LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 9 FALL 2021 ISSUE 1

LAYING IT ON THE LINE:

HOW *HERNANDEZ V. MESA* NIXED *BIVENS* FOR A TRANSNATIONAL HOMICIDE

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I. INTRODUCTION: NEIGHBORS, WORLDS APART

Two nations: two minds, two bodies, one line.[1] A line that has separated two cultures with different policies, ideologies, economies, governments, strengths, and weaknesses since the mid-1800s.[2] A line that is associated with security and sacrifice, with hope and heartbreak.[3] A line, as it turns out, that means something when it comes to law enforcement action and the application of law.[4]

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[1] *See U.S.–Mexico Border*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/media/tijuana-border-fence/ (last visited Jan. 26, 2021).

[2] *Cf. Treaty of Guadalupe Hidalgo*, BRITANNICA, https://www.britanniaca.com/event/Treaty-of-Guadalupe-Hidalgo (last updated Jan. 26, 2021) ("With this annexation [in 1848], the continental expansion of the United States was completed except for the land added in the Gadsden Purchase (1853).").

[3] *Cf. U.S.–Mexico Border*, *supra* note 1 ("All the border fortification is intended to reduce illegal immigration to the United States from Mexico. Most immigrants who cross the U.S.–Mexico border illegally flee extreme poverty in Mexico. . . Crossing the border near Tijuana–San Diego is dangerous. The crosses in this photograph represent the hundreds of men, women, and children who have died in the area while trying to reach the United States.").

[4] *See infra* Parts IV.A, IV.B.

One such law enforcement action implicated the Mexico–U.S. border in 2010 when a U.S. Border Patrol officer shot and killed a teenage boy, who was a citizen and resident of Mexico, giving rise to *Hernandez v. Mesa*.[5] The officer, claiming he was reacting to being assaulted with rocks during an illegal entry attempt, fired his weapon from U.S. soil at the teenager, who had run from the United States back to the Mexico side of the border.[6] Lacking a statutory claim for the alleged violation of their son's constitutional rights, the teenager's parents relied on a U.S. Supreme Court case that created a cause of action for violations similar to the one in their case, hoping it would equally apply.[7]

That recovery theory, known as the *Bivens* doctrine, was a way to sue federal officials personally for violating constitutional rights in certain circumstances.[8] But the *Bivens* doctrine lacked a precise scope when it first came into being; its borders were amoebic—undefined and ready to absorb anything for food.[9] Indeed, the doctrine behaved as such at the outset as the Supreme Court fed it disanalogous cases and failed to define its shape.[10] It also reaped criticism for defying the separation of powers and having an undesirable effect on the function of law enforcement.[11] But the Court became more sensitive to the roles of the different branches of government and soon began the process of limiting *Bivens*'s application, narrowing its scope drastically over a period of decades.[12] By the time the *Hernandez* lawsuit reached the Supreme Court, *Bivens* jurisprudence had laid out a more defined process for determining when *Bivens* already applied to an action and, if it did not apply, when it should be expanded to cover the new context.[13]

In *Hernandez*, the Court issued a 5–4 decision, ruling that the action was not already covered by *Bivens* and, given the circumstances—namely, implicating the international border between the United States and Mexico—*Bivens*

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[5] *See* Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020).
[6] *Id.*
[7] *See id.*
[8] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).
[9] *See infra* Part II.A.
[10] *See infra* Part II.A.
[11] *See infra* Part II.A.
[12] *See infra* Part II.B.
[13] *See infra* Part II.B.

should not be expanded to cover it.[14] This Note asserts that the Court reached the right conclusion in *Hernandez*, although its arguments were not always impervious to criticism.[15] The *Hernandez* decision was consistent with the Court's pattern of boxing *Bivens* in and it teed *Bivens* up to be jettisoned in the future.[16] Eliminating *Bivens* would be consistent with the separation of powers and *Hernandez* rightly puts the spotlight on Congress to formulate an effective solution.[17]

This Note in Part II looks at the cases that created and molded the *Bivens* doctrine, beginning with the original and expansion cases, then the cases in which a *Bivens* claim was rejected.[18] Part III walks through the factual circumstances that led to the lawsuit, considering both the agent's and the parents' perspectives.[19] Part IV considers, step by step within the *Bivens* framework, the arguments the majority made for the proposition that *Hernandez* did not warrant a *Bivens* remedy and the arguments the dissent made against that proposition.[20] Part IV also analyzes the concurrence's contention that the *Bivens* doctrine should be retired.[21] Part V contemplates the legal and practical effects *Hernandez* will have and what might happen if the *Bivens* doctrine were to be retired, as the concurrence advocated.[22] Part VI concludes by exhorting Congress to deliberate on the direction *Bivens* remedies are heading and to decide whether to allow that type of lawsuit by enacting legislation.[23]

II. HISTORICAL BACKGROUND: AN IMPLIED CAUSE OF ACTION FOR EXPRESS RIGHTS

[14] *See infra* Parts IV.A, IV.B.
[15] *See infra* Part IV.
[16] *See infra* Part IV.
[17] *See infra* Part IV.C.
[18] *See infra* Part II.
[19] *See infra* Part III.
[20] *See infra* Parts IV.A, IV.B.
[21] *See infra* Part IV.C.
[22] *See infra* Part V.
[23] *See infra* Part VI.

When *Bivens* remedies were created, they provided a way for plaintiffs to recover damages from federal officials who violated their Fourth Amendment rights.[24] Two cases after *Bivens* extended that remedy to certain Fifth and Eighth Amendment claims.[25] Due, in part, to concerns that the judiciary was performing a legislative function by expanding *Bivens* remedies, the Supreme Court began narrowing down *Bivens*'s applicability, developed a more specific method to analyze requests for *Bivens* relief, and did not extend *Bivens* to any case that reached the Court thereafter.[26]

A. CONCEPTION AND EARLY EXPANSION OF THE BIVENS DOCTRINE

In 1946, the Supreme Court in *Bell v. Hood* left open the question of whether a Fourth Amendment violation by a federal officer acting in the performance of the officer's duties necessarily provides grounds for a damages suit.[27] Federal tort lawsuits, which used to be the primary method of recovery against federal officials, had become a thing of the past following *Erie R. Co. v. Tompkins*.[28] Twenty-five years later, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court answered *Bell*'s question in the affirmative.[29] In *Bivens*, federal agents entered the plaintiff's home in New York with neither a warrant nor probable cause, thoroughly searched the home, and arrested the plaintiff for violations related to narcotics.[30] In deciding to find an implied damages remedy for the constitutional violation, the Court considered both the history of according damages for violating personal liberty and its holding from *Bell* that "where legal rights have been invaded, and a

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[24] *See infra* Part II.A.
[25] *See infra* Part II.A.
[26] *See infra* Part II.B.
[27] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (citing Bell v. Hood, 327 U.S. 678 (1946)). The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.
[28] Hernandez v. Mesa, 140 S. Ct. 735, 748 (2020).
[29] *Bivens*, 403 U.S. at 389. For a discussion on the history of civil liability for federal officers, see *Hernandez*, 140 S. Ct. at 748.
[30] *Bivens*, 403 U.S. at 389.

federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[31] The Court also noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress" and that the plaintiff lacked other possible remedies for his harm.[32] The concurring opinion expounded on this point, explaining that for Bivens, "it [was] damages or nothing."[33] However, the Court did not explain what it meant by "special factors counseling hesitation," only suggesting that "dealing with a question of 'federal fiscal policy'" or total absence of a constitutional violation might qualify.[34] The effect of the case was that plaintiffs could seek damages against federal agents personally for warrantless searches and arrests in violation of the Fourth Amendment if no factors counseled hesitation and the plaintiff had no alternate remedy.[35]

Three dissenting opinions highlighted various concerns.[36] Justice Burger's concern was that the majority's ruling was out of line with the separation of powers doctrine.[37] In Justice Black's dissent, he noted that Congress had already made a remedy for similar causes of action against state officials and stated that Congress could do the

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[31] *Id.* at 395–96 (quoting *Bell*, 327 U.S. at 684). However, the Court clearly recognized that there was no such federal statute here, instead justifying the creation of the remedy by Congress's silence. *Id.* at 397 ("For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents . . .").

[32] *Id.* at 396–97. The latter came down to a question of whether a plaintiff in an action for federal agents violating Fourth Amendment rights "[was] entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* at 397 (citing J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Jacobs v. United States, 290 U.S. 13, 16 (1933)).

[33] *See id.* at 410 (Harlan, J., concurring).

[34] *See id.* at 396–97 (majority opinion).

[35] *See id.* at 397.

[36] *See, e.g.*, *id.* at 411 (Burger, J., dissenting).

[37] *See id.* at 411–12. *See generally* Robert Longley, *Separation of Powers*, THOUGHTCO, https://www.thoughtco.com/separation-of-powers-3322394, (last updated Apr. 5, 2020) (providing an overview of the powers of each branch of the government and the doctrine of separation of powers). Justice Burger opined that this decision was the work of the legislative branch, something the judiciary was ill equipped to do. *See Bivens*, 403 U.S. at 411–12 (Burger, J., dissenting). Justice Black also believed creating the availability of this remedy was outside the powers of the judiciary. *See id.* at 427–28 (Black, J., dissenting).

same for federal officials if it believed such legislation was prudent.[38] Meanwhile, Justice Blackmun made the point that the effect this ruling would have on law enforcement—that proper enforcement would be "stultif[ied]"—was a factor that counseled hesitation.[39]

The *Bivens* decision could reasonably have been interpreted more narrowly since the Court specifically provided the remedy for Fourth Amendment violations.[40] However, the *Bivens* Court did not explicitly limit its decision to Fourth Amendment violations; thus, it left the door wide open for a Court that apparently believed fashioning remedies was more important than the concerns flagged by the dissenters.[41]

Over the ensuing nine years, cases involving this new *Bivens* claim reached the Supreme Court twice.[42] First, in *Davis v. Passman*, a Fifth Amendment due process claim arose after a congressman wrongfully terminated a deputy administrative assistant on the basis of sex.[43] In *Davis*, the

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[38] *See Bivens*, 403 U.S. at 427–28 (Black, J., dissenting). *See generally* 42 U.S.C. § 1983 (2018) (creating personal liability for state officials who violate constitutional rights).

[39] *See Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting) ("[Allowing suspects to sue federal officers in federal court] will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical.").

[40] *See id.* at 397 (majority opinion) ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." (citation omitted)).

[41] *See* Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) (quoting J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969); Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969)) ("In the decade preceding *Bivens*, the Court believed that it had a duty 'to be alert to provide such remedies as are necessary to make effective' Congress'[s] purposes in enacting a statute. Accordingly, the Court freely created implied private causes of action for damages under federal statutes." (internal quotations omitted)).

[42] *See* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979).

[43] *Davis*, 442 U.S. at 231. The Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. This Due Process Clause contains within it a guarantee of equal protection of the laws, so a government official firing someone on the basis of sex would violate due

Court reasoned that where there was no "'textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' we presume that justiciable constitutional rights are to be enforced through the courts."[44] Following *Bivens*, the Court held that the plaintiff had no other remedy available to her and that some factors did counsel hesitation in that context, but countervailing interests overrode them.[45] The Court thus allowed for the plaintiff to seek a damages remedy under *Bivens* against the (then-former) congressman for alleged wrongful termination based on sex in violation of Fifth Amendment due process.[46]

Multiple dissenting opinions again followed this decision.[47] Notably, Justice Burger once more expressed his belief that this action by the Court "encroache[d] on that barrier" of separation of powers.[48] Justice Powell was also concerned about the separation of powers but wrote separately to criticize the majority's method of applying *Bivens*, calling it "not an exercise of principled discretion."[49]

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process by failing to afford that equal protection. *See Davis*, 442 U.S. at 235.

