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Bivens in the End Zone: The Court Punts to Congress to Make the Right (of Action) Play

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I. THE WEATHER ON GAME DAY: INTRODUCTION

The Black Lives Matter (BLM) Movement demands equality, justice, and, perhaps most importantly, accountability.[1] Because of the abuse of power by governmental officials, particularly by those charged with law enforcement, we have seen many protests in Portland and elsewhere that invoke the First Amendment "right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] This, of course, is one of the essential elements of the Bill of Rights, which was ratified by the States in 1791. We saw a unique development in the Trump Administration unprecedented since President Eisenhower sent federal troops into the public schools of Little Rock, Arkansas to support desegregation.[3] This article addresses federal involvement in the BLM protests.

"Little Green Men" is an ascription that was used to describe Russian troops who, without insignia or other identification aside from their green camouflage uniforms, sneaked into Crimea, Ukraine, overthrowing the government there, and occupying the entire Crimean Peninsula, such occupation continuing to this day.[4] The federal agents who were involved in suppressing BLM protests, first in Lafayette Square across the street from the White House in Washington, D.C., and later, in Portland, Oregon, were very similar to the Little Green Men of Vladimir Putin.[5] Such a phenomenon in the United States, however, was a very unusual

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1 *See generally*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/.

2 U.S. Const. amend. I.

3 Cooper v. Aaron, 358 U.S. 1, 12 (1958).

4 Quinta Jurecic & Benjamin Wittes, *Nothing Can Justify the Attack on Portland*, THE ATLANTIC (July 21, 2020), https://www.theatlantic.com/ideas/archive/2020/07/nothing-can-justify-attack-portland/614413/; *see also* Iryna Zaverukha, *The Trajectory of Crimean Flight 2014: Falling Through the Cracks Between the Rock of 'Refugee' and the Hard Place of 'Internally Displaced Person*,' 49 INTERNATIONAL LAWYER 373, 389 (2016) (*citing* Steven Pifer, *Watch out for Little Green Men*, SPIEGEL ONLINE (July 7, 2014), http://www.spiegel.de/international/europe/nato-needs-strategy-for-possible-meddling-by-putin-in-baltic-states-a-979707.html).

5 Katie Shepherd & Mark Berman, *'It was like being preyed upon': Portland protesters say federal officers in unmarked vans are detaining them,* WASHINGTON POST (July 17, 2020), https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/; Mark Sumner, *What Trump is doing in Portland is terrifying, and it is coming to a town near you*, DAILY KOS (July 17, 2020), https://www.dailykos.com/stories/2020/7/17/1961412/-What-Donald-Trump-is-doing-in-Portland-is-just-as-big-a-threat-to-America-as-COVID-19; Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OREGON PUBLIC BROADCASTING (July 17, 2020), https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/.

development. The footage of those events is disturbing, to say the least.[6] It depicts United States federal agents forcibly removing any protestors in the area by force and using tear gas, ostensibly for the purpose of enabling former President Trump to have a photograph taken of him holding a Bible (reportedly upside down) in front of the church adjacent to Lafayette Square.[7]

Of course, in the era of the coronavirus, tear gas is particularly problematic. It has the natural consequence of eliciting fluids from the body through tearing, nasal drip, coughing, and, in some cases, vomiting, which can, of course, result in the spreading of coronavirus.[8] Tear gas was used by the federal agents in Portland, as were a variety of other techniques of crowd control.[9] Most notably, rubber bullets were deployed in Portland by federal agents, which resulted in substantial harm.[10] In some cases, people were hit directly in the face with rubber bullets.[11] Video footage that was broadcast on the news showed one young man who was hit in the face, thereafter requiring surgery, and who was subsequently hospitalized for a number of days.[12]

Other footage showed a middle-aged veteran who had a sweatshirt on with "NAVY" in large letters on the front and who was targeted with tear

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6 *See* Washington Post, *A video timeline of the crackdown on protesters before Trump's photo op | Visual Forensics,* YOUTUBE (June 8, 2020) https://www.youtube.com/watch?v=JxYmILDya0A.

7 *See id.*

8 *See* Drew Marine, *Environmental epidemiologist says exposure to tear gas could heighten someone's chance of getting COVID-19*, FOX 12 OREGON (July 23, 2020), *https://www.kptv.com/news/environmental-epidemiologist-says-exposure-to-tear-gas-could-heighten-someones-chance-of-getting-covid-19/article_bf4708b0-cd72-11ea-a20b-ebce25307b7b.htm*. Indeed, tear gas is prohibited in wartime use by international law. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, done at Geneva, June 17, 1925, 94 L.N. Treaty Series 65; 25 A.J.I.L. Supp. 94 (1931).

9 *See id.*

10 Liz Sabo et al., *Fractured skulls, lost eyes: Police break their own rules when shooting protesters with rubber bullets*, USA TODAY NEWS (June 19, 2020), https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001/.

11 *See* Tracy Connor*, VIDEO: Portland Protestor Shot in Face with Rubber Bullet*, THE DAILY BEAST (July 12, 2020), https://www.thedailybeast.com/portland-protester-shot-in-face-with-rubber-bullet.

