

1-1-2021

## The Bivens "Special Factors" and Qualified Immunity: Duplicative Barriers to the Vindication of Constitutional Rights

Amelia G. Collins  
*University of Richmond School of Law*

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Procedure Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Amelia G. Collins, *The Bivens "Special Factors" and Qualified Immunity: Duplicative Barriers to the Vindication of Constitutional Rights*, 55 U. Rich. L. Rev. 1 (2021).

Available at: <https://scholarship.richmond.edu/lawreview/vol55/iss4/1>

This Comment is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# COMMENT

## THE *BIVENS* “SPECIAL FACTORS” AND QUALIFIED IMMUNITY: DUPLICATIVE BARRIERS TO THE VINDICATION OF CONSTITUTIONAL RIGHTS

*Amelia G. Collins* \*

### INTRODUCTION

When courts imply a cause of action under a *Bivens* analysis and when they apply an immunity as a defense, they are acting in their capacity as common-law courts.<sup>1</sup> However, each of those mechanisms developed differently, and the Supreme Court of the United States has been hesitant to utilize one—*Bivens* causes of action—while generously applying the other—qualified immunity. The purposes behind each device were originally antithetical, with *Bivens* aiming to deter unconstitutional conduct and qualified immunity seeking to ensure courts did not deter too much. However, the Supreme Court gradually restricted its *Bivens* jurisprudence, from granting a cause of action unless there are “special factors,” to denying a cause of action whenever there are “sound reasons.”<sup>2</sup> As a result, the practical outcomes of both analyses are the same: plaintiffs cannot fully vindicate their constitutional rights and often cannot vindicate them at all. This

---

\* J.D. Candidate, 2021, University of Richmond School of Law; B.A., 2014, MidAmerica Nazarene University. Thanks to Professor Jack Preis, Associate Dean at the University of Richmond School of Law, for inspiration and guidance.

1. See Richard H. Jr. Fallon, *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 949 (2019) (“Absent statutory authorization, a right to sue for redress of a constitutional violation is a species of common law, crafted by the courts to implement the Constitution in the absence of a necessary one-to-one correlation between a constitutional right and a particular remedy for the right’s violation. *Bivens*’ innovations were to ground a cause of action in federal rather than state common law and to put alleged constitutional violations at the core of the right to sue.”).

2. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

Comment argues that, to ensure the vitality of the foundational presumption that for every legal right, there is a remedy,<sup>3</sup> the Supreme Court should restore its *Bivens* analysis to the original framework, invoking only those “special factors” recognized in the Court’s initial extensions of a cause of action to plaintiffs bringing constitutional claims.

That would mean abandoning the catch-all “sound reasons” espoused in *Ziglar v. Abbasi*<sup>4</sup> and followed in the Court’s most recent *Bivens* decision, *Hernández v. Mesa*.<sup>5</sup> It would mean considering only whether the issue is purely a matter of policy—that is, one that does not implicate a constitutional right—or whether the issue raises extraordinary separation-of-powers concerns. A restoration of the original *Bivens* framework would ensure that federal actors can be held accountable when they violate the Constitution. The court-created doctrine of qualified immunity would remain a defense, but, at the very least, the courts would reprise their proper role in the protection of constitutional rights.

Part I of this note traces the history of the *Bivens* cause of action and analyzes the original “special factors” that concerned the Supreme Court. Part I also outlines the purpose behind implying a *Bivens* cause of action for plaintiffs bringing constitutional claims. Part II includes the same analysis of the qualified immunity defense, both to its history and purpose. Part III demonstrates how the Supreme Court has incorporated the concerns addressed by qualified immunity into the “special factors” analysis, rather than acknowledging the mitigating nature of immunity defenses when examining if any “special factors” exist. Finally, Part IV argues for the restoration of the original, more limited “special factors” jurisprudence—and an abandonment of the incorporation of qualified immunity concerns—to facilitate the vindication of constitutional rights.

## I. THE HISTORY AND PURPOSE OF THE *BIVENS* CAUSE OF ACTION

On the morning of November 26, 1965, federal agents entered the home of Webster Bivens and effected a warrantless search and

---

3. *Marbury v. Madison*, 1 Cranch 137, 162–63 (1803).

4. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

5. *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020).

a warrantless arrest.<sup>6</sup> They handcuffed Bivens in front of his family, searched his entire apartment, and transported him to the police station where he was interrogated and strip-searched.<sup>7</sup> Bivens sued the officers for damages in federal court alleging violations of his Fourth Amendment rights.<sup>8</sup> The district court dismissed the complaint, finding Bivens failed to state a cause of action.<sup>9</sup> The court of appeals affirmed.<sup>10</sup>

However, the Supreme Court reversed.<sup>11</sup> In doing so, it first rejected the government's contention that Bivens should bring his claim in state court under state tort law.<sup>12</sup> The Court noted that the Fourth Amendment is a limit on the exercise of federal power regardless of whether state law would penalize the officer's conduct.<sup>13</sup> Further, the interests protected by state trespass law are not necessarily the same as those protected by the Fourth Amendment.<sup>14</sup> For example, the entry of a federal officer given permission would not be covered by state trespass law, even though the entry may be unreasonable under the Fourth Amendment.<sup>15</sup> The Court noted that the Fourth Amendment's protection does not hinge on the availability of a state law remedy because "it guarantees . . . the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority."<sup>16</sup> Therefore, the available causes of action under state law were insufficient and the question of whether the officers' conduct was a violation of the Fourth Amendment was "an independent claim both necessary and sufficient to make out the plaintiff's cause of action."<sup>17</sup>

After deciding that Bivens had a cause of action under the Fourth Amendment, the Court turned to the question of whether damages were an available remedy.<sup>18</sup> When federally protected

---

6. *Bivens*, 403 U.S. at 389.

7. *Id.*

8. *Id.*

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

10. *Bivens*, 403 U.S. at 390.

11. *Id.* at 397.

12. *Id.* at 392.

13. *Id.*

14. *Id.* at 394.

15. *Id.*

16. *Id.*

17. *Id.* at 395.

