Bivens or Nothing: Constitutional Torts and Cross-Border Shootings

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"It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[1]

*"*Bivens *is a relic of the heady days in which this Court assumed common-law powers to create causes of action."*[2]

INTRODUCTION

On June 7, 2010, fifteen-year-old Sergio Adrián Hernández Güereca (Hernández) was playing with a group of friends in the cement culvert separating El Paso, Texas, and Ciudad Juarez, Chihuahua, Mexico.[3] The boys were allegedly playing a game in which they would run up the incline of the culvert and touch the barbed-wire fence separating the United States and Mexico and then run back into the culvert.[4] While the boys were playing, United States Border Patrol Agent Jesus Mesa, Jr. (Agent Mesa), arrived.[5] He detained one of the boys.[6] Hernández retreated to the Mexican side of the border, where he hid behind a pillar of the Paso Del Norte Bridge.[7] Agent Mesa then fired two shots at Hernández.[8] One of the shots hit Hernández in the face, fatally wounding him.[9] Soon after, Hernández was discovered and

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).
2. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).
3. Hernandez v. United States, 802 F. Supp. 2d 834, 837 (W.D. Tex. 2011).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 837–38.

pronounced dead by Mexican police.[10] Agent Mesa claimed that he shot Hernández out of self-protection, asserting the boys were throwing rocks at him while he patrolled the area.[11]

Similarly, on October 10, 2012, around midnight, José Antonio Rodríguez (Rodríguez), a sixteen-year-old boy, was walking home along Calle Internacional, a street that runs parallel to the Mexico–Arizona border in Nogales, Sonora, Mexico.[12] United States Border Patrol Agent Lonnie Swartz (Agent Swartz) fired his pistol through the border fence into Mexico at the boy.[13] Agent Swartz fired between fourteen and thirty shots, hitting Rodríguez in the back approximately ten times and killing him immediately.[14] Again, the agent claimed self-defense.[15] Agent Swartz asserted that Rodríguez had assisted in ferrying marijuana across the border, and during the operation, he heard another agent warn that the smugglers were throwing rocks at them.[16]

Hernández's parents and Rodríguez's mother sought to challenge the constitutionality of the agents' use of lethal force against their sons. Both parents brought suits for damages in the form of *Bivens* claims.[17] *Bivens* claims provide a cause of action for damages directly under the Fourth, Fifth, and Eighth Amendments.[18] The victims' families alleged that the agents' use of deadly force violated their sons' Fourth and Fifth Amendment rights.[19] In *Hernandez v. Mesa*, the Fifth Circuit held that Hernández's parents did not have a cause of action under *Bivens*.[20] Conversely, in *Rodriguez v. Swartz*, the Ninth Circuit held that Rodríguez's mother did have a claim under *Bivens*.[21] The Supreme Court then granted certiorari in *Hernandez* to resolve the circuit split. While acknowledging the tragic circumstances of the death of Hernández and the fact that Hernández's parents had no alternative remedy, the Supreme Court held that *Bivens* claims are unavailable to victims of cross-border shootings.[22]

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10. *Id.* at 838.
11. Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018).
12. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1028 (D. Ariz. 2015).
13. *Id.*
14. *Id.* at 1028–29.
15. Linda Friedman Ramirez, *CBP Acquitted in Second Jury Trial,* Bivens *Action Still in Question*, 35 INT'L ENF'T L. REP. 23, 23 (2019).
16. *Id.* at 24.
17. *See* Hernandez v. United States, 802 F. Supp. 2d 834, 845 (W.D. Tex. 2011); *Rodriguez*, 111 F. Supp. 3d at 1030.
18. *See infra* Part I.B.2.
19. *Hernandez*, 802 F. Supp. 2d at 838; *Rodriguez*, 111 F. Supp. 3d at 1028.
20. Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018).
21. Rodriguez v. Swartz, 899 F.3d 719, 726 (9th Cir. 2018).
22. Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).

After the Court's decision in *Hernandez*, victims of cross-border shootings effectively have no cause of action under U.S. law to challenge the lawfulness of Border Patrol agents' use of lethal force. *Hernandez* underscores the problems arising from the erasure of state common law as a mechanism to safeguard constitutional rights against federal officials' tortious conduct and the need for an adequate substitute. This Comment argues that the Supreme Court's current *Bivens* jurisprudence is untenable. Specifically, this Comment argues that the cross-border shooting context reveals that the Westfall Act's erasure of state common law as a mechanism for the enforcement of constitutional rights has made *Bivens* indispensable to remedy constitutional tort claims brought against federal officials.[23]

Part I, Section A of this Comment offers an overview of the role common law has historically played in holding federal officials accountable for tortious conduct. Part I, Section B then examines the origin of *Bivens*, its brief acceptance as a cause of action, and its subsequent decline into judicial disfavor. Part I, Section C explores the role the Westfall Act played in altering the legal landscape for tort claims brought against federal officials. Part I, Section D then outlines the contours of the split between the Fifth and Ninth Circuits and the Supreme Court's decision in *Hernandez* to decline to extend *Bivens*. Part II makes four arguments. First, the Supreme Court's decision in *Hernandez* prohibitively narrows *Bivens* and threatens its continuing viability as a remedy for constitutional torts. Second, courts should view *Bivens* as an extension of the historical practice of using common law tort claims to test the constitutionality of federal officials' conduct. Third, despite the Court's insistence that *Bivens* is a judge-made remedy unsupported by congressional authorization, the current legislative framework ratifies *Bivens*. Fourth, the erasure of state common law as a mechanism to enforce constitutional rights has made *Bivens* indispensable to remedy claims in the cross-border shooting context and beyond.

I. BACKGROUND

Section A explores the role common law historically played in providing causes of action to hold federal officials accountable for tortious conduct. Section B.1 examines the origin of the *Bivens* claim as an attempt to supplement common-law remedies. Then, Section B.2 chronicles the Supreme Court's brief acceptance of *Bivens* as a cause of action, followed by

23. The scope of this Comment is narrow. It focuses exclusively on whether the victims' families of cross-border shootings should have a cause of action in the form of a *Bivens* claim against the Border Patrol agents who shot them. The Comment does not address whether the victims' families are entitled to prevail on the merits of their claims against the offending officers.

its persistent eroding of *Bivens* to its present-day state as a cause of action severely limited in scope and application. Taking into consideration the whittling away of *Bivens*, Section C looks at the passage of the Westfall Act and its implications for constitutional tort claims. Finally, Section D outlines the Court's decision to decline to extend *Bivens* claims to cross-border shootings.

A. The Historical Role of Common Law in Providing Remedies for the Tortious Conduct of Federal Officers

The origins of the right of ordinary citizens to bring claims against government officials in their individual capacities stretch back to England long before the founding of the United States.[24] In England, as early as 1285, if a sheriff imprisoned an individual for a felony without an indictment, the individual could sue the sheriff for false imprisonment.[25] By the time of the Glorious Revolution in 1688, the common law theory of trespass provided citizens with a flexible tool to hold government officers accountable for unlawfully seizing individuals, entering private land, and interfering with personal property.[26]

In England, before the Founding, if government officers committed a tortious act, they were subject to common law suits as if they were private individuals.[27] The fact that the defendant was a government officer was relevant to the extent that it may have provided a defense if the court deemed the officer's conduct to fall within the limits of the officer's lawful authority;[28] however, the defendant's status as a government officer had no bearing on whether the injured individual possessed a cause of action.[29] At the very least, the individual could bring a common law tort claim against the officer in an attempt to hold the officer answerable for tortious conduct.[30] In the event the officer's conduct exceeded the bounds of the officer's legal authority, the officer was stripped of the protections government officers received and assumed the status of a private citizen.[31] In turn, the suit became

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24. JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 6 (2017).

25. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9 (1963).

26. *Id.* at 14.

27. Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531 (2013).

28. *Id.*

29. Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1123 (1969).

30. *Id.*

31. *Id.*

one of a private citizen against another private citizen brought as a common law claim.[32]

Likewise, for much of U.S. history, and consistent with the English legal traditions adopted during the colonial era, federal officers were subject to common law tort liability in state and federal courts for tortious acts.[33] Notably, this liability even encompassed official acts committed abroad and during times of war.[34]

In keeping with the English tradition, *Little v. Barreme* clearly illustrates the use of common law to hold government officers accountable for tortious conduct. George Little (Little) was a United States naval captain during the Quasi-War with France.[35] In 1799, Congress enacted the Non-Intercourse Act to restrict commerce with France in the West Indies.[36] The Act ordered the forfeiture of any American ship caught sailing *to* a French port.[37] The Secretary of the Navy instructed Little to seize any American ship sailing *to* or *from* a French port.[38] He also advised Little that American cargo might be falsely registered under Danish papers.[39] In accordance with the Secretary's orders, Little intercepted a ship, the *Flying Fish*, sailing from a French port to the Dutch colony of St. Thomas.[40] Due to the American accent of the *Flying Fish*'s captain, Little seized the ship on the ground that it violated the Non-Intercourse Act.[41]

During the forfeiture proceedings, the ship's owner counterclaimed for damages for the unlawful seizure of his vessel under the common law theory of trespass.[42] Contrary to Little's suspicion, the evidence indicated that the

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32. *Id.* at 1122–23 ("In mitigation of the rigors of the doctrine of sovereign immunity, the view developed that the governmental officer acting under a void statute, or outside the bounds of a valid statute, may be regarded as stripped of his official character, and answerable, like any private citizen, for conduct which, when attributable to a private citizen, would be an offense against person or property."); *see also Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 832 (1957) ("A government officer who acts without authority is thus subject to the same legal rules as any private person.").

33. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987) ("[F]or nearly the first two centuries of our constitutional history, only state law—created by dint of the reserved lawmaking power of states—furnished any redress for a species of concededly unconstitutional conduct by federal officials.").

34. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851).

35. *Barreme*, 6 U.S. (2 Cranch) at 170.

36. *Id.*

37. *Id.* at 171.

38. *Id.*

39. *Id.*

40. *Id.* at 170.

41. *Id.* at 172–73.