12 *See* Press Release, Jeff Merkley, U.S. Senator for Oregon, *Wyden, Merkley, Blumenauer and Bonamici Demand Answers from DHS and DOJ After Federal Agent Shoots Peaceful Protestor in Head* (July 14, 2020), https://www.merkley.senate.gov/news/press-releases/wyden-merkley-blumenauer-and-bonamici-demand-answers-from-dhs-and-doj-after-federal-agent-shoots-peaceful-protester-in-head-2020.

gas at point blank range right in the face.[13] If that were not outrageous enough, the veteran also suffered a broken bone as a result of the federal agents' actions.[14] The video reveals that he was not resisting at all,[15] and also shocking is the fact that the victim simply allowed the battering by these agents.[16] When he was gassed, he turned away, but they continued to beat him with batons and truncheons.[17] In a video interview, he was shown bruised and with his broken leg bandaged.[18]

There were also instances of federal agents targeting journalists and legal observers. Both were clearly identifiable as such, the journalists having large designations on their helmets ("PRESS") and the legal observers with "ACLU LEGAL OBSERVER" on their backs.[19] These people were seemingly targeted because of who they were, resulting in a federal lawsuit.[20] An amended complaint added the federal officers as defendants, and thereafter Judge Michael Simon, the U.S. District Court judge who heard the case, ruled in favor of the plaintiffs and issued a temporary restraining order on July 23, 2020, against the federal defendants.[21]

Senators Ron Wyden and Jeff Merkley and Members of the House of Representatives from the Oregon delegation, Suzanne Bonamici and Earl Blumenauer, signed a letter on July 14, 2020, which was sent to William Barr, the Attorney General of the United States, and Chad Wolfe, the Acting Secretary of the Department of Homeland Security. The letter stated:

> On Saturday July 11th, 2020 federal agents who we understand to be members of the DOJ (Department of Justice) U.S. Marshals Service Special Operations Group (SOG) deployed at the Hatfield federal courthouse in Portland, Oregon, fired a potentially deadly crowd control munition in apparent violation of commonly employed training tactics that direct officers to aim below the head and face area. An Oregonian suffered a resulting critical head injury and, since undergoing surgery, is now

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13 *See* CBS Sunday Morning, *Navy Vet Christopher David Speaks on Portland Protests*, YOUTUBE (July 26, 2020), https://www.youtube.com/watch?v=m4jMxwKk8rI.

14 *See id.*

15 *See id.*

16 *See id.*

17 *Id*.

18 *Id.*

19 Index Newspapers LLC v. City of Portland, 474 F. Supp. 3d 1113, *1118 (D. Or. 2020).

20 *See id*.

21 *See id.* at 1126-1127.

> hospitalized. This is three days later. This use of force appeared from recorded accounts to be an unnecessary escalation on the part of federal agents.[22]

There were many instances where such actions were recorded on videotape, and some were livestreamed on the news. Bringing law enforcement to account for unconstitutional actions has come a long way since we reached the age of videotape. In fact, there are many links to videotaped assaults by federal agents, city police, and State police troopers that were included as links in the complaint filed in *Index Newspapers*.[23]

No one is suggesting that violence or any kind of criminal conduct by the protestors is acceptable. By and large, the overwhelming majority of the protests around the country and, indeed, the world, have been peaceful. A good example of peaceful protesting is the Portland protestors on the Morrison Bridge all getting down on one knee and maintaining that stance for a number of minutes in replication of the event of George Floyd and Derek Chauvin, the police officer who murdered him by kneeling on his neck for that period of time.[24]

In the words of Justice Brandeis in the case of *Olmstead v. United States*:

> If the government becomes a lawbreaker[,] it breeds contempt for law for it invites every man to become a law unto himself. It invites anarchy to declare that, in the administration of the criminal law, the end justifies the means, would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face.[25]

Those words are just as true today as they were in 1928 when they were uttered by Justice Brandeis. We have a situation where law enforcement agents are really out of control and breaking the law.

The case filed by the State of Oregon against the federal presence in Portland was ultimately dismissed for lack of standing to sue the federal government for the deprivations of rights that were at issue in the

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22 Press Release, *supra* note 12.

23 Second Amend. Complaint at ¶¶ 5,6,7,8,10, 99, 168, Index Newspapers LLC v. City of Portland, 474 F. Supp. 3d 1113 (D. Or. 2020).

24 *See* Alex Cnossen, *Moments of Peace, Love in Week 1 of George Floyd Protests*, FOX 12 OREGON (June 5, 2020), https://www.kptv.com/news/moments-of-peace-love-in-week-1-of-protests-in-portland-for-george-floyd/article_5d0d33dc-a788-11ea-a835-476f485d642d.html.

