# NOTES

## SHOOTINGS, SECURITY, AND ARTICULABLE SUSPICION: RETHINKING THE STANDARD FOR NATIONAL SECURITY AS A SPECIAL FACTOR PREVENTING *BIVENS* RECOVERY

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### INTRODUCTION

On the night of October 10, 2012, sixteen-year-old Mexican citizen Jose Antonio Elena Rodriguez walked alone and unarmed along the sidewalk of Calle Internacional, a well-traveled road that runs parallel to the United States-Mexico border fence.[1] Jose had just finished an evening of playing basketball with his friends and was traveling his usual route home along Calle Internacional when, without warning, U.S. Border Patrol Agent Lonnie Swartz opened fire directly at Jose.[2] Agent Swartz fired a range of fourteen to thirty shots, hitting Jose approximately ten times from behind.[3] According to eyewitnesses, Jose was fully visible and non-threatening.[4] He did not throw rocks, verbally or physically threaten the U.S. Border Patrol agents, or direct any activity at the United States side of the border at all.[5] After being shot from behind, Jose collapsed on the spot. He died seconds later in a pool of his own blood, just blocks away from his own home.[6]

The United States indicted and tried Agent Swartz for murder, which resulted in an acquittal.[7] Jose's mother, Araceli Rodriguez, brought a *Bivens* action in the

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1. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1028 (D. Ariz. 2015), aff'd 899 F.3d 719 (9th Cir. 2018).

2. *Rodriguez v. Swartz*, AM. CIVIL LIBERTIES UNION (Aug. 7, 2018), https://www.aclu.org/cases/rodriguez-v-swartz; *see also Rodriguez*, 111 F. Supp. 3d at 1028–29.

3. *Rodriguez v. Swartz*, AM. CIVIL LIBERTIES UNION (Aug. 7, 2018), https://www.aclu.org/cases/rodriguez-v-swartz.

4. *Rodriguez*, 111 F. Supp. 3d at 1028–29.

5. *Id.*

6. AM. CIVIL LIBERTIES UNION, *supra* note 2.

7. Samantha Schmidt, *U.S. Border Agent is Not Immune from Lawsuit in Cross-Border Killing of Mexican Teen, Court Rules*, WASHINGTON POST (Aug. 8, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/08/u-s-border-patrol-agent-is-not-immune-from-lawsuit-in-cross-border-killing-of-mexican-teenager-court-rules/. Although Agent Swartz was acquitted of the murder charge, the jury hung on the issue of manslaughter. *Id.*

United States District Court for the District of Arizona against Agent Swartz in his individual capacity, alleging that his use of unjustified deadly force violated Jose's Fourth and Fifth Amendment rights under the United States Constitution.[8] The district court determined that the shooting was a "seizure" within the meaning of the Fourth Amendment, but dismissed the Fifth Amendment claim.[9] The court also rejected Agent Swartz's claim to qualified immunity, allowing the case to proceed.[10] In a two-to-one decision, the Ninth Circuit affirmed the decision of the district court.[11] The Ninth Circuit held that, despite the presumption against the expansion of *Bivens* claims, the *Rodriguez* action was allowed to move forward because no other adequate remedy was available, the circumstances of Jose's case gave no reason to believe that Congress intended to withhold a remedy, and no special factors counseled hesitation in extending a *Bivens* action in the case.[12] Judge Smith dissented, stating that extending a *Bivens* action to *Rodriguez* overstepped separation of powers principles and created an unnecessary circuit split.[13] Indeed, Judge Smith called attention to the recent Fifth Circuit decision in *Hernandez v. Mesa*, reaching the opposite result on facts unnervingly similar to those of *Rodriguez*.[14]

In *Hernandez*, a U.S. Border Patrol agent positioned on United States soil fatally shot Sergio Hernandez, a fifteen-year-old Mexican national who was playing with his friends in the concrete culvert that separates El Paso, Texas from Juarez, Mexico.[15] The agent shot Sergio in the face as he peered out from behind a pillar on the Mexican side of the border, leaving Sergio fatally wounded without calling for medical assistance.[16] Among other claims for relief, Sergio's family, like the Rodriguez family, brought a *Bivens* action against the agent in his individual capacity, alleging violations of the teen's Fourth and Fifth Amendment rights.[17] The Fifth Circuit arrived at the opposite conclusion of the Ninth Circuit in *Rodriguez*, holding that a *Bivens* remedy was not available for the Hernandez family.[18] The court reasoned that a cross-border shooting provided a "'new context'

8. *Rodriguez*, 111 F. Supp. 3d at 1030.

9. *Id.* at 1041.

10. *Id.* at 1033–41.

11. Rodriguez v. Swartz, 899 F.3d 719, 748 (9th Cir. 2018).

12. *Id.* at 739–48.

13. *Id.* at 749 (Smith, C.J., dissenting).

14. Hernandez v. Mesa, 885 F.3d 811, 814–16 (5th Cir. 2018) (en banc) [hereinafter *Hernandez II*].

15. *Id.* at 814.

16. Hernandez v. United States, 802 F. Supp. 2d 834, 837–38 (W.D. Tex. 2011), *aff'd*, 757 F.3d 249 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017). Note that the Justice Department maintains that Hernandez began throwing rocks at the border agent while he was attempting to cross the border. *See* Press Release, Department of Justice, Federal Officials Close Investigation Into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca. At this stage in the proceedings, however, the court viewed the facts in the light most favorable to the plaintiff. *See Hernandez*, 802 F. Supp. 2d at 837–38.

17. Hernandez v. Mesa, 137 S. Ct. 2003, 2004–05 (2017) (per curiam).

18. *Hernandez II*, 885 F.3d at 819–22. The *Hernandez* litigation originally made its way up to the Supreme Court but was remanded back to the Fifth Circuit to determine the issue of whether a *Bivens* remedy was

under *Bivens* and numerous 'special factors'" weighed against the availability of a *Bivens* action for the Hernandez family.[19] The Fifth Circuit emphasized that allowing a *Bivens* action would place a great burden upon the "political branches' oversight of national security and foreign affairs" and "would create a remedy with uncertain limits."[20] Further, the Fifth Circuit concluded that allowing the claim to move forward would stop Border Patrol agents from making "split-second decisions" essential to protecting the borders, thereby hindering the national security interests of the United States.[21]

As of this writing, the Supreme Court has yet to issue a decision in *Hernandez*.[22] Although the Supreme Court has decided to review whether a *Bivens* action is available on the facts in *Hernandez*, the *Rodriguez-Hernandez* litigations raise to the surface a broader discussion about the unsettling role that national security has played in the discourse around *Bivens* litigation. Namely, it surfaces the idea that the "special factor" of national security should not only weigh against, but effectively halt *Bivens* litigation altogether, leaving federal agents with unlimited deference and no limitations on the scope of their so-called "split-second decisions." Additionally, it highlights the rapid expansion of national security as a special factor preventing recovery under *Bivens*, showing the apparent lack of standards for the scope of national security as a special factor cautioning recovery under *Bivens*.

This Note uses the *Rodriguez-Hernandez* litigations to illustrate the detrimental impact the expansion of national security as a special factor preventing recovery under *Bivens* will have upon victims of constitutional violations. Additionally, this Note argues for a new, workable standard to explain when the national security special factor can appropriately prevent a *Bivens* action. The argument proceeds in four parts. First, Part I briefly summarizes the basic requirements for *Bivens* claims under the clarified framework given by the Supreme Court in *Abbasi*. Part II then discusses the expansion of national security as a "special factor" preventing recovery under *Bivens* after 9/11 and its recent expansion to immigration actions. Part III explores the harmful consequences of unlimited judicial deference to federal agents in the name of national security. Finally, Part IV presents a new standard for analyzing national security *Bivens* actions by advocating for a modified version of the "reasonable articulable suspicion" standard in such cases.

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available in this particular case, a "question antecedent to the merits" of the Hernandez family's claim against Agent Mesa. *Id*. at 814.

19. *Id*. at 818.

20. *Id*. at 823.

21. *Id*. at 819 (quoting Vanderklok v. United States, 868 F.3d 189, 207 (3d Cir. 2017)).

22. *Hernandez v. Mesa*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/hernandez-v-mesa-2/ (last visited Jan. 27, 2020). The Court has not granted certiorari in *Rodriguez*.

## I. THE BACKGROUND OF *BIVENS* ACTIONS AS A RIGHT TO RECOVERY

*Bivens* claims find their origin in *Bivens v. Six Unknown Federal Narcotics Agents*, in which a group of federal agents, acting under the assumed authority of federal law, searched the home of Webster Bivens without probable cause or a search warrant in violation of the Fourth Amendment.[23] The Supreme Court allowed Webster Bivens to sue the agents for money damages.[24] In doing so, the Supreme Court created an implied private right of action for damages against federal agents who allegedly commit a constitutional violation against an individual while acting under assumed federal authority.[25] The Supreme Court allowed *Bivens* remedies to create the possibility of recovery for plaintiffs who do not have a right to recover under a federal statute, reasoning that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done."[26] The rationale for allowing *Bivens* actions is to dissuade federal agents from violating constitutional rights through the threat of individual liability and monetary damages.[27]

However, a *Bivens* action is not available for every constitutional violation.[28] Specifically, the Supreme Court has identified two circumstances where a *Bivens* action will not be allowed to move forward: (1) if "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective" or (2) if there are "special factors counselling hesitation."[29] Since *Bivens* was decided almost fifty years ago, only two additional claims alleging constitutional violations have managed to overcome these obstacles: an equal protection claim for a violation of the Fifth Amendment's Due Process Clause[30] and an action against federal prison officials who did not provide an inmate with adequate medical care in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.[31]

At the first stage of *Bivens*, the Supreme Court has not counseled how to measure whether an alternative remedy is equally effective, but it has found

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23. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

24. *Id.* at 397.

