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Turkmen v. Hasty: The Second Circuit Holds Highest Ranking Law Enforcement Officials Accountable for Post-9/11 Policies Infringing on Constitutional Rights

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TURKMEN v. HASTY: THE SECOND CIRCUIT HOLDS HIGHEST RANKING LAW ENFORCEMENT OFFICIALS ACCOUNTABLE FOR POST-9/11 POLICIES INFRINGING ON CONSTITUTIONAL RIGHTS

Abstract: On June 17, 2015, in *Turkmen v. Hasty*, the Second Circuit of the U.S. Court of Appeals affirmed in part the order of the U.S. District Court for the District of New York. This order denied motions to dismiss due process and equal protection claims for damages against federal officials, a cause of action created by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* ("*Bivens*"). The claims in *Turkmen* arose from the detainment and treatment of men perceived to be "Arab or Muslim" after 9/11. This Comment argues that the Second Circuit properly decided this case per the *Bivens* test without extending *Bivens* into a new context. This Comment also asserts that national security does not justify limitations on the constitutional obligations of federal officials toward those in their care. Last, this Comment argues that qualified immunity should be limited for *Bivens* claims regarding national security actions.

INTRODUCTION

On June 17, 2015, in *Turkmen v. Hasty*, the Second Circuit of the U.S. Court of Appeals held that plaintiffs who were detained post-9/11 based on a federal policy of detaining "Arab and Muslim" men had plausibly pleaded their complaint that the defendants, former federal officials, had violated the Constitution.[1] Plaintiffs had brought claims against these federal officials for damages using the cause of action created in 1971 by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* ("*Bivens*").[2] These claims were based on alleged violation of the plaintiffs' substantive due process, equal protection, and Fourth Amendment rights during their confinement in a federal facility.[3] The Second Circuit relied on the *Bivens* test stated in 2009 by the Second Circuit in *Arar v. Ashcroft* and concluded that the claim for damages could be extended in this context.[4] The

[1] *See* Turkmen v. Hasty, 789 F.3d 218, 225, 227, 241–42, 264 (2d Cir. 2015).

[2] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); *Turkmen*, 789 F.3d at 265.

[3] *See Turkmen*, 789 F.3d at 265.

[4] *See id.* at 234; Arar v. Ashcroft, 585 F.3d 559, 571–72 (2d Cir. 2009).

Bivens test requires the court to first determine if the claim is bringing *Bivens* into a "new context" and second if there is "another remedy, equally effective" or if there are "special factors counseling hesitation" against a judicial remedy.[5] The court in *Turkmen* reasoned that the context of conditions of confinement claims against individual officers for harsh detainment conditions has precedent within the *Bivens* jurisprudence.[6]

This Comment argues that the Second Circuit properly applied the two-part test articulated by *Arar* by recognizing that *Turkmen* does not bring *Bivens* into a "new context."[7] The court also properly avoided using the "special factors counseling hesitation" to justify limiting *Bivens* in the national security context.[8] Part I of this Comment discusses the history of *Bivens* claims and qualified immunity, as well as the procedural history and historical context of *Turkmen.*[9] Part II details the *Bivens* and qualified immunity analyses of *Turkmen* by comparing the majority and dissent opinions on several relevant issues.[10] Part III argues that *Turkmen* does not extend the *Bivens* remedy to a new context and that, in national security cases, the application of *Bivens* and the pullback of qualified immunity is justified.[11]

I. THE HISTORY OF *BIVENS* CLAIMS IN THE CONTEXT OF 9/11 IN DECIDING *TURKMEN V. HASTY*

In 1971, in *Bivens*, the U.S. Supreme Court first recognized an implied right to sue federal officials for money damages for a violation of the Fourth Amendment.[12] The Court rejected the U.S. government's argument that the plaintiff could only sue for damages under tort law because there may be disparities between Fourth Amendment interests and tort law interests.[13] The Court determined that a money damages remedy for a constitutional violation

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[5] *See Bivens*, 403 U.S. at 396–97; *Arar*, 585 F.3d at 571–72.

[6] *See Turkmen*, 789 F.3d at 235.

[7] *See id.* at 234–35 (quoting *Arar*, 585 F.3d at 572).

[8] *See id.* at 237 n.17; Stephen I. Vladeck, *National Security and* Bivens *After* Iqbal, 14 LEWIS & CLARK L. REV. 255, 277 (2010) (discussing why other doctrines will do the work to protect the exercise of federal discretion in national security cases and why *Bivens* remedies should extend to national security cases).

[9] *See infra* notes 12–57 and accompanying text.

[10] *See infra* notes 58–91 and accompanying text.

[11] *See infra* notes 92–125 and accompanying text.

[12] *See Bivens*, 403 U.S. at 397. The courts were given the onus whether or not to provide a damages remedy for alleged constitutional violations by federal officials similar to the statutory remedy provided in 42 U.S.C. § 1983 for claims against officials at the state and local level. *See* 42 U.S.C. § 1983 (2012); Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1126 (2014) (discussing why there have been such strong limitations on *Bivens* damages by the courts in the national security and foreign relations context).

[13] *Bivens*, 403 U.S. at 390–95; *see also* Kent, *supra* note 12, at 1139 (explaining that the Court in *Bivens* refused to allow state law to serve as the sole relief for the plaintiff because the Fourth Amendment covers a wider breadth of interests than state law).

would be proper because the Court had previously implied injunctive relief against federal officials for constitutional and statutory claims.[14] The Court included in its decision two limitations to the right to sue federal officials for money damages: if there was "another remedy, equally effective" or if there were "special factors counseling hesitation" against a judicial remedy.[15] The Court later extended *Bivens* to suits against federal officials under the Fifth Amendment and the Eighth Amendment.[16] Thus, the *Bivens* action was created.[17]

In the past, the U.S. Supreme Court has "refused to extend *Bivens* liability to any new context or new category of defendants."[18] The reason for this reticence is a concern about separation of powers.[19] Deciding whether to extend *Bivens* focuses on whether Congress or the judiciary should create this remedy, with the U.S. Supreme Court traditionally favoring Congress's discretion.[20] In 2015, in *Turkmen v. Hasty*, the Second Circuit became the first court to allow a *Bivens* action against highly-placed executive officials for their official policies in reaction to the 9/11 terrorist attack, specifically Attorney General John Ashcroft and FBI Director Robert Mueller.[21] Section A of this Part focuses on the history of *Bivens* claims and the requirements for the defense of qualified immunity to such claims.[22] Section B focuses on the procedural history of the *Turkmen* decision.[23]

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[14] *See Bivens*, 403 U.S. at 395–96.

[15] *Id.* at 396–97.