25 Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

protests.[26] As in all cases, if there has been a deprivation of Constitutional rights, the threshold question is whether the plaintiff — the person harmed or injured — has a right to sue. Specifically, in cases involving federal defendants, the germane question is whether there is a right to sue for compensatory damages to redress the injuries suffered at the hands of law enforcement. [27]

II. THE KICKOFF: THE LANDMARK CASE OF *BIVENS*

This threshold question of whether there is a right to sue, of whether there is a cause of action, to go into court and ask a federal judge to rule in favor of the plaintiff against the federal defendants for the purpose of granting that plaintiff damages for Constitutional violations, has been governed by the landmark case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[28] Decided by the U.S. Supreme Court in 1971, *Bivens* was a six-three decision the majority opinion of which was written by Justice Brennan.[29] A significant concurring opinion was authored by Justice Harlan.[30] The Supreme Court was deciding whether Bivens could be heard to sue for damages after federal agents, of the then Bureau of Narcotics, entered his home without a search warrant, roused him from bed, manacled him in the presence of his family, turned the house upside down, took him off to jail, booked him, strip searched him, and yet ultimately released him without charge.[31]

Of course, if he had been charged with a crime, this unconstitutional conduct could have been the subject of a motion to suppress any illegally obtained evidence. Bivens, however, was never charged with a crime, so a motion to suppress offered in his defense was obviated. Another inapplicable mode of redress, injunctive relief, was equally unavailing, because an injunction would have required Bivens to demonstrate that it was likely that the Bureau of Narcotics would come a second time and undertake the same kind of illegal activity, therefore giving rise to a need for an injunction against this future conduct.[32] Just as Justice Harlan said

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26 Rosenblum v. Does 1-10, 474 F. Supp. 3d 1128, 1137 (D. Or. 2020).

27 *See id.* at 1132-33.

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

29 *Id*.

30 *Id.* at 389.

31 *Id*.

32 Bivens, 403 U.S. at 400 n.3 (Harlan, J. concurring); *see also* City of Los Angeles, v. Lyons, 461 U.S. 95, 137 (1983).

in his concurring opinion, "for someone in Bivens' shoes, it is damages or nothing."[33] That was certainly true.

The Court addressed the question of whether courts should recognize an implied cause of action for damages caused by Constitutional violations by federal agents, notwithstanding the fact that there is no statute conferring a right of action.[34] The Court well understood that, if the unconstitutional actions had been undertaken by State or local law enforcement officers, Bivens could have sued using 42 U.S.C. § 1983, the Ku Klux Klan Act of 1871. Section 1983 confers no substantive rights but does confer a right of action to sue for deprivation of federal rights, whether they be Constitutional, statutory or regulatory.[35] Of course, § 1983 did not apply to the circumstances in *Bivens* because the Federal Bureau of Narcotics employed federal agents. Because they were not State or local agents, they were beyond the coverage of § 1983.

Section 1983 was the basis for the primary argument that Justice Black advanced in his dissent in *Bivens*.[36] Black reasoned that Congress knows how to enact a statute conferring a right of action because they did so in enacting § 1983.[37] Justice Black's rationale was that, if Congress wished to provide any protection against federal violations of Constitutional rights, they simply could have enacted a similar statute; absent that, courts should not get involved.[38] The majority, however, felt otherwise as seen in Justice Brennan's majority opinion, which states:

> [T]that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. The present case involves no special factors counseling hesitation in the absence of affirmative action by Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is

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33 *Bivens*, 403 U.S. at 410 (Harlan, J. concurring in the judgment).

34 *Id.* at 389.

35 This statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

36 *Bivens*, 403 U.S. at 429 (Black, J., dissenting).

37 *Id.*

38 *Id.*

> entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison* (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.[39]

This was indeed a landmark decision of the Supreme Court, recognizing that there can be redress directly under the Constitution even absent a statute conferring a right of action to sue.[40]

III. HALFTIME: THE BRIEF VIABILITY OF THE LANDMARK

Bivens is currently under attack by the U.S. Supreme Court. Since 1971, there have only been three cases after *Bivens* that have ruled that one can sue directly under the Constitution for violations of rights. The first was the case of *Davis v. Passman* in 1979.[41] *Davis* involved discrimination against a female staffer on the basis of sex by a Member of Congress.[42] She sued under the Fifth Amendment of the Constitution for due process violations.[43] The Court upheld her suit and found that the *Bivens* claim would be heard and that she could sue under that doctrine for damages.[44]

The second case was the following year, *Carlson v. Green* in 1980, which involved a federal inmate who suffered from asthma.[45] The jailers disregarded his plight, he suffered for quite a long time, and he ultimately died.[46] His estate sued for damages for Mr. Green's death and, again, the Court recognized an implied right of action, this time under the Eighth Amendment provision that prohibits the infliction of cruel and unusual punishments.[47]

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39 *Id.* at 395-397 (Brennan, J., joined by Douglas, Stewart, White, and Marshall, JJ.) (quoting Marbury v. Madison, 1 Cranch 137, 163 (1803)).
40 *See id.*
41 David v. Passman, 442 US. 228 (1979).
42 *Id.* at 231.
43 *Id.*
44 *Id.* at 230.
45 Carlson v. Green, 446 U.S. 14, 16 n.1 (1980).
46 *See id.*
47 *Id.* at 24-28.

