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Constitutional Law—A Tale of Two Shootings: Should a Bivens Remedy Be Available When CBP Agents Shoot and Kill Victims on the Mexican Side of the Border?

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CONSTITUTIONAL LAW—A TALE OF TWO SHOOTINGS: SHOULD A *BIVENS* REMEDY BE AVAILABLE WHEN CBP AGENTS SHOOT AND KILL VICTIMS ON THE MEXICAN SIDE OF THE BORDER?

I. INTRODUCTION

In 2012, Jose Antonio Elena Rodriguez ("Rodriguez"), a sixteen-year-old Mexican national, died in a hail of gunfire.[1] The shooter, a Customs and Border Patrol ("CBP") agent, fired southward from the United States' border fence, several feet above a street in Nogales, Mexico where Rodriguez fell.[2] Not an isolated incident, this shooting came on the heels of another fatal cross-border shooting of fifteen-year-old Sergio Hernandez at the hands of a CBP agent in Texas.[3]

Because the victims died in Mexico, no statutory remedy for the killings existed to compensate the victims' survivors.[4] As such, the victims' families sued the individual agents under an implied remedy theory coined in *Bivens v. Six Unnamed Agents of Federal Bureau of Narcotics*,[5] alleging violations of the victims' Fourth Amendment rights.[6] A *Bivens* claim affords "victims of a constitutional violation by a federal agent . . . [the] right to recover damages against the agent in federal court in the absence of statutory authority conferring such a right."[7] The Supreme Court has recognized the availability of *Bivens* claims for Fourth, Fifth, and Eighth Amendment violations.[8] The Court's more recent jurisprudence, however, reveals a con-

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1. Kristine Phillips, *U.S. Border Agent Who Repeatedly Shot Mexican Teen Through a Fence Acquitted of Murder*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/24/u-s-border-agent-who-repeatedly-shot-mexican-teen-through-a-fence-acquitted-of-murder/.

2. *Id.*

3. Hernandez v. Mesa (*Hernandez III*), 137 S. Ct. 2003, 2005 (2017).

4. *See* Rodriguez v. Swartz, 899 F.3d 719, 739 (9th Cir. 2018) (discussing the Federal Tort Claims Act's proscription of suits "arising in a foreign country"), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309); Hernandez v. Mesa (*Hernandez IV*), 885 F.3d 811, 815 (5th Cir. 2018) (stating "[n]o federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer"), *cert. granted*, 139 S. Ct. 2636 (U.S. May 28, 2019) (No. 17-1678).

5. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 n.4 (1971).

6. *Rodriguez*, 899 F.3d at 727; Hernandez v. United States (*Hernandez I*), 757 F.3d 249, 255 (5th Cir. 2014), *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam).

7. Carlson v. Green, 446 U.S. 14, 18 (1980).

8. *Carlson*, 446 U.S. at 16–20; Davis v. Passman, 442 U.S. 228, 241, 245 (1979); *Bivens*, 403 U.S. at 389.

spicuous reticence to extend *Bivens* remedies beyond those expressly found in the Court's prior cases.[9]

In 2017, with the extension of *Bivens* claims already on life support, the Supreme Court's opinion in *Ziglar v. Abbasi* sounded what appeared to be the death knell for the extension of *Bivens* claims.[10] *Abbasi* presented an opportunity for the Court to consider the applicability of a *Bivens* claim to redress multiple constitutional violations of the plaintiffs' Fourth and Fifth Amendment rights.[11] *Abbasi* emphasized the role of "special factors counseling hesitation" in the lower courts' calculus on whether to recognize a *Bivens* claim.[12] *Abbasi* served as the backdrop for the conflicting circuit court decisions that addressed the propriety of a *Bivens* claim when a federal agent shoots a foreign national from the American side of the Mexican border.[13]

Part II of this note addresses the background of *Bivens* claims and shifts to an analysis of *Abbasi*.[14] Part III outlines the decisions at the heart of the circuit split over whether, after *Abbasi*, a cross-border shooting presents a cognizable *Bivens* claim.[15] Part IV demonstrates the Fourth Amendment's applicability to cross-border shootings.[16] Part V argues that the United States Court of Appeals for the Ninth Circuit's disposition in *Rodriguez v. Swartz* comported with the strictures of *Abbasi* and that the extension of a *Bivens* claim to the victims' survivors adhered to both the letter and spirit of the law.[17] This note concludes that victims of a cross-border shooting launched from American soil by federal agents are entitled to proceed under *Bivens*.[18]

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9. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–56 (2017).

10. Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2175 (2018).

11. *Id.* at 2169.

12. *Abbasi*, 137 S. Ct. at 1859–63.

13. Rodriguez v. Swartz, 899 F.3d 719, 737–39 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309); *Hernandez IV*, 885 F.3d 811, 815–16 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678). At the outset, the implication of qualified immunity on cross-border shootings is beyond the scope of this note, however, in *Rodriguez v. Swartz*, the United States Court of Appeals for the Ninth Circuit denied qualified immunity to the federal agent. *Rodriguez*, 899 F.3d at 732–34.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

II. BACKGROUND: THE RIGHT TO REDRESS FOR CONSTITUTIONAL VIOLATIONS COMMITTED BY FEDERAL AGENTS

A. The Right to Recover Damages Against Federal Agents for Constitutional Violations Pre-*Bivens*

The roots of the right to recover against government agents in their individual capacities for constitutional violations predate the United States.[19] In England, as early as 1285, false imprisonment suits were available against sheriffs who executed felony arrests absent an indictment.[20] The American Revolution and subsequent British ouster significantly curtailed—almost 50%—citizens' rights to redress against the government; however, "the great category of suits against [government] officers" developed in the English common law survived.[21]

Since the founding, an individual's status as a federal agent has never conferred a blanket immunity from common law suits.[22] But if a federal agent could show that the conduct giving rise to the suit stemmed from actions taken in the agent's official capacity, then the agent could plead justification as a defense.[23] The scope of the justification defense extended to the bounds of authorized conduct.[24] Because the government cannot authorize constitutional violations, such violations vitiate the justification defense.[25] Without the shroud of governmental authority, government officers were subject to state law suits on the same footing as ordinary individuals.[26] In the context of Fourth Amendment violations, victims brought suit against federal agents based on the common law theory of trespass.[27] Finally, damages remedies have historically been the ordinary remedy for "an invasion of personal interests in liberty."[28]

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

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

21. *Id.* at 20.

22. Vázquez & Vladeck, *supra* note 19, at 531.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 537.

28. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

B. The Birth, Extension, and Decline of The Implied Federal Cause of Action

Whether victims of constitutional violations perpetrated by federal agents could access the federal courts for redress remained an open question until 1970 when the Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[29] Twenty-five years before *Bivens*, in *Bell v. Hood*, the Court addressed the propriety of a lower court's dismissal, on jurisdictional grounds, of a complaint in federal court against federal agents alleging Fourth and Fifth Amendment violations.[30] The Court found that jurisdiction was proper because "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another."[31] *Bell*, however, left unanswered whether a right to redress could be had for constitutional violations. In *Bivens*, the Court answered the ultimate question in *Bell* of whether constitutional violations can support a cognizable claim and ruled in favor of an implied federal cause of action against federal agents for the violation of the Fourth Amendment.[32] The Court extended *Bivens* to two additional contexts.[33]

1. *Bivens v. Six Unknown Named Federal Agents of Bureau of Narcotics*

Bivens recognized, for the first time, a federal cause of action for a Fourth Amendment violation against a federal agent in her individual capacity.[34] In 1965, Mr. Bivens claimed that federal agents entered his apartment and arrested him without a warrant.[35] During the arrest, the agents "manacled [Mr. Bivens] in front of his wife and children, and threatened to arrest the entire family."[36] After restraining Mr. Bivens, the agents searched the apartment before transporting him to a federal courthouse where he was interrogated and subjected to a visual strip search.[37] The absence of a warrant, combined with the arrest and the use of force employed to secure the

29. *Id.* at 389.

30. 327 U.S. 678, 679–80, (1946). This note will "use the phrase 'cause of action' . . . to refer roughly to the alleged invasion of 'recognized legal rights' upon which a litigant bases his claim for relief." Davis v. Passman, 442 U.S. 228, 237–38 (1979) (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949)).

31. *Bell*, 327 U.S. at 685.

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

33. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–1855 (2017).

