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New Contexts and Special Factors: The Court's New Bivens Framework

Alexander J. Lindvall

NEW CONTEXTS AND SPECIAL FACTORS: THE COURT'S NEW *BIVENS* FRAMEWORK

Alexander J. Lindvall[*]

I. INTRODUCTION

For the last several decades, the Court's *Bivens* framework[1] was reminiscent of the hearsay rule: a general rule with what seemed like unlimited exceptions. But in two recent decisions—*Ziglar v. Abbasi*[2] and *Hernández v. Mesa*[3]—the Supreme Court provided a new framework for analyzing constitutionally based suits against federal officials. These decisions make clear that allowing constitutionally based suits against federal officials *is the exception*; the general rule is that these suits are not allowed. This article gives an overview of the Court's decisions in this area and provides a practical *Bivens* framework that practitioners should use going forward.

This article proceeds in two parts. Part I provides a brief history of *Bivens* suits, beginning with *Bivens* itself and ending with the Court's 2007 decision in *Wilkie v. Robbins*. Part II addresses the Court's two most recent *Bivens* decisions—*Ziglar v. Abbasi* and *Hernández v. Mesa*—and provides a law-school-outline-style framework for addressing future *Bivens* claims.

Long ago, the Supreme Court reminded us:

> No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. . . . [And the] Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government.[4]

In real-world terms, these decisions mean that many federal officials will not be held accountable—at least not through the courts—for their disturbing and unconstitutional behavior. I believe the Court's recent *Bivens* decisions are misguided, but they are what practitioners are left with. This article is meant to show practitioners the framework by which they must now abide.

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* Assistant City Attorney, Civil Division, Mesa, Arizona. J.D., Sandra Day O'Connor College of Law, Arizona State University. B.A., *magna cum laude*, Iowa State University.

1. A brief history of *Bivens* suits can be found in Part II of this article.
2. 137 S. Ct. 1843 (2017).
3. 140 S. Ct. 735 (2020).
4. United States v. Lee, 106 U.S. 196, 220 (1882).

II. A BRIEF HISTORY OF *BIVENS* SUITS

This section proceeds in two parts. Part A discusses the Court's creation and expansion of *Bivens* suits between 1971 and 1980. Part B discusses the Court's consistent restriction of *Bivens* between 1980 and 2007.

A. 1971–1980: Creating and Expanding *Bivens*

Since 1871, there has been a federal statute that allows *state* and *local* officials to be sued for violating the Constitution.[5] That statute is now codified at 42 U.S.C. § 1983.[6] However, there is no statutory counterpart that allows constitutional suits for money damages against *federal* officials.[7] Accordingly, for 100 years, a victim's right to bring suit for violations of their constitutional rights largely depended on whether the offending officer was a state or federal actor.

In 1971, however, in *Bivens v. Six Unknown Federal Narcotics Agents*, the Supreme Court held that the Fourth Amendment contains an implied cause of action that allows aggrieved citizens to bring money-damages suits against federal officials for their unconstitutional acts.[8] As the Court later described it: "*Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest [can] invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."[9] Since this decision, constitutionally based lawsuits for money damages against the federal government or its agents are commonly called "*Bivens* suits."

Bivens arose from the illegal and humiliating search and seizure of Webster Bivens and his family.[10] On November 26, 1965, several Federal

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5. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017).

6. Originally part of the Ku Klux Klan Act of 1871, section 1983 currently provides: "Every person who, under color of [state law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

7. *Abbasi*, 137 S. Ct. at 1854; ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1.1 at 631 (6th ed. 2012) ("No federal statute authorizes [the] federal courts to hear suits or give relief against federal officers who violate the Constitution of the United States."); *see also* Wheeldin v. Wheeler, 373 U.S. 647, 650 (1963) (holding that 42 U.S.C. § 1983 does not apply to the federal government or its officers).

8. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389, 395–97 (1971); *id.* at 399 (Harlan, J., concurring) ("I am of the opinion that federal courts do have the power to award damages for violation of 'constitutionally protected interests,' and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.").

9. *Butz v. Economou, 438 U.S. 478, 504 (1978).*

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

Bureau of Narcotics agents entered Bivens's apartment without a warrant and arrested him in front of his wife and children.[11] After searching his apartment from "stem to stern," the agents took Bivens to the local federal courthouse, where he was "interrogated, booked, and subjected to a visual strip search."[12] After this incident, relying exclusively on the Fourth Amendment, Bivens filed a suit for money damages in federal court, alleging that he was unlawfully searched and seized, and that he "suffered great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct."[13] The agents sought to dismiss Bivens's suit, arguing no federal law allowed suits for money damages against federal officers.[14]

On appeal, the Supreme Court ruled in Bivens's favor, finding the Fourth Amendment itself "gives rise to a cause of action for damages."[15] Justice Brennan, writing for the Court, reasoned that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[16] Although the Fourth Amendment "does not in so many words provide for its enforcement by an award of money damages,"[17] in this case, for Bivens, "it is damages or nothing."[18] Accordingly, Bivens should be entitled to the "remedial mechanism normally available [to plaintiffs] in the federal courts" (i.e., money damages).[19]