The only other case in which a *Bivens* claim has been recognized since 1980 was a case that actually slips through the cracks of the opinions of the various Justices on the Supreme Court who have emphasized the desuetude of *Bivens*.[48] Said case, however, recognized a cause of action under a *Bivens* analysis.[49] In 1994, in *Farmer v. Brennan*, Dee Farmer, a pre-operative male-to-female transgender federal inmate, was described in the complaint as particularly vulnerable to sexual attack because she projected feminine characteristics and because of her transgender orientation.[50] Farmer was repeatedly raped in prison and she ultimately wanted to be transferred to a different male facility, but her request was denied; instead, the federal authorities transferred her to a maximum security penitentiary, which is where the most dangerous criminals are held.[51] Predictably, she was subject to more rapes and was brutally beaten by one of the other inmates.[52] After having gone through Hell before her case was heard by the Supreme Court, and in an opinion by Justice Souter without dissent, a cause of action was recognized once again under the Eighth Amendment for the unconstitutional actions taken against Farmer by the federal authorities.[53] Thus, there are but three cases since *Bivens* was decided in which the Supreme Court recognized the right to sue for damages directly under the Constitution.

IV. THE HANDOFF: THE INCREMENTAL REJECTION OF *BIVENS*

In the interim, there were eight cases before the 2017 decision in *Ziglar v. Abbasi* and the 2020 case of *Hernandez v. Mesa* that foreclosed an action for damages in the federal courts directly under the Constitution.[54] In *Correctional Services Corp. v. Malesko*, the Court rejected an Eighth Amendment suit against a private halfway house operator.[55] Similarly, in *Minnecci v. Pollard*, in 2012 the Court rejected a claim for damages in an Eighth Amendment suit against prison guards at a private prison.[56] Both Eighth Amendment cases failed, despite the fact

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48 Farmer v. Brennan, 511 U.S. 825, 831 (1994).
49 *Id.*
50 *See id.* at 821.
51 *See id.* at 835 (Blackmun, J. concurring).
52 *See id.*
53 *Id.* at 830.
54 *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Hernandez v. Mesa 140 S. Ct. 735 (2020).
55 *See* Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).
56 Minnecci v. Pollard, 565 U.S. 118, 120 (2012).

that *Carlson v. Green* and *Farmer v. Brennan* were both Eighth Amendment cases in which the Court had recognized *Bivens* claims.

Similarly, notwithstanding the fact that the Court had recognized a Fifth Amendment due process claim in *Davis*, the Court rejected a due process race discrimination claim against military officers in *Chappell v. Wallace*;[57] a substantive due process claim against military officers in *United States v. Stanley*;[58] a procedural due process claim against Social Security Administration officials in *Schweiker v. Chilicky*;[59] a procedural due process claim against a federal agency for wrongful termination in *Federal Deposit Insurance Corporation v. Meyer*;[60] and a due process suit against officials from the Bureau of Land Management in *Wilkie v. Robbins*.[61] Although the case of *Bush v. Lucas* was brought under the First Amendment,[62] like *Davis v. Passman* it was a claim against a federal employer. With the exception of *Farmer*, over the course of *five decades* the U.S. Supreme Court has refused to recognize a *Bivens* cause of action.

V. THE PUNT INTO THE END ZONE: THE COURT'S INSISTENCE ON ACTION BY CONGRESS

The Court's refusal to recognize *Bivens* actions came to a head with its decisions in *Ziglar v. Abbasi*[63] in 2017 and *Hernandez v. Mesa*[64] in 2020. *Ziglar* was a four to two decision with Justices Sotomayor, Kagan,

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57 462 U.S. 296, 304 (1983) ("Taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers") (unanimous opinion of Burger, C.J.).

58 United States v. Stanley, 483 U.S. 669 (1987) (Scalia, J., for the majority).

59 Schweiker v. Chilicky, 487 U.S. 412, 425 (1988) ("The creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed . . . .The prospect of personal liability for official acts, moreover, would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established.") (O'Connor, J., for the majority).

60 Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471, 484 (1994) ("If we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government.") (unanimous opinion of Thomas, J.).

61 Wilkie v. Robbins, 551 U.S. 537 (2007) (Souter, J., for the majority).

62 Bush v. Lucas, 462 U.S. 367, 385-386 (1983) ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures -- administrative and judicial -- by which improper action may be redressed. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system.") (Stevens, J., for the majority).

63 *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

64 *See* Hernandez v. Mesa, 140 S. Ct. 735 (2020).

and Gorsuch taking no part in the decision.[65] The majority opinion was authored by Justice Kennedy.[66] *Ziglar* essentially established a two-part test to consider claims under the Constitution for damages against federal officials.[67] The first prong is "whether the request involves a claim that arises in 'a new context' or involves a 'new category of defendants.'"[68] The Court goes on to make it clear that its "understanding of a 'new context' is broad. We regard a context as 'new' if it is 'different in a meaningful way from previous *Bivens* cases decided by this Court.'"[69] The second prong is whether there are any special factors counseling hesitation in the absence of affirmative action by Congress.[70]

Ziglar v. Abbasi involved six individuals who sued various federal officials and officers in the detention facility where they were housed.[71] Five of them were Muslim and one was South Asian.[72] They were rounded up shortly after the attacks of September 11, 2001.[73] These detainees were held *incommunicado* for three to six months and were subjected to what could be characterized as cruel and unusual punishments, including torture.[74] They were subjected to sleep deprivation, lights were left on for twenty-three hours a day; they were held in tiny cells; and some had bones broken.[75] They were left without recourse and without any ability to redress their situation during the time of their detention.[76] The six individuals were detained on the basis of alleged immigration violations, which are civil offenses subject to adjudication in immigration courts, which are civil tribunals. They were not charged with crimes. Shockingly, during the deplorable course of action that federal officials took, they were aware that the six individuals were innocent of any terrorist activities. Despite this information, the six innocent individuals were detained for

