The Disingenuous Demise and Death of *Bivens*

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If you read only Justice Samuel Alito's majority opinion or Justice Clarence Thomas's concurrence in the Supreme Court's February 2020 ruling in *Hernández v. Mesa* ("*Hernández II*"), you might think that the Court's 1971 decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* was, among other things, a bolt from the blue; an indefensible judicial "usurpation of the legislative power"; and "a relic of the heady days in which [the Supreme] Court assumed common-law powers to create causes of action."[1]

In *Bivens*, of course, the Supreme Court recognized at least some circumstances in which federal courts can and should fashion a judge-made damages remedy for constitutional violations by federal officers.[2] And even though a claim under *Bivens* is often the *only* possible remedy today for those whose constitutional rights are violated by federal officers, it has become an article of faith among conservative jurists and commentators that *Bivens* was wrongly decided.[3] Against that backdrop, *Hernández II*—in which the Court refused to recognize a *Bivens* remedy for the parents of a 15-year-old Mexican national who was shot and killed (allegedly without provocation) while standing in Mexico by a U.S. Border Patrol agent standing

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[1] Hernández v. Mesa, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring) (internal quotations and citations omitted). I use "*Hernández II*" throughout this essay to distinguish the 2020 ruling from the Court's earlier decision in the same case with the same caption, Hernández v. Mesa, 137 S. Ct. 2003 (2017) (per curiam) ("Hernández I").

[2] 403 U.S. 388 (1971).

[3] See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (Scalia, J., concurring).

on U.S. soil—appears to be an easy case. Even though the Court assumed, as it had to, that the shooting was unconstitutional, it nevertheless held that the parents were not entitled to any remedy under U.S. law.

The problem with *Hernández II* is that, like the conservative case against *Bivens* more generally, it rests on two distinct analytical moves that simply don't withstand meaningful scrutiny. First, for the proposition that *Bivens* is an arrogation of legislative power, both the majority and concurring opinions rest on a stunningly superficial reading of the Supreme Court's landmark 1938 ruling in *Erie R.R. Co. v. Tompkins*—which disclaimed the power of the federal courts to fashion *general* common law, but which in no way repudiated the federal courts' lawmaking authority (and responsibility) in *specific* classes of cases.[4] Indeed, the Supreme Court today often fashions and applies federal common law to satisfy unique and uniquely important federal interests, *including* in damages suits against federal officers; the question in *Hernández II* should have been whether judicial recognition of *Bivens* remedies is similarly justified.

Second, even if *Bivens* remedies can't be justified solely under what Judge Henry Friendly famously called the "new federal common law,"[5] the *Hernández II* opinions—and conservative attacks on *Bivens*—almost entirely fail to grapple with the availability and relevance of constitutional remedies against federal officers under *state* tort law. After all, in *Bivens* itself, the federal government's position was not that the plaintiff should have no remedy; it was that he had an adequate remedy for the Fourth Amendment violation under New York trespass law—a remedy that traced all the way back to the Founding.[6] But state tort law, which routinely provided a means of redress against federal officers well into the 20th century, is no longer an option in most cases today because of the Westfall Act—a 1988 statute that has been interpreted to preempt *all* state tort claims against federal officers acting within the scope of their employment.[7]

[4] 304 U.S. 64 (1938).

[5] Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964).

[6] See Brief for the Respondents at 34–40, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 301), 1970 WL 116900.

[7] 28 U.S.C. § 2679(b); see Carlos M. Vázquez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question, 161 U. Pa. L. Rev. 509 (2013).

In a case like *Hernández II*, then, it's *Bivens* or nothing. By taking away state remedies in cases arising out of federal constitutional violations in which no alternatives are available, the Westfall Act raises an undeniably serious Fifth Amendment due process question. But even though that precise question was presented to the justices in *Hernández II*, they ignored it twice—first by refusing to grant certiorari on the issue and then by refusing to grapple with the implications for the Westfall Act of their *Bivens* analysis. Reasonable minds may still conclude that, these omissions notwithstanding, the Court reached the right result in *Hernández II*. The purpose of this essay is to explain that, if nothing else, it certainly shouldn't have been that easy.

I. *Hernández II*: The Factual Background

Hernández II arose out of an allegedly unprovoked cross-border shooting[8]—in which, while on duty along the Texas-Mexico border, U.S. Border Patrol Agent Jesus Mesa Jr. shot and killed Sergio Adrián Hernández Güereca while Hernández was standing on Mexican soil. Hernández's parents brought a damages action against Mesa in federal district court, alleging that Mesa's conduct violated both the Fourth Amendment and the Due Process Clause of the Fifth Amendment.

In *Hernández I*, a three-judge panel of the Fifth Circuit held that, as a noncitizen standing on foreign soil, Hernández was not protected by the Fourth Amendment. But it held that the shooting *did* violate the Due Process Clause of the Fifth Amendment, that a *Bivens* remedy was available for the parents' Fifth Amendment claim, and that Agent Mesa was not entitled to qualified immunity.[9] On rehearing en banc, the Fifth Circuit held—unanimously—that Mesa *was* entitled to qualified immunity because it was not "clearly established" that Hernández was protected by the Constitution at all, sidestepping the more contested *Bivens* and merits questions.[10]

In June 2017, the Supreme Court vacated the Fifth Circuit's ruling. Among other things, the per curiam opinion held that Mesa was not

[8] Even though the case reached the Supreme Court on appeal of the grant of a motion to dismiss (in a posture in which the well-pleaded allegations in the complaint are supposed to be taken as true), Justice Alito's majority opinion instead treated the facts as disputed. See Hernández II, 140 S. Ct. at 740 & n.1.