Bivens "broke new ground" in the area of civil rights.[20] Although the courts had long allowed suits against federal officials for injunctive relief,[21] they had never allowed implied constitutional suits for money damages.[22] The "core premise" underlying *Bivens* was that enforcing constitutional rights is incredibly important—so important that it justified the Court in finding an implied cause of action.[23] And given the Court's reasoning and

11. *Id.*
12. *Id.*
13. *Id.* at 389–90.
14. *Id.* at 390.
15. *Id.* at 389.
16. *Bivens*, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
17. *Id.* at 396.
18. *Id.* at 410 (Harlan, J., concurring).
19. *Id.* at 397.
20. Hernández v. Mesa, 140 S. Ct. 735, 741 (2020).
21. Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What is Special About Special Factors?*, 45 IND. L. REV. 719, 725–26 (2012).
22. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (noting that *Bivens* "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights").
23. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 CATO SUP. CT. REV. 23, 25 (2007).

broad language in *Bivens*, it seemed possible that this court-made doctrine might evolve into the federal equivalent of 42 U.S.C. § 1983.[24]

In the decade that followed, the Court extended *Bivens* on two occasions. In 1979's *Davis v. Passman*, the Court found the Fifth Amendment's Due Process Clause contained an implied cause of action that allowed federal employees to sue for wrongful, sex-based discrimination.[25] There, Congressman Otto Passman fired his administrative assistant, Shirley Davis, explicitly because of her sex.[26] Passman said it was "essential" that a man fill her position because of the "unusually heavy work load" in his office.[27] Davis sued Passman in federal court, alleging that his explicit sex-based discrimination violated the Fifth Amendment and entitled her to backpay.[28]

The Supreme Court agreed, holding that the Fifth Amendment's Due Process Clause allows causes of action for sex-based discrimination.[29] Justice Brennan, again writing for the Court, maintained that interpreting the Bill of Rights is not like interpreting a statute.[30] The Constitution does not have the "prolixity of a legal code," he noted.[31] Rather it is the nation's "great outline"[32] that speaks with a "majestic simplicity."[33] And it is the judiciary's duty to discern the primary means by which these vague rights will be enforced.[34] After finding that the Fifth Amendment contains an implied

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24. Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1139 (2014); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822 (2010) (noting that it was widely assumed among lower courts and commentators that *Bivens* remedies would eventually be available for all constitutional rights).

25. 442 U.S. 228, 248–49 (1979).

26. *Id.* at 230.

27. *Id.* at 230 n. 3. Congressman Passman terminated Ms. Davis through a letter, which read in part:

> You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.

Id. Needless to say, Ms. Davis did not "agree with [Passman's] conclusion."

28. *Id*. at 231. Normally, a suit against the government for sex-based discrimination would arise under the Fourteenth Amendment's Equal Protection Clause. But because Davis's suit was against a *federal* official, her suit was brought under the Fifth Amendment's Due Process Clause, which forbids the federal government from denying equal protection of the law. *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 95 n. 1 (1979); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

29. *Davis*, 442 U.S. at 243–44.

30. *Id.* at 241.

31. *Id.* (quoting McCulloch v. Maryland, 4 Wheat. 316, 407 (1819)).

32. *Id.* (quoting *McCulloch*, 4 Wheat. at 407) (cleaned up).

33. *Id*.

34. *Id*.

cause of action for wrongful termination, the Court went on to hold that this cause of action allows for money damages.[35] Money damages is the "ordinary remedy for an invasion of personal interests in liberty."[36] And because there are "no special factors counseling hesitation" in a suit for wrongful termination, the Court reasoned, money damages are "surely appropriate."[37]

The Court next addressed *Bivens* the following year in *Carlson v. Green*.[38] *Carlson* is a pivotal and peculiar case because it both greatly expanded and greatly limited the availability of *Bivens* suits. The Court expanded *Bivens* by holding that the Eighth Amendment's Cruel and Unusual Punishment Clause gives federal prisoners an implied damages remedy for their prison's failure to provide adequate medical treatment.[39] The Court, however, also placed two significant limitations on *Bivens* suits that had only been hinted at in past cases.[40] These two limitations would serve as the foundation for *Bivens*'s decline.

Carlson arose from the death of federal prison inmate Joseph Jones, Jr.[41] Despite being aware of Jones's serious asthmatic condition, prison officials allegedly kept Jones in an unsafe prison environment "against the advice of doctors."[42] After Jones suffered an asthma attack, prison officials "failed to give him competent medical attention for some eight hours" and "administered contraindicated drugs [that] made his attack more severe."[43] Jones died as a result of this asthma attack.[44] Jones's estate, through his mother, sued these officials for money damages, alleging their "deliberate indifference" to Jones's health and safety violated the Eighth Amendment.[45]

The Court, in a seven-to-two decision, allowed the plaintiff's Eighth Amendment claim for money damages to proceed.[46] Justice Brennan, how-

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35. *Davis*, 442 U.S. at 244–45.

36. *Id.* at 245 (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395 (1971)).

37. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978). Justice Brennan noted that a sex-based termination claim under the Fifth Amendment is not meaningfully different from a Title VII suit, where the courts routinely award money damages. *Id.* As such, in a case like this, where "it is damages or nothing," the courts are obliged to afford a damages remedy. *Id.* (quoting *Bivens*, 403 U.S. at 410).

38. 446 U.S. 14 (1980).

39. *Id.* at 16, 18–19, 25. Prisoner suits make up a considerable portion of the federal courts' dockets, *see, e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 1–5 (4th ed. 2003) (noting that over 14,000 prisoner suits were filed in 1999), so allowing *federal* prisoners to bring comparable suits had significant consequences.

40. *Carlson*, 446 U.S. at 18–19.

41. *Id.* at 16.

42. *Id.* at 16 n. 1.

43. *Id.*

44. *Id.*

45. *See id.*

46. *Carlson*, 446 U.S. at 17–18, 23.

ever, yet again writing for the Court, began the opinion in a somewhat curious way—by noting when *Bivens* suits are *not* available.[47] Justice Brennan noted that *Bivens* suits are unavailable in two circumstances: (1) when there are "special factors counseling hesitation," and (2) where Congress has provided an "equally effective" alternative remedy that was clearly meant to supplant *Bivens*.[48] The Court had hinted at these limitations in past cases,[49] but it had never explicitly stated that these were hard-and-fast limitations on *Bivens*. The Court found that these limitations did not apply to the plaintiff's Eighth Amendment suit,[50] but these two exceptions laid the groundwork for *Bivens*'s decline.

B. 1980–2007: Limiting *Bivens*

After 1980, the Court began to consistently and repeatedly retreat from *Bivens*, using the two exceptions provided in *Carlson*.[51] In *Bush v. Lucas*, for example, the Court found the existence of an alternative administrative remedy foreclosed a *Bivens* suit.[52] In *Bush*, a NASA aerospace engineer alleged he was demoted for making critical statements about the agency.[53] Bush appealed his demotion to the Civil Service Commission, alleging his demotion violated the First Amendment.[54] While this appeal was pending, however, Bush also filed a *Bivens* suit.[55] The district court dismissed Bush's suit, finding that the Civil Service Commission's appeals process was an adequate alternative remedy, thereby barring Bush's *Bivens* claim.[56]

The Supreme Court agreed. Although the Court assumed that (a) Bush's First Amendment rights were violated, (b) the Civil Service Com-

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47. *Id.* at 18–19.

48. *Id.* (quoting *Bivens*, 403 U.S. at 396–97).

49. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 245 (1979) ("[I]n appropriate circumstances, a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.'") (quoting *Bivens*, 403 U.S. at 396); *Butz v. Economou, 438 U.S. 478, 503 (1978) ("*In *Bivens,* the Court . . . looked for 'special factors counselling hesitation.' Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages*." (internal citations omitted))*.

50. *Carlson*, 446 U.S. at 18–19.

51. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–57 (2017); *see also* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 275–76 (1989) (arguing that the Court's 1983 decision in *Bush v. Lucas* represented a significant retreat from *Bivens*).

52. 462 U.S. 367, 388–90 (1983).

53. *Id.* at 369–70.

54. *Id.* at 370–71.

55. *Id.* at 371.

56. *Id.* at 371–72.

mission's remedies were "not as effective" as a *Bivens* money-damages remedy, and (c) Congress had not foreclosed *Bivens* suits in this area,[57] the Court nevertheless found that the existence of a comprehensive, administrative remedial scheme precluded an implied First Amendment cause of action.[58] In *Carlson*, the Court held that an alternative remedial scheme would preclude a *Bivens* suit only if the scheme was as "equally effective" as a *Bivens* suit.[59] The *Bush* Court, however, seemingly rejected this high standard, noting that Congress could foreclose the possibility of a *Bivens* suit simply by providing any reasonable alternative remedy.[60] The mere existence of an alternate remedial scheme approved by Congress, in other words, is a "special factor counselling hesitation" that precludes a *Bivens* suit.

The Court continued its *Bivens* retreat in *Schweiker v. Chilicky*, where the Court again found that the existence of a congressionally created remedial scheme precluded a *Bivens* cause of action.[61] In the 1980s, the Reagan administration illegally disqualified a large number of citizens from receiving their Social Security benefits.[62] Pursuant to an ill-conceived "continuing disability review" program, the Social Security Administration wrongfully discontinued disability benefits for roughly 200,000 people.[63] In response, Congress passed emergency legislation to stop the disqualifications.[64] James Chilicky was among those whose disability benefits were wrongly denied, causing him to suffer months of financial and medical hardship.[65] Chilicky filed a *Bivens* action under the Fifth Amendment's Due Process Clause, seeking money damages for the "emotional distress" and "loss of food [and] shelter" that resulted from the Social Security Administration's wrongful denial of benefits.[66]

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57. *Id.* at 372–73.

58. *Bush*, 462 U.S. at 368.

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

60. *See Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised."); *id.* at 388 ("[W]hether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy for the constitutional violation at issue . . . obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff."). *See also* Jones v. Tenn. Valley Auth., 948 F.2d 258, 264 (6th Cir. 1991) (holding that the Civil Service Reform Act forecloses *Bivens* suits, even if its remedies are not as effective as a *Bivens* suit for money damages).