[16] *See* Kelly Dougherty, Note, *The Circuit Split Created by* Pollard v. Geo Group, Inc.*: The Dangers of Allowing a* Bivens *Action Where Adequate Alternative State Remedies Exist*, 9 RUTGERS J.L. & PUB POL'Y 665, 668 (2012) (examining the history and changes in *Bivens* jurisprudence).

[17] *See Bivens*, 403 U.S. at 397 (holding that, in the absence of an affirmative congressional statement to the contrary, a petitioner can state a cause of action and recover damages for injuries caused by federal officials' violation of the Fourth Amendment).

[18] *See Turkmen*, 789 F.3d at 267 (Raggi, J., dissenting) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) (holding that a plaintiff cannot bring a *Bivens* claim against a private entity acting in a federal capacity)).

[19] *See id.*

[20] *See id.* This favoring of a potential legislative remedy is based on the notion that Congress is better equipped to determine the consequences of new litigation on public officials than the courts. *See id.* (citing Bush v. Lucas, 462 U.S. 367, 389 (1983) (holding that Congress is more able than the judiciary to determine how new litigation between federal employees will impact the government because of Congress's experience and investigative capabilities)).

[21] *Id.* at 265.

[22] *See infra* notes 24–44 and accompanying text.

[23] *See infra* notes 45–57 and accompanying text.

A. Bivens *and Qualified Immunity: Accountability for Federal Policy Infringing on Constitutional Rights, Up to a Point*

Prior to the creation of the *Bivens* action, no remedy existed for infringements of a citizen's constitutional rights by federal government officials.[24] In 1971, in *Bivens*, the U.S. Supreme Court first implied private damages actions against federal officials for alleged violations of a citizen's constitutional rights.[25] Under *Bivens*, federal officials could be sued individually rather than as officials of the federal government.[26] The last time the Court extended *Bivens* liability was 1980.[27] The Second Circuit has stated that *Bivens* liability should be very limitedly applied in "new contexts."[28]

There is a two-step process for determining whether a *Bivens* claim is available to a plaintiff.[29] First, a court must determine whether the underlying claim "would extend *Bivens* to a new context."[30] If the answer to the first question is yes, then the court must consider whether there is an alternative remedy available to the plaintiff or whether "special factors counsel hesitation."[31]

Bivens liability has rarely been granted by the courts, but it offers a valuable tool in the court's discretion to hold federal officials responsible for breaches of constitutional rights.[32] In 1980, in *Carlson v. Green*, the U.S. Su-

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[24] *See* Dougherty, *supra* note 16, at 667 (describing the lack of a claim to assign liability to federal officials for violations of the Constitution that injured citizens prior to 1971). 42 U.S.C § 1983 allowed claims to enforce such constitutional infringements against states only. *Id.* at 666–67.

[25] *See Bivens*, 403 U.S. at 397 (implying action for unlawful arrest and excessive force in arrest under Fourth Amendment unreasonable searches and seizures prohibition). On its face, the 1971 U.S. Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* appears to express a fundamental belief about liberty, which was articulated by Chief Justice Marshall in *Marbury v. Madison* in 1803: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." George D. Brown, *Counter-Counter Terrorism via Lawsuit—The* Bivens *Impasse*, 82 S. CAL. L. REV. 841, 845 (2009) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

[26] *See* Kent, *supra* note 12, at 1140 (describing why allowing suits against federal officials as individuals is preferable because, although victims of federal officials' violations could sue the United States government directly, sovereign immunity would likely block their relief).

[27] *See* Carlson v. Green, 446 U.S. 14, 20 (1980) (implying claim under Eighth Amendment Cruel and Unusual Punishment Clause for failing to see to prisoner's medical needs). The only other Supreme Court extension of *Bivens* was in 1979. Davis v. Passman, 442 U.S. 228, 248–49 (1979) (implying *Bivens* claim under the Fifth Amendment Equal Protection Clause for gender discrimination by a U.S. congressman against his employee).

[28] *See Arar*, 585 F.3d at 571 (clarifying the limited two-step *Bivens* analysis).

[29] *See id.* at 572.

[30] *Id.*

[31] *Id.* (quoting Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

[32] *See Turkmen*, 789 F.3d at 233–34; *id.* at 267 (Raggi, J., dissenting); Frederick Schauer, *Constitutionalism and Coercion*, 54 B.C. L. REV. 1881, 1903–04 (2013) (arguing for the necessity of constitutional coercion in the form of *Bivens* remedies to hold officials in the executive branch accountable to constitutional provisions).

preme Court last extended the *Bivens* action.[33] Although the Court found both that the claims extended *Bivens* into the "new context" of the Eighth Amendment and that the Federal Tort Claims Act ("FTCA") provided an alternative remedy, a *Bivens* remedy still applied.[34] The Court reasoned that the *Bivens* remedy more effectively protected the plaintiff's rights than the FTCA remedy.[35] The Court concluded that, unlike an FTCA remedy, a *Bivens* remedy was a deterrent because it held individual employees liable instead of the government, offered punitive damages, allowed a plaintiff to opt for a jury, and was not dependent on the discretion of an individual state.[36]

In order to avoid unnecessary *Bivens* liability when working in their official capacities, federal officials may receive qualified immunity from liability.[37] A defendant can utilize the protections of qualified immunity if the complaint does not sufficiently plead that the defendant's actions violated the plaintiff's rights or if, at the time of the violation, the defendant would not have known that the right existed because it was not clear.[38]

In 2008, the U.S. Supreme Court in *Ashcroft v. Iqbal* held that a federal official's constitutional liability cannot be based on vicarious liability alone to overcome qualified immunity.[39] Instead, plaintiffs must plausibly plead that each defendant federal official violated the plaintiff's constitutional rights

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[33] *See Carlson*, 446 U.S. at 20.

[34] *See id.* at 19–20 (alleging that federal prison officials violated the plaintiff's son's Fifth, Eighth, and Fourteenth Amendment rights because the officials were responsible for the injuries the son sustained in prison, which caused his death).

[35] *Id.* at 20.

[36] *See id.* at 21–23. There also was a lack of "special factors counseling hesitation" and no congressional legislative history that suggested that Congress intended to prohibit plaintiffs from a *Bivens* remedy when a Federal Tort Claims Act ("FTCA") remedy was available. *See id.* at 19.

