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Justice at the Border: Should Courts Provide Relief for Constitutional Violations at the Border?

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JUSTICE AT THE BORDER: SHOULD COURTS PROVIDE RELIEF FOR CONSTITUTIONAL VIOLATIONS AT THE BORDER?

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ABSTRACT

In two recent cases, children were shot by Border Patrol agents across the United States and Mexico border. In one case, the Ninth Circuit found the Border Patrol agent was not entitled to qualified immunity and should pay damages to the teen's family. However, the Fifth Circuit refused to allow damages in the other case because of concerns over national security. The circuit split raises questions over separation of powers and how far the power of the courts should go when deciding damages in cases involving transnational issues. This Article discusses officials' qualified immunity and its limits when constitutional violations occur; judicially created Bivens *damages; and the circuit split over separation of powers concerns and fairness to plaintiffs.*

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I. INTRODUCTION

Tensions run high at the United States and Mexico border. Concerns over drugs, crime, and illegal immigration at the border involve national security and foreign policy, causing significant political attention.[1] A recent circuit split could bring attention to the judiciary's reaction to the border, as courts are asked to make decisions about Border Patrol agents' lability in cross-border shootings.[2] But courts already have a history of limited extension of these kinds of damages.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[3] the Supreme Court first recognized a damages-cause-of-action for federal officials' constitutional violations. Over the last fifty years, courts have hesitated to find additional *Bivens* actions. The Supreme Court's decision in *Ziglar v. Abbasi*[4] as well as circuit decisions in *Hernandez v. Mesa*[5] and *Rodriguez v. Swartz,*[6] add new questions about allowing *Bivens* claims in circumstances arousing national security concerns. This Article will discuss the history of qualified immunity and *Bivens* claims, the discussions of the Fifth and Ninth Circuit courts in deciding the *Hernandez* and *Rodriguez* cases, and how the Court should resolve the circuit split.

Section II first discusses the development of qualified immunity to eliminate personal liability when harm is caused in an official's role and the limits of qualified immunity. Next, Section II discusses Bivens claims—the history and development of the "*Bivens* test" in a "new context." Lastly, Section II discusses how courts have applied the *Bivens* test requiring (1) no other adequate remedy and (2) no special factors counseling hesitation.

Section III discusses the benefits and drawbacks of allowing *Bivens* claims. First, the drawbacks of allowing *Bivens* claims include:

1. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES, (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.

2. Adam Liptak, *Two U.S. Agents Fired into Mexico, Killing Teenagers. Only One Faces a Lawsuit,* N.Y. TIMES, (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/us/politics/agents-border-killings-supreme-court.html.

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

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

5. Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018).

6. Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).

overstepping separation of powers concerns, unfairness to government officials and ineffective public service, and exerting a burden on agencies that may shift focus from pressing public issues to putting more policies in place to protect officials. Second, the benefits of allowing *Bivens* claims include: the judiciary acting, as it should, to create remedies to constitutional violations, deterring federal officials from violating clearly established constitutional rights, and fairly providing remedy for constitutional violations.

Section IV discusses the circuit split between the Fifth and Ninth Circuits. Both courts' determinations of special factors counseling hesitation are discussed and analyzed. While the Ninth Circuit argued that none of these factors were present, the Fifth Circuit said it was not even a close case. Section V proposes how the Supreme Court should act. This Section provides suggestions for a resolution that asks courts not to refuse causes of action until "special factors" are fully scrutinized and government officials are held accountable.

II. BACKGROUND

Federal officials are protected from liability by qualified immunity unless an official violates a clearly established constitutional right.[7] In the absence of a statute allowing plaintiffs to seek damages against federal officials, the Supreme Court recognized a judicially implied cause of action under the Constitution itself.[8] This is known as a "*Bivens* claim."[9] To successfully bring a *Bivens* claim, a federal official must violate a clearly established constitutional right and damages must be the appropriate remedy—damages are appropriate when there is no other remedy and there are no special factors that counsel hesitation.[10] The development of qualified immunity and *Bivens* claims are discussed in turn.

A. *Qualified Immunity*

Qualified immunity is a legal doctrine that shields government officials from suit for wrongdoing within the scope of their official role.[11] In 1967, the Supreme Court first decided officials were entitled

7. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
8. *See generally Bivens*, 403 U.S. 388.
9. *Id.*
10. Jordan Emily, *The Essence of Civil Liberty: Legitimacy and Judicial Oversight for the Targeted Killing of an American Citizen through the Bivens Claim*, 47 U. MEM. L. REV. 887, 896 (2017).
11. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE

to qualified immunity in *Pierson v. Ray*.[12] In *Pierson*, the Court grounded qualified immunity in defense of good faith and probable cause.[13]

In the last fifty years, qualified immunity has undergone judicial revision and clarification "both small and large, to the substance and the procedural framework."[14] In 1982, one of the greatest changes in the doctrine came in *Harlow v. Fitzgerald*.[15] Before *Harlow*, plaintiffs could defeat qualified immunity in two ways—through a subjective bad faith standard or an objectively reasonable person standard.[16]

First, a plaintiff could show an official's actions were in bad faith if the act occurred "with the malicious intention" to deprive an individual of their constitutional rights.[17] Second, a plaintiff could show that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]"—an objective question.[18]

The Court in *Harlow* was concerned that the subjective standard—questions regarding a government official's motive—unnecessarily kept insubstantial claims from early resolution.[19] The Court decided to eliminate the subjective question of qualified immunity. Thus, the good-faith standard no longer applies.[20] Further, the Court highlighted additional policies behind qualified immunity that went beyond its blanket "unfair burden" reasoning, asserting qualified immunity protected against the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[21] The Court also cited its previous policy stating qualified immunity ensures public officials are not deterred from taking decisive actions that are necessary to their jobs.[22]

Today's standard for qualified immunity provides protection "regardless of whether the government official's error is a mistake of

DAME L. REV. 1999, 2000 (2018).

