

2019

## ***Bivens and Constitutional Integrity at the Border: Hernandez v. Mesa & Rodriguez v. Swartz***

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### **Recommended Citation**

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Available at: <https://lawcommons.luc.edu/lucj/vol51/iss1/8>

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## *Bivens and Constitutional Integrity at the Border: Hernandez v. Mesa & Rodriguez v. Swartz*

*Gabriella A. Orozco\**

*Mexican national J.A. Rodriguez took ten bullets in the back on October 10, 2012. He was walking home, and his usual route happened to take him down a street that runs alongside the United States-Mexico border. The shots, fired by United States Border Patrol, came from United States territory without warning or provocation. Anywhere in the United States, the shooting victim would have a civil claim for relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* for constitutional violations committed by federal officers. The Ninth Circuit found that Rodriguez was entitled to Fourth Amendment protections under *Bivens*, but others, like Sergio Adrián Hernández Guereca who was shot in the face by a Border Patrol agent standing in Texas and aiming over the border, have not been allowed such relief. The Supreme Court has granted certiorari to determine whether the duties incumbent upon federal agents under the Constitution extend to people on the other side of the border. This article argues that justice ought not to be constrained to man-made borders and the Court should accordingly resolve this split in favor of Rodriguez and Hernández by adopting the Ninth Circuit’s reasoning. The Ninth Circuit considered the new context raised by Rodriguez’s claim and fairly concluded that no special factors counseled against relief. Despite the “disfavored” nature of the remedy, the Ninth Circuit saw that justice demanded relief. Before the Court is an opportunity to reinvigorate *Bivens* and cure the stigma surrounding the cause of action in federal courts. This article argues that *Bivens* can and should be used more often to preserve the integrity of the Constitution, and that *Hernandez v. Mesa* presents the Court a ripe opportunity to do so.*

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## INTRODUCTION

United States Border Patrol Agents guard United States borders and maintain our nation's security, but at what cost?<sup>1</sup> Sergio Hernández and J.A. Rodríguez were Mexican youths socializing with friends near the border when United States Border Patrol Agents shot and killed them.<sup>2</sup> The killings present an intriguing and unprecedented legal question: if agents shoot from across the border, are the legal consequences different than they would have been had the Mexican victim been standing in the United States?<sup>3</sup> Two cases, *Hernandez v. Mesa* and *Rodríguez v. Swartz*, presented this question to both the Fifth and Ninth Circuit Courts. The circuits rendered two opposite holdings; a split based on the "same" law and an almost identical set of facts.<sup>4</sup>

Damages are the ordinary legal panacea sought when one's personal liberty interests are compromised in the United States.<sup>5</sup> The complex nature of the circumstances surrounding the deaths of Rodríguez and Hernández leaves the victims' families with only a narrow set of options in seeking a remedy, and the one most feasible turns on a contentious

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1. See *Border Patrol Agent Duties*, U.S. CUSTOMS BORDER PROTECTION, <https://www.cbp.gov/careers/frontline-careers/bpa/duties> [<https://perma.cc/4YDS-B2DE>] (last modified Mar. 29, 2019). Border Patrol Agent duties include: patrolling international land borders and coastal waters; detecting, preventing and apprehending undocumented aliens and smugglers of aliens; and communicating and giving verbal commands in Spanish to Spanish-speaking illegal aliens and smugglers.

2. See *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018) (explaining the facts of the case); see also *Rodríguez v. Swartz*, 899 F.3d 719, 727 (9th Cir. 2018) (providing case fact summary).

3. See Joseph C. Alfe, *Extraterritorial Constitutionalism: A Rule Proposed*, 50 J. MARSHALL L. REV. 787, 808 (2017) (citing Oral Argument at 17–18, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118) [hereinafter *Hernandez* Supreme Court Oral Argument]). This article focuses on the reach of the Constitution but briefly touches on the *Bivens* aspect of the *Hernandez* case. It references a question asked to Justice Elena Kagan by counsel for Petitioners during oral argument. Counsel asked her, "[y]ou have a U.S. law enforcement officer exercising unreasonable force, and Sergio Hernandez is in the group of victims that are injured because of excessive force. The issue is, is where he fell and where he was shot, does it take it out of his right to a *Bivens*?"

4. See *Hernandez*, 885 F.3d at 814 (stating the issue presented to the court: whether federal courts have the authority to craft an implied damages action for alleged constitutional violations in [*Hernandez*]). See *Rodríguez*, 899 F.3d at 726 (stating that one of the issues is whether the mother of the deceased minor has a cause of action against the agent for money damages). See *infra* Part III for a discussion of the facts of the cases and how they are nearly identical.

5. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971) ("[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."). See also *Marbury v. Madison*, 5 U.S. 137, 163 (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."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").

determination of “special factors.”<sup>6</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court created a remedy for individuals to sue and seek damages against federal officers for their constitutional violations.<sup>7</sup> The facts of the case amounted to a clear invasion of constitutional rights, specifically Fourth Amendment rights, but Congress failed to provide a procedural avenue for the injured to seek redress.<sup>8</sup> Accordingly, the Supreme Court determined that because there was a right, there was surely a remedy.<sup>9</sup> Implying from the Fourth Amendment that the plaintiff should have the opportunity to be heard, the Court effectively created a common-law cause of action, sparking a new line of cases that would prove to be both complicated and highly contested.<sup>10</sup>

The *Bivens* remedy is available to a plaintiff only if there are no other options for recourse, Congress has shown no indication that it would disagree with the remedy, and if there are no “special factors” that would cause courts to hesitate before extending the remedy.<sup>11</sup> The Court never provided a clear definition for “special factors,” but instructed courts to focus on whether providing the implied cause of action will constitute a

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6. See *Rodriguez*, 899 F.3d at 744 (explaining that *Bivens* is the only remedy for the plaintiff but that the court cannot provide that remedy if there are any special factors); *Hernandez*, 137 S. Ct. at 2006–07 (stating that on remand, the circuit court must first determine whether there are any special factors present because the constitutionality of remedies for the alleged injury depends on whether special factors allow the claim to proceed).

7. See *Bivens*, 403 U.S. at 397 (“[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment.”). See also Frank F. Davis, Note, *Constitutional Law—Federal Agents Conducting Unreasonable Searches and Seizures Are Liable for Damages under the Fourth Amendment*, 50 TEX. L. REV. 798, 806 (1972). This article was published the year following the *Bivens* decision and demonstrates the impact it had at the time. The author states that the decision marked an important advance in constitutional tort law but qualifies this assertion by stating that further development is necessary to fully understand the usefulness of the Court’s decision.

8. See *Bivens*, 403 U.S. at 396 (stating that a right needs a remedy and there are no special factors counseling hesitation in the absence of affirmative action by Congress); *id.* (quoting *Bell*, 327 U.S. at 684) (“[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”).

9. See *Bivens*, 403 U.S. at 389 (citation omitted) (“In *Bell v. Hood*, we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.”).

10. *Id.* See also Ryan D. Newman, Note, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 478–81 (2006) (discussing the evolution of the *Bivens* dissent).

11. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)) (beginning the legal analysis by restating the main legal rules as developed through Supreme Court precedent).

judicial overstep into the duties of the other branches.<sup>12</sup> However, this approach is further complicated by the fact that the common law later established—without much explanation—that implied judicial causes of action are “disfavored,” just another example of the ambiguities plaguing the *Bivens* doctrine.<sup>13</sup>

The families of Rodriguez and Hernández filed suit against the agents in the federal district courts of Texas and Arizona, alleging constitutional violations and bringing suit under *Bivens*.<sup>14</sup> The Ninth Circuit held that the *Bivens* remedy was available to the plaintiffs, but the Fifth Circuit disagreed.<sup>15</sup> The “losing” parties in each case, Border Agent Lonnie Swartz and the Hernández family, respectively, filed petitions of certiorari with the Supreme Court.<sup>16</sup> On May 28, 2019, the Supreme Court decided it would hear *Hernandez* and *Rodriguez* in November, 2019.<sup>17</sup> Specifically, the Court will decide one question: “[W]hether, when plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is not alternative remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*?”<sup>18</sup>

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12. See *Bivens*, 403 U.S. at 396–97 (recounting the Court’s holdings in *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947) and *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)). In *Standard Oil*, the federal government asked the Court to infer from the Government-soldier relationship a remedy that allows them to recover from one who injured a soldier resulting in the U.S. paying for the soldier’s medical bills and loss of his service. *Standard Oil*, 332 U.S. at 311. In *Wheeldin*, the Court refused to impose liability on a congressional employee for actions allegedly in excess of their delegated powers. *Wheeldin*, 373 U.S. at 647.

13. See *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (stating that implied causes of action are disfavored). See also *infra* Part IV (explaining why the remedy became disfavored in the first place).

14. See Complaint at 2, *Hernandez v. United States*, 802 F. Supp. 2d 834 (W.D. Tex. 2011) (No. 3:11-cv-00027), 2011 WL 333184 [hereinafter *Hernandez* Complaint]; Complaint at 1, *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (No. 4:14-cv-02251-RCC), 2014 WL 3734237 [hereinafter *Rodriguez* Complaint]. The original complaints cite different defendants than the ultimate defendants in the case. The *Hernandez* plaintiffs originally sued the United States for several causes of action, including *Bivens*, but, as shown in this article, the defendant becomes a single individual government employee. Similarly, in *Rodriguez*, the original named defendants are several individuals employed by the government but the ultimate defendant is Swartz.

15. See generally *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018); *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018).

16. See *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) *petition for cert. filed* (U.S. June 15, 2018) (No. 15-118), 2018 WL 3155839 [hereinafter *Hernandez* Petition for Writ of Cert. 2018]; *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) *petition for cert. filed* (U.S. Sept. 7, 2018) (No. 18-309) [hereinafter *Rodriguez* Petition for Writ of Cert. 2018].

17. See *Hernandez v. Mesa*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/hernandez-v-mesa-2/> [<https://perma.cc/5DLQ-N4WE>] [hereinafter *Hernandez* SCOTUSBLOG].

18. See *Hernandez* Petition for Writ of Cert. 2018, *supra* note 16; *Hernandez* SCOTUSBLOG,

This article contends that the Fifth Circuit's analysis lacks completeness and the Supreme Court should follow the Ninth Circuit's reasoning. As shown in the later sections of this article, the Ninth Circuit's analysis studies the issue from all angles and provides a much more thorough examination of policy considerations.<sup>19</sup> Most importantly, the Ninth Circuit's analysis seems to recognize that under no circumstances does justice cease at man-made borders.<sup>20</sup>

Part I of this article introduces the *Bivens* remedy, its creation, its journey through the courts, its changes, and its current status.<sup>21</sup> Part II discusses the procedural history and facts *Hernandez* and *Rodriguez*, respectively.<sup>22</sup> Next, Part III compares the opinions rendered by the Fifth and Ninth Circuits, analyzes why the Ninth Circuit's reasoning is more complete and accurate, and concludes that the Supreme Court should align its ruling with the Ninth Circuit.<sup>23</sup> Finally, Part IV argues that *Bivens* needs revitalization.<sup>24</sup> Specifically, it uses *Hernandez* and *Rodriguez* to show why the revival is necessary and how these cases present the Supreme Court a timely opportunity to do just that.<sup>25</sup>

## I. BACKGROUND

This part begins by discussing the creation of the *Bivens* remedy and its early development.<sup>26</sup> Next, it discusses three major elements of the *Bivens* implied cause of action: new context, alternative remedies, and special factors.<sup>27</sup>

The Supreme Court has decided eleven instrumental *Bivens* cases. In nine of those cases the set of facts presented to the Court did not exactly

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*supra* note 17 (stating that on May 28, 2019 the Court granted the petition for certiorari, however limited review, limited to Question 1 presented by the petition).

19. *See infra* Part III (showing why the Ninth Circuit ruling is a more thorough examination of policy considerations).

20. *See infra* Parts III and IV (arguing why this should be the case).

21. *See infra* Part I (noting the *Bivens*' procedural history).

22. *See infra* Part II (introducing *Hernandez* and *Rodriguez*).

23. *See infra* Part III (arguing for the opinion of the Ninth Circuit and why the Supreme Court should align its ruling with the Ninth Circuit's reasoning).

24. *See infra* Part IV (arguing for the revitalization of *Bivens*).

25. *See infra* Part IV (analyzing how *Hernandez* and *Rodriguez* help to show why *Bivens* should be revitalized).

26. *See generally* *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *see* Newton, *supra* note 10, at 478 (detailing the progression of *Bivens* and the main three cases that shaped the doctrine).

27. *See, e.g.,* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (stating that courts are to exercise caution in extending *Bivens* remedies into new contexts and *Bivens* will not be available if there are special factors counseling hesitation in the absence of affirmative action by Congress).

fit the mold required to extend the *Bivens* remedy.<sup>28</sup> Because the cause of action is implied and lacks a corresponding statute, these cases essentially serve as the judicial equivalent of congressional commentary on a federal statute.<sup>29</sup> Additionally, these cases demonstrate where the *Bivens* claim stands today. This article uses *Ziglar v. Abbasi*, as the framework to discuss the development of the elements. *Abbasi* leads the discussion of *Bivens* history because it solidified the “new context” element, the most recent development in *Bivens* jurisprudence, which is crucial to the analysis of *Hernandez* and *Rodriguez*.

#### A. *Bivens*’ Conception

In 1965, agents from the Federal Bureau of Narcotics violated Webster Bivens’ Fourth Amendment right to be free from unreasonable search and seizure when they entered his home without a warrant, without probable cause, and with unreasonable force.<sup>30</sup> Bivens brought suit against the officer in federal district court alleging that the officers violated his Fourth Amendment rights.<sup>31</sup> The district court dismissed the complaint for failure to state a cause of action and the Second Circuit Court of Appeals affirmed.<sup>32</sup> The Supreme Court thereafter created a new implied cause of action: a suit for constitutional violations effected by federal government agents.<sup>33</sup>

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28. See *id.* at 1843; see also *Minneci v. Pollard*, 565 U.S. 118 (2012); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983). *Passman* and *Carlson* are two cases where the Supreme Court granted a *Bivens* remedy, which is why I specify that nine cases were insufficient. See *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). This list excludes the most recent *Hernandez* case because that is part of the main focus of this article. Each of these cases are discussed in this article.

29. See *Abbasi*, 137 S. Ct. at 1855 (citing Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139–40 (2014)) (stating that, had it not been for the Supreme Court declaring that implied remedies were disfavored for separation-of-powers reasons, *Bivens* would have continued to expand until it was the substantial equivalent of The Civil Rights Statutes, 42 U.S.C. § 1983).

30. See *Bivens*, 403 U.S. at 389.

31. See *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 276 F. Supp 12 (E.D.N.Y. 1967).

32. See *id.*; see also Recent Cases, *Constitutional Law—Searches and Seizures—Fourth Amendment Does Not Establish a Federal Cause of Action for Damages Caused by an Unreasonable Search and Seizure*, 83 HARV. L. REV. 684 (1970) [hereinafter Recent Cases, *Search and Seizure*]. The district court dismissed *Bivens* claim for lack of federal question jurisdiction and for failure to state a claim upon which relief could be granted.

33. See generally *Bivens*, 403 U.S. at 388. The Court recognized that, even though the language of the Fourth Amendment lacked an express provision for money damages, a remedy was necessary. The Court pulled this authority from case law, stating that it is within the power of federal courts to “use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S.



At the time of *Bivens*'s adjudication, a statutory cause of action against a federal agent for a violation of one's Fourth Amendment rights simply did not exist.<sup>34</sup> The only comparable authority was 42 U.S.C. § 1983, which allows an individual to bring suit in federal court when a state or local government official effects a constitutional violation.<sup>35</sup> Federal government agents acting within the scope of their duties are protected by sovereign immunity.<sup>36</sup> At the time the *Bivens* case was heard, if a federal agent exceeded the scope of his government authority, that agent was no longer acting on behalf of the government, but as a private individual.<sup>37</sup> Thus, when a constitutional violation occurred it would amount to only a civil tort claim against a private citizen, and only if the violation amounted to such.<sup>38</sup> Congress aimed to fix the lack of remedy when it enacted the Federal Tort Claims Act (FTCA), which allows a private party to sue for state law torts committed by federal agents. This remedy, though an attempt to bridge the gap, substitutes the government as defendant in place of the federal agent<sup>39</sup> and does not consider constitutional violations unless they are also common-law torts.<sup>40</sup> Thus, a gap still existed.

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678, 684 (1946).

34. There only existed 42 USC § 1983, a federal statute authorizing individuals to sue in federal court state or local officials who committed constitutional violations. *See, e.g.*, Newman, *supra* note 10, at 480–81 (discussing how the dissenters in *Bivens* perceived § 1983's existence as evidence that Congress did not intend a remedy to be provided in situations like this).

35. *See* 42 U.S.C. § 1983 (2017); *see also* Andrea Robeda, *The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effect on State Constitutional Tort Jurisprudence: Correctional Services Corp v. Malesko*, 33 N.M. L. REV. 401, 419 (2003) ("A defendant in a civil action filed under [this statute] is liable only if they acted under color of state law. A person acts under color when exercising his or her power by virtue of state law because she is clothed with the authority of state law.").

36. *See, e.g.*, *Schillinger v. United States*, 155 U.S. 163 (1894) (explaining how the United States cannot be sued in their courts without their consent and that congress has the absolute discretion to specify situations wherein the federal government can be liable). *See also* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 342–45 (explaining how federal sovereign immunity poses a hurdle for *Bivens* plaintiffs).

37. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 276 F. Supp. 12, 14 (E.D.N.Y. 1967).

38. *See Bivens*, 403 U.S. at 394 (discussing why the state tort claims defendant suggests for plaintiff are unreasonable).

39. This may be a downside for some who wish to hold the individual liable. However, the government is typically the "deep pocket."

40. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994); *United States v. Gaubert*, 499 U.S. 315, 322 (1991); 28 U.S.C. § 1346 (2017) (providing a cause of action against the United States in tort). *See* Brian Shea, *The Parent Trap: Constitutional Violations and the Federal Tort Claims Act's Discretionary Function Exception*, 52 B.C. L. REV. 57, 67 (2011) (referencing how the *Meyer* case is an example of where the Court would not allow recovery for constitutional violations under the FTCA).

The Supreme Court in *Bivens* recognized that there was an explicit right laid out in the Fourth Amendment but that Congress had failed to fashion a means of seeking recourse where federal agents violated that right.<sup>41</sup> Despite the defendant's argument that an alternative state tort action was available to the plaintiff, the Court uncovered the potential injustice in that alternative.<sup>42</sup> An unlawful trespass by an ordinary citizen yields different results than an unlawful trespass by a federal agent.<sup>43</sup> When an ordinary citizen unlawfully demands entry into another's home, the homeowner can confidently deny entry.<sup>44</sup> When a federal agent does so, however, the homeowner can only resist, which may amount to a crime.<sup>45</sup> The Court reasoned that this discrepancy would require state courts to account for the different status of a trespasser acting under federal authority, thus requiring them to determine the extent to which federal authority can be exercised.<sup>46</sup> Consequently, the solution to this dilemma would be to either authorize federal agents to violate the Fourth Amendment under state law, or to control the limits of federal authority, a clear breach of federalism.<sup>47</sup>

Because the *Bivens* case presented to the Court a situation that was not previously accounted for by Congress, the Court found it necessary to fill the gap and authorize a remedy where one was necessary.<sup>48</sup> Crucial to this determination was that the case before them involved "no special factors that counseled hesitation in the absence of affirmative action by Congress."<sup>49</sup> Crafted by Justice Brennan, this phrase has framed the way

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41. See *Bivens*, 403 U.S. at 390–91 (referring to how Constitutional Amendments do not provide direction for how courts should deal with situations when a violation is as direct as the one in *Bivens*).

42. See *Bivens*, 403 U.S. at 390, 394–95 ("Accordingly, [Respondents] argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts."); see also Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719 (providing comments on the Court's trespass example).

43. *Bivens*, 403 U.S. at 394–95.

44. *Id.* at 394 ("[W]e may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance.").

45. *Id.* at 395 (citing *United States v. Lee*, 106 U.S. 196, 219 (1882)).

46. *Bivens*, 403 U.S. at 395.

47. *Id.*

48. See *id.* ("The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action."). See also Bernstein, *supra* note 42, at 722 (explaining the origin of the *Bivens* rule and the reason for its creation).

