausibility standard with differing results. Thus, the question becomes: when is a claim plausible under the Supreme Court’s \textit{Iqbal} analysis? Under the former easier-to-plead

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89 Id. at 166; Sidhu, \textit{supra} note 13, at 437.
90 \textit{See} Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); \textit{see} discussion \textit{supra} Part II.B.
91 \textit{Hasty}, 490 F.3d at 175.
92 \textit{Id.} at 177 (“the order of the District Court is affirmed as to the denial of the Defendants' motions to dismiss all of the Plaintiff's claims, …”).
94 \textit{Id.} at 1953; \textit{but see} \textit{Twombly}, 550 U.S. 544 (applying the plausibility standard flexibly to antitrust complaints).
95 Frank & Cooper, \textit{supra} note 9 (internal quotation marks omitted).
96 \textit{See} \textit{Iqbal}, 129 S. Ct. 1937. A prisoner-plaintiff must meet various pre-filing procedures. \textit{See infra} Part IV.B.
Twombly analysis, when viewing the complaint as a whole, the standard “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim].”<sup>97</sup> The Iqbal majority disagreed, and applied a strict interpretation of Twombly by separating out each allegation of a complaint and analyzing them with a two-prong analysis.<sup>98</sup> Indeed, it appears that “if the plaintiffs did not come into the case with a smoking gun level of evidence in hand, then the allegations were sufficiently conclusory to allow a trial court power to engage in a plausibility review.”<sup>99</sup>

**A. The Iqbal Test**

Iqbal introduced a two-part test to determine whether a pleading is facially plausible and able to survive a motion to dismiss: a trial court judge must separate legal conclusions from factual allegations;<sup>100</sup> and then determine the plausibility of factual allegations.<sup>101</sup> This plausibility pleading standard is something less than probability.<sup>102</sup> It does, however, “[ask] for more than a sheer possibility that a defendant has acted unlawfully.”<sup>103</sup> This new interpretation is more “aggressive” than the Twombly approach, therefore this Article refers to it as a strict application of the plausibility standard.<sup>104</sup>

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<sup>98</sup> Iqbal, 129 S. Ct. at 1950; but see Twombly, 550 U.S. 544 (looking at the plausibility of the entire complaint taken as a whole, rather than breaking the complaint into each component and analyzing under a two-prong analysis).
<sup>99</sup> See Klein, supra note 43, at 273.
<sup>100</sup> Iqbal, 129 S. Ct. at 1949.
<sup>101</sup> Id. at 1950.
<sup>102</sup> Frank & Cooper, supra note 9.
<sup>103</sup> Iqbal, 129 S. Ct. at 1949.
<sup>104</sup> The Iqbal court implements a “stricter version of the plausibility standard” and “reflects a more aggressive approach to screening at the pleading stage.” Bone, supra note 21, at 861; compare Iqbal, 129 S. Ct. at 1949 (holding that each allegation of a complaint should be viewed separately and analyzed under a two-prong test), with Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (holding that a complaint should be viewed as whole to determine whether the allegations are plausible); see discussion supra note 21.
i. Separate Legal Conclusions from Factual Allegations

To decide an *Iqbal* Motion, the trial court must first address which allegations in the complaint are factual allegations, and which are legal conclusions.\(^{105}\) There is an inherent duplicity in the doctrine by allowing a court to declare that a factual allegation is not a factual allegation for the purposes of deciding a Rule 12(b)(6) motion to dismiss. According to the *Iqbal* majority, however, a legal conclusion is nothing more than a recitation of the elements required for a claim.\(^{106}\) These “threadbare” conclusory accusations are insufficient to state a claim.\(^{107}\)

In the *Iqbal* test, distinguishing factual allegations from legal conclusions is important for the assumption of veracity. Factual allegations are assumed to be true for the purposes of an *Iqbal* Motion.\(^{108}\) However, legal conclusions are not entitled to the same assumption.\(^{109}\) This prong is not to say that legal conclusions lack importance in a complaint. As the Court explained, legal conclusions “provide the framework of a complaint,” while factual allegations support the conclusions.\(^{110}\)

ii. Determine Plausibility of Factual Allegations

The second prong of the *Iqbal* analysis asks whether the pleader’s factual allegations plausibly suggest entitlement to relief.\(^{111}\) This heightened interpretation of Rule 8(a)(2) is more than a mere possibility of misconduct.\(^{112}\) This discretionary standard is “a context-specific task

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\(^{106}\) Blumstein, *supra* note 105, at n.10.

\(^{107}\) *Iqbal*, 129 S. Ct. at 1949.


\(^{109}\) *Iqbal*, 129 S. Ct. at 1949-50 (“we are not bound to accept as true a legal conclusion couched as a factual allegation”); see also Blumstein, *supra* note 112, at 25.

\(^{110}\) *Iqbal*, 129 S. Ct. at 1950.

\(^{111}\) *Id.* at 1950; see also Blumstein, *supra* note 105, at 25.