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65 *Ziglar*, 137 S. Ct., at 1843.
66 *Id.*
67 *See id.* at 1859.
68 *Id.* at 1876 (Ginsburg, J. and Breyer, J. dissenting).
69 *Id.* at 1864.
70 *Id.* at 1848.
71 *Id.* at 1853.
72 *Id.*
73 *Id.*
74 *See id.*
75 *Id.*
76 *Id.* at 1854 ("Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion."). Because the case reached the Court on a motion to dismiss for failure to state a claim upon which relief may be granted, the Court assumed the facts alleged as true. *Id.* at 1853.

months on end in horrible conditions.[77] The Supreme Court nonetheless rejected the *Ziglar* respondents' *Bivens* claims.[78]

To put this into historical context, there was another case decided by the Supreme Court a week after it issued its decision in *Ziglar*. *Hernandez v. Mesa* was filed in 2015 after a fifteen-year-old boy was killed by a Customs and Border Protection agent.[79] The boy was playing a game with his friends in the culvert between Ciudad Juárez on the Mexican side of the border and El Paso on the American side.[80] At the time of the incident, the young man, Sergio Adrián Hernández Güereca, was going up to the fence on the American side, touching it, and running back to the Mexican side.[81] The game that Sergio and his buddies were playing irritated Mr. Mesa, the Customs and Border Protection agent who was on the American side. When Sergio got back to the Mexican side, Mesa fired two shots, the second of which hit Sergio in the face and killed him.[82] According to the complaint, Sergio was unarmed and unthreatening at the time.[83]

His parents brought suit in federal court against the federal agent involved. The U.S. Court of Appeals for the Fifth Circuit, in an *en banc per curiam* opinion, decided the case partially in favor of Sergio Hernández, describing what the three-judge panel of the Fifth Circuit had found:

> The panel opinion correctly describes the substantive due process claim as the agent, Mesa, showed callous disregard for Hernández's Fifth Amendment rights by using excessive deadly force when Hernández was unarmed and presented no threat.[84]

The first appeal to the U.S. Supreme Court resulted in a 2017 *per curiam* opinion in which the Court stated that it was undisputed that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa, the Border Protection agent, at the time of the shooting.[85] Mesa did not know whether Hernández was Mexican, American, or Mexican-American at the time he fired the shots.[86] On that

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77 *Id.* at 1873 (Breyer, J., joined by Ginsburg, J., dissenting).
78 *See id.*
79 *See* Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020).
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 Hernandez v. United States, 785 F. 3d 117, 119 (5th Cir. 2015) (*en banc, per curiam*).
85 Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017).
86 *Id.*

basis, the Supreme Court remanded the case in light of *Ziglar*.[87] The parameters of *Ziglar*, therefore, were instrumental in the ultimate resolution of *Hernandez v. Mesa*, which the Court decided in February of 2020.[88] In *Ziglar*, the Supreme Court was of the view that there could be seven different excuses that would constitute a sufficiently "new context" so as to preclude suit in the federal courts for damages under the *Bivens* doctrine.[89]

The particular factors that constitute new contexts were critically discussed, one by one, by Justice Breyer, writing for both himself and Justice Ginsburg in dissent in the four to two *Ziglar* decision.[90] The first new context is based on the rank of the officers; if there is a difference in rank of the defendant officers in question and the rank of the officers in *Bivens* or in the three cases that were decided subsequently on the basis of *Bivens*, that factor would preclude suit. The rejoinder is, "what does the rank of officers have to do with Constitutional violations and why should that matter?" There really is no good reason.

The second new context is the Constitutional right at issue. If the reason for the *Bivens* decision is, as stated by Justice Brennan, to deter unconstitutional conduct by federal agents, why should the Constitutional right at issue matter? Moreover, there have been *Bivens* cases involving the Fifth Amendment, the right at issue in *Ziglar*. Because the respondents in that case were immigration detainees, the Eighth Amendment was inapplicable, so the cruel and unusual punishments to which they were subjected should have been cognizable as violations of their rights to due process of law. Hernández involved both Fifth and Fourth Amendment claims, the latter of which was the claim in *Bivens* itself.

The third new context is the generality or specificity of the individual action. A group of people who are known to be innocent by the federal actors should be general or specific enough, however one reads the tea leaves of generality or specificity. Choose your poison. The federal actors were known, the violations were known, and all of the allegations had to be taken as true because of the 12 (b)(6) procedural posture of a motion to dismiss for failure to state a claim upon which relief can be granted. In the context of *Hernández*, shooting an unarmed, unthreatening boy should also speak for itself, no matter the level of generality or specificity.

The fourth new context relates to the extent of judicial guidance. The courts well know what the Constitution requires. Indeed, interpretation of

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87 *Id.*

88 Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020) Justice Gorsuch did not participate in the case. Like *Ziglar*, the Court assumed the facts as true because the case was dismissed pursuant to a motion under Federal Rule of Civil Procedure 12(b)(6).

89 *Ziglar,* 137 S. Ct. at 1859.

90 *Id.* at 1881-1882.

the Constitution is perhaps the most important function of the federal courts. Turning to the courts for judicial guidance in a future *Bivens* case should involve the same type of evidentiary analysis as in previous cases.