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

35. *Id.*

36. *Id.*

37. *Id.*

arrest, served as the bases for Mr. Bivens's allegations of Fourth Amendment violations.[38]

In allowing Mr. Bivens's claims to proceed, the Court rejected the agents' contention that the sole remedy available to Mr. Bivens rested on state tort law.[39] The Court found unpersuasive the agents' argument that their conduct, if tortious, presented a run-of-the-mill state law claim as if between two ordinary individuals.[40] Instead, the Court noted that an agent's unconstitutional action "in the name of the United States possesses a far greater capacity for harm than an individual trespasser."[41] The nature of the Fourth Amendment vis-à-vis state law also compelled the Court's ultimate decision.[42] The Court emphasized that the Fourth Amendment served as a limitation on the exercise of federal authority regardless of whether an abuse of that authority would satisfy the elements of a state law claim.[43] The Court concluded that it "should hardly seem a surprising proposition" that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials."[44]

In its conclusion that damages could be available when the government violated a citizen's constitutional rights, the Court alluded to a limiting principle to guide lower courts when deciding whether a cause of action should extend to other contexts.[45] This principle is manifested in *Bivens* through the Court's emphasis on the lack of "special factors counseling hesitation in the absence of affirmative action by Congress."[46] The idea being that if a special factor counseled hesitation, then the Court should stay its hand in that instance.[47] The Court stopped short of a precise definition of the special factors and instead listed examples of special factors that the Court previously found to deny a federal cause of action.[48] These examples included questions of federal fiscal policy, congressional inaction to create a liability within its authority, and an attempt to "impose liability upon a congressional employee for actions contrary to no constitutional prohibition."[49]

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38. *Id.*
39. *Id.* at 390–91.
40. *Bivens*, 403 U.S. at 390–91.
41. *Id.* at 392.
42. *See id.*
43. *Id.*
44. *Id.* at 395.
45. *See id.* at 396–97.
46. *Bivens*, 403 U.S. at 396.
47. *Id.*
48. *Id.*
49. *Id.* at 396–97.

2. *Davis v. Passman* and *Carlson v. Green*

The Supreme Court's first extension of a *Bivens* claim came in *Davis v. Passman*.[50] There, Ms. Davis alleged that her superior, then a United States Representative, discriminated against her on the basis of sex in contravention of the equal protection component of the Due Process Clause of the Fifth Amendment.[51] The Court expanded on the "special factors" from *Bivens* in its analysis and added another point of emphasis, namely the availability of other remedies.[52] The Court acknowledged that the status of a congressman raised special factors counseling hesitation based on separation of powers principles, but resolved that the Speech and Debate Clause's provision of shelter ensured that the judiciary would not encroach on congressional power.[53] If the Speech and Debate Clause did not offer protection to the former representative, then "the principle that legislators . . . ought generally to be bound by [the law] as are ordinary persons" applied.[54] The absence of a congressional proscription of damages remedies for an equal protection violation tilted away from finding a special factor.[55] Regarding the available remedies, the Court focused on the absence of equitable remedies and concluded that damages served as the only available redress.[56] Ultimately, the Court concluded that Ms. Davis's equal protection claim was cognizable under *Bivens*.[57]

In *Carlson v. Green*, the Supreme Court once again acknowledged the availability of a *Bivens* claim when it concluded that a cruel and unusual punishment allegation brought under the Eighth Amendment gave rise to a federal cause of action.[58] In *Green*, the administratrix of Mr. Green, a prisoner at the time of his death, filed a *Bivens* action against the Director of the Bureau of Prisons.[59] The defendants argued a special factor existed because "requiring them to defend [the] suit might inhibit their efforts to perform their official duties."[60] The Court pointed to qualified immunity as the safe-

50. *See generally* Davis v. Passman, 442 U.S. 228 (1979).
51. *Id.* at 231.
52. *Id.* at 245–46.
53. *Id.* at 246.
54. *Id.* (alteration in original).
55. *Id.* at 246–47.
56. *Davis*, 442 U.S. at 245.
57. *Id.* at 234.
58. 446 U.S. 14, 19 (1980); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (acknowledging that *Carlson* marked the court's second extension of a *Bivens* claim on the allegation that "failure to provide adequate medical treatment" could give rise to a constitutional violation).
59. *Carlson*, 446 U.S. at 16.
60. *Id.* at 19.

guard to the defendants' contention and found no special factor counseling hesitation.[61]

The Court also rejected the defendants' contention that the Federal Tort Claims Act (FTCA), enacted before *Bivens*, preempted *Bivens* and created an "equally effective remedy for constitutional violations."[62] The Court explained that the FTCA, which waived sovereign immunity and allowed for tort claims to be brought against the United States for the negligence of federal officials, and *Bivens* claims served different purposes.[63] The Court highlighted the heightened deterrence brought about by the imposition of individual liability and found such deterrence warranted the availability of *Bivens* in addition to claims brought under the FTCA. At bottom, the Court found that the existence of another remedy does not necessarily bar a *Bivens* claim.[64]

C. *Ziglar v. Abbasi* and the Supreme Court's Reluctance to Extend *Bivens*

After *Green*, the Supreme Court displayed a reluctance to extend *Bivens*.[65] Eight cases reached the Supreme Court asserting the right to recover against federal agents for varied constitutional violations; each case failed to persuade the Court that *Bivens* applied.[66] As explained in *Abbasi*, the Court's subsequent *Bivens* cases revealed a seismic shift in the Court's understanding of its role vis-à-vis Congress in extending liability to federal officials.[67] Tellingly, the majority in *Abbasi* expressed that the Court's mod-

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61. *Id.*

62. *Id.* at 19–20 (finding that the FTCA as amended in 1974 to include intentional torts committed by federal agents did not make the FTCA the exclusive remedy for such torts, and, instead, that the legislative record combined with Congress's usual course of making it clear when the FTCA offered an exclusive remedy resulted in the conclusion that the FTCA and *Bivens* were complementary).

63. *Id.* at 20–21.

64. *Carlson*, 446 U.S. at 21.

65. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017). In *Abbasi*, the Court rehearsed its prior decisions to deny an extension of *Bivens*:

> [T]he Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, a race-discrimination suit against military officers, a substantive due process suit against military officers, a procedural due process suit against Social Security officials, a procedural due process suit against a federal agency for wrongful termination, an Eighth Amendment suit against a *private prison operator*, a due process suit against officials from the Bureau of Land Management, and an Eighth Amendment suit against *prison guards at a private prison*.

Id. (emphasis added) (citations omitted). Justice Kennedy wrote for the majority that garnered four out of the six justices' assent as Justices Sotomayor, Kagan, and Gorsuch took no part in the decision.

66. *Id.*

67. *Id.* at 1856.

ern stance on *Bivens* remedies would likely not have allowed the decision in *Bivens* in the first place.[68]

The *Abbasi* plaintiffs asserted multiple claims against two discrete groups of federal officials.[69] The first group, dubbed the "Executive Officials," comprised the United States Attorney General, the Director of the Federal Bureau of Investigation (FBI), and the Naturalization Service Commissioner.[70] The second group, the "Wardens," oversaw the detention facility where the claims arose.[71]

The *Abbasi* plaintiffs sought damages based on allegations of multiple constitutional violations stemming from their confinement in federal custody.[72] The plaintiffs' confinement occurred in the wake of the September 11, 2001 terrorist attacks.[73] After the attacks, tips pointing to potential terrorists deluged the FBI and resulted in the arrest and detention of 700 individuals, including the plaintiffs, on immigration charges.[74] The FBI classified the detainees as either "of interest" or "not of interest."[75] If a detainee's status could not be resolved, the detainee received the same classification as those "of interest" and was detained "subject to a hold-until-cleared policy" without bail.[76] The plaintiffs fell in the "of interest" category.[77] They alleged conditions of confinement that constituted violations of the Fourth and Fifth Amendments.[78] An overarching claim alleged that "Executive Officials" confined the plaintiffs because of their "race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment."[79] The plaintiffs further claimed that the Bureau of Prisons' policy requiring internment for twenty-three hours a day in "tiny" cells violated their constitutional rights.[80] So too did the alleged deprivation of recreation time and a denial of access to basic hygiene products.[81] Finally, they claimed that the guards subjected them to a pattern of physical and verbal abuse in addition to random strip searches.[82]

