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United States Supreme Court Survey: 2019 Term: Hernandez v. Mesa: A Catalyst for Change?

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Hernandez v. Mesa: A Catalyst for Change?

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INTRODUCTION

In the latest blow to a cause of action seemingly hanging on by a thread, the Supreme Court in *Hernandez v. Mesa* continued to weaken the role of constitutional torts as an effective remedy to, or deterrent against, federal government misconduct. In *Hernandez*, the Court dismissed a claim against a border patrol agent who shot and killed a fleeing unarmed teenager.[1] Fifteen-year-old Sergio Hernandez Guereca (Guereca) was playing a game with friends in a dry culvert that runs through the border of the United States and Mexico; the game involved running back and forth between the two borders.[2] While on the U.S. side of the border, a border patrol agent detained one of Guereca's friends.[3] Guereca then ran back to the Mexican side of the border and a border patrol agent shot him twice,

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1. *See* Hernandez v. Mesa,140 S. Ct. 735, 739–40 (2020).
2. *Id.* at 740.
3. *Id.*

killing him.[4] Guereca's parents brought a civil claim for damages against the agent who shot their son.[5] The plaintiffs sought the civil damages remedy established in *Bivens v. Six Unknown Named Agents*.[6]

However, the Court dismissed the *Hernandez* case, reasoning that the expansion of claims against federal agents under *Bivens* should be done cautiously and that expansion was not justified given that the allegations presented a factual and legal context different from previous successful *Bivens* actions.[7] The new context that justified the dismissal of the *Hernandez* case was that the shooting occurred across the United States and Mexican border.[8] The border patrol agent was standing on the U.S. side of the border while the shooting victim was on the Mexican side.[9] The Court found that even though Fourth Amendment *Bivens* claims had gone forward in the past, the fact that the incident happened between two borders presented a new context and that the special factors of international relations and national security required dismissal.[10] Expressing skepticism about the legitimacy of a court-created remedy such as *Bivens*, the Court unsurprisingly dismissed the claim.[11] The lawsuit created significant controversy and generated criticism, with some arguing that the Hernandez family had been denied justice.[12]

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4. *Id.* Defendant Mesa disagrees with plaintiff's description of the incident and claims that Guereca and his friends were involved in an attempted illegal border crossing and were throwing rocks at the defendant. *Id.*

5. *Id.*

6. *Id. Bivens v. Six Unknown Named Agents* created a civil cause of action against federal officials for violations of constitutional rights. 403 U.S. 388, 389 (1988).

7. *See Hernandez*, 140 S. Ct. at 739, 743–49.

8. *See id.* at 744–45.

9. *Id.* at 740.

10. *See id.* at 743–46.

11. *See id.* at 741.

12. *See* Linda Greenhouse, Opinion, *Who Will Watch the Agents Watching the Border?*, N.Y. TIMES, (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/opinion/who-will-watch-the-agents-watching-our-borders.html [https://perma.cc/67Q8-ECY7] ; Linda Greenhouse, Opinion, *Will the Supreme Court Stand Up for an Unarmed Mexican Teenager Shot by a Border Agent?*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/opinion/supreme-court-mexico-border-

The *Hernandez* decision comes at the end of a long story of the diminishing possibility of bringing a successful *Bivens* claim. The decision reflects the Court's firmly established hostility to constitutional torts in general and *Bivens* claims in particular.[13] The expansion of the qualified immunity defense that provides broad protection for defendants has further narrowed the possibility for successful redress against governmental misconduct. While *Bivens* claims may still be an option in a narrow range of circumstances, the limited scope and effectiveness of the remedy has created pressure for reform. One such change would be to eliminate individual liability for government agents completely and, instead, allow those harmed to bring actions directly against the United States. This model is used for negligence and other tortious acts committed by federal employees.[14] Along with the proposed shift to governmental rather than individual liability, have come efforts to eliminate the qualified immunity defense.[15] The increasingly protective doctrine of qualified immunity significantly reduces the possibility of obtaining a judgment for violation of a constitutional right by either a state or federal employee.

The Court's commitment to the severe limitation, if not the elimination, of damages claims against federal officials leaves many plaintiffs harmed by federal misconduct without any remedy. The creation of a mechanism to deter misconduct and to provide compensation to victims of federal misconduct is in the hands of the legislature. In order to create change, Congress and state legislatures would need to pass statutes that would shift liability from individual to governmental and that would eliminate or reform qualified immunity. Such statues have recently been

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patrol.html [https://perma.cc/8HG8-9GBJ]; Mary Harris, *The Supreme Court Just Gave the Border Patrol a License to Kill*, SLATE (Mar. 4, 2020, 2:04 PM), https://slate.com/news-and-politics/2020/03/supreme-court-immigration-cbp-killing-hernandez-mesa-bivens.html [https://perma.cc/9DW2-UHV6?type=image].