25. *Id.*

26. *Id.* at 396 (internal quotations and citations omitted).

27. *E.g.*, Corr. Services Corps. v. Maleski, 534 U.S. 61, 69 (2001) ("The purpose of *Bivens* is to deter the officer."); F.D.I.C. v. Meyer, 510 U.S. 471, 485 (1994) (same).

28. *See*, *e.g.*, Minneci v. Pollard, 565 U.S. 118 (2012) (rejecting *Bivens* action against private prison employees for Eighth Amendment violation); *Meyer*, 510 U.S. at 484–86 (rejecting *Bivens* action against federal agencies); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (rejecting *Bivens* action for procedural due process violation in Social Security proceeding); United States v. Stanley, 487 U.S. 669, 685–86 (1987) (rejecting *Bivens* claim for injuries obtained during military service); Bush v. Lucas, 462 U.S. 367, 388–90 (1983) (rejecting *Bivens* action for First Amendment violation because alternative remedy available).

29. Carlson v. Green, 446 U.S. 14, 18 (1980) (quoting *Bivens*, 403 U.S. at 396); *see also* Anya Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What is Special About Special Factors?*, 45 IND. L. REV. 719, 734 (2012) (discussing precluded claims in the decade after *Bivens*).

30. Davis v. Passman, 442 U.S. 228, 234 (1979).

31. *Carlson*, 446 U.S. at 16 n.1, 18.

congressionally created civil service remedies,[32] Social Security remedies,[33] and state tort claims[34] to be adequate. At the second stage of *Bivens*, the Supreme Court has declined to explicitly define "special factors counseling hesitation,"[35] leaving the inquiry to be a factual, case-by-case determination for the specific context presented before a court. The Court guided, however, that the inquiry should "concentrate 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."[36] But the practical effect of this instruction has been a pattern of cases which drastically limit *Bivens* actions to prevent the expansion of a judicially created remedy and encroachment on the power of the political branches.[37]

Recently, the Supreme Court revisited the framework for *Bivens* recovery in *Ziglar v. Abbasi*.[38] In *Abbasi*, the Supreme Court declined to extend a *Bivens* action to a group of men of Arab and South-Asian descent who alleged that their detention on suspicion of terrorism after the 9/11 attacks violated their Fourth Amendment right to be free from unreasonable seizures.[39] The Supreme Court's decision in *Abbasi* further demonstrated that a *Bivens* action is a "disfavored judicial activity,"[40] and that only a narrow class of constitutional violations will be able to pass the strict standards required for a *Bivens* action.[41] *Abbasi* further clarified the framework for analyzing a *Bivens* claim, requiring a court to first inquire whether a case presents "a new context" under *Bivens*.[42] If the case presents a new context, the court should move forward to analyze whether an alternative remedy is available or whether "special factors" counsel against the judiciary extending an implied right of action over Congress.[43]

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32. *Lucas*, 462 U.S. at 381–89.

33. *Schweiker*, 487 U.S. at 428–29.

34. Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 72–73 (2001).

35. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–58 (2017).

36. *Id.*

37. *See, e.g.*, *Malesko*, 534 U.S. at 61; *Schweiker*, 487 U.S. 412; United States v. Stanley, 487 U.S. 669 (1987); *Lucas*, 462 U.S. at 367; *see also* Stephen I. Vladeck, *National Security and* Bivens *after* Iqbal, 14 LEWIS & CLARK L. REV. 255, 259–60 (2010) (discussing the Supreme Court's "unbroken pattern" of limiting *Bivens* actions).

38. *Abbasi*, 137 S. Ct. at 1854.

39. *Id.* at 1853–54.

40. *Id.* (citing Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

41. *Compare* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (allowing an implied right of action for a Fourth Amendment violation) *with Abbasi*, 137 S. Ct. at 1856–57 (denying an implied right of action for a Fourth Amendment violation).

42. *Abbasi*, 137 S. Ct. at 1859–1860. The context of a case is new when it is "different in a meaningful way from previous *Bivens* cases." *Id.* at 1859. The Court guided, "Meaningful differences may include, *e.g.*, the rank of the officers involved, the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of the other branches; or the presence of special factors not considered in previous *Bivens* cases." *Id.* at 1849, 1859–1860.

43. *Id.* at 1857.

## II. NATIONAL SECURITY'S EXPANSION AS A FACTOR PREVENTING RECOVERY UNDER *BIVENS*

Since the inception of *Bivens* claims, the Supreme Court has repeatedly declined to expand *Bivens* relief, even when a remedy under *Bivens* appeared to be the best, if not the only, remedy for an individual with a legitimate claim of a constitutional violation.[44] Consequently, lower courts have interpreted "special factors counseling hesitation" liberally as they have filled in the holes of the vague "special factors" analysis articulated by the Supreme Court.[45] But, as Professor Stephen Vladeck argues, it was not until after the 9/11 attacks that national security seemingly became a special factor in its own right.[46] Professor Vladeck argues that as more and more *Bivens* actions were brought in the years after 9/11, national security appeared to become more than just a "special factor" considered by the courts.[47] Rather, it has evolved from being just a "special factor" limiting recovery to a full-stop defense, often determining the ultimate outcome of *Bivens* actions. In practice, this appears to mean that *Bivens* actions automatically fail when national security is raised as a defense in the litigation.[48]

In recent years, the lower courts appear to have followed the Supreme Court's reluctance to expand *Bivens* when a federal agent claims national security as a special factor. Five of the federal circuit courts have held that, even in the absence of an alternative remedy, a *Bivens* claim cannot go forward when issues of national security or foreign relations are raised.[49]

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44. *See* Wilke v. Robbins, 127 S. Ct. 2588, 2593–2604 (2007) (denying a *Bivens* action under the Takings Clause of the Fifth Amendment arising out of systematic harassment from federal agents at U.S. Bureau of Land Management); *see also* Vladeck, *supra* note 37, at 266 (discussing *Wilke* as a unique expansion of "special factors" because no alternative remedy was available for a clearly violated constitutional right).

45. *See* Bernstein, *supra* note 29, at 722, 744–45; *see also* Julie Hunter, Note, *Breaking Legal Ground: A* Bivens *Action for Noncitizens for Trans-Border Constitutional Torts against Border Patrol Agents*, 15 SAN DIEGO INT'L L.J. 163, 192–95 (2013) (discussing criticism surrounding the *Bivens* "special factors" analysis).

46. Vladeck, *supra* note 37, at 268–70.

47. *Id.*

48. *See Hernandez II*, 885 F.3d at 818–19. ("The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.") (quoting Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012)).

49. *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193, 203–05 (7th Cir. 2012) (en banc) (declining to extend *Bivens* in the military context because it could adversely affect national security); Doe v. Rumsfeld, 683 F.3d 390, 394–95 (D.C. Cir. 2012) (same); Mirmehdi v. United States, 689 F.3d 975, 982–83 (9th Cir. 2012) (declining to extend *Bivens* action to immigration action because it could adversely affect national security); Lebron v. Rumsfeld, 670 F.3d 540, 544 (4th Cir. 2012) (declining to extend *Bivens* in military context because it could adversely affect national security); Arar v. Ashcroft, 585 F.3d 559, 563–64 (2d Cir. 2009) (en banc) (declining to extend *Bivens* action against high level policy makers because it could adversely affect national security); *see also* Andrew Kent, *Are Damages Different?* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125–26 (2014).

Although the national security exception has predominantly referred to actions arising out of military service[50] and anti-terrorism efforts in the aftermath of 9/11,[51] it has quickly expanded to other contexts, including immigration actions.[52] Whether a *Bivens* claim can be brought when it arises out of an immigration action has not been explicitly considered by the Supreme Court.[53] However, continuing to follow the Supreme Court's reluctance to expand *Bivens* remedies, four federal circuit courts have explicitly declined to expand *Bivens* to the immigration enforcement context, in part because of the broadening view of national security as a special factor counseling hesitation in such cases.[54] The following sections will first examine the recent expansion of the national security special factor in immigration actions and then discuss this expansion's significance to the *Rodriguez-Hernandez* litigations.