42. *Id.* at 172, 179.

ship belonged to a Prussian national living in St. Thomas and was not subject to forfeiture under the Non-Intercourse Act.[43] Regardless of ownership, Little had seized the ship as it sailed *from* a French port, which violated the Act's authorization to only seize boats sailing *to* French ports.[44]

The question of Little's liability for damages reached the Supreme Court. Chief Justice Marshall expressed ambivalence in holding Little personally liable for damages in light of the unlawful direction he received from his superiors.[45] Nonetheless, in the end, the Chief Justice concluded that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[46] Accordingly, "Little then must be answerable in damages to the owner of this neutral vessel."[47] Notwithstanding the circumstances of Little's seizure of the *Flying Fish*—the instructions he received from his superior, the fact it transpired amidst a military conflict with a foreign state, and the extraterritorial character of the case—the Supreme Court still saw fit to hold Little accountable.[48] The Court's explanation was simple: the law did not condone Little's conduct; therefore, he must answer for his transgression.[49]

Little v. Barreme is not an anomaly. In *Mitchell v. Harmony*, a merchant brought a common law claim for trespass against a United States army officer for forcefully taking his merchandise and converting it for military use during the Mexican-American war.[50] In *Mitchell*, Colonel David Mitchell (Mitchell) compelled Manuel Harmony (Harmony), a merchant, to remain with Mitchell's regiment in Chihuahua, Mexico, despite Harmony's fear that doing so would lead to the destruction of his property.[51] As Harmony had feared, his property was destroyed by Mexican authorities.[52] The jury awarded Harmony $90,806.44 for Mitchell's forcible taking of his property.[53]

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43. *Id.* at 173.

44. *Id.* at 170.

45. *Id.* at 179. The Chief Justice feared that holding Little liable threatened to undermine obedience within the military hierarchy, explaining that the "obedience which military men usually pay to the orders of their superiors . . . is indispensably necessary to every military system." *Id.*

46. *Id.*

47. *Id.* Even though Captain Little was personally liable for damages to the owner of the *Flying Fish*, a system of indemnification existed for federal officials who owed damages. Federal officials petitioned Congress for relief. If Congress deemed the official's conduct to have occurred within the scope of his official duty, Congress indemnified the official. *See* PFANDER, *supra* note 24, at 9–11 (2017).

48. *Barreme*, 6 U.S. (2 Cranch) at 179.

49. *Id.*

50. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 121 (1851).

51. *Id.* at 129.

52. *Id.* at 130.

53. *Id.* at 118.

The Supreme Court affirmed the jury's finding and damages award based on the fact that no immediate or impending danger or necessity existed to justify the seizure of the property.[54] Mitchell's defense that Harmony's property was necessary to strengthen his regiment against enemy forces did not overcome the absence of urgency required to justify the taking.[55] As such, Mitchell was liable for trespass.[56]

Little and *Mitchell* demonstrate that holding federal officers accountable for their unlawful conduct is not foreign to U.S. legal tradition. In fact, it is deeply rooted in American jurisprudence.[57] At one time, courts viewed common law tort claims as an assured safeguard against unlawful overreach by federal officers.[58] When the Supreme Court decided *Little* and *Mitchell*, courts were committed to holding federal officers accountable based on the dictates of the law—irrespective of where the offending conduct transpired or the circumstances underpinning the tort.[59] In both cases, the Supreme Court recognized that because the law prescribed a right and a federal officer interfered with that right, the injured party was entitled to pursue relief by way of a common law claim against the offending officer.[60] And as the Supreme Court indicated, if the law so required, courts did not hesitate to provide a remedy for the claimant.[61]

B. The Origin of Bivens *Claims and Subsequent Narrowing*

1. Successful *Bivens* Claims: *Bivens*, *Davis*, and *Carlson*

In 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court for the first time implied a damages remedy

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54. *Id.* at 133–34.

55. *Id.* at 135.

56. *Id.* at 137.

57. *See* Vázquez & Vladeck, *supra* note 27, at 531 ("From the beginning of the nation's history, federal (and state) officials have been subject to common law suits as if they were private individuals, just as English officials were at the time of the Founding.").

58. *See* PFANDER, *supra* note 24, at 6; *supra* text accompanying note 33.

59. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804); *Mitchell*, 54 U.S. (13 How.) at 115.

60. *See Barreme*, 6 U.S. (2 Cranch) at 179; *Mitchell*, 54 U.S. (13 How.) at 134.

61. *See Barreme*, 6 U.S. (2 Cranch) at 179; *Mitchell*, 54 U.S. (13 How.) at 134; *see also* Amar, *supra* note 33, at 1486–87. This tradition was also articulated in *Marbury v. Madison*. The Court emphasized, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) 137, 163 (1803).

directly under the Constitution for constitutional torts committed by federal officials.[62] Specifically, the Court held that a federal official may be held personally liable for damages under the Fourth Amendment for an unconstitutional search and seizure.[63] In *Bivens*, Webster Bivens sued six federal agents for searching his home without a warrant and using excessive force.[64] Bivens sued for damages, claiming that the agents had violated his Fourth Amendment protection against unreasonable searches and seizures.[65] The agents insisted that Bivens lacked a cause of action to sue for damages under the Fourth Amendment and that any recourse was limited to a common law claim under state tort law.[66]

The Court disagreed. In the Court's view, the scheme for which the agents advocated penalized Fourth Amendment violations only if state law prohibited the conduct in question—that is, even if a federal official violated an individual's Fourth Amendment rights, the individual could obtain damages only if the official's conduct gave rise to a common law claim under state tort law.[67] However, according to the Court, this approach fundamentally undermined the elementary purpose of the Fourth Amendment.[68] The Court emphasized that the Fourth Amendment guaranteed "the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority," regardless of whether the state where the power was exercised prohibited such an act carried out by a private citizen.[69] In other words, the absence of a cause of action under state tort law to hold a federal official accountable for Fourth Amendment violations did not render an individual's constitutional rights obsolete.[70]

Having determined that Bivens possessed a cause of action under the Fourth Amendment—independent of any common law or statutory cause of action—the Court turned to the issue of damages. The Court acknowledged that the Fourth Amendment does not expressly provide a damages remedy for its violation; nonetheless, the Court took a broad view of its power to remedy a rights violation.[71] The Court emphasized that well-established precedent indicated that "where legal rights have been invaded, and a federal

62. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).
63. *Id.*
64. *Id.* at 389–90.
65. *Id.* at 390.
66. *Id.* at 390, 397.
67. *Id.* at 392.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 396–97.

statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[72] Moreover, the Court concluded that, historically, damages were considered the go-to remedy for violations of personal rights and liberty, which was precisely the injury Bivens suffered.[73] As Justice Harlan emphasized in his concurrence, for Bivens, "it [was] damages or nothing."[74]

Finally, the Court laid out two instances that would defeat a cause of action for damages directly under the Constitution. First, if a defendant demonstrated "special factors counselling hesitation in the absence of affirmative action by Congress," a court should deny relief.[75] Second, if a defendant showed that Congress had "explicitly" declared that the plaintiff's situation did not give rise to a damages claim under the Constitution, and Congress viewed an alternative remedy as "equally effective," the claim should fail.[76] To a certain extent, the Court's reasoning relied on the assumption that when ascertaining the intent of Congress, if there were no special factors counseling hesitation, congressional silence signaled congressional approval for the Judiciary to imply a damages remedy directly under the Constitution.[77]

However, the Court was not unanimous. In dissent, Chief Justice Burger, joined by Justices Blackmun and Black, insisted that Congress exclusively held the authority to create a federal cause of action.[78] The dissent characterized the Court's creation of a federal cause of action as judicial lawmaking and a violation of separation of powers principles.[79] Fundamentally, according to the dissent, creating a cause of action for damages belonged to the province of Congress, not the Court.[80]

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72. *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

73. *Id.* at 395.

74. *Id.* at 409–10 (Harlan, J., concurring) ("[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court.").

75. *Id.* at 396 (majority opinion). Unfortunately, the Court elaborated little as to what qualified as "special factors." The Court did note that questions of federal fiscal policy or determinations of the amount of authority delegated to a congressional employee falls under the gamut of "special factors." *Id.* Otherwise, little explanation was provided. *See id.*

76. *Id.* at 397.

77. *See id.* at 396–97. "For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397.

78. *Id.* at 411–12 (Burger, C.J., dissenting).

79. *Id.*

80. *Id.*

Following *Bivens*, the Court extended its holding only twice: in *Davis v. Passman* in 1979[81] and *Carlson v. Green* in 1980.[82] In *Davis*, the Court held that the Fifth Amendment implied a cause of action for damages for Due Process Clause violations.[83] The plaintiff in *Davis* alleged that when she was fired as a congressman's secretary on the basis of gender, she was deprived of her due process rights.[84] The Court premised its holding largely on the fact that the plaintiff's claim rested squarely on the Due Process Clause: she had no means other than her Fifth Amendment claim to vindicate her rights.[85]

The Court extended *Bivens* for a second and final time in *Carlson*. There, the Court held that the mother of a deceased federal inmate denied medical treatment could bring a damages claim under the Eighth Amendment's Cruel and Unusual Punishment Clause.[86] Quite simply, the Court determined the suit did not implicate the two situations that *Bivens* identified as necessitating judicial disinclination to infer a cause of action directly under the Constitution.[87] Notably, although the plaintiff also had a claim under the Federal Tort Claims Act (FTCA), the Court was still willing to infer a cause of action under the Eighth Amendment.[88] The Court emphasized that nothing in the FTCA or its legislative history suggested that Congress intended the FTCA to preempt a *Bivens* remedy for an Eighth Amendment violation.[89] *Carlson* was the final extension of the *Bivens* cause of action. Collectively, *Bivens*, *Davis*, and *Carlson* established that the *Bivens* action is a vehicle to redress the unconstitutional conduct of federal officials only under the Fourth, Fifth, and Eighth Amendments.[90]

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81. 442 U.S. 228, 248 (1979).

82. 446 U.S. 14, 24–25 (1980).

83. *Davis*, 442 U.S. at 248–49.

84. *Id.* at 230–31.

85. *See id.* at 245 n.23 ("Respondent does not dispute petitioner's claim that she 'has no cause of action under Louisiana law.' And it is far from clear that a state court would have authority to effect a damages remedy against a United States Congressman for illegal actions in the course of his official conduct . . . ." (citation omitted)).

86. *Carlson*, 446 U.S. at 16 & n.1.

87. *Id.* at 18–20.

88. *Id.* at 19–20.

89. *Id.*

90. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–55 (2017); Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020).