18. For a historical exploration of the cause of action as it relates to rights, remedies and jurisdiction, see John F. Preis, *How the Federal Cause of Action Relates to Rights*,

rights—like those guaranteed by the Fourth Amendment—are invaded, “it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”<sup>19</sup> The Court noted that, in the context of federal statutes with a general right to sue, it had the authority to use any remedy to right a wrong.<sup>20</sup> In extending that authority to remedying constitutional violations, the Court decided that “no special factors counsel[] hesitation in the absence of affirmative action by Congress.”<sup>21</sup> That is because Bivens’ claim was not a question of “federal fiscal policy.”<sup>22</sup> Here, the Court offered two examples: *United States v. Standard Oil Company* and *United States v. Gilman*.<sup>23</sup> In both instances, the Court refused to permit a cause of action where the United States was a party and where the issue did not concern a violation of a constitutional right.<sup>24</sup> The Court also noted that Bivens’ claim did not involve the liability of a congressional employee for conduct that did not implicate constitutional rights.<sup>25</sup> In sum, the “special factors” identified merely signaled that the Court had previously refused to imply a cause of action in cases lacking allegations of constitutional violations and would continue to do so in order to leave policy decisions to Congress.

Bivens’ claim did not raise any “special factors” and a remedy of monetary damages for a Fourth Amendment violation was not prohibited by an explicit congressional declaration proscribing an alternative remedy.<sup>26</sup> Therefore, the Court held that Bivens was

---

*Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2015).

19. *Bivens*, 403 U.S. at 395 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

20. *Id.* at 396.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (citing *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), where the government sought damages from a company for injuries its employee caused to a soldier, and *United States v. Gilman*, 347 U.S. 507 (1954), where the government sought indemnification from its employee who was liable under the Tort Claims Act. In both cases, the Court refused to decide an issue of policy that was the proper subject of congressional action. Notably, neither of these cases involved constitutional rights); see *Bush v. Lucas*, 462 U.S. 367, 380 (1983) (“Unlike *Standard Oil* and *Gilman*, this case concerns a claim that a constitutional right has been violated.”).

25. *Bivens*, 403 U.S. at 396–97 (citing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), where an individual sued a congressional employee for damages resulting from the issuance of a subpoena). The Court refused to imply a cause of action for damages because it found the conduct did not violate constitutional rights. *Id.*

26. *Id.* at 397.

entitled to sue the federal officials for damages for his injuries resulting from their unconstitutional conduct.<sup>27</sup>

A. *The Application of Bivens in Subsequent Cases*

*Bivens* was the first time the Court implied a cause of action for damages arising from the Constitution.<sup>28</sup> In *Bivens*, the right at issue was the Fourth Amendment's protection against unreasonable search and seizure. Eight years after deciding *Bivens*, in *Davis v. Passman*, the Court recognized an implied cause of action for a violation of the Due Process Clause of the Fifth Amendment.<sup>29</sup> In that case, a congressman terminated the employment of a female employee, Ms. Davis, after he concluded that her role needed to be filled by a man.<sup>30</sup> The employee sued in federal court, alleging the congressman's conduct violated the Fifth Amendment as discrimination on the basis of sex.<sup>31</sup> The district court granted the congressman's motion to dismiss on the ground that the employee had failed to state a claim, and the Fifth Circuit, sitting en banc, held that no right of action may be implied from the Due Process Clause of the Fifth Amendment.<sup>32</sup>

The Supreme Court reversed, holding that the employee asserted a constitutionally protected right, stated a cause of action asserting that right, and that damages were a proper remedy.<sup>33</sup> As to whether the complaint stated a cause of action, the Court distinguished between implying a cause of action under a federal statute and implying one under the Constitution.<sup>34</sup> While statutory rights are established by Congress, and therefore it is entirely appropriate for Congress to determine who may enforce them and how, the Constitution "does not 'partake of the prolixity of a legal code.'"<sup>35</sup> The Court recognized the judiciary as the "clearly discernible" means through which constitutional rights may be

---

27. *Id.*

28. See Fallon, *supra* note 1, at 948. Before *Bivens*, plaintiffs could sue for injunctive relief for constitutional violations by federal officials under *Ex Parte Young*. See *id.* at 947–48.

29. 442 U.S. 228 (1979).

30. *Id.* at 230.

31. *Id.* at 231.

32. *Id.* at 232.

33. *Id.* at 234.

34. *Id.* at 241.

35. *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) 407 (1819)).

enforced.<sup>36</sup> In that capacity, the Court had previously recognized a cause of action under the Due Process Clause of the Fifth Amendment for plaintiffs seeking equitable relief.<sup>37</sup> Therefore, Davis could invoke general federal-question jurisdiction to seek relief in federal court.<sup>38</sup>

The second question in *Davis* was whether damages were an appropriate remedy.<sup>39</sup> The Court referenced *Bivens*' holding that a federal court may provide relief in damages for constitutional violations if there are "no special factors counselling hesitation in the absence of affirmative action by Congress."<sup>40</sup> In analyzing the presence of "special factors," the Court noted that, while a suit against a congressman for allegedly unconstitutional conduct during his tenure would "raise special concerns counselling hesitation," those separation-of-powers concerns were addressed by the protections afforded him under the Speech or Debate Clause.<sup>41</sup>

The Court also found there was no explicit congressional bar on monetary damages for unconstitutional employment discrimination.<sup>42</sup> While Title VII of the Civil Rights Act protected federal employees from discrimination, it did not cover Ms. Davis' position, and there was no evidence Congress intended to foreclose all remedies for those the statute left out.<sup>43</sup> The Court ultimately held that Davis had a cause of action for damages under the Fifth Amendment.<sup>44</sup>

Less than a year after deciding *Davis*, the Court extended *Bivens* yet again, to imply a cause of action under the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>45</sup> Marie Green sued federal prison officials on behalf of her deceased son's estate, alleging he died from personal injuries resulting from violations of his Eighth Amendment rights.<sup>46</sup> The Court summarized *Bivens* as establishing a right to recover damages

---

36. *Id.*

37. *Id.* at 242–43 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

38. *Id.* at 244.