49. *Bivens*, 403 U.S. at 396. See also Christian Patrick Woo, *The Final Blow to Bivens: An Analysis of Prior Supreme Court Precedent and the Ziglar v. Abbasi Decision*, 43 OHIO N.U. L. REV. 511, 546–47 (stating that the early cases focused on the nature of the constitutional right and that special factors counselled hesitation).

that courts approach the *Bivens* cause of action analysis, as it highlights the need to provide a remedy where necessary while at the same time keeping in mind the importance of the separation of powers.<sup>50</sup>

### B. *The Early Bivens Cases*

Following *Bivens*, two cases emerged to expand the scope of *Bivens* beyond the Fourth Amendment by providing protections for Fifth and Eighth Amendment violations.<sup>51</sup> In *Davis v. Passman*, a United States Congressman terminated the employment of an administrative assistant because she was a woman, a violation of the Fifth Amendment.<sup>52</sup> The Supreme Court held that, under *Bivens*, the petitioner had a cause of action for damages where a federal agent acting under color of law violated her Fifth Amendment due process rights.<sup>53</sup>

Next, in *Carlson v. Green*, the Supreme Court determined that a *Bivens* cause of action was appropriate when prison guards violated the Eighth Amendment by denying an inmate proper medical care, resulting in his death.<sup>54</sup> In *Carlson*, the decedent's mother brought suit against federal prison officials who neglected to properly treat her son.<sup>55</sup> In determining that there were no statutes conferring a right to recover, a lack of sufficient alternative remedies, and no "special factors," the Court allowed a *Bivens* cause of action to proceed.<sup>56</sup>

However, *Bivens* claims are not available for every constitutional violation effected by federal officials.<sup>57</sup> In fact, *Bivens*, *Passman*, and

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50. See *Davis v. Passman*, 442 U.S. 228, 245 (1979) (reciting the special factors language from *Bivens*); *Carlson v. Green*, 446 U.S. 14, 19 (1980) (citing both *Bivens* and *Passman* in holding that the case presented no "special factors" or "alternative remedies").

51. See *Passman*, 442 U.S. at 248–49 (extending a *Bivens* cause of action to protect Fifth Amendment rights when a congressman fired an administrative assistant because she was female); see also *Carlson*, 446 U.S. at 25 (extending a *Bivens* cause of action to protect Eighth Amendment rights for an inmate who was denied proper medical care).

52. See *Passman*, 442 U.S. at 230 ("Passman subsequently terminated [Davis's] employment, effective July 31, 1974, writing Davis that, although she was 'able, energetic and a very hard worker,' he had concluded 'that it was essential that the understudy to my Administrative Assistant be a man.'"); U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

53. *Passman*, 442 U.S. at 230; Michael Box, Note, *Discriminatory Congressional Hiring Practices: Davis v. Passman and Its Continuing Epilogue*, 37 BAYLOR L. REV. 793, 793 (1985) (analyzing the Court's opinion).

54. *Carlson*, 446 U.S. at 25 (1980); see U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

55. See *Green v. Carlson*, 581 F.2d 669, 670 (7th Cir. 1978) (summarizing the facts); see also Newman, *supra* note 10 (explaining the background of the *Carlson* case).

56. See *Carlson*, 446 U.S. at 25 ("A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action.").

57. See *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding that "enlisted military

*Carlson* are the only instances where the Supreme Court has approved a *Bivens* cause of action.<sup>58</sup> Since *Bivens*, various cases have built upon the cause of action: the *Passman* case was the first to expand *Bivens*' scope, extending not only to the Fourth Amendment, but also to the Fifth Amendment;<sup>59</sup> and *Ashcroft v. Iqbal* declared that an extension of *Bivens* is now a disfavored judicial act.<sup>60</sup> Despite the informative case law and the fact that *Bivens* was a landmark decision, its precedent has produced only a limited number of successful claims.<sup>61</sup> In the key nine cases consecutively adjudicated after *Passman* and *Carlson*, the Court found that *Bivens* claims could not proceed.<sup>62</sup> In each of these cases, the Court explicitly distinguished the facts of the case being heard from the three main cases, showing their importance and influence.<sup>63</sup> *Ziglar v. Abbasi*

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personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations"); *United States v. Stanley*, 483 U.S. 669, 686 (1987) (denying *Bivens* claim for violations arising out of military service). *See also* *Bush v. Lucas* 462 U.S. 367, 368 (1983) (denying *Bivens* claim for violations of the First Amendment because there already existed adequate statutory remedies); *Corr. Servs. Corp v. Malesko*, 534 U.S. 61, 63 (2001) (denying *Bivens* claim for violations by private corporations).

58. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (introducing the *Bivens* cause of action before beginning their analysis).

59. *See* *Davis v. Passman*, 442 U.S. 228, 230–31 (1979) (noting that *Passman* was the first successful *Bivens* claim heard by the Supreme Court after *Bivens*' adjudication).

60. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'").

61. *See* Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343–44 (2006) ("Of the some 12,000 *Bivens* suits filed, only thirty have resulted in judgments on behalf of the plaintiffs. Of these, a number have been reversed on appeal and only four judgments have actually been paid by the individual federal defendants.") (citing Written Statement of John J. Farley, III, Director, Torts Branch, Civil Division, U.S. Department of Justice, to the Litigation Section of the Bar of the District of Columbia (May 1985), at 1).

62. *See, e.g.,* *Minnecci v. Pollard*, 565 U.S. 118, 120–21 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 541 (2007); *Malesko*, 534 U.S. at 63; *FDIC v. Meyer*, 510 U.S. 471, 473 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); *Stanley*, 483 U.S. at 686; *Lucas*, 462 U.S. at 368; *Chappell*, 462 U.S. at 305.

63. *See* *Abbasi*, 137 S. Ct. at 1848; *Minnecci*, 565 U.S. at 124 (holding that a prisoner could not use *Bivens* to assert a claim against private prison employees); *Wilkie*, 551 U.S. at 549–50 (holding that a private landowner did not have a *Bivens* claim against government agency employees); *Malesko*, 534 U.S. at 74 (holding that there was no *Bivens* claim against a private corporation engaging in a government action); *Meyer*, 510 U.S. at 484–85 (holding that there could not be a *Bivens* action against a federal agency); *Schweiker*, 487 U.S. at 443 (holding that an improper denial of Social Security benefits could not give rise to a cause of action against the agency itself); *Stanley*, 483 U.S. at 678 (holding that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to military service); *Lucas*, 462 U.S. at 376–77 (holding that the court could not provide additional remedies to those that already existed in regulation); *Chappell*, 462 U.S. at 298 (holding that the court could not provide a *Bivens* remedy for an enlisted service member against his superior officers). *See also* Recent Cases, *Constitutional Remedies—Bivens Actions—Ziglar v. Abbasi*, 131 HARV. L. REV. 223, 313 (2017) [hereinafter Recent Cases, *Ziglar*

reinforced the disfavored position of *Bivens* by modifying the test and continuing the trend of distinguishing its facts.<sup>64</sup>

### C. *Bivens* Actions After *Abbasi*

In *Abbasi*, the Supreme Court enhanced the *Bivens* inquiry and provided a newly<sup>65</sup> formulated test that leads the analyses in the cases that are the focus of this article.<sup>66</sup> The government alleged that petitioners in *Abbasi*, all illegal aliens, had connections to the terrorist attacks of 9/11.<sup>67</sup> The government detained the petitioners, pursuant to the exceptional detention policies enacted in the wake of the event.<sup>68</sup> Following their eventual release, the petitioners brought claims against federal executive officers and detention center wardens, alleging that their poor confinement conditions violated the Fourth and Fifth Amendments and that they were entitled to damages under *Bivens*.<sup>69</sup>

The Court began by discussing the development of *Bivens* and highlighted that extending *Bivens* is now a disfavored judicial activity.<sup>70</sup> According to the Court, separation-of-powers principles should be “central” to the analysis, prompting the question: who should decide whether to provide for a damages remedy, Congress or the courts?<sup>71</sup> In order to avoid judicial interference in the legislature, the Court noted that courts are now advised to exercise caution when *Bivens* claims are brought under a “new context.”<sup>72</sup>

#### 1. Creating the “New Context”

After *Abbasi*, the “new context” became the first part of the analysis.<sup>73</sup>

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v. *Abbasi*] (emphasizing the Court’s continuous method of distinguishing facts from the *Bivens* case and that if the Court is going to continue denying remedies on this basis, they should just say it for the sake of “litigative efficiency”).

64. See *Abbasi*, 137 S. Ct. at 1859 (comparing the facts to both *Passman* and *Carlson*); Recent Cases, *Ziglar v. Abbasi*, *supra* note 63, at 313 (emphasizing the Court’s continuous method of distinguishing facts from the *Bivens* case and that if the Court is going to continue denying remedies on this basis, they should just say it for the sake of “litigative efficiency”).

65. The formulated test is considered new in that it is different because it adds the “new context” element.

66. See *infra* Section I.C.1 (discussing the test established by the *Abbasi* majority).

67. *Abbasi*, 137 S. Ct. at 1852.

68. *Id.* at 1851–53.

69. *Id.* at 1851–52. The petitioners also brought a claim under 42 USC § 1985(3) which allows damages to persons injured by conspiracies to deprive them of equal protection.

70. *Id.* at 1857.

71. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

72. *Abbasi*, 137 S. Ct. at 1857 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

73. See, e.g., *Rodriguez v. Swartz*, 899 F.3d 719, 737–38 (restating the test laid out in *Abbasi*, starting with the “new context” question then stating that the next step is determined by the outcome

A new context exists if the case is meaningfully different from previous *Bivens* cases decided by the Court.<sup>74</sup> Cases may differ meaningfully, for example, because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency at issue; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.<sup>75</sup>

If a court determines that the context of the case is not new, meaning that it closely resembles one of the three main *Bivens* cases, the claim can proceed to be adjudicated on its merits.<sup>76</sup> If the court decides that the context *is* new, there must be an analysis of whether there are adequate alternative remedies and whether there are special factors counseling against the court providing a remedy.<sup>77</sup>

A violation of those same constitutional rights violated in *Bivens*, *Passman*, and *Carlson* does not automatically mean the context is not new.<sup>78</sup> For example, in *Abbasi*, the Court held that a suit challenging the confinement conditions suffered by undocumented aliens pursuant to policies enacted during a major terrorist attack was “meaningfully different,” on both a policy and situational level, than: (1) a claim against FBI agents who handcuffed a man in his own home without a warrant, (2) a claim against a congressman for firing his female secretary, and (3) a claim against prison officials for failure to treat an inmate’s asthma.<sup>79</sup> Though the latter situation, *Carlson*, has similarities to the *Abbasi* claims against the wardens, the Supreme Court determined the context was

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of the new context inquiry).

74. *Abbasi*, 137 S. Ct. at 1857 (citing *Malesko*, 534 U.S. at 74) (“[T]he Court has urged ‘caution’ before ‘extending *Bivens* remedies into any new context.’”).

75. *Abbasi*, 137 S. Ct. at 1859–60.

76. *Id.*

77. *Id.* at 1860 (stating that the lower court should have held *Abbasi* was a new context and that, had it done so, the special factors analysis would be required before allowing the damages suit to proceed).

78. *Id.* at 1859. The *Malesko* case rejected a *Bivens* extension under the Eighth Amendment, yet an Eighth Amendment *Bivens* claim was extended in *Carlson*. Additionally, *Chappell* rejected a *Bivens* employment discrimination claim in the military, although such a claim was allowed to proceed in *Passman*.

79. *Id.* at 1860 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979)). The *Abbasi* Court compares the facts to the three main cases but incorrectly cites them. The Court cites *Chappell* when it meant to refer to *Carlson*. The opinion lists the successful *Bivens* case about the asthma attack in prison—that is *Carlson*. *Chappell* is about racial discrimination in the military.

“new” for two reasons.<sup>80</sup> First, because the petitioners alleged Fifth Amendment violations against the wardens, not Eighth Amendment violations, like in *Carlson*.<sup>81</sup> Second, because in *Carlson*, the standard for failure to provide medical treatment was long established by the Court, whereas the standard for alleging a warden allowed guards to abuse pre-trial detainees was less clear.<sup>82</sup> Because of the caution exercised in extending a *Bivens* remedy, it is easy to find that a claim arises in a new context.<sup>83</sup> This is exemplified in the Court’s determination that, despite the significant parallels to *Carlson*, *Abbasi* ultimately presented a new context because of the constitutional amendment implicated, precedent’s unfavorability, and the special factors.<sup>84</sup>

## 2. Alternative Remedies

If a court establishes that the context is new, it must assess whether the facts of the specific case apply to an “alternative remedial structure.”<sup>85</sup> Separation-of-powers principles are central to the *Bivens* analysis.<sup>86</sup> Thus, if Congress has already crafted an alternative process for protecting the injured party’s interest, that alone may direct a court to refrain from extending *Bivens*.<sup>87</sup>

In *Carlson*, the plaintiff had a potential wrongful death action under the FTCA.<sup>88</sup> However, the Supreme Court determined that Congress did not intend the FTCA to preempt a *Bivens* remedy and allowed the Eighth Amendment *Bivens* claim to proceed.<sup>89</sup>

Following the *Carlson* decision, the adequate alternative remedies factor received heightened scrutiny.<sup>90</sup> In *Bush v. Lucas*, the majority held

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80. *Abbasi*, 137 S. Ct. at 1864.

81. *Id.* at 1853–54. Petitioners also brought Fourth Amendment violation claims, but those were in regard to the strip searches that were allegedly conducted punitively. *Id.* at 1853–54.

82. *Id.* at 1864–65.

83. *Id.* at 1865; *see also* Recent Cases, Zigar v. *Abbasi*, *supra* note 63, at 315–16 (discussing how the *Abbasi* three-part test will be a difficult obstacle to overcome in future *Bivens* cases).

84. *Abbasi*, 137 S. Ct. at 1864.

85. *Id.* at 1858.

86. *Id.* at 1857.

87. *Id.* at 1858 (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

88. *Carlson v. Green*, 446 U.S. 14, 16–17 (1980).

89. *Id.* at 19–20; *see also* Newman, *supra* note 10, at 482 (explaining how the Court in *Carlson* determined that the FTCA recovery was not equally as effective as a *Bivens* remedy). The Court reasoned accordingly: “Petitioners point to nothing in the [FTCA] or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.” *Id.* at 19.

90. *See, e.g.*, Newman, *supra* note 10, at 482–83 (stating that the Court changed the requirement from an equally effective remedy to a constitutionally adequate remedy, lowering the standard for finding an alternative remedy).

that they would not supplement an existing remedial scheme<sup>91</sup> when a federal employer demoted the plaintiff after he publicized his distaste toward him,<sup>92</sup> reasoning that a constitutionally adequate remedy existed and would suffice even if it did not fully compensate the individual for the harm suffered.<sup>93</sup> Similarly, in *Schweiker v. Chilicky*, the Court refused to extend *Bivens* to a plaintiff whose federal disability payments halted without notice while the plaintiff was recovering from surgery.<sup>94</sup> The Court held that the alleged violation of due process had already been anticipated by Congress when they enacted a comprehensive statutory scheme to handle similar situations.<sup>95</sup>

More recently, in 2012, the Supreme Court broke away from the original *Bivens* line of reasoning by shifting the alternative remedies inquiry to federalism and state remedies, in addition to a separation of powers consideration, in *Minneci v. Pollard*.<sup>96</sup> In *Bivens*, the Court deemed inadequate the availability of bringing a private state tort action against the violating officer and focused its alternative remedy examination strictly on whether Congress, not state legislatures, had already contemplated a remedy.<sup>97</sup> In *Minneci*, the Court refused to extend

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91. See *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (explaining that the Court will consider “whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue”).

92. *Id.* at 369. The plaintiff was demoted after disparaging his federal government job in the media. *Id.* Congress did not provide a remedy that the plaintiff desired, so he filed suit alleging a constitutional violation. *Id.* at 371. The lower courts determined the plaintiff failed to assert a cause of action upon which damages could be granted, and the Supreme Court remanded that decision before the ultimate Supreme Court hearing, stating the lower courts should assess the claim in light of *Carlson*. *Id.* at 371–72.

93. *Id.* at 372.

94. *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); see also Newman, *supra* note 10, at 483 (discussing how *Schweiker* drifted even further away from the *Carlson* decision).

95. *Schweiker*, 487 U.S. at 423.

96. See, e.g., *Minneci v. Pollard*, 565 U.S. 118, 125–26 (2012); see also Alexander Reinert & Lumen Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. 1473, 1483 (2013) (explaining how state law remedies had been irrelevant to the Court’s *Bivens* analyses in many cases because the focus is on the separation of powers). In considering whether to imply a private cause of action, the Supreme Court in *Cort v. Ash* considered whether the cause of action is one traditionally relegated to state law, making a cause of action under federal law inappropriate. This opinion was rendered in 1975, yet the consideration of state remedies seemed to only take hold once *Minneci* was decided. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963)) (“[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?”).

97. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391–92 (1971). The Court in *Bivens* noted that the state tort remedies suggested by the defendant were problematic because, for example, the trespass tort requires the plaintiff to show he or she did not



a *Bivens* remedy where the plaintiff had been denied adequate medical treatment while imprisoned at a private prison that was operating under contract with the federal government.<sup>98</sup> The Court reasoned that, despite an absence of alternative congressional remedies, the state tort avenue was more appropriate than a *Bivens* remedy because the defendant was privately employed, which was the case in *Carlson*.<sup>99</sup> To bolster its argument, the majority referenced, *Correctional Services Corp. v. Malesko*, one of the other prominent *Bivens* cases, where the *Bivens* remedy was unavailable to a plaintiff who sued a privately operated federal prison.<sup>100</sup> Because *Bivens* seeks to deter federal officers from unconstitutional behavior and not a corporate employer, the Court declined the extension.<sup>101</sup> The plaintiff in *Minneci* named individuals, not a corporation, as defendants but the Court still found that the reasoning of *Malesko* applied.<sup>102</sup> In many of the main *Bivens* claims cases the Court approached the alternative remedies question looking primarily in the direction of Congress. *Minneci* and *Malesko* changed this.<sup>103</sup>

The *Abbasi* opinion does not mention state law alternatives but declares that the petitioners had available alternative forms of judicial relief.<sup>104</sup> Injunctive relief may have been available to address the policy decision and, in terms of their confinement at the time, petitioners could have petitioned for a writ of habeas corpus.<sup>105</sup> The majority rejected a remedy in terms of the detention policies but maintained the prison

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allow the defendant inside the home; however, an officer demanding entry complicates this element. *Id.* at 392; *see also* Reinart & Mulligan, *supra* note 96, at 1483 (explaining further the distinction the Court drew between a state-law trespass by a typical trespasser and admission of a federal officer who demands entry).

98. *Minneci v. Pollard*, 565 U.S. 118, 125 (2012).

99. *Id.* at 126 (explaining that this difference was “critical” in their decision not to apply the *Carlson* reasoning to *Minneci*).

100. *Id.* at 126–27 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

101. *Id.* at 126–27 (citing *Malesko*, 534 U.S. at 70 n.4) (explaining the Court rejected Justice Steven’s dissenting argument that the prison should fall within the *Carlson* remedy because the firm, like a federal employee, was acting under color of federal authority); *see also Malesko*, 534 U.S. at 70 (citing *FDIC v. Meyer*, 510 U.S. 471, 484–85 (1994)) (“[T]he threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.”).

102. *See Minneci*, 565 U.S. at 127 (discussing how Pollard’s argument is inconsistent with the holding in *Malesko*).

103. *See Davis v. Passman*, 442 U.S. 228, 245 (1979) (quoting *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)) (rejecting a federalism approach to *Bivens*); *Carlson v. Green*, 446 U.S. 14, 23 (1980) (holding that the FTCA’s use of state law is not an adequate safeguard of constitutional rights); *Bush v. Lucas*, 462 U.S. 367, 385 (1983) (finding that plaintiff had access to a congressionally created and comprehensive procedural remedy).

104. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017) (quoting *Minneci*, 565 U.S. at 124).

105. *Abbasi*, 137 S. Ct. at 1865. The Court said the same remedies were available for both the claims against the high officials and the prison wardens. *Id.*

warden claims.<sup>106</sup> The Court asserted that the Court of Appeals should have analyzed whether there were alternative remedies available or other sound reasons to think Congress would counsel against a judicial remedy.<sup>107</sup>

### 3. “Special Factors Counseling Hesitation”

*Bivens* also instructs courts to consider whether there are any “special factors” counseling hesitation absent affirmative action by Congress.<sup>108</sup> In other words, where Congress is silent, the courts are responsible for construing meaning from congressional actions.<sup>109</sup> Notably, the majority in *Bivens* did not explain exactly what it meant by special factors.<sup>110</sup> Instead, the majority provided examples of their previous holdings where they denied petitioners’ requests for the Court to infer a remedy.<sup>111</sup> The cases mentioned dealt with federal employment and, according to the Court, the solution rested with Congress.<sup>112</sup> This direction from the *Bivens* majority is brief and, because of this, the bulk of special factors law lies in the subsequent *Bivens* claims heard by the Supreme Court.<sup>113</sup>

Alternative remedies prevented a *Bivens* claim in *Lucas*, *Schweiker*, *Meyer*, and *Malesko*, mentioned above.<sup>114</sup> The remaining Supreme Court

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106. *Id.* at 1863, 1869.