\(^{112}\) *Iqbal*, 129 S. Ct. at 1950; see also Blumstein, *supra* note 105, at 25.
that requires the reviewing court to draw on its judicial experience and common sense."\(^{113}\) If the factual allegations cannot meet this requirement, then the complaint will be dismissed without prejudice.\(^{114}\) In a state that does not have a tolling or saving statute, however, the dismissal may move the re-filing of an amended complaint outside the statute of limitations, thus barring entitlement to relief.\(^{115}\)

The Court held that “when courts find an equally plausible explanation for the factual allegations, they are not required to accept the plaintiff’s explanation for the complained-of conduct.”\(^{116}\) In \textit{Iqbal}, the Supreme Court analyzed competing claims as to the intent of the government officials. While the Plaintiff argued that Defendants Ashcroft and Mueller discriminated against the Plaintiff on the basis of race or national origin, the Defendants argued it was equally plausible that the Defendants merely possessed “the nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”\(^{117}\) Without discovery, the Supreme Court accepted the Defendants’ non-discriminatory alternative over the Plaintiff’s allegations and held in favor of the Defendants.\(^{118}\)

\textbf{B. The Dissent}

Justice Souter, the author of the majority opinion in \textit{Twombly}, authored a bitter dissent to \textit{Iqbal}.\(^{119}\) The Dissent argued that the majority misapplied \textit{Twombly}, and the complaint as a

\(^{113}\) \textit{Iqbal}, 129 S. Ct. at 1950.
\(^{114}\) See \textit{FED. R. CIV. P.} 12(b)(6).
\(^{115}\) See discussion \textit{infra} Part IV.A.
\(^{116}\) See \textit{STEINGLASS}, supra note 52.
\(^{117}\) \textit{Iqbal}, 129 S. Ct. at 1944; \textit{STEINGLASS}, supra note 52.
\(^{118}\) \textit{Iqbal}, 129 S. Ct. at 1944.
\(^{119}\) The fact that the author of \textit{Twombly} (which the \textit{Iqbal} majority bases their decision on) leads the dissent in \textit{Iqbal} demonstrates how peculiar this 5-4 holding is. Justice Souter claims the majority misapplied his rule from \textit{Twombly} and conducted an improper analysis of the facts in \textit{Iqbal}. See \textit{Iqbal}, 129 S. Ct. 1954-61 (5-4 decision) (Souter, J., dissenting); \textit{contra} \textit{Twombly}, 550 U.S. 544 (where Justice Souter wrote the majority opinion). See discussion \textit{supra} note 37.
whole met the pleading requirements of Rule 8(a) by giving the Defendants “fair notice” of the Plaintiff’s claims and theories.\textsuperscript{120} In discussing the misapplication, the Dissent pointed out that the first-prong under the \textit{Twombly} interpretation requires that, regardless of “how skeptical the court may be\textsuperscript{[1]}	extsuperscript{121} the court “must [accept] the allegations as true\textsuperscript{[.]}”\textsuperscript{122} Justice Souter argued that, if the Court accepted the allegations as true (as required by \textit{Twombly}), the complaint was sufficient under Rule 8(a).\textsuperscript{123}

After \textit{Iqbal}, all complaints must meet a strict plausibility standard. For a prisoner-plaintiff, however, this pleading requirement’s heaviest impact is on claims against government officials for alleged constitutional violations.

\textbf{III. The Governing Doctrines: What a Plaintiff Must Plausibly Plead}

To sue a government official for an alleged deprivation of constitutional rights, a prisoner-plaintiff must use the proper vehicle: either 42 U.S.C. \textsection 1983 or a \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics} claim.\textsuperscript{124} Each doctrinal vehicle carries with it pleading requirements that now, after the holding in \textit{Iqbal}, must include more evidence to support factual allegations in the initial pleading stage than previously required.\textsuperscript{125} Thus, the \textit{Iqbal} decision coupled with the doctrinal pleading elements could extinguish a

\begin{itemize}
\item \textit{Iqbal}, 129 S. Ct. at 1961 (Souter, J., dissenting) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).
\item \textit{id.} at 1959 (Souter, J., dissenting).
\item \textit{id.} (Souter, J., dissenting) (citing \textit{Twombly}, 550 U.S. at 555 (a court must proceed on “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”; \textit{id.}, at 556 (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable”)).
\item \textit{Iqbal}, 129 S. Ct. at 1959 (Souter, J., dissenting).
\item See \textit{Iqbal}, 129 S. Ct. 1937 (expanding the plausibility pleading requirement from \textit{Twombly} to all federal claims); see also \textit{Twombly}, 550 U.S. at 570 (interpreting Rule 8 to require claims be “plausible on [their] face”). See generally, FED. R. CIV. P. 8(a)(2) (general complaint requirements).
\end{itemize}
prisoner’s claim from the start by dismissing a meritorious claim before the complainant has an opportunity to engage in discovery.\textsuperscript{126}

The appropriate vehicle through which a plaintiff may sue a government official depends on whether the official works for the state or federal government. Although their origins vary, courts in the United States treat the two vehicles similarly.\textsuperscript{127} Section 1983 permits individuals to sue state officials for civil rights violations.\textsuperscript{128} A \textit{Bivens} claim allows individuals to sue federal government officials for violations of their constitutional rights.\textsuperscript{129} These two vehicles are discussed in detail below.\textsuperscript{130}

\textit{a. Section 1983: Claims Against State Officials}

Section 1983 provides a vehicle for constitutional tort claimants to sue state government officials for constitutional violations.\textsuperscript{131} The language of § 1983 reads, in relevant part:

\begin{quote}
Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities
\end{quote}

\textsuperscript{126}See \textit{Iqbal}, 129 S. Ct. at 1945; see discussion supra Part II.C.3; see also Fed. R. Civ. P. 12(b)(6) (motion to state a claim upon which relief can be granted). Furthermore, after filing suit, the complainant will face the affirmative defense of qualified immunity.

\textsuperscript{127}STEVEN H. STEINGLASS, \textit{SECTION 1983 LITIGATION IN STATE COURTS} § 5:4 (discussing § 1983 and \textit{Bivens} actions).

\textsuperscript{128}See infra Part III.A.1.

\textsuperscript{129}See infra Part III.A.2.