[44] *Davis*, 442 U.S. at 242 (alteration in original) (citation omitted) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[45] *See id.* at 245–46. The Court did not name what those factors were, allowing the idea of factors counseling hesitation to remain clouded. *See id.* at 246.

[46] *See id.* at 248–49.

[47] *See, e.g.*, *id.* at 249 (Burger, J., dissenting). Justice Stewart's dissent was the least notable, as he dissented on the grounds that the case presented a separate dispositive issue that should have been ruled on before addressing damages. *Id.* at 251 (Stewart, J., dissenting) (stating that the case presented a Speech and Debate Clause issue which may have granted the defendant immunity).

[48] *Id.* at 250. Justices Powell and Rehnquist agreed with this assertion. *See id.* at 249.

[49] *Id.* at 254 (Powell, J., dissenting). Justice Rehnquist also joined this opinion. *Id.* at 251. Justice Powell used the words of Justice Harlan's concurrence from *Bivens* to set up this point:

> [T]he exercise of this responsibility [(inferring private causes of action from the Constitution)] involves discretion, and a weighing of relevant concerns. . . . [A] court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."

Id. at 252 (last alteration in original) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring)).

These problems again took a back seat to the Court's desire to create remedies, while the opinion failed to clarify how far *Bivens* could reach and what it meant to have a factor counseling hesitation.[50]

Following that decision, *Carlson v. Green* took up the question of whether *Bivens* should apply in yet another set of circumstances, in an Eighth Amendment cruel and unusual punishment claim.[51] The plaintiff in *Carlson* was the mother of a federal prisoner who died as a result of a health emergency during which prison hospital staff provided inadequate medical treatment.[52] There, the Court curiously altered the character of a *Bivens* claim analysis by stating that such claims "may be defeated in a particular case . . . . [W]hen defendants demonstrate 'special factors [counseling] hesitation in the absence of affirmative action by Congress'"[53] or, alternatively, "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[54] What changed was that, by its language, the Court seemingly presumed a *Bivens* claim would be proper, shifting the burden to the defendant to defeat it.[55] It also narrowed the definition of what qualified as an alternative remedy—suddenly some *Bivens* claims could be brought even if a remedy already existed, as long as Congress had not expressly stated the remedy stood in place of *Bivens*.[56] The

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[50] *See id.* at 246–49 (majority opinion).

[51] *See* Carlson v. Green, 446 U.S. 14, 16–17 (1980). The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[52] Green v. Carlson, 581 F.2d 669, 671 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980).

[53] *See Carlson*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396) (citing *Davis*, 442 U.S. at 245).

[54] *Id.* at 18–19 (citing *Davis*, 442 U.S. at 245–47; *Bivens*, 403 U.S. at 397).

[55] *See id.* at 26 (Powell, J., concurring) (lamenting the lack of "principled discretion" and stating: "Today we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' . . . .").

[56] *See id.* at 26–27.

> *Bivens* recognized that implied remedies may be unnecessary when Congress has provided "equally effective" alternative remedies. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are

Court found no factors counseled hesitation,[57] and failed again to define what a factor counseling hesitation was.[58] As for the remedies analysis, the Court held that while the plaintiff had an adequate remedy through the Federal Tort Claims Act (FTCA), Congress had not "explicitly stat[ed]" that the FTCA precluded plaintiffs from bringing *Bivens* claims.[59] Extending the *Bivens* claim to this new context, the Court stated that federal officials should be aware they may face *Bivens* suits for their misconduct just as state officials should be aware they may face lawsuits under 42 U.S.C. § 1983 for their illegal actions.[60]

While seven Justices ultimately approved of the judgment, four Justices, in a concurrence and two dissents, expressed grief with the majority's reckless expansion of the *Bivens* doctrine.[61] Justice Rehnquist, dissenting, took issue with *Bivens* itself and again raised the separation of powers problem.[62] In his view, "*Bivens* [was] a decision 'by a closely divided court, unsupported by the confirmation of time,' and, as a result of its weak precedential and doctrinal foundation, it [could not] be viewed as a check on 'the living process of

> adequate alternative avenues of relief. . . . These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

Id. (quoting *Bivens*, 403 U.S. at 397) (citing *Davis*, 442 U.S. at 248); *see also id.* at 31 (Burger, J., dissenting) ("Until today, I had thought that *Bivens* was limited to those circumstances in which a civil rights plaintiff had no other effective remedy." (citing *Bivens* 403 U.S. at 410 (Harlan, J., concurring); *Davis*, 442 U.S. at 245 & n.23)).

[57] *Id.* at 19 (majority opinion).

[58] *Id.* at 27 (Powell, J., concurring).

[59] *Id.* at 19–20 (majority opinion).

[60] *Id.* at 25 (quoting Robertson v. Wegmann, 436 U.S. 584, 592 (1978)).

[61] *See id.* at 26–27 (Powell, J., concurring); *id.* at 30 (Burger, J., dissenting); *id.* at 33 (Rehnquist, J., dissenting). Justice Burger concluded that "in future cases the Court will be obliged to retreat from the language of today's decision." *Id.* at 31 (Burger, J., dissenting).

[62] *Id.* at 34–35 (Rehnquist, J., dissenting) ("[T]he Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress, when the latter created a damages remedy for individuals whose constitutional rights had been violated by state officials and separately conferred jurisdiction on federal courts to hear such actions." (citations omitted) (citing Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979))).

striking a wise balance between liberty and order.'"[63] Justice Burger dissented because of the way the Court changed the analysis for the existing remedies factor.[64] Justice Powell's concurrence, with Justice Stewart joining, voiced the same type of criticism but joined the judgment out of a conviction that state and federal officials should be subject to the same liability for the same wrongdoing.[65] So *Bivens* remedies continued to be a sharply divided issue.[66]

At this point in the *Bivens* history, a claim involving a constitutional violation by a federal official would presumably be heard under *Bivens* unless the defendant either identified special factors counseling hesitation—which had yet to be defined—or identified an "equally effective" remedy that Congress enacted with the express purpose of replacing a remedy "directly under the Constitution."[67] This application and reckless treatment, however, would not last long.[68]

B. REVERSING COURSE

Starting in 1983 and continuing through 2017, the Supreme Court went through a process of reining *Bivens* in by denying its extension to each of the nine cases it heard that sought a *Bivens* remedy.[69] The Court leaned on three

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[63] *Id.* at 32 (quoting Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring)) (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–33 (1928) (Holmes, J., dissenting); Hudgens v. NLRB, 424 U.S. 507 (1976)).

[64] *Id.* at 30 (Burger, J., dissenting) ("The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.").

[65] *Id.* at 25, 30 (Powell, J., concurring).

[66] *See supra* text accompanying notes 36–65.

[67] *Id.* at 18–19 (majority opinion) (citing Davis v. Passman, 442 U.S. 228, 245–47 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)).

[68] *See infra* Part II.B.

[69] *See* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1863–64 (2017); Minneci v. Pollard, 565 U.S. 118 (2012); Wilkie v. Robbins, 551 U.S. 537 (2007); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); FDIC v. Meyer, 510 U.S. 471 (1994); Schweiker v. Chilicky, 487 U.S. 412 (1988); United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983)) ("[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*.").

prevailing reasons for denying *Bivens* in these cases[70]: (1) special factors counseled hesitation, [71] (2) some other form of process was available to the plaintiff, [72] and (3) the defendant was not a party that *Bivens* was intended to support action against.[73] To illustrate this third reason, in *FDIC v. Meyer*[74] the Court explained that "the purpose of *Bivens* is to deter *the officer*" from unlawful conduct, and bringing a *Bivens* action against a federal agency would defeat that purpose by failing to hold the individual officer accountable.[75] Thus, actions against federal agencies, corporate defendants, and federal officers whose subordinates' actions caused the harm

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[70] *See infra* text accompanying notes 71–73. Some of the cases fit into more than one of these categories. *See infra* notes 71–73 and accompanying text.

[71] *See Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74) (holding that *Bivens* was not to be used to bring about a change in policy); *Meyer*, 510 U.S. at 486 (holding that "creating a potentially enormous financial burden for the Federal Government" counseled hesitation); *Stanley*, 483 U.S. at 681–82 (holding that "the insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches" counseled hesitation); *Chappell*, 462 U.S. at 300, 304 (citing military discipline and Congress's constitutional authority to regulate the military justice system); *Bush*, 462 U.S. at 389 (citing the effect such lawsuits could have on federal employees' supervisors' willingness to enforce what they believe to be proper discipline measures). The Court specifically stated in *Stanley* that the fact that the plaintiff had no other remedy available to him was irrelevant because "congressionally uninvited intrusion into military affairs by the judiciary [was] inappropriate." *Stanley*, 483 U.S. at 683.

[72] *See Abbasi*, 137 S. Ct. at 1863 (habeas corpus); *Minneci*, 565 U.S. at 131 (state law afforded the plaintiff the opportunity to bring action against the defendant as a private employee); *Wilkie*, 551 U.S. at 553–54 (administrative and judicial processes for each complaint); *Malesko*, 534 U.S. at 72–73 (the option to bring a negligence claim instead); *Schweiker*, 487 U.S. at 417, 424–25 (1988) (an elaborate system for appeals and retroactive payments); *Chappell*, 462 U.S. at 303 (Board for the Correction of Naval Records, having power to grant backpay and retroactive promotion); *Bush*, 462 U.S. at 387–88 (Civil Service Commission and appeals processes).

[73] *See Abbasi*, 137 S. Ct at 1860 (citing Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (officers should not be responsible for the acts of their subordinates); *Malesko*, 534 U.S. at 63, 71 (corporate defendant providing services under contract with a federal agency); *Meyer*, 510 U.S. at 485 (federal agency as defendant).

[74] *Meyer*, 510 U.S. at 473. *Meyer* was a case where a manager of a failed thrift institution sued the corporation that fired him when the California Savings and Loan Commissioner seized his business and assigned that corporation as its receiver. *See id.*

[75] *Meyer*, 510 U.S. at 485 (citing Carlson v. Green, 446 U.S. 14, 21 (1980)).

were held to be outside *Bivens*'s scope.[76]

During this period, *Bivens* experienced a number of significant changes.[77] For one, the role of the availability of other forms of process became muddled as the Court departed from considering it separately, instead mixing it in with the special-factors analysis (as evidence that Congress had deliberately provided for those remedies and no others).[78] However, throughout *Bivens*'s progression, the availability of other remedies remained significant enough that it recaptured its separate role as a threshold issue.[79] Another important development in the law over this period was the Court characterizing the special-factors inquiry as "considering whether there are reasons for allowing Congress to prescribe the scope of relief that is made available."[80] For example, in its special-factors analysis in *United States v. Stanley*, the Court ruled that *Bivens* claims by servicemembers were precluded if the conduct was "incident to service" because the Constitution provided that

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[76] *See Abbasi*, 137 S. Ct at 1869; *Malesko*, 534 U.S. at 74; *Meyer*, 510 U.S. at 486.

[77] *See infra* text accompanying notes 78–86.