12. *See generally* Pierson v. Ray, 386 U.S. 547 (1967).

13. *Id.* at 556–57 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

14. Michelman, *supra* note 11, at 2005.

15. *Id.* at 2003.

16. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

17. *Id.*

18. *Id.*

19. *Id.* at 815–16.

20. *Id.*

21. *Id.* at 814.

22. *Id.*

law, a mistake of fact, or a mistake based on mixed questions of law and fact," as long as it meets the reasonable standard.[23] Qualified immunity protects officials in all cases except when an official violates "clearly established" constitutional rights.[24] If an official violates constitutional rights, there is no protection from liability when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[25]

Interestingly, during the revisions in the last fifty years, Congress has remained silent on the question of qualified immunity while the Court has modified the doctrine based on its own policy judgments.[26] In 1987, the Court acknowledged that it had "completely reformulated qualified immunity along principles not at all embodied in the common law."[27] Although the judiciary is not the branch to determine policy, it seems clear that the development and continuation of qualified immunity through court actions have been established based on policy considerations.[28]

B. *Bivens Claims*

Bivens claims are judicially created remedies that allow individuals to seek damages when federal officials' conduct violates a constitutional right and it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[29] 42 U.S.C. § 1983 provides a remedy against officials who violate constitutional rights but only applies to state and local officials and not federal officials.[30]

In *Bivens*, the Supreme Court recognized an implied right under the Fourth Amendment to sue federal officials for money damages.[31] In that case, Webster Bivens alleged that federal narcotics agents broke into his house, searched it, and arrested him without a warrant.[32] The search and arrest were conducted in front of Bivens's wife and

23. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
24. *Harlow*, 457 U.S. at 818.
25. Michelman, *supra* note 11.
26. *Id.* at 2005–06.
27. Anderson v. Creighton, 483 U.S. 635, 645 (1987).
28. *Harlow*, 457 U.S. at 814.
29. Michelman, *supra* note 11.
30. *Id.*
31. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).
32. *Id.* at 389.

children, and the agents threatened to arrest his family.[33] The Court found this conduct violated the Fourth Amendment.[34]

The government argued that Bivens could sue for damages under state tort law.[35] However, the Court rejected state tort law as an avenue of relief because it was an insufficient alternative.[36] The Court found that state law might be "inconsistent or even hostile" to federal civil rights.[37] The facts of the case could have allowed the officers to escape liability under state law.[38] The officers knocked on the plaintiff's door, requested entry, and were granted entry by the plaintiff.[39] Under state law, consent is a defense.[40] Therefore, the Court found a federal cause of action was necessary because state law was unreliable.[41]

Bivens had no remedy because there was no statutory remedy for violations by federal officials and no torts remedies were available to him. The Court reasoned that money damages were appropriate since "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[42] The Court explained that "for people in Bivens' shoes, it is damages or nothing."[43] The *Bivens* claim recognizes an implied cause of action directly under the authority of the Constitution, not under an enabling statute.[44] The Court stated "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[45]

To successfully bring a *Bivens* claim, courts require a constitutional violation against a personal right.[46] Since *Bivens*, courts are reluctant to extend *Bivens* claims "to any new context or new category of defendants."[47] A new context is present if the case differs in a meaningful way.[48] If a new context is present, courts apply a "*Bivens*

33. *Id.*
34. *Id.* at 389–90.
35. *Id.* at 390–91.
36. *Id.* at 391–95.
37. *Id.* at 394.
38. *Id.*
39. *See id.*
40. *Id.*
41. *Id.* at 395.
42. *Id.*
43. *Id.* at 410 (Harlan, J., concurring).
44. Carlson v. Green, 446 U.S. 14, 18 (1980).
45. *Bivens*, 403 U.S. at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
46. Emily, *supra* note 10, at 896–97.
47. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).
48. Hernandez v. Mesa, 885 F.3d 811, 816 (5th Cir. 2018).

test" to determine whether damages are the appropriate remedy.[49] Courts have found that damages are the appropriate remedy when a plaintiff demonstrates: (1) no other remedies and (2) no special factors counseling hesitation.[50] Some argue that these special factors have grown so large as to dominate the way the court considers *Bivens* claims.[51]

In cases asserting a *Bivens* claim, qualified immunity has gone from its status as a total defense to an element—showing a violation of a constitutional right—of the *Bivens* plaintiff's cause of action.[52] In these actions, the plaintiff bears the burden of specific pleading to stop a defendant from securing dismissal of the claim.[53] A *Bivens* claim is not available against a federal agency itself, but individual officials incur personal liability.[54] In a *Bivens* action, a supervisory official cannot be liable solely on account of the acts or omissions of his or her subordinates.[55] In other words, the doctrine of respondeat superior does not apply. Thus, a plaintiff must allege that the *individual* defendant was *personally* involved in the constitutional violation.

The next two sections discuss successful *Bivens* claims. Section 1 examines previously established *Bivens* claims and courts' hesitation to expand when a "new context" is present.[56] Section 2 describes when damages are the correct remedy—when there are no other remedies for plaintiffs,[57] and there are no special factors counseling hesitation.[58]

1. *Bivens* Contexts

The development of *Bivens* claims in subsequent cases created two additional causes of actions where damages are more generally awarded.[59] After the 1971 decision, the Court extended *Bivens* against federal officials under other constitutional provisions—the equal protection component of the Due Process Clause of the Fifth

49. Emily, *supra* note 10.
50. *Id.*
51. *Id.*
52. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009).
53. *Id.* at 686–87.
54. F.D.I.C. v. Meyer, 510 U.S. 471 (1994).
55. *Iqbal*, 556 U.S. at 676.
56. Ziglar v. Abbasi, 137 S.Ct. 1843, 1857 (2017).
57. *Id.*
58. *Id.*
59. *See generally* Bernard Bell, *Reexamining Bivens After Ziglar v. Abbasi*, 9 CONLAWNOW 77, 78–79 (2018).