107. *Id.* at 1863, 1865, 1869.

108. *Bivens*, 403 U.S. at 396.

109. *See, e.g.*, Michael P. Robotti, *Separation of Powers and the Exercise of Concurrent Constitutional Authority in the Bivens Context*, 8 CONN. PUB. INT. L.J. 1, 9 (2009) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)) (highlighting that the Supreme Court gives deference to indications that congressional inaction has not been inadvertent).

110. *See Bivens*, 403 U.S. at 396 (noting that the concept of “special factors counselling hesitation in the absence of affirmative action by Congress” has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent).

111. *Id.* at 396–97 (recounting the Court’s lines of reasoning and holdings in *United States v. Standard Oil Co.*, 332 U.S. 301, 311, 316 (1947) and *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963)). In *Standard Oil*, the federal government asked the Court to infer a remedy from the Government-soldier relationship a remedy that allows them to recover from one who injured a soldier resulting in the U.S. paying for the soldier’s medical bills and loss of his service. *Standard Oil*, 332 U.S. at 302. In *Wheeldin*, the Court refused to impose liability on a congressional employee for actions allegedly in excess of their delegated powers. *Wheeldin*, 373 U.S. at 649.

112. *See Bivens*, 403 U.S. at 396–97 (citing *Standard Oil Co.*, 332 U.S. at 311 and *Wheeldin*, 373 U.S. at 647) (stating that the *Standard Oil* case example involved federal fiscal policy and that the *Wheeldin* case involved Congressional overstep but violated no constitutional right).

113. *See generally* *Minnecci v. Pollard*, 565 U.S. 118 (2012); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

114. *See Malesko*, 534 U.S. at 66 (no *Bivens* claim when alternative remedies are available); *Meyer*, 510 U.S. at 486 (no *Bivens* claim for an FSLIC employee summarily terminated); *Schweiker*, 487 U.S. at 423 (no *Bivens* claim for improper termination of Social Security benefits);

cases adjudicating *Bivens* claims are *Chappell*, *Stanley*, and *Wilkie*, excluding *Abbasi*. In each of these cases, a special factor prevented the court from extending *Bivens*.<sup>115</sup> In *Chappell*, the Court held that Congress held plenary power in regulating military life and therefore did not extend *Bivens* to plaintiffs who faced racial discrimination coming from their commanding officers.<sup>116</sup> In *Stanley*, the Court was yet again faced with a *Bivens* claim in the military context, but ultimately denied the plaintiff a remedy, holding that judicial interference in military affairs is inappropriate.<sup>117</sup> Lastly, in *Wilkie*, the Court refused to extend *Bivens* to the plaintiff where federal officials urged him, in a harassing manner, to reinstate a government easement on his property, one that the previous owner of the land had granted, allegedly in violation of the Fourth and Fifth Amendment.<sup>118</sup> The Court held that Congress was better positioned to determine when agents who exceed their authority in this context can be held liable for their actions.<sup>119</sup>

*Abbasi* reaffirms the focus of the special factors element: “the inquiry must concentrate on whether the judiciary is well-suited, absent congressional inaction or instruction to consider and weigh the costs and benefits allowing a damages action to proceed.”<sup>120</sup> First, the Court restated that a *Bivens* action is not a “proper vehicle for altering an entity’s policy,” and that actions targeting the conduct of executive officers would call into question a policy’s formulation, implementation,

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*Stanley*, 483 U.S. at 678 (no *Bivens* claim for a serviceman given LSD); *Lucas*, 462 U.S. at 378 (no *Bivens* claim when there are alternative remedies provided by Congress).

115. See *Malesko*, 534 U.S. 61 (holding that *Bivens* could not confer a cause of action for damages against private entities, even when those entities appeared to be acting under color of federal law); *Meyer*, 510 U.S. 471 (declining to extend a *Bivens* remedy against a federal agency, even though the agency was otherwise open to suit (because of a Congressional sovereign immunity waiver); *Schweiker*, 487 U.S. 412 (declining to infer a damages action related to alleged violations of due process in a Social Security matter, reasoning that the lack of a statutory remedy for a constitutional violation did not automatically require a *Bivens* remedy simply because another method of relief was unavailable); *Stanley*, 483 U.S. 669 (declining to extend the analysis in the military context either, even when defendants were allegedly civilians); *Lucas*, 462 U.S. 367 (declining to extend a *Bivens* remedy for an alleged First Amendment violation by individual federal employees, reasoning that administrative review alternatives were available and obviated the need for a new, judicially created cause of action).

116. See generally *Chappell v. Wallace*, 462 U.S. 296 (1983).

117. See *Stanley*, 483 U.S. at 671–72 (noting the plaintiff suffered hallucinations and other trauma after serving as a sergeant in the army, which secretly administered LSD to the plaintiff).

118. See *Wilkie v. Robbins*, 551 U.S. 543, 562 (1979) (noting that though the government employees might have been “unduly zealous” in their actions on behalf of the government, the Court could not extend a *Bivens* remedy without creating an unworkable judicial standard related to the property rights at issue).

119. *Id.* See also *Woo*, *supra* note 49, at 530 (analyzing the case).

120. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017).

and maybe even cause high-level officials to refrain from taking urgent action in times of crisis, such as in the wake of a large-scale terrorist attack.<sup>121</sup> The Court distinguished *Abbasi* from *Bivens* by pointing out that the petitioners, rather than challenging an individual instance of discrimination or law enforcement overreach like in *Bivens*, were challenging a large-scale government policy decision.<sup>122</sup>

The Court remanded the case for a consideration of special factors since the lower courts failed to do so.<sup>123</sup> Nonetheless, the Court advanced some special factors for the circuit court to consider, such as whether the remedy could impact governmental operations worldwide, whether Congress designed regulatory authority in a way to suggest a judicial interference would be disfavored, and whether the features of the case, if “difficult to predict in advance,” would cause a Court to pause without explicit congressional action.<sup>124</sup> Essentially, if there are reasons intimating that Congress might doubt the necessity of a remedy, the court must refrain in order to respect the separation-of-powers.<sup>125</sup>

Lastly, the alternative remedies analysis discussed previously functions both independently and within the scope of special factors.<sup>126</sup> Independently, a lack of other remedies will typically favor the extension of *Bivens* because, as the courts have consistently opined, justice requires it and where there is a right violated, there should be a remedy.<sup>127</sup> At the same time, the presence of another special factor, such as national security being threatened if *Bivens* is extended, can terminate the *Bivens* question even if the plaintiff lacks an alternative remedy.<sup>128</sup> In this way,

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121. *Id.* at 1849, 1863.

122. *Id.* at 1862.

123. *Id.* at 1869. The Court dismissed the claims against the executive officials and remanded the *Bivens* claim with respect to the prisoner abuse claim against the wardens. The case remains unresolved. *Id.*

124. *Id.* at 1858.

125. *Id.*

126. See Bernstein, *supra* note 42, at 734, 736–37 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)) (stating that the Supreme Court in *Lucas* concluded that the existence of an alternative federal remedy was a special factor).

127. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396, 2004 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)) (“[I]t is well . . . settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”).

128. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (explaining that a *Bivens* analysis has two parts, one of which looks beyond the lack of other alternative remedies toward other factors that would require hesitation before extending the remedy); *Hernandez v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (stating that an extension of *Bivens* in the case threatens the ability of the political branches to supervise national security).

the special factors analysis holds more weight.<sup>129</sup> Additionally, the existence or nonexistence of an alternative remedy can speak to congressional intent, which is an element that spans both the alternative remedies and the special factors inquiries.<sup>130</sup> Because of this and the superior authority of the special factors analysis in general, the alternative remedies element is sometimes assessed as if it may constitute a special factor.<sup>131</sup>

a. *Abbasi* and Extraterritoriality

In addition to its enrichment of *Bivens*, *Abbasi* also looks at the Constitution's reach.<sup>132</sup> In *Abbasi*, the petitioners were noncitizens suing for violations that occurred within the United States.<sup>133</sup> Under the doctrine of territorial incorporation, established at the start of the twentieth century, the Constitution applies in full in "incorporated" territories.<sup>134</sup> It is well-established that aliens present within the United States, whether present legally or illegally, retain most constitutional

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129. See Bernstein, *supra* note 42, at 734–35 (citing *Lucas*, 462 U.S. 367) (stating that the Supreme Court in *Lucas* concluded that the existence of an alternative federal remedy was a special factor).

130. See, e.g., *Hernandez*, 885 F.3d at 821 (concluding that the nonexistence of alternative remedies represent "Congress' repeated refusals" to create a cause action for foreign citizens on foreign soil); *Lucas*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may . . . indicate its intent, by statutory language, . . . legislative history, or . . . the statutory remedy itself, that the courts' power should not be exercised.").

131. The Fifth Circuit in *Hernandez* looked at alternative remedies when going down the list of potential special factors. *Hernandez*, 885 F.3d at 827. The Supreme Court in *Abbasi* said that the Court of Appeals should have conducted a "special factors" test and analyzed whether there were alternative remedies or other reasons congress would disagree with a judicial remedy. *Abbasi*, 137 S. Ct. at 1858. Regardless of how a court characterizes it, if a special factor exists, a court will deny a *Bivens* extension even if there exists no adequate alternative remedy. *Id.*

132. See *Abbasi*, 137 S. Ct. at 1848 (stating that just as a judicial mandate should not create a cause of action when a statute is silent on the issue, neither should the Constitution be construed to imply a damages action in this context).

133. *Id.* at 1852–53.

134. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (citing *Dorr v. United States*, 195 U.S. 138, 143–44 (1904)). "Territories" here means in addition to the states, i.e., Puerto Rico.

rights,<sup>135</sup> including Fourth Amendment rights.<sup>136</sup> Where the Constitution is implicated *outside* the United States, however, is another issue.

The doctrine of extraterritoriality refers to the application of the Constitution outside of the United States' *de jure* sovereign borders, anywhere other than the United States' legally recognized territory.<sup>137</sup> Under the old "formalist approach," aliens received constitutional protections if they had come within the territory of the United States and developed substantial and voluntary connections with this country.<sup>138</sup> However, in 2008, the Supreme Court challenged the formalist approach in *Boumediene v. Bush* and established that Constitutional protections can extend to noncitizens outside of the United States under a different and less stringent standard.<sup>139</sup> The Court rejected the "formalist" approach<sup>140</sup> to extraterritorial application and instead adopted a "functional" extraterritoriality test, which looks to objective factors and practical concerns when answering questions of extraterritoriality.<sup>141</sup>

In determining whether the petitioner in *Boumediene*, a noncitizen detained at the United States controlled Guantanamo Bay detention center could petition for a writ of habeas corpus, a right provided in the Constitution's Suspension Clause, the Court established a three-part test

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135. See, e.g., *Zadydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that once aliens enter the country, their legal circumstances change because the due process clause applies to all persons within the United States); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that illegal aliens and their children are afforded Fourteenth Amendment protections); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that the Fifth Amendment protects unlawfully present aliens from discrimination by the federal government); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments protect illegal aliens from imprisonment without due process); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment is universal in its application to all people within the territorial jurisdiction, regardless of race, color or nationality).

136. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis omitted) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1953) (Murphy, J., concurring)) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.").

137. See Alfe, *supra* note 3, at 795 (citing *Boumediene*, 553 U.S. at 755) (explaining formalist reasoning contends that the constitutional protection of noncitizens necessarily stops where *de jure* sovereignty ends).

138. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1035 (2015) (referencing the need to utilize the "voluntary connections" test established in *Verdugo-Urquidez*).

139. See generally *Boumediene*, 553 U.S. 723.

140. See generally *Verdugo-Urquidez*, 494 U.S. 259 See also Alfe, *supra* note 3, at 795 (stating the "formalist" approach construed the Constitution to stop at the border of U.S. territory where noncitizens are concerned).

141. See *Boumediene*, 553 U.S. at 755 (stating that *de jure* sovereignty as the "touchstone" of the habeas inquiry is unfounded); Alfe, *supra* note 3, at 787, 796 (discussing the development of extraterritoriality at the Supreme Court level).

with the functional approach to extraterritoriality in mind.<sup>142</sup> First, the Court considered the citizenship status of the detainee and the adequacy of the process that determines that status.<sup>143</sup> Second, the Court considered the nature of the sites where the apprehension and then detention occurred.<sup>144</sup> Lastly, the Court considered the practical obstacles inherent in resolving the prisoner's entitlement to the writ of habeas corpus.<sup>145</sup>

The Supreme Court has held that "de jure sovereignty is not and has never been the only relevant consideration in determining the geographic reach of the Constitution."<sup>146</sup> Because the decedents in *Hernandez* and *Rodriguez* are not United States citizens, the extraterritoriality issue played a significant part in the Fifth and Ninth Circuits' opinions.<sup>147</sup>

## II. A DISCUSSION OF *HERNANDEZ* AND *RODRIGUEZ*

Judicial precedent plainly establishes that courts should grant *Bivens* remedies only in narrow circumstances.<sup>148</sup> *Hernandez* and *Rodriguez*, two cases nearly identical in fact, both utilize the analysis defined by the Supreme Court in *Abbasi*.<sup>149</sup> In both cases, the following is true: a United States Customs and Border Patrol Agent on the American side of the border shot and killed a Mexican youth playing or walking in Mexico near the border.<sup>150</sup>

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142. *Boumediene*, 553 U.S. at 766 (holding that at least three factors are relevant in determining the reach of the Suspension Clause).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2008 (2017) (Breyer, J., dissenting) (quoting *Boumediene*, 553 U.S. at 764).

147. The circuits discuss extraterritoriality in two respects. First, it is factored into the "special factors" analysis. Second, it is considered when the courts determine whether the Constitution will actually apply to the decedents. *Hernandez*, 137 S. Ct. at 2006. The Supreme Court's hearing of *Hernandez* characterized the *Bivens* analysis as the antecedent to the extraterritorial application of the Fourth or Fifth Amendments and thus instructed the Fifth Circuit to conduct the *Bivens* analysis before seriously considering the reach of the Constitution in the given circumstances. *Id.* (citing *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014)).

148. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 675–76 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)) (quoting *Malesko* to introduce brief summaries of other cases where the Court refused to extend *Bivens*).

149. *See generally Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (applying the *Abbasi* analysis to a matter in which a U.S. Customs and Border Patrol agent on the United States side of the United States-Mexico border shot and killed a 16-year-old Mexican citizen who was walking on the Mexican side of the border, (and his mother then brought suit); *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (applying the *Abbasi* analysis to a matter similar to that in *Rodriguez*; here, a 15-year-old was shot while playing on the Mexican side of the border while other boys threw rocks across the border, and the boy's parents then brought suit).

150. *See generally Rodriguez*, 899 F.3d at 719; *Hernandez*, 885 F.3d at 811. In each case, U.S.

The cases presented here required the courts to conduct both an extraterritoriality inquiry—whether the Constitution applied in the given circumstances—and also an analysis of whether the courts should grant a *Bivens* remedy.<sup>151</sup> This article focuses on the special factors analysis, and the issue of extraterritoriality is important to that analysis. The following section discusses the procedural history and holdings of *Hernandez* and *Rodriguez* in turn.<sup>152</sup> Within the sections dedicated to the individual cases, the special factors analysis is divided by topic: alternative remedies, national security, foreign affairs and diplomacy, and extraterritoriality. The order of the factors corresponds to the order in which the circuit discussed them.<sup>153</sup>

#### A. *Hernandez v. Mesa*

On June 7, 2010, Sergio Adrià Hernández Guereca, fifteen years old, was playing with a group of friends in the cement culvert that divides El Paso, Texas, United States from Ciudad Juárez, Chihuahua, Mexico.<sup>154</sup> The boys were playing a game in which they would touch the barbed-wire border fence and then run back down the incline of the culvert.<sup>155</sup> The boys reportedly threw rocks at Jesus Mesa, a United States Border Patrol Agent, who attempted to detain them.<sup>156</sup> While Hernández fled, Mesa shot twice into Mexico from the United States side of the border, and hit Hernández at least once in the face, killing him.<sup>157</sup>

On January 11, 2011, Hernández's parents brought suit in the United States District Court for the Western District of Texas, El Paso Division.<sup>158</sup> They alleged that the government and various federal employees and agencies were liable for Hernández's death under the FTCA, the Alien Tort Statute (ATS) and the Constitution.<sup>159</sup> The District Court dismissed all of the claims against the United States, reasoning that

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Border Patrol agents (from the United States side of the United States-Mexico border) shot and killed teenage boys playing (*Rodriguez*) or walking (*Hernandez*) on the Mexican side of the border.

151. *Rodriguez*, 899 F.3d at 747; *Hernandez*, 885 F.3d at 816–17.

152. See *infra* Sections III.A–B (providing case background for both *Hernandez* and *Rodriguez*).

153. See generally *Rodriguez*, 899 F.3d 719; *Hernandez*, 885 F.3d 811.

154. *Hernandez*, 885 F.3d at 814.

155. See *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014) (for the Court's description of how the children were playing).

156. *Hernandez*, 885 F.3d at 814 (where the Court describes the FBI's report about the activities of the agent and the children).

157. *Hernandez*, 757 F.3d at 255.

158. See *Hernandez* Complaint, *supra* note 14, at 2 (detailing the beginning of the preliminary statement and nature of the case).

159. *Hernandez*, 757 F.3d at 255.



the FTCA does not cover torts arising in a foreign country and that in order for a plaintiff to sue, the ATS requires the government to waive its sovereign immunity, something it did not do here.<sup>160</sup>

The *Bivens* claim against Mesa for violations of Hernández's Fourth and Fifth Amendment rights remained.<sup>161</sup> On leave, plaintiffs amended their complaint to add four *Bivens* actions, alleging the same violations, against other government agents in addition to Mesa.<sup>162</sup> The district court granted motions to dismiss in favor of all defendants, reasoning that Hernández, as an alien injured outside of the United States, lacked Fourth or Fifth Amendment protections,<sup>163</sup> and that the additional agents were not causally linked to the event.<sup>164</sup> Plaintiffs appealed all judgments to the Fifth Circuit.<sup>165</sup>

The Fifth Circuit affirmed the judgments dismissing both the United States and the supervisors, but then held that a noncitizen injured outside the United States as a result of arbitrary official conduct of a United States law enforcement officer may invoke the protections provided by the Fifth Amendment.<sup>166</sup> This determination allowed the Hernández family to assert a *Bivens* claim against Mesa for a Fifth Amendment violation.<sup>167</sup> The Court found that it could not extend the Fourth Amendment extraterritorially under the tests established in *Boumediene* and *United States v. Verdugo-Urquidez*.<sup>168</sup>

Following the appellate proceeding, at the request of a member of the Fifth Circuit, the court reheard the matter *en banc*.<sup>169</sup> The court affirmed

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160. *Id.* at 256. The district court granted the United States' motion to dismiss holding that the United States had not waived its sovereign immunity under either the Federal Tort Claims Act or Alien Tort Statute. *Id.*

161. *See Hernandez v. United States*, 802 F. Supp. 2d 834, 846 (W.D. Tex. 2011) ("Therefore, the Court finds that all the claims against the United States should be severed from those against Agent Mesa and all unknown agents.").

162. *See Hernandez*, 757 F.3d at 256 (describing what occurred at the district court level). The appellants amended their complaint alleging that the other officers added tolerated and condoned a pattern of brutality and excessive force and had knowledge that Mesa posed a risk. *Id.*

163. *See id.* at 256 (restating the lower court's holding that Hernandez could not be protected under the Fourth or Fifth Amendments, relying on *Verdugo-Urquidez*).

164. *See id.* at 257 ("The district court then granted summary judgment . . . holding that the Appellants had failed to show 'that the Defendants were personally involved in the June 7 incident' or that there was a causal link 'between the Defendants' acts or omissions and a violation of Hernandez's rights.'").

165. *See id.* at 257 (explaining that Hernandez appealed each adverse judgment and the Court consolidated the appeals).

166. *Id.* at 272.

167. *Id.* at 280.

168. *Id.* at 267 ("[W]e hold that . . . an alleged seizure occurring outside our border and involving a foreign national—the Fourth Amendment does not apply.").

169. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

the dismissals and then turned to the Fifth Circuit panel decision that a non-citizen with no connections to the United States who suffered an injury in Mexico is protected by the Fifth Amendment.<sup>170</sup> The *en banc* court, divided on whether Mesa's conduct violated the Fifth Amendment, nonetheless determined that qualified immunity protected Mesa from liability.<sup>171</sup> The court held that no case law at the time of the event reasonably warned Mesa that the general prohibition of excessive force applies where the person injured by a United States official standing on United States soil is an alien who was neither in the United States nor had significant connections to the United States.<sup>172</sup>

In October 2016, the Supreme Court granted certiorari to evaluate three issues:<sup>173</sup> first, whether Sergio Hernández's parents may assert *Bivens* claims for damages;<sup>174</sup> second, whether the shooting violated Hernández's Fourth Amendment rights;<sup>175</sup> and finally, whether Mesa was entitled to qualified immunity on a claim that the shooting violated Hernández's Fifth Amendment rights.<sup>176</sup> The Supreme Court ultimately vacated the entire judgment and remanded the case to the Fifth Circuit.<sup>177</sup>

The Supreme Court first looked to the *Bivens* question, which they deemed an antecedent to the other questions presented.<sup>178</sup> Reasoning that they were a court of review and not a court of first view, they remanded this question and instructed the Fifth Circuit to consider the *Bivens* question in light of the analysis laid out in *Ziglar v. Abbasi*.<sup>179</sup> Second, the Court addressed the findings with regard to the Fourth Amendment claim.<sup>180</sup> The Court stated that the approach taken by the Fifth Circuit, disposing of a *Bivens* claim by resolving the constitutional question at issue, while at the same time assuming a *Bivens* remedy exists—is

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170. *See id.* at 119–20 (stating the remaining issues the *en banc* court was to decide).

171. *See id.* at 120 (“Although the *en banc* court is somewhat divided on . . . whether [Mesa's] conduct violated the Fifth Amendment, the court . . . is unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires.”).

172. *Id.* at 117 (“No case law in 2010 . . . reasonably warned Agent Mesa that his conduct violated the Fifth Amendment.”). This is the determinant for qualified immunity. *Id.*

173. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004 (2017).

174. *Id.*

175. *Id.*

176. *Id.* at 2004–05.

177. *Id.* at 2006.

178. *Id.* (citing *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014)).

179. *See id.* at 2006 (explaining that it is appropriate for the Court of Appeals to have the opportunity to analyze in light of *Abbasi*).

180. *See id.* at 2007 (explaining that the Fourth Amendment claim is sensitive, and therefore the Court should not resolve the issue, given the intervening reasoning of *Abbasi*).

appropriate in many cases.<sup>181</sup> However, the Court stated that in this particular context, the Fourth Amendment question is sensitive and not an issue for the Court to resolve since the court of appeals must conduct the *Abbasi* analysis.<sup>182</sup>

Lastly, the Supreme Court assessed the Fifth Circuit's determination of the Fifth Amendment claim.<sup>183</sup> Because the *en banc* court found that Mesa was entitled to qualified immunity, it too did not address *Bivens*.<sup>184</sup> The Supreme Court found otherwise, stating that Hernández's nationality and the extent of his ties to the United States were unknown at the time of the shooting and therefore Mesa was not entitled to qualified immunity.<sup>185</sup> The Court relied on case law stating that the qualified immunity analysis is limited to "the facts that were knowable to the defendant officers" at the time they were engaged in the conduct in question.<sup>186</sup> The Supreme Court did not give any explicit guidance to the Fifth Circuit regarding how it should address the Fifth Amendment claim.<sup>187</sup>

### 1. New Context

On remand, the Fifth Circuit, in utilizing the *Abbasi* test, held that the transnational aspect of the facts presented a new context, and numerous special factors counseled against supplying a *Bivens* remedy.<sup>188</sup> The Fifth Circuit determined that the case presented a new context because of Hernández' Mexican citizenship, his lack of ties to the United States and the location of his death.<sup>189</sup>

The court initially addressed that there had been "no direct judicial guidance" concerning the Constitution's extraterritorial reach or concerning its application to foreigners outside of the United States.<sup>190</sup> Because Rodríguez brought suit under both the Fourth and Fifth Amendment, the justices assessed the each claim's extraterritorial

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (citing *White v. Pauly*, 137 S. Ct. 548, 550 (2017)).

187. *See id.* (stating that the Court would not address the government's argument that only the Fourth Amendment is cognizable, leaving that decision to the Fifth Circuit, if necessary, on remand).

188. *See Hernandez v. Mesa*, 885 F. 3d 811, 817 (2018) ("Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any 'constitutional' right benefitting him raises novel and disputed issues.").

189. *Id.*

190. *Id.*

feasibility in turn. First, the court looked to the *Verdugo-Urquidez* holding where the Fourth Amendment did not apply to a United States officer's actions outside of the United States. The court deduced that the language in *Verdugo-Urquidez* "strongly suggests" that the Fourth Amendment did not apply.<sup>191</sup>

In assessing the merits of the Fifth Amendment substantive due process claim, the court stated that Hernández could prevail if federal courts accept two theories.<sup>192</sup> First, because *Verdugo-Urquidez* precludes a Fourth Amendment claim for Rodríguez, the court would have to accept a Fifth Amendment excessive force claim, despite the Supreme Court's previous instruction that all excessive force claims should be analyzed under the Fourth Amendment.<sup>193</sup>

The second theory the Fifth Circuit believed federal courts must accept is an extension of *Boumediene*, allowing rights to stem from territory outside of the United States.<sup>194</sup> In *Boumediene*, the Supreme Court determined that the United States detention center in Guantanamo Bay was located on territory under the total control of the United States and therefore found that an extension was permissible.<sup>195</sup> The Fifth Circuit refused to make this extension, adding that in the nine years since *Boumediene*, no federal circuit court had made the extension to Mexican land surrounding the border.<sup>196</sup> The Fifth Circuit determined they were indeed presented with a new context.<sup>197</sup>

## 2. Special Factors

### a. National Security

The Fifth Circuit stated that the new context should have required dismissal of the plaintiff's damage claims, but assessed the special factors anyway.<sup>198</sup> Keeping in mind the focus of the inquiry is to maintain the separation of powers, the court stated that a *Bivens* extension "threatens the political branches" supervision of national security,<sup>199</sup> and stressed that "[n]ational-security policy is the prerogative of the Congress and the

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191. *Id.* (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990)).

192. *Id.*

193. *See id.* (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

194. *Id.* at 817.

195. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

196. *Hernandez*, 885 F.3d at 817.

197. *Id.* at 818 ("The newness of this 'new context' should alone require dismissal of the plaintiffs' damage claims.").

198. *Id.*

199. *Id.* at 818–19 (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012)).

President.”<sup>200</sup> Additionally, the Fifth Circuit referenced a recent Third Circuit opinion, *Vanderklok v. United States*, where the court denied a *Bivens* extension to an individual alleging a constitutional violation against a TSA agent.<sup>201</sup> The Fifth Circuit, quoting *Vanderklok* stated: “The threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers.”<sup>202</sup> The Fifth Circuit found that the same logic applied to *Hernandez*, meaning that to imply a private right to recover in the specific transnational context, increases the chance that border agents will hesitate when making split-second decisions.<sup>203</sup>

#### b. Foreign Affairs and Diplomacy

The Fifth Circuit also held that supplying a remedy “risks interference with foreign affairs and diplomacy more generally,” reasoning that the United States is already responsible to foreign sovereigns when government officials injure them on foreign soil, which is generally a delicate matter and “rarely [a] proper subject[] for judicial intervention.”<sup>204</sup>

The court next mentioned the Border Violence Prevention Council. In its view, since the council was created to address border disputes in the first place, inserting the court in these affairs would be an improper interference.<sup>205</sup> The court also points out that since the Executive previously refused to indict Mesa, allowing a *Bivens* remedy would “undermine Mexico’s respect for the validity of the Executive’s prior determination.”<sup>206</sup>

#### c. Alternative Remedies

As required by *Abbasi*, the Fifth Circuit looked to whether there were alternative adequate remedies for the plaintiffs.<sup>207</sup> It reasoned that Congress’s failure to provide a damages remedy in these circumstances should be an additional factor counseling hesitation.<sup>208</sup> The court found it difficult to believe that congressional inaction regarding this specific

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200. *Id.* at 819 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017)).

201. *Id.* (holding that *Vanderklok* presents comparable set of facts).

202. *Id.* (citing *Vanderklok v. United States*, 868 F.3d 189, 207 (3d Cir. 2017)).

203. *Id.* (citing *Vanderklok*, 868 F.3d at 207).

204. *Id.* at 819–20 (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

205. *Id.* 820.

206. *Id.*

207. *See id.* (starting their alternative remedies analysis under the special factors analysis).

208. *See id.* (“Congress’s failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation.”).

situation was unintentional since border security has increasingly been the focus of national security policy.<sup>209</sup> The court next looked to explicit congressional acts. It stated that *Bivens*, being the “judicially implied version of § 1983,”<sup>210</sup> cannot reach further than its statutory counterpart. In other words, if a statutory claimant cannot recover for incidents arising in a foreign country, neither can a *Bivens* claimant.<sup>211</sup> In support, the court raised the FTCA’s explicit exclusion of recovery for claims arising in a foreign country.<sup>212</sup> The repeated refusals of Congress to create private rights of action against federal officials for injuries to foreign citizens on foreign soil speaks to Congress’s disapproval of judicial intervention in this context.<sup>213</sup>

The Fifth Circuit added that even in the absence of an alternative remedy, courts should not extend *Bivens* if any special factors counsel hesitation.<sup>214</sup> In *Abbasi*, the Supreme Court acknowledged the concern that, absent a *Bivens* remedy, there will be insufficient deterrence to prevent officers from violating the Constitution.<sup>215</sup> The Fifth Circuit similarly took up that concern and decided that criminal investigations and prosecutions already serve to deter agents from committing violations.<sup>216</sup> Concluding its analysis of alternative remedies, the court cites *Abbasi*, stating that “when there is ‘a balance to be struck’ between countervailing policy considerations like deterrence and national security, [t]he proper balance is one for the Congress, not the Judiciary, to undertake.”<sup>217</sup>

#### d. Extraterritoriality

The court next concluded that extraterritoriality itself is a special factor that magnifies separation-of-powers issues.<sup>218</sup> In holding against *Hernandez*, the Fifth Circuit relied on the presumption against extraterritorial application. The Court emphasized that the presumption’s existence “helps ensure that the Judiciary does not erroneously adopt an

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209. *See id.* (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)) (“It is ‘much more difficult to believe that congressional inaction was inadvertent’ given the increasing national policy focus on border security.”).

210. *Id.*

211. *Id.*

212. *Id.*

213. *See id.* at 821 (“Thus, the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension.”).

214. *Id.* (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

215. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017).

216. *Hernandez*, 885 F.3d at 821.

217. *Id.* (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017)).

218. *See id.*

interpretation of United States law that carries foreign policy consequences not clearly intended by the political branches.”<sup>219</sup> The Fifth Circuit reasoned that never before has the Supreme Court even “favorably mentioned” a non-statutory cause of action for conduct that took place abroad.<sup>220</sup> Even if the Constitution did apply extraterritorially, the court stated, remedies with the potential to cause “international friction beyond that presented by merely applying United States substantive law to that foreign conduct” should give courts reason to hesitate.<sup>221</sup>

### 3. Holding

The Fifth Circuit ultimately affirmed the district court’s dismissal, holding that extending *Bivens* would improperly meddle in national security and foreign affairs, “flout” Congress’s rejection of damages remedies for aliens injured abroad, and create a remedy with “uncertain limits.”<sup>222</sup> Since the court found that a *Bivens* remedy did not exist, the constitutional questions remained untouched.

#### B. *Rodriguez v. Swartz*

On the night of October 10, 2012, a sixteen-year-old Mexican citizen, J.A. Rodriguez, walked home down the sidewalk on a street that ran alongside the United States-Mexico border fencing. According to reports, Border Patrol Agent Lonnie Swartz, without any verbal warning, shot at Rodriguez from the United States side of the fence, hitting him approximately ten times from behind.<sup>223</sup> The complaint alleges that Rodriguez posed no threat to the agent or to others and was neither committing a crime, throwing rocks, or using a weapon.<sup>224</sup>

On July 29, 2014, Araceli Rodriguez, J.A.’s mother, filed a complaint against various border agents, including Swartz, in the United States District Court for the District of Arizona, alleging violations of the Fourth and Fifth Amendments and seeking recovery pursuant to *Bivens*.<sup>225</sup> Swartz, the only remaining defendant, filed a motion to dismiss, leading the district court to consider two issues. First, whether a Mexican national standing on the Mexican-side of the United States and Mexico border at

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219. *Id.* at 822 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013)).

220. *Id.* (citing *Vance v. Rumsfeld*, 701 F.3d 193, 198–99 (7th Cir. 2012)).

221. *Id.* at 822–23 (citing *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016)).

222. *Id.* at 822.

223. *Id.* at 823.

224. *Id.*

225. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1030 (D. Ariz. 2015). The original complaint alleged claims against multiple individuals, who were ultimately dismissed, leaving Swartz as the sole defendant at the time of the later decision by the circuit court.

the time of the alleged violation can avail himself of the protections of the Fourth and Fifth Amendment.<sup>226</sup> Second, whether a United States Border Patrol Agent may assert qualified immunity based on facts he found out after the alleged violation.<sup>227</sup>

The district court granted Swartz's motion in part and dismissed the Fifth Amendment claim. However, it found that Swartz violated Rodriguez's Fourth Amendment rights when he shot him, characterizing the shooting as a "seizure," and Swartz was not entitled to qualified immunity.<sup>228</sup> Citing the same law from the Fifth Circuit's *Hernandez* opinion on remand, the district court found that where physically intrusive government misconduct is concerned, the Fourth Amendment should be the guide for analyzing these claims and not the Fifth Amendment's "generalized notion" of substantive due process.<sup>229</sup> The court allowed the Fourth Amendment claim to proceed.<sup>230</sup> The district court expressly stated its respectful disagreement with the Fifth Circuit in *Hernandez*.<sup>231</sup>

Next, Swartz was not entitled to qualified immunity because the rights of Rodriguez were clearly established at the time.<sup>232</sup> According to the court, a law enforcement agent knows that it is unlawful and unconstitutional to use deadly force against an unarmed suspect to prevent his escape.<sup>233</sup> Swartz countered that it was not clear at the time whether the Constitution applied extraterritorially to Rodriguez, a

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226. *See id.* at 1030–31. Swartz made two claims: (i) Rodriguez argued that J.A. lacked substantial voluntary connections to the U.S. and was therefore not entitled to Constitutional protections; (ii) and even if he were entitled to those protections, qualified immunity shielded Swartz from liability. *Id.* Swartz was protected by qualified immunity. *Id.* at 1031.

227. *See id.* (outlining the parties' disagreement over whether Swartz could even invoke qualified immunity based his lack of knowledge regarding J.A.'s citizenship status at the time of the time of the incident).

228. *Id.* at 1033, 1039 (quoting *Brower v. Cty. of Inyo*, 489 U.S. 593, 596–97 (1989)). A seizure occurs "only when there is a governmental termination of freedom of movement" and that "[i]n this case, J.A. was seized, not when Swartz shot at him, but when the bullets entered J.A.'s body and prevented him from moving. As such, any such constitutional violation that may have transpired materialized in Mexico." *Id.* at 1033.

229. *Id.* at 1038 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

230. *See id.* at 1041 ("The Court finds that, under the facts alleged in this case, the Mexican national may avail himself to the protections of the Fourth Amendment and that the agent may not assert qualified immunity.").

231. *Id.* at 1032.

232. *See id.* at 1041. (citing *Hernandez v. United States*, 785 F.3d 117, 120–21 (5th Cir. 2015)) ("This Court respectfully disagrees with the en banc panel's decision that 'any properly asserted right was not clearly established to the extent that the law requires.'").

233. *Id.* 1039–40 (citing *Brosseau v. Haugen*, 543 U.S. 194, 203 (2004)) (emphasizing that law enforcement officers have been "well-aware" for thirty years that it is unlawful to use deadly force on an unarmed suspect to prevent his escape).



noncitizen, on foreign soil.<sup>234</sup> The court emphasized that Swartz only learned of Rodriguez's citizenship status after the fact and that he was well aware at the time that it is unlawful to use deadly force against both citizens and noncitizens while in the United States.<sup>235</sup> Since Swartz himself was standing on United States soil, the court held that the limits of deadly force applied just the same.<sup>236</sup> Swartz appealed the denial of qualified immunity.<sup>237</sup>

The Ninth Circuit Court of Appeals filed its decision on appeal on August 7, 2018.<sup>238</sup> The panel affirmed the district court's judgment that Rodriguez had a right to be free from an unreasonable use of deadly force by an American agent standing in the United States even though the bullets hit Rodriguez in Mexico.<sup>239</sup> Additionally, the panel affirmed the judgment that Swartz was not entitled to qualified immunity.<sup>240</sup> Accordingly, the court decided to extend *Bivens*, reasoning that there was no other adequate remedy available; they were presented with no reasons to infer that Congress deliberately chose to withhold a remedy; and that the special factors considered either did not apply or counseled in favor of extending the *Bivens* remedy.<sup>241</sup>

### 1. New Context

After concluding that the Fourth Amendment protects Rodriguez according to *Boumediene* and *Verdugo-Urquidez*,<sup>242</sup> and that Swartz was

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234. *Id.* at 1040.

235. *Id.*

236. *Id.*

237. *Rodriguez v. Swartz*, 899 F.3d 719, 728 (9th Cir. 2018).

238. *Id.* at 719.

239. *Id.* at 731. Comparing the facts to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990), the court determined that *Rodriguez* was different because it was not about overseas operations or seizures generally, rather, it is about the “unreasonable use of deadly force by an American agent acting on American soil . . . .” The Court emphasized that *Verdugo-Urquidez* did not consider the actions of American agents on American soil, only the actions of American agents on Mexican soil.

240. *Rodriguez*, 899 F.3d at 732–34. An officer loses qualified immunity when he commits a clear constitutional violation. *Id.* at 732–33. Swartz argues that it was not clear at the time of the conduct that aliens were protected by the Constitution. *Id.* The court states that when Swartz shot J.A., he could not have known whether he was an alien or an American citizen with family and activities on both sides of the border. *Id.* at 732–33. Since the analysis is limited to the facts knowable to the officer at the time of the conduct, Swartz loses his qualified immunity because he could not have known whether J.A. was an American citizen or not at the time of the shooting. *Id.* at 733.

241. *Id.* at 748.

242. *See id.* at 731 (finding that American agents' actions on *foreign* soil invalidated a Constitutional claim, but that foreign detainees (on American soil) alleged innocence was reason to apply Constitutional protection).

not entitled to qualified immunity, the court began its *Bivens* inquiry. The court briefly determined that the case is a new context, stating that this context is like *Bivens* in that it concerns a federal law enforcement officer who violated the Fourth Amendment.<sup>243</sup> The difference, however, was that Hernández died in Mexico and the injured party seeking a remedy is an alien.<sup>244</sup> Because the context was new, the court moved on to the next factor whether there is an adequate alternative remedy.

## 2. Special factors

### a. Alternative Remedies

The court breaks down its analysis of the alternative remedies, giving attention to the arguments asserted by the defendants and also by the United States in its Amicus Brief.<sup>245</sup> Looking first to the FTCA, the court acknowledged that the Act does not allow recovery for claims arising in a foreign country.<sup>246</sup> The defendants, the United States, and the dissent all pointed to this as a Congressional indication against extending a *Bivens* remedy.<sup>247</sup> The majority opinion qualifies this assertion by pointing out that the purpose of the FTCA limitations is to prevent application of foreign laws in foreign courts, since the “choice-of-law” standards at the time focused on applying the law of the place where the harm occurred.<sup>248</sup> This was not implicated here, the court held, because neither Mexican nor Arizonan law was implicated, only the Constitution.<sup>249</sup> Additionally, the FTCA is concerned only with common law torts, not constitutional violations.<sup>250</sup>

The United States suggested that Rodriguez could sue for wrongful death under Arizona state law.<sup>251</sup> However the court pointed out that the Westfall Act granted agents complete immunity from torts arising out of

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243. *Id.* at 738.

244. *Id.*

245. *Id.* at 739 (citing *Minneeci v. Pollard*, 565 U.S. 118, 120, 129 (2012); *Adams v. Johnson*, 355 F.3d 1179, 1185 n.3 (9th Cir. 2004)) (“Swartz and the United States have suggested several possible alternative remedies. But even though an alternative remedy need not be ‘perfectly congruent’ with *Bivens* or ‘perfectly comprehensive,’ it still must be adequate. None of the suggested alternatives is adequate.”).

246. *Id.* (quoting 28 U.S.C. § 2680(k) (2018)) (“[T]he FTCA also specifically provides that the United States cannot be sued for claims ‘arising in a foreign country.’”).