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68. *Id.*
69. *Id.* at 1853.
70. *Id.*
71. *Abbasi*, 137 S. Ct. at 1853 (reaching the Court on a motion to dismiss for failure to state a claim and the Court assumed the facts alleged as true for the purposes of the case); *see* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
72. *Abbasi*, 137 S. Ct at 1851–52.
73. *Id.* at 1852.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1852–53.
78. *Abbasi*, 137 S. Ct. 1853–54.
79. *Id.* at 1853–54.
80. *Id.* at 1853.
81. *Id.*
82. *Id.*

On its way to declining a *Bivens* remedy, the Court first explained the judicial proclivity to imply damages remedies in statutes at the time of *Bivens*,[83] referring to the "*ancien regime*" under which *Bivens* arose as a time when the "Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose."[84] *Abbasi* noted the decline of the Court's extension of implied causes of action and the rise of the Court's insistence on its role as "limited solely to determining whether Congress intended to create the private right of action asserted."[85] If Congress failed to convey its intent to create a private cause of action in no uncertain terms, then the Court was powerless to imply a cause of action regardless of its desirability.[86] The separation of powers principles that undergirded the Court's recent jurisprudence on statutory implied causes of action laid the framework for the Court's denial of a *Bivens* claim in *Abbasi*.[87]

"When a party seeks to assert an implied cause of action under the Constitution itself, . . . separation of powers principles are or should be central to the analysis."[88] The Court reduced the calculus of the separation of powers analysis to the question of whether Congress or the courts should provide a damages remedy, declaring that the answer is most often "those who write the laws."[89] Deference to the separation of powers necessarily implicates the "special factors counseling hesitation" aspect of a *Bivens* analysis.[90]

In *Abbasi*, the Court honed its guidance on the "special factors counseling hesitation."[91] The Court stated that the "inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits," and admonished that hesitation on the part of the trial court to answer yes to this inquiry presents a factor foreclosing the extension of *Bivens*.[92] The Court pointed to multiple considerations in the "special factors" analysis.

The impact of a damages remedy on governmental operations serves as a fundamental consideration of whether a "special factor" counsels hesitation.[93] Also, Congress's decision to exercise "its regulatory authority in a

83. *Id.* at 1854.
84. *Abbasi*, 137 S. Ct. at 1855 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).
85. *Id.* (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)).
86. *Id.* at 1855–56.
87. *Id.*
88. *Id.* at 1857.
89. *Id.*
90. *Abbasi*, 137 S. Ct. at 1857.
91. *Id.*
92. *Id.* at 1857–58.
93. *Id.*

guarded way" served as another example of an instance where congressional intent pointed away from judicial interference.[94] The Court also deemed the congressional provision of alternative remedies as another factor compelling the denial of a *Bivens* extension.[95]

The multiple considerations capable of giving rise to "special factors" leads to the conclusion that the Court sought to greatly curtail the already anemic *Bivens* action. Beyond the "special factors" analysis, the Court emphasized caution in the extension of *Bivens* to a new context as such an extension is a "disfavored judicial activity."[96] The Court posited that a new *Bivens* context arises when a different constitutional right is implicated or if the same constitutional right is implicated and there exists the potential that "special factors" were not considered in an earlier case.[97] "If the case is different in a meaningful way from previous *Bivens* cases decided by [the] Court, then the context is new."[98] The Court elaborated on this test by pointing out that the constitutional violation and the means of the violation in *Correctional Services Corporation v. Malesko*[99] mirrored the government officials' conduct in *Carlson v. Green*.[100] In *Malesko*, however, the Court rejected the *Bivens* claim based on its "special factors" analysis, an unnecessary analysis had the Court concluded that *Malesko* did not present a new *Bivens* context.[101] *Abbasi* concluded that the detention policy claims against the "Executive Officials" presented a new *Bivens* context.[102]

A finding that the context was new necessitated a "special factors" analysis in which the Court concluded that Congress—not the Court—should decide whether a damage remedy should exist.[103] The Court based its reasoning on the attendant intricacies inherent in the development and implementation of the detention policy at the national level.[104] The Court further noted that discovery would intrude on the "discussion and deliberations that led to the formulation of the policy."[105] The Court relied on precedent to note that this intrusion could chill the "free flow of advice" upon which the other branches rely to develop and implement policy.[106] Another factor of

94. *Id.*
95. *Id.*
96. *Abbasi*, 137 S. Ct. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 665 (2009)).
97. *Id.* at 1864.
98. *Id.* at 1859.
99. 534 U.S. 61 (2001).
100. *Abbasi*, 137 S. Ct. at 1859 (comparing *Malesko* 534 U.S. at 67–68 and Carlson v. Green, 100 S. Ct. 1468 (1980)).
101. *Malesko*, 534 U.S at 66.
102. *Abbasi*, 137 S. Ct. at 1860.
103. *Id.* at 1859–60.
104. *Id.* at 1861.
105. *Id.* at 1860–61.
106. *Id.* at 1861 (quoting Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979)).

central importance to the Court's conclusion was the availability of other remedies such as an injunction or possibly a writ of habeas corpus.[107] Finally, the Court distinguished the detention policy at issue from ordinary law enforcement practices through its emphasis on the impetus for the policy, namely the terrorist attacks.[108] The Court insisted that Congress and the President control national security policy and thus, judicial intervention in this milieu raises the alarm of judicial encroachment.[109] These reasons combined with congressional silence on a matter wholly known to Congress led the Court to conclude that the "special factors" commanded a decision that *Bivens* did not apply to the detention policies.[110]

III. THE APPLICATION OF *ZIGLAR V. ABBASI* TO CROSS-BORDER SHOOTINGS SPLITS THE NINTH AND FIFTH CIRCUITS

A. The United States Court of Appeals for the Fifth Circuit Denies a *Bivens* Extension to the Survivors of a Cross-Border Shooting Victim

On June 7, 2010, fifteen-year-old Sergio Hernandez's ("Hernandez") life ended when CBP agent Jesus Mesa ("Mesa") fired a bullet across the border.[111] The complaint before the Supreme Court alleged that Hernandez and his friends were playing a game in which they would run from the Mexican side across a concrete culvert separating the United States and Mexico and touch the border fence.[112] During the game, Mesa arrived on bicycle and detained one of Hernandez's friends.[113] After subduing the friend, Mesa trained his weapon on Hernandez, who was then crouched behind a concrete support beam underneath a rail bridge that connected El Paso, Texas with Ciudad Juarez, Mexico.[114] Mesa then fired two shots from the United States' side of the border, one of which struck and killed Hernandez while he was on Mexican soil.[115] After the shooting, Hernandez's survivors brought an

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107. *Id.* at 1862–63.
108. *Abbasi*, 137 S. Ct. at 1862–63.
109. *Id.* at 1861.
110. *Id.* at 1860–61.
111. *Hernandez III*, 137 S. Ct. 2003, 2005 (2017). For this case, the Court assumed the facts alleged as true because the case was dismissed on Federal Rules Civil Procedure 12(b)(6) motions. The Justice Department concluded that the shooting occurred "while smugglers attempting an illegal border crossing hurled rocks from close range at a Border Patrol agent." *Id.*
112. *Id.*
113. *Id.* A cell phone captured grainy video of the shooting. CBS News, *Mexico Teen Shot on Tape*, YOUTUBE (June 10, 2010), https://www.youtube.com/watch?v=DCh-9sMkVPU.
114. *Id.*
115. *Id.*

action against Mesa under *Bivens* alleging violations of the Fourth and Fifth Amendments.[116]

In *Hernandez v. United States* ("*Hernandez II*"), the Fifth Circuit, sitting en banc, issued its second of what would ultimately be three opinions addressing the *Bivens* claims at issue.[117] *Hernandez v. United States* ("*Hernandez I*") held that Hernandez's status as a Mexican national with no voluntary ties to the United States failed the "sufficient connections test" announced in *United States v. Verdugo-Urquidez*[118] and thus, the Fourth Amendment did not extend extraterritorially to protect Hernandez.[119] Because the *sine qua non* of a *Bivens* claim is a constitutional violation, and the absence of a constitutional right forecloses the possibility of a constitutional violation, the court rejected Hernandez's Fourth Amendment claim.[120] *Hernandez II* affirmed this ruling on the same grounds.[121] The Supreme Court took up Hernandez's case and decided it one week after *Abbasi*.[122]

In *Hernandez v. Mesa* ("*Hernandez III*"), the Supreme Court vacated the opinion below and remanded the case for further proceedings in light of *Abbasi*.[123] The Court issued guidance to the lower court and emphasized the "special factors" analysis expounded upon in *Abbasi*.[124] The Court then expressed approval of the lower court's decision to conduct the constitutional

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116. *Hernandez I*, 757 F.3d 249, 255 (5th Cir. 2014), *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam). In addition to Mesa, Hernandez originally sued the United States under the FTCA and the Alien Tort Statute.