### A. *Expansion of National Security as a Special Factor in Immigration Actions*

First, in *Mirmehdi v. United States*, the Ninth Circuit declined to extend a *Bivens* action to a group of detained immigrants whose bond was revoked because their names allegedly appeared on a handwritten membership list for a known terrorist group.[55] The plaintiffs brought an action against the immigration agents, alleging that they had knowingly falsified the names on the membership list in order to detain the plaintiffs pending their deportation proceedings.[56] The Ninth

50. Chappell v. Wallace, 462 U.S. 296, 304 (1983), United States v. Stanley, 487 U.S. 669, 681–82 (1987). Both *Chappell* and *Stanley* also emphasized that Congress has unique power over the military. Rodriguez v. Swartz, 889 F.3d 719, 737 (9th Cir. 2018).

51. *See Vance*, 701 F.3d at 203–05 (denying *Bivens* action against the Secretary of Defense for allegedly approving U.S. military torture practices of two U.S. citizen contractors working in Iraq); *Doe*, 683 F.3d at 396–97 (denying *Bivens* action against the Secretary of Defense alleging that he approved plaintiff's unjustified detention as a terrorism security threat); *Mirmehdi*, 689 F.3d at 978–79, 983 (denying *Bivens* action by Iranian nationals alleging that federal agents lied about their ties to terrorism in order to detain them before deportation); *Lebron*, 670 F.3d at 544, 556 (denying *Bivens* action against Secretary of Defense and national security officials when plaintiff challenged his designation as an enemy combatant); Ali v. Rumsfeld, 649 F.3d 762, 764–65, 769–774 (D.C. Cir. 2011) (denying *Bivens* action against the Secretary of Defense and senior officers for alleged mistreatment during wartime detention); *Arar*, 585 F.3d at 563–64 (denying *Bivens* action against Attorney General, FBI Director, and other federal agents by Syrian-Canadian citizen for alleged torture); Rasul v. Myers, 563 F.3d 527, 528, 534 (D.C. Cir. 2009) (denying *Bivens* action against Secretary of Defense and other officials for alleged mistreatment of prisoners at Guantanamo Bay).

52. It is worth noting that there is much categorical overlap between *Bivens* actions categorized as "post-9/11 *Bivens* actions" and *Bivens* actions categorized as "predominately immigration" *Bivens* actions. *See, e.g.*, *Arar*, 585 F.3d at 563–66.

53. Alvarez v. U.S. Immigrations and Customs Enf't, 818 F.3d 1194, 1206–07 (11th Cir. 2016). The Supreme Court's decision in *Abbasi* could potentially be interpreted as barring *Bivens* actions in an immigration context. However, the Supreme Court appeared to intentionally conduct a narrow analysis in order to avoid such a conclusion. Lanuza v. Love, 899 F.3d 1019, 1026 (9th Cir. 2018) ("Although *Abbasi* could have stood for the broad proposition that *Bivens* remedies are not available in the context of immigration proceedings because of the sensitive nature of immigration policy, the *Abbasi* Court did not paint in such broad strokes.").

54. *See Alvarez*, 818 F.3d at 1206–07; *Mirmehdi*, 689 F.3d at 983; De La Paz v. Coy, 786 F.3d 367, 375 (5th Cir. 2015).

55. 689 F.3d at 979–83.

56. *Id.*

Circuit held that a *Bivens* remedy did not apply, stating that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation.'"[57]

The Fifth Circuit followed this reasoning in *De La Paz v. Coy*.[58] In *De La Paz*, two immigrants brought a *Bivens* action against Border Patrol agents for allegedly conducting an illegal stop and arresting them at the U.S.-Mexico border merely because they were Hispanic.[59] The court held that an action under *Bivens* could not go forward, emphasizing that the complexity of immigration proceedings counseled hesitation in extending *Bivens*. The court reasoned, in part, that "immigration enforcement may disclose more than 'normal domestic law-enforcement . . . techniques' and might involve disclosure of foreign-policy objectives."[60] The court also worried that the possibility of a *Bivens* suit would make a federal agent "readily shirk his duty" of "vigorous enforcement and investigation of illegal immigration" to further the national security interests of the United States.[61]

The Eleventh Circuit declined to extend a *Bivens* action in *Alvarez v. United States Immigration and Customs Enforcement*.[62] In *Alvarez*, a Cuban national brought an action against federal agents for an alleged conspiracy to unconstitutionally prolong his detention in a federal prison.[63] The court declined to allow the action to proceed, reasoning in part[64] that the "political branches of the federal government [have] broad, undoubted power over the subject of immigration" because they are "better situated to consider sensitive foreign policy issues."[65]

Most recently, however, the Ninth Circuit allowed an immigrant to pursue a *Bivens* action when an ICE attorney intentionally forged a document used in an immigration proceeding to prevent the plaintiff from pursuing lawful permanent resident status.[66] The government claimed the Ninth Circuit's earlier decision in *Mirmehdi* precluded recovery.[67] Additionally, the government claimed that the reasoning in *Abbasi* meant *Bivens* actions were unavailable in immigration actions partly because of the sensitive national security issues raised in immigration

57. *Id*. at 982 (quoting Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009)). The Ninth Circuit also reasoned that an alternative remedy was available under the Immigration and Nationality Act. *Id*.

58. 786 F.3d at 375.

59. *Id*. at 370–72.

60. *Id*. at 379 (quoting *Mirmehdi*, 698 F.3d at 983).

61. *Id*. at 379. The court also reasoned that the Immigration and Nationality Act could provide relief, courts had the potential to be flooded with litigants, and serious separation of powers concerns further pointed toward Congress as the appropriate body to provide a remedy. *Id*. at 379–80.

62. 818 F.3d 1194, 1196 (11th Cir. 2016).

63. *Id*. at 1208.

64. Like the Ninth Circuit in *Mirmehdi* and the Fifth Circuit in *De La Paz*, the Eleventh Circuit also reasoned that the Immigration and Nationality Act or a petition for writ of habeas corpus provided an alternative remedy for the plaintiff and that providing a *Bivens* remedy to the immigration context would be "difficult to administer." *Id*. at 1210.

65. *Id*. at 1210 (citations omitted).

66. Lanuza v. Love, 899 F.3d 1019, 1021 (9th Cir. 2018).

67. *Id*. at 1027.

proceedings.[68] The Ninth Circuit rejected this argument and allowed the action to move forward, reasoning that *Abbasi* did not stand for the broad proposition that *Bivens* remedies are not available in immigration actions.[69] Further, the court found that intentionally falsifying evidence could not be legitimately connected to national security concerns like the concerns raised in *Mirmehdi*.[70] The court further emphasized the importance of protecting the plaintiff's due process rights and deterring due process violations by federal agents.[71] The court ultimately concluded that, despite the national security special factor argued by the defendant, "there are compelling interests that favor extending a *Bivens* remedy here, and on balance, those interests outweigh the costs of allowing this narrow claim to proceed against federal officials."[72]

In direct contrast to the Ninth Circuit's decision, the Fourth Circuit most recently denied a *Bivens* action by a group of undocumented immigrants alleging violations of the Fourth and Fifth Amendments for a series of illegal searches and seizures.[73] The immigrants were randomly stopped in their northern Virginia neighborhood and detained by Immigration and Customs Enforcement agents without cause. The immigrants were subjected to searches of their homes without consent, probable cause, or a warrant, and were ultimately placed in deportation proceedings after the encounters.[74] One of the defenses raised by the government was that immigration actions raise national security policy concerns, and therefore should stop *Bivens* actions.[75] The Fourth Circuit agreed with the government and declined to allow the *Bivens* action to go forward. [76]

Despite this expansion of the national security special factor as a defense in immigration actions, both *Alvarez* and *De La Paz* left open the question of whether a *Bivens* remedy would be available for cases of physical abuse brought as a constitutional claim, despite the underlying immigration issues.[77] Thus, even as the national security special factor begins to creep its way into immigration actions, at least the Ninth Circuit has begun to seek guidance as to whether *Bivens* actions are appropriate in immigration proceedings presenting egregious constitutional violations.

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68. *Id*.
69. *Id*.
70. *See id*. at 1029–30.
71. *See id*. at 1026.
72. *Id*. at 1033.
73. Tun-Cos v. Perrotte, 922 F.3d 514, 517–18 (4th Cir. 2019). The immigrants also brought a claim alleging violations of the Equal Protection Clause. *Id*.
74. *Id*. at 517–18.
75. *Id*. at 526.
76. *Id*. at 528.
77. Alvarez v. U.S. Immigrations and Customs Enf't, 818 F.3d 1194, 1208 (11th Cir. 2016); De La Paz v. Coy, 786 F.3d 367, 373–74 (5th Cir. 2015). The opinion in *De La Paz* recognized that Fifth Circuit precedent allowing *Bivens* claims for physical abuse against immigration detainees "may be in some tension with ensuing pronouncements of the Supreme Court . . . ." *De La Paz*, 786 F.3d at 373.

### B. *Application to the* Rodriguez-Hernandez *Litigations*

With this background, it is no surprise that the Ninth and Fifth Circuits split in the *Rodriguez-Hernandez* litigations. The circuits faced the difficult issue of physical abuse by Border Patrol agents, but they also faced the additional pressure of considering separation of powers principles that "should be central to the [*Bivens*] analysis."[78] In addition, both circuits spent considerable time dissecting what "special factors" were presented by the cases that may indicate that a *Bivens* action should not be allowed.[79] Although the facts of *Rodriguez* and *Hernandez* were virtually identical and the circuits agreed on many essential components of the *Bivens* and *Abbasi* application,[80] they ultimately arrived at two opposite conclusions regarding the specific cross-border shootings.