13. *See generally* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019).

14. Federal Tort Claims Act, 28 U.S.C. § 1346.

15. Qualified Immunity is a defense to constitutional tort claims that protects the defendant from liability unless the constitutional right at issue was clearly established and the defendant would reasonably have known that his actions violated that right. Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

introduced in both state legislatures and Congress.[16] Perhaps the opportunity for reform is at hand given the increasing public awareness and revulsion against the abuses, particularly against black and brown people, perpetrated by state and federal law enforcement. The frustration following the *Hernandez* decision may well have added fuel to the reform movement.

In Part I, this Survey explains the origins and subsequent Court hostility to the *Bivens* remedy. Part II analyzes the reasoning in the *Hernandez* decision. Part III examines the use of *Bivens* in excessive force cases. This Survey concludes in Part IV with a discussion of reforms that might provide a meaningful civil remedy for federal government misconduct and suggests that shocking denials of remedy, such as in *Hernandez*, might bolster reform efforts.

I. THE SHORT, SAD STORY OF THE *BIVENS* ACTION

A civil remedy for violations of constitutional rights by federal agents was first created only in 1971 by the Court in *Bivens*.[17] There, the plaintiff was allowed to bring a claim for money damages against agents for their actions during the execution of a warrantless search and the plaintiff's subsequent detention.[18] Agents of the Federal Bureau of Narcotics entered and searched the plaintiff's apartment, manacled the plaintiff in front of his wife and children, and held the plaintiff in custody.[19] The Court rejected the defendants' argument that the only remedy available to the plaintiff for violation of his Fourth Amendment rights should be under state tort law, finding that the constitutional remedy against

16. *See* Jacob Gershman, *Some States Are Pushing Laws to Restrict Police Behavior*, WALL STREET J. (Aug. 19, 2020 5:30 AM), https://www.wsj.com/articles/some-states-are-pushing-laws-to-restrict-police-behavior-11597829401 [https://perma.cc/5DLM-XG59]; Jamie Ehrlich, *Democrats team for effort to end doctrine shielding police as GOP backs off*, CNN, https://www.cnn.com/2020/07/01/politics/qualified-immunity-senate-markey-warren-sanders/index.html [https://perma.cc/3CAM-UV2N] (last updated July 1, 2020 9:50 PM).

17. Bivens v. Six Unknown Named Agents, 401 U.S. 388 (1971). Prior to *Bivens*, the only civil remedy available to victims of misconduct by federal agents was through state tort law.

18. *Id.* at 389–90.

19. *Id.* at 389.

federal agents was available regardless of any possible state law remedy.[20]

In *Bivens*, the Court created a federal analog to 42 U.S.C. § 1983, enacted by Congress in 1874 to allow civil damages against state officials for violations of civil rights.[21] Section 1983 only became a useful civil remedy in 1961 when the Court in *Monroe v. Pape* expanded the scope of the remedy to cover unauthorized constitutional violations by state agents.[22] Prior to *Monroe,* the § 1983 statutory remedy was interpreted to cover only unconstitutional actions that were authorized by state law, thus limiting the remedy to the rare circumstance when a state explicitly enacted or authorized unconstitutional behavior.[23]

Beginning with the court-created *Bivens* remedy; plaintiffs could bring claims against federal agents in a similar manner to those brought against state officials under § 1983. However, the *Bivens* remedy imposed some limitations that were not present in the statutory remedy. Constitutional claims would not be allowed against federal officials if there were "special factors counseling hesitation" or if an "equally effective alternative remed[y]" was available to the plaintiffs.[24]

Following the *Bivens* decision, the Court expanded the scope of the remedy beyond the Fourth Amendment to the equal protection guarantees of the Fifth Amendment Due Process Clause.[25] In *Davis v. Passman*, the Court concluded that a claim of gender discrimination by a congressional employee could be the basis of a

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20. *Id.* at 390–92.

21. *See id.* at 389. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

22. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961).

23. *See id.*

24. Davis v. Passman, 442 U.S. 228, 246, 248 (1979).

25. *Id.* at 248–49.

civil cause of action under the Fifth Amendment.[26] Just one year later, in *Carlson v. Green*, the Court again permitted a *Bivens* claim to go forward in a new context—the Eighth Amendment rights of a federal prisoner.[27] The case involved allegations that the plaintiff received inadequate medical care while imprisoned and that this led to his death.[28] Notwithstanding the fact that the plaintiff could bring a tort claim under the Federal Torts Claims Act (FTCA) for this injury, the Court determined that a *Bivens* claim was an appropriate complementary action.[29] Significantly, the Court in *Carlson* explained that even if the plaintiff had another remedy under FTCA, the remedy provided by *Bivens* was a "parallel, complementary cause[ ] of action."[30]

In these early years after the *Bivens* decision, in opinions authored by Justice Brennan, who also wrote the majority opinion in *Bivens*, the Court allowed a generous expansion of the claim. In *Davis*, for example, "special factors counseling hesitation" were overcome even when there was a possible collision with the Speech or Debate Clauses.[31] And, in *Carlson*, an alternative remedy was not considered a bar because that remedy was not as "equally effective" as a direct action based on the Eighth Amendment.[32] In the following decades, however, the Court has consistently refused to expand the range of claims possible under *Bivens*. Broadly construing the special factors that constitute a basis for rejecting a claim and finding weak alternative remedies, or in some situations no remedy, acceptable, the Court has strictly limited the scope of *Bivens*. Since 1980, the Court has not met a *Bivens* claim it likes.