247. *See id.* (stating that the foreign country exception does not imply that Congress intended to prevent a *Bivens* remedy).

248. *Id.* at 739–40 (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)).

249. *Id.* at 740.

250. *Id.*

251. *Id.* at 741.

acts taken in the course of their duties.<sup>252</sup> Under the Westfall Act, a later addition to the FTCA, immunity granted to federal agents does not apply in civil actions brought against a government employee for a constitutional violation.<sup>253</sup> Therefore, if Rodriguez were to sue under state law, the claim would transform into an FTCA claim, substituting the United States as defendant, and resulting in a bar by the “arising in a foreign country” exception.<sup>254</sup>

The court next determined that restitution is not an adequate alternative, as a court will only order payment of restitution if Swartz is convicted of a crime.<sup>255</sup> Additionally, the court reasoned that the United States had the choice to charge Swartz, and if it chose to do so this was the government’s remedy, not the victim’s.<sup>256</sup> The court held that these remedies were inadequate, and noted that while criminal charges were potentially available in the *Bivens* case itself, they nonetheless did not bar a damages cause of action.<sup>257</sup>

Next, the court addressed the dissent’s claim that since state or local officials would not face consequences under §1983, because the statute only covers victims within the jurisdiction of the United States, that it was “bizarre” for federal agents to face liability.<sup>258</sup> The court disagreed, stating that the original purpose of the statute was related to Confederate States’ failure to respect constitutional rights, and it is therefore “inconceivable that, at the same time, Congress thought about (and deliberately excluded liability for) cross-border incidents involving federal officials.”<sup>259</sup>

The court reviewed additional remedies briefly and ultimately considered them inadequate, including the ATS and the option of a

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252. *Id.* (citing *Osborn v. Haley*, 549 U.S. 225, 229 (2007)) (“[T]he Westfall Act in effect ‘accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.’”). See *The Westfall Act*, 28 U.S.C. § 2679 (2018) (describing the exclusivity that Westfall Act claims against the United States provides for government employees acting within the scope of their employment).

253. 28 U.S.C. § 2679.

254. See *Rodriguez*, 899 F.3d at 741 (citing *Minnecci v. Pollard*, 565 U.S. 118, 126 (2012)) (explaining how the Westfall Act’s immunity provided to government employees acting within the scope of their employment would convert a state-law claim against Swartz into an FTCA claim against the United States, and that the FTCA foreign country exception would apply, barring J.A.’s claim).

255. *Id.* at 741–42 (citing 18 U.S.C. § 3663A(a)(1), (b)(2)–(4) (2018)).

256. *Id.* at 742.

257. *Id.* (citing *Bivens v. Six Unknown Named Agents*, 409 F.2d 718, 724–25 (2d Cir. 1969)).

258. *Id.*; 42 U.S.C. § 1983.

259. See *id.* (describing the purpose of the statute was to ensure state and local officials did not escape liability for Constitutional violations, particularly because such violations were endemic in the recently defeated Confederate States).

Mexican court granting a remedy.<sup>260</sup> The court proceeded to consideration of special factors after it determined that Congress did not intend to preclude *Bivens*.<sup>261</sup>

#### b. National Security

The Ninth Circuit's special factors analysis began with policy generally (as discussed further in the analysis section) and then moved on to a discussion of national security.<sup>262</sup> In terms of national security, the court determined that holding Swartz liable would not meaningfully deter other agents from performing their duties.<sup>263</sup> While acknowledging that border patrol agents help guarantee national security, the court stated that no duty exists that would have required Swartz to shoot J.A. Rodriguez, "people who are just walking down a street in Mexico."<sup>264</sup> The court ended its national security analysis stating, "it cannot harm national security to hold Swartz civilly liable any more than it would to hold him criminally liable, and the government is currently trying to do the latter."<sup>265</sup>

#### c. Foreign Affairs and Diplomacy

Next, the panel examined the government's assertion that the cross-border nature of the incident and the application of *Bivens* could implicate foreign policy, but the court found this concern non-threatening.<sup>266</sup> While the court agreed that application of *Bivens* could implicate foreign policy, it countered the government's concerns with numerous reasons why a *Bivens* remedy would not interfere here.<sup>267</sup> First, the court reasoned that a denial of a remedy could threaten international relations because it would mean United States courts could not provide remedies for gross violations of Mexican sovereignty.<sup>268</sup>

The court next rejected the government's argument that injecting the courts into matters of international diplomacy—and extending *Bivens*—

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260. *See id.* at 742–44 (denying the adequacy of other remedies and concluding that Congress did not intend to preclude *Bivens* for Rodriguez).

261. *Id.* at 744.

262. *Id.* at 744–45. The circuit's policy discussion is brief and better suited for discussion in the analysis section of this article.

263. *Id.* at 746.

264. *Id.* at 745–46.

265. *Id.* at 746. The opinion previously mentions how the United States plans to try Swartz for manslaughter.

266. *See id.* at 746–47 ("We fail to see how extending *Bivens* here would actually implicate American foreign policy.").

267. *Id.* at 746.

268. *Id.*

“risks undermining the government’s ability to speak with one voice in international affairs.”<sup>269</sup> If this risk existed, the court argued, the courts would be excluded from considering all incidents of violence at the border.<sup>270</sup> Yet this is not the case; adjudication of border incidents are routinely held at the district court level and thus, the court held, this argument fails.<sup>271</sup> Lastly, the court highlighted Mexico’s Amicus Brief, which explicitly proclaims that the application of *Bivens* in this situation would not conflict with Mexico’s laws nor would it damage United States-Mexico relations.<sup>272</sup>

#### d. Extraterritoriality

The last special factor the court considered was extraterritoriality. Despite the existence of the presumption against extraterritoriality, the court held that *Rodriguez*’s case fell into the exception which overcomes the presumption: where actions “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.”<sup>273</sup> The court stated that there is a compelling interest in regulating our own government agents’ conduct on our own soil and that is, presumably, why the United States was willing to apply its criminal law extraterritorially to Swartz.<sup>274</sup>

### 3. Holding

The Ninth Circuit held that, taking the facts as pleaded in the complaint as true, the Fourth Amendment applies to *Rodriguez* and that *Bivens* should be extended.<sup>275</sup>

## III. ANALYSIS

The Fifth Circuit Court of Appeals incorrectly decided *Hernandez* and the Supreme Court should apply the Ninth Circuit’s reasoning in deciding the reach of *Bivens* claims in the context of cross-border shootings.<sup>276</sup> Both circuits determined that their respective set of facts presented a

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269. *Id.* at 746.

270. *Id.* at 747.

271. *See id.* (explaining that the district courts along the border hear cases about smuggling).

272. *Id.*; Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellee and in Support of Affirmance at 7, *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (No. 15-16410) [hereinafter *Rodriguez Amicus Curiae of Mexico*].

273. *See Rodriguez*, 899 F.3d at 747 (citing *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25 (2013)).

274. *Id.* at 747–48.

275. *Id.* at 748.

276. This article does not discuss the Fourth Amendment’s application to the decedents in *Hernandez* and *Rodriguez*.

“new context,” but diverged in their reasoning where “special factors” are concerned.<sup>277</sup> Though reasonable minds may differ, the judicial process requires a single definitive outcome.<sup>278</sup> The Supreme Court stated in *Hernandez* that the guidance provided in *Abbasi* may ultimately eliminate the Fourth Amendment issue because special factors could prevent a *Bivens* remedy.<sup>279</sup> This article argues that the Supreme Court should extend *Bivens*, and proceeds with confidence that, once *Bivens* is granted, the various arguments in favor of extraterritorial application of the Fourth Amendment will prevail.<sup>280</sup>

This part compares the Fifth and Ninth Circuits’ analyses of special factors and argues that the Ninth Circuit’s analysis on each issue is far more exhaustive and meticulous. This section makes the comparisons by topic, starting with the circuits’ discussions on general policy implications, followed by national security, foreign affairs and diplomacy, and finally, extraterritoriality.

#### A. *Hernandez and Rodriguez Do Not Require Changing United States Policy*

The Ninth Circuit’s opinion and Judge Edward Prado’s Fifth Circuit dissent succinctly lay out the reality of what the *Rodriguez* case ultimately presented to the court: an individual instance of a law enforcement officer exceeding the scope of his authority.<sup>281</sup> Courts have repeated that *Bivens* is not a proper vehicle for altering policy.<sup>282</sup> In other words, and as a refresher, under this limitation, *Bivens* plaintiffs cannot challenge a high-level official, a policymaking individual, or a policy itself because any of these could raise a separation-of-powers issue.<sup>283</sup>

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277. See *Rodriguez*, 899 F.3d at 738; *Hernandez v. Mesa*, 885 F.3d 811, 817 (5th Cir. 2018) (finding that their respective cases presented new contexts).

278. There is widespread use of this phrase in Supreme Court case law. See, e.g., *Medina v. California*, 505 U.S. 437, 450 (1992) (“[R]easonable minds may differ as to the wisdom of placing the burden of proof on the defendant in these circumstances . . . .”); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 509 (1992) (“[R]easonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting.”).

279. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017) (“The Court of Appeals here . . . has not had the opportunity to consider how the reasoning and analysis in *Abbasi* may bear on this case.”).

280. See Alfe, *supra* note 3, at 812 (concluding that Agent Mesa’s location at the time of the shooting should mean that the Fourth Amendment will apply to *Hernandez*).

281. See *Rodriguez*, 899 F.3d at 745; *Hernandez*, 885 F.3d at 825 (Prado, J., dissenting) (both citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)).

282. See *Rodriguez*, 889 F.3d at 744; *Hernandez*, 885 F.3d at 826 (Prado J., dissenting) (both citing *Abbasi*, 137 S. Ct. at 1860).

283. See *id.* (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001)); *Abbasi*,

For example, the *Abbasi* plaintiffs challenged the policy decisions of executive officials, a defendant dissimilar to those in the main three *Bivens* cases, and the far-reaching implications of that distinction were clear to the Supreme Court.<sup>284</sup> So, applying this reasoning, the Ninth Circuit found that *Abbasi* inadvertently implies that *Bivens* is available to *Rodriguez*.<sup>285</sup> Again, *Rodriguez* was neither challenging a policy decision nor bringing suit against some policymaker or high-up official, like in *Abbasi*.<sup>286</sup> In fact, not only did *Rodriguez* bring suit against an *Abbasi*-approved defendant, but he also brought suit for conduct that was expressly prohibited by Customs and Border Patrol policy.<sup>287</sup> Indeed, under the circumstances deadly force was absolutely forbidden and still Swartz did exactly that.<sup>288</sup> If the distinction between *Abbasi* and *Rodriguez*, isn't yet clear, consider this: the *Abbasi* plaintiffs challenged activity *mandated* by a government policy, but here, *Rodriguez* is challenging activity that *violated* a government policy.<sup>289</sup>

Now compare: the Fifth Circuit's special factors analysis jumped straight into national security and nowhere did the majority give meaningful consideration to *Abbasi*'s language about individual instances of law enforcement overreach.<sup>290</sup> Unsurprisingly, Judge Prado's dissent *did*, and he criticized the majority's oversight.<sup>291</sup> He pointed out how the majority aimed to characterize the case as an umbrella issue, asking whether "aliens injured abroad," in a general sense, can seek damages under *Bivens*.<sup>292</sup> The problem with this portrayal, as Prado states, is that it overlooks the critical fact that the case

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137 S. Ct. at 1849 (stating that suits against executive officers would call into question the process behind high-level policy decisions, resulting in litigation that impedes officials in carrying out their job).

284. *Abbasi*, 137 S. Ct. at 1862.

285. *Rodriguez*, 899 F.3d at 745.

286. *Id.*; *Abbasi*, 137 S. Ct. at 1851.

287. *Rodriguez*, 899 F.3d at 745. See 8 C.F.R. § 287.8(a)(2)(ii) (2012) ("Deadly force may be used only when a designated immigration officer has reasonable grounds to believe that such force is necessary to protect the . . . officer or other persons from the imminent danger of death or serious physical injury.").

288. *Rodriguez*, 899 F.3d at 745.

289. See *Abbasi*, 137 S. Ct. at 1860 ("[R]espondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil."); *Rodriguez*, 899 F.3d at 745; 8 C.F.R. § 287.8(a)(2)(ii) (noting that instead of arguing Swartz's compliance with government policy, federal regulations expressly prohibited the type of force used under the circumstances alleged).

290. See *Hernandez v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (beginning the special factors analysis).

291. *Id.* at 825 (Prado, J., dissenting).

292. *Id.*

involved one single federal officer who shot and killed one single unarmed boy.<sup>293</sup>

Another example, in *Abbasi* one of the main reasons the plaintiffs could not prevail on a *Bivens* claim was that they were challenging a major policy.<sup>294</sup> The Fifth Circuit did not address this factor, despite its frequent presence in the special factors analysis.<sup>295</sup> Perhaps that is because this factor is so clearly not present—an absence that speaks highly in favor of the *Bivens* extension. The Fifth Circuit’s failure to observe the absence of a challenge to existing government policy reveals the paucity of its analysis. Instead, the Fifth Circuit combats the “individual instance” argument by ignoring it and then later add that extending *Bivens* would encourage agents to “hesitate in making split-second decisions,” convenient language that infests anti-*Bivens* discourse.<sup>296</sup>

*Bivens* exists to deter officers from violating constitutional rights and to hold individually responsible those who do so.<sup>297</sup> Neither *Hernandez* nor *Rodriguez* would require an inquiry into government or policy-making deliberations more than any other permissible excessive force *Bivens* suit against a border patrol agent.<sup>298</sup> There is no major policy at issue and this further favors extending *Bivens*.<sup>299</sup> As this section further argues, the Ninth Circuit’s thorough analysis and assessment of general policy implications, or lack thereof, is the first illustration of its exhaustive methodology.

### B. Victims Devoid of Alternative Remedies

The existence of an alternative remedy, or not, is not dispositive. The

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293. *Id.*

294. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017) (“Other special factors counsel against extending *Bivens* to cover the detention policy claims against any of the petitioners. Because those claims challenge major elements of the Government’s response to the September 11 attacks, they necessarily require an inquiry into national-security issues.”).

295. In his dissent, Judge Prado highlights the majority’s analytical misstep, stating that the majority overlooks the critical “who, what, where, when, and how” of the officer, and instead focuses on issue of whether aliens injured abroad can bring *Bivens* claims. *Hernandez*, 885 F.3d at 825–26 (Prado, J., dissenting).

296. *Id.* at 819. (majority opinion). See *Rodriguez v. Swartz*, 899 F.3d 719, 754 (9th Cir. 2018) (Smith J., dissenting) (citing the “split-second” language); Brief for the United States as Amicus Curiae at 8, *Hernandez v. Mesa*, 885 F.3d 811 (2017), 2019 WL 1579640 [hereinafter *Hernandez Amicus Curiae of the United States*] (citing the “split-second” language).

297. *Hernandez*, 885 F.3d at 826 (quoting *FDIC v. Meyer*, 510 U.S. 471, 485 (1994)).

298. *Id.* at 826–27.

299. *Hernandez*, 885 F.3d at 826 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001)) (noting that, with regard to the Executive Officials, a *Bivens* action is not “a proper vehicle for altering an entity’s policy”).



existence of a special factor will terminate the possibility of a *Bivens* extension even if the injured individual has no other means of seeking a remedy.<sup>300</sup> Originally, the alternative remedy inquiry looked mostly to federal separation-of-powers principles.<sup>301</sup> However, as later *Bivens* claims arose the courts became increasingly hesitant to extend *Bivens* when there was any other remedy, even a state claim.<sup>302</sup> The law shifted from requiring an equally effective alternative remedy,<sup>303</sup> to only requiring a legally acceptable alternative.<sup>304</sup> Because of this, the feasibility of plaintiffs successfully pleading a *Bivens* claim only became more unlikely.<sup>305</sup> The Fifth and Ninth Circuits both conclude that plaintiffs lack alternative remedies, including both to state and federal remedies,<sup>306</sup> but the Fifth Circuit construes this as counseling hesitation.<sup>307</sup> This subpart does not restate why the alternative remedies are unavailable, as that is already provided in the discussion of *Hernandez* and *Rodriguez*.<sup>308</sup> Instead, it analyzes the alternative remedies element from the lens of the special factors analysis, and looks to how the circuits construe the nonexistence of alternative remedies. While the Fifth Circuit's reasoning at first seems sound, the Ninth Circuit's examination of congressional intent dives deeper, rendering the Fifth Circuit's conclusions incomplete.<sup>309</sup>

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300. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (stating that even if there is no alternative, courts must make an appropriate determination that pays attention to special factors counseling hesitation); *Hernandez*, 855 F.3d at 821 (stating that even in the absence of an alternative, courts should not extend *Bivens* if any special factors counsel hesitation).

301. See *supra* Section I.C.2 (discussing the *Minnecci* case).

302. See *Minnecci v. Pollard*, 565 U.S. 118, 125 (2012) (citing *Wilkie*, 551 U.S. at 550) (stating that *Bivens* is inappropriate "primarily" because state tort law had already provided a process capable of protecting the constitutional interests at stake).

303. See *Carlson v. Green*, 446 U.S. 14, 18 (1980) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Davis v. Passman*, 442 U.S. 228, 245–47 (1979)).

304. See *Bush v. Lucas*, 462 U.S. 367, 378 n.14 (1986) (stating the only remedy needed was a constitutionally adequate one).

305. See, e.g., Newman, *supra* note 10, at 482–83 (stating that the Court changed the requirement from an equally effective remedy to a constitutionally adequate remedy, lowering the standard for finding an alternative remedy).

306. See *Hernandez v. Mesa*, 885 F.3d 811, 820–21 (5th Cir. 2018) (noting that Congress intentionally excluded any possible remedy); *Rodriguez v. Swartz*, 899 F.3d 719, 739 (9th Cir. 2018). Both courts explicitly state that the plaintiffs lack alternative remedies.

307. *Hernandez*, 885 F.3d at 820 ("Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation").

308. See *supra* Sections II.A.2.c, II.B.2.a (discussing why alternative remedies are unavailable in *Hernandez* and *Rodriguez* respectively).

309. See *infra* Part IV (showing the discrepancies in the courts' opinions and how the Fifth Circuit on many occasions excludes critical law); see generally *Rodriguez*, 899 F.3d 719 (2018); see generally *Hernandez*, 885 F.3d 811 (2018).

From Congress's failure to fashion a remedy for Hernández, the Fifth Circuit infers a reason to hesitate extending *Bivens*.<sup>310</sup> *Abbasi* instructed the courts to consider that congressional silence may be relevant where Congress's interest in an issue has been frequent and important.<sup>311</sup> The Fifth Circuit found it "difficult to believe" that, considering the rising controversy over border security, Congress accidentally overlooked the issue.<sup>312</sup> Precedent establishes that drawing inferences from congressional silence is difficult, "treacherous," and potentially dangerous,<sup>313</sup> yet, in support of its position, the Fifth Circuit points to § 1983 and the FTCA as evidence that Congress's inaction was intentional.<sup>314</sup>

First, plaintiffs in both cases are unable to bring claims under the FTCA.<sup>315</sup> The FTCA allows individuals injured by federal agents to sue the United States,<sup>316</sup> but the Act precludes claims where the injury arose in a foreign country.<sup>317</sup> The Fifth Circuit's analysis of the FTCA stops here.<sup>318</sup> It reasons: Since the FTCA doesn't permit foreign injury cases, that must mean Congress doesn't want *any* foreign injury recovery. The Ninth Circuit, however, continues, and explains why the foreign country exception does not translate to Congress wanting to prevent a *Bivens* claim.<sup>319</sup> First, it argues that the core of this provision stems from Congress's "unwillingness to subject the United States to liability arising

310. See *Hernandez*, 885 F.3d at 820–21 (conducting their analysis of alternative remedies within the special factors analysis).

311. See *id.* at 820 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)) ("It is 'much more difficult to believe that congressional inaction was inadvertent' given the increasing national policy focus on border security.").

312. *Id.*

313. *Id.* at 831 (Prado, J., dissenting) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)); *Castro v. Chi. Hous. Auth.*, 360 F.3d 721, 729 (7th Cir. 2004).

314. See *Hernandez*, 885 F.3d at 820–21 (conducting their analysis of alternative remedies within the special factors analysis).

315. *Id.* at 820 (explaining that Congress did not want to waive federal sovereign immunity under the FTCA for claims arising in a foreign country); *Rodriguez v. Swartz*, 899 F.3d 719, 739 (9th Cir. 2018) (explaining that since J.A. suffered his deadly injury in Mexico, he cannot sue the U.S. under the FTCA pursuant to the foreign country exception).

316. See 28 U.S.C. § 2680(k) (allowing injured individuals to sue the government). The United States may step in as a defendant because the Westfall Act of 1988 grants immunity to individual officers who commit torts while acting in the scope of their employment.