In particular, the circuits disagreed about the weight of national security as a "special factor" counseling against a *Bivens* remedy. Both circuits, citing *Abbasi*, recognized that national security should not "become a talisman used to ward off inconvenient claims."[81] Despite this recognition, the Fifth Circuit rejected this caution as inapplicable, reasoning, "[n]ational-security concerns are hardly 'talismanic' where, as here, border security is at issue."[82] In contrast, the Ninth Circuit, while recognizing that "Border Patrol agents protect the United States from unlawful entries and terrorist threats," reasoned that "shooting people who are just walking down a street in Mexico" does not implicate national security concerns.[83] Further, it reasoned that allowing the *Bivens* action to move forward "would not meaningfully deter Border Patrol agents from performing their duties."[84]

The difference in the approaches of the Fifth and Ninth Circuits in the *Rodriguez-Hernandez* litigations illustrate how national security as a special factor has deviated from post-9/11 anti-terrorism efforts and expanded to other "national security" efforts by federal agents. As noted by courts applying the *Bivens* analysis, central to the special factors prong of *Bivens* is the question of "'who should decide' whether to provide for a damages remedy, Congress or the courts?"[85] As we have seen, when the government agent raises national security concerns as a special factor in *Bivens*, the answer almost always becomes unchecked deference

78. *Abbasi*, 137 S. Ct. at 1857 (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

79. See Rodriguez v. Swartz, 899 F.3d 719, 730 (9th Cir. 2018); *Hernandez II*, 885 F.3d at 818–20.

80. For example, the two circuits agreed that cross-border shootings presented a "new context;" that a *Bivens* remedy should not be allowed when special factors counseled otherwise; and that Congress could create a remedy or signal that it does not want to allow a remedy for cross-border shootings. Brief in Opp'n at 8–9, Swartz v. Rodriguez, No. 18-309 (Sept. 18, 2018).

81. *Hernandez II*, 885 F.3d at 819 (citing *Abbasi*, 137 S. Ct. at 1862); *Rodriguez*, 899 F.3d at 745 (citing *Abbasi*, 137 S. Ct. at 1862).

82. *Hernandez II*, 885 F.3d at 818.

83. *Rodriguez*, 899 F.3d at 745–46. Notably, the Ninth Circuit was narrow in its reasoning for allowing the *Bivens* action to move forward because of lack of national security concerns, recognizing that "in many hypothetical situations, a cross-border shooting would not give rise to a *Bivens* action." *Id*. at 745.

84. *Id*.

85. *Abbasi*, 137 S. Ct. at 1183 (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

to the political branches. The next Part discusses the costs and benefits of such deference.

## III. DEFERENCE TO POLITICAL BRANCHES OR LEGITIMIZING BORDER VIOLENCE?

The stories of Jose Rodriguez and Sergio Hernandez are chilling, but not uncommon. Since January 2010, at least one hundred people have died as a result of violence caused by U.S. Border Patrol agents, with growing numbers each day.[86] The violence has ranged from a twelve-day killing spree[87] to kidnapping and raping immigrant women under the guise of assisting them to safety.[88] Few, if any of these individuals have brought actions against the Border Patrol agents in their individual capacities, or have even brought an action at all.

With the pattern of unsuccessful *Bivens* claims in federal courts, this should come as no surprise. As a practical matter, the *Bivens* doctrine is a nightmare for individuals who seek to bring a claim for a constitutional violation against a federal agent. To be successful, these individuals face the challenge of fitting their claim into one of the narrow categories defined in past *Bivens* actions. They must challenge the doctrine of qualified immunity and the seemingly impenetrable national security defense. Further, the power imbalance between a Border Patrol agent and individuals who are the victims of border violence provides further deterrence against bringing *Bivens* actions. Many victims of border violence are unfamiliar with the court system in the United States, lack the resources to bring an action, or fear further violence as retaliation.

The practical effect of this is that many agents are left unaccountable and many families are left without a remedy. This Part will explore how border violence and lack of remedy has been legitimized, first discussing the misconception that border violence began with the Trump administration, followed by a discussion of our limited constitutional framework and how it can—and has already—ignored border violence.

### A. *Not Merely an Administration Problem*

Since the 2016 election, border violence has increasingly been attributed to President Trump's rhetoric prioritizing the security interests of the United States,

86. *Deaths by Border Patrol Since 2010*, SOUTHERN BORDER COMMUNITIES COALITION (Sept. 18, 2018), http://www.southernborder.org/deaths_by_border_patrol. It is worth noting that this number does not reflect the total of people who have died at the border since 2010. The United States Border Control reports that the number of deaths at the Southwest border from 2010-2017 is 2,855. UNITED STATES BORDER PATROL, SOUTHWEST BORDER DEATHS BY FISCAL YEAR (2017).

87. Manny Fernandez & Michelle Ferman, *Unraveling the Mystery of a 12-Day Killing Spree at the Border*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/us/texas-laredo-border-patrol-serial-killer.html.

88. Manny Fernandez, *They Were Stopped at the Border. Their Nightmare Had Only Just Begun*, N.Y. TIMES (Nov. 12, 2018), https://www.nytimes.com/2018/11/12/us/rape-texas-border-immigrants-esteban-manzanares.html.

particularly at the Southwest border.[89] While the Trump administration has used illegal immigration as a rallying cry for increased border security,[90] violent practices by federal Border Patrol agents is not administration specific. For example, in May of 2018, the ACLU Border Litigation Project released a report recording hundreds of encounters of physical and sexual violence perpetrated by Border Patrol agents against migrants under the Obama Administration.[91] The report is based upon a Freedom of Information Act request that produced over 30,000 pages from four agencies in the Department of Homeland Security documenting these encounters from 2009 to 2014.[92] The accounts record a number of allegations of violent incidents, mainly perpetrated against unaccompanied minors.[93] Some of the more egregious incidents reported by the ACLU include smashing a child's head under an agent's boot, partially running over children with patrol vehicles, and using physical force to obtain arrests through tasers, fists, and flashlights.[94]

Likewise, Border Patrol agents under the Trump administration have engaged in their own series of violent practices. For example, agents have used tear gas on migrants at the border multiple times, reaching a seven-year high in fiscal year 2018.[95] Even worse, the actions were explicitly condoned by the policies of the Trump administration.[96] Later into Trump's term, his administration enacted a harsh "zero-tolerance" policy against illegal immigration with the explicit goal of showing force at the border to deter illegal crossings.[97] The Trump administration

89. *See, e.g.*, INTERNATIONAL CRISIS GROUP, MEXICO'S SOUTHERN BORDER: SECURITY, VIOLENCE AND MIGRATION IN THE TRUMP ERA (2018), https://www.crisisgroup.org/latin-america-caribbean/mexico/66-mexicos-southern-border-security-violence-and-migration-trump-era.

90. *E.g.*, Jeremey W. Peters, *How Politics Took Over the Killing of Mollie Tibbetts*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/politics/mollie-tibbetts-republicans-immigration-trump.html.

91. Mitra Ebadolahi, *The Border Patrol Was Monstrous Under Obama. Imagine How Bad It Is Under Trump*, AM. CIVIL LIBERTIES UNION (May 23, 2018), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/border-patrol-was-monstrous-under-obama-imagine.

92. *Id.*

93. *Id.*; *see also* Letter from Pro Bar South Texas Pro Bono Asylum Representation Project, to Department of Homeland Security, Office of Inspector General (June 16, 2014); Letter from Pro Bar South Texas Pro Bono Asylum Representation Project, to Department of Homeland Security, Office of Inspector General (Aug. 27, 2014); Letter from Pro Bar South Texas Pro Bono Asylum Representation Project to Department of Homeland Security, Office of Inspector General (Aug. 28, 2014).

94. Ebadolahi, *supra* note 91.

95. John Haltiwanger, *Border Patrol Also Used Tear Gas and Pepper Spray at US-Mexico Border During Obama Administration*, BUSINESS INSIDER (Nov 27, 2018), https://www.businessinsider.com/border-patrol-also-used-tear-gas-pepper-spray-at-border-under-obama-2018-11.

96. Kim Kyung-Hoon, *Trump Administration Official Defends Use of Tear Gas at Mexico Border*, NBC NEWS (Dec. 11, 2018), https://www.nbcnews.com/news/us-news/trump-administration-official-defends-use-tear-gas-mexico-border-n946741.

97. *See* Nick Miroff and Josh Dawsey, *Before Trump's Purge at DHS, Top Officials Challenged Plan for Mass Family Arrests*, WASH. POST (May 13, 2019), https://www.washingtonpost.com/immigration/before-trumps-purge-at-dhs-top-officials-challenged-plan-for-mass-family-arrests/2019/05/13/d7cb91ce-75af-11e9-bd25-c989555e7766_story.html.

has even authorized the use of "lethal force" if necessary to control migration.[98] These accounts demonstrate similarly violent encounters that occurred during two different administrations from two sides of the political spectrum. That is, the problem of accountability for constitutional violations at the border is more complex than who maintains political power at the time the violation occurs.