Amendment[60] and the Eighth Amendment ban on cruel and unusual punishment.[61] Altogether, these three cases are "the *Bivens* trilogy."[62] Outside of these established *Bivens* claims, a "new context" is present.[63]

The first extension, under the Fifth Amendment, was a gender-based employment discrimination suit against a congressman in 1979.[64] In *Davis v. Passman*, Congressman Passman fired Davis believing the position should be held by a man.[65] The Court first considered whether the stated cause of action was in direct reliance upon the Due Process Clause, thus constituting a constitutional violation of a personal right.[66] The Court held that the Due Process Clause did imply a direct cause of action.[67]

Then, the Court turned to whether damages were appropriate relief for that cause of action.[68] This step took further determination as the Court first decided whether there was another adequate remedy.[69] The Court found that no alternative remedy existed because an injunctive order of reinstatement was impossible since Passman was no longer a congressman.[70] Further, the Court argued that the judiciary is equipped to determine damages because the federal courts have experience "evaluating claims for backpay due to illegal sex discrimination."[71] Next, the Court determined if there were any special factors counseling hesitation.[72] The Court found that a suit against a congressman presented a factor, but it did not counsel hesitation because awarding damages would not impede official duties.[73] The Court examined congressional silence as another factor.[74] The Court

60. Davis v. Passman, 442 U.S. 228, 230 (1979).
61. Carlson v. Green, 446 U.S. 14, 17–18 (1980).
62. *See* Bernard Bell, *Critiquing Hernandez v. Mesa: Contextual Assessment of Administrative Law's Potential as an Alternative to Bivens Remedies*, 36 YALE J. ON REG.: NOTICE & COMMENT (Apr. 25, 2018), http://yalejreg.com/nc/critiquing-hernandez-v-mesa-contextual-assessment-of-administrative-laws-potential-as-an-alternative-to-bivens-remedies/.
63. Hernandez v. Mesa, 885 F.3d 811, 816 (2018).
64. *Passman*, 442 U.S. at 230.
65. *Id.*
66. *Id.* at 236–44.
67. *Id.* at 243–44.
68. *Id.* at 245–48.
69. *Id.* at 245.
70. *Id.*
71. *Id.*
72. *Id.* at 245–46.
73. *Id.* at 246.
74. *Id.* at 246–47.

rejected congressional silence as a factor counseling hesitation because it reasoned that unless there was clear intent that Congress meant to exclude alternative remedies when statutory relief was unavailable, there is no factor counseling hesitation.[75] With no alternative remedy for the plaintiff and no special factors counseling hesitation, the Court concluded damages were the appropriate remedy.[76] Thus, Passman became the second successful *Bivens* claim because the cause of action arose from a violation of a constitutional right and damages were the appropriate remedy.

Next, in 1980, a *Bivens* claim arising under the Eighth Amendment was found in the case of *Carlson v. Green*.[77] *Carlson* involved a federal prisoner suffering from chronic asthma.[78] On the day the prisoner died, no prison official called a doctor to examine him even though he remained in the prison hospital for eight hours.[79] Here, the Court focused on the *Bivens* test—whether damages were the appropriate remedy.[80] *Carlson* considered whether Congress provided an alternative remedy, which was expressly "declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[81] At issue was a possible alternative remedy under the Federal Tort Claims Act ("FTCA").[82] The Court found that the FTCA, which allows damages for intentional torts committed by federal law enforcement agents, is not a substitute but works as a parallel remedy to *Bivens* damages.[83] The Court argued that the FTCA does not protect constitutional rights, and thus "without a clear congressional mandate" the Court cannot find that the FTCA is an equally effective remedy.[84] The Court allowed *Bivens* damages in this case because the Court found no factors counseling hesitation.[85] Today, the Court no longer applies the "equally effective" remedy requirement but requires only an alternative remedy.[86]

75. *Id.* at 247.
76. *Id.* at 248.
77. Carlson v. Green, 446 U.S. 14, 16 (1980).
78. *Id.* at 16 n.1.
79. *Id.*
80. *Id.* at 18.
81. *Id.* at 18–19.
82. *Id.* at 19.
83. *Id.* at 19–20.
84. *Id.* at 23.
85. *Id.* at 19, 23.
86. United States v. Stanley, 483 U.S. 669, 678 (1987) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)).

The *Bivens* trilogy expanded the use of *Bivens* remedies. However, since *Passman* and *Carlson*, the Court has mostly rejected *Bivens* claims, describing the expansion of *Bivens* as a "disfavored" activity.[87] The Court has been reluctant to extend *Bivens* damages "to any new context or new category of defendants."[88] Overall, courts are cautious to extend *Bivens* remedies to new contexts.[89]

A case presents a new context whenever it differs "in a meaningful way from previous *Bivens* cases."[90] A new context can be present even in a case arising under the Fourth, Fifth, and Eighth Amendments.[91] The fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative.[92] For example, the plaintiffs in *Abbasi* asserted claims for strip searches under both the Fourth and Fifth Amendments. However, the Supreme Court found a new context despite similarities between "the right and the mechanism of injury" involved in previous successful *Bivens* claims.[93] The Court offered a nonexclusive list of differences:

A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.[94]

When a new context is present, the court questions if damages are the appropriate remedy.[95] It is a two-part question—first, whether there is another remedy available to the plaintiff, and second, whether special factors counsel hesitation in creating the remedy.[96]

87. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
88. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).
89. James L. Buchwalter, Annotation, *Remediation of Constitutional Harm through Bivens Action in Immigration Context*, 80 A.L.R. Fed. 2d 201, § 16 (2013).
90. Rodriguez v. Swartz, 899 F.3d 719, 738 (9th Cir. 2018) (quoting *Ziglar*, 137 S. Ct. at 1849).
91. Hernandez v. Mesa, 885 F.3d 811, 816 (5th Cir. 2018).
92. *Id.*
93. *Id.* (quoting *Ziglar*, 137 S. Ct. at 1859).
94. *Ziglar*, 137 S. Ct. at 1860.
95. Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 352 (E.D. N.Y. 2013).
96. *Id.*

2. Damages as the Appropriate Remedy

Damages should be the only means of relief to successfully assert a *Bivens* claim.[97] First, to conclude damages are justified, courts determine if any alternative remedy exists.[98] If courts find remedies provided by agency administrative processes, equitable remedies available to courts, or federal statutory or state tort law damages remedies, then *Bivens* damages are not appropriate.[99] Going further, lower courts have refused to extend *Bivens* claims even when no alternative remedy exists unless the absence of alternative remedies is attributable to legislative oversight.[100]

Second, courts consider special factors counseling hesitation.[101] Recently, *Abbasi* clarified the concept of "special factors" stating, "separation-of-powers principles . . . should be central to the analysis."[102] The decision from *Abbasi* focuses "on 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."[103] Thus, the purpose of including special factors in courts' determinations is to examine whether a judicial decision would interfere with another branch. Courts fear that not considering special factors "would create a remedy with uncertain limits."[104]

III. BENEFITS AND DRAWBACKS OF *BIVENS* CLAIMS

There are functional reasons both to allow *Bivens* damages and to abolish the remedy altogether. Because courts examine many factors before allowing *Bivens* damages, successful claims occur in narrow circumstances.[105] Additionally, the Court acknowledges that

97. Rodriguez v. Swartz, 899 F.3d 719, 739 (9th Cir. 2018).
98. Emily, *supra* note 10.
99. Vega v. United States, 881 F.3d 1146, 1154 (9th Cir. 2018). *See, e.g.*, Torres v. Taylor, 456 F. Supp. 951, 954–55 (S.D.N.Y. 1978) (damage remedy was not allowed even though there the fifth and eighth amendment rights were violated because the court found the FTCA adequate); Neely v. Blumenthal, 458 F. Supp. 945, 960 (D.D.C. 1978) (no damages allowed for employment discrimination because Title VII adequate).
100. Mirmehdi v. United States, 689 F.3d 975, 982 (9th Cir. 2012).
101. Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 352 n.25 (E.D. N.Y. 2013).
102. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
103. *Id.* at 1857–58.
104. Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018).
105. *See generally* Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 937–38 (2018).

extending *Bivens* is highly disfavored.[106] So why have *Bivens* claims at all? This section will examine both the drawbacks and benefits of allowing *Bivens* claims.

A. *Drawbacks of Allowing Bivens Claims*

Allowing *Bivens* claims does have drawbacks. First, allowing the judiciary to establish *Bivens* claims raises separation of powers concerns because the judiciary seemingly oversteps into policy.[107] Second, allowing *Bivens* claims may be unfair to government officials and ultimately cause ineffective public service.[108] Third, allowing *Bivens* claims may exert a burden on agencies that may shift focus from pressing public issues to putting more policies in place that protect officials.[109]

First, allowing *Bivens* claims can infringe on the other branches' authority because the judicial branch lacks authority to make policy.[110] The judicial branch should not declare judgments that limit or overrule the policy of the executive branch or Congress on complex and rapidly changing matters.[111] The political question doctrine is a function of separation of powers that defines questions that are nonjusticiable.[112] The Supreme Court itself found that some questions are political in nature and are not for the courts to resolve.[113] The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to . . . Congress or . . . the Executive Branch."[114]

When cases assert a *Bivens* claim, courts should determine whether allowing damage remedies requires answering political questions.[115]

106. *Ziglar*, 137 S. Ct. at 1857.
107. *Id.* at 1861.
108. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
109. *Id.*
110. *See* Baker v. Carr, 369 U.S. 186 (1962).
111. Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for* Bivens *Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, 1180 (2018).
112. *Baker*, 369 U.S. at 217.
113. *Id.*
114. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).
115. *See, e.g.*, Wilson v. Libby, 535 F.3d 697, 704 (D.C. Cir. 2008). The court found that the political question doctrine does not apply because the Wilsons did not challenge any foreign policy or national security decisions entrusted to the Executive Branch. While the case may have implicated national security, the lawsuit for *Bivens* damages itself is not about national security in a manner that would preclude jurisdiction because of the political question doctrine.

For example, after the terrorist attacks on September 11, 2001 and the subsequent war in the Middle East, *Bivens* claims were brought against officials for constitutional violations, but courts recognized that any questions relating to national security may present an overstep of their authority.[116] The Constitution allocates foreign affairs and defense to Congress and the President, and they are beyond the scope of the judiciary's authority.[117] Because courts have limitations when policy determinations are required, *Bivens* claims should not be allowed when damages would interfere with national security, defense, or other affairs outside constitutionally granted authority.[118]

Second, allowing *Bivens* claims may be unfair to government officials and ultimately cause ineffective public service.[119] The Court has expressly stated that qualified immunity protects against expenses of litigation, the deterrence of citizens from taking public office, and the deterrence of public officials to take decisive actions necessary in their jobs.[120] Denying *Bivens* claims may protect against these concerns.