[78] *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("[T]he concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

[79] *Cf., e.g.*, Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983) ("[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" (citation omitted))).

[80] *Bush*, 462 U.S. at 380. Following this type of analysis, the Court believed Congress should be the one to create the remedy. *Id.* at 388–90 (quoting United States v. Standard Oil Co. of Cal., 332 U.S. 301, 302 (1947)) ("[W]e decline 'to create a new substantive legal liability without legislative aid and as at the common law' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." (citation omitted)).

Congress would have the power to govern and regulate the military.[81] Finally, the Court had shined some light on the special factors inquiry.[82]

More notably, as early as 1988, the Court began to recognize that it felt apprehension when considering expanding *Bivens*.[83] In the midst of that, the Court developed a means of identifying what cases *Bivens* already applied to and where *Bivens* required an extension, utilizing the idea of "context" to make that determination.[84] In 2017, *Ziglar v. Abbasi* defined "new context" to mean "the case is different in a meaningful way from previous *Bivens* cases decided by this Court," and it offered numerous suggestions that would indicate how a case might differ in a meaningful way.[85] Context became a considerable part of the analysis in *Abbasi*, constituting the first of two prongs in the analysis to decide if a case warranted the *Bivens* remedy.[86]

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[81] United States v. Stanley, 483 U.S. 669, 681–82 (1987).

[82] *See supra* text accompanying notes 80–81.

[83] *Schweiker*, 487 U.S. at 421 ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.").

[84] *See* Meg Green, Comment, *Standing on the Wrong Side:* Hernandez v. Mesa *and* Bivens *Remedies in the Context of Cross-Border Shootings by Federal Law Enforcement*, 61 B.C. L. REV. (ELECTRONIC SUPPLEMENT) II.-18, II.-24 to -25 (2020).

[85] Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017). This non-exhaustive list included:

> [T]he 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.

Id. at 1860.

[86] *Cf. Abbasi*, 137 S. Ct. *passim*. All of the opinions of *Abbasi* made use of the word "context" fifty times combined, compared to fifty-eight times total in the previous eleven cases. *See id. passim*; Minneci v. Pollard, 565 U.S. 118, 127 (2012) (twice); Wilkie v. Robbins, 551 U.S. 537, 575 (2007) (Ginsburg, J., concurring) (once); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 *passim* (2001) (eight times); FDIC v. Meyer, 510 U.S. 471 *passim* (1994) (six times, including footnotes); *Schweiker*, 487 U.S. *passim* (seventeen times); *Stanley*, 483 U.S. *passim* (fourteen times, including footnotes); Chappell v. Wallace, 462 U.S. 296, 301 (1983) (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981)) (once); Bush v. Lucas, 462 U.S. 367,

The *Abbasi* decision was the most recent Supreme Court ruling on a *Bivens* claim prior to *Hernandez*, giving the *Hernandez* Court the framework it would operate within.[87] At this point, the alternative remedies issue stood essentially as a threshold requirement, acting as a roadblock to *Bivens* remedies where the plaintiff had another method of relief.[88] A case would undergo a two-prong analysis in determining whether to grant the remedy.[89] First, a case that fell within a previously recognized *Bivens* context may proceed, but a case that presented a new context (i.e., was different in a meaningful way) was required to undergo the next stage of analysis before *Bivens* would apply.[90] In that next stage, a case involving special factors that counseled hesitation would not be allowed to proceed, but a case where no factors counseled hesitation would be heard on the merits (presuming there were no other challenges).[91] This second prong was critical to respect the separation of powers.[92]

Thus, in the years following *Bivens*'s expansion, the Court dramatically reduced the vagueness surrounding *Bivens* by providing more definition and substantially whittled it down so it no longer seemed as imposing as had

372 (1983) (once); Carlson v. Green, 446 U.S. 14 *passim* (1980) (six times, including footnotes); Davis v. Passman, 442 U.S. 228, 253 n.2 (1979) (Powell, J., dissenting) (once); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Burger, J., dissenting) (once).

[87] *See* Hernandez v. Mesa, 140 S. Ct 735, 740 (2020).

[88] *Cf. Abbasi*, 137 S. Ct. at 1858 (quoting *Wilkie*, 551 U.S. at 550) ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that itself may 'amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" (second and third alterations in original)).

[89] *See infra* text accompanying notes 90–91.

[90] *See Abbasi*, 137 S. Ct. at 1856, 1860.

[91] *See id.* at 1857–58 ("[T]he Judiciary [must be] well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.").

[92] *See id.* at 1858 ("In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, 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.").

been.[93] And with that, the legal stage was set for *Hernandez*.[94]

III. FACTS: WHERE *BIVENS* MET BORDERS

Sergio Hernandez was a citizen of Mexico living in Ciudad Juarez, near the Mexico–U.S. border, in 2010.[95] A dry, concrete culvert divided Ciudad Juarez from El Paso, Texas, and the border separating the countries went down the center of it.[96] The only physical indicators of the border were the fences on either side of the culvert.[97] Hernandez's family said that at the time of the incident, fifteen-year-old Hernandez and his friends were playing a game where they would start at the fence at the top of the culvert on the Mexico side of the border, run across the culvert, touch the fence on the U.S. side of the culvert, and run back.[98] Jesus Mesa was an agent for the U.S. Customs and Border Protection Agency (CBP) assigned to patrol the border and apprehend people illegally entering the United States.[99] Mesa said that Hernandez and his friends were attempting to illegally enter the United States and that they started throwing rocks at him.[100] Mesa detained one of the friends and Hernandez ran back to the Mexico side.[101] While Hernandez was across the border, Mesa shot at Hernandez twice, hitting him once and killing him.[102]

At the time he shot, Mesa did not know for certain what nationality Hernandez was.[103] The Department of Justice investigated the incident and, in deciding not to take any action against Mesa, concluded that he had acted within the bounds of his training and CBP policy.[104] The United States subsequently refused Mexico's request to extradite

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[93] *See supra* text accompanying notes 69–85.
[94] *See supra* text accompanying note 87.
[95] Hernandez v. Mesa, 140 S. Ct. 735, 740, 753 (2020).
[96] *Id.* at 740.
[97] *Id.* at 753.
[98] *Id.* at 740.
[99] *Id.* at 740, 746.
[100] *Id.* at 740.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 753.
[104] *Id.* at 740.

Mesa for criminal prosecution.[105]

With no other legal recourse, Hernandez's parents brought a civil claim against Mesa under *Bivens*, seeking damages for the alleged violation of Hernandez's Fourth and Fifth Amendment rights.[106] The District Court for the Western District of Texas dismissed the claim, and the Fifth Circuit Court of Appeals affirmed.[107] The Supreme Court first vacated the judgment and remanded for the circuit court to consider the Court's recent *Abbasi* decision in its analysis.[108] The circuit court again dismissed the claim because it found the case presented a new context and multiple factors counseled against extending *Bivens* to it.[109] The Supreme Court then took up the case for final disposition and affirmed the circuit court's decision.[110]

IV. ANALYSIS: CONTEXTS AND FACTORS

The Court first addressed the issue of whether *Hernandez*'s circumstances presented a new context that had not yet qualified for a *Bivens* remedy.[111] The Court correctly held that it was a new context, and proceeded to answer the question of whether there were special factors counseling hesitation before extending *Bivens*.[112] The Court's decision that there were such factors was the right conclusion based on the jurisprudence, and the subsequent denial of the *Bivens* remedy was thus proper.[113] The concurrence asserted that *Bivens*'s foundation has been profoundly weakened and that the doctrine should be done away with.[114] The rationale supporting that assertion is strong, especially when considering the government's fundamental separation of powers.[115]

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[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 741.
[110] *Id.*
[111] *See infra* Part IV.A.
[112] *See infra* Parts IV.A, IV.B.
[113] *See infra* Part IV.B.
[114] *See infra* Part IV.C.
[115] *See infra* Part IV.C.

A. WAS *HERNANDEZ* A NEW CONTEXT FOR *BIVENS*?

1. ARGUMENTS

Characterizing the concept of a new context as "broad," the majority relied heavily on *Abbasi*'s contributions to "context" to deduce that the plaintiffs' claim was, indeed, a new context.[116] Even though the lawsuit came under amendments to the Constitution that had served as the basis for previously sustained *Bivens* actions—the Fourth Amendment (in *Bivens* itself) and the Fifth Amendment (in *Davis v. Passman*)—the majority accurately pointed out that claims under the same amendment may still present different contexts.[117] In its contexts analysis, the majority described the original *Bivens* context as an "allegedly unconstitutional arrest and search carried out in New York City" and the *Davis* context as an "alleged sex discrimination on Capitol Hill," and held that those were different in a meaningful way from Hernandez's "cross-border shooting claims" at the Mexico–U.S. border.[118] The majority did not expound on the meaning of "different in a meaningful way" and did not add much explanation to its decision here, only citing "the risk of disruptive intrusion by the Judiciary into the functioning of other branches"—one of the suggestions from *Abbasi*'s "meaningful difference" list.[119] With that, the majority concluded "[t]here [was] a world of difference between those claims," and that it was "glaringly obvious" *Hernandez* presented a new context.[120]

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[116] *See* Hernandez v. Mesa, 140 S. Ct. 735, 743–44 (2020).

[117] *See id.* at 743 (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71–74 (2001); Carlson v. Green, 446 U.S. 14, 16–18 (1980)); Davis v. Passman, 442 U.S. 228, 231 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). *Carlson* and *Malesko* both arose under the Eighth Amendment, but *Carlson* was allowed the *Bivens* claim and *Malesko* was not. *Hernandez*, 140 S. Ct. at 743.

[118] *See Hernandez*, 140 S. Ct. at 744 (citing *Davis*, 442 U.S. at 230; *Bivens*, 403 U.S. at 389).

[119] *See id.* at 743–44 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017); *supra* note 85.

[120] *See Hernandez*, 140 S. Ct. at 743–44. However, the Court discussed in more detail the idea of intrusion on other branches' territory in its special-factors analysis. *See id.* at 744–45. In *Abbasi*'s application of the "different in a meaningful way" concept, the Court similarly neglected to explain how the framework it had just set out distinguished *Abbasi* from previous

Unsurprisingly, the dissent argued that the plaintiffs' claim fell squarely within the same context as *Bivens* itself.[121] The dissent reached this conclusion by drawing the lines of *Bivens*'s context more broadly than the majority did—as a case involving a rogue officer using unreasonable force to effect an unreasonable seizure[122]—and thereby worked under a narrower concept of what a new context was than the majority did.[123] Confronting the issue of the transnational nature of the incident, the dissent believed it "should not matter one whit" since the deterrent purpose of the *Bivens* doctrine would still be served.[124] In support of this assertion, the dissent signaled to Mesa's concession at oral argument that the claim would have been valid if Hernandez had been shot on the United States side of the border.[125] But each of the dissenters ' arguments missed the

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successful *Bivens* cases and concluded that they "[bore] little resemblance" to each other. *See Abbasi*, 137 S. Ct. at 1860.

[121] *See Hernandez*, 140 S. Ct. at 756 (Ginsburg, J., dissenting). Neither Justice Alito's nor Justice Ginsburg's opinion attempted to compare *Hernandez* to the third affirmative Supreme Court *Bivens* case, *Carlson*, during this part of the analysis. *See id.* at 743–44, 756–57. This was most likely because *Carlson* was an Eighth Amendment claim, whereas *Hernandez* was based on the Fourth and Fifth Amendments, and one way a case may arise in a new context is if the rights that are allegedly violated are different from those of any other previous *Bivens* cases successfully litigated at the Supreme Court level. *See Abbasi*, 137 S. Ct. at 1860.