317. *Id.*

318. The Fifth Circuit dedicates a single sentence to the FTCA. See *Hernandez*, 885 F.3d at 820 ("Likewise, under the Federal Tort Claims Act—a law that comprehensively waives federal sovereign immunity to provide damages remedies for injuries inflicted by federal employees—Congress specifically excluded '[a]ny claim arising in a foreign country.'").

319. *Rodriguez*, 899 F.3d at 739–40 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004)).

out of foreign laws.”<sup>320</sup> The objective of the statute was to prevent foreign substantive law from entering United States courts. To be clear, Congress specifically refers to claims based on foreign harms *arising out of foreign laws*.<sup>321</sup> The law’s complementary House Report elaborates, clarifying that claims arising in a foreign country are exempt from the bill because liability in those instances is determined by the law where the injury took place, which would then introduce foreign law into a United States court.<sup>322</sup> Extending *Bivens* to *Rodriguez*, the Ninth Circuit held, does not implicate this concern because, rather than some foreign law, it arises under United States constitutional law.<sup>323</sup>

Keeping this in mind, of utmost importance is the FTCA’s focus on common law torts, as opposed to constitutional law claims.<sup>324</sup> The Westfall Act clearly states that its authority of granting qualified immunity to federal agents does not apply in civil actions brought against a government employee for a constitutional violation.<sup>325</sup> That is the *Bivens* cause of action exactly. So, the FTCA explicitly provides an exception for *Bivens* claims.<sup>326</sup> If the exception is not already clear enough, The Westfall Act’s contemporaneous House Report further elaborated on the relationship between the act itself and *Bivens*. Congress declared that a constitutional tort is a “more serious intrusion” of individual rights that “merits special attention.”<sup>327</sup> Congress further stated that the Westfall Act would not impact victims of constitutional torts in seeking personal redress against an inflictor.<sup>328</sup> The purpose of the foreign country exception in the FTCA was to maintain uniformity of law in United States courts and that continues to be an important purpose.<sup>329</sup> The Fifth Circuit equates the FTCA and *Bivens* when they

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320. *Rodriguez*, 899 F.3d at 739–40.

321. *Id.* at 740 (citing *Sosa*, 542 U.S. at 707–08).

322. *Id.*

323. *Id.* The court also stated that neither Mexican law nor Arizona choice-of-law provisions could lead to the application of Mexican substantive law.

324. *See id.* (differentiating between constitutional and tort law claims); 28 U.S.C. § 2679 (2018) (discussing the remedy against the United States for “injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government”).

325. 28 U.S.C. § 2679.

326. *Rodriguez*, 899 F.3d at 740 (citing *Hui v. Castaneda*, 559 U.S. 799, 806–07 (2010)).

327. *Id.* (citing H.R. REP. NO. 100-700, at 6 (1988), reprinted in 1998 U.S.C.C.A.N. 5945, 5950).

328. *Id.*

329. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (citing Hearing on H.R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942)) (“[S]ince liability is to be determined by the law of the [place] of the wrongful act . . . it is wise to restrict this bill to claims arising in this country . . . because the law of the particular state is being applied. Otherwise,

assume that since Hernández cannot bring tort claims under the FTCA, neither can Hernández bring a constitutional violation claim under *Bivens*.<sup>330</sup> The FTCA applies to tort claims only and Congress plainly differentiates those claims falling under the FTCA from those falling under the Constitution.<sup>331</sup> The Fifth Circuit cut its assessment of the FTCA short while the Ninth Circuit proceeded, introducing that critical history and case law that weighs in favor of a *Bivens* extension.

Next, the Fifth Circuit alleges that § 1983 speaks against the *Bivens* extension because the statute limits recovery to United States citizens or individuals within United States jurisdiction, and *Hernandez* was neither.<sup>332</sup> They reason that because *Bivens* is a judicially implied version of the statute, it would violate separation-of-powers principles if the implied remedy reached further than the express one.<sup>333</sup> The Ninth Circuit rejects this argument, emphasizing that Congress enacted the statute in response to officials in the Confederate States, and to prevent them from escaping liability when they refused to enforce federal law.<sup>334</sup> According to the court, and also general common sense, it is unthinkable that, in the midst of the nineteenth century American political zeitgeist, Congress deliberately excluded liability for incidents at the Mexican-American border involving federal officers with semi-automatic pistols.<sup>335</sup>

Congress failed to provide a remedy for Webster Bivens when an officer violated his Fourth Amendment rights, yet Congressional silence in that instance manifested the *Bivens* implied remedy.<sup>336</sup> Does this mean that Congress intentionally neglected to provide a remedy for an individual whose Fourth Amendment rights were violated, a right that is

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it will lead I think to a good deal of difficulty.”).

330. See *Hernandez v. Mesa*, 885 F.3d 811, 820 (5th Cir. 2018) (stating that since the FTCA provides remedies for injuries inflicted by federal employees and also prohibits claims arising in a foreign country, that this speaks to congressional intent regarding *Bivens*).

331. See *id.* (“Congress’s failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation.”).

332. *Id.* (citing 42 U.S.C. § 1983).

333. *Id.*

334. *Rodriguez v. Swartz*, 899 F.3d 719, 742 (9th Cir. 2018) (citing *Mitchum v. Foster*, 407 U.S. 225, 240–42 (1972)).

335. See *id.* (stating that it is inconceivable that Congress deliberately excluded liability for cross-border incidents); *Use of Force Policy, Guidelines and Procedures Handbook*, U.S. CUSTOMS BORDER PROTECTION (May 2014), <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf> [<https://perma.cc/T88N-7R6W>] [hereinafter *CBP Use of Force Policy*]. At the time, Congress was focused on crafting remedies for harms arising out of tensions from the Civil War. Domestic conflict was the focus, not Mexican migrants and border protection.

336. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

central to the United States Constitution?<sup>337</sup> Unlikely. This is yet another example of how the Fifth Circuit’s inquiry, which can be characterized as shallow at best, unravels to reveal shortsighted and fatally flawed reasoning.

The manner in which *Abbasi* utilized “congressional silence,” on the other hand, was reasonable. Following the 9/11 attacks, congressional interest in responding to the attack was “frequent and intense.”<sup>338</sup> Unsurprisingly, that interest gave rise to the confinement conditions that were at issue in *Abbasi*.<sup>339</sup> In contrast, Judge Prado in his dissent argues that congressional interest in cross-border shootings has been negligible, and suggests that inadvertent silence is more likely.<sup>340</sup>

### C. *The Scapegoat Named “National Security”*

“[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins.”<sup>341</sup>

Both circuits cite this language from *Abbasi* in addressing the national security factor.<sup>342</sup> The Supreme Court in *Abbasi*, following this statement, cautioned that this “danger of abus[ing]” the “national security” label is especially relevant in domestic cases because of the difficulty involved in “defining the domestic security interest.”<sup>343</sup> The Court borrowed this language from an earlier Supreme Court case which held that electronic surveillance of a criminal defendant’s conversations, commissioned by the executive branch, lacked judicial approval and violated the Fourth Amendment.<sup>344</sup> The government accused the

337. *Id.*

338. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (citing *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)).

339. *Hernandez v. Mesa*, 885 F.3d 811, 831 (5th Cir. 2018) (Prado, J., dissenting) (citing *Abbasi*, 137 S. Ct. at 1862).

340. *Id.* (citing *Abbasi*, 137 S. Ct. at 1862).

341. *See Rodriguez v. Swartz*, 899 F.3d 719, 745 (9th Cir. 2018); *Hernandez*, 885 F.3d at 819 (both citing *Abbasi*, 137 S. Ct. at 1861); *see also Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (“[T]he label of ‘national security’ may cover a multitude of sins . . .”).

342. *See Rodriguez*, 899 F.3d at 745; *Hernandez*, 885 F.3d at 819 (both citing *Abbasi*, 137 S. Ct. at 1862).

343. *See Abbasi*, 137 S. Ct. at 1862 (quoting *United States v. U.S. Dist. Court. for E. Dist. Of Mich.*, 407 U.S. 297, 314 (1972)).

344. *See United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313–14 (1972) [hereinafter *Surveillance Case*] (holding that electronic surveillance can violate the search and seizure laws requiring a warrant). In the *Surveillance Case*, the defendants were charged with conspiracy to destroy government property in violation of 18 U.S.C. § 371 and defendant was charged with bombing a CIA office in Michigan. The defendants sought government disclosure of their recorded conversations, arising out of a concern that the recordings “tainted” evidence. The

defendant of bombing a CIA building, and defended its surveillance activities by primarily relying on national security concerns.<sup>345</sup> In response, the Court looked to history's various examples that illustrate the government's tendency to be suspicious of those who challenge its policies and how, in addressing those dissidents, it tends to act under its vague power of protecting "domestic security."<sup>346</sup> As an example, the Court referenced a Senate debate wherein one Senator stated: "As I read it—and this is my fear—we are saying that the President . . . could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government."<sup>347</sup> This convoluted take on so-called "security," naming any source of political controversy as a threat, is exactly the approach the Fifth Circuit takes in *Hernandez*. The majority discerns that *Hernandez* was not domestic, as was the concern in the surveillance case, and held that national security concerns are hardly talismanic because the issue is border security.<sup>348</sup> The shootings at issue, indeed, took place in the context of border security, but as the Ninth Circuit explained, that does not necessarily implicate national security.<sup>349</sup>

The Ninth Circuit underlines that *Abbasi* implicated national security concerns because protecting the United States in the wake of 9/11 was clearly "a job for Congress and the President, not judges."<sup>350</sup> In contrast, national security, the Court states, does not involve shooting people walking down the street.<sup>351</sup> Despite this clear distinction, the Fifth Circuit's national security discussion plunges straight into the classic—and overly broad—argument that extending *Bivens* liability would deter border patrol agents from performing their essential national security duties.<sup>352</sup> Citing the code governing United States Customs and Border Patrol, the majority laid out the duties border agents are tasked with, such

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government argued that the surveillance was lawful via the President's power to protect national security, but both the district court and the court of appeals held that the lack of judicial approval was unlawful. The Supreme Court ultimately affirmed.

345. See *Surveillance Case*, 407 U.S. at 301 ("[T]he government asserted that the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect national security.").

346. *Id.* at 314.

347. *Id.* (citing 114 CONG. REC. 14750 (1968) (statement of Sen. Hart)).

348. *Hernandez v. Mesa*, 885 F.3d 811, 819 (5th Cir. 2018).

349. See *Rodriguez v. Swartz*, 899 F.3d 719, 746 (9th Cir. 2018) (holding that national security was not a factor in the case).

350. *Rodriguez*, 899 F.3d at 745.

351. *Id.*

352. *Hernandez*, 885 F.3d at 819.

as “deter[ring]. . . the illegal entry of terrorists, terrorist weapons, persons, and contraband.”<sup>353</sup> The Fifth Circuit then turned to *Vanderklok v. United States*, a case whose special factors they deem comparable to those in *Hernandez* and as evidence of why the court should not extend *Bivens*.<sup>354</sup> In *Vanderklok*, the plaintiff accused the defendant TSA agent of violating the First and Fourth Amendments. On interlocutory appeal, the Third Circuit was faced with a qualified immunity question but first thought it proper to determine whether a *Bivens* claim would even exist in the first place.<sup>355</sup> In its discussion of special factors, the Third Circuit held that the role of TSA is so vital to public safety—“securing our nation’s airports and air traffic”—that an extension of *Bivens* would be inappropriate and “increase the likelihood of agents hesitating in making split-second decisions.”<sup>356</sup> The majority in *Hernandez* held that the same *Vanderklok* logic applies to their case, adopting the hesitate-in-making-split-second-decisions language and essentially equating the cases in terms of their transnational contexts.<sup>357</sup> What the majority failed to acknowledge, which is also pointed out in Judge Prado’s dissent, is that the *Vanderklok* Court gave special recognition to the fact that TSA agents are absolutely different than law enforcement officers in a significant way: they are not trained on issues of probable cause or constitutional doctrine, knowledge of which is required of border agents.<sup>358</sup> The Third Circuit even pointed out how the Supreme Court has refused to extend *Bivens* liability to a new category of defendant and a TSA agent, being a non-law enforcement officer, is indeed a new defendant and in this way notably different from a border patrol agent, who *is* considered a law enforcement officer.<sup>359</sup> There’s yet another oversight: neither the Fifth

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353. *Id.* (citing 6 U.S.C. § 211(e)(3)(B) (2017)) (indicating that the U.S. Border Patrol shall “deter and prevent the illegal entry of terrorists, terrorist weapons, persons, and contraband. . .”).

354. *Id.*

355. *See Vanderklok v. United States*, 868 F.3d 189, 195 (3d Cir. 2017). In this case, plaintiff and the TSA agent had an argument at the TSA checkpoint. The agent then called the police and falsely accused plaintiff of threatening to bring a bomb to the airport, leading to plaintiff’s detainment. Video footage contradicted the agent’s testimony and the plaintiff brought suit alleging violations of the First, Fourth and Fourteenth Amendments under both *Bivens* and § 1983 for false imprisonment, false arrest, assault and battery, malicious prosecution.

356. *Id.* at 207.

357. *Hernandez*, 885 F.3d at 819 (citing *Vanderklok*, 868 F.3d at 207).

358. *Id.* at 829 (Prado, J., dissenting) (citing CBP *Use of Force Policy*, *supra* note 33); *see also Vanderklok*, 868 F.3d at 209 (“[TSA] are instructed to carry out administrative searches and contact local law enforcement if they encounter situations requiring action beyond their limited though important responsibilities.”); 49 C.F.R. § 1542.213 (2019) (laying out the training required of TSA agents).

359. *See Vanderklok*, 868 F.3d at 200 (citing to *Wilkie*, *Malesko*, and *Bush* to show how to court refused to extend the remedy to new areas).

Circuit nor Judge Prado acknowledged that the Third Circuit considered *only* the First Amendment retaliatory prosecution claim, not the Fourth Amendment claim.<sup>360</sup> Embedded deep in *Bivens* jurisprudence is the firm denunciation of 1) extending *Bivens* beyond those amendment clauses that have been the subject of successful claims in the past, and 2) extending liability to new defendants.<sup>361</sup> The *Vanderklok* case does both of these things and the *Hernandez* case does not. To equate *Vanderklok* and *Hernandez* is to ignore the important difference in constitutional right and also category of defendant. Judge Prado was right when he stated that the practical concerns raised in *Vanderklok* have “little bearing” in the context of *Hernandez*.<sup>362</sup>

The *Rodriguez* majority, on the other hand, determined that holding Swartz liable would not meaningfully deter agents from performing their duties. For one, this argument applies to all *Bivens* cases where the defendant is a law enforcement officer.<sup>363</sup> This risk of deterrence existed in the original *Bivens* case itself and yet it did not prevent the court from providing a remedy.<sup>364</sup> Additionally, no duty exists justifying a border agent’s decision to carelessly fire a weapon at a non-threatening individual on Mexican soil, like when Agent Swartz shot Rodriguez.<sup>365</sup> The Customs and Border Patrol Use of Force Handbook explicitly provides that deadly force is generally unauthorized.<sup>366</sup> Where a subject is fleeing, deadly force is only permissible if the subject has inflicted serious injury or threatens to do so to either the officer or anyone else.<sup>367</sup> Even if the decedent in *Hernandez* was throwing rocks prior to apprehension, no reasonable person would consider this act—by a minor playing a game with friends—as requiring a response of deadly force.

The Ninth Circuit next cites two past instances where border agents

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360. *Id.* at 194 (stating that the denial of qualified immunity as to the First Amendment claim is before them but that they must first decide whether the First Amendment claim against a TSA employee exists).

361. *Id.* at 200 (citing *Malesko* wherein the court stated “[w]e have consistently refused to extend *Bivens* liability to any new context or new category of defendants”).

362. *Hernandez*, 885 F.3d at 828–29 (Prado J., dissenting) (“In light of Agent Mesa’s status as a federal law enforcement officer, the practical concerns raised in *Vanderklock* pertaining to non-officer TSA employees in the First Amendment retaliation context have little bearing here.”).

363. *See* Alfe, *supra* note 3, at 810 (stating that the deterrence argument is without weight because *Bivens* already provides a remedy against federal agents who violate a person’s constitutional rights).

364. *Id.*; *see generally* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (explaining that a remedy was possible).

365. *Rodriguez v. Swartz*, 899 F.3d 719, 745–46 (9th Cir. 2018); *CBP Use of Force Policy*, *supra* note 335.

366. *CBP Use of Force Policy*, *supra* note 335.

367. *Id.*



faced Fourth Amendment *Bivens* claims and, interestingly enough, one of those cases was adjudicated in the Fifth Circuit.<sup>368</sup> In that case, *Martinez-Aguero v. Gonzalez*, the plaintiff was a Mexican citizen who, using a valid border-crossing card, travelled to Texas on a monthly basis.<sup>369</sup> On one occasion, her card expired and border agents told her she could not pass into Texas, contrary to information she had received previously from another United States official.<sup>370</sup> After the plaintiff made a sarcastic remark, the agent violently detained her and handcuffed her to a chair, resulting in her experiencing an epileptic seizure.<sup>371</sup> The plaintiff brought suit against the agent alleging, among other claims irrelevant here, violations of her Fourth and Fifth Amendment rights under *Bivens*.<sup>372</sup> On appeal from the district court, the Fifth Circuit affirmed the lower court's denial of the defendant agent's motion for summary judgment, holding that aliens have a constitutional right to be free from false imprisonment and excessive force by law enforcement, and this right was clearly established at the time of the event.<sup>373</sup>

The Fifth Circuit explicitly stated that under these circumstances, it follows that the plaintiff may bring a *Bivens* claim under the Fourth Amendment.<sup>374</sup> The Fifth Circuit in this instance would have permitted a claim to proceed against a border patrol agent who was acting within the scope of his authority, just like in *Hernandez*.<sup>375</sup> In *Martinez-Aguero*, the court did not express concern that holding the agent liable would cause

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368. See *Rodriguez*, 899 F.3d at 746, n.174 (following up its reference to past Fourth Amendment *Bivens*). The majority, in its footnote cites both *Chavez v. United States*, 683 F.3d 1102, 1106–07 (9th Cir. 2012) and *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006).

369. *Martinez-Aguero*, 459 F.3d at 620. Plaintiff would accompany her aunt to the Social Security office in El Paso, Texas.

370. *Id.* When the plaintiff went to apply for new border-crossing cards, officials told her that she could get her old card stamped and continue to travel while awaiting the arrival of her new card in the mail. Plaintiff used the stamped card to cross the border for three months with no problems up until the accident at issue.

371. *Id.* at 621.

372. See *id.* at 621–22; *Martinez-Aguero v. Gonzalez*, No. EP–03–CA–411(KC), 2005 WL 388589 (W.D. Tex. Feb. 2, 2005). The plaintiff here brought claims of assault, battery, and false arrest under the FTCA and a violation of her First, Fourth, and Fifth Amendment rights under *Bivens*. However, on appeal the Fifth Circuit's discussion only considered the issues relating to her Fourth and Fifth Amendment *Bivens* claims.

373. See *Martinez-Aguero*, 459 F.3d at 626–27 (“[A]liens in disputes with border agents [have] a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation . . .”).

374. *Id.* at 625.

375. See *Hernandez v. Mesa*, 885 F.3d 811, 828 (5th Cir. 2018) (Prado, J., dissenting) (stating that the majority even recognized that Border Patrol agents have been subject to *Bivens* suits when they commit constitutional violations on U.S. soil).

later agents to hesitate in making split-second decisions, but in *Hernandez*, this was the court's most important concern.<sup>376</sup> The implications of holding an agent liable in *Martinez-Aguero* are the same as holding Mesa liable in *Hernandez*.<sup>377</sup> In *Martinez-Aguero*, the agent's conduct fell directly under those same duties laid out by the Fifth Circuit in *Hernandez*: preventing the illegal entry of terrorists and contraband.<sup>378</sup> So why did the Fifth Circuit suggest that *Hernandez* implicates national security when they clearly did not think so in *Martinez-Aguero*? There is no justification; perhaps the Fifth Circuit was feeling generous when it heard *Martinez-Aguero*. Nonetheless, this inconsistency belies a talismanic use of "national security."<sup>379</sup>

Now consider the Ninth Circuit's take on the issue. Specifically, consider the closing of the national security analysis in comparison.<sup>380</sup> It asserted that holding Swartz civilly liable cannot harm national security "any more than it would to hold him criminally liable," something the government was independently trying to do at the time.<sup>381</sup> Remember, the Fifth Circuit's major qualm concerns split-second decision-making.<sup>382</sup> If agents can potentially face criminal liability as well, why would civil liability would deter agents from making split-second decisions any more than criminal liability?<sup>383</sup> Both kinds of liability are punishment. The Fifth Circuit *Hernandez* opinion yields no such explanation for this distinction.