117. *See id.*; Hernandez v. United States (*Hernandez II*), 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam); *Hernandez IV*, 885 F.3d 811 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678).

118. 494 U.S. 259, 265 (1990) (explaining "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community").

119. *Hernandez I*, 757 F.3d at 266.

120. *Id.*; The *Hernandez I* court did find Hernandez's Fifth Amendment substantive due process violation claim cognizable and allowed a *Bivens* claim to proceed under that theory, and denied Mesa's qualified immunity defense. *Id.* at 267–77; *Hernandez II* reversed the panel's holding that qualified immunity did not apply and affirmed the district court's dismissal of all claims. *Hernandez II*, 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam); Because the Supreme Court's holding in *Graham v. Connor* rejects the application of a Fifth Amendment due process analysis for an excessive force claim, this note elides the Fifth Amendment claims raised by Hernandez. Graham v. Connor, 490 U.S. 386, 395 (1989) (stating that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment") (internal quotations omitted).

121. *Hernandez II*, 785 F.3d at 119.

122. *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); *Hernandez III*, 137 S. Ct. 2003 (2017).

123. *Hernandez III*, 137 S. Ct. at 2006–08.

124. *Id.* at 2006.

analysis of the Fourth Amendment's applicability while assuming the availability of a *Bivens* claim as this tact would likely dispose of the case without reaching the *Bivens* question.[125] The Court, however, declined to rule on the Fourth Amendment question because it "[was] sensitive and [could] have consequences that are far reaching."[126] The Court concluded with an admonishment that the guidance from *Abbasi* may enable a lower court to evade the Fourth Amendment question.[127]

In *Hernandez v. Mesa* ("*Hernandez IV*") the en banc Fifth Circuit applied *Abbasi* and concluded that the extraterritoriality questions presented by the case in conjunction with multiple "special factors" compelled the denial of a *Bivens* action to Hernandez.[128] The court hewed to the *Abbasi* two-part inquiry to determine whether a *Bivens* remedy is available.[129] The court first reasoned that the open question of the Fourth Amendment's reach into Mexican soil to protect a Mexican citizen provided ample reason to conclude that this case presented a new *Bivens* context.[130] The court elaborated by pointing out the Supreme Court's lack of "judicial guidance concerning the extraterritorial scope of the Constitution."[131] It further added that *United States v. Verdugo-Urquidez* can be read to preclude such an extraterritorial extension of the Fourth Amendment.[132] The court concluded this prong of the analysis with the belief that the new context of the asserted *Bivens* claim directed a denial of a *Bivens* action on its own, but nevertheless proceeded to the "special factors" analysis.[133]

The thrust of *Hernandez IV*'s "special factors" analysis focused on national security implications.[134] The court highlighted that "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence."[135] The court added that Congress tasked the Border Patrol with the deterrence of illegal entry, terrorists, and weapons at the border.[136] The court further hesitated to imply a damages remedy due to the deleterious effect such liability might have on an agent's response to threats that often require split-second countermeasures.[137] Beyond the con-

125. *Id.* at 2007.
126. *Id.*
127. *Id.*
128. *Hernandez IV*, 885 F.3d at 816–23.
129. *Id.*
130. *Id.* at 817.
131. *Id.*
132. *Id.*
133. *Id.* at 818.
134. *Id.*
135. *Hernandez IV*, 885 F.3d 811, 818–19 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678) (quoting Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012)).
136. *Id.* at 819.
137. *Id.*

cerns for agent safety and national security, the court pointed to diplomatic concerns that presented further cause for hesitation in extending *Bivens*.[138]

The Fifth Circuit decided that the extension of *Bivens* risked judicial overreach into sensitive matters of foreign policy.[139] To buttress its decision, the court pointed to the Mexican government's desire for a damages remedy as a substitute for the executive branch's refusal to extradite Mesa to face charges for the shooting as evidence of the sensitive foreign relations implications.[140] Concern for the executive branch's standing in the diplomatic arena, in the court's estimation, created greater pause to extend the remedy because "[i]t would undermine Mexico's respect for the validity of the Executive's prior determinations."[141] In hewing to *Abbasi*, the court next looked to whether Congress intended to create a remedy in this situation.[142]

The court attributed intention to Congress's silence on the availability of a remedy in the border context.[143] The increased national security policy focused on the Mexican border informed the court's reluctance to "believe that congressional inaction was inadvertent."[144] To show that congressional silence revealed that Congress intentionally elided a remedy, the court highlighted that 42 U.S.C. § 1983 constrained damages remedies to claimants within the jurisdiction of the United States.[145] The court looked next to the FTCA, which excluded "any claim arising in a foreign country" as further evidence that the absence of a remedy in the cross-border context was not the product of a congressional oversight.[146]

Next, the court rejected the argument that the absence of a federal remedy compelled a *Bivens* claim on the grounds that *Bivens* served as the only deterrence to unconstitutional federal conduct.[147] It acknowledged that the presence of an alternative remedy was dispositive to foreclosing a *Bivens* remedy, but stated that the absence of a remedy alone does not give rise to an implied one when the case presents "special factors."[148] The court also pointed out the deterrence already in place to ensure federal agents operate within the confines of the law, acknowledging that "the DOJ is currently prosecuting another Border Patrol agent in Arizona for the cross-border homicide of a Mexican citizen."[149] The deterrence analysis ended with a

138. *Id.*
139. *Id.* at 819–20.
140. *Id.* at 820.
141. *Hernandez IV*, 885 F.3d at 820.
142. *Id.*
143. *Id.*
144. *Id.* (quoting *Abbasi*, 137 S. Ct. 1843, 1862 (2017)).
145. *Id.*
146. *Id.*; 28 U.S.C. § 2680(k) (2019).
147. *Hernandez IV*, 885 F.3d at 821.
148. *Id.*
149. *Id.*

separation of powers argument, stating that alternative remedies notwithstanding, when "a balance is to be struck" between deterrence and national security, Congress should strike the balance.[150]

B. The United States Court of Appeals for the Ninth Circuit Allows a *Bivens* Action to Proceed Against a Border Patrol Agent

In the waning minutes of October 10, 2012, Border Patrol agent Lonnie Swartz ("Swartz") responded to alleged rock throwers beyond the United States' border with lethal force, killing Elena Rodriguez.[151] When Swartz fired the fatal shots, he stood behind the border fence on an embankment twenty-five feet above the street in Nogales, Mexico, where Rodriguez was walking at the time of the homicide.[152] A local newspaper in Tucson, Arizona summarized the expert testimony of a forensic pathologist and reported that:

> While Swartz's first shot was catastrophic, Elena Rodriguez was still alive until the final shot, which sliced through the helix of his right ear and punch[ed] through the skull, lacerat[ed] his mid-brain, before [it came] to rest just beneath his scalp.[153]

Ten bullets pierced the sixteen-year-old's body.[154] As a result, Rodriguez's survivors sued Swartz in his individual capacity for Fourth and Fifth Amendment violations under *Bivens*.[155]

The Ninth Circuit held that the survivors could proceed under *Bivens*.[156] The court confronted the Fourth Amendment question and ruled that Rodriguez "had a Fourth Amendment right to be free from the objec-

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150. *Id.* (quoting *Abbasi*, 137 S. Ct. 1843, 1863 (2017)).

151. Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309). The court reviewed this case on interlocutory appeal regarding whether agent Swartz was entitled to qualified immunity. As such, the facts presented were deemed true for the purposes of appeal. Because this note focuses on the availability of *Bivens* in the context of Fourth Amendment excessive force violations in cross–border shootings, I will proceed under the same presumed facts. Also, the United States intervened on appeal and presented the argument that a *Bivens* remedy was unavailable. Although Swartz conceded that *Bivens* was available in his opening brief, Swartz subsequently incorporated the government's argument in his reply brief and the court passed on both qualified immunity and the availability of *Bivens*. *Id.* at 728.

152. *Id.*

153. Paul Ingram, Swartz *Trial: Boy Mortally Wounded But Alive When BP Agent Shot Him in Head, Says Expert*, TUCSON SENTINEL (Nov. 5, 2018), http://www.tucsonsentinel.com/local/report/110518_swartz_trial/swartz-trial-boy-mortally-wounded-but-alive-when-bp-agent-shot-him-head-says-expert/.