The fifth new context is the statutory or other legal mandate under which the officer was operating. The legal mandate, however, is analytically distinct from the Constitutional violation. If the action of the federal officer is based on a legal mandate but involves a Constitutional violation, under the Supremacy Clause, the Constitutional right supersedes the mandate.

The sixth new context is the risk of disruptive judicial intrusion. This factor is particularly problematic from an analytical perspective. The Court in *Ziglar* and later in *Hernández* was of the view that the Court should not get involved because, after all, Congress should authorize such lawsuits. The argument goes that, absent such authorization, it is an arrogation of the role of Congress for the courts to declare the bounds of Constitutional rights and provide remedies. When one considers that the federal courts often enjoin federal conduct — on a nationwide basis in many cases — an individual suit for damages pales by comparison. The Court's concern rings hollow when one considers what the federal courts do and have done since the inception of the Republic.

The seventh and last context is denominated "other potential special factors." Justice Breyer even declined to respond to that factor because the majority opinion fails to elucidate what these "other potential special factors" might be.[91] We would simply be engaging in speculation as to what Justice Kennedy might have had in mind when he referenced these "other potential special factors" in his opinion in *Ziglar*. Suffice it to say that the Court left itself an out to come up with anything it wants to deny a cause of action against federal officers.

New contexts, therefore, will preclude suit. If the case does involve a new context, the courts should then proceed to consider whether there are any special factors that counsel hesitation in granting the "extension" of *Bivens*.[92] Interestingly, the Court in *Hernandez* does not include the full phraseology used in *Bivens* ("special factors counseling hesitation in the absence of affirmative action by Congress").[93] In *Bivens*, the Court uses that phraseology to reference the fact that Congress had never expressed any hostility to the recognition of suits against federal actors without

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91 *Id.* at 1882.

92 *Hernandez v. Mesa*, 140 S. Ct. at 743 (2020).

93 *Compare id.*, *with 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 (2012).

statutory authorization.[94] There had never been a statute prohibiting such a cause of action, and there was never any indication in any federal statute that such suits should not be cognizable in the federal courts. In fact, under common law, the federal courts were there to provide remedies in all kinds of cases. That is the very reason that *Bivens* invoked Chief Justice Marshall's opinion in *Marbury v. Madison*.[95]

Moreover, the Federal Tort Claims Act (FTCA)[96] and the Westfall Act,[97] which amended it, are the only statutes that might bear on the subject of the intent of Congress with respect to *Bivens*. Justice Breyer's dissenting opinion in *Ziglar* observes that, "[i]t is by now well established that federal law provides damages actions . . . where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance."[98] By enacting the FTCA and the Westfall Act, an amendment to the FTCA, Congress was not redacting *Bivens*. Justice Breyer recognizes "that it is consequently 'crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as [providing] complementary causes of action;'"[99] and Congress' subsequent silence amounts to a strong sign that it accepted *Bivens* actions as part of the law. There is no evidence in any statute that Congress meant to foreclose a damages remedy under *Bivens*. In *Carlson* the Court itself affirmed that proposition, observing that, "not only was there no sign that Congress meant to preempt a *Bivens* remedy, but there was also *clear evidence* that Congress intended to preserve it."[100] "Congress, although well aware of the Court's decision in *Bivens*, [ ] has not endeavored to dislodge the decision."[101] Ultimately, the Court's elimination or limitation of *Bivens* actions is actually inconsistent with Congressional intent, and the Court's

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94 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). "The absence of a congressional proscription of damages remedies for an equal protection violation tilted away from finding a special factor." Glenn Larkin, *A Tale of Two Shootings: Should a* Bivens *Remedy Be Available When CBP Agents Shoot and Kill Victims on the Mexican Side of the Border*, 42 UALR L. REV. 171, 176 (2019) (*citing* Davis v. Passman, 442 U.S. 228, 246-47 (1979)).

95 *See Bivens*, 403 U.S. at 395-397.

96 Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563 (1988).

97 Westfall Act, 28 U.S.C. §§ 2671-2680; *see generally* Carlos M. Vasquez & Stephen M. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).

98 Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017).

99 *Id.* at 1879 (Breyer, J., dissenting) (quoting Carlson v. Green, 446 U.S. 14, 20 (1980)).

100 Carlson v. Green, 446 U.S. 14 (1980) (emphasis added).

101 Hernandez v. Mesa, 140 S. Ct. 735, 758 (2020) (dissenting opinion of Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (internal citation omitted).

reluctance to acknowledge *Bivens* actions sets an unfortunate, indeed even a lawless, precedent.[102]

The criterion of "special factors" has now been turned upside down. Since at least 2017, the Supreme Court has been explicit in its holdings that, until Congress authorizes such suits and until it legislatively confers a private right of action, the courts should not get involved — precisely the opposite point that was made by the "special factors" language in *Bivens*. As Justice Alito characterized it, "[C]ongress' decision not to provide a judicial remedy does not compel us to step into its shoes . . . .When evaluating whether to extend *Bivens*, the most important question 'is "who should decide" whether to provide for a damages remedy, Congress or the courts?' The correct 'answer most often will be Congress.'"[103]

Another point that is made in both *Ziglar* and *Hernandez* is that the special factor counseling hesitation absent affirmative action by Congress also includes a consideration of national security.[104] This is a particularly interesting and somewhat ironic factor when you consider what was actually involved in the cases of both *Ziglar* and *Hernandez*.