There are clear gaps in the Fifth Circuit's opinion. The Prado dissent

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376. See *Martinez-Aguero*, 459 F.3d at 625. The court discussed that the plaintiff had adequate enough connections to receive Fourth Amendment protection and thus she may bring a *Bivens* claim for that violation. The court thereafter shifts to its analysis of whether the facts establish that the defendant violated those rights. Nowhere in between this shift does the court consider the national security implications of a *Bivens* extension in the border security context.

377. See *Hernandez*, 885 F.3d at 828 (Prado, J., dissenting) ("It make little sense to argue that a suit against a Border Patrol agent who shoots and kills someone standing a few feet beyond the U.S. border implicates border and national security issues, but at the same time contend that those concerns are not implicated when the same agent shoots someone standing a few feet inside the border.").

378. *Id.* at 819 (quoting 6 U.S.C. § 211(e)(3)(B) (2017)).

379. See *Rodriguez v. Swartz*, 899 F.3d 719, 746 (9th Cir. 2018) (citing *Hernandez*, 885 F.3d at 830 (Prado, J., dissenting)) (emphasizing that Border Patrol agents have been held liable under *Bivens*).

380. *Rodriguez*, 899 F.3d at 746.

381. *Id.*

382. See *Hernandez*, 885 F.3d at 819 (stating that the transnational context of the case increases the likelihood that the agents will hesitate).

383. See *id.* at 828 (Prado, J., dissenting) ("[I]f recognizing [*Bivens*] . . . implicates border security . . . so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment.").

points out additional issues not present in the Ninth Circuit opinion but those factors nonetheless favor the same conclusion reached by the Ninth Circuit. The Ninth Circuit's reasoning should prevail at the Supreme Court level, as national security is not a special factor speaking against a *Bivens* extension for either *Hernandez* or *Rodriguez*.

#### D. Foreign Affairs and Diplomacy

Foreign policy is not a place for judicial intervention and courts are instructed not to extend *Bivens* if it would require a judgment of United States foreign policy.<sup>384</sup> The Fifth Circuit frames *Hernandez* as a case requiring a judicial determination of aliens' rights and foreign affairs, an intrusion on the executive and legislative branches.<sup>385</sup> The Ninth Circuit, however, effectively counters the Fifth Circuit's analysis by showing that no special factors concerning foreign affairs and diplomacy actually speak against *Bivens*.<sup>386</sup>

The Fifth Circuit begins its very brief foreign affairs analysis with this statement: "the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil."<sup>387</sup> They continue, "[t]hese are . . . delicate diplomatic matters . . . rarely proper subjects for judicial intervention."<sup>388</sup> The United States' Amicus Brief in *Rodriguez* casts doubt on whether the United States "always" hold itself responsible. The brief states that in certain recurring circumstances, Congress has limited remedies for aliens injured abroad by federal employees.<sup>389</sup> Opponents of the *Bivens* extension, Swartz, Mesa, and the United States, bend their arguments, based on a single source, in two different directions, and both in their favor. These opponents assert that Congress already has some remedies for aliens, though limited, and because of this, Congress has indeed provided

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384. See, e.g., *Rodriguez*, 899 F.3d at 746 ("[C]ourts should not extend *Bivens* if it requires courts to judge American foreign policy."); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy . . . are rarely proper subjects for judicial intervention.")

385. See *Hernandez*, 885 F.3d at 825 (Prado, J., dissenting) ("The majority repeatedly attempts to frame this case around the issue of whether aliens injured abroad can pursue *Bivens* remedies.")

386. See generally *Rodriguez*, 899 F.3d 719 (concluding there are no special factors counseling hesitation).

387. See *Hernandez*, 885 F.3d at 819–20 (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)). The majority's assertion that the U.S. is always responsible to foreigners is not supported by a citation. They do not cite a statute nor case law which states that the United States is always "responsible." It is unclear whether the court meant this as referring to a moral responsibility. Nonetheless, the majority is arguing that, where these kinds of incidents occur, judicial intervention is improper.

388. *Id.*

389. *Id.* at 9–10 (citing 10 U.S.C. §§ 27433(a), 2734(a); 21 U.S.C. § 904; 22 U.S.C. § 2669-1).

remedies for aliens to an extent.<sup>390</sup> This is the same argument the Fifth Circuit makes: that the United States holds itself responsible by providing these remedies. Yet, at the same time, the opponents use these “limitations” as evidence that the court should not grant aliens a *Bivens* remedy.<sup>391</sup> These arguments can be stretched to favor the *Bivens* extension too. For example, one could argue that because the United States has intentionally held itself responsible, that *Bivens* should be granted because the circumstances of *Hernandez* and *Rodriguez* present situations that Congress has simply overlooked and therefore the extension would be precisely appropriate.<sup>392</sup>

Next, the Fifth Circuit looks to the existence of the joint Border Violence Prevention Council, stating that this forum created by Mexico and the United States exists to address issues precisely like the *Hernandez* issue.<sup>393</sup> In its brief, the United States argued that foreign policy is implicated because the United States and Mexico have already discussed the use of force at the border<sup>394</sup> via this council. They also state that

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390. See Supplemental Amicus Curiae Brief of the United States in Support of Reversal, at 9–10, *Rodriguez v. Swartz*, 899 F.3d 719 (2018) (No. 15-16410) [hereinafter *Rodriguez* Supplemental Amicus Curiae of the United States] (“In certain recurring circumstances, Congress has authorized limited administrative remedies for aliens injured abroad by U.S. employees.”).

391. See *id.* at 10 (“Moreover, where Congress has provided remedies for aliens injured abroad by U.S. employees, it has done so through administrative mechanisms, not by authorizing suits in federal court.”); *supra* Part IV (discussing the Fifth Circuit argument that because the FTCA and § 1983 lack remedies for aliens, this suggests Congress didn’t intend for there to be a grant of a *Bivens* remedy).

392. Congress overlooked the situation presented in the original *Bivens* case. There, the right at stake was so fundamental that the Supreme Court acknowledged the oversight, resulting in the *Bivens* remedy. See Leah Litman, *Remedial Convergence and Collapse*, 106 CAL. L. REV. 1477, 1516 (2018) (reasoning that if a constitutional violation has not arisen or if there is no Supreme Court *Bivens* case on the issue, Congress may not have considered whether there should be a cause of action).

393. *Hernandez v. Mesa*, 885 F.3d 811, 820 (5th Cir. 2018); see Robert Harris, West Director, *Written Testimony for a House Committee on Oversight and Government Reform Hearing*, DEP’T HOMELAND SEC. (Sept. 9, 2015), <https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west> [https://perma.cc/9EXM-F3EY] [hereinafter Robert Harris *Written Testimony*] (discussing the methods the program will employ to combat border violence and the goals of the council). “Through these bilateral initiatives, the U.S. Government and the Government of Mexico jointly address issues pertaining to U.S./Mexico border security and border management, including border violence, managing the flow of legitimate travelers, and strengthening border security.” *Id.*

394. See *Rodriguez* Supplemental Amicus Curiae of the United States, *supra* note 390 at 7–8 (referencing the Border Violence Prevention Council and the U.S.-Mexico Bilateral Human Rights Dialogue); Robert Harris *Written Testimony*, *supra* note 393 (discussing the methods the program will employ to combat border violence and the goals of the council); Governments of Mexico and the United States of America, *Joint Statement on the U.S.-Mexico Bilateral High Level Dialogue on Human Rights*, U.S. DEP’T STATE (Oct. 27, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263759.htm> [https://perma.cc/T7F7-3L5G] [hereinafter *Joint Statement* by

injuries suffered by aliens abroad on account of United States officials were traditionally addressed through diplomatic negotiations or by voluntary payments to the injured party.<sup>395</sup> This “traditional” mechanism for addressing injury in no way suggests that the circuits should hesitate in granting a remedy for plaintiffs like Hernández or Rodriguez. If the United States did not have an existing and concrete procedure for remedying an injury, but asserts that one should exist or “traditionally” did exist, what better way to address that gap than to allow a *Bivens* remedy? After all, *Bivens* has been extended where a bridging-of-the-gap was necessary.<sup>396</sup>

The United States further argued, and the Fifth Circuit adopted this reasoning, that because of the joint council’s preexistence, extending *Bivens* would result in improper judicial intervention and also weaken the “United States’ ability to speak with one voice in international affairs.”<sup>397</sup> The Ninth Circuit countered that if they were to accept this argument, courts would be obliged to dismiss cases involving crimes at the Mexico border when, in actuality, these issues are regularly addressed in district courts near the border.<sup>398</sup> The majority went even further, stating that the only policy interest proffered by the opponents of the extension—maintaining the conversation between Mexico and the United States—shows that the United States wants to reduce the number of cross-border shootings.<sup>399</sup> Mexico wants a remedy.

Lastly, opponents of extending the *Bivens* remedy can hardly argue that granting the extension would “undermine Mexico’s respect” for the

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*Mexico and the US*].

395. *Rodriguez* Supplement Amicus Curiae of the United States, *supra* note 394, at 9 (citing William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 MIL. L. REV. 59, 61–64 (1966)).

396. *See* Bernstein, *supra* note 42, at 722 (“*Bivens* fills the gap when Congress has not indicated how a particular situation ought to be handled.”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1999) (stating that the avenue of state law renders a “dual limitation”). “[T]he federal question becomes . . . an independent claim both necessary and sufficient to make out the plaintiff’s cause of action.” *Id.*

397. *See Rodriguez* Supplemental Amicus Curiae of the United States, *supra* note 390, at 8 (“Judicial examination of the incident at issue in this case would inject the courts into these sensitive matters of international diplomacy and risk undermining the government’s ability to speak with one voice in international affairs.”); *Hernandez*, 885 F.3d at 820 (“It would undermine Mexico’s respect for the validity of the Executive’s prior determinations if, pursuant to a *Bivens* claim, a federal court entered a damages judgment against Agent Mesa.”).

398. *See Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) (stating why the United States’ argument proves too much).

399. *Id.* (stating that no policy has been brought to the Court’s attention, no policymaking individuals were being sued, and the only policy interest put forward by the U.S. pertains to maintaining dialogue between countries).

United States, as the Mexican government submitted a brief explicitly favoring a *Bivens* remedy.<sup>400</sup> In this argument about “respect” the court suggested that because the Executive previously disagreed with Mexico’s request to indict Mesa, an individual who killed a Mexican citizen of their own, a later change of heart by the Executive would somehow “undermine” Mexico’s respect. This self-serving proposition controverts any notion of common sense. The executive branch declined to extradite Mesa and Mexico makes it clear that it only seeks to hold the United States accountable for the injustice its agents created.<sup>401</sup> In support of this request, Mexico highlighted the United States’ ratification of the International Covenant on Civil and Political Rights (ICCPR), a set of guidelines created via the United Nations governing foreign relations and human rights.<sup>402</sup> The guidelines specifically urge nations to ensure that individuals whose rights have been violated have an effective remedy, including judicial remedies. In its amicus brief, Mexico urged the Circuits to comport with this guidance.<sup>403</sup>

The arguments against *Bivens* on this issue are plainly insincere and frankly show a lack of regard for the lives of individuals who are not United States citizens. If the United States aims to maintain a dialogue with Mexico, it would do well to refrain from offering superficial excuses in the name of “diplomacy.” There are no foreign diplomacy implications that counsel hesitation in extending *Bivens*.<sup>404</sup> The Ninth Circuit effectively exposed the frailty in the Fifth Circuit’s foreign affairs discussion and showed that there are no special factors counselling hesitation. Rather, the special factors show that extending *Bivens* would help improve United States-Mexico relations.<sup>405</sup>

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400. See *Hernandez*, 885 F.3d at 820 (holding that an extension would undermine Mexico’s respect for the executive because the executive already refused to extradite Mesa).

401. See *id.* at 8–9 (“Under international human rights law. . . it is well established that a nation has human rights obligations whenever it exercises ‘effective control’ over an individual, even outside its own territory.”); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. EXEC. DOC. E, 95–2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, ratified by Mexico Mar. 23, 1981, ratified by U.S. June 8, 1992) [hereinafter ICCPR].

402. See *Hernandez* Amicus Curiae of Mexico, *supra* note 272, at 10 (noting that both Mexico and the United States have ratified the ICCPR); see generally ICCPR, *supra* note 401. The United States has not treated the agreement as directly enforceable because at the time of ratification, the U.S. saw existing U.S. law as sufficient to comply with the guidelines of the covenant.

403. *Hernandez* Amicus Curiae of Mexico, *supra* note 272, at 18; ICCPR, *supra* note 401, at Art. 2 § 3.

404. See *supra* Part IV (detailing how the Fifth Circuit argues that because the FTCA and 1983 lack remedies for aliens, that this suggests Congress didn’t intend for there to be a grant of a *Bivens* remedy).

405. See Alfe, *supra* note 3, at 796–97 (arguing that applying the Fourth Amendment to *Hernandez* would eliminate the lawless border zone and improve American foreign relations with

### E. Extraterritoriality

*“Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject to such restrictions as are expressed in the Constitution.”*<sup>406</sup>

In conducting their analyses of extraterritoriality, the Circuits veered in two different directions. The Fifth Circuit focused on special factors technicalities and the Ninth Circuit focused on policy. As shown below, “extraterritoriality” is unique in the context of *Bivens* actions, and while the Fifth Circuit presented a convincing argument initially, seemingly its strongest argument yet, the Ninth Circuit went further. Comparing the opinions, the Ninth Circuit clearly triumphs by including critical law to its analysis that the Fifth Circuit omitted, thereby tipping the balance in favor of extending *Bivens* once more.

First, considering extraterritoriality under the special factors analysis is questionable because, should a court extend *Bivens*, extraterritoriality would be a sizeable factor in determining whether the plaintiffs are entitled to Fourth Amendment protections.<sup>407</sup> The plaintiffs in *Hernandez* argued that the special factors inquiry should not look to extraterritoriality because doing so would multiply the significance of extraterritoriality.<sup>408</sup> They argued that the issues are coextensive: if the Constitution applies extraterritorially, it cannot be a special factor.<sup>409</sup> In *Davis v. Passman*, the Supreme Court held in accordance with this notion, stating that if the defendant congressman was not immune from punishment for his conduct via the Speech and Debate Clause,<sup>410</sup> then it was not a special factor.<sup>411</sup> The Fifth Circuit majority, in its most persuasive reasoning yet,

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Mexico).

406. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

407. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (stating that the Fourth Amendment question is sensitive and that the *Bivens* question is antecedent to the Fourth Amendment question). If the *Bivens* remedy is granted, the court then looks to whether the plaintiffs are protected by the Constitution, given that they were in Mexico when they were shot and they are not citizens of the U.S. At the district court level, the judges adjudicated the application of the Fourth Amendment, considering extraterritoriality, and reached opposite conclusions. They both relied heavily on *Boumediene* for guidance in determining the extent of the Constitution’s reach. *See supra* Sections III.A–B.

408. *Hernandez v. Mesa*, 885 F.3d 811, 821 (5th Cir. 2018).

409. *Id.*

410. The defendant was a congressman. Members of Congress are immune from suit for their legislative activity under the Speech and Debate Clause of the Constitution. *See* U.S. CONST. art. I, § 6, cl 1.

411. *See Hernandez*, 885 F.3d at 821–22 (citing *Davis v. Passman*, 442 U.S. 228, 246 (1979)); *see also* U.S. CONST. art. I, § 6, cl 1. In *Passman*, the defendant argued that he was immune via the Speech or Debate Clause and, alternatively, that the Clause was a “special factor.”

rejected that contention, holding that the applicability of a constitutional immunity cannot be equated with the scope of a Constitutional right.<sup>412</sup> In defense of its position, the court relied on *United States v. Stanley*, where the Supreme Court held that a cause of action for injuries under the Constitution “is a question logically distinct from immunity to an action on the part of particular defendant.”<sup>413</sup> The Court in *Stanley* distinguished the facts before it from *Passman* because the defendant in *Stanley* was not a federal agent with a unique immunity provision.<sup>414</sup> Extraterritoriality in the context of the special factors analysis speaks to one side of the issue—whether a court should imply the cause of action—and is an issue present regardless of the defendant. However, courts would not have even addressed the immunity question or contemplated the same as a special factor in *Passman* had the accused federal agent been one unentitled to a specific constitutionally granted immunity. Nonetheless, the Fifth Circuit does not redeem itself.

Next, the circuits address the presumption against extraterritorial application of United States law.<sup>415</sup> This presumption helps to ensure that judges do not adopt interpretations of United States law that carry foreign policy consequences unintended by the political branches.<sup>416</sup> Where a court is faced with this potential risk, courts must ask whether Congress has “affirmatively and unmistakably” provided that the statute will apply extraterritorially and “if the statute provides no clear indication of extraterritorial application, it has none.”<sup>417</sup> Here, however, the circuits were presented with *Bivens*, an implied cause of action created by the

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412. *Hernandez*, 885 F.3d at 822.

413. *United States v. Stanley*, 483 U.S. 669, 686 (1987); see *Hernandez*, 885 F.3d at 822 (stating that *Stanley* rejected a similar argument that also relied on *Passman*).

414. See *Stanley*, 483 U.S. at 685 (stating that *Passman* would be relevant if the Constitution contained a grant of immunity to military personnel similar to the Speech or Debate Clause); see U.S. CONST. art. I, § 6, cl. 1 (“They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.”).

415. See, e.g., *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world . . .”); *Hernandez*, 885 F.3d at 822 (“The presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad.”); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)) (“Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.”).

416. *Hernandez*, 885 F.3d at 822 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013)).

417. *RJR Nabisco*, 136 S. Ct. at 2100 (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).



judiciary, not an explicit congressionally-enacted statute.<sup>418</sup> For this reason, an extraterritorial *Bivens* extension, the Fifth Circuit stated, is “doctrinally novel.”<sup>419</sup>

In holding that extraterritoriality was a special factor, the Fifth Circuit relied on *Meshal v. Higgenbotham*, a D.C. Circuit case that addressed extraterritoriality in the *Bivens* context.<sup>420</sup> In this case, the plaintiff brought a *Bivens* action against several FBI agents alleging Fourth and Fifth Amendment violations carried out during the plaintiff’s detainment in Africa.<sup>421</sup> The D.C. Circuit noted that the agent’s actions took place both overseas and during a terrorism investigation, critical factors the court deemed “special” in the *Bivens* context.<sup>422</sup> In support of their position, the court reasoned that further litigation would involve judicial inquiry into whether United States intelligence and national security procedures in Africa were applied correctly, and into the substance and sources of intelligence.<sup>423</sup> Additionally, further litigation would have required discovery from counterterrorism officials and evidence of the conditions of the alleged detention.<sup>424</sup> The court thereafter asked: why would an inquiry into the facts of the detention implicate these concerns?<sup>425</sup> The court acknowledged that the plaintiff was challenging only an individual agent’s action,<sup>426</sup> rather than an entire government

418. *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (“With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.”).

419. *Hernandez*, 885 F.3d at 822.

420. *See id.* at 823 (citing *Meshal v. Higgenbotham*, 804 F.3d 417, 424–25 (D.C. Cir. 2015)) (stating that they agree with the D.C. Circuit’s holding in *Meshal*).

421. *See* *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015). In this case, the plaintiff was a United States citizen who travelled to Somalia to “broaden his understanding of Islam.” During his visit, violence erupted in the country and he fled to Kenya, leading to his detainment through a joint Kenyan-U.S.-Ethiopian operation. The U.S. believed the plaintiff had connections to al Qaeda. *See id.* at 419.

422. *See id.* at 418 (“We hold that in this particular new setting—where the agents’ actions took place during a terrorism investigation *and* those actions occurred overseas—special factors counseling hesitation in recognizing . . . *Bivens*. . .”).

423. *See id.* at 426 (“Further litigation, the government claims, would involve judicial inquiry into ‘national security threats in the Horn of Africa region,’ the ‘substance and sources of intelligence,’ and whether procedures relating to counterterrorism investigations abroad ‘were correctly applied.’”).

424. *See id.* (“The government [in its amicus brief supporting the defendants] also alleges *Bivens* litigation would require discovery ‘from both foreign counterterrorism officials, and U.S. intelligence officials up and down the chain of command, as well as evidence concerning the conditions at alleged detention locations in Ethiopia, Somalia, and Kenya.’”).