154. *Rodriguez*, 899 F.3d at 727.

155. *Id.*

156. *Id.* at 730.

tively unreasonable use of deadly force."[157] To reach this conclusion, the court rejected Swartz's reliance on *United States v. Verdugo-Urquidez* and distinguished it on multiple grounds, the most significant being that *Verdugo-Urquidez* did not address the conduct of federal agents on American soil.[158] It followed from this distinction that the issues implicated by Mexican sovereignty in *Verdugo-Urquidez* were absent in Rodriguez's case.[159] Another aspect of the Supreme Court's reasoning the Ninth Circuit used to distinguish *Verdugo-Urquidez* was the fact that *Verdugo-Urquidez* addressed inefficacy of warrants issued in the United States to operate beyond United States sovereign territory.[160] Because the court believed *Verdugo-Urquidez* to be inapposite, it turned to *Boumediene v. Bush*[161] for authority.[162]

The Ninth Circuit asserted *Boumediene* stood for the proposition that the determination of the Constitution's reach requires a three-part analysis.[163] This analysis revolved around Rodriguez's "citizenship and status, the location where the shooting occurred, and any practical concerns that ar[os]e."[164] The court added that "[n]either citizenship nor voluntary submission to American law is a prerequisite for constitutional rights," and serve only as non-dispositive factors to the determination of whether the Constitution applies.[165] The court acknowledged that *Boumediene* extended constitutional protections to detainees held at Guantanamo Bay in Cuba in part because the United States had complete, practical control over the area.[166] Mexico's sovereignty and practical control over the street where Rodriguez died notwithstanding, the court concluded that the Fourth Amendment applied.[167] After determining that Fourth Amendment protection inured to Rodriguez, the court trained its eye on the Fifth Circuit's contrary decision in *Hernandez IV*.[168]

After acknowledging that its decision resulted in a circuit split, the court explained why it diverged from the Fifth Circuit on analogous facts.[169] The court rehearsed its above-mentioned argument against applying *Verdugo-Urquidez* and stated that this case did not involve the practical concerns

157. *Id.* at 728.
158. *Id.* at 731.
159. *Id.*
160. *Rodriguez*, 899 F.3d at 731.
161. 553 U.S. 723 (2008).
162. *Rodriguez*, 899 F.3d at 729–30.
163. *Id.* at 729.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 730.
168. *Rodriguez*, 899 F.3d at 731.
169. *Id.*

highlighted first in *Verdugo-Urquidez* and echoed in *Hernandez IV*.[170] Instead, the only practical effect of an extension of the Fourth Amendment in these limited circumstances is to "simply say American officers must not shoot innocent, non-threatening people for no reason."[171] Having dispatched with the Fourth Amendment question, the court then engaged in a *Bivens* analysis through the *Abbasi* lens.[172]

The court made short work of finding that this case presented a new *Bivens* context, and thus moved to determine whether the plaintiffs had remedies aside from *Bivens* available.[173] The court noted that unwaived sovereign immunity acts as a complete bar to suit on respondeat superior claims against the United States.[174] The court further noted that the limited waiver granted in the FTCA still precluded "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[175] As a result, the court found that the United States could not be sued, but refused to cede that Congress's exclusion of foreign claims in the FTCA manifested a congressional intention to bar *Bivens* claims as well.[176]

The court supported its assertion that Congress did not intend to eliminate *Bivens* claims through the analysis of an amendment to the FTCA, the Westfall Act.[177] The court viewed the Westfall Act as indicative of Congress's intent to protect federal agents subject to suit under common law tort claims while engaged within the scope of employment by mandating that claims against the individual be brought against the United States. [178] The court noted, however, that the Westfall Act provides no protection for federal agents' conduct that violates the Constitution. In the court's reasoning, the limitation on protection for constitutional violations proves that Congress intended for there to be an "explicit exception for *Bivens* claims."[179] Finally, the court rejected Swartz's contention that Rodriguez could bring suit in state court on the grounds that the Westfall Act precluded such an action.[180] The court concluded by saying, "for Rodriguez, it is damages under *Bivens* or nothing, and Congress did not intend to preclude *Bivens*."[181]

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170. *Id.*
171. *Id.*
172. *Id.* at 737–48.
173. *Id.* at 738–44.
174. *Rodriguez*, 899 F.3d at 739.
175. *Id.*
176. *Id.*
177. *Id.* at 740.
178. *Id.*
179. *Id.* (internal quotations omitted) (quoting Hui v. Castaneda, 559 U.S. 799, 807 (2010)).
180. *Rodriguez*, 899 F.3d at 741.
181. *Id.* at 744.

The Ninth Circuit found "[n]o 'special factors' present in this case."[182] The court invoked *Abbasi* to demonstrate that the "special factors" analysis is conducted not in the abstract, but to a high degree of specificity.[183] It noted that *Abbasi* microscopically probed the specifics of the detention policy claims in the context of the September 11, 2001 attacks and not at detention claims in general.[184] The court limited its finding to the specific facts of the claim, to wit, the cross-border shooting of an unarmed and nonthreatening individual and not cross-border shootings in general.[185] With this qualification announced, the court considered the arenas of national policy and national security.

Contrary to the attacks launched in *Abbasi* against the high-level detention policies, the court found that Rodriguez was not challenging any policies.[186] Indeed, "neither the United States nor Swartz argues that he followed government policy."[187] Additionally, unlike the Executive Officials sued in *Abbasi*, Swartz occupied a "rank-and-file" position that did not implicate the same concerns noted in *Abbasi*.[188]

As with domestic policy, the court found no indication that the extension of *Bivens* would entangle the court in a separation of powers struggle that an extension in *Abbasi* portended.[189] Instead, the court recognized the language in *Abbasi* warning "that national security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins."[190] The court concluded that Swartz's and the United States' invocation of national security fit the bill of just such a "talisman."[191] The United States fared no better with the court in its assertion of "special factors" raised in the foreign policy context.[192]

Finally, the Ninth Circuit panel addressed the presumption against extraterritoriality.[193] The court accepted that the presumption against the extraterritoriality effect of statutes finds an analog in the constitutional context as well.[194] The court stated, however, that the presumption is rebuttable upon a showing that "actions touch and concern the territory of the United

182. *Id.*
183. *Id.*
184. *Id.* at 745.
185. *Id.* at 744.
186. *Rodriguez*, 899 F.3d at 745.
187. *Id.*
188. *Id.*
189. *Id.* at 746.
190. *Id.* at 745 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017)) (internal quotation marks omitted).
191. *Id.* at 746.
192. *Rodriguez*, 899 F.3d at 746–47.
193. *Id.* at 747.
194. *Id.*

States."[195] The court recounted that Swartz launched his barrage of gunfire from United States soil, an action that gave rise to a "compelling interest" for the court in terms of regulating "our own government agents' conduct on our own soil."[196] Also, the Government's decision to apply the criminal law extraterritorially to prosecute Swartz in a federal court provided the court with additional authority to support its contention that the presumption against extraterritorial remedies was rebutted.[197]

In summation, the Ninth Circuit held that the new *Bivens* context asserted by Rodriguez constituted an available theory of recovery.[198]

IV. THE FOURTH AMENDMENT PROTECTS AGAINST UNREASONABLE SEIZURES WITHIN THE BORDER AREA SUBJECT TO UNITED STATES' CONTROL

Whether the Fourth Amendment operates to protect Mexican nationals from cross-border shootings perpetrated by federal agents from within United States territory remains an open question.[199] The federal agents at the root of the circuit split, based on the facts before the respective courts, employed objectively unreasonable force in contravention of the Fourth Amendment.[200] Thus, the question of extraterritoriality in the context of the United States border represents the central question of the Fourth Amendment's application in cross-border shootings. Given the implications of an extension of the Fourth Amendment to this context, it is understandable that the Fifth Circuit declined to do so. Cross-border shootings, however, present a minimal extension of the Fourth Amendment in contrast with the respect for the Constitution that an extension embodies. The Ninth Circuit's application of the Fourth Amendment was therefore proper in the normative sense as well as in line with Supreme Court jurisprudence.

The Fourth Amendment's reach across the United States border in the context of illegal seizures remains an open question.[201] While authority ex-

195. *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)) (internal quotation marks omitted).