61. 487 U.S. 412, 423–25 (1988). For a deeper dive into *Chilicky*, see Gene R. Nichol, Bivens*,* Chilicky*, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

62. *Chilicky*, 487 U.S. at 416, 418.

63. *Id.* at 415–16.

64. *Id.* at 415–17.

65. *Id.* at 417–18.

66. *Id.* at 418–19. Among other things, Chilicky alleged that the higher-ups at the Social Security Administration had "adopted illegal policies that led to the wrongful termination of

On appeal, the Court prevented Chilicky's claim from proceeding.[67] Writing for the majority, Justice O'Connor noted that, since *Carlson*, the Court had been hesitant to extend *Bivens* "into new contexts."[68] The Court again noted several "special factors" that weighed against allowing Chilicky's *Bivens* suit to proceed.[69] Most significantly, the *Chilicky* Court found that Congress's *silence* was evidence that it did not want to allow *Bivens* suits in this context: "When the design of a [g]overnment program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."[70]

This was a striking departure from the reasoning in *Bivens*, *Davis*, and *Carlson*. In *Davis* and *Carlson*, the Court found that *Bivens* suits were appropriate because Congress had not expressly disapproved of such causes of action (i.e., Congress's silence indicated an approval of, or at least ambivalence toward, a *Bivens*-like remedy).[71] In *Bush* and *Chilicky*, however, the Court found the exact opposite: that *Bivens* suits were inappropriate because Congress had not expressly approved of them (i.e., Congress's silence indicated a disapproval of a *Bivens*-like remedy).[72] *Bush* and *Chilicky*, thus, show that the existence of any congressionally created remedial scheme will preclude a related *Bivens* action unless Congress explicitly approves of such suits.[73]

Between the Court's *Chilicky* decision and its 2017 ruling in *Ziglar v. Abbasi* (discussed below), the Court further limited *Bivens* suits in three significant ways: (1) it barred any *Bivens* suits arising out of military service; (2) it barred *Bivens* suits against private entities that were under con-

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benefits" and "used an impermissible quota system" that required state agencies to terminate a predetermined numbers of recipients. *Id.*

67. *Id.* at 423–25.

68. *Chilicky*, 487 U.S. at 421.

69. *Id.* at 423.

70. *Id.*

71. Carlson v. Green, 446 U.S. 14, 19 (1980) (holding that a *Bivens* suit was allowable because there was "no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but [instead] must be remitted to another remedy, equally effective in the view of Congress"); Davis v. Passman, 442 U.S. 228, 246–47 (1979) (holding that a *Bivens* action was allowable because there was "'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury") (quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971)).

72. *Chilicky*, 487 U.S. at 423; Bush v. Lucas, 462 U.S. 367, 388–90 (1983).

73. *See, e.g.*, *Chilicky*, 487 U.S. at 423 ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

tract with the federal government; and (3) it required the courts to determine whether a new type of *Bivens* suit is, on balance, desirable.[74]

The Court has categorically prevented *Bivens* suits arising out of military service.[75] In *United States v. Stanley*, for example, the Court barred a U.S. service member's lawsuit for the injuries he allegedly suffered as part of the military's forced LSD experiments.[76] The *Stanley* Court blanketly declared that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to [military] service.'"[77] Military service, in other words, is another "special factor counselling hesitation" that prohibits a *Bivens* suit.[78]

The Court also disallowed *Bivens* suits against private entities in 2001's *Correctional Services Corp. v. Malesko*.[79] In *Malesko*, the Federal Bureau of Prisons contracted with a private company to operate a halfway house.[80] John Malesko was an inmate at this halfway house, and the halfway house staff was aware that Malesko suffered from a serious heart condition.[81] On one occasion, however, a halfway house guard refused to let Malesko use the elevator to reach his fifth-floor room.[82] Malesko protested that he was specially permitted to use the elevator because of his heart condition, but the guard, for some reason, was "adamant" that Malesko use the stairs.[83] Malesko suffered a heart attack while climbing the stairs, and he later sued the halfway house for his injuries.[84]

In a 5-to-4 opinion written by Chief Justice Rehnquist, the Court held that private entities may not be sued under *Bivens*.[85] The primary purpose of *Bivens* remedies, Rehnquist reasoned, was to deter "individual [federal] officers from engaging in unconstitutional wrongdoing."[86] To extend *Bivens* to suits against agencies and private companies, he continued, would not fur-

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74. *See generally* CHEMERINSKY, *supra* note 5, § 9.1, at 648–51, 653–54.
75. *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987).
76. *Id.* at 671.
77. *Id.* at 684 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).
78. *Id.* at 683 (holding that the "'the unique disciplinary structure of the Military Establishment and Congress' activity in the field,'" is a "special factor[] counselling hesitation" that "require[s] abstention") (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983). Scholars have widely criticized the Court's decision in *Stanley*. *See, e.g.*, Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (1989); Johnathan P. Tomes, Feres *to* Chappell *to* Stanley*: Three Strikes and Service Members Are Out*, 25 U. RICH. L. REV. 93 (1990).
79. 534 U.S. 61 (2001).
80. *Id.* at 63.
81. *Id.* at 64.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Malesko*, 534 U.S. at 63.
86. *Id.* at 74.