Beginning with *Chappell v. Wallace*, the Court steadily restricted the application of *Bivens*.[33] Similar to *Davis*, *Chappell*

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26. *Id.* at 230–31. Even though the suit against a congressman raised special constitutional concerns, the Court determined that the suit could go forward. *Id.* at 246.

27. *See* Carlson v. Green, 446 U.S. 14, 16–18 (1980).

28. *Id.* at 16 n.1.

29. *See id.* at 19–20.

30. *Id*. at 20.

31. *Davis*, 442 U.S. 228, 234, 235–36 n.11 (1979); *see also* U.S. CONST. art. I, § 6, cl. 1 (establishing immunities for Congresspeople involved in legislative activities).

32. *See* Carlson v Green, 446 U.S. 14, 20 (1980).

33. Chappell v. Wallace, 462 U.S. 296 (1983).

involved claims of discrimination by Navy-enlisted men against their superior officers.[34] The Court concluded that the military context of these claims constituted a "special factor counseling hesitation" and dismissed the claim.[35] Finding itself to be "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," the Court determined that allowing military personnel to bring civil claims against their superior officers may well be disruptive to the military and so should not go forward.[36] Similar special factors were found in *United States v. Stanley* where the claim brought against military officials by a serviceman who had participated in chemical warfare experiments was rejected because of the impact such suit might have on military discipline and decision making.[37]

In *Bush v. Lucas*, the availability of an "equally effective alternative remedy" precluded a *Bivens* claim by a federal employee for violation of his First Amendment rights. [38] Unlike in *Carlson*, the existence of a remedy under the civil service procedures was not considered a complementary remedy, but rather created a bar to a *Bivens* action.[39] Even though the remedy supplied by the Civil Service Commission procedures "was not as effective as an individual damages remedy," the Court nonetheless determined that a claim under *Bivens* should not go forward.[40] The Court concluded that given the development of extensive civil service procedures and protections for federal employees, the determination of whether a new civil damages remedy is appropriate should be left to Congress.[41] Further, the Court has

34. *Id.* at 297.

35. *Id*. at 304–05.

36. *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

37. United States v. Stanley, 483 U.S. 669, 671, 682, 685–86 (1987). In denying the remedy the Court also relied on the "incident to service" doctrine, which disallows damages under the FTCA for injuries to soldiers received as a result of their military service. *See id.* at 681.

38. Bush v. Lucas, 462 U.S. 367, 374–89 (1983).

39. *See id.*

40. *Id.* at 372.

41. *Id.* at 390.

made clear that even in the absence of any alternative remedy, a *Bivens* claim might not succeed.[42]

In declining to extend a *Bivens* remedy to a claim against a private halfway house for former federal inmates, the Court explained that since *Carlson* the Court has "consistently refused to extend *Bivens* liability in any new context or new category of defendants."[43] In *Correctional Services Corporation v. Malesko*, extending liability to a corporate entity was considered "a new context."[44] Finding that the purpose of the *Bivens* remedy was to deter individual federal officials from engaging in unconstitutional action, an extension of the remedy to claims against a corporation would not be consistent with prior precedents.[45] The refusal to expand *Bivens* to what can be construed as a "new context" continued in *Ziglar v. Abbassi* where the Court explained that:

> If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential

42. *See* Wilkie v. Robbins, 551 U.S. 537, 541 (2007) (holding that, in a claim against Bureau of Land Management for damages, a *Bivens* claims might be unjustified even if there is no other way to vindicate the right asserted by the plaintiff); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 69 (2001) (declining to extend *Bivens* to allow recovery against a private corporation operating a halfway house and "reject[ing] the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court.").

43. *Malesko*, 534 U.S. at 63, 68.

44. *See id.* at 74.

45. *Id.* at 74; *see also* FDIC v. Meyer, 510 U.S. 471, 484–85 (1994) (concluding that a *Bivens* action could only be brought against an individual).