196. *Id.*

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

198. *Id.* at 748.

199. *See Hernandez III*, 137 S. Ct. 2003, 2007 (2017) (condoning the Fifth Circuit's decision to avoid the Fourth Amendment question due to its sensitivity and potential for far reaching consequences).

200. *See* Graham v. Connor, 490 U.S. 386, 396 (1985) (explaining that the test for unreasonable use of force requires a totality of the circumstances inquiry that includes the severity of the crime at issue, the threat, if any, the suspect poses to the officers or others, and "whether he is actively resisting arrest or attempting to evade arrest by flight").

201. *See Hernandez III*, 137 S. Ct. at 2007 (stating that the Fourth Amendment's applicability to a cross-border shooting is a sensitive issue that need not be resolved at that time).

ists that suggests a bright line blocking the Fourth Amendment's protection of aliens across the border, it does not foreclose a contrary finding.[202] Crucial distinctions between the previous cases and the cross-border context exist in both the constitutional violation alleged and the location of the government actor at the time the violation occurred. Because the Border Patrol agents employed deadly force—launched from United States soil—to effectuate unreasonable seizures, *United States v. Verdugo-Urquidez*[203] does not control the extraterritoriality question in the cross-border shooting context.

The Supreme Court's deepest dive into the Fourth Amendment's extraterritorial reach came in *Verdugo-Urquidez*.[204] This case arose after Mexican police delivered Verdugo-Urquidez ("Urquidez"), a suspected drug cartel leader and Mexican national, to United States marshals in the United States.[205] After his arrest, federal agents acting in concert with Mexican officials, searched various residences of Urquidez in Mexico and seized evidence of his criminal enterprise.[206] Initially, the district court granted Urquidez's suppression motion that argued that the officers' warrantless search without further justification violated the Fourth Amendment.[207] The United States Court of Appeals for the Ninth Circuit affirmed and the Supreme Court reversed based on its conclusion that the Fourth Amendment did not apply to the "search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[208]

The Supreme Court gave multiple reasons that led to its finding that the Fourth Amendment did not protect Urquidez.[209] First, the Court set forth a textual argument that "the people" as utilized in the Fourth Amendment referred to "a class of persons who are part of a national community or who have . . . sufficient connection with this country."[210] Writing for the majority, Justice Rehnquist elaborated that neither the Framers nor their contemporaries displayed concern for the rights of nonresident aliens and that the courts have remained faithful to that lack of concern by refusing to extend

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202. *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (stating that the contemporaries of the Framers did not understand the Fourth Amendment to apply to "activities of the United States directed against aliens in foreign territory"), *with* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that the Constitution granted writs of habeas corpus to alien detainees held at Guantanamo Bay, Cuba).

203. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

204. *Id.*

205. *Id.* at 262.

206. *Id.* at 262–63.

207. *Id.* at 263.

208. *Id.* at 259.

209. *Verdugo-Urquidez*, 494 U.S. at 264–68.

210. *Id.* at 265.

commensurate rights to aliens.[211] Next, Justice Rehnquist pivoted to the question of where the Fourth Amendment applied and concluded that the Fourth Amendment, like the Fifth Amendment, is cabined to the sovereign territory of the United States.[212] Finally, while noting that a warrant issued by a United States magistrate "would be a dead letter" outside of the United States, the Court warned of the inherent difficulties that an extraterritorial application of the Fourth Amendment would create for the executive and legislative branches.[213] Having found that Urquidez lacked sufficient ties to the United States in combination with the location of the searches and seizures occurring in Mexico, the Court held that the Fourth Amendment provided no shelter to Urquidez.[214]

Justice Brennan's dissent, joined by Justice Marshall, rejected the majority's narrow reading of the Constitution's reach and instead reasoned that the Constitution's protections should extend to "wherever the United States wields power."[215] Justice Brennan posited that the majority's anachronistic view failed to account for the proliferation of United States laws that could be enforced to punish conduct exercised wholly beyond United States territory.[216] Instead, he presented a rule that would respect the mutuality of obligations.[217] Succinctly put, when the United States expects foreign nationals in foreign countries to abide by United States laws, the least the United States can do is to follow the Constitution—the source of the power to enact and enforce laws—in its enforcement of the law.[218] In conclusion, Justice Brennan invoked Justice Brandeis's words from *Olmstead v. United States* where Brandeis warned:

> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the

211. Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo–Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 341 (1994).

212. *Verdugo-Urquidez*, 494 U.S. at 269–70.

213. *Id.* at 274.

214. *Id.* at 274–75.

215. Bentley, *supra* note 212, at 340.

216. *Verdugo-Urquidez*, 494 U.S. at 279–80 (Brennan, J., dissenting). Justice Brennan pointed to antitrust, securities, "and a host of other federal criminal statutes" that could be violated without the violator ever stepping foot in the United States based on the effects that such conduct has on the United States. *Id.*

217. *Id.* at 283–84 (Brennan, J., dissenting).

218. Bentley, *supra* note 212, at 343; *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

> means . . . would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face.[219]

The Constitution's extraterritorial reach regarding foreign nationals remained ensconced in the holding of *Verdugo-Urquidez* until the Court took up *Boumediene v. Bush* in 2007.[220]

In *Boumediene*, the Court confronted the question of "whether foreign nationals apprehended and detained in [Guantanamo Bay] during a time of serious threats to our Nation's security, may assert the privilege of the writ [of habeas corpus] . . . ."[221] The Court rebuffed the approach taken in *Verdugo-Urquidez*, acknowledging that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism," and concluded that the detainees were entitled to the writ.[222] The Court noted that the Constitution's force does not categorically stop "where *de jure* sovereignty ends."[223] In the majority opinion, Justice Kennedy recognized that the United States retained actual control over Guantanamo Bay through calculated negotiations and that the Government could not rely on technicalities to empower it to "switch the Constitution on or off at will."[224] Instead of a categorical bar to the Constitution's extraterritorial reach, the Court set out a three-factor test.[225] The factors considered:

> (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[226]

The Court's analysis of the first factor homed in on the adequacy of the process Congress afforded to the detainees: the Court found the substitutes for habeas petitions inadequate.[227] Moving to the second factor, the Court decided that in all practicality, the United States exercised full dominion over Guantanamo Bay.[228] Finally, the Court ruled that the United States' control over Guantanamo Bay removed the obstacles found in prior cases

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219. *Verdugo-Urquidez*, 494 U.S. at 285 (Brennan, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

220. Boumediene v. Bush, 553 U.S. 723 (2008).

221. *Id.* at 746; *see also* U.S. CONST. art. 1, § 9, cl. 2.

222. *Boumediene*, 553 U.S. at 764.

223. *Id.* at 755, 764–65.

224. *Id.* at 765–66.

225. *Id.* at 766.

226. *Id.*

227. Tung Yin, Boumediene *and Lawfare*, 43 U. RICHMOND L. REV. 865, 875 (2009) (citing *Boumediene*, 553 U.S. at 791).

228. *Id.*

declining the extension of the Constitution extraterritorially as impractical.[229] The Court concluded that Congress's only option to remove the privilege of habeas corpus was through an invocation of the Suspension Clause.[230] At bottom, *Boumediene* broke from the plurality's formalistic approach in *Verdugo-Urquidez* that relied on single dispositive factors such as citizenship and location, forging a path forward that employed a "functional approach" that considered practical considerations to determine the extraterritorial applicability of constitutional protections.[231]

The Ninth Circuit adhered to the functional approach and analyzed the *Boumediene* factors to create a framework applicable to the cross-border shooting context that this note adopts for the purposes of the Fourth Amendment extraterritoriality analysis.[232] Following that framework, the first factor concerned the citizenship and status of the individual fighting for constitutional protection.[233] In both shootings, the victims' citizenship and statuses were unknown to the Border Patrol agents prior to their opening fire.[234] It is arbitrary to draw the Fourth Amendment protection line solely based on citizenship and not in keeping with the holding in *Boumediene* where the Supreme Court granted constitutional protection to noncitizens. The counterargument to the above contention in the cross-border shooting context would confer Fourth Amendment protection upon a United States citizen should she find herself on the wrong side of a Border Patrol agent's bullet while standing on Mexican soil within sight of the United States border. The Constitution cannot rise or fall based on such a trivial distinction when lives are at stake. It is likely that if the roles were reversed and a Mexican agent shot from Mexico and killed an innocent United States citizen on United States' soil, then the full force of the United States government would rain down on that agent ; the United States' conspicuous position of power would yield results that the Mexican government could not attain for

229. *Id.*

230. *Id.*

231. Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 U. S. CAL. L. REV. 259, 261 (2009); *see also* Boumediene v. Bush, 553 U.S. 723, 762 (2008) (rejecting the government's argument that a prior case held the extension of constitutional protections turned on a formalistic approach and instead positing that the prior case highlighted the importance of practical considerations).