There is a recognition that constitutional law is constantly evolving, and public officials cannot be "expected to predict the future course of constitutional law."[121] Qualified immunity seeks to balance competing values: "on one hand, government officials sometimes suffer no personal liability even when they violate constitutional rights, [b]ut at the same time, the threat of punishing an officer for violating previously unknown rights could chill legitimate governmental action."[122] Thus, not subjecting individuals to liability prevents the high burden of asking officials to constantly keep up with every change in the law and the threat of ineffective service.

Additionally, the Court has focused on qualified immunity's presumed ability to shield government officials from burdens associated with discovery and trial.[123] Because costs of litigation are high, it might follow that officials conduct a cost-benefit analysis and

116. Emily, *supra* note 10, at 892.
117. Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125–26 (2014).
118. Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017).
119. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
120. *Id.*
121. Procunier v. Navarette, 434 U.S. 555, 562 (1978).
122. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 3 (2015).
123. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018).

choose to protect themselves over the community.[124] The Court is worried that the threat of litigation and the cost-burden of litigation will deter officials from seeking public positions.[125] Officials, concerned about the costs of damages, might encourage inaction by officers to reduce liability costs.[126]

Third, on an agency level, the Court has pointed out that without qualified immunity there is a danger of "the diversion of official energy from pressing public issues."[127] Officials and agencies should have the discretion to make decisions, especially in areas of pressing public issues, like security.[128] Changing procedures to encourage inaction in security or defense positions would be a dangerous result. Not allowing *Bivens* claims and reducing the risk of litigation may promote more effective performance of important service jobs by individuals and agencies.

B. *Benefits of Allowing Bivens Claims*

Allowing *Bivens* claims does have benefits. First, the judiciary is needed to create remedies for constitutional violations.[129] Second, allowing *Bivens* claims against officials may be an important way to deter federal officials from violating clearly established constitutional rights.[130] Third, allowing *Bivens* claims serves the principle of fairness—when someone is harmed there should be a remedy for that harm.[131]

First, the judiciary should be the branch to create remedies for constitutional violations because it has express authority to protect individual rights.[132] A *Bivens* claim recognizes an implied cause of action directly under the authority of the Constitution, not under an enabling statute.[133] In creating *Bivens* claims, the Supreme Court used the principle established in *Marbury v. Madison*, which states that

124. *See generally* John C. Jefferies, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 244–46 (2013).
125. *Id.*
126. *Id.*
127. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
128. Jefferies, *supra* note 124.
129. *See generally* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).
130. *Abbasi,* 137 S. Ct. at 1858.
131. *Id.*
132. U.S. CONST. art. III, § 2. (The source of the Court's power to create remedies is found in the language of article III: "The judicial power shall extend to all Cases … arising under this Constitution ….").
133. Hartman v. Moore, 547 U.S. 250 (2006).

when "federally protected rights have been invaded, courts will be alert to adjust its remedies so as to grant the necessary relief."[134] Justice Harlan, concurring in *Bivens*, asserts that the judiciary holds the responsibility to ensure the protection of constitutional rights.[135] The judicial branch's power allows the exercise of judicial discretion within fair limits, particularly in cases dealing with individual rights and fundamental issues.[136] The courts have the constitutional power to craft a remedy that includes "the power to define the contours" and to define limits to the remedy.[137] Allowing *Bivens* claims when constitutional rights are violated is an appropriate remedy because the judicial branch has express authority to create remedies.

Second, allowing *Bivens* claims may deter federal officials from violating citizens' clearly established constitutional rights because it subjects individuals to liability.[138] The Court has directly stated that damages as a remedy are necessary to "deter future violations."[139] The idea of allowing liability for general deterrence is present throughout tort law.[140] Allowing liability will force people to "take account of, or at least to consider, all the costs of their proposed activity" and will lead to "efficient investments in safety."[141] Allowing damages may help encourage more mindful actions by taking into account costs usually ignored "because existing legal rules do not provide liability for those costs."[142] Because allowing *Bivens* claims would subject individuals to liability, those costs can be used to deter future bad actions.

While it has been argued that litigation imposes an unfair burden on officials and may deter individuals from taking public positions, evidence suggests that "the threat of being sued does not play a meaningful role in job application decisions."[143] Additionally, a survey of law enforcement officers found a number of respondents believe that lawsuits do deter unlawful behavior and officers should be

134. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).
135. *Id.* at 407 (Harlan, J., concurring).
136. Monroe v. Pape, 365 U.S. 167, 221–22 (1961).
137. Michelman, *supra* note 11, at 2013.
138. Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).
139. *Id.*
140. *See generally* Thomas C. Galligan, *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001).
141. *Id.* at 1031–32.
142. *Id.*
143. Schwartz, *supra* note 123, at 1804.

subject to civil liability.[144] Thus, it is questionable that individuals are deterred from entering public positions, and some information suggests a perception by public officials that lawsuits should be allowed. Therefore, disallowing *Bivens* claims based on fears that individuals will be unlikely to take public positions is likely unsubstantiated.

Third, allowing *Bivens* claims serves the principle of fairness because it provides a remedy when plaintiffs have no other options.[145] Justice Harlan emphasized in his *Bivens* concurrence, "for people in Bivens' shoes, it is damages or nothing."[146] Recently, the Court reasserted the importance of having no other adequate remedy stating, "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm. . .."[147] Under *Bivens*, when there are no other means of relief, courts have recognized that plaintiffs should be remedied for irreparable constitutional violations.[148] It would be an unjust outcome to leave plaintiffs like Bivens with no remedy when the court finds their constitutional rights are violated. What would be the value in the Constitution if the courts did not uphold its protections? Allowing plaintiffs an avenue of relief not only helps plaintiffs but also offers recourse against violations of constitutional rights.