\textsuperscript{130}In addition to these two statutory vehicles, a plaintiff suing a government official will face qualified immunity. Qualified immunity is an affirmative defense where “government officials performing discretionary functions generally are shielded from liability” so long “as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” \textit{Harlow}, 457 U.S. at 818 (citing \textit{Procanier v. Naverette}, 434 U.S. 555, 565 (1978); \textit{Wood v. Strickland}, 420 U.S. 308, 322 (1975)). To overcome a qualified immunity defense, a plaintiff must show that (1) the constitutional violation is a matter of clearly established law, (2) there is personal involvement of the defendant, and (3) the plausibility pleading standard from \textit{Iqbal} is met. \textit{Iqbal} v. Hasty, 490 F.3d 143 (2007), \textit{rev’d sub nom.} Ashcroft v. \textit{Iqbal}, 129 S. Ct. 1937 (2009); Rid Dasgupta, \textit{Bivens in the War on Terror: Scope for the Supreme Court in Its Upcoming Case}, 3 CHARLESTON L. REV. 397, 407 (2009); see e.g., \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 818 (1982); MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, \textit{SECTION 1983 LITIGATION} n. 827 (Fed. Judicial Ctr. 2d ed. 2008) (“Several of the Supreme Court qualified immunity decisions are in \textit{Bivens} actions. The same qualified immunity analysis applies in § 1983 suits and \textit{Bivens} suits.”) (citing \textit{Wilson}, 526 U.S. at 609; \textit{Scherer}, 468 U.S. at 194); \textit{Hasty}, 490 F.3d at 152; Dasgupta, \textit{supra} note 130, at 407.

secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, . . . 132

When interpreting § 1983, the Supreme Court relied on the statute’s historical background: Congress enacted the original statute as a way to enforce civil rights when state law was inadequate. 133 The modern purpose of § 1983 is to deter state officials from depriving individuals of their constitutional rights, and when that fails, to provide relief to aggrieved parties. 134 To promote its purpose of vindicating constitutional violations, the statute should be interpreted generously. 135

To plead a constitutional violation under § 1983, four elements are required. 136 “[T]he plaintiff must establish [1] conduct by a person; [2] who acted under color of state law; [3] proximately causing [4] a deprivation of a federally protected right.” 137 The plaintiff must satisfy the burden of proof by a preponderance of the evidence, 138 but is not required to allege that the official acted in bad faith. 139

b. Bivens: Claims Against Federal Officials

Bivens established that there is an implied federal right to a remedy when an individual’s constitutional rights are violated by a federal government actor. 140 Successful Bivens claims are

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132 Id.
133 SCHWARTZ & URBONYA, supra note 130 (internal citations omitted). This statute was enacted in 1871 as part of the Civil Rights Act of 1871. See Dist. of Columbia v. Carter, 409 U.S. 418 (1973); see also Ernest H. Schopler, Annotation: Supreme Court’s Construction of Civil Rights Act of 1871 (42 USCS § 1983) Providing Private Right of Action for Violation of Federal Rights, 43 L. Ed. 2d 833 (2003). The original Act, often referred to as the Ku Klux Klan Act, was intended to apply to states. See id. This purpose is extended to its modern counterpart, § 1983. See id. The modern statute provides a method for persons to bring constitutional claims. See § 1983.
136 The four elements required for a prima facie case under § 1983 are (1) the conduct was performed by a person, (2) who acted under the color of state law, (3) proximately causing, (4) a deprivation of a federally protected right. See id. at 640; see also SCHWARTZ & URBONYA, supra note 130 (internal quotation marks and citations omitted).
137 SCHWARTZ & URBONYA, supra note 130 (internal quotation marks and citations omitted).
138 Id. (internal citations omitted).
139 Gomez, 446 U.S. at 640.
rare creatures in modern courts, and pleading a Bivens claim is more difficult than its § 1983 counterpart.

To establish a Bivens claim, a prisoner-plaintiff must plead: (1) a defendant lacked of good faith, (2) there is no alternative regulatory method to obtain relief, and (3) there are no “special factors” that may cause a court to dismiss the claim. With these difficult pleading requirements, including the requirement to plead the defendant’s bad faith state-of-mind, it is no surprise that Bivens plaintiffs rarely find a favorable ruling at the Supreme Court.

Plausibly pleading the elements of these two statutory vehicles is not the only challenge facing a prisoner-plaintiff. Before a prisoner can submit a complaint, the prisoner must comply with rigorous pre-litigation requirements.

IV. THE PRE-LITIGATION REQUIREMENTS: THE ROUGH ROAD TO THE COURTHOUSE

After the Iqbal decision, the pre-litigation requirements a prisoner-complainant must complete, coupled with the need to conduct pre-litigation fact-finding, can be fatally

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141 This is partly due to their “provision by provision analysis of the underlying constitutional rights, the relationship of the constitutional rights to statutory remedies, and other ‘special factors counseling hesitation.’” STEINGLASS, supra note 127 (quoting Bivens, 403 U.S. 388); see also Carlson v. Green, 446 U.S. 14 (1980).


143 In Harlow v. Fitzgerald, the Supreme Court held that a defendant’s objective good faith is enough to dismiss a plaintiff’s claim. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). The plaintiff must include in the pleading sufficiently plausible factual allegations that the defendant lacked good faith. See id. (good faith requirement); see also Ashcroft v. Iqbal, 127 S. Ct. 1937 (2009) (plausibility pleading standard); accord, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). For a pro se indigent prisoner-complainant, the process of gathering enough factual materials to form these allegations can be prohibitively cumbersome. Finding evidence of a defendant’s state of mind without any method of obtaining discovery is virtually impossible. Through its brief and confidential fact-finding process, the PLAC may assist a complainant reach this lack-of-good-faith pleading requirement by giving a prisoner-plaintiff access to the subpoena power. See discussion infra Part V.A.