2. The Erosion of *Bivens*

After *Davis* and *Carlson*, the Supreme Court declined to extend *Bivens* in nine successive cases,[91] sending the message that it was wary of expanding *Bivens* as a cause of action for tort claims against federal officials. Underpinning the Supreme Court's eroding of *Bivens* was the objection voiced in Chief Justice Burger's *Bivens* dissent—namely, *Bivens* claims constitute judicial lawmaking and thus infringe on Congress's exclusive domain to create federal causes of action and remedies.[92] Intertwined with this separation of powers concern was the view that *Bivens* emerged from an illegitimate judicial practice that the Court had abandoned since its decisions in *Bivens*, *Carlson*, and *Davis*.[93] Following its decisions in these cases, the Court shifted away from, and ultimately rejected, the practice of implying causes of action to enforce statutory rights despite the absence of express congressional authorization.[94] A majority of the Court came to view this

91. *See* Bush v. Lucas, 462 U.S. 367, 390 (1983) (a federal employee's claim that his employer dismissed him in violation of the First Amendment); Chappell v. Wallace, 462 U.S. 296, 297 (1983) (a race discrimination suit against military officers); United States v. Stanley, 483 U.S. 669, 671–72 (1987) (a substantive due process suit against military officers); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (a claim by social security recipients that their benefits had been denied in violation of the Fifth Amendment); FDIC v. Meyer, 510 U.S. 471, 473–74 (1994) (a procedural due process suit against a federal agency for wrongful termination); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (an Eighth Amendment suit against a private corporation operating a halfway house); Wilkie v. Robbins, 551 U.S. 537, 547–48, 562 (2007) (a Fifth Amendment suit against officials from the Bureau of Land Management for interference with private property rights); Minneci v. Pollard, 565 U.S. 118, 120 (2012) (an Eighth Amendment suit against prison guards at a private prison); *Abbasi*, 137 S. Ct. at 1865 (a Fifth Amendment suit for unlawful detention).

92. Vázquez & Vladeck, *supra* note 27, at 524–25.

93. *See Abbasi*, 137 S. Ct. at 1855; *Mesa*, 140 S. Ct. at 741.

94. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 126 (2009); *Abbasi*, 137 S. Ct. at 1855 ("During this '*ancien regime*,' the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose. Thus . . . the Court would imply causes of action not explicit in the statutory text itself." (citations omitted) (first quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001); and then quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964))). Conservative Justices have argued that *Erie*'s rejection of general federal common law marked "the analytical demise" of this practice. *See* Stephen I. Vladeck, *Constitutional Remedies in Federalism's Forgotten Shadow*, 107 CALIF. L. REV. 1043, 1051 (2019). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts must apply and interpret the common law as would the courts of the state in which they sit).

practice as an arrogation of legislative power and the *Bivens* cause of action as a corollary of this now defunct judicial practice.[95]

Most recently, in 2017, in *Ziglar v. Abbasi*, the Supreme Court signaled its desire to further restrict *Bivens* as a cause of action, even as it acknowledged that *Bivens* was still good law.[96] *Abbasi* was a class action brought by six noncitizen detainees held by the federal government on immigration violations following the September 11, 2001, terrorist attacks.[97] The government held the detainees to determine whether they had connections to the attacks.[98] The Court divided the plaintiffs' claims, all brought pursuant to *Bivens*, into two categories: (1) detention policy claims and (2) a prisoner-abuse claim.[99] In the detention policy claims, the plaintiffs alleged that executive branch officials and federal prison employees contravened the Fourth and Fifth Amendments by detaining the plaintiffs under punitive pretrial conditions in violation of their due process and equal protection rights.[100] Also, they alleged that the prison wardens violated the Fourth and Fifth Amendments by subjecting the plaintiffs to frequent strip searches. [101] The prisoner-abuse claim alleged that the prison warden violated the plaintiffs' Fifth Amendment rights by allowing prison guards to abuse them.[102]

In *Abbasi*, the Court characterized expanding *Bivens* as a "'disfavored' judicial activity" and designated *Bivens*, *Davis*, and *Carlson* as belonging to

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95. Whether or not implying a damages remedy directly under the Constitution is analogous to implying a cause of action for damages under a statute is disputed. As the Court emphasized in *Davis v. Passman*,

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. . . . The Constitution, on the other hand, does not 'partake of the prolixity of a legal code.' . . . And in 'its great outlines,' the judiciary is clearly discernible as the primary means through which these rights may be enforced.

442 U.S. 228, 241 (1979) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)); *see also* Steve Vladeck, *On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SEC. (June 19, 2017), https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/ [https://perma.cc/W9NN-4RM8].

96. *Abbasi*, 137 S. Ct. at 1856.

97. *Id.* at 1847.

98. *Id.*

99. *Id.* at 1858, 1863.

100. *Id.* at 1858.

101. *Id.*

102. *Id.* at 1863.

the "*ancien regime*."[103] Reflecting this view, the Court put forth a narrow two-step analysis for deciding whether a *Bivens* remedy should apply to future cases.[104] First, a court must determine whether a case is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]."[105] The Court provided an extensive, yet non-exhaustive, list of factors bearing on whether a case differs from previous *Bivens* cases and constitutes a new context:

> A case might differ in a meaningful way 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 to be confronted; 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.[106]

Second, if the case presents a new *Bivens* context, a court must assess whether "special factors counsel[ ] hesitation" in extending a *Bivens* remedy.[107] Driving the special factors analysis is the determination whether permitting a *Bivens* claim implicates separation of powers concerns.[108] Basically, if special factors indicate that providing a damages remedy runs the risk of judicial intrusion on congressional or executive functions, the court must refrain from extending *Bivens*.[109] In this two-step analysis, a court must

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103. *Id.* at 1855, 1857 (first quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001); and then quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

104. *Id.* at 1857; *see also* Leading Case, *Constitutional Remedies*—Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV 313, 315–16 (2017). Note that this two-step test is significantly narrower than the previous two-step test generally employed by the Court in *Bivens* cases. In *Wilkie v. Robbins*, the Court framed the inquiry as to whether a *Bivens* claim may lie as follows: (1) Is there an existing remedy protecting the interest sought to be vindicated by the plaintiff that "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages"? And (2) are there any "special factors counselling hesitation" in implying a *Bivens* remedy from the Constitution? *See* 551 U.S. 537, 550 (2007).

105. *Abbasi*, 137 S. Ct. at 1858–59. The previous *Bivens* cases decided by the Supreme Court consist of *Bivens*, *Carlson*, and *Davis*. Thus, if the claim differs in a meaningful way from the claims brought in *Bivens*, *Carlson*, or *Davis*, the claim constitutes a new *Bivens* context. *Id.*

106. *Id.* at 1859.

107. *Id.* at 1856–57.

108. *Id.* at 1857; *see also* Peter S. Margulies, *Curbing Remedies for Official Wrongs: The Need for* Bivens *Suits in National Security Cases*, 68 CASE W. RSRV. L. REV. 1153, 1167–68 (2018) (discussing how the concern for separation of powers influenced the Court's construal of "special factors counselling hesitation").

109. *Abbasi*, 137 S. Ct. at 1857.

also consider whether adequate alternate remedies exist.[110] If so, the plaintiff has no remedy under *Bivens*.[111]

The Court set a low bar for what constitutes a "special factor counselling hesitation," explaining that such factors "must cause a court to hesitate" when deciding whether or not to permit a *Bivens* claim.[112] Simply, when deliberating whether to apply *Bivens*, if the court weighs a factor that causes it to "hesitate," then the court should not extend *Bivens*.[113] The Court's analysis shed some light on potential special factors, such as the following: the claim challenges a formulation or implementation of policy, rather than a challenge to standard law enforcement operations; the claim requires judicial inquiry into national security issues; and upholding the claim contravenes the implied or expressed will of Congress.[114]

In *Abbasi*, the Court refused to extend *Bivens* to the detention policy claims on the ground that the detainees' claims failed both prongs of the Court's test: the claims presented a new *Bivens* context and were subject to factors counseling hesitation.[115] In the Court's view, the detention policy claims were plainly distinguishable from the *Bivens* claims the Court recognized in *Bivens*, *Carlson*, and *Davis* and thus presented a new context.[116] Principally, the claims in *Abbasi* sought to challenge a "high-level executive policy" enacted in response to terrorist attacks against the United States—a far cry from the claims challenging the conduct of individual officials in the Court's previous *Bivens* cases.[117]

Moreover, the detention policy claims failed the Court's special factors analysis primarily on the ground that the claims challenged the constitutionality of a policy rather than an official's conduct.[118] The Court emphasized that *Bivens* claims are not a "proper vehicle for altering an

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110. *Id.* at 1858; *see also* Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (the existence of an "alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages").

111. *Abbasi*, 137 S. Ct. at 1858.

112. *Id.*

113. *See id.*

114. *Id.* at 1860–62. When determining the intent of Congress as to whether to provide a damages remedy in a particular situation, the Court emphasized that congressional silence does not translate to approval of a damages remedy. *Id.* at 1862. On the contrary, in *Abbasi*, where the issue was the detainment of aliens suspected to have ties to terrorism, congressional silence was "notable because it is likely that high-level policies will attract the attention of Congress." And "when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was 'inadvertent.'" *Id.* at 1862 (quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)).

115. *Id.* at 1860, 1865.

116. *Id.* at 1860.

117. *Id.*

118. *Id.*

entity's policy,"[119] and "[t]he purpose of *Bivens* is to deter the *officer*."[120] Nonetheless, the Court noted that even if the claims were limited to the conduct of a particular official, the fact that the claims called into question the implementation of national security policy assured that extending *Bivens* ran afoul of separation of powers principles.[121] The Court emphasized that national security policy was the well-established prerogative of Congress and the Executive.[122] The Court feared that implying a damages remedy for a claim challenging national security policy would cause an official to "second-guess difficult but necessary decisions concerning national-security."[123] Finally, the Court reasoned that the detention of suspected terrorists after September 11 was a policy likely to attract Congress's attention.[124] Thus, congressional silence and its failure to provide detainees a damages remedy "suggest that Congress' failure . . . might be more than mere oversight."[125] In sum, whether the detainees' detention policy claims warranted damages was "a decision for the Congress to make, not the courts."[126]

However, the Court did not completely foreclose the possibility of relief for the prisoner-abuse claim, despite finding that it constituted a new *Bivens* context.[127] The Court held that this claim potentially qualified the detainees for relief under *Bivens*, depending on the outcome of a special factors analysis.[128] The Court remanded the claim to the lower courts to engage in this analysis pursuant to the Court's instructions in *Abbasi*.[129]

Nevertheless, in determining that the detainees' Fifth Amendment claim against the prison warden for prisoner abuse raised a new context, the Court underscored its narrow construal of *Bivens*.[130] The Court conceded that "this case has significant parallels to one of the Court's previous *Bivens* cases, *Carlson v. Green*," and that "[t]he differences between this claim and the one in *Carlson* are perhaps small."[131] However, unlike *Carlson*, the claim in *Abbasi* involved a Fifth Amendment right.[132] The Court seemed unconcerned that the claimants were detainees who, unlike the convicted prisoner in

119. *Id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)).
120. *Id.* (quoting FDIC v. Meyer, 510 U.S. 471, 485 (1994)).
121. *Id.* at 1860–61.
122. *Id.* at 1849.
123. *Id.* at 1861.
124. *Id.* at 1862.
125. *Id.*
126. *Id.* at 1860.
127. *Id.* at 1864.
128. *Id.*
129. *Id.* at 1865.
130. *Id.*
131. *Id.* at 1864–65.
132. *Id.* at 1864.