ther this underlying purpose.[87] As such, given the Court's "caution toward extending *Bivens* remedies into *any* new context," the Court refused to extend *Bivens* to suits against private companies.[88]

Finally, in 2007's *Wilkie v. Robbins*, the Court added an additional limitation on *Bivens* suits: when presented with a *Bivens* suit in a new context, the courts must determine whether the suit, on balance, is desirable.[89] *Robbins* arose from a property dispute between a Wyoming rancher and the federal Bureau of Land Management (BLM).[90] The BLM failed to record an easement on a large piece of private property in Wyoming.[91] Frank Robbins subsequently purchased that property, vitiating the government's easement; and when the BLM realized its mistake, it demanded that Robbins recognize the federal government's unrecorded easement.[92] When Robbins refused, "BLM officials mounted a seven-year campaign of relentless harassment and intimidation to force Robbins to give in."[93] This harassment campaign included "intentionally trespassing on Robbins's land, inciting a neighbor to ram a truck into Robbins while he was on horseback, breaking into his guest lodge, filing trumped-up felony charges against him without probable cause, and pressuring other government agents to impound Robbins's cattle without cause."[94]

In response to this harassment campaign, Robbins eventually filed a *Bivens* action against the BLM officers under the Fourth and Fifth Amendments.[95] The *Robbins* Court seemingly recognized that a *Bivens*-type lawsuit was the only meaningful way to vindicate Robbins's rights.[96] But the Court

87. *Id.* at 70–71.

88. *Id.* at 74 (emphasis added). Although the *Malesko* Court emphasized that the "core purpose" of *Bivens* is to "deter[] individual [federal] officers from engaging in unconstitutional wrongdoing," *id.*, the Court later refused to allow *Bivens* suits against individual prison guards at a private prison, *Minneci v. Pollard*, 565 U. S. 118, 120 (2012). When these *Bivens* cases are viewed holistically, they are infuriating, because the Court is clearly just making it up as it goes. There are no principled reasons for these rulings, and the Court consistently talks out of both sides of its mouth. This area of law is a muddled mess to say the least.

89. 551 U.S. 537, 550, 554 (2007).

90. *Id.* at 541–42.

91. *Id.* at 542.

92. *Id.* Because Robbins was a bona fide purchaser—i.e., he was unaware of the federal government's easement when he purchased the land and the easement had not been recorded—the government lost the ability to record its easement once Robbins purchased the property, and Robbins acquired title free and clear of the government's easement. *See* WYO. STAT. ANN. § 34-1-120 (2005).

93. *Robbins*, 551 U.S. at 568 (Ginsburg, J., concurring in part and dissenting in part).

94. Tribe, *supra* note 23, at 29 (citing multiple pleadings, briefs, and opinions from the *Robbins* case).

95. *Robbins*, 551 U.S. at 547–48.

96. *See id.* at 554 (describing the "forums of defense and redress open to Robbins" as "a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules"). The Court surely took a large step back from

nevertheless precluded Robbins's suit because allowing a *Bivens* suit in this context could lead to a wave of litigation and because of the difficulty of proving whether federal officers were acting with a retaliatory motive.[97] The Court, with Justice Souter writing for the majority, held that the courts must weigh the general reasons for and against creating a new type of *Bivens* suit, while "paying particular heed . . . to *any* special factors counselling hesitation before authorizing a new kind of federal litigation,"[98] "the way common law judges have always done."[99] *Robbins*, thus, "transform[ed] the *Bivens* presumption in favor of a federal cause of action into a general, all-things-considered, balancing test."[100]

As Professor Laurence Tribe has recognized, the *Robbins* Court "departed from the core premise of *Bivens*—that the importance of constitutional rights justified implying a cause of action directly from the Constitution."[101] *Robbins* was different from the Court's prior anti-*Bivens* decisions, because in those cases the plaintiff at least had some alternative form of recourse.[102] In *Robbins*, however, the plaintiff had no form of recourse that "would operate to deter that kind of violation or at least redress it when deterrence failed."[103]

"Cases that get distinguished often enough are commonly said to die—or at least to suffer near-death experiences."[104] Between 1980 and 2007, *Bivens* suffered roughly a dozen near-death experiences. The Court's newfound reluctance to find implied causes of action shows that *Bivens*, *Davis*, and *Carlson* have "slowly become mere ghosts of their former selves, barely clinging to existence."[105]

III. THE ROBERTS COURT'S NEW *BIVENS* FRAMEWORK

The Court's post-*Carlson* trend of limiting *Bivens* at every turn came to a head in 2017's *Ziglar v. Abbasi* and 2020's *Hernández v. Mesa*, where the Court essentially limited *Bivens*, *Davis*, and *Carlson* to their facts. The plaintiffs' allegations in *Abbasi* and *Hernández* were truly disturbing, yet the

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Bivens in this case, as the "patchwork" of remedies available to Robbins, *see id.*, were surely available to the plaintiffs in *Bivens*, *Davis*, and *Carlson* as well.