144 Wilkie v. Robins held that a Bivens action may be dismissed where there are “special factors counseling hesitation.” Wilkie v. Robbins, 551 U.S. 537, 550 (2007). These special factors include “matters of ‘national security.’” See Tribe, supra note 42, at 65 (a critique of the Wilkie case by the plaintiff’s attorney); Zaring, supra note 42, at 327.

145 Zaring, supra note 42, at 327; Harlow, 457 U.S. at 818-19 (a defendant’s objective good faith is enough to dismiss a plaintiff’s claim); see also Wilkie, 551 U.S. at 550 (discussing special factors counseling hesitation).

146 Zaring, supra note 42, at 327.
cumbersome.\textsuperscript{147} Within the statute of limitations, a prisoner must comply with the various requirements of the PLRA.\textsuperscript{148} The PLRA’s exhaustion requirement can prove to be the most difficult hurdle for a prisoner-complainant.\textsuperscript{149} Depending on the statute of limitations in a particular jurisdiction, the administrative exhaustion process may end a prisoner’s lawsuit before it begins.\textsuperscript{150} If a prisoner manages to overcome those statutory obstacles, the inmate still faces a severe limitation on his or her access to information.\textsuperscript{151} These limitations pose a threat to both the sufficiency of an inmate’s access to legal research and the inmate’s pre-litigation fact-finding attempts.

\textit{a. Statute of Limitations: Racing the Clock}

The statute of limitations poses a threat to any civil claimant.\textsuperscript{152} Statutes of limitation vary by jurisdiction. Claims for \S\ 1983 violations and \textit{Bivens} actions do not have their own statute of limitations: instead, these claims borrow the statute of limitations for general tort claims in that jurisdiction.\textsuperscript{153} Most states have a statute of limitations between two and three years.\textsuperscript{154}

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{147}] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (plausibility pleading standard requires more than a recitation of the elements of a cause of action); see discussion infra Part II.C.
\item[	extsuperscript{148}] See PLRA cited supra note 19.
\item[	extsuperscript{149}] See infra Part IV.B.1.
\item[	extsuperscript{150}] See infra Part IV.A.
\item[	extsuperscript{151}] See infra Part IV.C.
\item[	extsuperscript{152}] \textsc{Restatement (Second) of Conflict of Laws} \S\ 142(1) (1971) (“An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.”).
\item[	extsuperscript{154}] See discussion supra note 153.
\end{enumerate}
\end{footnotesize}
State law also controls tolling (or saving) statutes. A tolling statute is an interruption in the statute of limitations for certain situations, such as a dismissal. Some states have lenient statutory provisions to allow a prisoner, whose complaint is dismissed for a non-meritorious reason, to re-file the complaint without meeting some of the PLRA’s requirements. Other states have provisions that “toll the statute of limitations during the pendency of administrative procedures such as a prison’s internal grievance procedures.”

The statute of limitations is a daunting problem for prisoners who are in jurisdictions without lenient tolling statutes. These prisoners must race against the clock to file a proper complaint. In jurisdictions that do not permit tolling, dismissal from an Iqbal Motion will likely cause the prisoner to miss the statute of limitations. The prisoner will then be forever barred from raising that claim.

**b. Prison Litigation Reform Act: The First Barrier to the Courts**

The PLRA severely restricts a prisoner’s ability to file a lawsuit by imposing pre-filing requirements. This section discusses the main issues created by the PLRA: the exhaustion requirement, filing fees, the three strikes policy, and the pro se prisoner litigation problem.
1. PLRA’s Requirement to Exhaust Administrative Remedies

The PLRA § 1997a(a) states: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”†62 Exhaustion means a prisoner must use the prison’s grievance system to attempt to settle the dispute before filing a lawsuit.†63 The PLRA’s exhaustion requirements are enforced more strictly than most other administrative exhaustion procedures.†64 However, a prisoner’s claim may be considered exhausted if the prisoner’s failure to exhaust is due to either the staff not providing the prisoner with the grievance forms, or the staff causing untimely delays in the responses to grievance forms.†65 A prisoner may make multiple attempts to use the grievance system for the same grievance, but the prisoner must act quickly: the statute of limitations continues to run.†66

2. PLRA Requires Filing Fees Be Paid In Full

The PLRA requires a prisoner to pay all of his or her court filing fees in full.†67 Generally, if indigent persons cannot afford their court costs, they may file in forma pauperis, and disregard the costs.†68 This indigent-friendly costs exception is not available to a prisoner-

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†62 § 1997a(a).
†63 Id.
†64 Schlanger, supra note 2.
†65 § 1997e(a); Powe v. Ennis, 177 F.3d 393 (5th Cir. 1999). Cf. Lewis v. Washington, 300 F.3d 829 (7th Cir. 2002) (holding that administrative remedies are exhausted if prison officials do not respond to a prisoner’s grievance).
†66 § 1997e(a).
†68 BLACK’S LAW DICTIONARY 859 (9th ed. 2009) (in forma pauperis allows an indigent person to “disregard” court costs and filing fees).
The only option available to a prisoner who cannot afford to pay all of the filing fees up front is to pay the fees in installments. This requirement severely limits a prisoner’s ability to file a claim because most prisoners, if allowed to have a prison job, receive practically nothing for their work.

3. PLRA’s Three Strikes Policy

The PLRA’s three strikes policy creates another obstacle in prisoner litigation. If a judge dismisses a claim under a Rule 12(b)(6) motion, that dismissal counts as a strike. Once a prisoner receives three strikes, not counting the case before the court, the prisoner cannot bring another claim without first paying all court fees in full. To make matters worse, if a prisoner appeals a dismissal, then the initial ruling and the appellate affirmation each count as individual strikes: leaving the plaintiff with two strikes instead of one. Since, after Iqbal, a plaintiff must meet a strict plausibility pleading requirement, the likelihood of a prisoner-plaintiff’s complaint being dismissed on a Rule 12(b)(6) motion is greater; thereby increasing the possibility that a prisoner will receive a strike when filing a federal civil claim.