39. *Id.*

40. *Id.* at 245 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

41. *Id.* at 246.

42. *Id.*

43. *Id.* at 247.

44. *Id.* at 249.

45. *Carlson v. Green*, 446 U.S. 14 (1980).

46. *Id.* at 16.

under an implied cause of action for a constitutional violation unless (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy explicitly intended as a substitute.<sup>47</sup>

In Green's case, neither condition was met.<sup>48</sup> First, the case did not implicate the federal officer's "independent status in our constitutional scheme" that would suggest an implied remedy would be inappropriate,<sup>49</sup> and even if a remedy would inhibit the performance of the officer's duties, qualified immunity provided adequate protection.<sup>50</sup> Second, the Court found no explicit congressional declaration that individuals could not recover damages and must use an alternative remedy instead.<sup>51</sup> Specifically, the Court noted that when Congress amended the Federal Tort Claims Act (FTCA) in 1974 to create a cause of action against the United States for intentional torts committed by federal officers, it meant to create a complementary cause of action to a *Bivens* claim, not to displace it.<sup>52</sup> The Court ultimately affirmed the Seventh Circuit's holding that Green pled an Eighth Amendment violation and had a *Bivens* cause of action for damages.<sup>53</sup>

#### B. *The Expansion of "Special Factors"*

The Supreme Court's ruling in *Carlson v. Green* was the high-water mark for *Bivens* claims; the Court's decision seemed to presume an available *Bivens* remedy unless there were narrowly-defined "special factors counselling hesitation" or an explicit declaration by Congress that an alternative remedy must be used in place of a suit for damages.<sup>54</sup> The original "special factors" noted

---

47. *Id.* at 18.

48. *Id.* at 19.

49. *Id.* The Court is referring to the potential implications of implying a cause of action against a congressman in *Davis*.

50. *Id.*

51. *Id.*

52. *Id.* at 19–20; see also Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. 1473, 1495–96 (2013) (noting that "[d]espite the Court's rhetoric that *Bivens* represents the Court acting entirely on its own accord, Congress has ratified the *Bivens* remedy twice"—first, when it amended the FTCA in 1974, legislative history indicates Congress viewed *Bivens* as a complementary remedy, and second, when Congress adopted the Westfall Act, which immunized federal employees from state tort claims, but the provision was not the exclusive remedy in civil actions against federal employees for violations of constitutional rights.).

53. *Carlson*, 446 U.S. at 17–18.

54. *Id.*



by the Supreme Court implicated separation-of-powers concerns only regarding (1) deference to Congress on policy matters in cases that did not implicate constitutional rights, and (2) hesitation to impose liability on federal officers operating in the other branches of government—like the congressman in *Davis* and the prison official in *Carlson*.<sup>55</sup> However, the Court explicitly noted that the liability concern was mitigated by the availability of various immunities.<sup>56</sup>

Subsequently, the Supreme Court expanded the types of “special factors counselling hesitation” beyond those recognized in the *Bivens-Davis-Carlson* trilogy to deny *Bivens* causes of action to a variety of plaintiffs.<sup>57</sup> In *Bush v. Lucas*, the Court denied a *Bivens* cause of action to a federal employee who alleged his supervisor violated his First Amendment rights.<sup>58</sup> The Court found “Congress [was] in a better position to decide whether or not the public interest would be served” by allowing a cause of action in cases regarding federal personnel policy.<sup>59</sup> In *Chappell and Stanley*, the Court identified the “special factors” of the unique disciplinary structure of the military and Congress’s constitutionally delegated purview over military matters to deny a *Bivens* remedy to members of the military for constitutional violations that occurred “incident to service.”<sup>60</sup> In *Malesko*, the Court withheld a *Bivens* remedy in a

---

55. See *supra* notes 21-25; *Davis v. Passman*, 442 U.S. 228, 246 (1979); *Carlson*, 446 U.S. at 19. For a characterization of *Bivens* as being not principally about separation-of-powers concerns, but rather about federalism, and whether federal judges should be responsible for crafting liability governing federal officers, see Stephen I. Vladeck, *Constitutional Remedies in Federalism’s Forgotten Shadow*, 107 CALIF. L. REV. 1043, 1051–52 (2019).

56. *Davis*, 442 U.S. at 246; *Carlson*, 446 U.S. at 19.

57. *E.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (holding *Bivens* unavailable against executive officials because the balance between deterring constitutional violations and ensuring officers can make critical decisions should be made by Congress); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (holding *Bivens* unavailable against federal officers in land-use dispute due to the potential for a large increase in litigation); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (holding *Bivens* unavailable against a private corporate defendant because imposing liability on private prisons is a question for Congress); *FDIC v. Meyer*, 510 U.S. 471 (1994) (holding *Bivens* unavailable against a federal agency defendant due in part to “special factor” of potentially large financial burden on the government); *United States v. Stanley*, 483 U.S. 669 (1987) (holding *Bivens* unavailable when plaintiff’s injury arises out of activity incident to military service due to constitutional delegation of authority over the military to Congress); *Bush v. Lucas*, 462 U.S. 367 (1983) (holding *Bivens* unavailable due to the preference for Congress to make federal personnel policy decisions); *Chappell v. Wallace*, 462 U.S. 296 (1983) (holding *Bivens* unavailable as between military personnel due to combined “special factors” of the unique disciplinary structure of the military and Congress’ activity in establishing military policy).

58. *Bush*, 462 U.S. at 380.

59. *Id.* at 390.

60. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *United States v. Stanley*, 483 U.S.

suit against a corporate prison defendant because, as in *Meyer*, where the Court declined to allow a *Bivens* suit against a federal agency, *Bivens*' purpose is to deter individual officers, not corporations or agencies.<sup>61</sup> Therefore, Congress should decide whether to expand *Bivens* to create a remedy against private companies.<sup>62</sup> In these cases, the Court expanded the scope of the separation-of-powers concerns raised before: in addition to leaving policy matters unrelated to constitutional rights to Congress, the Court started deferring to Congress even when plaintiffs were alleging constitutional violations.