The history of violations unconnected to a specific administration reveals that the problem of constitutional violations at the border is not limited to any political party. Rather, the framework for recovery itself must be critiqued to question why a pattern of violence continues to prevail even when control of the political branches changes. Consequently, the judiciary's role is critical to provide a check on the political branches' oversight—or blatant disregard—of constitutional violations of individual rights at the border. For those affected by these violations, the judiciary's role, as illustrated by the *Rodriguez-Hernandez* litigations, can mean the difference between "damages or nothing."[99]

Considering this background, it should come as no surprise that the victims of these violations rarely attempt to seek redress. Should the victims attempt to bring a *Bivens* action, the question of whether recovery is available is uncertain at best. While the circuit courts in *Alvarez* and *De La Paz* left open the question of whether a *Bivens* action would be available in cases of physical abuse in immigration actions, they declined to let the claims move forward due to concerns that immigration issues should be left to the discretion of the political branches.[100] *Alvarez* and *De La Paz* tell us that the victims of the violence described in these reports would be unlikely to recover under *Bivens*.[101] Ultimately, this uncertainty is what led to the *Rodriguez-Hernandez* split, pushing this important question to the Supreme Court.

### B. *A Constitutional Framework Hostile to Recovery*

The *Rodriguez-Hernandez* split demonstrates the constraints a judge faces when confronted with whether to allow a *Bivens* action to move forward. In both *Rodriguez* and *Hernandez*, the courts struggled through the cautionary principles of separation of powers, institutional competency, and administrative efficiency.[102] Proponents of severely limiting *Bivens* actions would argue that this caution is not

98. Tara Copp, *White House Approves Use of Force, Some Law Enforcement Roles for Border Troops*, MILITARY TIMES (Nov. 21, 2018), https://www.militarytimes.com/news/your-military/2018/11/21/white-house-approves-use-of-force-some-law-enforcement-roles-for-border-troops/.

99. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

100. Alvarez v. U.S. Immigration and Customs Enf't, 818 F.3d 1194, 1208 (11th Cir. 2016); De La Paz v. Coy, 786 F.3d 367, 379 (5th Cir. 2015).

101. *See De La Paz*, 786 F.3d at 380 ("In the final tally, the costs of judicially creating a new *Bivens* remedy [in the immigration context] significantly outweigh any largely conjectural benefits.").

102. *See* Rodriguez v. Swartz, 889 F.3d 719, 753 (9th Cir. 2018) (Smith, J., dissenting); *Hernandez II*, 885 F.3d at 813–15.

unwarranted.[103] *Bivens* is a judicially created remedy, and thus raises the question of whether unelected judges should create new causes of action when the political branches have not done so. Additionally, expanding *Bivens* could flood the courts with litigants, overwhelming the judicial system with a new host of plaintiffs. In the context of border violence alone, this could mean an expansive cast of new plaintiffs knocking at a court's door, rather than the limited group intended to recover using *Bivens* actions.

While these cautions are not unwarranted, they are overstated. These external bars to *Bivens* actions serve as harsh restrictions against the already limited means for recovery built into our constitutional framework. These external constraints can sometimes appropriately caution extending a judicially created remedy, but we must question whether this caution is given a place of primacy that is both undeserved and ultimately unjust. An essential function of the judiciary is to protect and correct constitutional wrongs that have not been redressed by the political branches.[104] This function is critical to affording proper protection and process to groups with no political bargaining power.[105]And despite fear of judicial overreach, this function is not new. To the contrary, as advocates for the Hernandez family argue, the Supreme Court has "repeatedly recognized common law damages claims against rogue federal officers who had acted unlawfully."[106] It is well-established that courts may account for cautionary principles when defining remedies.[107] An overreliance upon cautionary principles can do away with the limited recovery available to victims of constitutional violations. While a cautious approach may safeguard against judicial overreach, we have to question whether this is the just approach; and whether we want to support a framework that prioritizes cautionary principles over a shot at recovery for victims who need it most.

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103. *See, e.g.*, George D. Brown, *Of Activism and Erie: The Implication of Doctrine's Implication for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 644–54 (1984) (arguing that separation of powers principles and *Erie* doctrine strongly disfavors implied rights of actions); Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 93–94 (1981) (arguing that implied right of actions are acceptable only when explicitly intended by Congress); Richard Posner, *Economics, Politics, and Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 278–80 (1982) (arguing that an implied right of action is acceptable under public-interest but not interest-group theory of legislation).

104. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); 1 WILLIAM BLACKSTONE, COMMENTARIES *23 ("It is a settled and variable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.").

105. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73 (1980).

106. Brief for Petitioners at 10–11, Hernandez v. Mesa, No. 17-1678 (Aug. 2, 2019). In support of this assertion, the brief cites a number of early cases allowing recovery against federal officers for constitutional violations. *Id.* (discussing Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Maley v. Shattuck, 7 U.S. (3 Cranch) 458, 490, 492 (1806); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1 (1817)).

107. *See* Bell v. Hood, 327 U.S. 678, 684 (1986) ("[W]here 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."); Texas & N.O.R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 569–70 (1930) ("Many rights are enforced for which no statutory penalties are provided. . . . The right is created and the remedy exists.").

A parallel to a familiar context of violence can help illustrate this point. In her article *Police Violence and the Constitution*, Professor Allegra M. McLeod forcefully argues that the Supreme Court has played a role in perpetuating police violence by adhering to a flawed constitutional framework that gives "permission to police to engage in needless violence."[108] By adhering to what Professor McLeod calls "doctrinal complicity" and "the formalist abyss," she argues that the Supreme Court has validated violence in current policing practices in the United States by adhering to formalist doctrines over the lived experiences and voices of those who are subjected to violence.[109] Drawing from Justice Sotomayor's voice throughout a series of dissents, she posits that a more just constitutional framework is both necessary and possible, but it requires moving toward a recovery discourse that is "informed more explicitly by values of equality, dignity, justice, and fairness."[110]

The heart of Professor McLeod's argument is that by adhering to formalist principles limiting recovery, the Supreme Court ignores the unjust experiences of vulnerable individuals who are directly impacted by the violations. Instead of focusing on the purpose of a body of law meant to deter wrongdoing and protect victims of police misconduct, the Court focuses on technical analysis rather than lived experiences, practical understanding of misconduct, and a fair application of justice.[111] The effect of this focus results in a "rule-bound analysis" instead of a "fact-specific, context-sensitive analysis."[112] She argues that the analysis for recovery must not be bound by limited, formalist doctrines specifying cautionary principles, but instead focus on what justice really requires in each specific context.[113]

Professor McLeod's argument can guide the analysis for plaintiffs seeking redress for constitutional violations at the border. Here too, through limitless deference and adherence to a procedural framework which inevitably results in the plaintiff's loss, the judiciary can—and indeed has—perpetuated violence. Cloaking opinions in "empty labels of national security, foreign affairs, and extraterritoriality,"[114] the judiciary justifies its opinions by stating that it is adhering to fundamental constitutional principles. But by prioritizing these principles, the judiciary overlooks and excludes vulnerable voices with no political power who are victims of violence at the border.

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108. Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 159 (2016).

109. McLeod, *supra* note 108, at 161, 169. In explaining "doctrinal complicity," Professor McLeod describes a series of criminal procedure decisions from the Supreme Court, arguing that the Court has "normalized and constitutionalized a set of practices that consign the most vulnerable citizens, especially those in low-income communities of color, to a condition of virtual statelessness. . . ." *Id.* at 169. Professor McLeod explains the "formalist abyss" as an approach that "obscures the actual meaning and effect" of the law by ignoring marginalized voices and instead focusing on "highly technical analysis of existing doctrinal terms and exceptions." *Id.* at 169–70.

110. McLeod, *supra* note 108, at 195.

111. *See* McLeod, *supra* note 108, at 169–70.

112. *See* McLeod, *supra* note 108, at 170–73, 194.

113. *See* McLeod, *supra* note 108, at 194.

114. *Hernandez II*, 885 F.3d at 825 (Prado, C.J., dissenting).

This overly-cautious reliance on separation of powers, institutional competence, and administrative efficiency leaves us with a framework that is fundamentally flawed in its priorities. The *Bivens* doctrine loses its meaning if formalist principles outweigh even the opportunity for a victim to recover. The practical result of over-relying on these principles is that the individuals most likely to be subjected to constitutional violations are silenced and excluded.