97. *Id.* at 561, 556–58.

98. *Id.* at 550 (emphasis added) (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).

99. *Id.* at 554.

100. Tribe, *supra* note 23, at 25.

101. *Id.*

102. *Id.* at 25, 67–68.

103. *Id.* at 25.

104. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 101 (2016).

105. Leading Case, *Constitutional Remedies*—Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV. 313, 317–18 (2017) (quoting WILLIAM O. DOUGLAS, WE THE JUDGES 199 (1956)).

Court refused to extend *Bivens* in these cases. Because the Court was unwilling to extend *Bivens* to the "new contexts" presented in *Abbasi* and *Hernández*, it seems safe to say that the Roberts Court's conservative majority is unwilling to extend *Bivens* under any circumstances.

A. Ziglar v. Abbasi (2017)

After the terrorist attacks of September 11, 2001, the federal government detained hundreds of Muslim-American immigrants who were "of interest."[106] Eighty-four of these detainees were held, without bail, at a detention center in Brooklyn, New York, where they were repeatedly strip-searched, verbally abused, tortured, and humiliated.[107] Their bones were broken.[108] They were not allowed to have basic hygiene products, like toothbrushes or soap.[109] They were kept in small cells for over twenty-three hours a day.[110] And their religious beliefs and practices were prohibited and belittled.[111]

After eight months of confinement, these detainees were released and deported.[112] The detainees eventually filed suit, alleging the government "had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions."[113] Among others, these detainees sued three high-ranking federal officials: Attorney General John Ashcroft, FBI Director Robert Mueller, and Naturalization Service Commissioner James Ziglar.[114] The detainees alleged these officials implemented and oversaw a policy that was designed to imprison and torture Muslims without adequate cause in violation of the Fourth and Fifth Amendments.[115]

The detainees' suit made it to the Supreme Court for the first time in 2009, where the Court, in *Ashcroft v. Iqbal*, completely recalibrated the federal courts' pleading standard to shield these federal officials from civil liability.[116] After amending their complaint to comply with *Iqbal*'s new pleading standard, the detainees' suit again reached the Supreme Court in *Abbasi*.

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106. Ziglar v. Abbasi, 137 S. Ct. 1843, 1852 (2017).
107. *Id.* at 1852–53.
108. *Id.* at 1853.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Abbasi*, 137 S. Ct. at 1853.
113. *Id.*
114. *Id.*
115. *Id.* at 1853–54.
116. *See* 556 U.S. 662, 679 (2009) (holding, contrary to existing precedent, that federal trial courts must disregard all conclusory, implausible allegations in a plaintiff's complaint when addressing a motion to dismiss).

In *Abbasi*, the Court, in a 4-to-2 decision,[117] held that the detainees' *Bivens* suit against these high-ranking federal officials could not proceed.[118] But before dismissing the detainees' *Bivens* suit, the Court went on a full-blown, anti-*Bivens* tirade.[119] Justice Kennedy, writing for the majority, noted that the Court previously "followed a different approach to recognizing implied causes of action than it follows now."[120] "During this '*ancien regime,*'" Justice Kennedy recounted, "the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose."[121] Today, however, the Court uses a "far more cautious course before finding implied causes of action"[122] and views *Bivens* remedies as "a 'disfavored' judicial activity."[123] The four-Justice *Abbasi* majority then articulated an entirely new framework for addressing *Bivens* suits.

When asked to extend *Bivens*, the Court will engage in a two-step inquiry. First, the Court must determine whether the proposed *Bivens* suit arises in a "new context" (i.e., whether the proposed case is "different in a meaningful way from previous *Bivens* cases").[124] To make things as confusing as possible, the Court provided a seven-part, non-exhaustive, non-dispositive, disjunctive, multi-factor test to determine whether a case might arise in a new context:

> A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider.[125]

If the context is not new, the case may proceed. But if the case arises in a new context, the Court will go on to step two.

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117. Justices Sotomayor, Kagan, and Gorsuch did not participate in *Abbasi*. 137 U.S. at 1850. Per 28 U.S.C. § 1, only six Justices are required to reach a quorum and decided a case.

118. *Abbasi*, 137 S. Ct. at 1862–63.

119. *See id.* at 1855–58.

120. *Id.* at 1855.

121. *Id.* (quoting Alexander v. Sandoval, 532, U.S. 572, 287 (2001), and J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)). As a reminder, Justice Kennedy is using the term "*ancien regime*" to refer to the 1960s, 70s, and 80s. I don't know why he felt compelled to speak French in this portion of the opinion.

122. *Id.* at 1855.

123. *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

124. *Id.* at 1859–60.

125. *Id.* at 1859–60. Given this list, the Court might as well have said, "If the case isn't identical to *Bivens*, *Davis*, or *Carlson*, dismiss the suit."