[37] *See Turkmen*, 789 F.3d at 280–81 (Raggi, J., dissenting). Qualified immunity exceeds the reach of a mere defense and allows a defendant to avoid litigation entirely in applicable contexts. *See* Kent, *supra* note 12, at 1141 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009)). The qualified immunity doctrine serves, in part, to protect officials by allowing them to properly do their jobs for the public without fear of litigation against them. *See id.* Critics of the qualified immunity doctrine allege that it has been inconsistently applied by the Supreme Court, reflecting a high degree of legal maneuvering based on policy determinations. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35–36 (1989) (examining the impact of qualified immunity litigation on civil rights claims). Thus, the Court often draws the contours of the qualified immunity doctrine based on policy determinations as to the government's interests. *See id.*

[38] *See* Varrone v. Bilotti, 123 F.3d 75, 78 (2d Cir. 1997) (holding that the officers who conducted a required strip search of the son of a prison inmate were entitled to qualified immunity even if their duty was discretionary). Generally, this determination is based on the reasonableness of the officials' conduct in the circumstances and at the time that the conduct occurred. *Id.*; *see also* Pearson v. Callahan, 555 U.S. 223, 244 (2009) (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)) (holding that the petitioners were entitled to qualified immunity because their conduct was not necessarily unconstitutional when the search occurred).

[39] *See Iqbal*, 556 U.S. at 676–77.

themselves.[40] The decision placed a higher burden on the plaintiff to show that the defendant purposefully condoned or agreed to a subordinate's unconstitutional actions.[41] Before *Iqbal*, if the supervisory defendant was involved in the misconduct at issue, the theory of *respondeat superior* applied liability to them in *Bivens* claims.[42] After *Iqbal*, a plaintiff's due process and equal protection claims required proof that each defendant possessed the intent to punish or discriminate against the plaintiff through his or her own actions.[43] Seemingly, this made it harder for plaintiffs to overcome defendants' qualified immunity.[44]

B. Turkmen v. Hasty*: Unique in a Contentious Post-9/11 Climate*

The plaintiffs in *Turkmen v. Hasty* first brought their claims against the defendants, five federal law enforcement officials, over thirteen years ago.[45] After 9/11, the FBI and other agencies within the Department of Justice ("DOJ") initiated an investigation aimed at identifying the perpetrators of the attack.[46] This investigation included a policy whereby any resident who was

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[40] *See id.*

[41] *See id.* at 682–83; *see also Turkmen*, 789 F.3d at 233.

[42] *See Turkmen*, 789 F.3d at 250.

[43] *See id.* at 233; *id.* at 275 (Raggi, J. dissenting); *see also* Bell v. Wolfish, 441 U.S. 520, 538 (1979) (evaluating whether the conditions of confinement of pre-trial detainees violated the Due Process Clause, either through evidence of explicit punitive intent or the lack of a rationally related alternative purpose for the condition); Washington v. Davis, 426 U.S. 229, 241–42 (1976) (holding that courts may infer an intent to discriminate on the basis of race from a statute in order to support a finding of an Equal Protection Clause violation). In *Bell v. Wolfish* in 1979, the U.S. Supreme Court considered a suit brought by pretrial detainees who challenged the constitutionality of the conditions of their confinement in a federally operated, short-term custodial facility. *See* 441 U.S. at 523. Conditions of confinement for pretrial detainees are unconstitutional under the Due Process Clause when the detainee's conditions become so punitive so as to undermine the detainee's liberty interest. *See id.* On the one hand, a particular condition is not punishment if it is reasonably related to a legitimate government purpose, unless the requisite punitive intent exists. *See id.* at 538–39. On the other hand, the condition may not be "arbitrary or purposeless" or a court may make an inference that the actual purpose of the condition is unconstitutional punishment. *Id.* at 539. In *Washington v. Davis* in 1976, the Supreme Court held that proof that a law impacts one race to a much greater degree than another does not make that law *per se* unconstitutional under the Equal Protection Clause. *See* 426 U.S. at 242. Although disproportionate impact is relevant, discriminatory intent must be demonstrated as well in order to trigger strict scrutiny, which is traditionally applied to laws that discriminate on the basis of race. *See id.* Thus, in *Washington*, the Court held that proof of discriminatory purpose is necessary for an equal protection violation to be shown. *See id.* at 245.

[44] *See Turkmen*, 789 F.3d at 250 (requiring *Bivens* plaintiffs to prove that defendants' own misconduct meets each of the requirements of the constitutional violation, element by element, to hold them liable).

[45] *See id.* at 224.

[46] *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1, 11–12 (2003), https://www.oig.justice.gov/special/0306/index.htm [https://perma.cc/37ED-AJ6E].

perceived to be "Arab or Muslim," and discovered in violation of his or her visa, was arrested and held until affirmatively cleared.[47] While confined under this policy, the plaintiffs suffered from harsh conditions, including frequent strip searches, meager food, denial of basic hygiene items, physical and verbal abuse, and were held indefinitely, often with no suspected links to terrorism.[48] The defendants received daily reports of the arrests and detentions and some determined how to exert the most pressure possible on the detainees.[49] Most of the plaintiffs were held in the Administrative Maximum Special Housing Unit ("ADMAX SHU") of the Metropolitan Detention Center ("MDC"), a particularly restrictive unit.[50]

In 2006, the United States District Court for the Eastern District of New York dismissed the plaintiffs' unlawful-length-of-detention claims but permitted the substantive due process and equal protection claims to continue.[51] Six of the original eight plaintiffs then settled their claims against the government and *Iqbal* was decided, which changed the pleading requirements for the plaintiffs' case.[52] The Second Circuit then vacated and remanded the conditions of confinement claims for further consideration.[53] Later, six additional plaintiffs intervened and the plaintiffs amended their complaint.[54] The *Bivens* claims included a due process conditions of confinement claim, an equal protection claim alleging that the plaintiffs faced such conditions due to their perceived "race, religion, ethnicity, or national origin," and a Fourth and Fifth

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[47] *See* Fourth Amended Complaint and Demand for Jury Trial ¶¶ 1, 39–49, Turkmen v. Ashcroft, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02 CV 2307); U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *supra* note 46, at 14, 37–39.

[48] *See* Fourth Amended Complaint and Demand for Jury Trial, *supra* note 47, ¶¶ 119, 120, 128, 130; U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 1, 33–35 (2003), https://oig.justice.gov/special/0312/final.pdf [https://perma.cc/22PB-6E9Z]. For example, an agent from the FBI came to arrest Anser Mehmood's wife but arrested him based on a minor immigration violation only, stating he would be out on bail within days, but he was instead held for months in harsh conditions. *See* Fourth Amended Complaint and Request for Jury Trial, *supra* note 47, ¶¶ 159–172.

[49] *See* Fourth Amended Complaint and Demand for Jury Trial, *supra* note 47, ¶ 61.

[50] *See id.* ¶¶ 4, 67, 76.