IV. SPLIT BETWEEN SPECIAL FACTORS AND FAIRNESS TO PLAINTIFFS

The *Bivens* test asks whether there are "special factors," which are usually concerned with separation of powers implications *and* whether there is any other remedy.[149] This test weighs the danger of special factors against the unfairness of leaving plaintiffs without any relief. Because special factors are not expressly defined, courts have applied this inquiry inconsistently. This inconsistency is evident in the following cases, which have caused a circuit split between the Fifth Circuit and Ninth Circuit.[150] The facts in the *Hernandez* and *Rodriguez*

144. *Id.* at 1812, n.99 (finding that 48% of respondents "either agreed or strongly agreed that the threat of civil liability deters misconduct among criminal justice employees" (citation omitted)).

145. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring).

146. *Id.* at 410.

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

148. Bell, *supra* note 62.

149. Emily, *supra* note 10.

150. Rodriguez v. Swartz, 899 F.3d 719, 758 (9th Cir. 2018) (Smith, J., dissenting).

cases are remarkably similar, yet two different courts have applied the *Bivens* test differently.

In *Hernandez v. Mesa*, the Fifth Circuit refused to allow damages after a Border Patrol agent shot and killed a teen across the United States and Mexico border citing multiple special factors.[151] Shortly after, in *Rodriguez v. Swartz*, the Ninth Circuit allowed damages under similar circumstances because they found no special factor counseling hesitation.[152] The special factors discussed in each case were separation of powers, national security, and foreign policy.[153] While the Ninth Circuit argued that none of these factors were present,[154] the Fifth Circuit said it was not even a close case.[155] How did each of these courts come to such different outcomes on special factors? The next two sections discuss each courts' analysis.

A. *The Fifth Circuit's Special Factors Finding*

In *Hernandez v. Mesa*, the Fifth Circuit focused its analysis on special factors counseling hesitation including separation of powers concerns, Congress' silence, and opening a new context and new pool of plaintiffs.[156] In *Hernandez*, a Border Patrol agent fatally shot Sergio Hernandez, a fifteen-year-old Mexican national.[157] At the time, Hernandez was standing near a culvert that separates El Paso, Texas from Ciudad Juarez, Mexico.[158] Hernandez and several friends had ran up the culvert's embankment towards the United States side, touched the border fence, and ran back.[159] Agent Mesa had fired a shot from the United States side of the border killing the teen.[160]

In its opinion, the Supreme Court remanded *Hernandez* to the Fifth Circuit after its decision in *Ziglar v. Abbasi*, which refused to permit a *Bivens* claim in a national security context.[161] On remand, the Fifth Circuit held that "[t]he transnational aspect of the facts present[ed] a 'new context' under *Bivens*, and numerous 'special factors' counsel[ed] against federal courts' interference with the Executive and

151. Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018).
152. *Rodriguez*, 899 F.3d at 744.
153. *See Hernandez*, 885 F.3d at 818–19; *see also Rodriguez*, 899 F.3d at 744.
154. *Rodriguez*, 899 F.3d at 744.
155. *Hernandez*, 885 F.3d at 823.
156. *See Hernandez*, 885 F.3d at 818–19.
157. *Id.* at 814.
158. Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017).
159. *Id.*
160. *Id.*
161. Bell, *supra* note 59, at 77–78.

Legislative branches of the federal government."[162] The court held that the case was not a "garden variety excessive force case against a federal law enforcement officer."[163] The court considered these special factors: (1) an extension of *Bivens* threatens the political branches' supervision of national security; (2) interference with foreign affairs and diplomacy more generally; (3) Congress's failure to provide a damages remedy in these circumstances; and (4) the extraterritorial aspect of the case as it aggravates the separation of powers issues.[164]

After weighing the special factors, the Fifth Circuit decided it was "not a close case."[165] Because "[t]he only relevant threshold—that a factor 'counsels hesitation'—is remarkably low," the court had little difficulty in holding that this was not a case for a *Bivens* claim.[166] The special factors are now considered.

The first, second, and fourth special factors mentioned by the court—the extension of *Bivens* threatening the political branches' supervision of national security, interference with foreign affairs and diplomacy more generally, and the extraterritorial aspect of the case—are separation of powers concerns. It is easy to argue this is a matter of national security because Border Patrol agents are charged with protecting the border. Since the political branches, and not the judicial, supervise national security, foreign affairs, and diplomacy, the Fifth Circuit was inclined to not interfere with the other branches.[167] When federal officials injure citizens from other countries outside of the United States, these are diplomatic matters that are delicate in nature,[168] and the court asserts they "are rarely proper subjects for judicial intervention."[169] While it seems well established that Congress and the executive should supervise national security, foreign affairs, and diplomacy, the court did not explain how allowing damages for families will disrupt national security, foreign affairs, and diplomacy.