In *Ziglar*, the basis for the national security rationale was that the respondent immigration detainees were detained because they might be terrorists.[105] Not only was it known by the petitioners that the detainees were not terrorists but, most importantly, the only issue in the case was the conditions of confinement. There was nothing in the case relating to the reasons for the arrest, and there was nothing in issue about the predicate actions that the federal actors might have considered before the arrest. The primary question in the case was whether the harm and suffering that resulted from the authorization of this torture and unconstitutional treatment should be compensated.[106] National security is a red herring in *Ziglar*. This is particularly ironic given Justice Kennedy's quotation in *Ziglar* of the Court's opinion in *Mitchell v. Forsyth* that "national security concerns must not become a talisman used to ward off inconvenient claims – a 'label' used to 'cover a multitude of sins.'"[107] Unfortunately, Justice Kennedy's admonition seems to be nothing more than lip service.

In *Hernandez v. Mesa*, a similar analysis obtains. The Court says there, "we have said that 'matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be

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102 Ziglar v. Abbasi, 137 S. Ct. 1843, 1884 (2017) (Breyer, joined by Ginsburg, J., dissenting).

103 Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020) (internal citations omitted).

104 *See Ziglar*, 137 S. Ct. at 1861; *Hernandez*, 140 S. Ct. 735 at 757.

105 *See Ziglar,* 137 S. Ct. at 1853, 1865.

106 *Id.* at 1854.

107 *Id.* at 1852 (*quoting* Mitchell v. Forsyth, 472 U.S. 511, 523 (1985)).

largely immune from judicial inquiry or interference.'"[108] The Court, therefore, uses foreign relations and national security as yet another excuse to foreclose a case involving clear violations of human rights. The observation the Court makes is that "since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."[109] In fairness, there was somewhat of an international controversy in *Hernandez* because a sovereign nation invaded the space of another sovereign nation and, in so doing, took the life of someone. That being said, the Court's opinion in the 2020 decision goes into great detail about the act taking place on foreign soil and thereby raises the question of extraterritoriality and the application of the Constitution in other countries.[110] The fact of the matter is, however, that Customs and Border Protection agent Mesa was on United States soil when he shot the gun.[111] That datum is incontrovertible, it was stipulated, and is not in issue. The question of cabining the actions of federal agents is fair game, if that federal agent has acted on United States soil. The question of national security or foreign relations, therefore, is yet another red herring. The tragic dimension of all this, of course, is that the Court has basically said what Justice Harlan admonished in his concurring opinion in *Bivens*: "For someone in Bivens' shoes, it is damages or nothing."[112]

The family of Sergio Adrián Hernández Güerica was relegated to nothing for their son's murder:

> On the United States' side, the Department of Justice conducted an investigation. When it finished, the Department, while expressing regret over Hernández's death, concluded that Agent Mesa had not violated Customs and Border Patrol [sic] policy or training, and it declined to bring charges or take other action against him. Mexico was not and is not satisfied with the U.S. investigation. It requested that Agent Mesa be extradited to face criminal charges in a Mexican court, a request that the United States has denied.[113]

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[108] *Hernandez*, 140 S. Ct. 735, 744 (2020) (*quoting* Haig v. Agee, 453 U.S. 280, 292 (1981)).

[109] *Id.* at 747 (*citing* Ziglar, 137 S. Ct. 1843, 1861).

[110] *See id.* 739-750.

[111] Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017).

[112] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

[113] *Hernandez*, 140 S. Ct. 735, 740 (2020).

The Court invoked the diplomatic relations between the United States and Mexico, excusing the murder because the United States took the position that this was a matter for diplomacy that should be worked out because it involves international dimensions.[114]

From an international perspective, if the Court was so concerned with international law in this case, it might be well to consider the International Covenant on Civil and Political Rights — an international treaty to which the United States is a signatory.[115] That treaty was ratified by the United States and, in the course of ratification, the United States issued reservations and understandings, which is not unusual when an international instrument is agreed to by a foreign state. The relevant provision of the treaty states: "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[116] Importantly, beyond the actual text of the treaty, the reservation that the United States lodged in agreeing to be bound by that international instrument provides: "[a]rticle 9 (5) requires the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity."[117] The concern with foreign relations and national security, therefore, rings hollow when one considers what is actually binding on the United States rather than some speculation about activities in a foreign country that involve extraterritoriality. It has been made abundantly clear in *Ziglar* and *Hernandez* that the Supreme Court will not entertain any future *Bivens* actions until Congress acts.

The tragedy of Sergio Hernández is that it is not the only incident of its kind. Among many others, one other particularly egregious murder involved Rodriguez, another boy, who was sixteen years old when he was shot at least ten times.[118] He was also on the Mexican side of the border when a Border Protection agent who was standing in Nogales, Arizona, on an embankment looking down on the Mexican side fired fourteen to thirty shots at Rodriguez.[119] Rodriguez was still alive until the tenth shot crushed his cranium and killed him.[120] There are reports that document instances

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114 *Id.* at 749-750.