Carlson, could not bring an Eighth Amendment claim.[133] In the Court's estimation, seeking to vindicate a different constitutional right, despite factually similar situations, constituted a new context.[134] As the Court explained, "[E]ven a modest extension [of *Bivens*] is still an extension."[135]

Abbasi makes clear that courts should apply *Bivens* only under very narrow circumstances. *Abbasi* requires a particularized investigation into whether the claim arises in a new context, which, given the extensive list of distinguishing factors, is generally a foregone conclusion.[136] Also, in many ways, *Abbasi* inverts the Court's jurisprudence in *Bivens*. In *Bivens*, the Court interpreted congressional silence as indicating congressional approval to imply a damages remedy under the Constitution.[137] In *Abbasi*, the Court takes the opposite view: absent affirmative action by Congress, the Court should presume that Congress views granting damages remedies under the Constitution unfavorably.[138] Although *Abbasi* did not overrule *Bivens* outright, the restrictive test the Court introduced, and the Court's clear refusal to apply *Bivens* to cases that only modestly differ from *Bivens* and its progeny, all but gutted the precedents set by *Bivens*, *Carlson*, and *Davis*.[139]

Even as the Court drew distance from *Bivens*, Congress took actions that limited the use of state common law remedies to hold federal officials accountable in tort. The next Section examines the interaction between the Westfall Act of 1988 and the evolution of *Bivens* jurisprudence.

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133. Leading Case, *supra* note 104, at 318.

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

135. *Id.*

136. *See id.* at 1859.

137. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971).

138. *See Abbasi*, 137 S. Ct. at 1862 ("The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than 'inadvertent.'"), *construed in* Michael C. Dorf, *SCOTUS Severely Narrows Civil Rights Suits Against Federal Officers*, TAKE CARE BLOG (June 20, 2017), https://takecareblog.com/blog/scotus-severely-narrows-civil-rights-suits-against-federal-officers [https://perma.cc/67W3-6BEP] ("In *Abbasi*, the Court takes the extraordinary step of holding that it will presume Congress intends that there be no remedy available for most violations of constitutional rights by federal officers.").

139. *See* Richard M. Re, *The Nine Lives of* Bivens *(SCOTUS Symposium)*, PRAWFSBLAWG (June 22, 2017, 8:30 AM), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html [https://perma.cc/T49E-GEVN].

C. The Westfall Act of 1988

1. A Restriction on State Tort Claims Against Federal Officials

The passage of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) significantly altered the legal framework under which state tort claims could be used to hold federal officials accountable for tortious conduct. Congress signed the Westfall Act into law following the Supreme Court's decision in *Westfall v. Erwin*.[140] In *Westfall*, the Court held unanimously that federal officials lacked absolute immunity against tort actions brought under state law, even when officials were acting within the scope of their employment.[141] Fearing that the Court's decision would hinder federal officials when carrying out their official duties, Congress enacted the Westfall Act.[142]

Essentially, the Act transforms any claim against a federal official brought on a state common law tort theory into a claim under the FTCA.[143] To protect federal officials from personal liability, the Act authorizes the federal government to substitute itself as the defendant in the suit, as long as the alleged tortious conduct transpired within the scope of the federal official's employment.[144] The Act implements a procedure whereby the Attorney General certifies conduct as falling within the zone of the official's employment.[145] Upon certification, the lawsuit proceeds against the federal government rather than directly against the federal official.[146] The government as the defendant defends against the state law tort claim and pays any damages awarded to the plaintiff.[147] The Act makes clear that a suit against the United States under the FTCA is the "exclusive" remedy for someone injured by a federal official in the course of the official's duties.[148]

Unfortunately for claimants, claims under the FTCA are subject to certain limitations that did not apply to state common law tort claims. By requiring

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140. Westfall v. Erwin, 484 U.S. 292 (1988).

141. *Id.* at 300. The plaintiff in *Westfall* brought a regular tort claim, not a constitutional tort claim. *Id.* at 293–94. Specifically, the plaintiff was a warehouseman at an army depot where he was exposed to toxic soda ash. *Id.* He brought a negligence claim against the supervisor of the depot. *Id.*

142. *See* Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1729 (2008); 28 U.S.C. § 2679.

143. § 2679(d)(4); *see also* PFANDER, *supra* note 24, at 102.

144. § 2679(d)(1).

145. *Id.*

146. *Id.*

147. *See* § 2679(d)(2); *see also* PFANDER, *supra* note 24, at 102.

148. § 2679(b)(1).

state tort claims against federal officials to be brought under the FTCA, the Westfall Act, in some cases, bars any sort of recovery for claimants—including claimants who would have had a claim for recovery pre-Westfall Act.[149] For example, the FTCA bars recovery for claims for intentional torts committed by non-law enforcement officers,[150] claims arising out of an official's discretionary function,[151] claims arising in a foreign country,[152] and claims relating to military service.[153] Consequently, due to these limitations, the Westfall Act significantly narrows the availability of tort remedies against federal officials.

Cross-border shooting cases underscore this reality. Crucial to the cross-border shooting context is the fact that the FTCA does not encompass claims arising out of a federal official's performance of a discretionary function or claims arising in a foreign country.[154] Any claim falling into one of these categories is barred from relief. Likely, the decision to discharge one's gun is a discretionary function inherent in a Border Patrol agent's scope of duties.[155] Even if it is not, the foreign country exception is surely at play. In *Sosa v. Alvarez-Machain*, the Supreme Court made clear "that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[156] Consequently, even though the tortious act—pulling the trigger and discharging the gun at the victim—transpired in the United States, the controlling consideration is that the injury occurred in a foreign country. Thus, *Sosa* makes clear that plaintiffs in the cross-border shooting context are barred from seeking relief under the FTCA, and therefore, under state tort law as well.

2. The Westfall Act's Exception for Constitutional Torts

Despite the limitations the Westfall Act imposes on state law tort claims against federal officials, the Act contains a critical exception for

149. Vázquez & Vladeck, *supra* note 27, at 569.
150. § 2680(h).
151. *Id.* § 2680(a).
152. *Id.* § 2680(k).
153. *Id.* § 2680(j).
154. *See id.* § 2680(a), (k).
155. The discretionary exception is remarkably broad and has the potential to insulate officials from a wide range of claims. *See* Vázquez & Vladeck, *supra* note 27, at 569–70 ("[B]oth substantively and procedurally, the effect of the Westfall Act is to narrow the universe of (and scope of recovery for) tort claims that individuals can pursue for injuries caused by federal officials.").
156. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

constitutional torts. Section (b)(2) of the Westfall Act states that it "does not extend or apply to a civil action against an employee of the [federal government] which is brought for a violation of the Constitution of the United States."[157] In short, under the Westfall Act, a claim brought to remedy a constitutional tort is not supplanted by an FTCA claim, as is the case for regular torts. Thus, although the Westfall Act dictates that a claimant bring a claim for a regular tort against the federal government under the FTCA, a claimant may still bring a claim for a constitutional tort directly against the federal official responsible for the constitutional violation.[158]

Unfortunately, the Westfall Act's statutory language is ambiguous and gives rise to two plausible interpretations: (1) the Act preempts all state tort claims against federal officials and thus carves out an exception for *Bivens* claims for constitutional torts, or (2) state tort claims for constitutional torts can still be brought directly against federal officials despite requiring regular tort claims to proceed under the FTCA.[159] Regrettably, the Court's jurisprudence concerning the precise remedial scheme the Westfall Act establishes is far from conclusive. In *Minneci v. Pollard*,[160] the Court seemed to indicate the Act preempts all state tort law claims against federal officials.[161] Conversely, the Court assumed the opposite in *Wilkie v. Robbins*[162]: despite the Westfall Act, plaintiffs could bring state tort claims against federal officials for constitutional violations.[163] And in *Hui v. Castaneda*, the Court characterized the statute's carve-out for constitutional

157. § 2679(b)(2).

158. *Id.* § 2679(b)(1)–(2).

159. *See* Vázquez & Vladeck, *supra* note 27, at 570–79 (arguing that both interpretations of the Westfall Act are plausible, but the interpretation that the Westfall Act preempts all civil actions except *Bivens* claims against federal officials is the best reading of the statute). *But see* PFANDER, *supra* note 24, at 104 (arguing that the Westfall Act preempts all state tort claims against federal officials, regardless of whether they are brought for regular or constitutional tort claims).

160. 565 U.S. 118 (2012). In *Minneci*, a prisoner at a private prison filed a *Bivens* claim against several employees at the facility, alleging that they violated his Eighth Amendment rights by depriving him of adequate medical care. The Supreme Court held that the prisoner could not bring a *Bivens* claim against the employees of a private prison. *Id.* at 131.

161. *See* Vázquez & Vladeck, *supra* note 27, at 570; *see also Minneci*, 565 U.S. at 126 ("Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government.").

162. In *Wilkie*, the plaintiff brought a *Bivens* claim against employees of the Bureau of Land Management for retaliating against him for refusing to grant an easement through his property. The Court refused to create a new *Bivens* remedy on the ground that the plaintiff had alternative administrative and judicial remedies available. 551 U.S. 537, 562 (2007).

163. *See* Vázquez & Vladeck, *supra* note 27, at 570–71; *see also Wilkie*, 551 U.S. at 551 (denying extending *Bivens*, in part, because the plaintiff "had a civil remedy in damages for trespass" against the offending federal officials).

torts as an "explicit exception for *Bivens* claims."[164] In the Court's recent decisions dealing with *Bivens*, the Court has either overlooked or ignored state tort claims as an alternative mechanism for holding officials accountable for unconstitutional conduct. *Abbasi* noted that an additional reason for declining to extend *Bivens* was the existence of an alternative remedy in the form of a writ of habeas corpus.[165] Nevertheless, the Court was silent regarding possible relief under state tort law.[166] Likewise, in *Hernandez*, the Court made no mention of a possible state tort claim, and the dissent presumed that the plaintiff lacked any remedy other than *Bivens*.[167] Considering the Court's persistent refusal to apply *Bivens* when alternative remedies exist, the Court's silence on the continuing availability of state tort claims against federal officials for constitutional violations suggests that it views the Westfall Act as preempting these claims. This Comment argues in Part II, Section C that until the Court establishes otherwise—that is, that the Westfall Act preserves state tort law causes of action for constitutional violations—it is required to interpret the Act as preserving *Bivens* claims.