On a moral and ethical basis, we must be troubled by a framework that results in this exclusion. But even if an ethical desire is not persuasive, as a practical matter, unlimited deference to federal agents in the name of "national security" can have wider consequences that affect us all, not just traditionally excluded voices. As the Ninth Circuit noted in its *Rodriguez* opinion, Jose's citizenship or ties to the United States when he was shot across the border are "similarly irrelevant" to the analysis of his claim.[115] For all the agent knew, "[he] was an American citizen with family and activities on both sides of the border."[116] Thus, beyond the limited facts of the *Rodriguez* or *Hernandez* litigations, the deference given to federal agents should alarm us because its impacts have the potential to cause harm, regardless of one's nationality or whether the injury occurs on United States soil.[117]

As the Ninth Circuit noted, "this case involves the unjustifiable and intentional killing of someone who was simply walking down a street in a Mexico."[118] And while the opinion limits its basis for recovery to the specific facts of *Rodriguez*, the *Rodriguez-Hernandez* litigations raise a broader, more disturbing question about unlimited "police super powers"[119] given to federal agents at the border and whether this deference should be afforded to the executive at all. Thus, the *Rodriguez-Hernandez* litigations illustrate the need for a radical reorientation in the *Bivens* special factors analysis to match the severity of the problems that *Bivens* actions seek to redress. The expansive national security exception is growing out of control, and requires a fact-specific standard that gives plaintiffs the opportunity to have their *Bivens* actions fairly considered instead of automatically halted. Specifically, for *Bivens* actions against border agents, this reorientation requires a standard that allows for an intensive inquiry into the particular circumstances of the alleged violation.

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115. *Rodriguez*, 889 F.3d at 733. Thus, the Ninth Circuit found that Jose's situation did not present a "new context" under step one of the *Bivens* analysis.

116. *Rodriguez*, 889 F.3d at 733.

117. The question of whether the constitution's protections would apply to a non-citizen plaintiff extraterritorially is unsettled. *See Hernandez II*, 885 F.3d at 817. The Fifth and the Ninth Circuits reached opposite conclusions about the relevance of this question to allowing the *Bivens* action forward. The Fifth Circuit concluded that non-citizen status of a plaintiff alleging injury not on United States soil presented a "new context" that could be fatal to a *Bivens* action. *Id.* By contrast, the Ninth Circuit concluded that citizenship status was "similarly irrelevant" here, and that the focus should be on whether the officer acted unconstitutionally in using deadly force without justification. *Rodriguez*, 889 F.3d at 733.

118. *Rodriguez*, 889 F.3d at 733.

119. *See* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO L.J. 1419, 1452–57 (2016) (discussing various forms of "police super powers").

Unlike other special factors which may counsel hesitation in allowing a *Bivens* action, courts appear to be less likely to evaluate national security concerns fully because of the sensitive information potentially raised with national security issues.[120] This reluctance to inquire into the national security special factor indicates that Border Patrol agents are more likely to claim the exception. Further, because of the traditional deference given to the political branches to control national security policy, the potential danger for national security to become a post-hoc rationale for constitutional violations is much greater than for other special factors. Accordingly, the following Part argues that a defendant claiming the national security special factor requires the court to conduct a modified "reasonable articulable suspicion" analysis as applied in the search and seizure context.

## IV. ARTICULABLE SUSPICION FOR *BIVENS* NATIONAL SECURITY ACTIONS

Under the current *Bivens* analysis clarified in *Abbasi*, a court must first consider whether a new context is presented by the *Bivens* action.[121] Second, the court must consider whether "special factors counsel in favor of hesitation" in extending the action.[122] The special factors analysis centers around "'who should decide' whether to provide for a damages remedy, Congress or the courts?"[123] Unsurprisingly, as we have seen, when the defendant argues that national security concerns are implicated in a *Bivens* suit, the courts tend to defer to the judgment of the political branches. What factual inquiry is required when the national security exception is raised remains unsettled. To what extent it can be said that courts have engaged in factual inquiry, the result appears to be the same: relief is denied when the agent claims that national security is at issue.[124]

This Part argues that a modified articulable suspicion standard should be adopted as a preliminary analysis in *Bivens* actions where national security is claimed as a special factor counseling against allowing the *Bivens* suit. First, this Part briefly explains the articulable suspicion standard in Fourth Amendment doctrine. Second, it explains how the articulable suspicion standard should be modified and applied in *Bivens* national security suits. Third, this Part argues why the articulable suspicion standard should govern the national security special factor. Finally, it illustrates one example of how this standard should operate by applying it to the *Rodriguez-Hernandez* litigations.

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120. *E.g.*, *Hernandez II*, 885 F.3d at 818–19. ("The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.") (quoting Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012)).

121. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

122. *Id.* at 1857–58.

123. *Id.* at 1857 (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

124. *See Hernandez II*, 885 F.3d at 818–19. ("The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.") (quoting *Doe*, 683 F.3d at 394); Vladeck, *supra*, note 37 at 259–60 (discussing the Supreme Court's "unbroken pattern" of limiting *Bivens* actions after 9/11).

### A. *Reasonable Articulable Suspicion*

The reasonable articulable suspicion standard originates in Fourth Amendment doctrine. The Fourth Amendment protects against unreasonable searches and seizures, ensuring the protection of personal security both on the streets and in the privacy of one's home.[125] The rights bestowed by the Fourth Amendment are not unlimited, but are subject to exceptions to balance the rights of the individual subjected to a search or seizure and the interest of the public at large.[126] A well-established category of Fourth Amendment exceptions has been created to address policy concerns about the ability of officers to make split-second decisions crucial to the safety of themselves or others.[127] Two illustrative examples of these exceptions include (1) searches of individuals on the street when the officer has reason to believe that the individual is armed or dangerous (known as stop-and-frisks or *Terry* stops)[128] and (2) protective sweeps of an individual's home or car during an arrest.[129]

Instead of the stricter "probable cause" standard typically needed to justify an officer's search or seizure, *Terry* stops and protective sweeps are subject to the lower standard of "specific and articulable facts" indicating that safety is at issue, whether for the responding officer or for other people present at the time of the search or seizure.[130] In *Terry* stops, the officer must put forth "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the suspicion that the suspect is dangerous or has access to dangerous weapons that could harm the officer or others.[131] In assessing reasonableness, courts should not rely upon "inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[132] The *Terry* standard has been applied to protective sweeps of cars for weapons[133] and protective sweeps of homes for other dangerous assailants that pose immediate danger to the responding officers or others.[134] The articulable suspicion standard has been widely applied to a variety of Fourth Amendment searches, and as the standard mandates, takes account of the specific facts facing the officer at the time of the search.[135] Put simply, *Terry* stop

125. *See* U.S. CONST. amend. IV; *e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2060–61 (2016).

126. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 331 (1990); Michigan v. Long, 463 U.S. 1032, 1046 (1983); Terry v. Ohio, 392 U.S. 1, 27 (1968).

127. *See, e.g.*, *Buie*, 494 U.S. at 329–31.

128. *Terry*, 392 U.S. at 24.

129. *Buie*, 494 U.S. at 333–34.

130. *E.g.*, *Terry*, 393 U.S. at 21; *Buie*, 494 U.S. at 333–34.

131. *Terry*, 393 U.S. at 21.

132. *Id.* at 27.

133. *E.g.*, *Long*, 463 U.S. at 1049–50.

134. *E.g.*, *Buie*, 494 U.S. at 333–34.

135. *E.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case . . . .").

and protective sweep jurisprudence have one underlying theme: the need to balance the safety of the officers and the public with the rights of the individual subjected to invasion.

### B. *Articulable Suspicion as a Preliminary Analysis in Bivens National Security Cases*

Applying the articulable suspicion standard to *Bivens* national security cases would require a two-part inquiry modified to meet the needs of national security cases. In practice, the analysis would function as follows: first, the initial step of the *Bivens* analysis would remain unchanged—that is, a court should first inquire whether the *Bivens* claim presents a "new context" that is "meaningfully different" than previous *Bivens* actions.[136] If the action passes the first step of the *Bivens* analysis, the court should then inquire what special factors were facing the federal agent at the time of the alleged constitutional violation. If the federal agent claims that a national security situation or national security policy should counsel hesitation in allowing the action to move forward, the agent will then have the burden of producing facts that meet the articulable suspicion standard for (1) the national security situation or policy, and (2) the circumstances connecting the individual to the national security situation.

To meet the articulable suspicion standard for factor (1), the federal agent must be able to demonstrate that a legitimate national security situation or policy interest would be implicated by allowing the action to move forward. To accomplish this, the federal agent should articulate specific facts which, taken together with rational inferences, indicate that (a) a national security threat was facing the agent at the time of the alleged constitutional violation; or (b) national security policy would be hindered by allowing the *Bivens* action to move forward. For justification (a), such articulated facts could include: a national security declaration from the political branches before the alleged violation, facts indicating the imminent threat of violence, or reliable data showing that the alleged violation occurred in a location prone to violence or safety concerns or otherwise flagged as an area where officers would be on heightened alert. For justification (b), the federal agent would be required to articulate what national security policy would be hindered by the suit and an explanation justifying the assertion. Such an inquiry could be conducted in closed proceedings to protect the interests of maintaining secrecy in sensitive national security cases.[137]

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136. Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017).

137. For example, Alexandar Steven Zbrozek argues that *Bivens* cases raising sensitive national security concerns should be heard by a separate tribunal governed by the Military Commission Rules of Evidence, which provide for *in camera* review and protective orders for evidence that raises national security concerns. *Moving Beyond Bivens in National Security Cases*, 47 COLUM. J.L. & SOC. PROBS. 485, 517 (2014). *See also* MIL. COMM'N R. EVID. 505(a) (stating that evidence jeopardizing national security shall be protected from disclosure but balance the interest of the accused in presenting relevant evidence); MIL. COMM'N R. EVID. 505(i) (allowing for in camera review of classified evidence in military tribunals).