> special factors that previous *Bivens* cases did not consider.[46]

In short, anything other than the same factual and legal context found in *Bivens*, *Davis*, or *Carlson*, would be rejected as a "new context." By the time of the *Abbasi* decision, it was clear that while *Bivens* might not yet be overruled it would be kept firmly within the contours of the claims recognized in the few successful opinions issued in the 1980s.[47]

At the same time the scope of *Bivens* claims was being narrowed, the protections provided to defendants by qualified immunity were strengthened. The qualified immunity defense protects officials from liability unless they are violating clearly established constitutional rights and would reasonably be aware of those rights.[48] This defense has become increasingly protective. For example, in *Wilson v. Layne*, the Court determined that the decision to allow the media to accompany officers into a private home during the execution of an arrest warrant was a violation of

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46. 137 S. Ct. 1843, 1851, 1859–60, 1869 (2017) (no *Bivens* claim against high-ranking officials in Justice Department for detention of illegal aliens).

47. The Court created another barrier to successful *Bivens* claims in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2017). The plaintiff, Iqbal, was detained by federal officers after 9/11 and alleged that his treatment while detained was based on his race and religion in violation of the First and Fifth Amendments. *Id.* at 1942, 1944. Among the defendants were the Attorney General and the Director of the FBI. *Id.* at 1942. The Court dismissed Iqbal's claims against high-ranking officials for failure to state a claim. *Id.* at 1943. The Court found that the high-ranking officials' involvement in the unconstitutional treatment was not supported by sufficient factual content and that the allegations were merely conclusory. *Id.* at 1951, 1954. This seeming tightening of Federal Rule of Procedure Eight's requirements has been sharply criticized. *See, e.g.*, Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government From Accountability for Constitutional Deprivations*, 114 PENN. ST. L. REV. 1333, 1374-75 (2010); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 575–83 (2010); Goutam U. Jois, Pearson*,* Iqbal*, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901 (2010); Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise or Discipline Subordinates in a Post*-Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 288–98 (2012); Alexander A. Reinert, *Supervisory Liability and* Ashcroft v. Iqbal, 41 CARDOZO L. REV. 945, 977–78 (2020); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

48. Anderson v. Creighton, 483 U.S. 635, 638–39 (1987).

the Fourth Amendment.[49] However, the defendants were protected by qualified immunity because the violation of the Fourth Amendment had not been set down with sufficient specificity by an earlier court decision.[50] While the general principle had been established—that third parties could not be brought into private homes when police were executing a warrant—its specific application to this situation had not been made prior to the time of the incident.[51]

Another common theme in qualified immunity is whether the official's action was reasonable under the circumstances. This defense is often successful in cases alleging use of excessive force. In *Scott v. Harris*, the Court determined that it was reasonable under the circumstances for a police officer to use deadly force to stop a fleeing motorist, even though the motorist was being pursued only for speeding.[52] The police officer used a technique designed to stop a speeding car by pushing the police car into the bumper of the car being pursued.[53] This maneuver caused the motorist to lose control and crash.[54] The accident resulted in severe injuries causing the plaintiff to be quadriplegic.[55] The Court reasoned that the risk to the public caused by a speeding car pursued by police justified the use of deadly force.[56] The use of a dangerous and possibly deadly technique was a reasonable response to the reckless driving of the fleeing motorist when the recklessness "threaten[ed] the lives of innocent bystanders."[57] Thus, even with the use of deadly force, a broad definition of reasonableness protects officials.[58]

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49. Wilson v. Layne, 526 U.S. 603, 605–06 (1999).
50. *Id.* at 606.
51. *See id.* at 616–17.
52. Scott v. Harris, 550 U.S. 372, 374–75, 386 (2007).
53. *Id.* at 375.
54. *Id.*
55. *Id*.
56. *Id.* at 386.
57. *Id.*
58. *See id.*; Plumhoff v. Richard, 572 U.S. 765, 768 (2014) (holding that shooting at a fleeing vehicle even after vehicle was stopped was reasonable); Reich v. City of Elizabethtown, 945 F.3d 968, 974, 973, 977 (6th Cir. 2019) (holding that shooting a man holding a knife twenty to thirty feet away who had turned away to run was reasonable); Horton v. Pobjecky, 883 F.3d 941,

II. HERNANDEZ FOURTH AMENDMENT CLAIM REJECTED

It was against this background that the Court considered whether the Hernandezes could bring their Fourth Amendment *Bivens* claim. Defendant Border Patrol Agent Jesus Mesa, Jr., shot the plaintiffs' child, Sergio Hernandez Guereca.[59] The shooting took place in an area between the United States and Mexico borders.[60] The plaintiffs claimed that Agent Mesa violated their son's Fourth and Fifth Amendment rights.[61]