[122] *See Hernandez*, 140 S. Ct. at 753–54, 756 (Ginsburg, J., dissenting) ("Rogue U.S. officer conduct falls within a familiar, not a 'new,' *Bivens* setting.").

[123] *Cf. id.* at 743–44 (majority opinion) (warrantless search and arrest).

[124] *Id.* at 756 (Ginsburg, J., dissenting). However, the purpose of this part of the analysis is not to determine whether *Bivens*'s purposes are being fulfilled, but rather to keep *Bivens* in check. *See, e.g.*, *id.* at 739 (majority opinion) ("[T]he Constitution's separation of powers requires us to exercise caution before extending *Bivens* to a new 'context.'"); *Abbasi*, 137 S. Ct. at 1848 ("*Bivens* is well-settled law in its own context, but expanding the *Bivens* remedy [to new contexts] is now considered a 'disfavored' judicial activity." (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

[125] *Hernandez*, 140 S. Ct. at 756 (Ginsburg, J., dissenting). That the party conceded that point, though, does not make it a legal truth; there may be arguments to be made for that point but the party might have chosen the strategy to concede in order to highlight the existence of an international border as the distinguishing circumstance. *Cf.* Amy Larson, *4 Important Insights for a Strong Litigation Strategy and How to Easily Attain Them*, ABOVE THE LAW (Sept. 21, 2018, 1:42 PM), https://abovethelaw.com/small-firm-center/2018/09/4-important-insights-for-a-strong-litigation-strategy-and-how-to-easily-attain-them/ ("What all judges want is for attorneys to

mark.[126]

2. VERDICT

Overall, the majority's characterization of the *Bivens*, *Davis*, and *Hernandez* contexts was closer to recent precedent than the dissent's.[127] To illustrate: in *Abbasi*'s context analysis, the Court was fairly specific, describing *Bivens* as "a claim against FBI agents for handcuffing a man in his own home without a warrant."[128] Comparing that to the *Hernandez* majority describing it as an "allegedly unconstitutional arrest and search carried out in New York City,"[129] it becomes clear that the dissent's description, "[r]ogue U.S. officer conduct," was extremely broad.[130] Moreover, the dissent utilized a statement from *Abbasi*—that the "opinion [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"—and interpreted it to mean that *Bivens*'s context was a broad search-and-seizure-by-law-enforcement context.[131] This was a misinterpretation.[132] For perspective, the *Abbasi* Court followed up its statement with a more precise description of

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make it as uncomplicated as possible for them to rule on a case. . . . [M]ake sure your strategy includes how to distinguish your case from those they've ruled on previously.").

[126] *See infra* Part IV.A.2.

[127] *See infra* text accompanying notes 128–135.

[128] *See Abbasi*, 137 S. Ct. at 1860 (citing Chappell v. Wallace, 462 U.S. 296 (1983)*; Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971)). The Court in *Abbasi* was also specific with its description of *Carlson* as "a claim against prison officials for failure to treat an inmate's asthma" and of *Davis* as "a claim against a Congressman for firing his female secretary," rather than broad cruel and unusual punishment or due process violations. *See id.* *Note that the Court erroneously cited to *Chappell* instead of *Carlson*, as the Court was describing the three approved *Bivens* contexts, which *Chappell* was not one of. *See id.*; *supra* Part II.A.

[129] *Hernandez*, 140 S. Ct. at 744 (majority opinion) (citing *Bivens*, 403 U.S. at 389).

[130] *See id.* at 753 (Ginsburg, J., dissenting).

[131] *Cf. id.* at 756 (quoting *Abbasi*, 137 S. Ct. at 1856, 1877) ("*Abbasi* acknowledged the 'fixed principle' that plaintiffs may bring *Bivens* suits against federal law enforcement officers for 'seizure[s]' that violate the Fourth Amendment." (alteration in original) (quoting *Abbasi*, 137 S. Ct. at 1877)).

[132] *See infra* text accompanying notes 133–135.

the context than that.[133] That precise description grants credence to the idea that the Court meant to preserve *Bivens* actions for the *specific* context that *Bivens* presented within the search-and-seizure realm.[134] Certainly, one search-and-seizure case could be different in a meaningful way from another.[135]

While the majority accurately defined the contexts, its holding that this context was different in a meaningful way, and thus a new context, lacked detailed explication.[136] But there were considerations the majority could have brought up to bolster its holding, including the potential effect on foreign relations.[137] Additionally, whereas the dissent pointed out that lethal force may constitute an unreasonable seizure in the right circumstances,[138] the majority could have used the application of lethal force to show how the official in *Hernandez* operated under a different "statutory or other legal mandate" (from *Abbasi*'s meaningful difference list) since the officials in *Bivens* did not employ lethal force.[139] Otherwise, the majority could have attempted to call upon other significant legal principles or facts that were implicated in *Hernandez* and not in *Bivens* or *Davis*.[140] For instance, this could have been: the officers'

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[133] *See supra* text accompanying note 128.

[134] *See supra* text accompanying note 128. This viewpoint was advocated in many concurring opinions in this line of cases, that "*Bivens* and its two follow-on cases . . . [should be limited] to the precise circumstances that they involved." *See Abbasi*, 137 S. Ct at 1870 (Thomas, J., concurring) (quoting Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring)); Minneci v. Pollard, 565 U.S. 118, 131–32 (2012) (Scalia, J., concurring) (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)); *Wilkie*, 551 U.S. at 568 (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)); *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) ("The dissent is doubtless correct that a broad interpretation of its rationale *would* logically produce such application, but I am not inclined (and the Court has not been inclined) to construe *Bivens* broadly.").

[135] *See supra* note 85 and accompanying text.

[136] *See Hernandez*, 140 S. Ct. at 743–44 (majority opinion).

[137] *Cf. id.* at 744 ("[M]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting Haig v. Agee 453 U.S. 280, 292 (1981))). This factor was discussed at length in the next part of the analysis, the special factors inquiry. *See id.* at 744–45.

[138] *See id.* at 756 (Ginsburg, J., dissenting) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

[139] *See Abbasi*, 137 S. Ct. at 1859.

[140] *See, e.g.*, *infra* notes 141–144.

use of self-defense,[141] homicide versus warrantless search and seizure and wrongful termination of employment,[142] the officers' likely levels of premeditation or otherwise their mental states at the time of the incident,[143] or the Department of Justice's investigation and conclusion that Mesa had done no wrong.[144] Using any of the preceding ideas would have reinforced the majority's argument and explained why it thought *Hernandez* was so different from *Bivens* and *Davis*, reducing some of the criticism that the Court was making arbitrary rulings.[145]

The conclusion here is that *Hernandez* did present a new context, even though the majority did not fully explain why.[146] Thus, a special-factors analysis was required to determine whether the Court should have extended a *Bivens*

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[141] *See Hernandez*, 140 S. Ct. at 740 (majority opinion) ("According to Agent Mesa, Hernández and his friends were involved in an illegal border crossing attempt, and they pelted him with rocks."); Hernandez v. Mesa, 885 F.3d 811, 822 n.22 (5th Cir. 2018) ("If the dissenters' position here prevails, whenever Border Patrol officers return fire in self-defense, and someone gets hurt in Mexico, *Bivens* suits will follow."), *aff'd*, 140 S. Ct. 735 (2020).

[142] *See Hernandez*, 140 S. Ct. at 740; Davis v. Passman, 442 U.S. 228, 230–31 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[143] *See Hernandez*, 140 S. Ct. at 740; *Davis*, 442 U.S. at 230; *Bivens*, 403 U.S. at 389. While Mesa's mental state would likely be a matter of fact-finding at trial, the Court might have considered—solely for the purposes of determining context—the likelihood that Mesa had a different mental state than the actors in both *Bivens* and *Davis*. *Cf. Hernandez*, 140 S. Ct. at 740; *Davis*, 442 U.S. at 230; *Bivens*, 403 U.S. at 389. For example, Border Patrol agents reacting to a situation encountered in the regular discharge of their duties may have a different state of mind than agents bursting into a private residence to execute a search and arrest without legal authority or than a congressman firing an administrative assistant because she was a woman. *Cf. Hernandez*, 140 S. Ct. at 740 (explaining that Mesa lawfully detained one of Hernandez's friends before firing); *Davis*, 442 U.S. at 230 n.3 ("You are able, energetic and a very hard worker. . . . [H]owever . . . I concluded that it was essential that the understudy to my Administrative Assistant be a man."); *Bivens*, 403 U.S. at 389 (explaining that agents entered the apartment "under claim of federal authority," arrested Bivens, and made threats against the family).

[144] *See Hernandez*, 140 S. Ct. at 740.

[145] *See, e.g.*, Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, CATO SUP. CT. REV., 2019–2020, at 282 ("[*Hernandez*] eviscerated those distinctions, too—again, without any acknowledgment that it was doing so or any explanation for why.").

[146] *See Hernandez*, 140 S. Ct. at 743–44.

remedy to this context.[147]

B. DID ANY SPECIAL FACTORS COUNSEL HESITATION BEFORE EXTENDING *BIVENS* TO *HERNANDEZ*?

1. MAJORITY'S ARGUMENTS

The majority cited several factors it believed counseled hesitation: "the potential effect on foreign relations," "implicat[ing] an element of national security," and a "survey of what Congress has done in statutes addressing related matters."[148] In arguing the foreign relations factor, the majority attributed authority to regulate foreign relations to the political branches.[149] In *Hernandez*, the executive branch was especially implicated because of the Department of Justice's investigation and handling of Mesa's case, the decision to not extradite Mesa, and "the Executive's understanding of the Fourth Amendment's prohibition of unreasonable seizures and [its] assessment of circumstances at the border" that went into creating CBP policy and training.[150] Foreign policy was also implicated by bringing various interests from each country to the forefront, interests which had been the subject of diplomatic measures like the Border Violence Prevention Council.[151]

Considering national security, the majority cited the importance of maintaining a secure border along Mexico's territory and the central role of CBP and its officers in

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[147] *See id.*

[148] *See id.* at 744–47.

[149] *See id.* at 744 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018)) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

[150] *See id.*

[151] *Id.* at 745 ("The United States has an interest in ensuring that agents assigned the difficult and important task of policing the border are held to standards and judged by procedures that satisfy United States law and do not undermine the agents' effectiveness and morale. Mexico has an interest in exercising sovereignty over its territory and in protecting and obtaining justice for its nationals. It is not our task to arbitrate between them."). The Border Violence Prevention Council is led by CBP, Mexico's Secretariat of Foreign Relations, and Mexico's Federal Police. *See* Border Violence Prevention Council, *Fact Sheet*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/sites/default/files/publications/bvpc-fact-sheet.pdf (last visited Mar. 9, 2021).

promoting that goal.[152] It attempted to draw similarities between *Hernandez* and the two previous *Bivens* cases that involved military members (which were denied), stating: "We have declined to extend *Bivens* where doing so would interfere with the system of military discipline created by statute and regulation . . . ."[153] Because both the military and CBP were closely tied to national security and the Court had previously denied *Bivens* claims by military members, the majority reasoned, CBP officers should not be subject to *Bivens* claims either.[154]

The majority supported its final special factor—Congress's actions in this area—by noting that "Congress ha[d] repeatedly declined to authorize the award of damages for injury inflicted outside our borders," and finding that this neglect was a calculated exclusion.[155] The majority backed this assertion by pointing to 42 U.S.C. § 1983, which created personal damages liability for officials acting under state law who violate constitutional rights.[156] Congress limited § 1983's reach to cover "citizen[s] of the United States or other person[s] within the jurisdiction thereof."[157] Given that limit, a presumption that statutes have no effect outside the United States, and a prior holding that "[i]t would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action,'" the majority believed there was ample reason to hesitate in applying *Bivens* to a

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[152] *See Hernandez*, 140 S. Ct. at 746 ("The lawful passage of people and goods in both directions across the border is beneficial to both countries. Unfortunately, there is also a large volume of illegal cross-border traffic. . . . [Among other things], powerful criminal organizations operating on both sides of the border present a serious law enforcement problem for both countries.").