[9] Hernández v. United States, 757 F.3d 249 (5th Cir. 2014).

[10] Hernández v. United States, 785 F.3d 117 (5th Cir. 2015) (en banc).

entitled to qualified immunity on the theory adopted by the Fifth Circuit because Mesa did not know, at the time he pulled the trigger, that Hernández was a noncitizen with no connections to the United States.[11] The justices returned the case to the Fifth Circuit for reconsideration in light of its intervening decision in *Ziglar v. Abbasi*—which had further refined (and narrowed) the proper framework in *Bivens* cases.[12]

On remand in *Hernández II*, the en banc Fifth Circuit held, by a 12-2 vote, that no remedy was available under *Bivens*. Writing for the majority, Judge Edith Jones first emphasized that the parents' claims arose in a "new context," in which recognition of *Bivens* remedies is "disfavored." She then identified three "special factors"—"national security," "foreign relations," and "extraterritoriality"—that all militated against recognition of a judge-made damages remedy.[13]

Given the terms of the remand in *Hernández I*, matters might have ended there. But while the petition for certiorari in *Hernández II* was pending, the Ninth Circuit, in an eerily similar cross-border shooting case, reached the opposite conclusion—holding that a *Bivens* remedy *was* available for an allegedly unconstitutional cross-border shooting by a Customs and Border Protection officer.[14] After calling for the views of the solicitor general (who recommended granting certiorari in *Hernández II*), the Court granted certiorari in May 2019, and heard argument on November 12.

On February 25, 2020, the Court sided with the Fifth Circuit. Writing for a 5-4 majority, Justice Alito agreed that the claims in *Hernández II* arose in a "new context," and largely echoed the Fifth Circuit's special-factors analysis—holding that recognition of a *Bivens* remedy in such a case might impinge on foreign relations and undermine border security.[15] Concurring, Justice Thomas, joined by Justice Neil Gorsuch, would have "abandoned [*Bivens*] altogether."[16] Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer,

[11] Hernández I, 137 S. Ct. 2003. Three justices dissented. Justices Breyer and Ginsburg would have resolved the case by holding that the Fourth Amendment applies—and remanding for further proceedings. Justice Thomas would have held that no *Bivens* remedy was available.

[12] 137 S. Ct. 1843 (2017).

[13] Hernández v. Mesa, 885 F.3d 811 (5th Cir. 2018) (en banc).

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

[15] Hernández II, 140 S. Ct. at 743–50.

[16] *Id*. at 750–53 (Thomas, J., concurring).

Sonia Sotomayor, and Elena Kagan, dissented, explaining that, even if the parents' claims arose in a "new context,"

> plaintiffs lack recourse to alternative remedies, and no "special factors" counsel against a *Bivens* remedy. Neither U.S. foreign policy nor national security is in fact endangered by the litigation. Moreover, concerns attending the application of our law to conduct occurring abroad are not involved, for plaintiffs seek the application of U.S. law to conduct occurring inside our borders.[17]

On the surface, then, *Hernández II* comes across as a fairly routine dispute among the justices about how to apply their existing precedents to a new set of facts. In fact, the backstory is far more complicated—and the potential implications of the Court's ruling are far more significant.

II. The Road to *Bivens*

At the Founding, and for much of American history, there was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers. Not only did federal courts routinely provide such relief, but the Supreme Court repeatedly blessed the practice.

In *Little v. Barreme*, for example, the Court, in an opinion by Chief Justice John Marshall, held a U.S. Navy officer liable for trespass after he seized a neutral ship pursuant to an invalid presidential order. As Marshall explained: "If [an officer's] instructions [from the executive branch] afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him. . . ."[18] To similar effect was *Wise v. Withers*. There, the Court considered an action for trespass in which the defendant federal officer had entered the plaintiff's home to collect a fine that had been (improperly) imposed by a court-martial. Because the court-martial had no jurisdiction, "[t]he court and the officer [were] all trespassers" and were subject to a judge-made damages remedy.[19] Likewise, *Slocum v. Mayberry* held that a customs officer who had no authority to seize cargo was properly subject to suit in Rhode Island

[17] *Id*. at 753 (Ginsburg, J., dissenting).

[18] 6 U.S. (2 Cranch) 170, 178 (1804).