To meet factor (2), the federal agent should articulate specific facts which, taken together with rational inferences, demonstrate that the individual (a) was a past or present participant, contributor, or violator of the purported national security situation, or (b) acted toward the federal agent in a way which rationally indicated that the safety of the officers or others was threatened. Facts which could potentially weigh in favor of justifying (a) may include: knowledge from credible sources that an individual was a participant in a terrorist organization or repeated attempts to threaten, intimidate, or harm federal agents. Facts which could potentially weigh in favor of justifying (b) could include: forceful or threatening movements indicating violence toward federal agents or facts which indicate the presence of weapons and an intent to use weapons to harm federal agents.[138]

To sum up, when a federal agent claims national security as a special factor counseling hesitation, this should trigger a preliminary analysis applying the articulable suspicion standard to the facts facing the agent at the time of the alleged constitutional violation. The burden will be placed on the agent to produce facts meeting the articulable suspicion standard for both the alleged national security situation and the circumstances connecting the individual to the national security situation. If she can meet the articulable suspicion standard for the facts produced, then, although not dispositive, national security may be considered by the court as a special factor counseling hesitation in allowing the action to move forward. If the articulable suspicion is not met, then the court may continue to evaluate the other special factors which may counsel hesitation in allowing the action to move forward.

The fact-specific nature of this inquiry cannot be overstated, and the analysis may develop to include other potential facts that can rationally be included to meet the articulable suspicion standard. The heart of the analysis should be to inquire whether the federal agent acted with bona fide intention and sound judgment when considering all the facts facing her at the moment of the alleged violation. Recklessness, racial bias, or unfounded hunches as the basis for a national security claim are not enough to pass the articulable suspicion standard in the *Bivens* national security special factors analysis.[139]

### C. *Why Reasonable Articulable Suspicion Should Guide the Analysis*

Articulable suspicion has never been applied to the national security special factor in *Bivens*. Why national security is treated differently than the police encounters during *Terry* stops or protective sweeps may seem obvious: the risk of harm may be higher, specialized knowledge may be needed to address the national

138. These factors would be consistent with the purpose of the articulable suspicion standard in focusing on safety and justifying the overuse of police power to only the extent necessary. *See* Terry v. Ohio, 392 U.S. 1, 13–15 (1968).

139. For a detailed discussion of racial bias and articulable suspicion in *Terry* stops, *see* Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994).

security situation, and less information might be available to officers in sensitive national security contexts.[140] Further, *Bivens* actions are filled with separation of powers concerns that are not present in everyday police-citizen encounters, making the judiciary more vulnerable to criticism about encroaching upon a function of the political branches than might be typical of a *Terry* stop. Despite these differences, as this Section explores, articulable suspicion is the right standard. Articulable suspicion should guide the analysis in *Bivens* national security actions for three reasons: (1) it balances competing interests; (2) it allows for a fact-specific, but more rigorous inquiry than currently available; and (3) it can contribute to the efficiency of *Bivens* actions.

First, articulable suspicion strikes a balance between safety interests and preventing unlimited deference to officials that oversteps the bounds of constitutional authority.[141] On its face, the competing interests in the *Bivens* special factors analysis are different from the competing interests balanced through *Terry* stops and protective sweeps. In *Bivens* national security cases, separation of powers concerns seem to dominate the analysis.[142] By contrast, *Terry* stops and protective sweeps appear to focus on balancing the privacy interests of citizens with the safety interests of officers and the public.[143]

While separation of powers principles serve as a dominant constraint in whether to allow a *Bivens* action to move forward, the two competing interests raised in protective sweeps and *Terry* stops—safety and individual rights—are precisely the interests raised in the national security special factor under *Bivens*. In *Bivens* national security cases, the national security special factor is meant to ensure that the threat of a private action does not chill federal agents from making "split-second decisions" that could have serious implications for the national security interests (i.e., national safety) of the United States.[144] Simultaneously, the judiciary has a duty to individual victims to remedy constitutional violations.[145] This duty ensures that national security does not become an unchecked rationalization which unjustly prevents recovery.

Thus, the *Bivens* national security special factor seeks to balance precisely the same competing interests of *Terry* stops and protective sweeps—individual rights and a compelling safety interest. Accordingly, applying the lower standard of

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140. *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–84 (2009) (surveying the rationale of judicial deference to executive officials in national security cases).

141. *See Terry*, 393 U.S. at 10–12 (discussing the delicate balance of interests between public safety and the constitutional protections of the Fourth Amendment).

142. Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions*, 45 IND. L. REV. 719, 731–41 (2012) (discussing the evolution of the special factors analysis throughout the circuits).

143. *See Terry*, 393 U.S. at 13–15 (discussing the interests that must be balanced when considering *Terry* stops).

144. *Hernandez II*, 885 F.3d at 819 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)).

145. *See*, *e.g.*, Davis, 442 U.S. at 242 ("[t]he class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing protection of their justiciable constitutional rights.").

reasonable articulable suspicion in *Terry* stop and protective sweep cases to national security *Bivens* actions, can help strike the balance of ensuring that national security does not become a "talisman used to ward off inconvenient claims"[146] with the need for federal agents to make difficult decisions that protect the national interest.

Second, the articulable suspicion standard provides some guidance for the lower courts while still allowing for the fact-specific inquiry that is necessary for sensitive security decisions that must often be made in a matter of seconds. Articulable suspicion is a low standard—lower than the already low bar of probable cause.[147] Articulable suspicion is designed so that officers may rely on their experience and inferences when limited information faces them at the time.[148] In the analysis for *Terry* stops, the articulable suspicion analysis focuses on the mindset of the individual officer because of the fact-specific, unpredictable nature of encounters between police and citizens on the street.[149] The very nature of this test requires an intensive examination of the facts facing the government agent at the time of the alleged violation.[150] Accordingly, the articulable suspicion standard is designed to be flexible to allow officers to respond to a variety of unpredictable circumstances.

For the *Bivens* national security special factor, this flexible standard is necessary. The constantly changing global and domestic national security scene requires a flexibility, largely because some national security situations will require more deference to the political branches than others. The articulable suspicion standard provides the flexibility to assess the challenges facing the executive while still providing a minimum standard to serve as a check against its power.

Despite the articulable suspicion standard providing a low minimum standard, this standard can still pressure the officer not to make reckless, thoughtless, or malicious split-second decisions, knowing that she must be able to support her decisions with specific facts in subsequent criminal or civil proceedings.[151] And in *Bivens* national security actions, where there is seemingly no standard when national security is claimed, even the low bar of articulable suspicion can provide enough threat of accountability to help prevent constitutional violations.

Third, requiring federal agents to adhere to the articulable suspicion standard can contribute to the efficiency of *Bivens* actions. If federal actors are required to articulate specific facts which guided their decision to act, much of the heavy factual inquiry that would typically take place at the merits stage of the claim will be

146. *Hernandez II*, 885 F.3d at 819 (citing *Abbasi*, 137 S. Ct. at 1862); Rodriguez v. Swartz, 899 F.3d 719, 745 (9th Cir. 2018) (citing *Abbasi*, 137 S. Ct. at 1862).

147. United States v. Arvizu, 534 U.S. 266, 266–67 (2002).

148. *See id.*; United States v. Cortez, 449 U.S. 411, 417–18 (1981).

149. *See Cortez*, 449 U.S. at 413–14.

150. Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

151. For example, an unconstitutional *Terry* stop results in exclusion of the evidence obtained from the stop. The primary purpose for this remedy is to deter police misconduct. *See, e.g.*, United States v. Leon, 468 U.S. 897, 909, 921, n.22 (1984). The case for deterrence here is even stronger than in the *Terry* context, as the officer is individually liable in *Bivens* actions.

fleshed out in the preliminary stages. This preliminary inquiry should not replace a constitutional analysis on the merits. However, a factual inquiry in the early stages of deciding whether a *Bivens* action can move forward could help sharpen any potential defenses from the federal agents or, in some cases, help a case settle before it reaches the merits stage. For example, if an officer fails to meet the articulable suspicion standard for an asserted national security situation, she may be more inclined to settle before trial.[152]

Applying this standard would not obviate the separation of powers concerns underlying *Bivens* actions. On the contrary, it would help courts determine if they were encroaching upon an issue properly left to the political branches. That is, the articulable suspicion standard can help separate legitimate national security concerns from pretextual, post-hoc justifications for constitutional violations. If the officers cannot pass the articulable suspicion standard by articulating the national security concerns facing them at the time of the alleged violation, it is less likely that the judiciary is encroaching on the political branches' national security decisions by allowing the *Bivens* action.