[153] *See id.* at 746–47 (citing United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983)).

[154] *See id.* at 747 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017)) ("[A] similar consideration is applicable here. Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.").

[155] *See id.* (quoting *Abbasi*, 137 S. Ct. at 1862 (2017)) (calling Congress's lack of action "telling").

[156] *See id.*

[157] *Id.* (alterations in original).

harm suffered outside of the United States.[158]

The majority wrapped up its special-factors analysis by placing it all under the umbrella of the separation of powers.[159] In sum, because foreign relations were within the purview of the political branches and Congress had chosen to avoid providing for this type of action, the majority decided it was not the Court who should create the remedy but Congress.[160]

2. DISSENT'S ARGUMENTS

The dissent could not conceive of any special factor that would preclude Hernandez's parents from bringing the lawsuit and offered rebuttals to the majority's reasoning.[161] The dissent attempted to discredit foreign policy and national security as reasons to hesitate by first distinguishing *Hernandez* from *Abbasi*, which also invoked

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[158] *See id.* (alterations in original) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975)). The FTCA and the Torture Victim Protection Act (TVPA) were other pillars of support on this point. *See id.* at 748. The FTCA, as "the exclusive remedy for most claims against Government employees arising out of their official conduct," does not allow for claims "arising in a foreign country." *Id.* (first quoting Hui v. Castaneda, 559 U.S. 799, 806 (2010); then quoting 28 U.S.C. § 2680 (2018)). The TVPA—while a mechanism for non-U.S. citizens to redress injury suffered outside the United States through the U.S. court system—does not apply to injuries caused by United States officials. *Id.* (quoting Meshal v. Higgenbotham, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring)).

[159] *See id.* at 749.

[160] *See id.* at 749–50.

[161] *See id.* at 757 (Ginsburg, J., dissenting) ("[N]ot one of the 'special factors' the Court identifies weigh any differently based on where a bullet happens to land."). Justice Ginsburg repeatedly insisted that a bullet just happened to land on the Mexico side of the border and strike a Mexican national and that those facts were irrelevant to the outcome of this legal issue. *See id.* at 756–57. This was a disingenuous tactic likely employed in an effort to minimize the significance of international boundaries in order to reach the desired outcome of allowing the *Bivens* action to proceed, because earlier in her opinion she explicitly recognized: "Hernandez [had] retreated into Mexican territory. Mesa pointed his weapon across the border, 'seemingly taking careful aim,' and fired at least two shots." *See id.* at 753. This shows that Justice Ginsburg was aware that Mesa's actions were deliberate and that where the bullet impacted was not "a happenstance subsequent to the conduct." *See id.* at 756.

these factors.[162] The dissent noted that *Abbasi* drew distinctions between cases against policymakers and cases for "individual instances of . . . law enforcement overreach"[163] while warning against misusing the national security "'label' . . . to 'cover a multitude of sins'" by rejecting claims.[164] Here, however, the majority and the dissent held nuanced views on the concept of foreign policy.[165] Whereas the majority talked more broadly about, for example, foreign *relations* and foreign policy *concerns*, the dissent limited foreign policy to mean a formal policy already in place.[166] Additionally, in the dissent's eyes, the fact that courts address other types of conduct at the border "concurrently with whatever diplomacy may also be addressing them" was reason enough to extend *Bivens* to this new cross-border shooting context.[167]

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[162] *See id.* at 757–58. The primary difference was that the plaintiffs brought claims against the policymakers in *Abbasi*, whereas Mesa was not a policymaker but an agent that supposedly violated the laws and policies in place. *Id.*

[163] *See id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017)). The *Abbasi* Court made the distinction based on the general differences in how each could be redressed, identifying individual overreach cases as "difficult to address except by way of damages actions after the fact," holding that the plaintiffs, in suing the policymakers, could seek an injunction or other form of relief instead of a *Bivens* claim. *Abbasi*, 137 S. Ct. at 1862–63.

[164] *See Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting) (quoting *Abbasi*, 137 S. Ct. at 1862).

[165] *See infra* text accompanying note 166.

[166] *See, e.g.*, *Hernandez*, 140 S. Ct. at 744 (majority opinion) ("The first [factor] is the potential effect on foreign relations. 'The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.'" (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018))); *id.* at 758 (Ginsburg, J. dissenting) ("The special factors featured by the Court relate, in the main, to foreign policy and national security. But . . . no policies or policymakers are challenged in this case.").

[167] *See id.* at 758 (Ginsburg, J., dissenting) (quoting Rodriguez v. Swartz, 899 F.3d 719, 747 (9th Cir. 2018), *vacated*, 140 S. Ct. 1258 (2020) (mem.)). Justice Ginsburg identified *Rodriguez v. Swartz* as a similar cross-border shooting case in which the Ninth Circuit held the family could bring an action under *Bivens* and she stated "[t]he Government has identified no deleterious effect on diplomatic negotiations" subsequent to that decision. *Id.* (citing *Rodriguez*, 899 F.3d at 734). Perhaps an important distinction between these two cases is that in *Rodriguez* the U.S. government believed the Border Patrol agent had committed a wrongdoing and tried him for murder. *See Rodriguez*, 899 F.3d at 734. By way of contrast, where one government believes the agent followed policy, training, and the law, but the other does not, a deleterious effect could conceivably arise. *Cf. supra*

Moreover, according to the dissent, "the Court, in this case, [could not] escape a 'potential effect on foreign relations' by declining to recognize a *Bivens* action" because the Mexican Government said doing so "ha[d] the potential to negatively affect international relations."[168] The dissent then argued that allowing a *Bivens* action would be in line with United States foreign policy by citing an "international commitment" the United States had made, which stated that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[169]

Finally, the dissent analyzed the congressional actions cited by the majority and concluded that "[n]one of [them] should stand in plaintiffs' way."[170] According to the dissent, § 1983 did not serve as evidence that Congress intended to exclude actions for constitutional violations by federal officials because it was originally intended to guarantee rights for former slaves, so there was no way Congress would have contemplated its applicability to a cross-border shooting with a CBP agent.[171] The FTCA likewise did not apply because Congress's intention there was not to limit officer liability for a harm suffered outside the country, but rather to limit the United States' liability under laws of another country.[172] Furthermore, the TVPA had no bearing because it did not apply to violators acting under U.S. law at all.[173] Rather, that Congress had done nothing to invalidate the *Bivens* doctrine spoke to Congress's consent to allow *Bivens* claims.[174] The dissent then argued against the presumption that U.S. laws only apply in the United States, stating, in line with Supreme Court precedent, that the presumption was "displaced" since the

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text accompanying notes 104–105 (discussing the opposing viewpoints of the Mexican and U.S. governments with respect to treatment of Mesa's situation).

[168] *Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting) (alteration in original) (quoting Brief for Government of the United Mexican States as *Amicus Curiae* in Support of the Petitioners 12 (Aug. 9, 2019)).

[169] *See id.* (quoting International Covenant on Civil and Political Rights, art. 9, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 176).

[170] *Id.* at 759.

[171] *Id.* at 759 (quoting *Rodriguez*, 899 F.3d at 742) (citing Mitchum v. Foster, 407 U.S. 225, 238–39 (1972)).

[172] *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 707 (2004)).

[173] *Id.*

[174] *See id.* at 758.

conduct "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force"—Mesa did fire from within the United States, after all.[175]

The dissent concluded by making an appeal to emotion with statistics about issues at the border and by "resist[ing] the conclusion" that plaintiffs in these cases should go home with nothing.[176] In short, because Hernandez's parents had no other possible remedy,[177] national security and foreign relations issues provided no reasons to hesitate, and Congress had manifested no disapproval, the dissent would have extended *Bivens* here.[178]

3. VERDICT

Regarding the foreign relations factor, the majority had the stronger argument.[179] While the dissent was correct that courts do address other border issues that are the subject of diplomatic efforts (the dissent gave "smuggling" as an example),[180] it ignored the fact that the United States already codified laws that deal with those specific border

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[175] *Id.* at 759 (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)).

[176] *See id.* at 759–60. The number of complaints against CBP agents and the response by the government to those cases was irrelevant to the legal question at issue but was used as if it was justification for instituting a *Bivens* claim. *Cf. id.* ("[W]ithout the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border." (quoting Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners 4 (Aug. 9, 2019))); *15 Logical Fallacies You Should Know Before Getting into a Debate*, Heading for *Causal Fallacy*, THE BEST SCHOOLS (June 9, 2020) [hereinafter *Fallacies*], https://thebestschools.org/magazine/15-logical-fallacies-know/ (describing the appeal to pity/emotion fallacy).

[177] *Hernandez*, 140 S. Ct. at 757 (Ginsburg, J., dissenting). Justice Ginsburg also distinguished *Hernandez* from *Abbasi* on this point, since in *Abbasi* it was "of central importance" in denying a *Bivens* remedy that the plaintiffs had alternative options for a remedy. *See id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017)). Justice Ginsburg also correctly noted that "the absence of alternative remedies, standing alone, does not warrant a *Bivens* action." *Id.*

[178] *See id.* at 753.

[179] *See infra* text accompanying notes 180–185.

[180] *See supra* text accompanying note 167.

issues.[181] The dissent's view of foreign policy was too narrow to respect the process of identifying special factors since *Abbasi* called for any "sound reasons" to pause, which would presumably include more than only standing, formal policies.[182] Further, the dissent's argument that disallowing a *Bivens* suit would negatively impact foreign relations was misplaced since the inquiry was not whether inaction by the Court would have any negative effect, but whether the Court "[was] well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[183] Because foreign relations are within the purview of the other branches of government, the dissent sought to overstep the separation of powers by its valuation of the Mexican government's petition.[184] Indeed, that four Justices would attempt to make that judgment while playing blind to any possible countervailing U.S. interests at the same time that five other Justices named various reasons to hesitate is clear evidence that the Court was not well suited to make that kind of determination in

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[181] *See, e.g.*, 8 U.S.C. § 1324 (2018) (setting forth the circumstances that constitute and the penalties for smuggling humans into the United States); 18 U.S.C. § 545 (2018) (setting forth the circumstances that constitute and the penalties for smuggling goods into the United States).

[182] *Cf. Abbasi*, 137 S. Ct. at 1858 ("[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, 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."). While *Abbasi* itself was a case against policies and policymakers—and thus not an identical precedent for calling on foreign policy and national security as factors in *Hernandez*—Justice Ginsburg should not have limited her analysis of factors counseling hesitation to factors that had already been so deemed in *Bivens* jurisprudence. *Cf. id.* ("This Court has not defined the phrase 'special factors counselling hesitation.'"). The Ninth Circuit took a similar "highly specific" approach in its ruling on *Hernandez*'s sister case, *Rodriguez*, which analysis was predicted to fail at the Supreme Court while the Fifth Circuit's analysis was predicted to be upheld. *See* Green, *supra* note 84, at II.-31 to -32 (2020); *supra* note 167 (introducing the circumstances of *Rodriguez*).