D. Cross-Border Shooting Cases

The Supreme Court took up *Hernandez v. Mesa* to resolve a circuit split concerning the viability of *Bivens* claims in the cross-border shooting context. That split centered on the Fifth and Ninth Circuits' divergent readings of *Abbasi*. In *Hernandez v. Mesa*, the Fifth Circuit held that the Supreme Court's decision in *Abbasi* foreclosed a *Bivens* claim against a Border Patrol agent for his role in a cross-border shooting.[168] In contrast, in *Rodriguez v. Swartz*, the Ninth Circuit concluded that allowing a *Bivens* claim

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164. 559 U.S. 799, 807 (2010). In *Hui*, the survivors of an immigration detainee brought a *Bivens* claim against personnel of the Public Health Service (PHS) under the Fifth and Eighth Amendments for failure to provide medical care. The Court held the Public Health Service Act (PHSA) precluded a *Bivens* claim against PHS personnel because the PHSA grants absolute immunity for claims arising out of medical treatment, and any claim for ineffective medical treatment must be brought under the FTCA, which the PHSA makes clear is "exclusive of any other civil action or proceeding . . . against the officer or employee." *Id.* at 805–06 (2010) (citing 42 U.S.C. § 233(a)).

165. Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017).

166. *See id.*

167. *See* Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (limiting its discussion of the existence of an alternative remedy to noting that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [plaintiff] an 'adequate' federal remedy for his injuries" (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)). The dissent addressed the issue of alternative remedies more directly, concluding that "plaintiffs lack recourse to alternative remedies." *Id.* at 753 (Ginsburg, J., dissenting).

168. Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018).

against a Border Patrol agent for a cross-border shooting was consistent with the Supreme Court's jurisprudence in *Abbasi*.[169] This Section examines the circuit split in detail and the Supreme Court's holding in *Hernandez v. Mesa*, which declined to extend *Bivens* claims to cross-border shootings.[170]

1. *Hernandez v. Mesa*: No *Bivens* Claim

In *Hernandez*, the Fifth Circuit held that *Bivens* claims could not remedy violations of the Fourth and Fifth Amendment rights of cross-border shooting victims.[171] In a federal lawsuit, Hernández's parents brought eleven claims against Agent Mesa, the United States government, other Border Patrol officials, and several federal agencies.[172] The federal district court dismissed all claims.[173] The Fifth Circuit reversed in part, finding that Hernández could bring a *Bivens* claim alleging excessive use of force under the Fifth Amendment and that Agent Mesa was not entitled to qualified immunity from this claim.[174] On rehearing en banc, the Fifth Circuit reversed.[175] The court held that Agent Mesa had qualified immunity from the Fifth Amendment excessive force claim, thus affirming the district court's dismissal of the case.[176] The Supreme Court then granted certiorari.[177] The Court vacated the Fifth Circuit's decision and remanded for further proceedings, directing the Fifth Circuit to consider whether a *Bivens* claim existed in light of the Court's recent decision in *Ziglar v. Abbasi*.[178] On remand, the Fifth Circuit held that Hernández did not have a viable *Bivens* claim under *Abbasi*.[179]

Applying the two-part analysis laid out by *Abbasi*, the Fifth Circuit concluded that despite the lack of alternative remedies, a cross-border shooting presented an "unprecedented" new context for a *Bivens* claim and implicated special factors counseling hesitation.[180] The court emphasized that the extraterritorial aspect of the case "raise[d] novel and disputed issues" that clearly distinguished it from previous *Bivens* cases decided by the Supreme Court.[181] In fact, given the strict limitations *Abbasi* imposed on *Bivens*, the

169. Rodriguez v. Swartz, 899 F.3d 719, 726 (9th Cir. 2018).
170. *Hernandez*, 140 S. Ct. at 739.
171. *Hernandez*, 885 F.3d at 814.
172. Hernandez v. United States, 802 F. Supp. 2d. 834, 838 (W.D. Tex. 2011).
173. *Id.* at 846–47.
174. Hernandez v. United States, 757 F.3d 249, 280 (5th Cir. 2014).
175. Hernandez v. United States, 785 F.3d 117, 119 (5th Cir. 2015).
176. *Id.*
177. *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2006 (2017).
178. *Id.* at 2006–07.
179. Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018).
180. *Id.* at 817–18.
181. *Id.* at 817.

court concluded that the "newness" of the context should alone constitute sufficient grounds for dismissal of the plaintiffs' *Bivens* claims.[182]

Furthermore, in accordance with the Supreme Court's decision in *Abbasi*, the Fifth Circuit's special factors inquiry stressed that the extension of *Bivens* to the cross-border shooting context implicated factors that jeopardized separation of powers principles.[183] In addition to affecting national security policy, which is exclusively the province of the executive and legislative branches, the court explained that "the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security."[184] According to the court, imposing such liability risked causing Border Patrol agents to "hesitate in making split second decisions."[185]

The Fifth Circuit also emphasized that Congress's "repeated refusals" to create causes of action for foreigners injured by federal officials abroad counseled against extending *Bivens*.[186] According to the court, because Congress expressly limited remedies under 42 U.S.C. § 1983 to citizens of the United States or people within its jurisdiction, and the FTCA excluded any claim arising in a foreign country, extending *Bivens* to remedy an injury to a foreigner on foreign soil would violate congressional intent to withhold remedies from foreigners injured abroad.[187] In sum, echoing the dissent in *Bivens*, the Fifth Circuit concluded 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.'"[188]

2. *Rodriguez v. Swartz*: *Bivens* Claim Allowed

Less than five months later, the Ninth Circuit, sitting en banc, directly rejected the Fifth Circuit's decision and held that a *Bivens* remedy did exist in the context of cross-border shootings.[189] The Ninth Circuit concluded that *Bivens* should be extended to the context of cross-border shootings to remedy

182. *Id.* at 818.

183. *Id.* at 817–23. Quoting *Abbasi*, the Fifth Circuit emphasized that if "Congress might doubt the efficacy or necessity of a damages remedy . . . 'the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.'" *Id.* at 818 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)).

184. *Id.* at 819.

185. *Id.*

186. *Id.* at 821.

187. *Id.* at 820.

188. *Id.* at 821 (quoting *Abbasi*, 137 S. Ct. at 1863).

189. Rodriguez v. Swartz, 899 F.3d 719, 726 (9th Cir. 2018).

the violation of Rodríguez's Fourth Amendment rights.[190] Guided by the Supreme Court's decision in *Abbasi*, the Ninth Circuit concluded that even though the cross-border shooting context was new, a *Bivens* remedy existed for two reasons: Rodríguez's family did not have an adequate alternative remedy, and there were no special factors counseling hesitation.[191]

The Ninth Circuit addressed four policy concerns, all of which the court concluded did not counsel against extending *Bivens*. First, unlike *Abbasi*, the case did not challenge executive or legislative policy.[192] The case "involv[ed] 'standard law enforcement operations' and 'individual instances of . . . law enforcement overreach.'"[193] Second, the case did not implicate national security concerns because the actions of Agent Swartz were clearly inconsistent with the Border Patrol's law enforcement duties.[194] The court emphasized that punishing such overreaches of power would not interfere with agents' prescribed duties.[195] Third, the court noted that applying *Bivens* did not complicate or implicate any specific foreign policy concerns.[196] Indeed, in the court's view, not extending *Bivens* ran the risk of souring relations with Mexico because American courts refused to "give a remedy for a gross violation of Mexican sovereignty."[197] Fourth, and finally, the Ninth Circuit concluded that the presumption against extending remedies extraterritorially was rebutted because Supreme Court precedent establishes that the presumption is overcome when actions "touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[198] In the court's view, the facts of the case rebutted the presumption because the challenged conduct—discharging the gun at Rodríguez—transpired squarely on American soil.[199]

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190. *Id.*
191. *Id.* at 748.
192. *Id.* at 745.
193. *Id.* (alteration in original).
194. *Id.* at 745–46.
195. *Id.* Also, the court noted that the Department of Justice (DOJ) brought criminal charges against Agent Swartz for second-degree murder and concluded that "[i]t 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." *Id.* at 746.
196. *Id.*
197. *Id.*
198. *Id.* at 747 (quoting Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124–25 (2013)).
199. *Id.*

3. Supreme Court: No *Bivens* Claims for Cross-Border Shooting Victims

To resolve the split between the Fifth and Ninth Circuits, the Supreme Court granted certiorari in *Hernandez* for a second time.[200] Exclusively addressing the applicability of *Bivens*, the Court affirmed the Fifth Circuit's decision and held that *Bivens* claims are not available to victims in cross-border shootings.[201] Before engaging in the two-step test devised in *Abbasi*, the Court went to great lengths to emphasize that causes of action for damages ordinarily originate with Congress.[202] The Court further stressed that "for almost 40 years, [the Court has] consistently rebuffed requests to add to the claims allowed under *Bivens*."[203] Applying the first step of the *Abbasi* analysis, the Court concluded that it was "glaringly obvious" that a claim arising out of a cross-border shooting involved a new *Bivens* context.[204] Although *Bivens* recognized a remedy for a Fourth Amendment violation and *Davis*, a Fifth Amendment violation, the Court emphasized that a cross-border shooting did not remotely resemble an unconstitutional search and arrest in New York City or sex discrimination against a congressional staffer.[205]

Turning to step two of the *Abbasi* analysis, the Court concluded that the special factors of foreign relations and national security counseled against extending *Bivens* to the cross-border shooting context.[206] The Court characterized a cross-border shooting as an "international incident."[207] It noted that issues pertaining to foreign policy "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference," unless Congress has "provided otherwise."[208] The Court gave significant weight to the fact that the executive branch determined the Border Patrol agent's use of force did not violate Border Patrol policy.[209]

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200. Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020).

201. *Id.* at 739.

202. The Court emphasized, "[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress . . . and no statute expressly creates a *Bivens* remedy." *Id.* at 742. Also, "Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017)).

203. *Id.* at 743.

204. *Id.*

205. *Id.* at 744.

206. *Id.* at 744–47.

207. *Id.* at 744.

208. *Id.* (first quoting Haig v. Agee, 453 U.S. 280, 292 (1981); and then quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).