Thus, articulable suspicion provides a persuasive standard to guide *Bivens* national security claims. Its low standard strikes a balance between protecting against legitimate national security threats and protecting the constitutional rights of individuals. Articulable suspicion likewise allows enough flexibility for the court to conduct a fact-specific analysis of the totality of the circumstances facing the federal agent at the time of the alleged violation, yet still forces the agent to meet the burden of producing the facts which justify the constitutional intrusion. Finally, articulable suspicion promotes efficiency in *Bivens* actions and sharpens the factual record at the preliminary stages of the action.

### D. *Application to the* Rodriguez-Hernandez *Litigations*

Applying this standard to the *Rodriguez-Hernandez* litigations, there is no doubt that the national security rationale put forth by the Border Patrol agents would not meet the articulable suspicion standard. Applying the first step of the articulable suspicion analysis, the agents in both *Rodriguez* and *Hernandez* would be unlikely to present specific facts or reasonable inferences which could support finding a national security threat at the location where the victims were shot. In *Rodriguez*, the shooting occurred on a residential street, not a location well known for illegal crossings or violence toward Border Patrol agents.[153] Similarly, in *Hernandez*, the victim was playing in the division between El Paso, Texas and Juarez, Mexico—a

152. *See* Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html (discussing the severe financial penalties that parties can face by predicting a trial outcome incorrectly). Here, applying the reasonable articulable suspicion standard in the early stages of a *Bivens* action can help parties better predict the chances of success at trial, and thus could serve to potentially settle the case.

153. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1028–29 (D. Ariz. 2015), aff'd 899 F.3d 719 (9th Cir. 2018).

highly industrialized area and a favorite play place for the children of Juarez.[154] Simply put, no rational inferences can be made that indicate a residential street or a favorite play spot of children presents a national security threat.[155]

Likewise, under the first prong of the articulable suspicion standard, the agents would be unlikely to present specific facts indicating that a sensitive national security policy is implicated. In *Hernandez*, Agent Mesa asserted that a national security situation existed because a group of "smugglers" was attempting to cross the border.[156] To bolster the claim, Agent Mesa put forth that the Department of Justice conducted an investigation into the shooting of Sergio Hernandez, concluding that the victim was shot while he was throwing rocks at the agent as he was attempting to detain one of the smugglers.[157] The Justice Department's investigation concluded that Agent Mesa's use of force was a reasonable act of self-defense when faced with being targeted by rock-throwing.[158] In support of this assertion, the brief includes a footnote stating that: "It is not uncommon for human traffickers to use rock throwing to hamper law enforcement efforts to apprehend alien smugglers in the border region."[159] Even accepting this characterization as true, rock-throwing by teenagers playing hide and seek near the border hardly rises to the level of a national security policy. Thus, this assertion would be unlikely to meet even the low standard of articulable suspicion.

The border agents could potentially point to recent debates about a "national emergency" at the southern border to indicate a national security crisis was implicated.[160] Potentially, under this analysis, a national emergency declaration could be enough to justify invoking the national security special factor.[161] But here, the shooting occurred in 2010, a time when no national security emergency was

154. Kathy Velkov, *How the Rio Grande Came to Separate the U.S. and Mexico*, THE ARCHITECT'S NEWSPAPER (July 31, 2018), https://archpaper.com/2018/07/politics-etched-concrete-el-paso-ciudad-juarez-rio-grande-border/.

155. In operation, this standard requires that the officers be given the opportunity to contest the facts which are put forth in the complaint. In both *Rodriguez* and *Hernandez*, the court took the facts in the complaint to be true, but under the proposed articulable suspicion standard, the agent may rebut the facts put forth in the complaint as it relates to her national security defense. For example, here, the border agent may rebut the allegation that the location of the shooting was a residential street.

156. Brief on the Merits for Respondent at 2, Hernandez v. Mesa, No. 17-1678 (Sept. 23, 2019).

157. *Id.*

158. *Dep't of Justice, Federal Officials Close Investigation into Death of Sergio Hernandez*, U.S. DEP'T OF JUST. (2012) https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca.

159. Brief on the Merits for Respondent at 2 n.2, Hernandez v. Mesa, No. 17-1678 (Sept. 23, 2019).

160. *See, e.g.*, 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.htm.

161. However, a national emergency declaration would likely require being formally implemented, rather than a mere assertion of the crisis to justify meeting this standard. For example, Trump's national emergency declaration has faced numerous political and legal challenges. *See*, *e.g.*, El Paso City v. Trump, Case 3:19-cv-00066-DB, Doc 129, (W.D. Tex. Oct. 11, 2019); *Jacob Pramuk, Senate Votes Again to Block Trump's National Emergency Over the Border But Fails to Get Veto-Proof Majority*, CNBC (Sept. 26, 2019) https://www.cnbc.com/2019/09/25/senate-votes-to-block-trump-national-emergency-over-border-wall.html.

declared and border apprehensions were in decline.[162] Thus, on these facts, a claim to a national security emergency declaration would not be specific enough to meet the articulable suspicion standard for the first prong of the analysis.

Even if agents could pass the first step of the analysis, the national security rationale would fail to meet the second prong of the articulable suspicion analysis, which requires the individuals to be connected to the national security situation. Similar to the analysis under the first prong, facts or rational inferences connecting the victims of the shootings to a national security crisis do not exist in either *Rodriguez* or *Hernandez*. In *Rodriguez*, the victim was walking peacefully down a street when he was shot—in the back—by Agent Swartz.[163] The victim was not fleeing a crime, did not threaten or harass the agents, or direct any attention toward the agents at all.[164] Similarly, in *Hernandez*, the victim was playing hide and seek in the culvert that separated the U.S.-Mexico border—reportedly a common pastime of the youth in the area.[165] Even accepting that Hernandez was throwing rocks, the assertion that this alone connects Hernandez to the level of a national security threat simply would not withstand the articulable suspicion standard, let alone our basic notions of common sense.[166]

In summary, applying the articulable suspicion standard to the *Rodriguez-Hernandez* litigations would reveal that the border agents could not meet the low bar because they had no legitimate national security rationale for their use of force across the border. Rather than allowing national security to be a post-hoc rationale for reckless violence at the border, applying the articulable suspicion standard here would allow the *Bivens* actions to be considered on the merits. Applying this

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162. Lesly Sapp, *Apprehension by the U.S. Border Patrol: 2005–2010*, DEP'T OF HOMELAND SEC. (July 2011), https://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf; Linda Qui, *Border Crossing Have Been Declining for Years, Despite Claims of a Crisis of Illegal Immigration*, N.Y. TIMES (June 20, 2018).

163. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1028–29 (D. Ariz. 2015), aff'd 899 F.3d 719 (9th Cir. 2018).

164. *Id.*

165. *Hernandez II*, 885 F.3d at 814–15.

166. Agent Mesa originally asserted that rock throwing is a common form of assault on border agents, citing statistics recording all assaults on border agents. Brief on the Merits for Respondent at 2, n.2, Hernandez v. Mesa, No. 17-1678 (Sept. 23, 2019). The statistics do not specify what number of these assaults are attributed to rock throwing. The use of deadly force in response to rock throwing by migrants at the border has been widely criticized – both by social justice groups and the Mexican government. Michael Martinez & Jaquelie Hurtado, *Border Patrol Agent Shoots, Kills Migrant who Threw Rocks*, CNN (Feb. 19, 2014), https://www.cnn.com/2014/02/19/us/california-border-rock-throwing-death/index.html. Additionally, the first time the Hernandez case went before the Supreme Court, Agent Mesa asserted, without citing authority, that Hernandez had a criminal record for helping smuggle aliens across the border. Brief on the Merits for Respondent at 3, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 17-1678). This assertion is notably left out of the most recent brief to the Supreme Court in September 2019. Brief on the Merits for Respondent, Hernandez v. Mesa, No. 17-1678 (Sept. 23, 2019). If Hernandez did have such a record, this could potentially weigh in favor of preventing the *Bivens* action from moving forward under factor (2) of the proposed test because it could show how Hernandez was connected to a national security situation. However, the agent would first need to show that a national security situation existed under part (1) of the analysis and demonstrate that she knew of Hernandez's connection to the national security threat.

standard does not account for a full analysis on the merits of the claim, but rather, it allows the plaintiffs' action to move forward and have a fair chance at being heard.

## CONCLUSION

The deference given to federal agents in the name of national security demands our attention. *Bivens* remedies were created to uphold the fundamental notion that where there is a right, there must also be a remedy. As Justice Harlan warned in *Bivens*, for many *Bivens* plaintiffs, it is "damages or nothing."[167] And while the need to protect the right to recovery is an important consideration, this problem also demands our attention because there must be an appropriate balance between protecting constitutional rights and legitimately protecting the safety of the nation.

As we have seen, the current special factors analysis in *Bivens* national security cases is failing. National security has become a catch-all excuse for reckless decisions against unsuspecting victims instead of striking the proper balance between allowing federal agents the freedom to conduct their duties diligently, and sufficiently deterring constitutional violations. The articulable suspicion standard strikes this necessary balance by allowing for a fact-specific inquiry that gives federal agents both flexibility in their duties and the pressure of accountability for their actions. This standard is needed, both to protect the opportunity for plaintiffs to have their claims heard and also to protect the values of fairness, accountability, and integrity on which our justice system desperately depends.

167. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).