In *Wilkie*, the Court characterized the *Bivens* analysis as “a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest.”<sup>63</sup> The Court framed the special factors analysis as balancing the inadequacy of discrete remedies against the “difficulty in defining a workable cause of action” under the plaintiff’s theory that his claim should rest on the sum of multiple individual acts.<sup>64</sup> In denying a *Bivens* cause of action for alleged retaliation by federal officers against a plaintiff exercising his Fifth Amendment property rights<sup>65</sup>, the Court held Congress was in a better position to decide the issue and relied on a special factor “unlike any [the Court] ha[d] recognized”<sup>66</sup> before: the threat of “an onslaught of *Bivens* actions.”<sup>67</sup> The circular reasoning of the Court—that, because allowing a suit under *Bivens* would lead to more suits under *Bivens*, and therefore the Court should not allow a suit under *Bivens* here—would apply to any attempt by a plaintiff asserting a cause of action for a constitutional violation not previously permitted under *Bivens-Davis-Carlson*. Due to this potential rise of litigation against federal officials, the Court determined that “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”<sup>68</sup>

---

669, 680–82 (1987).

61. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71 (2001).

62. *Id.* at 72.

63. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

64. *Id.* at 555.

65. *Id.* at 562.

66. *Id.*

67. *Id.* at 577 (Ginsburg, J., dissenting).

68. *Id.* at 562 (majority opinion); see Laurence H. Tribe, *Constitutional Remedies: Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins*, 2006

The Court then shifted to a special factors analysis that denied a *Bivens* cause of action if Congress was better equipped to decide whether a remedy was appropriate, and the Court essentially decided that Congress was always in a superior position. In *Abbasi*, Justice Kennedy expanded “special factors” to encompass anything that “cause(s) a court to hesitate,” construed so broadly that

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.<sup>69</sup>

In *Abbasi*, the Court prevented a *Bivens* suit against executive officials over detention policies because the litigation could potentially prevent officials from properly discharging their duties, a suit could interfere in the “sensitive functions” of the executive branch, litigation would inquire into the “sensitive issues of national security,” and Congress was silent regarding a damages remedy.<sup>70</sup> The Court determined that striking a balance between “detering constitutional violations and freeing high officials to make the lawful decisions necessary” should be left to Congress.<sup>71</sup>

In *Hernández*, the most recent *Bivens* case before the Supreme Court, a 5-4 majority denied a cause of action to the parents of a Mexican teenager who was shot and killed by a U.S. Customs and Border Patrol Officer “because of the distinctive characteristics of cross-border shooting claims.”<sup>72</sup> Justice Alito reiterated the standard for “special factors” from *Abbasi*, writing it includes anything providing the Court with “reason to pause.”<sup>73</sup> The Court then identified several “reasons,” including the potential impact on

---

CATO SUP. CT. REV. 23, 71 (2006) (critiquing the Court’s analysis as “ring[ing] hollow” and providing “no explanation of why Congress is in a better position to perform the prototypically judicial line-drawing functions with which the Court appears to have decided not to dirty its hands in this context”).

69. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) (emphasis added).

70. *Id.* at 1860–62 (observing that congressional silence was notable because “high-level policies will attract the attention of Congress” and, therefore, where Congress fails to provide a remedy, it is “much more difficult to believe that ‘congressional inaction’ was ‘inadvertent’” (quoting *Schweiker v. Chilicky*, 487 U. S. 412, 423)). *But see id.* at 1875 (Breyer, J., dissenting) (noting that the Court recognized that “Congress’ silence on the subject indicate[d] a willingness to leave th[e] matter to the courts. In *Bivens*, the Court noted, as an argument favoring its conclusion, the absence of an ‘explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents.’”).

71. *Id.* at 1863 (majority opinion).

72. *Hernández v. Mesa*, 140 S. Ct. 735, 739 (2020).

73. *Id.* at 743.

foreign relations, national security implications, and examples of legislation creating damages remedies but precluding claims for injuries abroad.<sup>74</sup> Ultimately, the Court refused to extend *Bivens*, citing its “respect for the separation of powers.”<sup>75</sup>

In *Bivens*, *Davis*, and *Carlson*, the Court was concerned with wading into the purview of Congress and deferred to the superior congressional capacity to decide issues of policy, including regarding statutory rights.<sup>76</sup> However, the Court explicitly recognized its common law authority to adjust available remedies to vindicate constitutional rights.<sup>77</sup> Subsequently, the Court expanded “special factors” to encompass nearly anything, virtually eliminating the *Bivens* cause of action for plaintiffs asserting a constitutional violation distinct in any way from those raised in *Bivens*, *Davis* and *Carlson*.<sup>78</sup> After *Abbasi* and *Hernández*, the *Bivens* analysis no longer asks whether there are truly *special* factors that counsel hesitation before implying a cause of action for damages to redress constitutional violations. Rather, the Court need only point to *sound reasons* prompting the court to *pause* to deny vindication.

### C. *The Purpose of Bivens*

The Court has recognized two purposes for implying a cause of action for damages to address constitutional violations: vindication of rights and deterrence of behavior. In *Bivens*, the Court invoked long-standing notions of civil liberty to allow the plaintiff to bring a claim.<sup>79</sup> In analogizing to the statutory context, the Court noted

---

74. *Id.* at 744–49. *But see 5-4: Hernández v. Mesa*, PROLOGUE PROJECTS (June 9, 2020), <http://www.westwoodonepodcasts.com/pods/5-4> [<https://perma.cc/CMK6-NTDA>] (critiquing the Court’s reasoning in relying on these special factors).

75. *Id.* at 749.

76. *See Davis v. Passman*, 442 U.S. 228, 241 (1979).

77. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 (1971); *see also Bush v. Lucas*, 462 U.S. 367, 378 (1983) (“The federal courts’ statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation.”).

78. *See Abbasi*, 137 S. Ct. at 1857 (“[T]he Court has made clear that expanding the *Bivens* remedy is now a “disfavored” judicial activity. . . . Indeed, the Court has refused to do so for the past 30 years.”).