In an opinion written by Justice Samuel Alito, the Court began by explaining that the judicially-created *Bivens* remedy was a product of an earlier era that has now been discredited.[62] The Court has come to see the creation of implied causes of action, such as *Bivens*, as an inappropriate judicial incursion into the power of the legislative branch.[63] It is a legislative, not judicial, prerogative to determine what type, if any, remedy is available for violations of law.[64] In fact, the action of the *Bivens* Court in creating the remedy has come to be seen as incorrect: "if 'the Court's three *Bivens* cases [had] been . . . decided today,' it is doubtful that we would have reached the same result."[65] Justice Alito concluded that given the now "disfavored" practice of creating judicial remedies without clear legislative intent, extension of *Bivens* must be approached with caution.[66] That caution is manifested in a twostep inquiry: does the claim arise in a new context from previous *Bivens* cases; if

944, 946 (7th Cir. 2018) (holding that shooting a sixteen-year-old crawling away from an officer was reasonable); Chappell v. City of Cleveland, 585 F.3d 901, 904 (6th Cir. 2009) (holding that shooting a fifteen-year-old boy with a knife from across the room was reasonable).

59. Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020).

60. *Id.*

61. *Id.*

62. *Id.* at 741. Justices Roberts, Gorsuch, and Kavanaugh joined the opinion of the Court; Justice Thomas separately concurred, joined by Justice Gorsuch; Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented. *Id.* at 735.

63. Justices Thomas and Gorsuch argued that the time has come to overrule Bivens. *Id.* at 750 (Thomas, J., concurring).

64. *See id.* at 741 (majority opinion); *see also id.* at 750 (Thomas, J., concurring).

65. *Id.* at 742–43 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017)) (majority opinion).

66. *Id.* at 742.

so, are there special factors counseling hesitation in expansion of the remedy.[67] The definition of a new context must be interpreted broadly and the special factors weighing against a *Bivens* claim should be based on a consideration of the necessity and efficacy of the remedy and a weighing of the costs and benefits.[68]

Justice Thomas would have gone further and "abandon[ed] the [*Bivens*] doctrine altogether."[69] He argued that the Court has abandoned judicial creation of remedies, leaving the *Bivens* remedy a relic of a mistaken past.[70] Noting that the Court has not extended the scope of *Bivens* for forty years, Justice Thomas concludes that the basis of the decision has been undermined and should no longer be followed.[71] The role of creating a remedy for constitutional wrongs against federal agents should be left to the legislature.[72] Congress has shown its ability to create such a cause of action with the adoption of § 1983 and Congress is capable of doing the same for federal misconduct should it choose to do so.[73]

Applying the flexible and broad standards laid out in his opinion, Justice Alito unsurprisingly found that the *Hernandez* case presented a new context. The context was new even though *Hernandez* presented a similar constitutional claim to the original *Bivens* action—excessive force by a law enforcement official. Despite the long recognition of Fourth Amendment *Bivens* claims, the cross-border location of the incident at issue provided the meaningful difference between *Hernandez* and previous excessive force cases.

Finding a new context, the Court went on to consider special factors and found that "there are multiple related factors that raise warning flags."[74] Those warning signs are the potential effect on foreign relations and national security, and the respect for the separation of powers inherent in those two areas.[75] The area of

67. *Id.* at 743.
68. *See id.*
69. *Id.* at 753 (Thomas, J., concurring).
70. *Id.* at 750–51.
71. *See id.* at 750–53.
72. *See id.* at 752.
73. *Id.*
74. *Id.* at 744 (majority opinion).
75. *Id.* at 744–46, 749.

foreign relations is not the province of the courts—the authority of the executive branch must be respected.[76] Because *Hernandez* involves the killing of a Mexican citizen in Mexico, the case necessarily becomes a matter of international concern.[77] The way in which this matter should be resolved should be left to the executive branch.[78] With respect to the *Hernandez* shooting, any differences between the United States and Mexico in what the consequences should be must be reconciled between the two governments without judicial interference.[79]

National security is a similar concern, best left to political branches rather than to the courts. Control of illegal cross-border activity is an issue central to national security and management of that activity is the purview of the executive branch through the Customs and Border Protection Agency.[80] Comparing the facts in *Hernandez* to *Chappell*, the Court reasoned that just as the system of military discipline should not be interfered with, the regulation and discipline of agents who work at the border, such as defendant Mesa, should not be intruded upon by the creation of a *Bivens* remedy.[81] Congress's actions in limiting extra-territorial remedies in some situations and providing them in others provides another indication that remedies in this area should be left to the discretion of Congress and the Executive Branch.[82] Undercutting the

76. *Id.* at 749–50.

77. *See id.* at 744–45.

78. *See id.* The Justice Department investigated the incident and determined that Agent Mesa "did not act inconsistently with [Border Patrol] policy or training regarding the use of force." *Id.* at 744 (internal quotations omitted).

79. *Id.* at 745.

80. *See id.* at 746.

81. *Id.* at 746–47 (citing United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983)).