115 International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U. N. T. S. 176.

116 Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U. N. T. S. 176.

117 U. S. Reservations, Declarations, and Understandings, ICCPR, 138 Cong. Rec. 8071 (1992). *See also* 1676 U. N. T. S. 544 (entered into force Sept. 8, 1992).

118 Rodriguez v. Swartz, 899 F. 3d 719, 727 (9th Cir. 2016)

119 *Id.*

120 *Id.*; Gabriella Orozco, Bivens *and Constitutional Integrity at the Border:* Hernandez v. Mesa *and* Rodriguez v. Swartz, 51 LOY. U. CHI. L. J. 245 (2019).

of deaths caused and murder committed by Customs and Border Protection agents on United States soil shooting toward the Mexican side.[121]

VI. THE PLAY THAT LEADS TO VICTORY: THE LEGISLATIVE FIX

If it were not clear after *Ziglar* that the legal landscape has definitively changed because of the four to two line-up of the Court, any doubt was eradicated by the majority opinion of Justice Alito in *Hernandez* (2020), which reflected the views of a clear five-member majority of the Court.[122] More explicit is the concurring opinion filed by Justice Thomas, which was very similar to his concurring opinion in *Ziglar*.[123] In *Hernandez*, however, he picked up another vote for the proposition that *Bivens* should simply be overruled, with Justice Gorsuch joining his opinion.[124] It is clear, therefore, that the Supreme Court is not going to countenance any compensation cases under the Constitution before Congress acts.

A remedy for this problem essentially takes the language of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, and simply adds five words to that statute. The amended statute (addition in bold) would, therefore, read as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, **of the United States or** of any State or Territory or the District of Columbia, 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 and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This could be entitled the "FAIR Act," also known as the "Federal Accountability Improving Responsibility Act." Section 1983 already provides a right of action to sue State and local actors for violations of federal rights. The inclusion of the words "of the United States or" simply extends that private right of action to sue federal actors for such violations.

Such an amendment would change the law to provide a statutory hook for compensatory relief against federal actors, such as those "little green

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121 Hernandez v. Mesa, 140 S. Ct. 735, 760 (Ginsburg, dissenting, joined by Breyer, Kagan & Sotomayor, JJ.) (*citing* authorities).

122 *See id*. at 739-750.

123 Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring).

124 *Hernandez*, 140 S. Ct. at 750 (Thomas, J., joined by Gorsuch, J., concurring).

men" who invaded Portland, injuring peaceful protestors with munitions, and those who forcibly pushed aside the crowd in Lafayette Square, using tear gas and violating people's Constitutional rights. As previously explained, an injunction, of course, would not have helped that young man who had to have surgery because of having a rubber bullet implanted in his face, and a motion to suppress certainly would not provide redress because these were peaceful protesters not involved in criminal activity. As Justice Harlan succinctly stated the obvious in his concurring opinion in *Bivens*, "it is damages or nothing."[125]

VII. THE NEXT GAME: THE CONCOMITANT PROBLEM OF QUALIFIED IMMUNITY

The availability of a cause of action, however, does not solve all of the problems that face us with regard to suits against governmental officials. Although this issue is beyond the scope of this Article, one of the other major issues in suits against governmental actors for unconstitutional conduct is the question of qualified immunity. Qualified immunity is the doctrine that allows a governmental defendant to get off the hook if it cannot be shown that there was a violation of "clearly established statutory or constitutional rights of which a reasonable person would have known."[126] In many cases, if not most, this doctrine essentially forecloses any relief.[127]

There have been several initiatives to address the qualified immunity side of this problem of accountability, including a bill introduced by Senators Booker and Harris entitled the "Justice in Policing Act" that would essentially end qualified immunity.[128] Another bill that has been introduced in the Senate is called the "Preventing Authoritarian Policing Tactics in America's Streets Act of 2020."[129] On the House side, as of the date of this writing, two bills have been introduced — the Ending

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

[126] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[127] *E.g.*, Kisela v. Hughes, 584 U.S. ___ (2018) (granting immunity to an Arizona police officer who shot a "composed and content" mentally impaired woman who was standing "stationary" holding a knife while speaking with her roommate from a distance when he opened fire, because the officer had not violated "clearly established law").

[128] Justice in Policing Act, H.R. 7120, 116th Cong. (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/7120/text.

[129] Preventing Authoritarian Policing tactics in America's Streets Act of 2020, S.4220, 116th Cong. (2019-2020) https://www.congress.gov/bill/116th-congress/senate-bill/4220/text?r=49&s=1.

Qualified Immunity Act of 2021,[130] and a bill that actually passed the House of Representatives in June 2020 entitled the "George Floyd Justice and Policing Act."[131] Such proposed legislation can effectively address the qualified immunity part of the problem, but to address the evisceration of *Bivens* and the lack of a right of action, a statute enacted by Congress is necessary. Only then could justice be done when federal actors run amok and cause injury with impunity.

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[130] Qualified Immunity Act of 2021, H.R. 288, 117th Cong. (2020-2021), https://www.congress.gov/bill/117th-congress/house-bill/288?s=1&r=1

[131] George Floyd Justice in Policing Act of 2020, 116 H. Rpt. 434, 116th Cong. 2d Sess. (June 19, 2020).