The third special factor—Congress's failure to provide a damages remedy in these circumstances—speaks to Congress's intention. The court argues Congress's intention is clear through its consistent and

162. Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018).
163. *Id.*
164. *Id.* at 818–21.
165. *Id.*
166. *Id.*
167. Margulies, *supra* note 111.
168. *Hernandez*, 885 F.3d 811, 819 (2018).
169. *Id.* at 819–20 (quoting, Haig v. Agee, 453 U.S. 280, 292 (1981)).

explicit refusals to provide damage remedies for noncitizens injured abroad.[170] However, in the last fifty years, Congress has had the opportunity to create a remedy or expressly deny *Bivens* remedies, but it has been silent.[171] Congress's silence can be taken as acquiescence because damages have been allowed in multiple contexts.[172] Although Congress has failed to provide a remedy and has specifically denied damage remedies to noncitizens injured abroad,[173] *Bivens* damages are specific to constitutional injuries, and the judicial branch should create remedies for injuries arising under the Constitution.[174]

Finally, the Fifth Circuit is concerned that *Hernandez* allowing a *Bivens* remedy in this case would open up a new avenue to plaintiffs like Hernandez, Rodriguez, and their families. However, in *Passman*, the court dismissed the idea that the risk of opening the federal courts to a flood of claims was a special factor counseling hesitation.[175] The court reasoned that courts cannot be closed because constitutional principles should be more important than any reason to limit the class of interests to protect.[176]

Although the Fifth Circuit cites many separation of powers concerns, it does not discuss how allowing damages for the families will disrupt national security, foreign affairs, and diplomacy. In this case, the court's safe decision demonstrates its deference to Congress and the President by avoiding overstepping its role. Because the Fifth Circuit found many factors counseling hesitation, the court refused to allow damages.

B. *The Ninth Circuit's Fairness Finding*

In *Rodriguez v. Swartz*, the Ninth Circuit focused its analysis on the plaintiff having no other remedy and the need to deter federal officials.[177] In *Rodriguez*, a Border Patrol agent standing on American soil, shot and killed a teenage Mexican citizen who was walking down a street in Mexico.[178] The majority extended a *Bivens* damage here.[179]

170. *Id.* at 821.
171. Michelman, *supra* note 11, at 2005–06.
172. *Id.* at 2012.
173. *Hernandez*, 885 F.3d at 823.
174. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971).
175. Davis v. Passman, 442 U.S. 228, 248 (1979).
176. *Id.*
177. *See generally* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).
178. *Id.* at 727.
179. *Id.*

The court described the teenager as "peacefully walking down . . . a street in Nogales, Mexico" and "without warning or provocation, Swartz shot [him] dead."[180] The agent fired somewhere between fourteen and thirty bullets across the border and hit him ten times, mostly in the back.[181]

The Ninth Circuit in *Rodriguez* upheld a district court's denial of qualified immunity because the official's use of force was unreasonable under the Fourth Amendment given that the teenager was not suspected of any crime, was not fleeing or resisting arrest, and did not pose a threat to anyone.[182]

Unlike the Fifth Circuit, the majority reasoned that *Bivens* damages should be extended because there was no other adequate remedy, and there was no reason to infer that Congress deliberately chose to withhold a remedy.[183] The court held that Rodriguez lacked an adequate alternative remedy because she could not bring a tort claim under the FTCA, restitution from a parallel criminal proceeding would be inadequate, and there was no evidence that Mexican courts could grant a remedy.[184]

Next, the Ninth Circuit court argues there are no special factors here.[185] First, the majority argues damages in this case would not interfere with government policies because this case involves standard law enforcement operations and excessive force, similar to force seen in other cases.[186] Second, the majority found no issues with national security but instead equated the case to other domestic law enforcement cases when excessive force was used.[187] The Ninth Circuit reasoned that awarding damages could not possibly interfere with national security, and it is within courts' authority to provide a remedy for a violation of a protected right because the case did not involve any special security risks.[188] The court held that national security concerns "could not be waved like a 'talisman.'"[189] The court emphasized that it was not likely that national security involves shooting people walking down the street.[190] Additionally, the Ninth

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 738–39.
184. *Id.* at 739–44.
185. *Id.* at 744.
186. *Id.* at 745.
187. *Id.* at 745–46.
188. *Id.*
189. *Id.* at 745.
190. *Id.*

Circuit majority suggests that holding Swartz liable would meaningfully deter other Border Patrol agents from acting in the same way.[191]

The dissent argues—like the Fifth Circuit majority—that *Bivens* should not be extended here because the case presents a new context for a *Bivens* claim.[192] Additionally, the dissent argues the court must exercise caution in light of concerns about a circuit split and separation of powers issues.[193]

The Ninth Circuit awarded damages because it did not find any factors counseling hesitation and did find there was no other remedy for the Rodriguez family. There is no other law to provide relief, and there are no guarantees Mexican courts could secure damages. At the core of the Ninth Circuit majority's opinion is the reasoning that it would be unfair to leave a family with nothing after a wrongful death by a government official. Similar to Bivens, for these families, it is damages or nothing.

V. COURTS SHOULD PROVIDE RELIEF

Courts should provide relief to plaintiffs like Rodriguez and Hernandez. This Section provides a discussion for a possible resolution, suggesting that courts not refuse causes of action until special factors are fully scrutinized and government officials are held accountable.

As the Fifth Circuit suggested, the special factors discussed in the circuit split are not demonstrated to interfere with national security, foreign affairs, or diplomacy.[194] The Supreme Court should allow *Bivens* damages in these cases because it is not clear special factors counsel hesitation.

The Supreme Court must make a decision to resolve the circuit split. As it stands, if someone is shot by a Border Patrol agent in violation of a constitutional right across the border in California or Arizona they have a remedy, but not if they were shot across the border by an agent in Texas.[195] Still, the Supreme Court is reluctant to make decisions that could overstep into areas protected by separation of powers.[196]

191. *Id.* at 746.
192. *Id.* at 749 (Smith, J., dissenting).
193. *Id.*
194. *Id.* at 745–47 (majority opinion).
195. *Id.* at 758 (Smith, J., dissenting).
196. Ziglar v. Abbasi, 137 S. Ct. 1843, 1848 (2017).

They will likely decline the cause of action in the *Hernandez* case because the Court is not supposed to make policy determinations.