209. *Id.*

Thus, in the Court's view, allowing a jury to decide whether the agent's actions violated the Constitution would be inappropriate and contravene the will of the Executive.[210] Finally, although Mexico supported a suit against the agent and in turn a remedy for the victim's family, the Court emphasized that the international character of the incident rendered diplomatic channels outside the courtroom the appropriate means of dispute resolution.[211]

Furthermore, the Court stressed that national security was central to the controversy.[212] According to the Court, the primary responsibility of U.S. Customs and Border Protection (CBP) is to secure the border from illegal activity, which has a "clear and strong connection to national security."[213] The Court expressed concern that extending *Bivens* to cross-border shootings risked undermining border security because doing so contravened the "framework established by the political branches" for handling cases alleging the unlawful use of deadly force by Border Patrol agents.[214] Fundamentally, Congress and the Executive had devised a system for disciplining agents independent of the courts, and this disciplinary system preempted *Bivens* claims in cross-border shootings.[215]

Finally, the Court emphasized that a survey of federal statutes indicated that Congress was hesitant to create claims based on officials' tortious conduct abroad.[216] The Court noted that neither 42 U.S.C. § 1983 nor the FTCA nor the Alien Tort Statute create a cause of action for damages against federal officials for injuries abroad.[217] Conversely, under limited circumstances, Congress has provided administrative remedies for the conduct of federal officials on foreign soil.[218] Unfortunately for the victims in *Hernandez*, these administrative remedies do not cover cross-border shootings.[219] Thus, the combination of Congress's reluctance to provide causes of action for the tortious conduct of officials abroad and its willingness to create alternative remedies for only particular situations showed that extending *Bivens* ran the risk of contravening congressional will.[220]

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210. *Id.*
211. *Id.* at 745.
212. *Id.* at 745–46.
213. *Id.* at 746.
214. *Id.*
215. *Id.* at 746–47.
216. *Id.* at 747.
217. *Id.* at 747–49.
218. *Id.* at 749.
219. *Id.* The Court noted that Congress does permit administrative remedies for injuries suffered abroad if the Drug Enforcement Administration, State Department, or military personnel cause those injuries. *Id.*
220. *Id.*

At its core, the Court's analysis rested on separation of powers concerns.[221] The Court emphasized that "[w]hen evaluating whether to extend *Bivens*, the most important question 'is "who should decide" whether to provide for a damages remedy, Congress or the courts?'"[222] The Court concluded that more often than not, the correct answer is Congress.[223]

II. ANALYSIS

The Supreme Court's decision in *Hernandez* leaves claimants in the cross-border shooting context in an untenable position. Arguably, under the laws of all the entities implicated in *Hernandez* and *Rodriguez*—that is, the laws of the United States, Texas, Arizona, and Mexico—the conduct of the defendant Border Patrol agents was legally unjustifiable. Yet the Supreme Court in *Hernandez* held that victims of cross-border shootings are not entitled to bring *Bivens* claims against the agents who shot them, even though no alternative remedy exists. This Part argues that the erasure of state common law as a mechanism for the enforcement of constitutional rights has made *Bivens* indispensable to remedy claims that arise in the context of cross-border shootings.

Section A argues that *Hernandez* further eroded *Bivens* and jeopardizes its survival. Section B then argues that, but for the Westfall Act, the plaintiffs in *Hernandez* and *Rodriguez* could have brought state common law tort claims to challenge the constitutionality of the agents' conduct. Section C argues that, contrary to the Court's jurisprudence, the Westfall Act intended to ratify *Bivens* as the principal cause of action against federal officials for constitutional torts. Finally, Section D argues that the current framework for protecting constitutional rights from federal intrusion is inconsistent with the Framers' intentions.

A. Hernandez *Prohibitively Narrows* Bivens

Hernandez narrowed the Court's already restrictive two-step test devised in *Abbasi*. Even more than *Abbasi*, *Hernandez* casts doubt on the continuing vitality of *Bivens*. In *Abbasi*, although the Court made clear that it viewed *Bivens* unfavorably—with respect to both its origins and its extension to new contexts—the Court offered several assurances that *Bivens* remained a

221. *See id.* at 750.
222. *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).
223. *Id.*

forceful cause of action.[224] For instance, the Court cautioned that *Abbasi* was "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[225] Additionally, *Abbasi* explained that although *Bivens* was not the proper means to challenge government policy, the cause of action did serve the important purpose of deterring individual officers from unconstitutional conduct.[226] Reinforcing the Court's assurance that *Bivens* remained good law, *Abbasi* even preserved the possibility that depending on the lower court's special factors analysis, the plaintiffs had a viable *Bivens* claim under the Fifth Amendment against the prison warden for the abuse they experienced while detained.[227] Although *Abbasi* set an extraordinarily low bar for when cases constitute new contexts and warrant a special factors analysis, it did leave the door open to the possibility that *Bivens* retained life in certain contexts.[228] *Hernandez* all but shut that door.

In *Hernandez*, the Court established a minimal threshold for whether a factor counsels hesitation. The Court's decision revealed that the special factors prong is satisfied with only a general showing of factors implicating separation of powers concerns.[229] *Hernandez* demonstrated that the factors of foreign relations and national security policy are, on their face and without a showing of particularity, dispositive in denying a *Bivens* claim.[230] Concededly, even under *Abbasi*, a case implicating foreign affairs or national security policy, more often than not, would consist of special factors that counsel against extending *Bivens*. As *Abbasi* made clear, a *Bivens* claim is an inappropriate vehicle to challenge government policy.[231] Nonetheless, *Abbasi* recognized that congressional and executive power have limits "even with respect to matters of national security."[232] Additionally, "national-security concerns must not become a talisman used to ward off inconvenient claims."[233] Such cautionary language is absent in *Hernandez*.

Arguably, *Hernandez* provided an opportune time to heed *Abbasi*'s cautionary language and distinguish the special factors analysis in *Hernandez* from that in *Abbasi*. Unlike the plaintiffs in *Abbasi*, the victim's family in *Hernandez* did not seek to sue high-ranking executive officials for

224. *See Abbasi*, 137 S. Ct. at 1856, 1860.
225. *Id.* at 1856.
226. *Id.* at 1860.
227. *Id.* at 1865.
228. Dorf, *supra* note 138.
229. Hernandez v. Mesa, 140 S. Ct. 735, 749 (2020).
230. *See id.* at 749–50.
231. *See Abbasi*, 137 S. Ct. at 1862–63.
232. *Id.* at 1861.
233. *Id.* at 1862.

authorizing purportedly unconstitutional policies. Rather, they merely sought to sue a rank-and-file law enforcement officer for an allegedly unconstitutional use of lethal force. Protecting individuals from such unconstitutional overreaches by federal law enforcement officers was the precise purpose *Bivens* was originally devised to serve.[234] Notwithstanding, the Court insisted that claims against a rank-and-file officer still threatened to undermine border security.[235]

The Court's analysis, moreover, reflected extraordinary deference to the political branches: "The question is not whether national security requires such conduct—of course, it does not—but whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that lethal force was unlawfully employed by an agent at the border."[236] The Court presumed that (1) the CBP rules and regulations regarding use of lethal force and the DOJ's investigation into the shooting were consistent with the Constitution; and (2) the only vehicle for challenging the legality of the shooting was the framework established by the political branches. These presumptions place tremendous power in the hands of Congress and the executive branch to determine when and if individuals can seek redress for an intrusion of their rights by federal officials. Likewise, the Court's conclusion overlooks the critical role that common law—judge-made law as opposed to congressionally enacted statutory law—once played in holding federal officials accountable for tortious conduct. In the Court's reluctance to run afoul of separation of powers principles, the Court displayed a willingness to abdicate its historical role of acting as a check on the unconstitutional conduct of the political branches.[237]

Despite the Court's blanket holding that *Bivens* does not apply to cross-border shootings, the Court did not endeavor to distinguish *Rodriguez*

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234. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *Abbasi*, 137 S. Ct. at 1860 ("The purpose of *Bivens* is to deter the officer.").

235. The Court emphasized that Border Patrol agents are statutorily authorized to "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States." *Hernandez*, 140 S. Ct. at 746 (quoting 6 U.S.C. § 211(c)(5)). Thus, the conduct of Border Patrol agents has a "clear and strong connection to national security." *Id.*

236. *Id.*

237. *See Bivens*, 403 U.S. at 403–04 (Harlan, J., concurring) ("[I]t would be at least anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will."); Marbury v. Madison, 5 U.S. (1 Cranch) 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. One of the first duties of government is to afford that protection."); 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.").

from *Hernandez*.[238] The circumstances in *Rodriguez* raise legitimate questions about whether the Court can honestly apply its national security analysis to that case. In *Rodriguez*, following an investigation of the shooting, the DOJ determined that the Border Patrol agent's actions did violate CBP policy and constituted an unlawful use of force.[239] In fact, not only was the agent disciplined by the CBP, but the DOJ also charged and tried him for second-degree murder.[240] Thus, while the Court's national security analysis plausibly carries force in *Hernandez*, it does not in *Rodriguez*. It is difficult to square the Court's conclusion that holding an agent civilly liable for a cross-border shooting undermines national security with the notion that holding an agent criminally liable for the same act does not.[241] Or framed more explicitly in terms of separation of powers, it is difficult to understand how allowing a civil claim for damages against an agent contravenes the will of the Executive when the Executive itself found the agent's conduct unlawful and sought to hold him criminally accountable.

Furthermore, the Court's discussion of foreign relations indicates that only a cursory analysis is needed to find that a factor counsels against extending *Bivens*. Undoubtedly, in many instances, foreign relations would raise separation of powers concerns. If, for example, the Mexican government opposed extending *Bivens* to the cross-border shooting context, or if Mexico and the United States entered a bilateral agreement to resolve cross-border shooting disputes through diplomatic channels, the Judiciary's extension of *Bivens* would likely intrude on the actions of the political branches and create separation of powers concerns. However, that was not the case in *Hernandez*. The Mexican government explicitly supported extending *Bivens* and providing cross-border shooting victims a remedy.[242] As an amicus brief filed by the Mexican government insisted, "Applying U.S. law in this case would not interfere with Mexico's foreign affairs or diplomacy. On the contrary, providing an adequate and effective remedy would show appropriate respect

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238. The Court's holding communicated that it almost certainly applied to all cross-border shooting cases, and thus foreclosed the use of *Bivens* in *Rodriguez*: "Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend *Bivens* into this new field." *Hernandez*, 140 S. Ct. at 739.