79. *Bivens*, 403 U.S. at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803))); *see also* Fallon, *supra* note 1, at 948 (“In its historical context, *Bivens* could be viewed as applying to damages suits against federal officials the insight that already governed in suits for damages against state officials and for injunctions against state and federal officers alike: violations of constitutional rights pose distinctive issues to which ‘ordinary’ tort doctrines will not always be well adapted.”).

that even though the text of the Fourth Amendment does not explicitly provide a damages remedy, “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”<sup>80</sup> The Court framed the overall inquiry as whether, where the plaintiff sufficiently demonstrated a constitutional violation, he was “entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.”<sup>81</sup> *Davis* reiterated the vindicatory purpose of *Bivens*:

We presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of [] litigants who allege that their own constitutional rights have been violated, and who . . . have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.<sup>82</sup>

After *Carlson*, the Court largely abandoned the vindication of rights rationale and began articulating the sole purpose of *Bivens* as deterrence of unconstitutional behavior. In *Meyer*, the Court stated “the purpose of *Bivens* is to deter the *officer*.”<sup>83</sup> In that case, the Court refused to extend a *Bivens* remedy to a claim against a federal agency because doing so would leave little incentive to bring suits against individual officers and the “deterrent effects of the *Bivens* remedy would be lost.”<sup>84</sup> The Court in *Malesko* analogized to *Meyer* in refusing to allow a suit against a private prison corporation, because the “threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.”<sup>85</sup> The Court has also emphasized that a *Bivens* remedy is a more effective deterrent than a claim under the Federal Tort Claims Act, as *Bivens* renders the *individual officer* liable for damages, as opposed to the United States government under the FTCA, and “it is almost axiomatic that the threat of damages has a deterrent effect.”<sup>86</sup>

---

80. *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

81. *Id.* at 397.

82. *Davis v. Passman*, 442 U.S. 228, 242 (1979).

83. *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (emphasis in original).

84. *Id.*

85. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

86. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

In *Hernández*, the majority opinion failed to mention the underlying purpose of a *Bivens* cause of action entirely.<sup>87</sup> That mantle was taken up by Justice Ginsberg in her dissent, where she reiterated the purpose behind implying a *Bivens* cause of action in cases where constitutional rights have been violated.<sup>88</sup> She noted that “suits against ‘the individual officer for his or her own acts’ deter behavior incompatible with constitutional norms, a consideration key to the *Bivens* decision.”<sup>89</sup> Further, “‘individual instances of . . . law enforcement overreach,’ the Court recognized, are by ‘their very nature . . . difficult to address except by way of damages actions after the fact.’”<sup>90</sup>

*Bivens* arose as the mechanism for federal courts to ensure plaintiffs could raise constitutional claims and hold federal officers accountable. Under *Bivens*, a plaintiff is not guaranteed a favorable ruling, and other barriers persist, including qualified immunity discussed in Part II. But, at the very least, *Bivens* permits the plaintiff to meaningfully air constitutional grievances. Not only does a *Bivens* cause of action provide a day in court for the plaintiff, but it also deters individual federal officers from committing constitutional violations in the first place.

## II. THE HISTORY AND PURPOSE OF THE QUALIFIED IMMUNITY DEFENSE

While *Bivens*’ purpose is to deter unconstitutional behavior by holding federal officials liable, the defense of immunity serves to protect them from criminal or civil actions based on state law while executing their federal duties.<sup>91</sup> However, if a federal official acts outside the scope of his federal authority, he could still be held liable.<sup>92</sup> When Congress passed 42 U.S.C. § 1983, it created a cause of action for damages in federal court against state officials who violate federal statutory or constitutional law.<sup>93</sup> The language of the statute did not include any immunities for state officials, but the Supreme Court applied common law immunities in suits

---

87. *Hernández v. Mesa*, 140 S. Ct. 735, 739–50 (2020).

88. *Id.* at 755 (Ginsburg, J., dissenting).

89. *Id.* at 756 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017)).

90. *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)).

91. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865–66 (1824).

92. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

93. 42 U.S.C. § 1983.

brought under § 1983.<sup>94</sup> The rationale for doing so was two-fold: “(1) the injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.”<sup>95</sup>

The Supreme Court subsequently applied the immunity standard recognized in § 1983 suits to *Bivens* claims against federal officials, noting there was

no basis for according . . . federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials.<sup>96</sup>

In deciding what level of immunity to provide federal officials in *Bivens* actions, the Court rejected absolute immunity as it would “seriously erode the protection provided by basic constitutional guarantees[,]”<sup>97</sup> because “a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs.”<sup>98</sup> Instead, the Court held that, in a suit for damages against a federal official for unconstitutional conduct, the officer is entitled “only” to *qualified* immunity, subject to those situations where the official demonstrates absolute immunity is essential.<sup>99</sup> In doing so, the Court carefully balanced “the need to protect officials who are

---

94. See *Butz v. Economou*, 438 U.S. 478, 507 (1978).

95. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Decades later, American society and federal courts are recognizing that officer “discretion” results in the disproportionate death of Black men at the hands of law enforcement and the shield of qualified immunity should not be used to perpetuate that injustice.

Although we recognize that our police officers are often asked to make split second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept.

*Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020).

96. *Butz*, 438 U.S. at 500.

97. *Id.* at 505.

98. *Id.* at 501, 505.

99. *Id.* at 507.

required to exercise their discretion” against the necessity of a damages remedy to deter federal officials from committing constitutional wrongs and to vindicate the rights of citizens.<sup>100</sup>

Qualified immunity is intended to protect “government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>101</sup> The goal of qualified immunity is to protect officers from the repercussions and costs of litigation under the premise that “insubstantial lawsuits can be quickly terminated by federal courts.”<sup>102</sup> Theoretically, “damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a motion for summary judgment based on the defense of immunity.”<sup>103</sup>

When qualified immunity is “properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”<sup>104</sup> To determine whether an officer is entitled to qualified immunity, courts must consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer’s alleged misconduct.<sup>105</sup> Formerly, courts were required to perform the analysis sequentially, assessing the first prong before moving on to the second.<sup>106</sup> However, the Supreme Court eliminated that requirement, holding that courts have discretion to determine which prong should be analyzed first.<sup>107</sup> Subsequently, courts, including the Supreme Court, have been hesitant to answer the first inquiry—whether the conduct amounted to a constitutional violation—and instead determine whether the law was clearly established, which is usually dispositive.<sup>108</sup>

---

100. *Id.* at 504–06.

101. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

102. *Butz*, 438 U.S. at 507.

103. *Id.* at 508.

104. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

105. *Pearson*, 555 U.S. at 232.

106. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

107. *Pearson*, 555 U.S. at 236.

108. *See Hannah Beard, Note, How Ziglar v. Abbasi Sheds Light on Qualified-Immunity Doctrine*, 96 WASH. U. L. REV. 883, 890–91 (2019) (noting that as of the 2017 Supreme Court term, in eleven of fourteen decisions granting qualified immunity, the Court did not address whether the claim would amount to a constitutional violation, but granted qualified immunity on the basis that the right was not “clearly established”). For a proposed reform to qualified immunity where litigants can secure vindication of their constitutional rights



### III. THE DUAL BARRIERS OF *BIVENS* “SPECIAL FACTORS” AND QUALIFIED IMMUNITY

The original purpose of implying a *Bivens* cause of action was to deter unconstitutional conduct. The purpose of qualified immunity is to prevent over-deterrence. However, currently, both function as barriers to plaintiffs bringing claims against federal officers for violations of constitutional rights. The contemporary, restrictive iteration of the *Bivens* analysis precludes actions at the outset. Even if a court finds a cause of action under *Bivens*, qualified immunity prevents recovery even if the court determines the officer’s conduct amounted to a constitutional violation because the right was not “clearly established.”

In order to ensure *Bivens* could fulfill its deterrent purpose, the Court rejected absolute immunity and adopted a qualified immunity standard in *Bivens* cases.<sup>109</sup> While the *Bivens* “special factors” analysis and the immunity analysis are “analytically distinct,”<sup>110</sup> the Supreme Court has frequently intertwined the two. In *Davis*, the Court noted that the constitutional status of a congressman may be a “special factor” counselling hesitation before implying a cause of action, but that concern was mitigated by the immunity provided by the Speech and Debate Clause.<sup>111</sup> Similarly, in *Carlson*, the Court considered the “special factor” implicit in extending liability to a federal prison official—an employee of the Executive Branch—but again recognized that any concern was mitigated by qualified immunity.<sup>112</sup>

In *Wilkie*, when denying a *Bivens* cause of action due to the “special factor” of the potential increase in litigation involving the federal government, the Court noted Congress was in a better position to tailor a remedy to “lessen[] the risk of raising a tide of suits threatening legitimate initiative on the part of the Government’s employees.”<sup>113</sup> The Court then quoted language identifying the concern addressed by qualified immunity: “that fear of being sued will ‘dampen the ardor of all but the most

---

through the imposition of only nominal damages, see James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

109. *Butz v. Economou*, 438 U.S. 478, 507 (1978).

110. *United States v. Stanley*, 483 U.S. 669, 684 (1987).

111. *Davis*, 442 U.S. at 246.

112. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980).

113. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>114</sup>

The conflation of reasons to deny a *Bivens* cause of action and effectuating the purposes of qualified immunity is even more explicit in *Abbasi*. The Court denied a *Bivens* remedy to challenge the constitutionality of a detention policy implemented after the September 11th terrorist attacks because it would “require inquiry . . . into the whole course of the discussions and deliberations” leading to the policy.<sup>115</sup> That inquiry “counsel[ed] against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or . . . future officials like them—from devoting the time and effort required for the proper discharge of their duties.”<sup>116</sup> The majority in *Hernández* again included concerns addressed by qualified immunity in their special factors analysis, with Justice Alito noting that “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.”<sup>117</sup> Essentially, the Court has been including the qualified immunity rationale in the “special factors” analysis—imposing liability on an officer is a special factor counselling hesitation, and therefore the Court is not going to impose liability at all.<sup>118</sup>

The consideration of immunity-esque concerns in the special factors analysis is redundant. It creates two barriers to vindication under *Bivens* where, as Justice Breyer noted in his *Abbasi* dissent, safeguards already exist to protect federal officers from the concern that allowing a *Bivens* suit will render federal officials fearful to fully perform their duties.<sup>119</sup> First, qualified immunity alone serves

---

114. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

115. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017).

116. *Id.* The Court further noted that “[t]hese concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.” *Id.* at 1861.

117. *Hernández v. Mesa*, 140 S. Ct. 735, 745 (2020).

118. See James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 779 n.216 (2019) (“Among its many further restrictions on the availability of *Bivens* litigation, *Ziglar* treats the threat of personal liability not only as a factor warranting judge-made official immunity, but also as an element of its special factors analysis and stated reluctance to recognize a right to sue.”); *id.* at 780 (“[T]he combination of the Court’s narrow *Bivens* jurisprudence and its qualified immunity doctrine offer individual defendants protection from liability to achieve the same policy goal.”).

119. See *Abbasi*, 137 S. Ct. at 1883 (Breyer, J., dissenting).

that purpose, as “[f]ederal officials will face suit only if they have violated a constitutional right that was ‘clearly established’ at the time they acted.”<sup>120</sup> By including qualified immunity concerns as a “special factor,” the courts are ensuring the threat of suit never materializes for the majority of constitutional claims against federal officers. In those cases, qualified immunity is no longer needed to ensure officers are not overly deterred, as the Court’s *Bivens* analysis serves the same purpose.