[51] *Turkmen*, 789 F.3d at 224–25 (citing Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 WL 1662663, at *33–36, 40–41 (E.D.N.Y. June 14, 2006), *aff'd in part*, *vacated in part*, 589 F.3d 542 (2d Cir. 2009) (per curiam)).

[52] *See id.* at 225; *see also Iqbal*, 556 U.S. at 678 (requiring a complaint to state a facially plausible cause of action, beyond a mere probability, to satisfy the inference that the defendant purposefully discriminated against the plaintiff).

[53] *See Turkmen*, 789 F.3d at 225; *see also* Turkmen v. Ashcroft, 589 F.3d 542, 546–47 (2d Cir. 2009) (holding that the conditions of confinement claims should be remanded in order for the court to apply the new *Iqbal* pleading standard).

[54] *Turkmen*, 789 F.3d at 225. This included a class of other non-citizens who were arrested and detained after September 11, 2001, and were perceived by the defendants to be Arab or Muslim. *Id.*

Amendment claim based on the unreasonable and punitive strip searches the plaintiffs faced.[55] Ultimately, the Second Circuit upheld most of the claims.[56] The court denied qualified immunity to the federal officials on most of the claims, holding that qualified immunity did not apply because pretrial detainees had constitutional rights no matter the circumstances.[57]

II. A COMPARISON OF THE *BIVENS* DOCTRINE AND QUALIFIED IMMUNITY THROUGH *TURKMEN V. HASTY*

In 2015, the Second Circuit Court of Appeals in *Turkmen v. Hasty* allowed for an extension of *Bivens* liability, which is unprecedented in challenges to post-9/11 detention policies.[58] This facially conflicted with the decision by the U.S. Supreme Court in *Ashcroft v. Iqbal* in 2009, which denied a *Bivens* remedy for a claim based on similar post-9/11 detainment policies.[59]

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[55] *Id.* Although critics argue that this litigation is sometimes merely a means of calling attention to personal politics against counter-terrorist policies, many of these plaintiffs suffered real injuries of the sort at which *Bivens* is aimed to remedy. *See* Brown, *supra* note 25, at 874.

[56] *See Turkmen*, 789 F.3d at 265.

[57] *See id.* at 224, 247, 259, 262–63; *id.* at 265 (Raggi, J., dissenting); *see also* Iqbal v. Hasty, 490 F.3d 143, 159 (2d Cir. 2007) (holding that the exigent circumstances post-9/11 did not diminish detainee's right not to be needlessly harassed and mistreated in a prison cell), *rev'd sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (determining that the respondent failed to plausibly plead facts to support a claim for purposeful discrimination against the detainees). Qualified immunity was denied in part because it was clearly established at the time of the plaintiffs' detention that it was illegal to impose punitive conditions of confinement on pretrial detainees, to hold individuals in harsh conditions of confinement due to their "race, ethnicity, religion, and/or national origin," to continuously subject detainees to unnecessary strip and body cavity searches, or to conspire to deprive detainees of equal protection of the law. *See Turkmen*, 789 F.3d at 251, 259, 261–62, 264. This illegality exists because there is no rational relationship between the harsh conditions that the detainees suffered and a legitimate government purpose. *See id.* at 251, 261–62, 264.

[58] *See* Turkmen v. Hasty, 789 F.3d 218, 265 (2d Cir. 2015) (Raggi, J., dissenting). The Fourth, Seventh, Ninth, and D.C. Circuit Courts of Appeals have not extended a *Bivens* remedy for post-9/11 policies undertaken by federal officials in the interest of national security. *See id.* at 265 n.1 (citing Vance v. Rumsfeld, 701 F.3d 193, 203 (7th Cir. 2012); Mirmehdi v. United States, 689 F.3d 975, 983 (9th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390, 394, 397 (D.C. Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540, 556 (4th Cir. 2012)).

[59] *See* Ashcroft v. Iqbal, 556 U.S. 662, 666–67, 687 (2009). *Ashcroft v. Iqbal*, decided by the Supreme Court in 2009, concerned a plaintiff who was arrested by agents of the Immigration and Naturalization Service due to the suspected fraud of identification documents. *Id.* The plaintiff was held in the Metropolitan Detention Center under maximum security conditions in the Administrative Maximum Special Housing Unit ("ADMAX SHU") because he was designated a person of "high interest" to the 9/11 investigation. *Id.* His causes of action arose from his harsh treatment in the ADMAX SHU. *Id.* at 667. The complaint contended that the designation of "high interest" undermined his First and Fifth Amendment rights because the designation was established based on his "race, religion, or national origin." *See id.* at 668–69. The complaint also alleged that the defendants condoned the plaintiff's harsh treatment as a policy judgment based solely on the plaintiff's "religion, race, or national origin." *See id.* The Court held that *Bivens* defendants are liable only if their actions satisfy each element of the underlying constitutional tort, which the Court held that they had not. *See id.* at 676–77. *Iqbal* involved many of the same defendants as

Furthermore, *Iqbal* favored granting qualified immunity to government officials in the national security context, but *Turkmen* pulled back on the qualified immunity doctrine.[60] Relying in part on *Ashcroft*, the dissent in *Turkmen* stated that the *Bivens* remedy should not be granted because it brought *Bivens* into a "new context" and included special factors counseling hesitation in applying this judicial remedy.[61] The commentary provided by the dissent presents a question as to why a *Bivens* remedy has been extended in this case, when it has never before been permitted to challenge federal officials' post-9/11 responses.[62]

First, the court in *Turkmen* evaluated whether the claim brought the *Bivens* remedy into a "new context.[63] Under this first step, it can be difficult to determine what constitutes a "new context."[64] In *Turkmen*, the majority noted that the context of the case is not the national response in the wake of 9/11, but the context of the plaintiffs facing punitive conditions while detainees in a federal facility.[65] This context was determined by the court by analyzing the constitutional "rights injured," due process and equal protection rights, in conjunction with the "mechanism of injury," the punitive prison conditions.[66] The court held that the constitutional claims in this case were

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Turkmen v. Hasty, the Second Circuit case from 2015, including John Ashcroft, the former Attorney General, and Robert Mueller, the former Director of the FBI. *Id.* at 666; *Turkmen*, 789 F.3d at 224. In *Iqbal*, the Court attempted to balance the right of an individual to actual and symbolic damages for a constitutional injury with allowing federal officers discretion, ultimately toward deference to the officials. *See* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 261 (arguing that the national security exceptionalism justification in post-9/11 emergency detention cases is overstated and judicial responses are more varied).