[19] 7 U.S. (3 Cranch) 331, 337 (1806).

state court. As Chief Justice Marshall wrote for a unanimous Court, "the act of congress neither expressly, nor by implication, forbids the state courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States; consequently, their jurisdiction remains."[20]

And in considering a tort action brought by the master of a French ship that had been seized by a U.S. official while in Spanish waters, Justice Joseph Story's opinion for the Court in *The Apollon* dismissed the diplomatic ramifications, explaining that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." Because the seizure in question was "wholly without justification under our laws," the U.S. official could not avoid plaintiff's common-law damages claim—even though the seizure took place outside the territorial United States.[21]

In *Elliott v. Swartwout*, the justices reviewed an assumpsit claim against a customs official who had collected duties from the plaintiff, despite the plaintiff's challenge to the collection. Because the relevant statute did not authorize the collection, the Court held that the defendant was personally liable.[22] And *Mitchell v. Harmony* affirmed a jury verdict awarding damages in a diversity case against a U.S. Army lieutenant colonel who, pursuant to direction from his commanding officer, unlawfully seized the plaintiff's goods. There, the Court observed that "the law did not confide to [the defendant's commanding officer] a discretionary power over private property"; as such, the order was "to do an illegal act; to commit a trespass upon the property of another."[23]

There was no suggestion in any of these early, seminal cases that federal courts lacked the authority or ability to fashion such judge-made tort remedies against rogue federal officers—including, in the years after *Swift v. Tyson*,[24] remedies arising under the general common law rather than state law. The only recurring issue in these cases was whether the claims properly belonged in state or federal court, a statutory jurisdictional issue that evolved as Congress initially enacted—and later expanded—the federal officer removal statute.

[20] 15 U.S. (2 Wheat.) 1, 12 (1817).

[21] 22 U.S. (9 Wheat.) 362, 367, 372 (1824).

[22] 35 U.S. (10 Pet.) 137, 158 (1836).

[23] 54 U.S. (13 How.) 115, 137 (1852).

[24] 41 U.S. (16 Pet.) 1 (1842).

Actions against federal officials for common-law torts remained routine throughout the 19th century. For example, in *Buck v. Colbath*, the Supreme Court affirmed the plaintiff's ability to bring a trespass action against a federal marshal, "[seeing] nothing . . . to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying [the writ] upon the property of a man against whom the writ did not run, and on property which was not liable to it."[25] And in *Bates v. Clark*, the justices affirmed a judgment finding U.S. Army officers liable for trespass when they seized the plaintiff's goods without lawful authority.[26]

Twenty years later, the Court again reiterated that federal officials could be held personally liable for actions exceeding their authority through common-law tort suits. In *Belknap v. Schild*, the plaintiff sued U.S. naval officers for patent infringement. As Justice Horace Gray wrote in sustaining the plaintiff's claims,

> the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers or agents . . . are therefore personally liable to be sued for their own infringement of a patent.[27]

And so it continued—even after the Supreme Court's 1938 decision in *Erie*. As late as 1963, the Supreme Court would explain that, "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law," even when the case was brought in or removed to federal court.[28] And none of these cases—from 1804 onwards, and to either side of *Erie*—voiced the slightest objection to the constitutional or normative propriety of federal courts fashioning such judge-made remedies.

If anything, "the Court [also] appears to have treated trespass remedies against the wrongdoing governmental actor—with their deep roots in the common law—as existing independent of the will of the legislature and as resistant to state legislative and

[25] 70 U.S. (3 Wall.) 334, 347 (1866).

[26] 95 U.S. 204, 209 (1877).

[27] 161 U.S. 10, 18 (1896) (citation omitted).

[28] Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

judicial uprooting."[29] Remedies against federal officers were therefore not viewed as being committed to the states' grace, and the Court suggested that in some cases "the existence of the common law tort action for certain types of official invasions of liberty or property may itself be a constitutional requirement."[30]

This pattern of judge-made tort remedies against rogue federal officers included cases in which the plaintiff's underlying claim was that the defendant had violated the Constitution. As the justices explained in 1949, "if [wrongful actions by federal officers] are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not . . . forbid a court from taking jurisdiction over a suit against him."[31] Indeed, "the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers or public instrumentalities."[32] Federal officers might have had defenses to such actions arising under the Constitution, statutes, or the common law, but the power of the courts to provide a common-law damages remedy in the abstract was taken as a given.[33]

III. *Bivens* and Its Aftermath

With that in mind, consider how Justice Anthony Kennedy, writing for a 4-2 majority (with three justices not participating) in *Ziglar v. Abbasi*, described the origins of *Bivens* in 2017:

> In 1871, Congress passed a statute that was later codified at 42 U.S.C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights.

[29] Ann Woolhandler, The Common-Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 123 (1997) (footnote omitted).

[30] *Id*. at 121 (citing Poindexter v. Greenhow, 114 U.S. 270, 303 (1885)); cf. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 101 (1993) (holding that the Due Process Clause of the Fourteenth Amendment requires states without adequate pre-deprivation tax-refund remedies "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation") (internal quotation marks omitted).

[31] Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 686 (1949) (citations omitted).

[32] *Id*. at 687 (citations omitted).

[33] See, e.g., Barr v. Matteo, 360 U.S. 564 (1959); cf. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (noting the "long history of judicial review of illegal executive action, tracing back to England").

> Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.
>
> In 1971, *and against this background*, this Court decided *Bivens*.[34]

In fact, *Bivens* was decided against a rich doctrinal background in which state tort law provided the principal mechanism for holding federal officers accountable, even for constitutional violations. In *Bivens*, the Supreme Court granted certiorari to decide whether, even after *Erie*, there were circumstances in which an allegation that a rogue federal officer had violated the Constitution stated a federal cause of action for damages—not just a claim under state law.[35] In arguing that the answer was no, the solicitor general repeatedly pointed to the tradition of holding federal officers to account under state law—and why that tradition rendered a federal remedy unnecessary.[36]

In contrast, where a federal remedy was necessary to vindicate a plaintiff's constitutional rights, including where a plaintiff had no state tort remedy against the offending federal officer, the solicitor general agreed that federal courts had the power—and obligation—to fashion such relief on their own, and, indeed, that they had been doing so for decades.[37] The question in *Bivens* was therefore whether a federal damages remedy truly was "indispensable" for vindicating constitutional rights. In the government's view, the availability of New York tort law proved that the answer was "no."

Justice William Brennan's majority opinion disagreed that the availability of a state claim precluded a judge-made federal damages remedy. But as Justice John Marshall Harlan II pointed out in

[34] 137 S. Ct. at 1854 (emphasis added).

[35] See Bell v. Hood, 327 U.S. 678, 684 (1946) (reserving this question).

[36] Brief for the Respondents, *supra* note 6, at 33–38.

[37] See, e.g., *id*. at 19 ("[T]he judicially created federal remedy under the Constitution was essential to protect against infringement of secured rights."); *id*. at 24 ("[C]auses of action under the Constitution in the absence of a statutory basis have been created only in the rare case where such a remedy was indispensable for vindicating constitutional rights."); *id*. at 40 ("In the absence of implementing legislation, judicial creation of a new, affirmative remedy to enforce a constitutional right should not be undertaken unless such a remedy is absolutely necessary.").

his opinion concurring in the judgment, the dispute the Court was resolving was therefore one grounded in federalism more than the separation of powers—whether the liability of federal officers for violations of the Constitution should depend upon 50 different state tort regimes or one uniform body of federal judge-made law. Framed in those terms, the case for a federal remedy was, in Harlan's view, compelling:

> It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.[38]

Whoever had the better of the argument concerning whether a judge-made federal remedy was preferable to a judge-made state remedy, the relevant point for present purposes is that no one in *Bivens* thought that the choice the Court was making was between a *Bivens* remedy and nothing. So framed—in terms of federalism as much as the separation of powers—*Bivens* looks quite a bit different.[39]

As is by now familiar, the Court expanded *Bivens* twice over the next decade. In *Davis v. Passman*, the Court sustained a *Bivens* claim by a former congressional staffer who claimed unconstitutional discrimination on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[40] And one year later, in *Carlson v. Green*, the Court allowed a federal prisoner's estate to bring an Eighth Amendment claim against his jailers for inadequate medical treatment that contributed to his untimely death. Even though the plaintiff could also have brought a claim under the Federal Tort Claims Act, the Court held that the act did not displace *Bivens*.[41] As Justice

[38] Bivens, 403 U.S. at 409 (Harlan, J., concurring in the judgment) (citations omitted); see also *id*. (questioning "the desirability of leaving the problem of federal official liability to the vagaries of common-law actions").

[39] See generally Stephen I. Vladeck, Constitutional Remedies in Federalism's Forgotten Shadow, 107 Cal. L. Rev. 1043 (2019).

[40] 442 U.S. 228 (1979).

[41] 446 U.S. 14 (1980).

Brennan explained, no special factors counseled hesitation because federal officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." And "we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress."[42] In other words, *Bivens* was to be the rule and cases in which *Bivens* was unavailable were to be the exception.

In retrospect, *Carlson* was the doctrinal high-water mark. In 10 subsequent decisions over the next 37 years, the Court gradually—but consistently—scaled back *Bivens* until almost nothing was left. And the first lever the Court used to narrow *Bivens* was the putative availability of alternative remedies.

In *Bush v. Lucas*, for instance, the Court declined to recognize a *Bivens* claim by a government employee claiming that he was subject to retaliatory employment action in violation of the First Amendment, holding that the modest relief provided by the Civil Service Reform Act of 1978 displaced *Bivens*—even though Congress had not said as much and the remedies available under the statute were hardly commensurate with the relief available under *Bivens*.[43]

To similar effect was the Court's decision five years later in *Schweiker v. Chilicky*, which refused to recognize a *Bivens* claim for wrongful denial of social security benefits in violation of the Due Process Clause of the Fifth Amendment. Even though Congress had not expressly displaced *Bivens* through the Social Security Act, and even though the only "remedy" available under that statute was the restoration of wrongly terminated benefits, the Court held that the alternative was sufficient to displace *Bivens*.[44]

More recently, the Court has held that the alternative remedy can even come from *state* law. Thus, in *Minneci v. Pollard*, the Court refused to recognize an Eighth Amendment *Bivens* claim against *private* corrections officers largely because, as nonfederal employees, they could be sued under California tort law. Even though *Bivens*

[42] *Id*. at 19.

[43] 462 U.S. 367 (1983).