169 § 1915(b)(1) (“. . . if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. . . .” (emphasis added)).
170 Id.
171 See Williams, supra note 160, at 862 (2006) (“This represents a significant barrier to access [to courts] because prisoners are often paid little or nothing for their labor.”) (internal citations omitted); see, e.g., Tourscher v. McCullough, 184 F.3d 236, 239 (3d Cir. 1999) (referring to a prisoner who worked in the prison cafeteria for twenty cents per hour).
172 § 1915(g).
173 Id.
174 Pigg v. FBI, 106 F.3d 1497 (10th Cir. 2006).
175 § 1915(g). If a prisoner was permitted to pay filing fees in installments, then all payments must be made before he or she files another claim.
c. The Pro Se Prisoner: A Problem Exacerbated by Iqbal

When asked about the PLRA’s impact on prison litigation, one prison superintendent stated:

“The PLRA hasn’t had much of a chilling effect on the inmates, because they’re mostly pro se, though it has decreased the numbers a little. The bigger impact is that the PLRA has shifted cases that would have had attorneys to the pro se docket, which has helped us with the potential damages and made them easier to defend.”

Many prisoners are pro se plaintiffs, or plaintiffs who represent themselves. It is difficult for inmates to find an attorney to represent them due to the low damages typically awarded in such lawsuits and the PLRA’s complex pre-litigation requirements.

Self-representation requires access to information, and prisoners have limited access. Most prisons have prison law libraries that contain the legal resources prisoners need to file claims. However, prisons may restrict an inmate’s access to the law library, or require an inmate to use a jailhouse lawyer to access the law library for them. The prison staff may deny

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177 See Schlanger, supra note 2, at 1655 (quoting Telephone Interview with Gerald Horgan, Superintenent, Suffolk County (Mass.) Jail (Apr. 13, 2001)) (emphasis added). Before Iqbal, commentators noted that statutory limitations, such as the PLRA, increased the pro se prisoner-plaintiff margin, and that change weakened many inmates’ civil claims. See id.


179 BLACK’S LAW DICTIONARY 1341 (9th ed. 2009).

180 Schlanger, supra note 2, at 1655 (“. . . for a variety of reasons, inmates prior to the PLRA found it quite difficult to obtain legal counsel. The PLRA greatly exacerbates this effect: under the PLRA, given the low damages usually expected in inmate cases . . . , the expected value to a lawyer of even a very high-probability damages action is rarely enough to fund the litigation. The PLRA’s fee limit thus leaves lawyers unable to afford to take almost any inmate case except as more-or-less pro bono activity.”) (internal cross references omitted).

181 Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978) (no access or limited access to the law library did not infringe on an inmate’s access to courts).

access to the law library altogether.\textsuperscript{183} If the prison staff grants access to the law library, the prisoner usually has a very short period of time to work in the law library.\textsuperscript{184}

In addition to the legal information barrier, inmates must overcome their limited access to facts and discovery. The inmate-plaintiff must have enough evidence to prove their claims are plausible.\textsuperscript{185} Since inmates are incapable of conducting fact-finding from behind bars, this requirement can be impossible to achieve.\textsuperscript{186} Further, inmates generally do not have the funds to engage in discovery.\textsuperscript{187} For example, they typically cannot afford to pay for depositions and expert witnesses.\textsuperscript{188}

The pre-filing information necessary to draft a sufficient complaint can be obtained in the post-filing discovery process through a subpoena.\textsuperscript{189} However, when a complainant is seeking information for the initial complaint, the complainant is not entitled to the subpoena power.\textsuperscript{190} This pre-complaint lack of authority makes it difficult, if not impossible, for a \textit{pro se} inmate-plaintiff to conduct initial fact-finding.

\textbf{V. RECOMMENDATIONS AND CONCLUSION: THE PRISON LITIGATION ADMINISTRATIVE COURT}

A prisoner-complainant faces numerous obstacles on the path to a civil remedy. The PLAC will assist a prisoner-plaintiff reach the pre-trial discovery phase of litigation by giving a prisoner-plaintiff access to discovery. This initial access to information will help the prisoner-

\begin{itemize}
\item \textsuperscript{183} U.S. \textit{ex rel.} Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa. 1963) (there is no constitutional right of access to a law library).
\item \textsuperscript{184} See Harrell, 470 P.2d 640.
\item \textsuperscript{185} See Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (interpreting the Rules to require a claim for relief be plausible on its face); see discussion supra Part II.C.3.
\item \textsuperscript{186} Schlanger, supra note 2, at 1612 (citing Billman v. Ind. Dep’t of Corr., 56 F. 3d 785, 790 (7th Cir. 1995) (“[I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit.”).
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} See FED. R. CIV. P. 45(a)(3) (only the clerk or attorney with authorization of the court may issue a subpoena to a requesting party).
\item \textsuperscript{190} Subpoenas are issued by courts during litigation. See FED. R. CIV. P. 45(a)(1)(c) (2008) (subpoenas must be issued from courts).
\end{itemize}
plaintiff overcome a government official defendant’s *Iqbal* Motion. This Part discusses the PLAC, how it will operate, and potential drawbacks to this new system. Next, the discussion turns to how the PLAC resolves the problems addressed throughout the body of this Article.