Additional mechanisms protect federal officials from undue interference from suits alleging unconstitutional conduct. Pleading standards were raised in *Iqbal*, ensuring plaintiffs must rely on more than “conclusory” statements and “threadbare” allegations to bring a plausible claim.<sup>121</sup> The Court has also protected higher-level officials by denying vicarious liability and requiring plaintiffs to show an official was personally involved in the unconstitutional conduct.<sup>122</sup> Finally, courts have discretion to tailor the discovery process to ensure it does not unduly interfere with an official’s duties.<sup>123</sup>

Refusing to imply a cause of action under *Bivens* and denying liability under qualified immunity both leave a plaintiff with less than full vindication of her rights, and in some instances, without any vindication at all.<sup>124</sup> Dissenting in *United States v. Stanley*, Justice Brennan noted that “the practical result of [denying a *Bivens* remedy for service-connected injuries] is absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military.”<sup>125</sup> Stephen Vladek, who argued *Hernández* before the Supreme Court, also recognized the consequences of denying *Bivens* causes of action to plaintiffs, saying that “[a] world with no *Bivens* is a world with absolute immunity when the Supreme Court has spent the better part of the last 38 years telling us that . . . law enforcement officers can’t have absolute immunity.”<sup>126</sup> The evolution of the Court’s *Bivens* jurisprudence to incorporate

---

120. *Id.* (citing *Harlow*, 457 U. S. at 818).

121. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

122. *Id.*

123. *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007)).

124. *See* *Davis v. Passman*, 442 U.S. 228, 245 (1979) (“For Davis, as for Bivens, ‘it is damages or nothing.’”).

125. *United States v. Stanley*, 483 U.S. 669, 691 (1987) (Brennan, J., dissenting).

126. 5-4: *Hernández v. Mesa*, PROLOGUE PROJECTS (June 9, 2020), <http://www.westwoodonepodcasts.com/pods/5-4/> [perma.cc/CMK6-NTDA].

concerns that are explicitly addressed by qualified immunity into the “special factors” analysis leaves plaintiffs with no legal recourse, no opportunity to be made whole, and certainly no chance of having the violation of their rights acknowledged by a court. It also eviscerates the necessary and important deterrent purpose originally recognized in *Bivens*.

#### IV. RESTORING *BIVENS* FOR THE PROPER VINDICATION OF CONSTITUTIONAL RIGHTS

Not only has the Supreme Court expanded the “special factors” to include concerns addressed by qualified and other immunities, but it has also shifted the overall *Bivens* framework. The Court moved from implying a cause of action unless there are “special factors” counselling hesitation, or Congress has provided an explicit remedial alternative, to denying a cause of action because there are “sound reasons” prompting the Court to “pause.”<sup>127</sup> The contemporary paradigm of *Bivens* effectively forecloses plaintiffs from bringing novel constitutional claims against federal officers. As Justice Brennan wrote in his dissent in *Stanley*, “[t]his is abdication, not hesitation.”<sup>128</sup>

To ensure the vitality of the foundational presumption that for every legal right, there is a remedy,<sup>129</sup> the Supreme Court should restore its *Bivens* analysis to the original framework, invoking only those “special factors” recognized in *Bivens*, *Davis*, and *Carlson*. As noted, that would mean abandoning the catch-all “sound reasons” and reverting to considering only whether the issue is purely a matter of policy—without an alleged violation of a constitutional right—and whether it implicates extraordinary separation-of-powers concerns.<sup>130</sup> As for the Court’s anxiety over exposing federal

---

127. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Abbasi*, 137 S. Ct. at 1858.

128. *United States v. Stanley*, 483 U.S. 669, 686 (1987) (Brennan, J., dissenting); see Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167 (2018) (discussing the Court’s failure to take private rights of action seriously, in the *Bivens* context and otherwise); 5-4: *Hernández v. Mesa*, *supra* note 126, at 54:09–22 (“One of the things that *Bivens* and the retrenchment of *Bivens* does is it actually is a form of constitutional avoidance because it allows the court to sidestep what really ought to be some pretty important constitutional questions one way or the other.”) [perma.cc/CMK6-NTDA].

129. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803).

130. See *supra* Part I; see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121 (2009) (“Instead of the case-by-case approach that characterizes current law, . . . the federal courts should presume that a well-pleaded complaint, alleging an unconstitutional invasion of individual rights,

officers to overly deterrent liability, qualified immunity remains a defense<sup>131</sup> and, when demonstrated, courts could sparingly apply absolute immunity.<sup>132</sup> The original framework also included a second instance where courts would refrain from implying a cause of action: if Congress has explicitly provided a substitute remedial scheme.<sup>133</sup> The Supreme Court largely relied on the remedial schemes created by Congress to deny a *Bivens* cause of action in several instances.<sup>134</sup> However, the Court also began broadening the criteria for what explicit alternative remedies sufficed, ruling out a remedy at state tort law and under the FTCA in *Bivens* and *Carlson* respectively, and then later accepting a state tort remedy in *Minneci* to deny a *Bivens* cause of action.<sup>135</sup>

If the Supreme Court restored *Bivens* to its original formulation, plaintiffs could raise novel constitutional claims. Take for example, the facts underlying *Hernández v. Mesa*.<sup>136</sup> As briefly mentioned, the case involved the deadly 2010 shooting of a fifteen-year-old Mexican boy by Agent Mesa, a U.S. Customs and Border Protection (CBP) officer, where the boy was standing on the Mexican side of the border and the officer was positioned within the United States.<sup>137</sup> The suit was brought by the boy's parents, alleging

---

gives rise to an action for damages under *Bivens*. [T]he 'special factors' that the Court has taken into account in deciding whether to allow an action would no longer operate as a threshold barrier to litigation.”).

131. Whether the Court should reform the doctrine of qualified immunity is beyond the scope of this comment, but for an argument that the Supreme Court has expanded qualified immunity to the detriment of constitutional rights, see Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 2 (2016).

132. *Butz v. Economou*, 438 U.S. 478, 506 (1978) (“[F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.”); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (acknowledging that high officials require greater protection and recognizing that legislators, judges, prosecutors, and other executive officials have been granted absolute immunity in certain instances).

133. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

134. *Wilkie v. Robbins*, 551 U.S. 537, 576 (2007) (Ginsburg, J., dissenting) (“The Court does not hold that Robbins’ *Bivens* suit is precluded by a carefully calibrated administrative regime like those at issue in *Bush*, *Chilicky*, *Chappell*, or *Stanley*. . . .”); see also Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. 1473, 1492–93 (2013). For a discussion of the Court’s shift away from implying a *Bivens* remedy regardless of alternative remedies to denying *Bivens* remedies if an alternative state or federal remedy exists, see John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1674–81 (2009).

135. *Bivens*, 403 U.S. at 397; *Carlson v. Green*, 446 U.S. 14, 19 (1980); *Minneci v. Pollard*, 565 U.S. 118, 125–26 (2012).

136. *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

137. Brief for Petitioners at 4, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

violations of his Fourth and Fifth Amendment rights.<sup>138</sup> On remand, the Fifth Circuit denied a cause of action under *Abbasi's Bivens* analysis and Hernández's parents appealed.<sup>139</sup> In part, they challenged the Fifth Circuit's application of the "special factors" of national security,<sup>140</sup> foreign affairs and diplomacy, extraterritoriality, and congressional inaction, arguing they are nothing more than "empty talismans" used to deny relief.<sup>141</sup>

The Supreme Court ultimately seconded the Fifth Circuit's reasoning and affirmed its dismissal of the Hernández's claims.<sup>142</sup> The Court identified several "warning flags" cautioning against implying a *Bivens* cause of action.<sup>143</sup> These "warning flags" are actually straws toward which Justice Alito grasps. First, the Court identified the potential impact on foreign policy.<sup>144</sup> It highlighted how the governments of the United States and Mexico have responded to the suit and their respective interests in the outcome.<sup>145</sup> It implied this suit is one with direct and concrete foreign policy implications.<sup>146</sup> However, it seems obvious that a suit by the parents of a child killed by a federal agent for monetary relief is distinct from any formal foreign relations between two countries.<sup>147</sup> Extradition discussions are also distinct from the claims brought by the boy's parents. Further, the case was already

---

138. *Id.* at 5.

139. *Hernández v. Mesa*, 885 F.3d 811, 819 (5th Cir. 2018), *aff'd*, 140 S. Ct. 735 (2020).

140. Immunity concerns crept into the Fifth Circuit's analysis in *Hernández*: in analyzing the "special factor" of national security, the Fifth Circuit determined that allowing *Bivens* would "increase[] the likelihood that Border Patrol agents will 'hesitate in making split second decisions.'" *Hernández v. Mesa*, 885 F.3d at 819, *aff'd*, 140 S. Ct. 735 (2020).

141. Brief for Petitioners at 21, 26–34, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678); *see Hernández*, 885 F.3d at 823 ("Here, extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs. It would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad. And it would create a remedy with uncertain limits. . . . The myriad implications of an extraterritorial *Bivens* remedy require this court to deny it.")

142. *Hernández v. Mesa*, 140 S. Ct. 735, 750 (2020).

143. *Id.* at 744.

144. *Id.*

145. *Id.* at 744–45.

146. *Id.*

147. *Id.* at 758 (Ginsburg, J., dissenting) ("Plaintiffs, however, have brought a civil damages action, no different from one a federal court would entertain had the fatal shot hit Hernández before he reached the Mexican side of the border. True, cross-border shootings spark bilateral discussion, but so too does a range of smuggling and other border-related issues that courts routinely address.")

before the Supreme Court and any decision, regardless of the outcome, would impact foreign policy.<sup>148</sup>

Second, the Court notes that the case implicates “an element of national security.”<sup>149</sup> The Court goes on to discuss “illegal cross-border traffic” and the role CBP plays in “attempting to prevent the illegal entry of dangerous persons and goods.”<sup>150</sup> However, again, this case involved the shooting of a teenager by a federal officer, not the alleged movement of people or contraband, and, as Justice Ginsburg noted, the majority failed to identify any specific way that allowing a *Bivens* suit would threaten national security.<sup>151</sup> Further, the majority’s concern about a *Bivens* suit impacting the “effectiveness and morale” of border agents is addressed by the defense of qualified immunity.<sup>152</sup>

Instead of precluding claims to vindicate constitutional rights because of misplaced, generalized concerns about foreign policy and national security, the Supreme Court should have restored the original “special factors” analysis under *Bivens*. That would eliminate the insurmountable barrier that the “special factors” analysis has become and would provide an opportunity for the Hernándezes to hold Agent Mesa accountable and to deter future federal agents from unconstitutionally depriving individuals of their Fourth Amendment rights.

## CONCLUSION

The evolution of *Bivens*—from its beginning in 1971 as a mechanism utilized by the federal courts to ensure that for every constitutional right there was a remedy, to its now overly expansive “sound reasons” analysis—effectively ensures that there will be no novel *Bivens* claims. While the Supreme Court has never expressly overruled its holdings in *Bivens*, *Davis* and *Carlson*, it

---

148. *Id.* The majority makes a related argument that “Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders.” *Id.* at 747 (majority opinion). However, Justice Ginsburg’s dissent also counters that point. She noted that the allegedly unconstitutional conduct took place within the United States and *Bivens* seeks to apply the law of the United States, dispensing with the conflict with congressional action conjured by the majority. *Id.* at 758–59 (Ginsburg, J., dissenting).

149. *Id.* at 746 (majority opinion).

150. *Id.*

151. *Id.* at 758 (Ginsburg, J., dissenting) (“*Abbasi* cautioned against invocations of national security of this very order: ‘[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins.’” (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (internal quotation marks omitted)).

152. *Hernandez v. Mesa*, 140 S. Ct. 735, 745 (2020).

has gutted the purpose of *Bivens* and has grossly expanded the justifications for federal courts to abdicate their responsibility as “independent tribunals of justice,” and as “impenetrable bulwark[s] against every assumption of power in the Legislative or Executive.”<sup>153</sup> The Supreme Court must reverse course and step into its mandate to protect individual constitutional rights.

---

153. *Davis v. Passman*, 442 U.S. 228, 242 (quoting James Madison, 1 Annals of Cong. 439 (1789)).