232. Rodriguez v. Swartz, 899 F.3d 719, 729 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309); *see also Hernandez II*, 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam) (applying the *Boumediene* factors to the extraterritoriality of the Fifth Amendment).

233. *Rodriguez*, 899 F.3d at 729.

234. *See id.* at 733; *Hernandez III*, 137 S. Ct. 2003, 2007 (2017) (stating that Hernandez's nationality was unknown to the Agent at the time of the shooting).

its slain citizens.[235] Thus, the citizenship and status of a person seized on Mexican soil through conduct launched from United States' soil should not weigh heavily against the application of the Fourth Amendment extraterritorially in the cross-border context.

The next factor derived from *Boumediene* concerns the location of the alleged constitutional violation.[236] The United States' de facto sovereignty over Guantanamo Bay did play an important role in the decision to extend the writ of habeas corpus to the detainees held there.[237] But *Boumediene* did not rest solely on this distinction, and the language from *Boumediene* contemplates flexibility in this factor.[238] Mexico's sovereignty over the territory south of the border does not necessarily defeat the extension of constitutional protections.[239] The United States has long exerted power over the border region, and therefore it is not irrational to expect the United States to abide by constitutional norms in this area.[240] Tellingly, in 2011, the Chief of the United States Border Patrol explained that "border security policy 'extends [the nation's] zone of security outward, ensuring'" that the physical border is not the last line of defense.[241] Such policies expand United States control to the cross-border region and further militate in favor of a finding that the Fourth Amendment applies there.

A further distinction that conforms with *Boumediene* and departs from *Verdugo-Urquidez* arises from the proximity of the agents' conduct to United States soil. It cannot be over-emphasized that the federal agents acted with their boots firmly planted in the United States.[242] Practical considerations that carried the day in *Boumediene* compel a finding that the propinquity of the seizure to the United States coupled with the location of the federal agents should weigh the location factor in favor of an extension of the Fourth Amendment. The government's conduct in *Verdugo-Urquidez* occurred solely in Mexico and represented an intrusion in property interests

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235. *See Hernandez IV*, 885 F.3d 811, 820 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678) (noting the United States' refusal to Mexico's request to extradite agent Mesa).

236. *Rodriguez*, 799 F.3d at 729.

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

238. Eva L. Bitran, Note, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 239 (2014).

239. *Boumediene*, 553 U.S. at 754 (stating that sovereignty alone does not end an extraterritorial analysis).

240. Bitran, *supra* note 239, at 248.

241. *Hernandez I*, 757 F.3d 249, 270 (5th Cir. 2014), *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam).

242. *See Hernandez III*, 137 S. Ct. 2003, 2004 (2017) (remarking that the complaint alleged that the agent shot Hernandez from American soil); Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309) (pointing to the complaint's allegations that the agent shot from the border fence while on American soil).

and implicated warrant considerations not present in the cross-border context.[243] The agents in the cross-border shootings acted from within the United States, and intruded on the liberty of the victims to live.[244] Thus, the functional approach rejects any reliance on an invisible line as the barrier to constitutional protections designed to constrain the federal government.

The final factor derived from *Boumediene* weighs the "practical obstacles inherent in enforcing" the Fourth Amendment in a cross-border context.[245] The rule this note advocates only covers the extension of the Fourth Amendment to unreasonable seizures effected through the use of deadly force and leaves untouched other Fourth Amendment jurisprudence in relation to the border. With that in mind, there is little distinction to be made between a cross-border setting and the streets of Memphis, Tennessee in the deadly force analysis.[246] There is no practical obstacle to the enforcement of the simple admonition from *Tennessee v. Garner* that "a police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[247] Every law enforcement officer in the United States is bound by the deadly force rule set forth in *Garner* and, thus, the expectation that Border Patrol agents will so comply imposes no additional burden.

Opponents to a proposed rule that extends Fourth Amendment protections to noncitizens shot by United States agents from United States soil would likely cabin *Boumediene* to the specific constitutional question at issue and hold out *Verdugo-Urquidez* as the authority on the Fourth Amendment's extraterritorial reach.[248] Such an approach dismisses the functional analysis Justice Kennedy employed in *Boumediene* to determine the Constitution's extraterritorial reach.[249] Also, Verdugo-Urquidez raised an argument based on the Warrant Clause.[250] Both the majority opinion and Justice Kennedy's concurrence acknowledged the inefficacy of a warrant issued by a United States magistrate to search and seize property in a foreign land.[251] There is even an argument to be made that though Justice Kennedy

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243. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (stating that adherence to the warrant requirement would be "impracticable and anomalous").

244. Boumediene v. Bush, 553 U.S. 723, 766 (2008).

245. *Hernandez II*, 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam).

246. *See* Tennessee v. Garner, 471 U.S. 1 (1985).

247. *Id.* at 11.

248. *See Hernandez IV*, 885 F.3d 811, 817 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678) (noting that since the holding in *Boumediene*, federal circuit courts have rejected any extension to *Boumediene* where the United States had neither *de jure* or *de facto* control).

249. *See* Neuman, *supra* note 232, at 264 (explaining Kennedy's functional approach).

250. United States v. Verdugo-Urquidez, 494 U.S. 259, 263 (1990).

251. *Id.* at 274, 278.

joined the majority opinion in *Verdugo-Urquidez*, his departure from much of the majority's reasoning produced a narrower holding based solely on the impracticality of a United States warrant executed in Mexico.[252] The previously mentioned courts that applied the *Boumediene* factors to determine the reach of the Fourth Amendment further betrays an argument that only *Verdugo-Urquidez* controls in the cross-border context.[253]

V. CROSS-BORDER SHOOTINGS CONSISTENT WITH FOURTH AMENDMENT VIOLATIONS ARE COGNIZABLE UNDER *BIVENS* AFTER *ABBASI*

At the outset, while the *Abbasi* framework likely curtails the extension of *Bivens* beyond contexts where the Court has recognized a *Bivens* action, Justice Kennedy's majority opinion took pains to emphasize the vitality of *Bivens* in the search and seizure context by stating:

> [I]t must be understood that this opinion is not intended to cast doubt on the continued force or *even the necessity*, of *Bivens* in the search and seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries[,] and it provides instruction and guidance to federal law enforcement officers going forward.[254]

Justice Kennedy further acknowledged *Bivens* as "a fixed principle in the law" in the search and seizure context.[255] *Abbasi* teaches that the extension of a *Bivens* remedy to a new context requires careful consideration of separation of powers principles through the "special factors analysis."[256] This note concedes that a *Bivens* claim based on a cross-border shooting presents a new context; thus, this section begins with the availability of other remedies and then focuses on the special factor analysis concluding that the absence of special factors should result in the extension of a *Bivens* rem-

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252. Bentley, Jr., *supra* note 212, at 339–40. Bentley argued that Chief Justice Rehnquist's majority opinion was joined in full by only three Justices and thus resulted in a plurality opinion. *Id.*

253. *See* Rodriguez v. Swartz, 899 F.3d 719, 729 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309) (applying the Boumediene factors); *Hernandez II*, 785 F.3d 117 (5th Cir. 2015) (en banc), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam); *Hernandez III*, 137 S. Ct. 2003 (2017) (applying the *Boumediene* factors to the extraterritoriality of the Fifth Amendment); *Hernandez I*, 757 F.3d 249, 262 (5th Cir. 2014), *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (per curiam) (stating that "though *Boumediene*'s underlying facts concerned the Suspension Clause, its reasoning was not so narrow" and noting that the Supreme Court's analysis invoked myriad constitutional rights from prior cases).

254. Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017) (emphasis added).

255. *Id.* at 1857.