82. *Id.* at 747–49 (citing Torture Victims Protection Act of 1991, 28 U.S.C. § 1350; Foreign Claims Act, 10 U.S.C. § 2734; Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679). *See also* Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 32–33 (2010)(arguing that the Supreme Court has rendered constitutional rights "second class rights" because the Court has narrowed § 1983 actions by establishing both absolute and qualified immunity, almost entirely excluding municipalities from *respondeat superior* liability, limiting supervisory liability, imposing a plausibility pleading requirement, narrowing the definition of "under the color of state law," requiring clear evidence that

reasoning of *Bivens*, Justice Alito asserted that even if there is no other remedy for the harm, a constitutional tort claim might still not be allowed to go forward.[83] Justice Alito concludes by emphasizing that the application of a judicial remedy, such as *Bivens*, should not be available so as to respect the roles of the political branches and "[t]o avoid upsetting the delicate web of international relations."[84] Deciding what type of remedy or if any remedy should be available in is the responsibility of Congress and not the courts.[85]

In her dissent, Justice Ginsburg challenged the majority's conclusion that the *Hernandez* case presented a "new context."[86] The Hernandezes' claim "arises in a setting kin to *Bivens* itself: Mesa, plaintiffs allege, acted in disregard of instructions governing his conduct and of Hernández's constitutional rights."[87] The type of excessive force allegation against federal law enforcement officials had been recognized as a common basis for a *Bivens* claim.[88] Since the purpose of *Bivens* is to deter unconstitutional behavior of federal officials and the agent shot from the U.S. side of the border, Ginsburg concluded that the fact that the victim was on the Mexican side should be of no consequence because the unconstitutional use of excessive force occurred in the United States.[89] The dissent also disputes whether the Hernandezes' claim presented special factors.[90] Unlike in *Abbasi*, "no policies or policy makers [were] challenged in [the] case."[91] Ginsburg also questioned why the diplomatic issue is different if the shooting victim is killed on the Mexican side of the border rather than on the

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Congress intended to provide for the violated right, and limiting the availability of punitive damages).

83. *See Hernandez*, 140 S. Ct. at 750.

84. *Id.* at 749.

85. *Id.* at 750.

86. *Id.* at 756 (Ginsburg, J., dissenting).

87. *Id*.

88. *Id*.

89. *Id*. at 757.

90. *Id.*

91. *Id.* The defendants in *Ziglar v. Abbasi*, were high ranking officials at the Justice Department and wardens at federal detention facilities. 137 S.Ct. 1843, 1851 (2017). In contrast, the defendant in *Hernandez* is a border patrol officer.

U.S. side.[92] Excessive force claims brought by Mexican citizens have gone forward under *Bivens* when they occur within the United States.[93] Congress has been aware of these suits and not sought to prevent them.[94] Justice Ginsburg's dissent concludes by criticizing the Court's reasoning, which allows for no remedy for border agent misconduct.[95]

III. NOT SUCH A NEW CONTEXT

A Fourth Amendment *Bivens* action brought against a federal law enforcement official is anything but new. In fact, *Biven*s itself involved a claim for unreasonable search and excessive force against federal agents.[96] As the petitioners' brief pointed out, this type of action is the most common type of *Bivens* action—claims against individual federal officers for misuse of their enforcement authority is the bread and butter of *Bivens* actions.[97] As noted in the *Hernandez* dissent, the use of deadly force by border agents potentially resulting in *Bivens* actions is unfortunately common.[98] Several suits based on deadly shooting by border patrol officers have been brought—some resulting in settlements or dismissal based on qualified immunity.[99] In one case, *Dominguez v. Corbett*, strikingly similar to *Hernandez*, a border patrol agent in Arizona shot a Mexican citizen as he was attempting a border crossing.[100]

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92. *Id*. at 757.

93. *See, e.g.*, Dominguez v. Corbett, No. CV 08-648-TUC-DCB, 2011 WL 2882001 (D. Ariz. July 19, 2011).

94. *Hernandez,* 140 S. Ct. at 758 (Ginsburg, J., dissenting).

95. *See id*. at 760.

96. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971).

97. *See* Brief for Petitioner at 22, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678) ("The Fifth Circuit has previously explained that '[t]he classic *Bivens*-style tort' is one 'in which a federal law enforcement officer uses excessive force, contrary to the Constitution or agency guidelines.'" (quoting Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987))).

98. *Hernandez*, 140 S. Ct. at 760 (Ginsburg, J., dissenting).

99. *See, e.g.*, Mendez v, Poitevent, 823 F.3d 326 (5th Cir. 2016); Dominquez v. Corbett, No. CV 08-648-TUC-DCB, 2011 WL 2882001 (D. Ariz. July 19, 2011); Estate of Alvarado v. Tackett, No. 13-CV-1202 W (JMA), 2015 WL 13239185 (S.D. Cal. May 14, 2015); Complaint, Vicente v. United States, No. 5:20-cv-00081, 2020 WL 2473881 (S.D. Tex. May 12, 2020).