[44] 487 U.S. 412 (1988).

itself had rejected the government's claim that the availability of state tort remedies mooted the need for a federal cause of action, by 2012, the availability of such state remedies was enough for every justice except Justice Ginsburg to eschew a federal judge-made cause of action.[45]

But perhaps the real shift in the Court's *Bivens* jurisprudence came in its "special factors" cases—as the justices found more and more reasons to decline to recognize *Bivens* remedies even in the absence of alternatives. At first, the only special factors the Court identified was interference with the military—which led the Court to decline to recognize *Bivens* claims by servicemembers in *Chappell v. Wallace*[46] and *United States v. Stanley*.[47] That logic expanded to encompass claims against federal *agencies* (as opposed to federal officers) in *FDIC v. Meyer*,[48] and claims against private corporations in *Correctional Services Corporation v. Malesko*.[49] None of these cases involved nonservicemember plaintiffs suing individual federal officers, but the Court's growing hostility to *all Bivens* claims was increasingly difficult to miss. Thus, in *Malesko*, Justices Antonin Scalia and Thomas for the first time argued that *Bivens* should be limited to its facts, pointing to the Court's contemporaneous scaling back of implied *statutory* causes of action:

> *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be "implied" by the mere existence of a statutory or constitutional prohibition. As the Court points out, we have abandoned that power to invent "implications" in the statutory field. There is even greater reason to abandon it in the constitutional field, since an "implication" imagined in the Constitution can presumably not even be repudiated by Congress.[50]

[45] 565 U.S. 118 (2012).

[46] 462 U.S. 296 (1983).

[47] 483 U.S. 669 (1987).

[48] 510 U.S. 471 (1994).

[49] 534 U.S. 61 (2001).

[50] *Id*. at 75 (Scalia, J., concurring) (citations omitted). For why the analogy between *Bivens* and implied statutory causes of action does not hold, see Stephen I. Vladeck, Bivens Remedies and the Myth of the "Heady Days," 8 U. St. Thomas L.J. 513 (2011).

After *Malesko*, the Court extended its hostility to *Bivens* even to suits against individual federal officers. *Wilkie v. Robbins* declined to recognize a *Bivens* claim against Bureau of Land Management employees who allegedly used extortion in an attempt to force the plaintiff to grant an easement to the federal government.[51] *Ashcroft v. Iqbal* categorically foreclosed *Bivens* claims based upon a theory of supervisory liability—noting that recognition of a *Bivens* claim had become a "disfavored" judicial activity.[52] And *Hui v. Castaneda* held that a statute that did not provide an alternative remedy, but instead provided immunity from *other* federal claims, also foreclosed a *Bivens* claim.[53]

These trendlines came to a head in *Ziglar v. Abbasi*, a case arising out of the post-9/11 immigration roundup of hundreds of Muslim men and men of Arab descent in and around the New York City metropolitan area. The plaintiffs in *Abbasi* sued six senior government officials—including Attorney General John Ashcroft and FBI Director Robert Mueller—claiming that various aspects of their detention and administrative segregation while detained were unconstitutional.[54]

Ignoring the history described above, Justice Kennedy went out of his way to narrow the circumstances in which a *Bivens* remedy would be appropriate. Building on *dicta* from *Malesko*, *Abbasi* held that plaintiffs cannot use *Bivens* as a means of challenging government policy, and that the plaintiffs' claims also presented "special factors" counseling hesitation insofar as (1) they implicated "sensitive issues of national security"; (2) Congress had been silent on the specific question of remedies like those sought by the plaintiffs; and (3) the plaintiffs had an alternative remedy while they were subject to detention—even though it was likely an illusory one. *Abbasi* thereby conflated the alternative-remedy and special-factors analyses, and also opened the door to treating national security as a special factor in any case remotely touching upon the subject. More generally, *Abbasi* made clear that the special-factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional

[51] 551 U.S. 537 (2007).

[52] 556 U.S. 662 (2009).

[53] 559 U.S. 799 (2010).

[54] Abbasi, 137 S. Ct. 1843.

action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," an analysis that will, in almost all cases, militate in favor of judicial passivity.[55]

For all of that, though, *Abbasi* also reinforced the significance of that part of *Bivens* it preserved. As Justice Kennedy explained,

> this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.[56]

Thus, even as it took as skeptical an approach to *Bivens* as any majority opinion by the Court to date, the *Abbasi* Court went out of its way to suggest that *Bivens* would still be available to challenge "individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact."[57]

IV. *Hernández II* and/as the Conservative Critique of *Bivens*

Enter, *Hernández II*—which, all agree, involved a challenge to an "individual instance[] of . . . law enforcement overreach." Without so much as noting the preceding language from *Abbasi*, the majority held that the plaintiffs' claims arose in a "new context," and that three separate special factors—"national security," "foreign relations," and congressional inaction—all militated against recognition of a *Bivens* remedy.[58] As noted above, Justice Thomas, joined by Justice Gorsuch, wrote separately to note that he would have just overruled *Bivens*, claiming that "[t]he analysis underlying *Bivens* cannot be defended."[59]

[55] *Id*. at 1857–58.

[56] *Id*. at 1856–57.

[57] *Id*. at 1862.