Second, if the context is new, the Court must then determine whether there are "any special factors" that advise against extending *Bivens* into the context presented.[126] Although the *Abbasi* Court did not endeavor to "create an exhaustive list" of special factors, it mentioned that the lower courts should look to (a) whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" and (b) "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[127] If the court finds any "special factors" weighing against the *Bivens* suit, the suit should be dismissed.[128]

The *Abbasi* Court found that the detainees' suit arose in a new context and that there were special factors counseling against the suit (i.e., the Court found the detainees' *Bivens* suit was inappropriate and not allowed).[129] The context was "new," the Court held, because the detainees were "challeng[ing] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil," which was markedly different than the claims seen in *Bivens*.[130] And the Court held there were, more or less, four "special factors" that counseled against the detainees' *Bivens* suit: (i) the civil litigation in this case (meaning discovery) would require the courts to inappropriately interfere with the sensitive functions of the executive branch; (ii) the unprecedented events of September 11th required the courts to defer to the political branches; (iii) Congress is silent on the issue, which should give the courts pause; and (iv) if the plaintiffs were to succeed in this case, it could uproot major executive policies, and *Bivens* is not the appropriate vehicle for major policy changes.[131] Accordingly, because these "special factors" arose in a new *Bivens* context, the detainees' suit was not allowed.

B. Hernández v. Mesa (2020)

Along the U.S.-Mexico border, there is a large concrete culvert that separates El Paso, Texas, and Juarez, Mexico.[132] On June 7, 2010, Sergio Hernández, a fifteen-year-old Mexican citizen, and several of his friends were playing in this culvert.[133] At one point, several of the kids, including

126. Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (citing *Abbasi*, 137 S. Ct. at 1857)).
127. *Abbasi*, 137 S. Ct. at 1858.
128. *Id.* at 1857.
129. *Id.* at 1860, 1862–63.
130. *Id.* at 1860.
131. *Id.* at 1860–63.
132. Hernández v. Mesa, 140 S. Ct. 735, 740 (2020).
133. *Id.* Officer Mesa disputed that the boys were simply "playing" in the culvert; he apparently believed that the boys were "involved in an illegal border crossing attempt," and

Hernández, ran up the culvert and crossed into United States territory.[134] Noticing that the boys had crossed into U.S. territory, Border Patrol Officer Jesus Mesa detained one of the boys, at which point the other boys fled back into Mexico.[135] As Hernández ran back across the culvert into Mexico, Officer Mesa, "seemingly taking careful aim," shot Hernández in the back of the head, killing him.[136] Officer Mesa's bullet crossed the U.S.-Mexico border and struck Hernández while he was standing on Mexican soil.[137]

Hernández's parents subsequently brought a *Bivens* suit against Mesa, alleging that Mesa violated their son's Fourth and Fifth Amendment rights.[138] The district court dismissed the plaintiffs' complaint, and the Fifth Circuit affirmed.[139] The Supreme Court was originally set to decide this case in 2017 but remanded the case to the Fifth Circuit so it could reevaluate the case in light of the Court's recent *Abbasi* decision.[140] On remand, the Fifth Circuit dismissed the plaintiffs' case, relying on the Court's *Abbasi* framework.[141]

Following *Abbasi*'s two-step approach, the Supreme Court, in a 5-to-4 ruling, held that *Bivens* did not extend to a federal agent's cross-border shooting because of the potential "foreign relations" and "national security" implications that could arise if the suit was allowed to proceed.[142] Justice Alito, writing for the majority, started by noting that *Bivens* remedies are the exception, not the rule.[143] Although the Court used to "routinely infer[] 'causes of action'" that "were 'not explicit' in the text of the provision that was allegedly violated,"[144] the *Hernández* Court made clear that those days were long gone.[145] Over the last forty years, Justice Alito noted, the Court has "c[o]me to appreciate more fully the tension between [inferring causes of action] and the Constitution's separation of legislative and judicial pow-

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he alleged that they "pelted him with rocks." *Id.* However, because this case was appealed to the Court on a motion to dismiss, the plaintiffs' factual allegations were required to be accepted as true. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

134. *Hernández*, 140 S. Ct. at 740.

135. *Id.*

136. *Id.* at 753 (Ginsburg, J., dissenting).

137. *Id.* at 740.

138. *Id.*

139. *Id.*

140. *Hernández*, 140 S. Ct. at 740 (citing Hernández v. Mesa, 137 S. Ct. 2003 (2017)).

141. *Id.* at 741.

142. *Id.* at 744, 746.

143. *Id.* at 741–42.

144. *Id.* at 741 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).

145. *See id.* at 741–44 (noting that the Court has "c[o]me to appreciate more fully the tension" that *Bivens*, *Davis*, and *Carlson* placed on the Constitution, and that if these three cases had been decided today, "it is doubtful that [the Court] would have reached the same result").

er."[146] By inferring causes of action, Justice Alito argued, the Court had been improperly stepping on Congress's toes.[147] And the Court even went so far as to note that if *Bivens* had been decided today, "it is doubtful that [the Court] would have reached the same result."[148]

The Court, however, again stopped short of overruling *Bivens* and instead made clear that constitutionally based suits against federal officials may proceed only if the facts of the case are virtually identical to the facts seen in *Bivens*, *Davis*, or *Carlson*.[149] Using new, broader language than in *Abbasi*, the Court held that a plaintiff's *Bivens* suit should be dismissed if the court has any "reason to pause" about whether *Bivens* should apply.[150]