*a. Recommendations: The PLAC Implementation, Problems, and Solutions*

This Article proposes a new *in camera* confidential administrative court to determine whether a prisoner’s claims against a government official meet *Iqbal’s* the strict plausibility pleading requirement. This court, the PLAC, will be modeled after the Foreign Intelligence Surveillance Court (FISC), an administrative court authorized under the Foreign Intelligence Surveillance Act (FISA). The purpose of the PLAC is to conduct confidential fact-finding before an administrative judge after a defendant files an *Iqbal* Motion. After reviewing the evidence, the PLAC judge will rule as to whether the factual allegations are plausible. The trial court will adopt the PLAC’s ruling on the *Iqbal* Motion.

1. How the PLAC Will Operate

After the implementation of the PLAC, pre-discovery procedure for an inmate’s allegations of constitutional violations by government officials will follow this path:

1. inmate exhausts PLRA procedures;
2. inmate files a civil complaint in Federal District Court;
3. defendant files an *Iqbal* Motion;¹⁹²
4. Federal District Court stays the litigation and the *Iqbal* Motion is taken to the *in camera* PLAC for review;

¹⁹¹ 50 U.S.C § 1803 (2008) (establishing that the FISC will be comprised of 11 district court judges from at least seven different federal circuits whom will determine whether applications for electronic surveillance are appropriate; this section also establishes the appellate court for this special court system).
¹⁹² An *Iqbal* Motion is a Rule 12(b)(6) motion for failure to state a claim using *Iqbal’s* strict plausibility pleading standard. *See* discussion *supra* Part I; *see also*, Fed. R. Civ. P. 12(b)(6) (motion to dismiss).
prisoner-plaintiff is given the opportunity to demonstrate that his or her claim is plausible;

(6) parties issue subpoenas and conduct discovery in camera;

(7) PLAC evaluates the evidence and makes a recommendation for the Federal District Court to decide the *Iqbal* Motion;\(^\text{193}\)

(8) the case is remanded back to Federal District Court; and

(9) Federal District Court Judge follows the PLAC Judge’s recommendation and rules on the *Iqbal* Motion.

The first three steps do not diverge from current pre-trial civil procedure. The fourth step, where the trial court stays the litigation and commences the PLAC proceeding, is the first part of the PLAC process. The PLAC will commence upon the recommendation of the Federal District Court Judge with jurisdiction over the matter.\(^\text{194}\) To maintain uniformity between violations by federal and state officials, the PLAC will have jurisdiction over both *Bivens* and § 1983 claims. Once a Federal District Court recommends that a case go to the PLAC, the PLAC Judge must accept the case.

In the fifth step, the prisoner-plaintiff will have the opportunity to prove their claim is plausible. The *in camera* court proceeding will only conduct as much investigation as necessary to determine whether the claim is meritorious and will strive to keep all discovery confidential.\(^\text{195}\)

Both parties are free to issue subpoenas in the sixth step. However, this discovery power is limited to conducting only as much fact-finding as necessary to decide the *Iqbal* Motion. The

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\(^{193}\) When reviewing the evidence, the PLAC Judge should do so in a light most favorable to the plaintiff.

\(^{194}\) This commencement method is slightly different from the PLAC’s FISC counterpart: the FISC commences once the government submits an application to a FISC Judge. § 1804(a)(1–11).

\(^{195}\) See discussion *infra* Part V.B.2.c.
PLAC Judge should exercise his or her discretion to ensure that the parties do not attempt to engage in post-pleading discovery before the PLAC: such complex discovery is outside the scope of the PLAC’s authority. Any objections to PLAC-ordered discovery will be handled immediately before the PLAC Judge. In the event of an objection by the defendant, the defendant will have the burden of proving that the information sought is either irrelevant or unattainable.\textsuperscript{196} Due to the confidential nature of the PLAC, the PLAC Judge has wide discretion regarding the enforcement of the Federal Rules of Evidence.

In the seventh step, the PLAC Judge evaluates the evidence and determines whether the plaintiff’s complaint is plausible by conducting an \textit{in camera} review of the evidence. In its review, the PLAC Judge must view the evidence in a light most favorable to the plaintiff. Although the plausibility standard has set a higher pleading bar than the former notice requirement, this standard is attainable when a claimant has access to discovery. After making his or her determination of the sufficiency of the complaint, the PLAC Judge will issue an order to the Federal District Court. The Federal District Court Judge must accept the PLAC Judge’s order.

\textbf{2. Potential Problems with the PLAC}

There are two main arguments against the creation of the PLAC. First, the PLAC may be unconstitutional and second, implementation of the PLAC is prohibitively expensive.

Arguably, the PLAC may be unconstitutional as an invalid adjunct Article III Court.\textsuperscript{197} To analyze the validity of this argument, it is useful to analogize the PLAC to the FISC, since the

\textsuperscript{196} Objections related to the discovery being cumbersome may suffice in some situations, but on those occasions, the defendant must make a good-faith effort to gather and submit as much information as can reasonably be obtained. A defendant’s objection based on the confidentiality of information sought will not suffice. The PLAC is a closed-door court, and the confidential information introduced to the PLAC Judge will remain in confidence between the defendant and the PLAC Judge.

\textsuperscript{197} See U.S. CONST. art. III (establishing the Judiciary in the United States, and granting Congress the authority to create inferior courts).
PLAC will be modeled after that existing court. Courts have generally held the FISC to be constitutional. Therefore, the PLAC will likely be held constitutional as well.