[183] *See Abbasi*, 137 S. Ct. at 1858.

[184] *Cf.* Hernandez v. Mesa, 140 S. Ct. 735, 744 (majority opinion) (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018)) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

this case.[185]

Turning to national security, the dissent rightly pointed out the main weakness in the majority's argument: that it talks about the importance of maintaining national security and how CBP fits into that scheme, but it "does not home in on how a *Bivens* suit for an unjustified killing would in fact undermine security at the border."[186] Using *Abbasi*'s warning about "cover[ing] a multitude of sins" under a national security label was particularly effective in making this point because each branch of the government has a part to play in achieving national security, and as long as an issue fits properly within that framework, saying the words "national security" should not automatically dispose of it.[187] The majority's attempt to tie off this factor by relating it to military discipline was dubious because military service is unique for many reasons beyond just its relation to national security.[188] And so, the dissent's argument was stronger on

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[185] *Cf.* Rodriguez v. Swartz, 899 F.3d 719, 746 (9th Cir. 2018) ("[The United States] then says that if we extend *Bivens* here, it will 'inject the courts into these sensitive matters of international diplomacy and risk undermining the government's ability to speak with one voice in international affairs.'"); *supra* Parts IV.B.1, IV.B.2 (naming foreign relations, national security, and congressional actions as reasons to hesitate versus attempting to refute those reasons). Using the International Covenant on Civil and Political Rights did lend support to Justice Ginsburg's argument, but the same conclusion would be reached, that, because five of the Justices did not even address the United States' international commitments, the Court was not the forum to affirmatively make decisions touching foreign policy concerns. *See supra* text accompanying notes 169, 185.

[186] *See Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting).

[187] *See Abbasi*, 137 S. Ct. at 1861–62.

[188] *See* Chappell v. Wallace, 462 U.S. 296, 300 (1983). To this point, in *Chappell* the Court stated:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. . . . The Court has often noted "the peculiar and special relationship of the soldier to his superiors," and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . ." This becomes imperative in combat, but conduct in combat

the national security factor.[189]

As with the contexts analysis, the majority had opportunities to "home in" on the negative effects that allowing the lawsuit could have on national security, which would have made its argument stronger.[190] For one, the majority should have argued that the action could exact a toll on society, including by excessively deterring CPB officials from performing their duties the way they should.[191] The

> inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Id. (citations omitted) (first quoting United States v. Brown, 348 U.S. 110, 112 (1954); then quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)) (citing Parker v. Levy, 417 U.S. 733, 743–44 (1974); Orloff v. Willoughby, 345 U.S. 83, 94 (1953)). Since federal law enforcement officers are civilians and not military, they do not fall under the separate framework for military justice and regulation that was put in place under Congress's constitutional authority—instead, they are under the same system that governs all civilians. *Cf. id.* at 302 ("Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure.").

[189] *See supra* text accompanying notes 186–188.

[190] *See Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting); *supra* text accompanying notes 136–137; *infra* text accompanying notes 191–198.

[191] *See* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1173–74 (2014). Professor Kent made the point, without determining the value of such considerations weighed against countervailing reasons, "that damages suits . . . are likely to waste officials' time, cause excessive caution in the performance of official duties, and deter good people from entering government service, and there are some reasons to think that these concerns are heightened in national security and foreign affairs cases." *Id.* at 1173. And when it comes to national security, "boldness is arguably more necessary." *Id.* at 1181. However, others may argue that, in reality, federal officials are not significantly deterred since research shows "[t]he threat of personal liability appears . . . to be far more theoretical than real." *See* James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 578–584 (2020); *infra* Part V.B.

main issue here is that the executive branch needs to "be able to act quickly, vigorously, and flexibly to meet dangerous and unforeseen or changing circumstances" in the national security sphere.[192] Extending *Bivens* to *Hernandez* could have resulted in "'overdeterrence,' which occurs when the fear of personal damages liability discourages the vigorous, efficient, and socially beneficial performance of official functions, either because there is some doubt about what the law requires or there is a prospect of meritless but nevertheless costly damages suits."[193] Regardless of the outcome of a case like *Hernandez*, then, overdeterrence could have a negative effect on national security that might outweigh the benefits.[194] For example, it is conceivable that CBP agents would see Mesa go through a tough lawsuit, and, even should Mesa prevail, be deterred from being diligent in their duties for fear of going through the same.[195] On the other hand, should Mesa be found liable, agents still might hesitate to exercise their duties since Mesa's actions were found to be within the scope of training and policy.[196] In either case, this could ultimately lead to a decrease in the security of the border and more Border Patrol agents being injured or killed in the line of duty.[197] With a deeper analysis that included the potential effects of overdeterrence, the majority could have assuaged critics that believed the Court was merely invoking national security to avoid an "inconvenient claim."[198]

Regarding the congressional actions factor, the majority again had the better argument, if by a slimmer margin.[199] The dissent's reasoning that "Congress knows about the *Bivens* decision and has not sought to undo it;

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[192] Kent, *supra* note 191, at 1174.
[193] *Id.*
[194] *See id.*
[195] *See id.*
[196] *See id.*
[197] *Cf. id.* (discussing the social costs of permitting damages actions against individual federal officers).
[198] *See* Hernandez v. Mesa, 140 S. Ct. 735, 758 (Ginsburg, J., dissenting) ("[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" (alteration in original) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017))). *But cf.* Kent, *supra* note 191 at 1181 (discussing a culture of accountability that developed post-9/11 that may water down *Bivens*'s deterrent effect).
[199] *See infra* notes 200–208 and accompanying text.

therefore, Congress wants *Bivens* to stay" was fallacious.[200] Similarly, the logic behind the majority's assertion that "Congress has enacted similar statutes but never authorized these actions against federal officials; therefore, Congress does not want these actions to be allowed against federal officials" was flawed at the basic level.[201] What carried the weight for the majority was the Court's previous holding of how "[i]t would be 'anomalous to impute" *Bivens* to apply in situations that Congress had not provided for in "comparable express causes of action."[202] The dissent was able to point out differences between *Bivens* suits and 42 U.S.C. § 1983, the FTCA, and the TVPA, yet it did not offer any other express cause of action comparable to *Bivens* that could support imputing *Bivens* to apply abroad.[203] It was incumbent on the dissent to show how imputing *Bivens* would not have been "anomalous," which it could have accomplished by supplying an express cause of action that both extended to a harm suffered outside the United States and was comparable to *Bivens*.[204] Because the dissent failed to do this, its argument on this point was toothless and the statutes the majority cited stood as the most comparable to *Bivens*, showing that extending *Bivens* to a transnational situation would be anomalous.[205] The dissent's final argument that the circumstances of *Hernandez* "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" had some merit to it because Mesa fired from U.S. soil.[206] However, the case the dissent relied on for that argument was born out of a situation

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[200] *See supra* text accompanying note 174.

[201] *See supra* text accompanying note 155. That Congress had taken neither of those actions could plausibly be attributed to other reasons; thus, the Justices in both of the opinions were making conclusions "without enough evidence to do so." C*f. Fallacies*, *supra* note 176 (describing the *non causa pro causa* fallacy).

[202] *See Hernandez*, 140 S. Ct. at 747 (majority opinion) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975)).

[203] *See id.* at 759 (Ginsburg, J., dissenting).

[204] *Cf. Blue Chip Stamps*, 421 U.S. at 754–55 (denying expansion of an implied action to a new class of plaintiffs where no comparable express cause of action did the same).

[205] *See Hernandez*, 140 S. Ct. at 747 (Ginsburg, J., dissenting) (quoting *Blue Chip Stamps*, 421 U.S. at 736).

[206] *See id.* at 759 (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)).

applying codified laws, while the case the majority relied on for its "anomalous" argument specifically applied to judicially implied causes of action.[207] Thus, the majority's case was more fitting for the Court to consider here, so it carried more weight.[208]

In summary, despite the majority's anemic argument on the national security factor, the Court encountered sufficient special factors that counseled hesitation and thus the Court correctly denied the *Bivens* extension.[209]

C. HAS *BIVENS'S* FOUNDATION ERODED AWAY?

Hernandez was the tenth consecutive case in which the Court did not extend *Bivens*, dating back to 1983.[210] With the Court denying all these cases and whittling *Bivens* down for so long, *Bivens*'s validity necessarily comes into question.[211] The concurrence minced no words in expressing the opinion that *Bivens* was bad law and should be done away with for good.[212] While the majority stopped short of commenting explicitly on *Bivens*'s future, some aspects of its opinion lent support to the concurrence's proposition—that it was outside of the Court's authority to create remedies without a statute.[213]

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[207] *See id.* ("We presume that *statutes* do not apply extraterritorially to 'ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.'" (emphasis added) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013))); *Kiobel*, 569 U.S. at 124–25 (declining to extend the Alien Tort Statute to conduct that occurred entirely outside the country).

[208] *See Hernandez*, 140 S. Ct. at 747 (majority opinion) (quoting *Blue Chip Stamps*, 421 U.S. at 736).

[209] *See id.* at 744–50.

[210] *See supra* Part II.B.

[211] *See infra* text accompanying notes 212–227.

[212] *See Hernandez*, 140 S. Ct. at 752–53 (Thomas, J., concurring) ("The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether.").

[213] *See infra* note 216. In fact, "[i]f the [*Hernandez*] majority were to address a direct challenge to *Bivens*, they would be able to use the same reasoning displayed in [*Hernandez*]. In such a scenario, it may be hard to justify the continuance of *Bivens*." Daniel Blair, Note, *One Step Away: How* Hernández II *Signals the Elimination of* Bivens, 64 ST. LOUIS L.J.

First attacking the foundation on which *Bivens* rested, the concurrence pointed out that, whereas in the days when *Bivens* was decided "the Court freely created implied private causes of action for damages under federal statutes," the Court later ceased that "misguided" practice, and even went so far as to abrogate case law that *Bivens* was built on.[214] The plaintiffs in *Hernandez* asserted that *Bivens* was much like a common-law action and that since federal officials were once subject to tort liability under common law, *Bivens* should apply.[215] However, as the majority noted, "federal general common law" ceased to exist after the decision in *Erie R. Co. v. Tompkins* in 1938, so federal courts had no authority to "rais[e] up causes of action where a statute ha[d] not created them."[216] It is because of this philosophical shift that the Court turned completely away from expanding *Bivens*, called *Bivens* expansion "a disfavored judicial activity," and suggested that had *Bivens* and its expansion cases appeared before the Supreme Court today, *Bivens* actions would not exist.[217] As the Court noted previously, "[*s*]*tare decisis* provides no 'veneer of respectability to our continued application of [these]

711, 724 (2020). The dissent avoided this conversation altogether. *Cf. Hernandez*, 140 S. Ct. at 753–60 (Ginsburg, J., dissenting) (failing to address the issue of whether *Bivens* had a legal base to stand on).

[214] *See Hernandez*, 140 S. Ct. at 750–51 (Thomas, J., concurring) (first citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969); Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); then citing Alexander v. Sandoval, 532 U.S. 275 (2001)). As Justice Thomas had previously mentioned: "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action." *Id.* at 750 (quoting Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring)).