425. *See id.* (“Why would an inquiry into Meshal’s allegedly unlawful detention without a judicial hearing reveal the substance or source of intelligence gathered in the Horn of Africa?”). The D.C. Circuit concluded that neither party knew what discovery would specifically entail, so the government’s suggestions in its brief are persuasive reasons for hesitance. *Id.*

426. *Cf. supra* Section I.C (stating that a major issue for the plaintiff’s *Bivens* claim was that he

policy, and found that the “unknown itself is reason for caution in areas involving national security and foreign policy,” areas where the judiciary has traditionally been reluctant to extend *Bivens*.<sup>427</sup> These considerations, in addition to the presumption against extraterritoriality, led the circuit to hold that extraterritoriality was indeed a special factor.<sup>428</sup>

There are two major problems with the Fifth Circuit’s use of this case. First, *Meshal* concerns ever-changing circumstances: the detainment occurred in the context of a terrorism investigation during a special United States operation in a foreign country. American agents acting in a foreign country are placed in unfamiliar circumstances and must continuously adapt to their environment. The D.C. Circuit recognized this and stated that the judiciary is “not suited to second-guess” officials operating under executive orders in foreign territory.<sup>429</sup> In *Hernandez*, the seizure occurred on a typical day where border agents would conduct their ordinary duties in the same environment and face the same issues: protecting the border. This context is not unfamiliar to the U.S. judiciary.<sup>430</sup>

Second, the agent in *Meshal* acted on foreign soil whereas the agent in *Hernandez* acted on domestic soil.<sup>431</sup> The Ninth Circuit acknowledged this critical difference. It found that Supreme Court precedent established that parties can overcome the presumption against extraterritorial application by showing that an officer’s actions “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.”<sup>432</sup> In both *Rodriguez* and *Hernandez*, the officers pulled the trigger while standing in the United States, and there is an important

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was challenging an entire government policy rather than an individual federal official’s actions).

427. *Meshal*, 804 F.3d at 426.

428. *See generally id.* (“We hold that in this particular new setting—where the agents’ actions took place during a terrorism investigation and those actions occurred overseas—special factors counsel hesitation in recognizing a *Bivens* action for money damages.”).

429. *Id.* at 427 (citing *Munaf v. Geren*, 553 U.S. 674, 702 (2008)).

430. *See Rodriguez v. Swartz*, 899 F.3d 719, 747 (9th Cir. 2018) (stating that district courts along the border address border incidents routinely); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2016) (adjudicating a border incident and utilizing the Border Patrol Use of Force handbook several times); *United States v. Brignoni-Ponce*, 422 U.S. 873, 879–80 (1975) (determining the scope of Border Patrol’s authority to stop cars near the Mexican border); *D & D Landholdings, Ltd. P’ship v. United States*, 82 Fed. Cl. 329 (2008) (discussing the duties of border agents in determining whether their conduct constituted a physical taking under the Takings Clause of the Fifth Amendment).

431. *See Meshal*, 804 F.3d at 418 (stating that the agents acted over the course of four months in three African countries); *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018) (stating that Agent Mesa shot from United States soil).

432. *Rodriguez*, 899 F.3d at 747 (citing *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25 (2013)).

interest in regulating conduct of agents acting under the power of the federal government.<sup>433</sup> *Bivens* functions to deter misconduct by those same agents,<sup>434</sup> and the Ninth Circuit observed that it is presumably for this same reason that the government was willing to apply its criminal law to charge Swartz extraterritorially.<sup>435</sup> Additionally, the Supreme Court has held that an express statement of extraterritoriality is not required and parties can overcome the presumption by showing “a clear indication of extraterritorial effect.”<sup>436</sup> What is at issue in *Hernandez* and *Rodriguez* is the conduct of border patrol agents.<sup>437</sup> Though there is no explicit statute to analyze in either case, it is undeniable that the duties of border patrol agents have an inherent extraterritorial effect.<sup>438</sup>

The Ninth Circuit’s opinion is persuasive in holding that the extraterritoriality aspect of *Rodriguez* does not constitute a special factor.<sup>439</sup> The Fifth Circuit based its argument on the presumption against extraterritorial application and largely on a case, *Meshal*, that has critically different facts than those presented in *Hernandez*.<sup>440</sup> Judge Prado’s dissent highlighted the importance of Mesa’s position during the shooting.<sup>441</sup> He found it difficult to comprehend how the plaintiff’s position a mere few feet beyond an invisible line would suddenly trigger a substantial government impact that would not otherwise exist had the

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433. See *Rodriguez*, 899 F.3d at 747 (stating that there is a compelling interest in regulating agents’ conduct on U.S. soil).

434. See *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.”); *Rodriguez*, 899 F.3d at 737 (“*Bivens* actions are a desirable deterrent against abusive federal employees.”) (citing *Carlson*, 446 U.S. at 21).

435. See *Rodriguez*, 899 F.3d at 747–48 (stating that because of the interest in regulating agents’ conduct, that is probably why the government charged Swartz with homicide).

436. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (stating that the presumption can be overcome by looking at context and effect); *United States v. Vasquez*, 899 F.3d 363, 375 (2018) (citing *RJR Nabisco*, 136 S. Ct. at 2102).

437. See generally *infra* Part III (discussing the facts of both *Hernandez* and *Rodriguez*); *Hernandez*, 885 F.3d 811; see generally *Rodriguez*, 899 F.3d 719.

438. See *Border Patrol Agent Duties*, *supra* note 1. The duties include: patrolling international land borders and coastal waters, detecting, preventing and apprehending undocumented aliens and smugglers of aliens and also communicating and giving verbal commands in Spanish to Spanish-speaking illegal aliens and smugglers. These duties implicate foreign citizens and foreign territory. Patrolling the border has inherent extraterritorial implications.

439. See *Rodriguez*, 899 F.3d at 747–48; see generally *Alfe*, *supra* note 3 (stating why the Fourth Amendment should apply despite extraterritoriality).

440. See *Hernandez*, 885 F.3d at 822–23 (discussing the presumption and how the D.C. circuit used the presumption in determining their *Bivens* case); *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015) (stating that the conduct at issue occurred in Africa while the U.S. was conducting a terrorism investigation).

441. See *Hernandez*, 885 F.3d at 831 (Prado, J., dissenting) (“[I]t cannot be forgotten that Agent Mesa was acting from the American side of the culvert.”).

plaintiff been standing a few feet closer within the boundaries of United States' territory.<sup>442</sup> Lastly, the Fifth Circuit did not mention that plaintiffs can overcome the presumption against extraterritorial application of the Constitution, and the Ninth Circuit shows that the facts of *Rodriguez* fit the requirements to overcome that presumption.<sup>443</sup>

#### F. No Hesitation

The circuits looked to general policy implications, national security, foreign diplomacy, and extraterritoriality.<sup>444</sup> The Circuits came to two separate conclusions under each category.<sup>445</sup> The Fifth Circuit held that, in considering *Bivens*' feasibility, *Hernandez* was not even a close case.<sup>446</sup> Where the Fifth Circuit said extending *Bivens* would interfere with the other branches in terms of national security, the Ninth Circuit held the special factors it considered either did not apply or actually worked in favor of a *Bivens* extension.<sup>447</sup> Juxtaposing the special factors analyses conducted by the circuits, the Ninth Circuit's reasoning was clearly correct and the Fifth Circuit excluded critical law that directs the *Bivens* inquiry to favoring the extension.<sup>448</sup>

### IV. A CALL TO REVITALIZE *BIVENS*

At the heart of the *Bivens* cause of action is the long-established legal concept that where there is a right that has been wronged, there is a remedy.<sup>449</sup> *Bivens* recognized the rule that where rights have been

442. *Id.*

443. *See id.* at 822 (stating case law about the presumption but stopping after that and not including any case law about the ability to overcome the presumption); *Rodriguez*, 899 F.3d at 747 (stating that the facts of *Rodriguez* "touch and concern" the territory of the United States).

444. *See Hernandez*, 885 F.3d at 818–23 (conducting the special factors analysis and concluding that each consideration constituted a special factor); *Rodriguez*, 899 F.3d at 744–48 (conducting the special factors analysis and concluding that none of the alleged factors constitute a special factor).

445. *See Hernandez*, 885 F.3d at 818–23 (conducting the special factors analysis and concluding that each consideration constituted a special factor); *Rodriguez*, 899 F.3d at 744–48 (conducting the special factors analysis and concluding that none of the alleged factors constitute a special factor).

446. *See Hernandez*, 885 F.3d at 823 ("Having weighed the factors against extending *Bivens*, we conclude that this is not a close case.").

447. *Id.*; *Rodriguez*, 899 F.3d at 748.

448. *See supra* Part III. Each subsection within the analysis points out where the Fifth Circuit left out critical law that switches the *Bivens* inquiry to favor an extension.

449. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392, 395–97 (1971) ("[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."). *See also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Marbury v. Madison*, 5 U.S. 137, 163

invaded courts will adjust their remedies to grant the injured necessary relief.<sup>450</sup> Yet, as time progressed, the success of *Bivens* actions dwindled and plaintiffs' burdens rose.<sup>451</sup> While it is true that *Bivens* is now a disfavored judicial act, the Supreme Court in *Abbasi* emphasized that courts should not construe their denial of *Bivens* relief for the plaintiff as casting doubt on *Bivens*' continued influence.<sup>452</sup> The Court stressed that there are powerful reasons to retain *Bivens*: it is well settled and also recurrent in the sphere of law enforcement, and there is an undeniable reliance upon it as a fixed principle of law.<sup>453</sup> If this is so, it is troubling that courts have continued to deny extending the remedy to plaintiffs.<sup>454</sup>

Separation-of-powers principles are critical to *Bivens*, its extension, its creation, and its continued existence.<sup>455</sup> The Constitution grants Congress the power to create the laws and the judiciary the power to interpret them.<sup>456</sup> Thus, where the Supreme Court created an implied cause of action in *Bivens*, they highlighted the importance of maintaining balance between the branches.<sup>457</sup> This concern is appropriately addressed

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(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.").

450. See *Bivens*, 403 U.S. at 392 (citing *Bell*, 327 U.S. at 684) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").

451. See Newman, *supra* note 10, at 482–83. This article highlights the Court's willingness to settle for an adequate remedy instead of equally effective remedy. In *Lucas* the court settled for an adequate remedy and in *Schweiker* the court settled for a remedy that did not provide complete relief. See *id.*

452. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

453. *Id.*

454. See *Hernandez v. Mesa*, 885 F.3d 811, 815 (5th Cir. 2018) (stating that from the late 1970s onward, the Court retreated from judicially implied causes of action in favor of congressionally enacted remedies); see Newman, *supra* note 10, at 474 (citing Rosen, *supra* note 61, at 343) (stating that *Bivens* seems like a dead letter because, as of May 1985, only thirty of the more than 12,000 *Bivens* suits filed since 1971 resulted in judgments for plaintiffs).

455. See *Abbasi*, 137 S. Ct. at 1856 (stating that when a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles are central to the analysis). The Court also mentions that when an issue involves several issues that must be weighed and appraised, those who write the laws, rather than those who interpret them, should be the ones committed to doing so.

456. See U.S. CONST. arts. I–III. Though there are various theories and interpretations of the Constitution regarding the separation of powers, this is the general understanding. The classic tripartite model states that the legislature makes the law, the executive implements the law at a general level, and the judiciary applies the law to particular disputes. See Michael P. Robotti, *Separation of Powers and the Exercise of Concurrent Constitutional Authority in the Bivens Context*, 8 CONN. PUB. INT. L.J. 171, 185 (2009) (citing Burt Neuborne, *Judicial Review and Separation of Power in France and the United States*, 57 N.Y.U. L. REV. 363, 370 (1982)).

457. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). After stating that the case presented no special factors, the Court explained why through examples of past cases. In those cases, the Court determined that Congress was better suited to

in the special factors part of the *Bivens* analysis and courts will withhold the remedy where an extension thereof would too significantly interfere with the legislative or executive branches.<sup>458</sup> For example, in *Chappell* and *Meshal*, the Court held that the contexts presented were either too political, complex, or too intertwined with the other branches for judicial intervention via *Bivens* to be appropriate, and this constituted a special factor.<sup>459</sup> Nevertheless, it seems that lower courts have taken the “disfavored remedy”<sup>460</sup> language and run with it, interpreting the words as requiring them to deny *Bivens* remedies unless the facts of a case are nearly identical to either *Bivens*, *Passman*, or *Carlson*. This practice is a dangerous stigmatization of the *Bivens* doctrine that is both superficial and unjust.<sup>461</sup> Courts are also reluctant to make *Bivens* determinations given that, ever since its conception, the Supreme Court has sent mixed messages about the validity of *Bivens* remedies in general.<sup>462</sup> Justice Scalia once opined that *Bivens* is a “relic” of the days when the Supreme Court assumed common-law powers to create causes of actions.<sup>463</sup>

Despite the multitude of case law counseling against *Bivens* remedies, the doctrine is not dead. The Supreme Court in *Abbasi* highlights the

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address those issues. See *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947); see generally *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

458. See, e.g., *Abbasi*, 137 S. Ct. at 1857–58. The Court states that it is clear that *Bivens* will not be available if there are special factors counselling hesitation. They assert that even though special factors have not been defined by the courts, the inquiry must concentrate on whether the judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing the action to proceed. *Id.*

459. In *Chappell*, the Court held that Congress held plenary power in regulating military life and therefore could not extend *Bivens* to plaintiffs who faced racial discrimination on behalf of their commanding officers. *Chappell v. Wallace*, 462 U.S. 296 (1983). In *Meshal*, the circuit court reasoned that further litigation would involve judicial inquiry into U.S. intelligence and national security procedures in Africa, whether they were applied correctly and into the substance and sources of intelligence. *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015). Both cases would have required judicial inquiry into the processes of the FBI and the Army, two subdivisions of the Executive Branch. See generally *Chappell*, 462 U.S. 296; *Meshal*, 804 F.3d at 418.

460. See *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (stating that implied causes of action are disfavored).

461. See Recent Cases, *Ziglar v. Abbasi*, *supra* note 63, at 313 (emphasizing the Court’s continuous method of distinguishing facts from the *Bivens* case and that if the Court is going to continue denying remedies on this basis, they should just say it for the sake of “litigative efficiency”).

462. See *Abbasi*, 137 S. Ct. at 1856–57. The Supreme Court states that the three *Bivens* cases may have been decided differently if they were decided today. Right after they state this in their opinion, they highlight that *Bivens* is necessary in the context of search and seizure.

463. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (citations omitted) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . . I would limit *Bivens* and its two follow-on cases to the precise circumstances that they involved.”).

importance of *Bivens* and this cannot not be overlooked.<sup>464</sup> Congress has not indicated that it disapproves of *Bivens*; rather, it has acknowledged and affirmed *Bivens*' existence when it explicitly stated that a certain statute was not meant to preempt a *Bivens* claim.<sup>465</sup> Additionally, *Bivens* remedies only came to be disfavored after the Supreme Court shifted its approach to *statutorily* implied causes of actions.<sup>466</sup> In a series of cases heard at the end of the 1970s, the Supreme Court pulled back on its implied remedies, holding that a statute does not provide a cause of action if it does not explicitly say it and courts cannot create one, even in the name of public policy.<sup>467</sup> Afterwards, this shift transferred over to the *Bivens* context simply because *Bivens* is also implied.<sup>468</sup> The difference between the two, however, is statutes are meticulously crafted by Congress and it follows that if Congress intended to create a private action, it would state so explicitly.<sup>469</sup> Conversely, constitutional amendments lack this underlying attention to detail, as it is unlikely that the founding fathers contemplated a cross-border shooting's constitutional implications.<sup>470</sup> For this reason, courts should not automatically hesitate to extend *Bivens*, as this risks legitimate violations of constitutional rights slipping through the cracks when justice demands that individuals' injuries be remedied.<sup>471</sup> This risk, illustrated by

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464. See *Abbasi*, 137 S. Ct. at 1857 (stating that their opinion should not be construed as casting doubt on *Bivens*' continued force or even necessity in the search and seizure context).

465. See *Rodriguez v. Swartz*, 899 F.3d 719, 740 (9th Cir. 2018) (citing H.R. REP. NO. 100-700, at 6 (1988), reprinted in 1998 U.S.C.C.A.N. 5945, 5950). The Westfall Act's contemporaneous House Report elaborated on the relationship between *Bivens* and the Westfall Act, declaring that courts consider constitutional torts as a "more serious intrusion" of individual rights that "merits special attention" and the Westfall Act would not affect the ability of victims of constitutional torts to seek personal redress from the inflictor. See *Abbasi*, 137 S. Ct. at 1856 (stating that Congress has never disapproved of the decisions rendered in *Bivens*, *Carlson*, or *Passman*).

466. See *Abbasi*, 137 S. Ct. at 1856 (stating that after the statutory implied causes of action relied on by *Bivens* lost their force, *Bivens* did as well); *Piper v. Chris-Craft Industries, Inc.*, 430 U. S. 1, 42 (1977); *Cort v. Ash*, 422 U. S. 66, 68-69 (1975).

467. *Abbasi*, 137 S. Ct. at 1856 (citing *Alexander v. Sandoval*, 532 U.S. 275, 287(2001)); see, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11, 15-16 (1979) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate.").

468. See *Abbasi*, 137 S. Ct. at 1856 ("[T]he Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself.").

469. See *id.* ("When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.").

470. *Id.*

471. See *Rosen*, *supra* note 61, at 338 ("In over-emphasizing the threat to the governing function, the Court has struck this balance in such a manner as effectively to eviscerate the right it created in *Bivens*.").

*Hernandez*, shows that the *Bivens* remedy needs to be revived and its stigma eradicated, and neither judicial precedent nor congressional declarations preclude this from happening.<sup>472</sup>

The Supreme Court could alter the perception of and remove the stigma associated with the *Bivens* cause of action by adopting the reasoning of the Ninth Circuit in *Rodriguez*.<sup>473</sup> Doing so would permit a wrong to be righted for the parents of Hernández and Rodríguez, and likely ease access to the *Bivens* remedy for future plaintiffs legitimately entitled to redress. The Ninth Circuit's opinion hearkens back to the original *Bivens* case, where the facts presented an individual instance of law enforcement overstep and the Supreme Court recognized it as such. The Ninth Circuit similarly recognized this in *Rodriguez* and did not allow past *Bivens* skepticism to distort their perception of the plaintiff and his case and the truth.<sup>474</sup> *Bivens*' rapid descent in American jurisprudence needs to be reevaluated. Should the Court decide to favor the extension of the *Bivens* remedy in the *Hernandez* and *Rodriguez* contexts, courts will know that there are indeed some situations where a *Bivens* remedy can proceed.

#### CONCLUSION

Both border agents were standing on United States soil<sup>475</sup> and we, as Americans, have an interest in regulating our own government agents' conduct on our own soil, at the very least.<sup>476</sup> The Supreme Court must not forget that it originally created the *Bivens* cause of action to remedy a wrong that Congress failed to foresee.<sup>477</sup> It was also created to deter government agents from misconduct.<sup>478</sup> The Court must bear in mind that there are situations that are nothing more than an individual instance of

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472. *Id.*; see *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (holding that special factors, a low threshold, prevent *Hernandez* from bringing a *Bivens* claim).

473. If the Supreme Court held with the Ninth Circuit, it would show that the *Bivens* remedy is still alive and well. The Supreme Court has not extended the remedy since *Carlson* in 1980.

474. See *Rosen*, *supra* note 61, at 345 (stating that the moment a plaintiff files his *Bivens* suit, he is not competing on a level playing field).

475. See generally *Rodriguez v. Swartz*, 899 F.3d 719 (2018); *Hernandez*, 885 F.3d 811.

476. See *Rodriguez*, 899 F.3d at 747 (stating that there is a compelling interest in regulating agents conduct on U.S. soil).

477. See *Bernstein*, *supra* note 42, at 722 (“*Bivens* fills the gap when Congress has not indicated how a particular situation ought to be handled.”); *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (stating that the avenue of state law renders a “dual limitation”). “[T]he federal question becomes . . . an independent claim both necessary and sufficient to make out the plaintiff’s cause of action.” *Bivens*, 403 U.S. at 395.

478. See *Rodriguez*, 899 F.3d at 748 (“A damages remedy against an officer for unconstitutional misconduct strengthens the set of disincentives that deter it.”).



law enforcement overreach, implicating neither the separation-of-powers, national security, or foreign relations doctrines.<sup>479</sup> The language paving *Bivens*' path through the common law has become more important than the underlying purpose of the remedy itself: maintaining constitutional integrity. For these reasons, the Court should favor the reasoning and outcome of the Ninth Circuit in *Rodriguez*, thereby righting the wrongs suffered by Sergio Hernández, J.A. Rodriguez, and their families, while at the same time reviving a doctrine vital to constitutional integrity and justice.

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479. *See id.* at 745 (“This case is therefore like the ones that *Abbasi* distinguished—those involving “standard law enforcement operations” and “individual instances of . . . law enforcement overreach.”).