256. *Id.* at 1860.

edy for victims of cross-border shootings that stem from Fourth Amendment violations in the unreasonable seizure context.[257]

A. For Noncitizens Killed at the Hands of Border Patrol Agents in Mexican Territory, It Is *Bivens* or Nothing

Chief Justice Marshall's words in *Marbury v. Madison* (that for every legal wrong, the law should provide a remedy) [258] explain the genesis for the *Bivens* remedy and the prudence of the extension of *Bivens* in the cross-border context. Often, survivors of victims of tragic shootings are not financially compensated for their loss, but they can find some justice through the criminal law. For Hernandez and Rodriguez, no such solace was to be found. In the case of Agent Mesa, the executive branch refused Mexico's request for extradition and refused to indict Mesa in the United States as well.[259] For the Rodriguez family, they experienced the pain of two trials where Agent Swartz was acquitted first of murder and later of manslaughter.[260] With the doors to justice closed on the criminal front, the only recourse left to these survivors and likely survivors moving forward rests on the availability of *Bivens*.

The sovereign immunity enjoyed by the United States bars claims against the United States not excepted by the FTCA.[261] The FTCA allows claims to be brought against agents of the United States for common law torts but excepts both constitutional violations and claims arising from injuries sustained in a foreign country.[262] Also, an amendment to the FTCA, the Westfall Act, likely forecloses the possibility that a victim could bring suit in a state court on the reasoning that this act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties."[263] As such, a *Bivens* claim provides the only redress for noncitizen victims of cross-border shootings.[264]

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257. *See id.* at 1855 (explaining that the Court has extended *Bivens* remedies in *Bivens*, *Carlson*, and *Davis*).

258. 5 U.S. (1 Cranch) 137, 163 (1803).

259. *Hernandez IV*, 885 F.3d 811, 820 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678).

260. Julia Jacobs, *Border Patrol Agent Who Shot Mexican Teenager Acquitted of Involuntary Manslaughter*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/border-patrol-acquitted-involuntary-manslaughter.html.

261. Rodriguez v. Swartz, 899 F.3d 719, 739 (9th Cir. 2018), *petition for cert. filed*, (U.S. Sept. 7, 2018) (No. 18-309).

262. *Id.* at 739–40.

263. *Id.* at 741.

264. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017) (explaining that alternative remedies can constitute a basis to deny the extension of *Bivens* to a given context).

B. No Special Factors Counsel Hesitation in a Cross-Border Context

The special factors analysis represents the Supreme Court's deference to separation of powers principles and asks whether the courts or Congress should afford a remedy.[265] The prominent consideration in the special factor analysis "requires an assessment of [a damages remedy's] impact on governmental operations systemwide."[266] This assessment gauges the burden that such a remedy would have on federal employees and the impact that a damages remedy would have on the government fisc.[267]

1. *The Burden on Federal Agents Does Not Provide a Basis for Denying a* Bivens *Claim*

The extension of a *Bivens* remedy to victims of cross-border shootings will burden federal agents, but no more than the burdens placed on similarly situated law-enforcement officials. The Fifth Circuit pointed to the transnational aspect of Border Patrol agents' duties coupled with the agents' need to make "split-second decisions" as a basis for concluding that a *Bivens* remedy would prove too onerous.[268] As the dissent noted, however, there is already a safeguard that protects federal agents in excessive force cases: qualified immunity.[269] Also, there is no indication of how split-second decisions made at the border are distinguishable from the same decisions that must be made on a daily basis in every state in the union. *Bivens* remedies in the border patrol context are not foreign concepts to border agents.[270] Courts have allowed *Bivens* actions for unreasonable searches conducted during roving patrols and for unlawful arrests.[271] CBP agents are tasked with the knowledge of constitutional restraints on government conduct and thus, a court denying a *Bivens* claim solely on the basis of where agents conduct their duty is arbitrary at best, and was rightly rejected by the Ninth Circuit.[272]

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265. *Rodriguez*, 899 F.3d at 757 (Smith, J., dissenting).

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

267. *Id.*

268. *Hernandez IV*, 885 F.3d 811, 819 (5th Cir. 2018), *cert. granted*, (U.S. May 28, 2019) (No. 17-1678).

269. *Id.* at 828 (Prado, J., dissenting).

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

271. *See* Chavez v. United States, 683 F.3d 1102, 1106–07 (9th Cir. 2012) (allowing a *Bivens* claim to proceed against a Border Patrol agent for a suspicionless search); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) (allowing a *Bivens* claim against a Border Patrol agent for an unlawful arrest and the excessive use of force claims).

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

2. *The Extension of a* Bivens *Claim to Border Patrol Agents Does Not Affect Governmental Operations*

The policy considerations surrounding the detention policy that served as the basis for the constitutional violations alleged in *Abbasi* are missing in the context of a cross-border shooting.[273] There are no policy implications that warrant hesitation in the extension of *Bivens* to Border Patrol agents in this context. Indeed, an extension of *Bivens* comports with already existing Border Patrol policy regarding the use of deadly force.[274] This policy allows the use of deadly force only if an agent has "reasonable grounds to believe that such force is necessary to protect the [agent] or other persons from imminent danger of death or serious physical injury."[275] This standard mirrors that found in the Supreme Court's deadly force jurisprudence and implicates no other policy considerations.[276] Unlike *Abbasi*, where the plaintiffs questioned the decisions of high-level executive officials tasked with the implementation of policies in response to a terrorist attack, a *Bivens* claim against Border Patrol agents serves the primary purpose of *Bivens*—the deterrence of unconstitutional conduct by individual federal agents—without calling into question high level determinations of executive officials.[277]

The Fifth Circuit's emphasis on the impact that an extension of *Bivens* would have on foreign affairs was misplaced.[278] The court warned that an extension of *Bivens* would "undermine Mexico's respect for the validity of the Executive's prior determinations."[279] The court's reasoning was specious. The extension of a civil remedy against an individual border patrol agent for conduct on American soil does not undermine the executive's criminal law decisions. It serves only to redress constitutional harms perpetrated by United States agents. Also, if the court's concern with Mexico's respect for the United States was genuine, then holding a federal agent accountable for constitutional violations against Mexican citizens serves that interest far better than projecting an image that border patrol agents may act with impunity when a Mexican national's life is at stake.

Further, a *Bivens* extension would not implicate national security policy. True, the Border Patrol is tasked with "deterring and preventing the illegal entry of terrorists, terrorist weapons, persons, and contraband."[280] But

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273. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).
274. 8 C.F.R. § 287.8(a)(2)(ii), (iii)(a) (2018).
275. *Id.*
276. *See* Tennessee v. Garner, 471 U.S. 1, 3 (1985) (announcing a rule in nearly identical language as that subsequently used in the Border Patrol regulations).
277. *Abbasi*, 137 S. Ct. at 1860.
278. *Hernandez IV*, 885 F.3d at 819–820.
279. *Id.* at 820.
280. *Id.* at 819.

using these tasks as an argument that a *Bivens* action would encroach on national security policy is inapt.[281] There exists little distinction between an instance where a Border Patrol agent uses deadly force against an individual just inside the border and an instance where the individual is feet beyond the border.[282] To say that the latter implicates national security concerns while the former does not represents just the talismanic incantation of national security implications that *Abbasi* rejected.[283] The Border Patrol is a domestic law enforcement agency with highly trained agents informed on the Constitution's imperatives. As such, a cross-border shooting falls outside of the national security realm and is more akin to common law enforcement.

At bottom, the extension of *Bivens* for the use of deadly force to effectuate a seizure initiated by federal agents on United States soil and completed just beyond the border is a function within the competence of the judiciary and not an encroachment on the separation of powers. Such an extension will not bring national policy decisions into play and indeed provides a check for an extant deadly force policy in place for Border Patrol agents.

VI. CONCLUSION

"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."[284] It strains credulity to believe that actions taken from within the United States by those entrusted to enforce the law can end the life of a human being with impunity if that human happens to be just on the other side of an imperceptible line.

281. *Id.* at 828 (Prado, J., dissenting).
282. *Id.*
283. *Id.* at 829.
284. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The Supreme Court adopted the *Bivens* remedy to ensure that the words of Chief Justice Marshall remained a vital component of American law and not a platitude to be bandied about when it suits. Just as § 1983 suits serve as a deterrence to state actors, so too does the availability of a *Bivens* remedy act to deter federal agents. *Abbasi* retained the availability of *Bivens* when confronted with an opportunity to overrule it. Even if the Court elevated the bar to *Bivens*, these cases, based on the pleadings, chinned that bar. While Congress has shirked its responsibility to enshrine in the law a right to redress for victims of the federal government's abuse at the border, the judiciary must stand ready to afford these victims remedies ensconced in the Supreme Court's jurisprudence.

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