[215] *Id.* at 742 (majority opinion).

[216] *Id.* (first quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); then quoting *Alexander*, 532 U.S. at 287). Justice Thomas further quoted the Court's *Alexander* decision, which "renounced the Court's freewheeling approach" because "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 751 (Thomas, J., concurring) (alteration in original) (quoting *Alexander*, 532 U.S. at 286).

[217] *Id.* at 751–52 (Thomas, J., concurring) (first quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017); then quoting *Abbasi*, 137 S. Ct. at 1856); *see also id.* at 743 (majority opinion) ("[I]t is doubtful that we would have reached the same result."). After less than a decade of expansion, the Court has not extended the doctrine to a case for over four decades. *See supra* Part II.

demonstrably incorrect precedents.'"[218] So, then, what is left to keep *Bivens* upright?[219]

The concurrence then described the continued use of *Bivens*, even in the narrow set of situations in which it already applied, as a violation of the separation of powers doctrine.[220] Defining the separation between the judiciary and the legislature, the concurrence stated that it is a "distinctly legislative task [to] creat[e] causes of action for damages to enforce federal positive law," and "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[221] Since Congress has the power to ensure federal officials are held accountable for violating constitutional rights and has proven capable of enacting such a law,[222] courts should not be stepping into the legislature's role and doing that for them.[223]

These arguments are not new; they were recognized in dissenting opinions in each of the affirmative *Bivens* cases, including in *Bivens* itself.[224] Those Justices saw the wisdom in maintaining the integrity of the system of government as divided between the judicial, legislative, and executive branches.[225] The process of weakening *Bivens* and limiting

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[218] *Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019)).

[219] *Cf. id.* at 752 ("Thus, it appears that we have already repudiated the foundation of the *Bivens* doctrine; nothing is left to do but overrule it.").

[220] *See id.* at 750 ("To ensure that we are not 'perpetuat[ing] a usurpation of the legislative power,' we should reevaluate our continued recognition of even a limited form of the *Bivens* doctrine." (alteration in original) (citation omitted) (quoting *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring))).

[221] *See id.* at 751–52 (quoting *Alexander*, 532 U.S. at 286). "Without such intent, 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Id.* at 751 (quoting *Alexander*, 532 U.S. at 286–87).

[222] *See supra* text accompanying note 156.

[223] *See Hernandez*, 140 S. Ct. at 752 ("[I]t is not for us to fill any hiatus Congress has left in this area." (alteration in original) (emphasis omitted) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963))).

[224] *See supra* Part II.A.

[225] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Burger, J., dissenting).

> And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court

its application was a manifestation of the Court returning to that wisdom.[226] Ultimately, the concurrence was correct that *Bivens* no longer has a foundation to stand on and that the separation of powers compels its overruling.[227]

V. IMPACT: A RARELY USED, RARELY SUCCESSFUL, AND RARELY PUNITIVE ACTION

The *Hernandez* decision will probably be the last *Bivens* case the Supreme Court hears before it throws *Bivens* out entirely.[228] The resulting impact *Hernandez* will have on law enforcement and potential plaintiffs will likely be minimal since *Hernandez* involves circumstances that occur very infrequently.[229] However, it may cause tension in relationships between Mexico and the United States, including among the people.[230]

A. LEGALLY SPEAKING

Hernandez has already had impacted the courtroom at the highest level: The Supreme Court vacated the Ninth Circuit's ruling in *Rodriguez v. Swartz* and remanded with instructions to implement the *Hernandez* decision.[231] In

> remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility.

Id. (quoting JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES & FELIX FRANKFURTER, JOHN MARSHALL 88 (Phoenix ed.) (1967)).

[226] *Cf.* Carlson v. Green, 446 U.S. 14, 31 (1980) (Burger, J., dissenting) ("I cannot escape the conclusion that in future cases the Court will be obliged to retreat from the language of today's decision.").

[227] *See Hernandez*, 140 S. Ct. at 752 (Thomas, J., concurring); Vladeck, *supra* note 145, at 282 ("[A]t least for a majority of the current Court, there's no remaining affirmative case *for Bivens*.").

[228] *See infra* Part V.A.

[229] *See infra* Part V.B.

[230] *See infra* Part V.B.

[231] *See* Swartz v. Rodriguez, 140 S. Ct. 1258 (2020) (mem.).

Rodriguez, the Ninth Circuit, faced with a cross-border shooting by Border Patrol, had found that the facts presented a new context and that no special factors counseled hesitation, thus extending *Bivens*.[232] With the Court in *Hernandez* deciding that special factors counseled hesitation on such broad, less specific terms, it is difficult to imagine a scenario in which any court applying *Hernandez*'s ruling to *Rodriguez*'s facts would not conclude that special factors counsel hesitation.[233] Thus, *Rodriguez* will likely not be granted the *Bivens* extension, either.[234]

As for other effects on the law, whereas the Court in *Abbasi* spoke of intent to preserve *Bivens* claims for certain contexts, particularly where a case deals with search and seizure by law enforcement, *Hernandez* "eviscerated" *Bivens*'s applicability to such overreach.[235] Moreover, after the *Abbasi* and *Hernandez* decisions, in conjunction with other Supreme Court opinions, there is "doubt [about] the ability of the lower courts to preside over a system of remedies in law and equity that will stay in touch with one another."[236] With the current appointed Justices, another *Bivens* case reaching the Supreme Court would likely result in the end of the *Bivens* doctrine.[237]

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[232] Rodriguez v. Swartz, 899 F.3d 719, 738–39 (9th Cir. 2018).

[233] *Cf. supra* text accompanying note 186 (discussing the majority's lack of specificity when considering national security as a factor). The alleged facts of *Rodriguez* are that a Border Patrol agent shot from the United States and killed a Mexican-national teenager (J.A.), who was simply walking down a street in Nogales, Mexico. *Rodriguez*, 899 F.3d at 727. The U.S. side of the border in Nogales, Arizona, was elevated about twenty-five feet higher than the road in Mexico. *Id.* Marking the border was a fence rising over twenty feet above the ground on the U.S. side. *Id.* While on duty, Agent Swartz fired his pistol from Arizona, through the fence, hitting J.A. ten times. *Id.* The Department of Justice tried Swartz for J.A.'s murder. *Id.* at 734. While Swartz was acquitted of murder, the jury was hung on manslaughter and Swartz would be retried. *Id.* at 734 n.58. Had the *Hernandez* decision been more particular in its reasoning, *Rodriguez* may have had a better chance at getting the *Bivens* remedy because of factual differences between the two cases (such as a marked border, DOJ prosecution, and mental state of the federal agent). *See supra* text accompanying notes 137–145, 190–198.

[234] *See* Green, *supra* note 84, at II.-31 to -32 (2020).

[235] Vladeck, *supra* note 145, at 282–83.

[236] James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 748 (2020).

[237] *See* Blair, *supra* note 213, at 723–24. As Blair pointed out:

The *Hernandez* decision was another step in the right direction for the separation of powers.[238] Maintaining separation of powers is crucial to the integrity of a system with divided powers, as in the United States.[239] A system of rogue branches of government overstepping their boundaries would be a corrupt system.[240] "By adhering rigidly to its own duty, the court [has] help[ed] . . . to fix the spot where responsibility lies . . . ."[241] If a "thunderbolt of popular condemnation" should be brought down for the result in *Hernandez*, it belongs not on the Court, but on Congress.[242]

B. PRACTICAL EFFECTS

But what practical effect might *Hernandez* have on society?[243] In a survey of data from five federal districts over three years, *Bivens* suits comprised 1.2% of the civil claims arising under a federal question and less than 0.2% of all civil

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> [The] Roberts Court has engaged in a pattern [called] "the doctrine of one last chance" in which the Court will "signal its readiness to impose major disruptions before actually doing so." If this theory were to play out here, *Hernández II* would serve as the last warning that *Bivens* claims will be overturned altogether.

Id. at 723 (footnote omitted) (quoting Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014)).

[238] *See* Hernandez v. Mesa, 140 S. Ct. 735, 751–52 (Thomas, J., concurring).

[239] *See* BEAU STEENKEN & TINA M. BROOKS, SOURCES OF AMERICAN LAW 9 (CALI eLangdell Press ed., 4th ed. 2019) ("At the same time that the Founding Fathers, in drafting the Constitution, limited the central government to enumerated powers, they also broke the federal government into three distinct branches. They did so in the hopes that the various branches would serve as checks and balances on each other and prevent the sort of tyranny that the former colonists rejected from the unified British government. . . . Indeed, every state government in the U.S. features Separation of Powers.").

[240] *Cf.* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. Rev. 433, 444 (2013) (suggesting the separation of powers is essential for liberty and the rule of law).

[241] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Burger, J., dissenting) (quoting JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES & FELIX FRANKFURTER, JOHN MARSHALL 88 (Phoenix ed.) (1967))).

[242] *See id.*

[243] *See infra* text accompanying notes 244–268.

claims.[244] *Bivens* claims involving a cross-border shooting of a foreign national would be a significantly smaller portion than that.[245] In fact, only 15.8% of the *Bivens* claims were based on the Fourth Amendment.[246] And of the *Bivens* claims in these districts, just 16.2% were successful.[247] Confining *Hernandez*'s ruling to cases with similar facts, then, this holding will hardly be noticed as a speed bump to the courts—more like a pebble in the road.[248] If the Supreme Court puts *Bivens* to rest permanently, the number of potential plaintiffs that otherwise would have seen some relief as a result of their *Bivens* claims would be infinitesimal.[249]

Among the perspectives surrounding *Bivens* is the idea that a holding such as the one in *Hernandez* would "create a dangerous loophole where federal law enforcement officials will face no consequences for extraterritorial killings."[250] However, this is ignorant to the fact that law enforcement can be held liable for crimes committed in the scope of the officer's official capacity, including murder and violations of constitutional rights,[251] and the employer agency can hold its employees accountable for violating its

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[244] Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837 (2010).

[245] *See id.* Forty-nine percent of these *Bivens* claims were about conditions in prison while the remaining fifty-one percent were all other *Bivens* claims. *Id.*

[246] *See id.* at 836 n.138.

[247] *Id.* The success rate for Fourth Amendment *Bivens* cases was higher than the overall rate, at 28.9%—a sheer total of eleven successful cases for the three-year period. *Id.* For this study, success was measured as "a judgment entered in favor of the plaintiff, a settlement of some kind, or a stipulated/voluntary dismissal by the plaintiff." *Id.* at 812 n.13.

[248] *Cf. id.* at 386–87 (discussing the rare frequency with which *Bivens* lawsuits are brought and successful).

[249] *See supra* text accompanying notes 244–247.

[250] Green, *supra* note 84.