[60] Chad Howell, *Qualified Discovery: How* Ashcroft v. Iqbal *Endangers Discovery When Civil Rights Plaintiffs File Suit Against Government Officials*, 21 GEO. MASON U. C.R.L.J. 299, 311 (2011) (arguing that after *Iqbal* the judicial remedies available to those facing constitutional violations by government officials will be more limited). For example, the Ninth Circuit Court of Appeals' 2012 decision in *Padilla v. Yoo* essentially created an exception to the principles embodied in *Bivens* by granting the government official qualified immunity. *See* 678 F.3d 748, 762, 768–69 (2012) (holding that an American citizen detained as an enemy combatant under harsh conditions for national security interests could not prove a violation of clearly established law, and, as such, the defendant was entitled to qualified immunity); *see also* Jonathan Hafetz, *Torture, and Impunity in U.S. Court*s, AL-JAZEERA (Jan. 30, 2012), http://www.aljazeera.com/indepth/opinion/2012/01/20121307159326319.html [https://perma.cc/J2TP-PX45] (discussing how *Padilla* threatens constitutional rights and liberties as well as the accountability of government actors). *Padilla* provided the potential for immunity from governmental abuse in the name of national security. *See* Hafetz, *supra*.

[61] *See Turkmen*, 789 F.3d at 265, 267, 272 (Raggi, J., dissenting).

[62] *See id.* at 272.

[63] *See id.* at 234 (majority opinion); *id.* at 267 (Raggi, J., dissenting) (citing Bush v. Lucas, 462 U.S. 367, 377–78 (1983)).

[64] *See id.* at 234 (majority opinion).

[65] *Id.* at 234–35.

[66] *Id.* This finding is based on the calculus used to determine the context of the claim in the 2009 Second Circuit Court of Appeals decision in *Arar v. Ashcroft*, in which the court refused to extend the *Bivens* remedy. *See id.* at 234; *Arar*, 585 F.3d at 572. In *Arar*, after determining that the

not in a new *Bivens* context, but fit into the previous context for conditions of confinement cases.[67] Conversely, the dissent in *Turkmen* argued that the context of the case was the national security response in the period post-9/11, when concerns were especially high and decisive action was warranted.[68] The dissent argued that, looking at all of the legal and factual circumstances, there was no similar precedent on point.[69] The dissent stated that the majority incorrectly applied a high level of generality to the inquiry and equated the claims at issue to previous *Bivens* precedent in which federal prisoners were permitted to bring actions for indifference to their medical needs.[70] The dissent claimed that the claim for punitive conditions of confinement of pre-trial detainees in a time of national security crisis was a "new context" requiring the full *Bivens* analysis.[71] The majority disagreed and held that the national security policies after 9/11 did not constitute the "context" of the claim and that instead this confused the first step of the *Bivens* test with the second.[72]

Second, the Second Circuit looked at whether the claim brought up "special factors counseling hesitation" or whether alternative remedies were available to plaintiffs.[73] In *Turkmen*, the majority did not address the "special factors" or the alternative remedies because it held that the claim did not bring *Bivens* into a "new context," the first step in the *Bivens* inquiry.[74] The dissent in *Turkmen* argued against applying *Bivens* to the claim because of four "special factors:" the fact that the plaintiffs confronted an official executive policy, that the claim infringed on the executive's immigration authority and national security authority, and that Congress had discretion to provide a statutory damages remedy, which they did not.[75] The dissent argued that the

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case brought the *Bivens* jurisprudence into a "new context," the Second Circuit then evaluated the policy concerns of the case, "special factors," and alternative remedies to determine if a *Bivens* claim was justified. *Arar*, 585 F.3d at 572; *see Turkmen*, 289 F.3d at 234.

[67] *Turkmen*, 789 F.3d at 235. Additionally, in *Turkmen*, the Second Circuit held that detainees had similar rights as citizens to be free from punitive confinement, so the case was not in a new context from other conditions of confinement cases. *See id.* at 236. Similarly, in *Carlson v. Green* in 1979, the U.S. Supreme Court created an Eighth Amendment *Bivens* action for the harsh treatment of prisoners. Carlson v. Green, 446 U.S. 14, 17–20 (1979); *Turkmen*, 789 F.3d at 236. Additionally, in *Correctional Services Corp. v. Malesko* in 2001, the Court held there was insufficient cause to create a *Bivens* remedy for the treatment of private corporations who were holding federal detainees; the plaintiffs were not federal prisoners suing a federal official, which could have justified *Bivens* protections. *See* Corr. Servs. Corp v. Malesko, 534 U.S. 61, 71–72 (2001); *Turkmen*, 289 F.3d at 235.

[68] *See Turkmen*, 289 F.3d at 268 (Raggi, J., dissenting) (stating that the majority unduly narrows the definition of context).

[69] *See id.* at 269–70.

[70] *See id.*

[71] *See id.* at 268–70.

[72] *See id.* at 234 (majority opinion).

[73] *See id.*

[74] *See id.* at 237 n.17.

[75] *Id.* at 272 (Raggi, J., dissenting).

Bivens remedy should not be used to challenge executive policy, in this case the official confinement policy undertaken by highly ranked federal officials in response to the threat created.[76]

The majority and dissent also disagreed about whether the plaintiffs had plausibly pleaded their due process and equal protection claims.[77] In order to bring a claim of due process or equal protection, the plaintiffs had to prove that the defendants had the specific intent to punish or discriminate against them through harsh detainment conditions.[78] The majority inferred both punitive intent and discriminatory intent from the actions of the defendants.[79] The plaintiffs showed that the defendants directed their detainment, even if the plaintiffs were not suspected of terrorism, and placed them in extremely restrictive conditions, which were normally reserved for suspected terrorists.[80] This unnecessary restriction served no legitimate purpose.[81] The dissent argued that the majority mistakenly implied the defendants' intent to punish or discriminate by stating that the confinement policy was not related to a legitimate goal.[82] To the dissent, the legitimate goal was national security.[83] In response, the majority stated that national security concerns do not justify detaining pre-trial individuals in such harsh conditions on the basis of per-

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[76] *See id.* (citing *Malesko*, 534 U.S. at 74).

[77] *See id.* at 245–46, 248–49, 252–53, 256 (majority opinion).