239. *See* Perla Trevizo, *Border Agent Lonnie Swartz To Be Tried Again in Cross-Border Shooting of Teen*, TUCSON.COM (Oct. 24, 2018), https://tucson.com/news/local/border-agent-lonnie-swartz-to-be-tried-again-in-cross/article_32729ad7-283c-58d8-90ad-1aca92db2072.html [https://perma.cc/W437-JVUH].

240. *Id.*

241. The Ninth Circuit echoed this sentiment in *Rodriguez v. Swartz*, 899 F.3d 719, 746 (2018). *See supra* text accompanying note 195.

242. Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678), 2018 WL 3533074, at *12 [hereinafter Brief of the Mexican Government].

for Mexico's sovereignty . . . and for the rights of its nationals."[243] Moreover, besides noting the establishment of a Border Violence Prevention Council in 2014, the Court did not identify a single concrete U.S. policy that extending *Bivens* threatened to undermine.[244]

Even more than *Abbasi*, *Hernandez* threatens the continuing vitality of *Bivens* as a cause of action. The Court's application of *Abbasi*'s two-step test presents an insurmountable threshold for claimants. Claimants are guaranteed to fail step one of the test—the "new context prong"—unless their claims are basically identical to those in previous *Bivens* cases decided by the Court (*Bivens*, *Carlson*, and *Davis*). At step two—the "special factors prong"—only a cursory analysis is required to determine whether there are special factors counseling hesitation. The Court's decision not only established that courts should apply *Bivens* and its progeny under the narrowest of circumstances; Justice Gorsuch's concurrence also raised the question of whether *Bivens* should be applied at all.[245] Noting that the Court's decisions "have undermined the validity of the *Bivens* doctrine," Justice Gorsuch averred that "nothing is left to do but overrule it."[246] Given the trajectory of the Court's *Bivens* jurisprudence, Justice Gorsuch's recommendation seems to be the logical next step.

B. Extending Bivens *Is Consistent with the Common Law Tradition*

The common law tradition supports preserving *Bivens* as a cause of action for constitutional torts. The argument that the Fourth and Fifth Amendments actually imply a cause of action for damages is admittedly difficult to make. However, this does not warrant disposing of or even restricting *Bivens*. For the past forty years, the Supreme Court has repeatedly framed *Bivens* as a judge-made remedy that represents an egregious violation of separation of powers. In the Court's view, *Bivens* is a cause of action that sprang into existence unsupported by judicial precedent and untethered to legitimate judicial practices. This Section argues that by placing *Bivens* on life support,

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243. *Id.*

244. *See Hernandez*, 140 S. Ct. at 745; *see also Rodriguez*, 899 F.3d at 746 (concluding that the "United States has not explained how any [foreign relations] policy is implicated or could be complicated by applying *Bivens* to this shooting"). The Mexican government's amicus brief explained that the Border Violence Prevention Council is an American–Mexican committee that meets to discuss policies to reduce border violence. *See* Brief of the Mexican Government, *supra* note 242, at 12. The brief noted the Council is not an adjudicative tribunal capable of providing a remedy to victims of cross-border shootings. *Id.* Accordingly, "[t]here is no overlap between the remedy sought here and the role of the Council." *Id.*

245. *See Hernandez*, 140 S. Ct. at 750–53 (Gorsuch, J., concurring).

246. *Id.* at 752.

the Court has overlooked the historic role that common law played in holding federal officials accountable and the compelling argument that preserving *Bivens* is consistent with, and an extension of, this tradition.

Had Congress never enacted the Westfall Act, the victims of cross-border shootings would have had at their disposal a common law action for damages under state tort law.[247] As discussed in Part I, Section A, for much of U.S. history, state common law played a vital role in holding federal officials accountable for tortious conduct. This analysis illustrates how the families of victims of cross-border shootings might have brought a common law wrongful death claim against the offending agents. For the sake of simplicity, this analysis focuses on the claim in the *Hernandez* case.

Given the nature of the claim, a state law tort claim, the victim's family would likely bring suit in Texas state court, and the agent would exercise his statutory right to remove the suit to federal district court.[248] Given the transnational nature of the case, the issue of conflicts of law would inevitably arise. The action causing the injury occurred in Texas, while the harm resulting from the action arose in Mexico. Under the modern "most significant relationship test,"[249] a strong argument exists to apply Texas law. Under this test, the rights and liabilities of the parties are determined by the laws of the state that has the "most significant relationship" to the event giving rise to the claim.[250] The test instructs courts to consider various "contacts,"[251] such as the places where the injury and the conduct causing the injury occurred, to determine which state has a "greater interest in the matter."[252] Courts must weigh whether the "primary purpose of the tort rule involved" is to "compensate the victim for his injuries" against whether its

247. This is precisely the argument that the Solicitor General made in *Bivens*, which was decided pre-Westfall Act, in urging the Court not to imply a cause of action directly under the Fourth Amendment. The Solicitor General insisted that the plaintiff already had an adequate remedy at common law in the form of a trespass claim against the agents. *See* Brief for the Respondents, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900, at *4–6.

248. 28 U.S.C. § 1442(a)(1). Pursuant to *Erie Railroad Co. v. Tompkins*, federal courts must apply and interpret the common law as would the courts of the state in which they sit. 304 U.S. 64, 78 (1938). Thus, a Texas district court would apply Texas state law and an Arizona district court would apply Arizona state law.

249. RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 (AM. L. INST. 1971). Under traditional conflict-of-laws principles, the vested rights approach maintained that the law of the place of injury governed. *See* HERMA HILL KAY ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 3–7 (9th ed. 2013). Thus, before the adoption of the "most significant relationship test," the federal district court in Texas would apply Mexican law.

250. RESTATEMENT (SECOND) OF CONFLICT OF L. § 145.

251. *Id.*

252. *Id.* at cmt. c.

primary purpose is to "deter or punish misconduct."[253] If the primary purpose of the tort rule is to compensate the victim, the state where the injury took place likely has the dominant interest.[254] Conversely, if the purpose of the tort rule is to "deter or punish misconduct," the state where the conduct occurred "has peculiar significance" and likely the most significant relationship to the dispute.[255]

Balancing these two considerations cuts both ways in *Hernandez*. One of the plaintiffs' objectives is obtaining a remedy for the harm done. Nonetheless, the suit is unique in that plaintiffs are not suing a private citizen but rather a federal agent. Americans and Mexicans living along the border have a strong interest in ensuring that Border Patrol agents comply with Texas laws, CBP rules and regulations, and the Constitution when using lethal force. The U.S. government has an equally strong interest that the conduct of its agents complies with its laws and is regulated by U.S. law rather than foreign law. Framed in this way, the claim's primary purpose is to regulate the conduct of Border Patrol agents—namely, to deter agents from partaking in, and hold them accountable for, unlawful behavior. Thus, because deterrence and punishment are central aims of the suit, Texas law should apply.[256]

Thus far, the family's wrongful death claim resembles a typical tort claim rather than a constitutional tort claim. However, the agent will likely raise the defense that he was acting within the scope of his authority when he shot the victim.[257] At this point, the Constitution comes into play. The plaintiffs will argue that the agent's use of lethal force violated their son's Fourth Amendment right to be free from unreasonable seizures[258] and thus exceeded the agent's scope of authority. If the district court agrees with the family that the agent's use of force violated the Constitution, the agent will lose the defense that his authority justified the use of force. Even if an agent acts within the course of his employment, the government cannot authorize

253. *Id.*

254. *Id.*

255. *Id.* at cmt. e.

256. It is worth noting that even if a court determined that Mexico had a more significant relationship to the event giving rise to the claim, the victim's family would still have a cause of action against the Border Patrol agent. The cause of action would simply arise under Mexican law rather than Texas law.

257. *See* Vázquez & Vladeck, *supra* note 27, at 531 (regarding common law claims brought against federal officials, "[i]f the claim was based on the official's conduct in performing his official duties, he could plead justification as a defense, though this defense would fail if he had exceeded his authority. In the United States, federal (as well as state) officials were deemed to have exceeded their authority whenever they violated the Constitution . . . .").

258. U.S. CONST. amend. IV.

violations of the Constitution[259]—at its core, the Bill of Rights is a check on the federal government's power. Accordingly, the common law claim will then proceed against the agent as if he were a private citizen on the ground that the claim is warranted to vindicate the victim's Fourth Amendment rights.

Regardless of whether Texas, Arizona, or Mexico law applies, prior to the enactment of the Westfall Act, the families of victims of cross-border shootings would have had a cause of action to seek redress for the death of their sons. Of course, the fact that the families would have had a common law cause of action in no way guarantees recovery for their claims. The federal defense of qualified immunity for federal agents[260] or the issue of extraterritoriality[261] might bar relief. Nonetheless, the families would have had at least a cause of action, which is much more than they have today. The historical role of state tort law in holding federal officials accountable demonstrates that *Bivens* is not an anomaly. For most of U.S. history, common law acted as a check on the unconstitutional conduct of federal officials. *Bivens* is a continuation of this tradition.

C. The Westfall Act Intended To Preserve Bivens *Claims*

Arguably, the Westfall Act does not completely neutralize state common law tort claims in all contexts as a means to recover for an official's

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259. *See* Vázquez & Vladeck, *supra* note 27, at 531.