100. First Amended Complaint at 10, Dominquez v. Corbett, No. CV 08-648-TUC-DCB, 2011 WL 2882001 (D. Ariz. Nov. 24, 2009).

The border patrol agent approached several men in a car—suspecting them of illegally crossing the border.[101] As alleged in the plaintiff's complaint, the men were ordered to kneel down and, as they were in the process of doing so, the agent shot one of them seemingly without provocation.[102] As with *Hernandez*, the shooting victim's parents brought a *Bivens* suit against the agent based on the Fourth Amendment.[103] The district court in *Dominguez* allowed the *Bivens* claim to proceed and the case resulted in a settlement.[104] The only difference between *Dominguez* and *Hernandez* was that the *Dominguez* shooting took place in Arizona, a few miles past the border.[105]

In contexts other than border security, a wide range of Fourth Amendment claims have been successfully brought against federal law enforcement for various types of misconduct.[106] Fourth Amendment claims are second only to prisoner treatment claims as the most common type of *Bivens* actions.[107] These routine excessive force and unreasonable search actions are relatively successful and have resulted in judgements for the plaintiffs and numerous settlements.[108] The new context determination found in *Hernandez* appears to be a stretch. The factual and legal issues that would have been raised by the *Hernandez* case are well within the familiar competence of the federal courts.

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101. *Id.* at 9.

102. *Id.* at 9–10.

103. *Dominguez*, 2011 WL 2882001 at *1.

104. *Id.* at *5; Order Dismissing Dominguez v. Corbett, No. 4:08-cv-00648-DCB-BPV (D. Ariz. Nov. 1, 2011) (Bloomberg Law).

105. *See* First Amended Complaint, *supra* note 100, at 10.

106. *See, e.g.*, DeMayo v. Nugent, 517 F.3d 11 (1st Cir. 2008) (warrantless entry); Tekle v. United States, 511 F.3d 839 (9th Cir. 2007) (unreasonable seizure); Dickey v. United States, 174 F. Supp.3d 366 (D.D.C. 2016) (unreasonable search); Terrell v. Petrie, 763 F. Supp. 1342 (E.D. Va. 1991) aff'd, 952 F.2d 397 (4th Cir. 1991) (unlawful search).

107. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 836 n.138 (2010).

108. *See id*. at 837. Professor Reinert has found that during the three-year period from 2001 to 2003 approximately thirty percent of the *Bivens* claims in the five judicial districts he surveyed resulted in successful outcomes for the plaintiffs. *Id.* at 836 n.138.

IV. THE FUTURE OF RELIEF FOR FEDERAL GOVERNMENTAL MISCONDUCT

Given the increasingly limited role of *Bivens* in providing relief and deterrence from federal agents' misconduct, and the increasing strength of defendant protective immunities, the question arises of whether there will be any remedy for the misconduct. The current climate for constitutional remedies against federal agents is bleak. *Bivens* is severely limited, the Federal Tort Claims Act does not cover actions based on constitutional law, and the Westfall Act does not allow state tort actions against federal employees.[109] Against this background, pressure has been mounting for change.

A. *Governmental Rather Than Individual Liability*

One avenue of relief may come from amendment to the Federal Tort Claims Act.[110] The FTCA is the statutory mechanism through which the United States can be sued for torts committed by federal employees acting within the scope of their employment.[111] The government has waived its sovereign immunity and the suit proceeds against the United States, not the individual federal employee and any compensatory damages awarded to the plaintiff are paid by the United States.[112] This regime has been in place since 1946 and has been used to provide relief for the negligence

109. The FTCA is of limited use in providing a remedy for law enforcement misconduct due to the popularly named Westfall Act, Federal Employees Liability and Reform and Tort Compensation Act, 28 U.S.C. § 2679, which limits liability for law enforcement officials under the FTCA. *See* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 745 (2008); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 122–123 (2009); Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *after* Minneci, 90 WASH. U. L. REV. 1473, 1496–97 (2013).

110. *See* Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 656 (2019). Professor Stern argues that because the *Bivens* remedy has proved to be so inadequate, the FTCA should be amended to provide a remedy for constitutional torts. *Id.*

111. *See id.* at 564.