[58] Hernández II, 140 S. Ct. at 743–48.

[59] *Id*. at 752 (Thomas, J., concurring).

Writing for herself and Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented. But the thrust of her relatively mild opinion was to dispute the majority's special-factors analysis—noting how closely the claims in *Hernández II* resembled those in *Bivens*, save for "the fortuity that the bullet happened to strike Hernández on the Mexican side of the embankment," and noting the significance of the fact that the plaintiffs in *Hernández II* had no other remedy.[60]

In the process, *Hernández II* settled that *Abbasi* did not mean what it said when it refused to cast doubt on the continued availability of redress for injuries caused by garden-variety abuses of power by federal officials. And, for the first time, the Court declined to recognize a *Bivens* claim against a rogue federal law enforcement officer. But the Court also finally grappled with the doctrinal and analytical origins of its hostility to *Bivens*—albeit in a way that raises more questions than it answered.

Tellingly, none of the conservative critiques of *Bivens*, none of the Court's decisions prior to *Hernández II*, and neither Justice Alito's nor Justice Thomas's opinion in *Hernández II* disputes the history surveyed above or the conclusion that federal courts, from the Founding and well into the 20th century, routinely recognized and/or fashioned judge-made damages remedies against federal officers in appropriate cases. For those methodologically committed to originalism as a means of interpreting the Constitution, there is little doubt that the original public meaning of the Constitution was one in which state judge-made tort remedies were of central importance in holding federal officers—and, through them, the federal government—accountable. Indeed, if the lower federal courts were themselves optional under the Constitution's text, how could it have been any other way?[61]

[60] *Id*. at 756–59 (Ginsburg, J., dissenting).

[61] See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."); see also Browder v. City of Albuquerque, 787 F.3d 1076, 1084 (10th Cir. 2015) (Gorsuch, J., concurring) ("Often, after all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries.").

Most of the critiques simply ignore these historical precedents and originalist arguments. But in *Hernández II*, the Court for the first time at least offered one explanation for why they are irrelevant: *Erie*. As Justice Alito wrote,

> *Erie* held that "[t]here is no federal general common law," and therefore federal courts today cannot fashion new claims in the way that they could before 1938. With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, and no statute expressly creates a *Bivens* remedy.[62]

The first sentence is unquestionably correct. But the second sentence does not follow from the first, for *Erie* did not generally repudiate the federal courts' power to fashion common law; it merely repudiated the power to do so generally. On the same day as *Erie*, and in dozens of decisions since, the Supreme Court has recognized circumstances in which federal common-law-making remains appropriate—including in cases implicating "the rights and obligations of the United States," even if the United States itself is not a party.[63] As Justice Scalia wrote for the majority in one such case, "[a]nother area that we have found to be of peculiarly federal concern, warranting the [judicial] displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty."[64] Although the cases Scalia cited all involved the fashioning of federal common-law immunity defenses, the same considerations govern the availability of a cause of action—for the cause of action likewise implicates "the civil liability of federal officials for actions taken in the course of their duty." And as Justice Harlan noted in his opinion concurring in the judgment in *Bivens*, in deciding between subjecting federal officers to the vagaries of 50 different state tort regimes and one uniform body of federal common law, the case for a federal common-law rule is especially compelling.[65]

[62] Hernández II, 140 S. Ct. at 742 (majority op.) (citations omitted); cf. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1413 n.1 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (tracing the modern Court's hostility to judge-made remedies back to *Erie*).

[63] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

[64] Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988).

[65] Bivens, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

Indeed, even as the Supreme Court has shown increasing hostility toward judge-made remedies, it has continued to identify circumstances in which they are appropriate, if not affirmatively necessary. As Justice Scalia explained five years ago with regard to prospective relief, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England," and, presumably, uninterrupted by *Erie*.[66] Why should the ability to sue to obtain *damages* for unconstitutional actions by federal officers be any different? Neither Justice Alito's majority opinion nor Justice Thomas's concurrence in *Hernández II* answers that question.

V. The Unnoticed Shadow of the Westfall Act

It would be one thing, of course, if the evisceration of *Bivens* returned the doctrine to the status quo circa 1971—in which federal officers were routinely subjected to damages liability under state tort law. Indeed, even after *Bivens*, victims of constitutional violations by federal officers could still pursue relief under state law separate and apart from a damages claim grounded directly in the Constitution.[67] Thus, the unsatisfying reliance upon *Erie* as the hook for criticizing *Bivens* might not be so problematic if the result were simply to remit plaintiffs to claims under state tort law.

But things changed in 1988, when Congress enacted the Westfall Act, which specifies that the Federal Tort Claims Act "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee."[68] To be sure, the Westfall Act expressly carved out "a civil action against an employee of the government . . . which is brought for a violation of the Constitution of the United States."[69] Nevertheless, courts and commentators have generally assumed that this language only preserves *Bivens* suits—and not *state*-law constitutional tort suits against federal officers that are consistent with the pre-*Bivens* model.[70]

[66] Armstrong, 575 U.S. at 327.

[67] See, e.g., Westfall v. Erwin, 484 U.S. 292, 297–98 (1988).

[68] 28 U.S.C. § 2679(b)(1).