Another possible drawback to the PLAC is the cost associated with establishing an entire new system of in camera courts. One might argue that there is no room in the federal budget to create new physical courts and to hire new judges to preside over them. However, the cost of establishing the PLAC is outweighed by the social and moral benefits. The PLAC will only hear one specific type of issue: Iqbal Motions in lawsuits between prisoner-plaintiffs and government official defendants. Given the specificity of the matters the PLAC will handle, there will only be a handful of PLACs in the United States. Since there will not be many physical courts, the DOJ will not need to appoint many judges to preside over them. That means only a few additional employees will be added to the federal payroll. By helping a prisoner-plaintiff gather enough evidence to overcome an Iqbal Motion and proceed with litigation, the PLAC benefits the social and moral goals of society by not merely weeding out weak cases, but ensuring that Rule 12(b)(6) throws out litigation that is truly frivolous.

b. Overcoming Iqbal: How the PLAC Resolves Problems in Prisoners’ Rights Litigation

This Article presented some obstacles faced by prisoner-plaintiffs who seek to impute civil liability on government officials for alleged deprivations of constitutional rights. This section discusses how the PLAC will resolve those problems. The three main problems the

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198 Since the judges used in the FISC and the PLAC are both Federal District Court Judges, the FISC and the PLAC are proper Article III Courts. See cf. U.S. v. Duggan, 743 F.2d 59 (2d Cir. 1984); U.S. v. Nicholson, 955 F. Supp. 588 (E.D. Va. 1997); U.S. v. Cavanagh, 807 F.2d 787 (9th Cir. 1987) (court is constitutional, and a neutral oversight of government). The FISC does not violate the case and controversy requirement of Article III of the Constitution because the applications for surveillance orders relate to concrete issues of individuals’ rights. Duggan, 743 F.2d 59 (discussing case and controversy). Furthermore, the cases heard by the FISC do not entertain political questions, rather, they address issues similar to those heard in ordinary courts. Id. (FISC judge does not adjudicate political questions).

199 See generally Bone, supra note 21, at 851 (discussing how Twombly created a pleading standard that sought to dismiss frivolous claims, whereas Iqbal’s interpretation and application of the plausibility standard places cases that are “weak[,]” or not likely to be successful at trial, in jeopardy of dismissal at the pleading stage).
PLAC seeks to resolve are: (1) restoring the goals of the PLRA and *Twombly*; (2) allowing a prisoner-plaintiff to plead a successful claim for relief by granting access to discovery; and (3) lifting the burdens of the PLRA coupled with the plausibility pleading standard.

1. The PLAC Restores the Goals of the PLRA and *Twombly*

The PLRA and *Twombly* shared a common goal of reducing the prevalence of frivolous lawsuits in the federal courts.\(^{200}\) This goal was undermined by *Iqbal*’s strict interpretation of the plausibility pleading standard expelling meritorious lawsuits.\(^{201}\)

The PLAC will restore the goals of the PLRA and *Twombly* by preventing the dismissal of meritorious claims on the basis that the trial court judge felt the claim was “weak.”\(^{202}\) Instead, the Federal District Court Judge will pass an *Iqbal* Motion to the PLAC Judge, who will engage in discovery to help the prisoner-plaintiff overcome the *Iqbal* Motion. This discovery process and evaluation will ensure that a prisoner-plaintiff’s claim does not fall victim to a judge’s desire to clear the docket.\(^{203}\) This restores the intent of *Twombly* and the PLRA by preserving cases that a judge may perceive as “weak,” but are meritorious claims.

2. The PLAC Provides a Prisoner-Plaintiff with the Opportunity to Plead Their Case

The pleading standard from *Iqbal* poses problems for prisoner-complainants. These problems include the lack of access to pre-complaint discovery, the unpredictability created by a case-by-case determination rule, and issues of confidentiality. This section will discuss each of these problems in turn, and how the PLAC could resolve the problems.

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\(^{200}\) *See* discussion *supra* Part I.

\(^{201}\) *See* discussion *supra* Part I.

\(^{202}\) *See* discussion *supra* Part I; Bone, *supra* note 21, at 851.

\(^{203}\) *See* discussion *supra* Part I; Bone, *supra* note 21, at 851.
A. A Prisoner-Plaintiff’s Lack of Access to Pre-Complaint Discovery

The heightened pleading standard from *Iqbal* presents a significant pleading problem for plaintiffs who challenge “an agency-wide custom” and other issues that are “impossible to allege (in an acceptably non-conclusory manner) without discovery.” In his speech to the House Committee on the Judiciary, Debo P. Adegbile, the Director of the NAACP Legal Defense and Education Fund, stated that the strict plausibility pleading standard will cause problems for civil rights complainants who must plausibly prove state-of-mind elements in their complaints.

Under the new pleading standard, “many cases that would have a good chance of winning with evidence uncovered in discovery will be dismissed under a thick screening model that demands specific factual allegations at the pleading stage.” In fact, many of Mr. Iqbal’s allegations did not pass muster because the Plaintiff could not “prove that the [D]efendant[s] acted with [a] discriminatory purpose[,]” a requirement of certain claims of constitutional violations.

Dismissing meritorious civil rights complaints, like that in *Iqbal*, is also “troubling from a social point of view.” These troubles resonate loudly in the realm of prisoners’ rights litigation, where the plaintiffs are often victims of some of the most egregious constitutional rights violations in the hands of government officials.

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205 Liability for Discriminatory Activity: Hearing on *Ashcroft v. Iqbal* Before Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 1 (Oct. 27, 2009) (statement of Debo P. Adegbile, Director, Litigation NAACP Legal Defense and Education Fund, Inc.) (hereinafter “Adegbile Statement 111th Cong. 1”); see also *Bone, supra* note 21, at 879 (“These problems are likely to be especially serious for civil rights cases, and particularly cases like *Iqbal* involving state-of-mind elements.”).