Plaintiffs and injured parties should have an avenue for relief. Courts do have authority to create and contour remedies to address constitutional injuries and should protect individual rights.[197] While courts disfavor expanding *Bivens* claims,[198] courts still say new *Bivens* remedies can be inferred,[199] and the *Bivens* trilogy suggests that extending *Bivens* to a new context does not preclude the court from limiting its own extension.[200] Allowing *Bivens* damages in these two cases will not necessarily create a large expansion of damages, but it could be an opportunity to provide guidance for lower courts by defining the contours of *Bivens* claims in this context.

Next, the Court can address separation of powers concerns by further scrutinizing whether special factors actually counsel hesitation. By examining how allowing damages would actually affect these "special factors," courts can still show respect to the other branches while finding the best outcome for plaintiffs. Courts can respect the other branches while still exercising its power to protect vulnerable interests. If plaintiffs are forced to wait for Congress to expressly provide or deny redress, the courts allow individuals to be injured without any recourse.

Additionally, because there is not a bright-line rule for defining special factors counseling hesitation, courts have used discretion to rule on different sides and inconsistencies persist.[201] It seems that special factors counseling hesitation have "grown so large as to swallow the *Bivens* claim in many courts."[202]

For example, in *Al-Aulaqi v. Panetta*, a district court was asked to decide a case arising under a *Bivens* claim for damages for the family of a deceased teenager.[203] In 2011, a drone strike unintentionally killed Abdulrahman Al-Aulaqi, a teenage United States citizen, not the intended target of the attack.[204] The family claimed that these officials violated the Fifth Amendment rights of the decedents when they

197. Dellinger, *supra* note 129.
198. *Abbasi,* 137 S. Ct. at 1857.
199. *Id.* at 1858.
200. Michelman, *supra* note 11, at 2012–13.
201. *Constitutional Law — Bivens Actions — Ninth Circuit Extends* Bivens *Remedy to Mexican Citizen Killed in Mexico by Cross-Border Agent Standing in America. —* Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018).*, 132 HARV. L. REV. 1096, 1100 (Jan. 2019).
202. Emily, *supra* note 10.
203. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).
204. *Id.* at 58–59.

authorized the drone strikes.[205] The court had to decide whether federal officials could be held personally liable for their roles in drone strikes abroad when they kill United States citizens.[206] The nature of the case raised national security concerns and that factor *alone* was enough to deny the claim.[207]

The court noted that the D.C. Circuit, the Fourth Circuit, and the Seventh Circuit have decided that "special factors—including separation of powers, national security, and the risk of interfering with military decisions— preclude the extension of a *Bivens* remedy" to cases like *Al-Aulaqi*.[208] If causes of action are being refused for the mere mention of issues related to national security, then the court is, as the majority in *Rodriguez* suggested, waving national security concerns like a "talisman."[209] While safety and security are important, courts should be looking more closely at cases to determine if allowing damages will threaten national security. In the Rodriguez and Hernandez families' cases, it seems unlikely that subjecting individuals, who caused wrongful death, to personal liability will threaten the safety of the United States and Mexico border.

Because holding governmental officials accountable does not implicate national security in the circuit split cases, the Supreme Court should provide relief to the Rodriguez and Hernandez families. Courts should not refuse causes of action until special factors are fully scrutinized. Separation of powers concerns are important, and courts should not interfere with safety and security. However, courts should find a connection between allowing damages and special factors concerns before denying relief.

VI. CONCLUSION

With eyes on the border, the recent circuit split could bring attention to the judiciary's decisions about Border Patrol agents' lability in cross-border shootings. Disqualifying federal agents from immunity could subvert agents to personal liability when they violate clearly established constitutional rights during their jobs. While *Bivens* claims are disfavored, they are still available to give plaintiffs relief when they have no other means of remedy. The Supreme Court's decision in *Ziglar v. Abbasi*, as well as circuit decisions in *Hernandez v. Mesa*

205. *Id.* at 59.
206. *Id.*
207. Emily, *supra* note 10.
208. *Al-Aulaqi*, 35 F. Supp. 3d at 75.
209. Rodriguez v. Swartz, 899 F.3d 719, 745 (9th Cir. 2018).

and *Rodriguez v. Swartz,* have only added questions about allowing *Bivens* in circumstances that even touch on national security concerns.

The history and development of qualified immunity and the *Bivens* claim over the last fifty years has not created a bright-line rule to apply to cases. However, the courts have developed the "*Bivens* test" when "new contexts" are present. Applying the *Bivens* test, which requires (1) no other adequate remedy and (2) no special factors counseling hesitation, has given some guidance to courts. Still, courts have discretion in applying the test and weighing special factors against the need for a remedy.

There are both benefits and drawbacks of allowing *Bivens* claims. The drawbacks of allowing *Bivens* claims—overstepping separation of powers concerns, unfairness to government officials and ineffective public service, and exerting a burden on agencies that may shift focus from pressing public issues to putting more policies in place to protect officials—value federal officials and not overreaching separation of powers. The benefits of allowing *Bivens* claims—the judiciary acting to create remedies to constitutional violations, deterring federal officials from violating clearly established constitutional rights, and fairly providing remedy for constitutional violations—values plaintiffs and constitutional rights.

The circuit split between the Fifth and Ninth Circuits demonstrates how courts consider the *Bivens* test differently and what each court values more. While the Ninth Circuit argued that none of these factors were present, the Fifth Circuit said it was not even a close case. The circuits' discussion of special factors suggests the Supreme Court needs to make a decision on which special factors counsel hesitation. Courts should not refuse causes of action until "special factors" are fully scrutinized and justify courts' hesitation.