[69] *Id*. § 2679(b)(2)(A).

[70] See, e.g., Hui, 559 U.S. at 807.

So construed, the Westfall Act has had the effect of eliminating *all* state-law constitutional tort claims against federal officers within the scope of their employment. As a result, in cases in which there is no alternative federal legal remedy for the violation, the Westfall Act does not just leave plaintiffs with a choice between "damages or nothing"; it leaves courts to choose between *Bivens* or nothing. And although the Court has heard over a dozen *Bivens* cases (including six since the Westfall Act was enacted), *Hernández II* was the first case the justices considered in which, thanks to the Westfall Act, the choice really was *Bivens* or bust.

The Westfall Act should therefore have factored into the analysis in *Hernández II* in at least two different respects. First, by preempting the Texas tort remedy that would otherwise have been available to Sergio Hernández's parents, the statute eliminated the only other remedy that would traditionally have been available for a claim of excessive force against a rogue federal law enforcement officer—giving rise at least to the possibility that Congress *intended* to endorse *Bivens* remedies. Second, if no *Bivens* remedy was available either, then the Westfall Act's preemption of Texas tort law might well be unconstitutional—if, as the Supreme Court has long hinted but never held, the Due Process Clause of the Fifth Amendment protects a right of access to *some* judicial forum for the resolution of colorable constitutional claims.

But the only discussion of the Westfall Act in Justice Alito's majority opinion is for almost the opposite point—that it militates *against* recognition of a damages remedy insofar as "the provision simply left *Bivens* where it found it" (a claim for which Justice Alito offers precisely zero support).[71] Ditto Justice Thomas's concurrence—which notes that, rather than providing a cause of action against federal officers, Congress "has pre-empted the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers."[72] The implications of that preemption remained wholly unaddressed by the *Hernández II* Court.

To be sure, the constitutional question the Westfall Act raises in a case like *Hernández II* is a difficult one. The Court has assiduously avoided deciding whether the Due Process Clause protects a right

[71] Hernández II, 140 S. Ct. at 748 n.9.

[72] *Id*. at 752 (Thomas, J., concurring).

of access to a judicial forum for constitutional claims—often by deploying an especially strong version of the constitutional avoidance canon to justify less-than-obvious interpretations of statutes that bypass the problem.[73] But whatever valence those constitutional concerns might otherwise have in other cases, they are arguably at their zenith in cases like *Hernández II*—in which the underlying claim is for a classical common-law tort, such as excessive force by a rogue law enforcement officer, for which, without *Bivens*, the statute at issue took away the only remedy that had historically been available. At the very least, then, the possible implications for the Westfall Act should have been an independent justification for recognizing a *Bivens* claim in *Hernández II*—to allow the Court to avoid, whether in *Hernández II* or a future case, the difficult question of whether, without *Bivens*, the Westfall Act's elimination of state claims for federal constitutional torts would violate the Due Process Clause.

It may well be that the current Court, if forced to decide the matter, would hold that the Westfall Act is constitutional because there is no such due process right. The relevant point for present purposes is that *not* addressing the question in *Hernández II* produced a decision that disingenuously limits *Bivens*—and, if Justices Thomas and Gorsuch had had their way, would have killed it outright.

Conclusion: After *Hernández II*

To be sure, three of the five justices in the majority were unwilling to formally overrule *Bivens*—whether because they believe there are some cases in which it still has utility or because they believe overruling it is unnecessary given how thoroughly it has been circumscribed. And it is at least possible to identify factors present in *Hernández II* that would not be present in other cases challenging unconstitutional conduct by rogue federal law enforcement officers. If the facts of *Bivens* were to literally repeat, for instance (and the government made no

[73] See, e.g., Webster v. Doe, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quoting Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)); see also Bartlett ex rel. Neuman v. Bowen, 816 F.2d 695, 699 (D.C. Cir. 1987) ("[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.").

claim of interference with national security), nothing in *Hernández II* suggests that a damages claim would be unavailable.

It is therefore possible that, in retrospect, *Hernández II* will be seen as a relatively modest ruling—one that further narrowed the availability of *Bivens* by declining to recognize a remedy on rather specific facts, but that left the core of the remedy intact relative to how thoroughly it had already been circumscribed by prior rulings.

But there are at least two problems with such a reading. First, it is belied by how lower courts have further narrowed *Bivens*. Including the Fifth Circuit's (now-affirmed) decision in *Hernández II*, different courts of appeals have, in the last two years, effectively foreclosed all *Bivens* claims against Transportation Security Administration officers;[74] Immigration and Customs Enforcement officers;[75] and officers in Customs and Border Protection[76]—self-described as the country's largest law enforcement agency. Indeed, the average American is far more likely to cross paths with officers from one of these three agencies than from the DEA (the successor agency to the Federal Bureau of Narcotics in *Bivens*) or the FBI. A world in which no *Bivens* remedies are available against any officer working for any of those agencies—regardless of the specific factual context in which the claim arises—is one in which *Bivens* is doing very little work, indeed.