C. The New Framework

When presented with a new *Bivens* suit, the courts will now follow a two-step inquiry to determine whether the suit can proceed. First, the court will ask whether the suit "arises in a new context." If the context is not new, the suit may proceed. But if the context is new, the court will proceed to step two. Second, if the context is new, the court must determine if there are any "special factors" that weigh against the suit. This step is essentially a general, all-things-considered policy analysis, where the court will be looking for any reason to dismiss the suit. Structured as a flowchart, the Court's new *Bivens* framework looks roughly like this:

> 1. Does the plaintiff's suit arise in a new context? If the plaintiff's suit is different in any meaningful way from *Bivens*, *Davis*, or *Carlson*, the context is "new."
>
> a. A suit is likely meaningfully different from the past *Bivens* cases if any of the following is true:
>
> i. The officers involved have a higher rank than the officers in *Bivens*, *Davis*, or *Carlson*;
>
> ii. The constitutional right at issue is something other than (a) unreasonable search or seizure under the Fourth Amendment, (b) sex-based or race-based discrimination under the Fifth Amendment,

146. *Hernández*, 140 S. Ct. at 741.
147. *Id.*
148. *Id.* at 742–43.
149. *See id.* at 743 (holding that the courts should reject a plaintiff's *Bivens* suit whenever it has "reason to pause" about whether *Bivens* should apply).
150. *Id.* If I were a betting man (which I am), I would bet this "reason to pause" language is going to be the most cited phrase from *Hernández* and will be quoted in nearly every motion to dismiss and order of dismissal going forward.

or (c) cruel and unusual punishment under the Eighth Amendment;

iii. The alleged misconduct is very general in nature, i.e., the plaintiff does not allege a specific instance of misconduct but puts forth only the-defendant-is-bad-at-his-job-and-I-want-money allegations;

iv. The plaintiff's proffered constitutional right was not clearly established at the time of the alleged violation;

v. The officer was following some sort of statute or protocol not seen in *Bivens*, *Davis*, or *Carlson*;

vi. Hearing the plaintiff's suit might disrupt important functions of the legislative or executive branch; or

vii. There are other persuasive reasons to distinguish the plaintiff's case from *Bivens*, *Davis*, and *Carlson*.[151]

b. If none of these issues are present, the plaintiff's case should be allowed to proceed. But if any of these issues are present, the court must move to step two.

2. Are there any "special factors" that would caution against the plaintiff's suit? If the court has any "reason to pause," the plaintiff's case should be dismissed.

a. This step is a freewheeling, all-things-considered policy analysis. The Court has not "create[d] an exhaustive list" of special factors, but the plaintiff's suit should be dismissed if any of the following is true:

i. The case touches on foreign policy, national security, or other important executive functions not seen in *Bivens*, *Davis*, or *Carlson*;[152]

ii. The case's discovery phase might require the government to turn over sensitive documents;[153]

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151. These seven issues were provided by the *Abbasi* Court. Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017).

152. *Hernández*, 140 S. Ct. at 744–46.

153. *Abbasi*, 137 S. Ct. at 1860.

> iii. There is a reasonable alternative remedy available to the plaintiff, such as an administrative remedy, the FTCA, or state law claims;[154]
>
> iv. There are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy in the context presented;[155]
>
> v. Allowing the plaintiff's suit could cause a flood of similar litigation in the future;[156] or
>
> vi. It would be extremely difficult for the plaintiff to prove the defendant had the requisite culpable mental state.[157]
>
> b. If any of these special factors are present, the plaintiff's case must be dismissed.

Given this new framework, it is safe to say that plaintiffs face a steep, uphill battle in any *Bivens* suits that are not virtually identical to *Bivens*, *Davis*, or *Carlson*. Plaintiffs' attorneys need to be cognizant of this new framework when drafting complaints and responding to motions to dismiss.

IV. CONCLUSION

Since the early 1980s, the Court has been reluctant to allow constitutionally based suits for money damages against federal officials. But the Roberts Court has taken this reluctance to a new level. Through two recent cases—*Ziglar v. Abbasi* and *Hernández v. Mesa*—the Court has made clear that any new *Bivens* suits must be virtually identical to the Court's past decisions in *Bivens*, *Davis*, or *Carlson* to avoid dismissal. What these decisions mean in real-world terms is that (a) plaintiffs and their attorneys need to do a substantial amount of legwork before filing any new *Bivens* suits; (b) practitioners need to be mindful of the Court's new, intricate framework for addressing *Bivens* claims, and must carefully draft their complaints to comply with this framework; and (c) any future *Bivens* claims are very likely to be dismissed, meaning federal officials will not be held accountable for their unconstitutional behavior. This article was meant to guide practitioners through this new and always-developing area of the law.

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154. Bush v. Lucas, 462 U.S. 462 U.S. 367, 368, 388–90 (1983).
155. *Abbasi*, 137 S. Ct. at 1858.
156. Wilkie v. Robbins, 551 U.S. 537, 560–61 (2007).
157. *Id.* at 559–60.