[78] *See* Bell v. Wolfish, 441 U.S. 520, 538 (1979); Washington v. Davis, 426 U.S. 229, 241–42 (1976); *Turkmen*, 789 F.3d at 233, 244, 252. Intent to punish or discriminate may be express or implied. *See* Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000) (holding that claim by black residents based on their relationship with police did not meet the requisite factual basis for showing discriminatory intent under the Equal Protection Clause). To show the requisite intent in such discrimination cases, the plaintiff can point to a law that creates an explicit classification of people based on race. *See id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213, 227–29 (1995) (holding that strict scrutiny applies to all governmentally-created racial classifications)). Alternatively, to show discriminatory intent, a plaintiff can demonstrate that a law, which is facially neutral, is intentionally discriminatory when applied. *See id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that a city cannot use a racially discriminatory means to enforce an ordinance)). Last, a plaintiff can allege that a neutral policy has a negative consequence in practice and was motivated by discriminatory intent. *See id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (holding that that a plaintiff had failed to carry its burden of proving that local authorities' refusal to rezone a tract showed racially discriminatory intent); Johnson v. Wing, 178 F.3d 611, 615 (2d Cir. 1999) (holding that a corporation charging a homeless, disabled plaintiff for the use of its facility, even though it swallowed most of her social security benefits, did not violate the Equal Protection Clause)).

[79] *See Turkmen*, 789 F.3d at 245–46, 248–49, 252–53, 256.

[80] *See id.* at 255–56. Two defendants also approved a false statement that the detainees had been classified as "high security" based on individual assessments of their behavior and past history of terrorism. *Id.* at 256. In fact, no such assessments were made. *Id.*

[81] *See id.* at 248–49.

[82] *Id.* at 275 (Raggi, J., dissenting).

[83] *See id.*

ceived race or religion, so the plaintiffs had plausibly pleaded their constitutional claims.[84]

Last, the qualified immunity doctrine at issue immunizes public officials from damages liability when the conduct for which they are being sued did not "violate clearly established rights of which a reasonable person would have known."[85] The majority held that the situation presented by 9/11 did not justify qualified immunity for the due process claim, because the plaintiffs plausibly pleaded their due process claim and this right was established at the time of confinement.[86] Furthermore, the majority held that qualified immunity did not apply to the equal protection claim because the plaintiffs had plausibly pleaded their equal protection claim and this right was also established at the time of confinement.[87] The restrictive confinement and mistreatment of the plaintiffs based on their "race, ethnicity, religion, and/or national origin" was illegal at the time of the detainment, such that any "reasonably competent officer" would understand the illegality of such actions.[88] Conversely, the dissent argued that the defendants should have been granted qualified immunity because it serves as a protection to government officials in their official duties.[89] The dissent argued that the defendants took quick, decisive action in a time of need in order to protect the nation from further attacks and did not defy "established law."[90] The dissent argued that that the majority was overly general in its definition of "established law" and incorrectly denied qualified immunity.[91]

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[84] *Id.* at 245, 264 (majority opinion).

[85] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (holding officers who entered arrestee's house without warrant were shielded by qualified immunity because they did not violate "clearly established" rights); Procunier v. Navarette, 434 U.S. 555, 565 (1978) (holding that qualified immunity should not have been rejected because the petitioners could not have reasonably known about a right that had not yet been "clearly established"); Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that school board member was only liable if he, in bad faith, ignored student's "clearly established" rights). Qualified immunity is an affirmative defense, which must be pled by the defendant. *See Malesko*, 534 U.S. at 69.

[86] *See Turkmen*, 789 F.3d at 246–47 (stating that pretrial detainees have a right to be free from punitive conditions, regardless of the circumstances).

[87] *See id.* at 259 (stating that illegally detaining the plaintiffs in the challenged conditions because of their race, ethnicity, religion, and/or national origin violated their equal protection rights).

[88] *See id.*

[89] *See id.* at 281 (Raggi, J., dissenting).

[90] *See id.*

[91] *See id.*

III. *TURKMEN V. HASTY*: EXTENDING *BIVENS* WITHOUT INFRINGING ON NATIONAL SECURITY CONCERNS

This Part argues that the Second Circuit correctly decided *Turkmen v. Hasty* in 2015.[92] First, it analyzes why *Turkmen* does not constitute a new context for *Bivens* claims.[93] Second, it analyzes why national security is an insufficient "special factor" for limiting *Bivens*.[94] Last, this Part explains why qualified immunity is an overly permissive defense to *Bivens* claims and should not apply in the national security context.[95]

Supreme Court precedent proves that conditions of confinement claims in federal prisons, such as the claim in *Turkmen*, fall squarely within the context of previous *Bivens* liability, not within a new context.[96] The first step of the *Bivens* calculus is whether the *Turkmen* claim extends *Bivens* to a "new context," which the court held it did not.[97] The test for a "new context" is whether the courts have recognized a *Bivens* remedy in cases with similar legal and factual components.[98] The context of the claim in *Turkmen* is the confinement of the plaintiffs, subject to punitive conditions.[99] This is a similar context to the U.S. Supreme Court's decision in 1979 in *Carlson v. Green*, in which the Court recognized a *Bivens* remedy under the Eighth Amendment for the overly harsh conditions of the plaintiff's confinement.[100] Other circuits have also permitted *Bivens* claims for unconstitutional conditions of confinement.[101] Although the *Turkmen* dissent argues otherwise, the Second Circuit adequately followed precedent as to conditions of confinement cases.[102] The

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[92] *See infra* notes 96–125 and accompanying text.

[93] *See infra* notes 96–104 and accompanying text.

[94] *See infra* notes 105–118 and accompanying text.

[95] *See infra* notes 119–125 and accompanying text.

[96] *See* Corr. Servs. Corp v. Malesko, 534 U.S. 61, 72 (2001) (providing dicta as to the availability of a constitutional *Bivens* claim against a prison officer by a federal prisoner); Carlson v. Green, 446 U.S. 14, 17–20 (1979) (applying a *Bivens* remedy for an Eighth Amendment conditions of confinement claim); *Turkmen*, 789 F.3d at 235.

[97] *See Turkmen*, 789 F.3d at 234; Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009).

[98] *See* Hernandez v. United States, 757 F.3d 249, 272 (5th Cir. 2014) (citing *Arar*, 585 F.3d at 572). This depends on a medium level of generality and specificity as to context. *Id.*

[99] *See Turkmen*, 789 F.3d at 235.

[100] *See Carlson*, 446 U.S. at 17–20. Additionally, in 2001, in *Correctional Services Corporation v. Malesko*, the U.S. Supreme Court reiterated this *Bivens* context and recognized that a federal prisoner could have a remedy against federal officials for constitutional confinement claims. *See* 534 U.S. at 72.

[101] *See* Bistrian v. Levi, 696 F.3d 352, 372–75 (3d Cir. 2012) (assuming that a *Bivens* remedy is available for plaintiff's Fifth Amendment substantive due process and other constitutional claims challenging the conditions of his confinement); Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988) (holding that federal courts can review a *Bivens* action alleging a prisoner's violation of his substantive due process rights and that the prisoner's allegations that a prison official planted drugs on him would be a constitutional violation).