112. *See* 28 U.S.C. § 1346(b)(1).

and other tortious conduct of government employees.[113] The scope of the FTCA is limited to torts that are recognized by state law for which an individual might be held liable.[114] Thus, actions for violations of constitutional rights are not cognizable under the FTCA.[115] Some scholars have suggested that an amendment to the FTCA to provide a waiver of sovereign immunity for constitutional torts would provide a sound mechanism for deterrence and compensation for wrongful acts.[116] As the United States would be the defendant, not an individual agent, the strongly protective qualified immunity defenses could not be raised. The potential burden of paying for the individual's representation and an individual damages award would also be eliminated if the defendant was the United States. While there has been discussion in Congress of this option in the past, the continued shrinking of *Bivens* may well bring more attention to this option.[117]

B. *Qualified Immunity Reform*

In response to the almost insurmountable difficulties in successfully challenging the misconduct of state and federal law enforcement officials, there have been increasing cries for reform of the qualified immunity defense. Because of the outrage accompanying the killing of Black Americans by police officers, the pressure for change has become increasingly acute. On the federal front, bills have been introduced in Congress that would curtail the use of the qualified immunity defense.[118] These bills would

113. The FTCA excludes intentional tort claims, but in 1973, a law enforcement exception was adopted that allows tort claims based on "assault, battery, false imprisonment, [and] false arrest," thus allowing some claims resulting from law enforcement misconduct. 28 U.S.C. § 2680(h) (2018); *see also* Stern, *supra* note 110, at 665.

114. 28 U.S.C. § 1346(b)(1) (the United States is liable "in accordance with the law of the place where the act or omission occurred.").

115. *See* Carlson v. Green, 446 U.S. 14, 23 (1980).

116. *See, e.g.*, Stern, *supra* note 110, at 717–20; Fallon, *supra* note 13, at 980–81.

117. Taking a contrary view, Professor Reinert argues that the qualified immunity defense does not have a significant impact on the outcome of federal constitutional tort claims. Reinert, *supra* note 107, at 817, 843–44.

118. During the 116th Congress, there were three bills that were introduced in Congress to reform or abolish qualified immunity: the Ending Qualified Immunity Act, the George Floyd Justice in Policing Act of 2020, and the Reforming Qualified Immunity Act. All three bills would eliminate qualified

eliminate the defenses of a good faith belief that the conduct was lawful, that the constitutional right was not clearly established, or that the defendant could not have reasonably known the conduct was unlawful.[119] There have also been bills introduced in several state legislatures that would reform the qualified immunity standard, and in a few states, some reforms have been passed but have not yet become law.[120] As with the federal bills, these state statutes would eliminate the qualified immunity defense while providing a state civil remedy for violation of constitutional rights.

CONCLUSION

The rejection of the *Bivens* claims brought by the parents of Sergio Hernandez Guereca was inevitable. The Court has steadily

immunity by amending § 1979 of the Revised Statutes (42 U.S.C. § 1983) and thus, eliminating the following four defenses: (1) the defendant acted in good faith; (2) that the defendant believed that his conduct was lawful; (3) that the constitutional right allegedly violate was not "clearly established" at the time of the deprivation; and (4) that the defendant could not have been reasonably expected to know whether his conduct was lawful due to the state of the law. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020); Ending Qualified Immunity Act, S. 4142, 116th Cong. § 4 (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); Reforming Qualified Immunity Act S. 4036, 116th Cong. § 4 (2020). However, unlike the Ending Qualified Immunity Act and the Justice in Policing Act that merely remove those defenses, the Reforming Qualified Immunity Act also creates two new defenses to qualified immunity, thus reforming rather than completely removing qualified immunity. *See* S. 4036 § 4.

119. *See* H.R. 7085 § 4; S. 4142 § 4; H.R. 7120 § 102; S. 4036 § 4. The Reforming Qualified Immunity Act eliminates the qualified immunity defense but creates new defenses if the conduct had previously been found by the courts to be constitutional or if the conduct was authorized by state or federal statute. *See* S. 4036 § 4.

120. There are several states in which qualified immunity reform has either passed, been considered, is currently being considered, or has concrete plans to consider reform in the future. Both Colorado and Connecticut have enacted qualified immunity reform. Enhance Law Enforcement Integrity Act, COLO. REV. STAT. ANN. §13-21-131(2)(b) (2020); Act Concerning Police Accountability, CONN. GEN. STAT. ANN. P.A. 20-1, § 41 (Westlaw). Massachusetts has passed some form of qualified immunity reform in both chambers, but because both chambers' reforms differed, legislators had to negotiate a new bill. Steve Brown & Ally Jarmanning, *Here's What's In The Police Reform Law Proposed For Massachusetts*, WBUR, https://www.wbur.org/news/2020/12/01/massachusetts-police-reform-legislation-explainer [https://perma.cc/A3CY-NKEU] (last updated Dec. 10, 2020). However, the version legislators could agree upon did not include meaningful qualified immunity reform. *See id*.

rejected *Bivens* claims determining that any factual or legal difference creates a new context that requires a presumption against the claim. A wide range of special factors based on a hostility to judicially created remedies leads to dismissal of the claims.

As the possibility of successful claims against federal misconduct has diminished, the pressure on Congress and state legislatures for reform has mounted. As the Court makes clear that it will not provide a remedy against federal misconduct, no matter how egregious, reform must come from the legislature. The shocking nature of the shooting in *Hernandez* and the outrage that the defendant suffered no consequences, may well hasten legislative response.