[251] *See* Rodriguez v. Swartz, 899 F.3d 719, 734 (9th Cir. 2018); *Law Enforcement Misconduct*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/law-enforcement-misconduct (last updated July 6, 2020) ("The Department of Justice . . . vigorously investigates and, where the evidence permits, prosecutes allegations of Constitutional violations by law enforcement officers. . . . The Department's authority extends to all law enforcement conduct, regardless of whether an officer is on or off duty, so long as he/she is acting, or claiming to act, in his/her official capacity.").

policies.[252] Additionally, one might argue that the importance of the job federal law enforcement agents perform outweighs the small chance that an agent may violate someone's constitutional rights, and thus the actual risk of danger after *Hernandez* is not at an unacceptable level.[253]

Alternatively, it is possible that *Bivens* may not be having the full deterrent effect it was designed to have on federal officials.[254] If the purpose of *Bivens* was to keep federal officials in line through fear of having to pay exorbitant amounts because of potential lawsuits,[255] data

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[252] *See HR Order DOJ1200.1: Part 3. Labor/Employee Relations: Chapter 3-1, Discipline and Adverse Actions (Aug. 25, 1998)*, U.S. DEP'T OF JUST., https://www.justice.gov/jmd/hr-order-doj12001-part-3-laboremployee-relations (last updated Aug. 29, 2014) (setting out disciplinary procedures for Department of Justice employees); *see also* Kent, *supra* note 191, at 1181–82 (describing a "thick new web of accountability mechanisms in the national security area" that developed after 9/11). *But cf. DHS Needs to Improve Its Oversight of Misconduct and Discipline*, OVERSIGHT.GOV, https://www.oversight.gov/report/dhs/dhs-needs-improve-its-oversight-misconduct-and-discipline (last visited Jan. 24, 2021) ("DHS does not have sufficient policies and procedures to address employee misconduct. . . . DHS also does not effectively manage the misconduct program throughout the Department, lacking data monitoring and metrics to gauge program performance.").

[253] *Cf. About*, FBI, https://www.fbi.gov/about (last visited Jan. 22, 2021) (describing the FBI mission as "to help protect you, your children, your communities, and your businesses . . . from international and domestic terrorists to spies on U.S. soil, from cyber villains to corrupt government officials, from mobsters to violent street gangs, from child predators to serial killers."); *Careers*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/careers (last visited Jan. 22, 2021) (describing the CBP mission as to "[p]revent terrorists and terrorists [sic] weapons from entering the United States" and noting that "on a typical day, CBP makes 900+ apprehensions and seizes 9,000+ pounds of illegal drugs."). While this is not the argument this Note makes, one could plausibly judge the importance of those missions, consider the stringent requirements federal law enforcement officials frequently must meet to be hired—minimum education, background checks, and polygraph interviews, for example—plus the quality of training each must undergo before arriving at their first assignment, and reach such a conclusion. *See, e.g.*, *Border Patrol Agent Application Process*, U.S. CUSTOMS AND BORDER PROTECTION,https://www.cbp.gov/careers/frontline-careers/bpa/app-proc (last visited Jan. 22, 2021); Eligibility Requirements for Special Agent Position, FBI JOBS, https://www.fbijobs.gov/career-paths/special-agents/eligibility (last visited Jan. 22, 2021).

[254] *See* Pfander et al., *supra* note 191.

[255] *See* FDIC v. Meyer, 510 U.S. 471, 485 (1994) (citing Carlson v. Green,

shows that the individual officers are generally not fronting the bill.[256] In a study of *Bivens* cases involving the Bureau of Prisons over a ten-year period, the individual officer and the officer's insurance contributed financially to the settlement in less than five percent of cases that resulted in a payment.[257] The actual amount that officers and their insurance contributed was far lower, totaling 0.32% of the amounts plaintiffs received in these successful cases.[258] The government essentially covered the rest of the payouts via the Judgment Fund in the U.S. Treasury.[259] By these figures, one may wonder if *Bivens* truly serves as a deterrent to official misconduct at all.[260] If such was already the case, *Hernandez* further delimiting the *Bivens* doctrine would not likely create or even exacerbate any "dangerous loophole" for law enforcement.[261]

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446 U.S. 14, 21 (1980)) ("It must be remembered that the purpose of *Bivens* is to deter the officer."); *Carlson*, 446 U.S. at 25 ("[T]o prevent frustration of the deterrence goals of § 1983 (which in part also underlie *Bivens* actions) '[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.' A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of [a *Bivens*] action.") (second alteration in original) (citations omitted) (quoting Robertson v. Wegmann, 436 U.S. 584, 592 (1978))).

[256] *See* Pfander et al., *supra* note 191.

[257] *Id.* at 579. Out of 171 of these cases, eight made up this subset. *Id.*

[258] *Id.* The average contribution by officers and their insurance in these eight cases was $7645. *Id.* at 581.

[259] *Id.* at 594; *see also* Kent, *supra* note 191, at 1153 n.126 ("It is widely asserted or assumed by scholars that, when sued under *Bivens*, nearly all officials are defended and indemnified by their government employers so that they do not incur an actual risk of monetary liability.").

[260] *See* Pfander et al., *supra* note 191, at 596 ("At the most basic level, the data contradict the Supreme Court's repeated assertion that federal officials face a threat of significant personal financial responsibility in these cases: The threat of personal liability appears from our data to be far more theoretical than real."). *But see* Kent, *supra* note 191, at 1153–54. Although the prospects of a successful *Bivens* lawsuit are not excellent and employers may indemnify their employees while the defendants will be represented by the government, Professor Kent believes that *Bivens* does still serve a deterrent purpose because indemnification is not an entitlement and the defendant officers typically do not know whether they will be indemnified until after disposition of the case. *See id.* The fact that many of these employees are acquiring insurance policies itself shows that personal liability is on their minds. *Id.* ("[T]his might well shape the incentives or behavior of those officials.").

[261] *Cf.* Pfander et al., *supra* note 191 (comparing the financial impact of

While *Bivens* may not be the legal solution to government intrusion, it is still important to recognize the human aspect encompassing *Hernandez*.[262] It is a tragedy that a young man was killed.[263] The perception that a Border Patrol agent could get away with wrongfully killing an innocent teenager could negatively impact relationships between the United States and Mexico.[264] Such a thought would undoubtedly incense people's emotions and could strain the relationships that communities on the border have with each other as well as the relationship between the United States and Mexico governments.[265] It may also damage the United States' global reputation for its commitment to justice and legal principles.[266] People's constitutional rights are vital, and safeguarding those rights is imperative if they are to mean anything.[267] As *Bivens* withers away, it remains to be seen how Congress will respond to the crescendo of demands for action on *Bivens* and

Bivens claims on officers against that on the government); Green, *supra* note 84, at II.-32 (documenting the fear that *Hernandez* will allow federal officers to escape consequences for cross-border shootings).

[262] *See* Hernandez v. Mesa, 140 S. Ct. 735, 759–60 (Ginsburg, J., dissenting).

[263] *Id.*

[264] *See id.* at 758 (quoting Brief for Government of the United Mexican States as *Amicus Curiae* in Support of the Petitioners 12 (Aug. 9, 2019)); Green, *supra* note 84, at II.-32.

[265] *See Hernandez*, 140 S. Ct. at 758 (Ginsburg, J., dissenting) (quoting Brief for Government of the United Mexican States as *Amicus Curiae* in Support of the Petitioners 12 (Aug. 9, 2019)); Green, *supra* note 84, at II.-32.

[266] *Cf.* Dominic Carman, *Where Can You Find the Best Justice System?*, GLOBAL LEGAL CHRONICLE (June 14, 2019), https://www.globallegalchronicle.com/where-can-you-find-the-best-justice-system/. (reporting that the Rule of Law Index published by the World Justice Project, which "measures how the rule of law is experienced and perceived by the general public worldwide," found the United States at twentieth out of 126 countries examined).

[267] *See* Blair, *supra* note 213 ("[T]he liberties of none are safe unless the liberties of all are protected." (alteration in original) (quoting WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 64 (Doubleday & Co. ed., 1961))).

the related qualified immunity doctrine.[268]

VI. CONCLUSION: SIT NOT IDLY BY

A border, whether marked by a physical barrier or not, demarcates where significant differences appear—differences of nationalities, of languages, of heritage, of dreams, and of legal authority.[269] Even within a country, these differences can be found by crossing borders into different provinces or states.[270] When an issue arises that implicates a border, the rules change; no longer are the interests of just one political, legal, or cultural body implicated.[271] When this happens at the international level and no legal authority dictates what should happen, diplomatic efforts must take place to weigh the costs and

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[268] *See* WHITNEY K. NOVAK, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 1, 4, 5 (Cong. Research Serv. ed., 2020). Qualified immunity (another court-made doctrine) provides a defense for public officials, including law enforcement officers, who are defendants in lawsuits for constitutional rights violations. *Id.* at 1. Justice Thomas has equally called for a revisitation of qualified immunity, stating the Court has likewise made "freewheeling policy choices" and done Congress's job as it advanced this doctrine. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (Thomas, J., concurring). Novak noted:

> Because qualified immunity is a product of statutory interpretation, Congress has wide authority to amend, expand, or even abolish the doctrine.
>
> . . . .
>
> Questions could remain, however . . . . [A]bout whether eliminating qualified immunity for state law enforcement agents (or some subset of state actors) under Section 1983—as several proposals would do—would create an anomaly where the doctrine would still exist for federal law enforcement agents under *Bivens*.

NOVAK, *supra*.

[269] *See Border*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/encyclopedia/border/ (last visited Feb. 6, 2021).

[270] *See, e.g.*, Mark Abadi, *This Map Shows the US Really Has 11 Separate 'Nations' with Entirely Different Cultures*, BUSINESS INSIDER (June 18, 2018, 2:04 PM), https://www.businessinsider.com/regional-differences-united-states-2018-1.

[271] *See Border*, *supra* note 269. In the United States, for example, when a crime crosses from one state into another, federal authorities may get involved to investigate and prosecute what would normally have been investigated and prosecuted at the state level. *See Federal Crimes*, JUSTIA, https://www.justia.com/criminal/offenses/other-crimes/federal-crimes/ (last updated Apr. 2018).

benefits of certain responses, including the interests of other countries and the political goals of the legislative and executive branches.[272] The U.S. judiciary, as the interpreter of U.S. laws, is a body that is neither granted the authority to nor is well equipped for making this kind of decision.[273]

With that backdrop, when considering how the *Bivens* doctrine would apply to *Hernandez*, it becomes clear that the Court decided correctly.[274] *Bivens* had been in a vegetative state for decades.[275] The cases it previously applied to were drawn exceedingly narrowly and the Court had all but decreed that it should not grow beyond its current limits.[276] *Bivens*, having become brittle and stirring up separation-of-powers arguments since its creation, was certainly not ripe for application to an international incident evoking a separation-of-powers conversation of its own in *Hernandez*.[277]

Now *Bivens* stands on the precipice of extinction, as it will likely be (and should be) overturned in the not-so-distant future.[278] In light of the separation of powers, overturning *Bivens* would be the right action.[279] This Note echoes the voices of those that call on Congress to specifically take up the question of whether to provide for a damages remedy against federal officers individually.[280] To maintain the integrity of the system of government and ensure justice is served in accordance with it, Congress must weigh the benefits and detriments of such actions and determine, with specificity, where an enacted version of *Bivens* should apply, where it should not apply, and what its scope should be.[281]

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[272] *See supra* Part IV.B.1.
[273] *See supra* Part IV.B.1; *cf.* STEENKEN, *supra* note 239, at 11 (defining the roles of each branch of government in the United States).
[274] *See supra* Part IV.B.3.
[275] *See supra* Part II.B.
[276] *See supra* Part II.B.
[277] *See supra* text accompanying notes 159–160.
[278] *See supra* Part IV.C.
[279] *See supra* Part V.A.
[280] *Cf., e.g.*, Green, *supra* note 84, at II.-33 ("Congress . . . should act immediately to address civil liability in the context of extraterritorial excessive force by federal agents at the United States border.").
[281] *See supra* text accompanying notes 238–242, 265–268.