[102] *See Turkmen*, 789 F.3d at 268 (Raggi, J., dissenting). The *Turkmen* dissent argues that the context of the case warrants a more specific, holistic examination of all legal and factual compo-

dissent makes an overly fact specific inquiry into lack of medical care, which was one specific condition of confinement at issue in *Carlson* and *Malesko*, to argue that the conditions in *Turkmen* were in a "new context."[103] This is unreasonably specific as *Carlson* was also related to the conditions of confinement of detainees, but because the claim was brought under the Eighth Amendment, the plaintiff was required to show a higher standard of punitive intent than the plaintiffs who brought substantive due process and equal protection claims in *Turkmen*.[104]

In response to the government's post-9/11 policy, necessary litigation grew around the abuse of government power, which allowed a judicial remedy to check such abuse, just as the Second Circuit did in *Turkmen*.[105] Threatening this check on governmental abuse, "national security" concerns arose as a limiting "special factor counseling hesitation" preventing the extension of a *Bivens* remedy.[106] This is problematic because, in many national security cases, damages under *Bivens* are the only remedy to the constitutional wrong, which meets the second prong of the *Bivens* analysis that there are no alternative remedies available.[107] The victims of the government's post-9/11 abuses are often non-citizens and non-residents of the United States, so they do not have the political capital to defend their rights elsewhere.[108] Even more, the

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nents of the situation from which the claim arises, including the context of detainment occurring after the 9/11 attacks. *See id.*

[103] *See Malesko*, 534 U.S. at 64–65 (alleging that the negligence of the correctional facility in giving the prisoner his medication necessitated a *Bivens* remedy); *Carlson*, 446 U.S. at 16 n.1 (alleging that the failure of correctional facilities to give the prisoner adequate medical care amounted to an Eighth Amendment violation under *Bivens*); *Turkmen*, 789 F.3d at 269 (Raggi, J., dissenting).

[104] *See Carlson*, 446 U.S. at 16 n.1 (holding that the plaintiff had sufficiently pleaded an Eighth Amendment claim under *Bivens*). *Compare* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (establishing the Eighth Amendment standard for conditions of confinement cases for prisoners, requiring awareness and disregard of a risk to the safety of a prisoner), *with* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (establishing the substantive due process standard for conditions of confinement cases for pretrial detainees, which is an inquiry into if the conditions are punitive in nature).

[105] *See Turkmen*, 289 F.3d at 233; Schauer, *supra* note 32, at 1903–04 (describing the need for remedies, such as *Bivens*, to uphold constitutional precepts and to enforce compliance with such precepts); Vladeck, *supra* note 8, at 269 (utilizing *Iqbal* as the example of a case challenging the government's actions in response to the 9/11 attacks).

[106] *See* Vladeck, *supra* note 8, at 269, 272. This categorization of "national security" as a "special factor counseling hesitation" has parallels to the political question doctrine, which some lower court judges have used as a separation of powers defense to refuse to hear constitutional claims. *See* Brown, *supra* note 25, at 845. This is incorrect because many of the cases that encompass these so-called "political questions" are classic *Bivens* claims: claims based on federal officials' alleged misconduct. *See id.* at 846.

[107] *See* Kent, *supra* note 12, at 1143 (arguing that the fact that a *Bivens* remedy is the only remedy available for a constitutional violation does not mean that the Court should extend *Bivens* for that case). Often, individual suits will be the only option to challenge national policies engaged in on behalf of the war on terror. *See* Brown, *supra* note 25, at 847.

[108] *See* Vladeck, *supra* note 8, at 276 (describing that most victims of the government's post-9/11 violations have little political support).

political and social climate surrounding suspected terrorists in America would be unlikely to provided legislative remedies for them.[109] A judicial remedy is necessary because Congress has no reason to provide a remedy, creating a hole in the rights afforded to those people affected by the post-9/11 policy.[110]

In *Turkmen*, the Court properly turned the analysis on the context of the claim instead of the "special factors counseling hesitation," and correctly provided a potential *Bivens* remedy for constitutional infringements on the rights of detainees to safe conditions.[111] As to the concern that an expansion of *Bivens* will deter officials from taking action for national security for fear of personal liability, there are other means to protect officials who act reasonably.[112] It is likely that federal government officials will be protected by doctrines such as the "state secrets privilege," "qualified immunity," and "government indemnification," as long as their actions are reasonable.[113] These other doctrines serve as an initial cutoff, preventing the litigation of cases that would threaten legitimate government policy concerns.[114] Other such doc-

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[109] *See* Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 518–19, 529 (2006) (arguing that the 9/11 attacks changed the political motivations of the government toward counter-terrorism, resulting in the passage of the Patriot Act, which increased surveillance of the people); Howard Hom, *The Immigration Landscape in the Aftermath of September 11*, L.A. LAW., Sept. 2002, at 1, 23–24 (discussing the more restrictive and intrusive immigration and surveillance law reforms against non-citizens that were instituted in the interest of preventing and rooting out terrorism in the aftermath of the 9/11 attacks); Vladeck, *supra* note 8, at 276 (describing why the politics of post-9/11 policies make a legislative remedy of constitutional violations stemming from these policies unlikely).

[110] *See* Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 129, 134, 136–37, 139 (2013) (discussing the congressional response to the 9/11 attacks, including the passage of the 2001 Authorization for Use of Military Force and the 2012 National Defense Authorization Act, which ultimately allowed for the detention of those with any perceived connection to the 9/11 attacks); Schauer, *supra* note 32, at 1903–04 (describing the necessity of remedies like *Bivens* and other sanctions to keep government officials accountable to the law, including the Constitution); Vladeck, *supra* note 8, at 258 (describing why, in the absence of a congressional remedy, a judicial remedy will enable constitutional actions to continue in times of national security and will establish the parameters of constitutional federal action for other officials).

[111] *See Malesko*, 534 U.S. at 71–72 (holding that a *Bivens* cause of action existed for conditions in federal prison, but not private prisons); *Carlson*, 446 U.S at 16–19 (holding that a *Bivens* cause of action existed for the Eighth Amendment violations of prison officials who caused the plaintiff's death because there were no special factors counseling hesitation and a judicial remedy was appropriate); *Turkmen*, 789 F.3d at 235, 237 & n.17 (holding that the conditions of confinement claims stand in the well-known context of substantive due process claims brought by federal detainees facing harsh, punitive conditions while in federal facilities); *Arar*, 585 F.3d at 583 (Packer, J., dissenting) (arguing that the complaint alleging mistreatment in U.S. detention facilities did not bring the claim into a "new context" and that the majority mistakenly refused a *Bivens* remedy).