260. In *Rodriguez v. Swartz*, the Ninth Circuit articulated the test for whether an official is protected by qualified immunity as "'(1) whether the officer's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident.' A constitutional right is 'clearly established' if 'every reasonable official would have understood that what he is doing violates that right.'" 899 F.3d 719, 728 (2018) (footnotes omitted) (first quoting Castro v. City of L.A., 833 F.3d 1060, 1066 (9th Cir. 2016); and then quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

261. *See generally* Netta Rotstein, Note, Boumediene vs. Verdugo-Urquidez*: The Battle for Control over Extraterritoriality at the Southwestern Border*, 93 WASH. U. L. REV. 1371, 1379–82 (2016) (discussing the Supreme Court's competing precedents of its bright-line approach not to apply the Constitution abroad in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and its more functionalist approach permitting constitutional extraterritoriality in *Boumediene v. Bush*, 553 U.S. 723 (2008)). *Compare* Andrew Kent, *What Happened in* Hernandez v. Mesa*?*, LAWFARE (June 27, 2017, 2:23 PM), https://www.lawfareblog.com/what-happened-hernandez-v-mesa [https://perma.cc/5BM9-9KP2] (arguing that Supreme Court precedent does not support applying the Constitution extraterritorially in *Hernandez v. Mesa*), *with* Steve Vladeck, *Correcting the Record in the* Hernandez *Briefing*, LAWFARE (Dec. 28, 2016, 11:48 AM), https://www.lawfareblog.com/correcting-record-hernandez-briefing [https://perma.cc/X54C-J6P7] (contending that the U.S.–Mexico border is a "gray area . . . over which the United States exercises almost plenary control" and that cross-border shootings present a very narrow application of extraterritoriality, which is supported by *Boumediene v. Bush*).

unconstitutional conduct. If the official's conduct does not fall under one of the FTCA's exceptions barring suit against the official, then a claimant can likely obtain recourse by bringing a state law tort claim that is then transformed into an FTCA claim. Even though the FTCA claim is brought against the government instead of the official directly, the claimant may obtain a damages remedy for the harm suffered. Thus, plausibly, if the agents had shot the victims in Texas and Arizona rather than Mexico, the victims' families would have had viable claims under the Westfall Act. Nonetheless, subjecting all state tort claims to the limitations imposed by the FTCA undermines the common law's historical role as a reliable mechanism to challenge the constitutionality of federal officials' conduct.[262]

The Westfall Act's legislative framework and plain language recognize this. The Act's exception for constitutional torts reflects Congress's intent to supplement common law tort claims with *Bivens* as the principal cause of action for holding federal officials accountable for unconstitutional conduct.[263] In congressional comments accompanying the Westfall Act, Congress noted that "[s]ince the Supreme Court's decision in *Bivens*, the courts have identified [constitutional torts] as a more serious intrusion of the rights of an individual that merits special attention."[264] For this reason, the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights."[265] As recently as 2010, in *Hui v. Castaneda*, even the Supreme Court recognized that the cause of action this exception sought to preserve was *Bivens*, noting that the Westfall Act contains an "explicit exception for *Bivens* claims."[266]

The legislative history of a 1974 amendment to the FTCA reinforces the notion that through the Westfall Act, Congress ratified the *Bivens* cause of action. In 1974, Congress amended the FTCA to create a cause of action directly against the federal government for intentional torts committed by federal law enforcement officers.[267] According to congressional comments, the 1974 amendment enabled victims of constitutional violations arising from intentional torts committed by federal law enforcement officers to "have a

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262. *See* PFANDER, *supra* note 24, at 104 ("[A]fter the Westfall Act, state common law no longer provides litigants with an assured way to test the constitutionality of federal conduct."); Vázquez & Vladeck, *supra* note 27, at 569–70 ("[B]oth substantively and procedurally, the effect of the Westfall Act is to narrow the universe of (and scope of recovery for) tort claims that individuals can pursue for injuries caused by federal officials.").

263. *See* H.R. REP. NO. 100-700, at 6 (1988).

264. *Id.*

265. *Id.*

266. Hui v. Castaneda, 559 U.S. 799, 807 (2010).

267. *See* 28 U.S.C. § 2680(h).

cause of action against the individual Federal agents *and* the Federal Government."[268] Moreover, rather than displace *Bivens*, the "provision should be viewed as a counterpart to the Bivens case and its [progeny]."[269] By passing legislation intended to build upon *Bivens*, Congress indicated its desire to preserve, rather than dispose of, *Bivens*. On two separate occasions, through both the Westfall Act and the 1974 FTCA amendment, Congress seemingly ratified *Bivens* as a remedy congruent to statutory causes of action for holding federal officials accountable for tortious conduct.

The Supreme Court reaffirmed this conclusion in *Carlson v. Green*.[270] Despite the Government's insistence that the plaintiff lacked a *Bivens* claim because a remedy existed under the 1974 amendment to the FTCA, the Court emphasized that nothing in the amendment or its legislative history demonstrated that Congress desired to preempt a *Bivens* remedy.[271] In fact, the Court concluded that "the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."[272] Thus twice, in both *Castaneda* and *Carlson*, the Court acknowledged expressly that the legislative framework has ratified and built upon the *Bivens* action.

The plain language of the Westfall Act supports this interpretation. The statute purports to allow constitutional tort claims to proceed independent of the FTCA and directly against the liable federal official.[273] Yet because the Westfall Act requires that all state law tort claims be brought under the FTCA, such state law causes of action cannot serve the Act's aim of holding federal officials personally liable for constitutional violations.[274] The only way for a constitutional tort claim against a federal official to advance independent of the FTCA is for the claimant to invoke a cause of action distinct from state tort law: a *Bivens* claim. Thus, in the Court's reluctance to run afoul of separation of powers principles, the Court has failed to recognize the legislative framework adopted by Congress, which establishes *Bivens* as the primary vehicle for bringing constitutional tort claims against federal officials.

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268. S. REP. NO. 93-588, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (emphasis added).

269. *Id.*

270. Carlson v. Green, 446 U.S. 14 (1980); *see supra* Part I.B.1.

271. *Carlson*, 446 U.S. at 19–20.

272. *Id.* at 19–20.

273. *See* 28 U.S.C. § 2679(b)(2)(A) (stating that the Westfall Act "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States").

274. *See* § 2679(b)(1)–(2).

The Supreme Court's unfavorable treatment of *Bivens* and its progeny is fundamentally at odds with Congress's apparent steps to ratify and preserve *Bivens*.[275] The Court has seized on the fact that the Westfall Act does not explicitly establish *Bivens* as the cause of action to sue federal officials for constitutional torts, permitting the Court to insist that *Bivens* remains unratified by Congress.[276] Yet analyzing the historical role of state tort law in constitutional torts, in conjunction with the Westfall Act's alteration of the landscape for state tort claims against federal officials, highlights the necessity of preserving *Bivens* as a means to hold federal actors accountable.

D. Preserving Bivens *Is Consistent with the Framers' Intentions*

Surely, the current arrangement for enforcing constitutional rights runs contrary to the intentions of the Framers. In light of the Westfall Act, the Court's gutting of *Bivens* abrogates two essential checks on federal power. From a federalism standpoint, at the time the Constitution was drafted and ratified, state common law provided a robust remedial scheme for imposing a check on federal power.[277] Because state law ensured a guaranteed vehicle for testing the constitutionality of federal conduct, free from the reaches of Congress, it protected against a self-serving federal government seeking to shield itself from liability. The Court's current *Bivens* jurisprudence assigns Congress control of the levers to determine if and when a remedy is available for an official's unconstitutional conduct. Taken to its logical end, under the Court's treatment of *Bivens*, if an official's conduct violates the Constitution, a court is ostensibly powerless to provide a legal remedy unless

275. *See* Pfander & Baltmanis, *supra* note 94, at 135 (noting that the Westfall Act's failure "to provide a clear statement authorizing constitutional suits against the government has proven fatal to their assertion").

276. *See* Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) ("[N]o [congressional] statute expressly creates a *Bivens* remedy."). In *Abbasi*, the Court contrasted *Bivens* claims with claims arising under 42 U.S.C. § 1983, explaining that while § 1983 enabled individuals to bring damages suits against state actors for constitutional violations, Congress has yet to ratify such a cause of action against federal officials. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017).

277. *See* Amar, *supra* note 33, at 1518 ("To give Congress plenary power to nullify any state remedy it disliked would disturb the careful constitutional balance of federalism, and would ultimately imperil individual constitutional liberty by weakening an important check against federal abuse."); *see also* THE FEDERALIST NO. 17 (Alexander Hamilton), https://avalon.law.yale.edu/18th_century/fed17.asp [https://perma.cc/P97Y-MFEA] ("[O]ne [transcendent] advantage belong[s] to the province of the State governments . . . . [They are] the immediate and visible guardian[s] of life and property . . . regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . .").

congressionally authorized to do so, even when no alternative remedy exists.[278]

From a separation of powers angle, the Court appears willing to abdicate its fundamental role of acting as a check on the political branches' exercise of power by declining to remedy intrusions on the rights of private citizens. Since the time of the Framers, the maxim "where there is a legal right, there is also a legal remedy" has been the cornerstone of American jurisprudence.[279] The notion that not all violations of rights are deserving of a remedy eviscerates this foundational principle. Despite its shortcomings, *Bivens* recognized that in a legal system based on laws, when a government official violates the law, turning away a wronged individual empty-handed contravenes the Judiciary's basic responsibility to remedy legal injuries. James Madison envisioned the Judiciary as a "guardian[ ]" of the Bill of Rights that would act as an "impenetrable bulwark against every assumption of power in the Legislative or Executive [and would] be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[280] The Court's hostile treatment of *Bivens* is a wholesale departure from this vision.

CONCLUSION

The inadequacies of the current framework for enforcing constitutional rights are especially pronounced in the context of cross-border shootings. Without *Bivens*, the plaintiffs in *Hernandez* and *Rodriguez* are left unable to vindicate fundamental rights enshrined in the U.S. Constitution—rights against the use of excessive force and the deprivation of life without due

278. Even though not statutorily authorized to do so, it is uncontested that federal courts are empowered to provide equitable relief in the form of injunctions for a federal official's unconstitutional conduct or unconstitutional federal policies. Over the course of the past forty years, during which the Court has eroded *Bivens*, the Court has insisted that because legal remedies might impose a financial burden on the federal government, they are not analogous to equitable remedies and must be authorized by Congress rather than devised by the courts. *See Abbasi*, 137 S. Ct. at 1856. Conversely, Justice Harlan's concurrence in *Bivens* interpreted the power of federal courts to provide equitable remedies as justifying its ability to devise a damages remedy. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 403–04 (1971) (Harlan, J., concurring).

279. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23); *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.").

280. James Madison, House of Representatives (June 8, 1789), *in* 1 THE FOUNDERS' CONSTITUTION 484 (Philip B. Kurland & Ralph Lerner eds., 1986), http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html [https://perma.cc/46A6-S3ZT].

process. As it currently stands, employing *Bivens* as a vehicle to remedy a constitutional violation by a federal official is all but certain to fail. At the same time, the Court's interpretation of the Westfall Act has made it far from clear whether state tort claims retain life in the sphere of constitutional torts independent of the limitations imposed by the FTCA—limitations that bar a wide variety of claimants from any sort of recovery. In a legal system that prides itself on protecting individual liberties, this result is regrettable. Fortunately, this outcome is avoidable. The Supreme Court should revisit its treatment of *Bivens* and the Westfall Act. First, the Court needs to accept that the Westfall Act's exception for constitutional torts ratifies *Bivens* claims as the primary vehicle for challenging the constitutionality of federal officials' conduct. Second, the Court needs to recognize that situating *Bivens* as a continuation of the well-established common law tradition of using state tort claims to hold federal officials constitutionally accountable—a tradition that the Westfall Act has rendered ineffective—justifies reinvigorating *Bivens* as a robust cause of action for constitutional torts against federal officials.