Second, and in any event, what the analysis in *Hernández II* makes clear is that, at least for a majority of the current Court, there's no remaining affirmative case *for Bivens*. At least in *Ziglar v. Abbasi*, in which the Court in 2017 further tightened the availability of *Bivens* claims, Justice Kennedy's majority opinion went out of its way to *distinguish* claims against rogue law enforcement officers, explaining that "[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere."[77] Later in the same opinion, Kennedy emphasized the "continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[78] After all, unlike other misconduct,

[74] See Vanderklok v. United States, 868 F.3d 189 (3d Cir. 2017).

[75] See Tun-Cos v. Perrotte, 922 F.3d 514 (4th Cir. 2019).

[76] See Hernández, 885 F.3d at 814.

[77] 137 S. Ct. 1843, 1857 (2017).

[78] *Id*. at 1856.

"individual instances of . . . law enforcement overreach . . . are difficult to address except by way of damages actions after the fact."[79]

But *Hernández II* eviscerated those distinctions, too—again, without any acknowledgment that it was doing so or any explanation for why. In one sense, no explanation was needed: The petition for a writ of certiorari in *Hernández II* was filed on June 15, 2018; Justice Kennedy announced his retirement 12 days later, and his successor, Justice Brett Kavanaugh, joined Justice Alito's majority opinion without comment.

* * *

The decline—and potential death—of *Bivens* might be dismissed as little more than an interesting, but largely academic, federal courts project. I'm biased, of course, but I think such dismissiveness is deeply myopic. It is certainly true that American courts have long since abandoned the maxim that for every right, there is a remedy. In the qualified-immunity context, for example, it has been settled (if increasingly controversial) law for decades that even many *constitutional* violations by state and federal officers will go unremedied. Against that backdrop, the evisceration of *Bivens* might seem like a drop in the bucket.

But the absence of a cause of action, although it sounds technical, is tantamount to a form of functional absolute immunity where no recourse is available no matter how far over the line federal officers tread. Even as Congress continues to debate whether to narrow or abolish the qualified-immunity defense in the aftermath of the killing of George Floyd and the resulting protests, *none* of the leading proposals would make clear that victims of such abuses by *federal* law enforcement officers are entitled to a damages remedy. Simply put, Congress may well decide to eliminate qualified immunity for state and local law enforcement officers even as the Court has effectively bestowed a form of absolute immunity on federal law enforcement officers. It shouldn't be difficult to see why that distinction is unsatisfying.

True, injunctive relief is still a possibility where the unconstitutional conduct is ongoing—even though equity is supposed to follow the law, and not the other way around. But the Supreme Court

[79] *Id*. at 1862.

has long made clear that this is a narrow category—and one in which the "remedy" is simply for the conduct to cease. More generally, as *Abbasi* itself recognized, in the run of cases in which individual officers act *ultra vires*, the constitutional violation is usually complete long before the victim can repair to court. Thus, those who are comfortable with the demise of *Bivens* are necessarily comfortable with the proposition that, in most cases in which federal officers violate the Constitution, they will be absolutely immune from any civil liability—not only because federal courts won't hold them accountable, but because Congress has affirmatively prevented state courts from doing so.

The easy and obvious response is to suggest that, just as Congress caused (or, at least, exacerbated) the problem with the Westfall Act, and just as Congress provided an express cause of action for constitutional violations by *state* officers, so, too, Congress should provide a federal damages remedy for constitutional violations by federal officers. As with many of the hardest questions facing the federal courts, life would certainly be easier if Congress acted more responsibly. And drafting a statute would be pretty simple; Congress would only need to add five words to 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, *or of the United States*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

But the fact that Congress *could* solve the problem is hardly proof that *only* Congress can solve it—especially where constitutional rights are concerned. After all, as Justice Harlan observed in his separate opinion in *Bivens*, "it would be at least anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining

the Government as an instrument of the popular will."[80] There wouldn't be much point to *having* constitutional rights if their enforceability depended upon the beneficence of those against whom they would be enforced.

More fundamentally, if, as *Hernández II* suggests, the current Court believes that there is no affirmative case for a meaningful federal judicial role in fashioning *damages* for constitutional violations by federal officers, what is the affirmative case for such a role in fashioning *injunctive* relief? Put another way, as bad as the demise and death of *Bivens* would be for a meaningful judicial role in holding the federal government accountable, what is to stop the Court from applying similar modes of analysis to suits for injunctive relief—and from leaving enforcement of the Constitution against the federal government entirely to Congress's whim? At least for claims against state officers, three of the current justices have already taken a sobering step in that direction.[81]

In his opinion for the Court in *Armstrong v. Exceptional Child Center, Inc.*, Justice Scalia's answer, at least, was the need for contemporary American courts to respect the "long history of judicial review of illegal executive action, tracing back to England."[82] But *Bivens*, too, rested at least indirectly on a similarly long history—and as *Hernández II* makes clear beyond peradventure, Scalia, like Kennedy, is no longer on the bench.

[80] Bivens, 403 U.S. at 403–04 (Harlan, J., concurring in the judgment).

[81] Douglas v. Indep. Living Ctr. of S. Cal., 565 U.S. 606, 616–24 (2012) (Roberts, C.J., dissenting).

[82] 575 U.S. at 327.