[112] *See* Vladeck, *supra* note 8, at 257–58.

[113] *Id.* at 258.

[114] *See id.* at 276.

trines exist to do the work to protect national security actions, so *Bivens* claims will depend on the existence of adequate alternative remedies, not national security as an amorphous "special factor."[115] This enables the judicial branch to serve its role as an apolitical, impartial check on the other branches, especially when there are politically controversial national security issues present.[116] This is the purpose of *Bivens* actions: to tender executive policy discretion with the limitations of constitutional rights and to hold executive officials accountable for harms to individuals' rights.[117] Utilizing national security as a "special factor" after 9/11 has stopped most recovery of damages in constitutional, counter-terrorism lawsuits, providing little opportunity for victim recovery.[118]

Last, *Turkmen* justifies why qualified immunity should not serve as a catchall defense to *Bivens* liability just because federal policy purports to be in the national interest.[119] Qualified immunity can be pled by a defendant to a

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[115] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985) (explaining that refusing the Attorney General absolute immunity still allowed him to proceed in addressing national security concerns with immunity, as long as he did not violate recognized law); *Arar*, 585 F.3d at 583, 610–11 (Parker, J., dissenting) (arguing that creating blanket immunity for federal actor violations relating to national security and foreign affairs undermines the role of the judiciary and that lawful qualified immunity and state secrets privilege are sufficient to protect national security); Vladeck, *supra* note 8, at 277 (arguing that doctrines such as qualified immunity will protect lawful government action related to national security, so the concern for national security should not be the touchstone of *Bivens* claims).

[116] *See* Brown, *supra* note 25, at 898 (arguing that *Bivens* actions can also serve as a check on the other branches in times of national security crisis).

[117] *See* Vladeck, *supra* note 8, at 272. The Second Circuit's decision in *Turkmen* favoring individual rights may reflect a shift in national security jurisprudence away from traditional deference to the executive. *See* Geoffrey Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. REV. 1315, 1331, 1334 (2006) (arguing that the Court is no longer providing the same degree of deference to national security decisions over individual civil liberties and is more closely scrutinizing such decisions). Similarly, in 2004 in both *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the U.S. Supreme Court weighed the President's actions based on the individual circumstances and rights affected, ultimately favoring individual rights over purported national security justifications. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536–37, 539 (2004); Rasul v. Bush, 542 U.S. 466, 485 (2004); Stone, *supra*, at 1334. Recent habeas corpus decisions may suggest a greater judicial role in checking the policies engaged in by the executive in the war on terror, giving more weight to the protection of individual rights during national emergencies. *See* Brown, *supra* note 25, at 847, 894.

[118] *See Arar*, 585 F.3d at 583 (Parker, J., dissenting) (arguing that "special factors" should give pause to the courts, but alone, do not determine whether a *Bivens* remedy is available because of countervailing interests); Vladeck, *supra* note 8, at 277–78 (arguing that the "special factors" analysis applied to claims against post-9/11 policies has been overly protective of federal officials). Thus, by restraining *Bivens* in the interest of national security, the court fails in one of its purposes to hold governments accountable for constitutional violations. *See* Editorial, *A National Disgrace*, N.Y. TIMES (Nov. 11, 2009), http://www.nytimes.com/2009/11/11/opinion/11wed1.html [https://perma.cc/M7KF-CR3H] (discussing the lack of a damages remedy in *Arar*).

[119] *Turkmen*, 789 F.3d at 247, 251, 259, 262, 264 (holding that the defendants' national security motivations did not justify the violation of clearly established constitutional rights and barring qualified immunity). As Justice O'Connor stated in *Hamdi*, during times of war there must be a

Bivens action if the defendant can show that his or her conduct was reasonable in the context or that the right violated was not clearly established at the time in question.[120] Many cases involving national security and, specifically, the "war on terror," include the violation of rights that were "clearly established" at the time of the government action, so qualified immunity should not apply to them.[121] The next step in looking at the allegedly violated right is to determine if it would be understandable to a reasonable official that his or her actions are violating the right, requiring a fact-specific inquiry that is not always possible in constitutional law.[122] Constitutional decisions are often made based on generalizations of prior decisions, to allow for changing norms, but this generality makes the qualified immunity application inconsistent in terms of what is an established constitutional right and what is not.[123] If there is no precisely narrowed precedent establishing a constitutional right on a certain set of facts, then qualified immunity will apply without regard to evolving constitutional violations and societal norms.[124] This undermines the very purpose of the *Bivens* remedy to protect and provide compensation for violations of individual rights.[125]

CONCLUSION

At its core, *Bivens* liability reflects the need to protect individual rights and to keep federal government officials accountable for their actions, which is especially important during national security crises. Therefore, the Second

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constitutional balance, but such balance must still give substantial weight to important constitutional values like due process. 542 U.S. at 532.

[120] *See* Varrone v. Bilotti, 123 F.3d, 75, 78 (2d Cir. 1997).

[121] *See* Brown, *supra* note 25, at 876 (explaining that some *Bivens* cases regarding the war on terror will survive motions to dismiss based on qualified immunity if the rights at issue are already established, but some cases will not survive because the rights at issue are not "apparent to a reasonable official").

[122] *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010) (describing the Supreme Court's requirement that a law be "clearly established" to a degree that would give federal officials guidance in their day-to-day actions).

[123] *See id.* at 855 (explaining that the Court's constitutional opinions look at precedent through general standards, making a fact-specific standard difficult to establish). For example, in 2010 in *Fields v. Prater*, the Fourth Circuit granted the defendants qualified immunity because the court could not determine with certainty whether the defendants were violating the plaintiff's rights by refusing to hire her on the basis of her political affiliation. *See* 566 F.3d 381, 383, 385, 390 (4th Cir. 2010) (holding that the First Amendment did not permit party affiliation to be a factor for a hiring determination at a county department of social services, but qualified immunity still applied to the defendants). This was due to the court's holding that the plaintiff's right against political discrimination was not "clearly established" because the closest precedent was still differentiated by the specific position at issue, Virginia director of social services. *Id.* at 390. Thus, it would appear that all that was lacking was a fact-specific prior Fourth Circuit decision applying political discrimination to this exact context. *See id.*

[124] *See* Jeffries, *supra* note 122, at 856, 858.

[125] *See id.* at 858.

Circuit correctly decided *Turkmen,* holding high-ranking federal law enforcement officials accountable for constitutional violations resulting from a post-9/11 detainment policy. This may reflect a necessary shift in national security jurisprudence away from traditional deference to the executive toward greater constitutional protection for individuals.

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