206 Adegbile Statement 111th Cong. 1.


209 *Bone, supra* note 21.
Inmates have limited access to discovery. They are confined and have limited financial resources.\(^{210}\) Since the Rules limit a plaintiff’s ability to make speculations in pleadings, the plaintiff needs to have factual data to support allegations in a complaint.\(^{211}\) Therefore, the plaintiff must somehow obtain actual knowledge about a government official’s conduct, mindset, or other confidential actions before pre-trial discovery.\(^{212}\)

The PLAC can enable a prisoner-plaintiff to conduct this pre-trial discovery by an *in camera* investigation and review of evidence. The PLAC will give a prisoner-plaintiff access to the subpoena power to obtain the factual information necessary to overcome an *Iqbal* Motion. Ideally, this access to discovery will foster access to the judicial system.

**B. The PLAC Prevents Adjudication Before Discovery**

Although the *Iqbal* majority claimed to accept the Plaintiff’s allegations as true, the Court accepted other plausible claims at their discretion. For example, in *Iqbal*, the majority held that the Plaintiff’s allegations that Ashcroft and Mueller acted with a discriminatory purpose were automatically defeated by the Defendants’ claims that there was a reasonable non-discriminatory alternative explanation for the alleged constitutional rights violations.\(^{213}\) This type of pre-discovery discretion litigates the entire dispute before the parties have presented their cases.

One purpose of the PLAC is to avoid adjudicating the entire dispute at the pleading stage. The PLAC seeks to determine the sufficiency of the plaintiff’s complaint by giving the plaintiff access to some discovery. The PLAC will have strict requirements about the discovery process.

\(^{210}\) See discussion supra Part IV.C.
\(^{211}\) Even the Rules recognize that, in certain circumstances, a plaintiff will be unable to sufficiently plead certain allegations before discovery. In such cases, the Rules permit a plaintiff to make an allegation in their complaint and note that further discovery is needed. See Fed. R. Civ. P. 11(b)(3) (“the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after reasonable opportunity for further investigation or discovery, . . .”). The Supreme Court’s holding in *Iqbal* may jeopardize this pleading function with the plausibility standard. See Ashcroft v. *Iqbal*, 129 S. Ct. 1937 (2009); see also discussion supra Part II.C.3 (discussing the plausibility standard).
\(^{212}\) STEINGLASS, *supra* note 52.
\(^{213}\) *Iqbal*, 129 S. Ct. at 1951-52. See discussion *supra* Part II.C.3.a.iii.
to ensure that the PLAC does not over-step its bounds and discover evidence beyond what is necessary to decide the *Iqbal* Motion. When paired together, the goal of the PLAC and the restrictions on overbroad discovery under the PLAC’s jurisdiction will prevent a defendant’s unsupported counterargument from overpowering a plaintiff’s pleading at the trial court’s discretion. This prevents adjudication at the pleading stage.

**C. The PLAC Protects Confidential Information**

The fear of exposing confidential information is a concern for some government official defendants. With litigation comes discovery, and issues of national security may leak to the general public. When government officials must answer to the public judicial system, they may be forced to operate in a “fishbowl[.]” working on matters of great sensitivity in the public view. Therefore, it is important to strike a balance between the interests of national security and the moral dilemma of leaving victims of constitutional rights violations without remedy.

Since the PLAC conducts its investigation and evaluation *in camera*, there is a minimal risk of exposing sensitive government information. This maintains the government’s interest in matters of national security while allowing an aggrieved plaintiff to seek recourse.

**3. The PLAC Relieves Burdens Imposed By the PLRA and the Statute of Limitations**

Fulfilling the PLRA’s requirements and obtaining pre-litigation discovery can pose a daunting task for a prisoner-complainant to complete within the statute of limitations. By permitting fact-finding to come after the filing the complaint, the PLAC alleviates the burdens and gives prisoner-complainants an avenue to obtain the hard evidence required by *Iqbal*.

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214 Spriegel, *supra* note 86, at 387.
216 See Bone, *supra* note 21, at 879. This Article proposes that this balance is best achieved through *in camera* discovery.
217 See discussion *supra* Part IV.
Additionally, the PLAC reduces the risk of receiving a strike for submitting a factually deficient but meritorious complaint. The PLAC also relieves a prisoner-complainant from the lack of access to information associated with pro se prisoner-plaintiffs by providing access to discovery. Access to information may increase the quality of initial fact-finding and help both parties form stronger arguments at the outset of litigation.

c. Conclusion

Ashcroft v. Iqbal negatively impacts prisoners’ already severely limited rights. When viewed as a whole, filing a successful prisoners’ rights complaint can be a cumbersome task. Statutory obstacles and challenging pleading requirements paired with a prisoner’s lack of resources may end many meritorious constitutional claims against government officials before a complainant reaches pre-trial discovery.

This Article proposes the creation of an administrative court, the PLAC, to conduct in camera fact-finding for a prisoner-plaintiff faced with an Iqbal Motion. This fact-finding and review will eliminate many of the challenges a prisoner-plaintiff faces behind bars. The PLAC will restore the motives of the PLRA and Twombly, enable a prisoner-plaintiff to obtain the discovery necessary to overcome an Iqbal Motion, and preserve confidential information.

Our modern jurisprudence is extinguishing prisoners’ rights. Unfortunately, the words of Former Attorney General Robert F. Kennedy are as true today as they were forty-six years ago:

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218 See discussion supra Part IV.B.3.
219 See discussion supra Part IV.C.
220 See discussion supra Part I.
221 See discussion supra Part I-IV.
222 See discussion supra Part V.A.
223 See discussion supra Part V.B.
“the law is always taking something away”\(^{224}\) from the poor. Perhaps it is time the law gives indigent prisoners an opportunity to plead their case.

\(^{224}\) See generally, PATRICIA WALD, LAW AND POVERTY: REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 6 n.13 (1965) (quoting Attorney General Robert F. Kennedy, Law Day at University of Chicago Law School (May 1, 1964)) (“The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.”).