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## Rodriguez v. Swartz: Civil Lawsuit Immunity in Border Shootings

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Case Note

***Rodriguez v. Swartz: Civil Lawsuit Immunity in Border Shootings***<sup>1</sup>

Alexis Woolison<sup>2</sup>

**A. I. Introduction**

When federal agents exhibit conduct that violates the United States Constitution, the Supreme Court has held that those agents should be held civilly liable for their actions, as shown by its decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>3</sup> Applicable constitutional violations include those which infringe on any individuals' constitutional rights. This includes violations of the constitutional rights of noncitizens. Although the Supreme Court disfavors expansion of *Bivens* claims and has only extended this remedy twice, in *Davis v. Passman* and *Carlson v. Green*, the Ninth Circuit Court recently approved such expansion in a cross-border shooting case, *Rodriguez v. Swartz*. That decision created a circuit split between the Fifth and Ninth Circuits, which is especially relevant as those Circuits include two-thirds of the courts along the United States border with Mexico. The decision of whether to extend *Bivens* remedies requires a careful analysis involving sensitive issues relevant to each case; in this case, most notably, foreign affairs, national security, and extraterritorial matters. When used appropriately, interpretations like the Ninth Circuit's allow constitutional integrity to be upheld and prevent qualified immunity of government officials from being overzealously applied.

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<sup>1</sup> This case note was written before the U.S. Supreme Court decision in *Hernandez v. Mesa*, 589 U.S. (2020), which also explores a *Bivens* action in a cross-border shooting.

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<sup>3</sup> *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 456 F.2d 1339 (2d Cir.1972)

## II. Facts

Shortly before midnight on October 10, 2012 a United States Border Patrol agent shot an unarmed, sixteen-year-old boy walking down the street in Mexico.<sup>4</sup> The agent, Lonnie Swartz, was on duty on the American side of the border with Mexico when he spotted the young boy, José Antonio Elena Rodriguez (hereafter “J.A.”), walking alone down the Calle Internacional, a street in Nogales, Mexico that runs parallel to the border.<sup>5</sup> From his high vantage point atop a rock wall that was 25 feet higher than the road J.A. was walking on, Swartz fired between 14 and 30 bullets through a steel beam fence at J.A. Ten of those bullets hit J.A., mainly in the back, and killed him instantly.<sup>6</sup>

Prior to the shooting, J.A. was walking peacefully down the Calle Internacional, unarmed and showing no signs of violence, aggression, or any other threatening behavior against anyone or anything. He was shot by Swartz without warning or provocation, despite posing no threat to Swartz or anyone else.<sup>7</sup> It was unknown to Swartz at the time of the shooting whether J.A. was armed, whether he had ever visited the United States, and whether he had any connections to the United States.<sup>8</sup>

Furthermore, the street J.A. was walking on separates Nogales, Arizona, from Nogales, Mexico, is the main thoroughfare of that area, and is lined with many commercial and residential buildings.<sup>9</sup> Families live on both sides of the border and it is common for people to cross from one side to the other for various reasons.<sup>10</sup> In fact, at the time of the shooting J.A.'s grandparents lived on the American side of the border in Arizona as lawful United

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<sup>4</sup> *Rodriguez v. Swartz*, 899 F.3d 719, 727 (9th Cir. 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

States permanent residents and often crossed into Mexico to visit J.A. and his family.<sup>11</sup> Although J.A. had never been to the United States, Swartz could not have known this at the time of the shooting.<sup>12</sup> In actuality, Swartz did not even know whether J.A. was an American or Mexican citizen when he shot him across the border.<sup>13</sup>

### III. Procedural Posture

Acting both individually and as a personal representative of J.A.'s estate, Araceli Rodriguez, J.A.'s mother, brought suit against Swartz in the United States District Court for the District of Arizona for money damages.<sup>14</sup> Suing under a *Bivens* cause of action, which allows civil suits to be brought following constitutional rights violations, Rodriguez alleged that J.A.'s Fourth and Fifth Amendment rights were violated by Swartz when he killed J.A. without any justification.<sup>15</sup> Although Swartz conceded that Rodriguez had a *Bivens* cause of action under the Fourth Amendment, he moved to dismiss the complaint based on qualified immunity.<sup>16</sup> The district court denied Swartz' claim of qualified immunity and dismissed Rodriguez' Fifth Amendment claim, treating the shooting as a "seizure" under the Fourth Amendment.<sup>17</sup>

In response, Swartz filed an appeal in the United States Court of Appeals for the Ninth Circuit to challenge the district court's denial of qualified immunity and the allowance of a *Bivens* cause of action.<sup>18</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Rodriguez*, 899 F.3d 719 at 727.

<sup>15</sup> *Id.*

<sup>16</sup> Qualified immunity protects public officials from liability for civil damages so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Id.* at 728.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

## IV. Background Discussion

### A. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court considered whether the Fourth Amendment provides a basis for a federal cause of action for damages arising out of an unreasonable search and seizure.<sup>19</sup> Reversing the decision of the Court of Appeals for the Second Circuit, the Court held that violation of Fourth Amendment rights by federal agents acting under color of their authority gives rise to causes of action for damages consequent to the unconstitutional conduct.<sup>20</sup>

On November 26, 1965, Webster Bivens' apartment was searched by six federal agents without a search or arrest warrant, in an unreasonable manner.<sup>21</sup> Bivens was arrested and put in manacles in front of his wife and children, who were also threatened with arrest, while the entire house was thoroughly searched.<sup>22</sup> Further, subsequent to the search, Bivens was arrested for violating narcotics laws and booked at the Federal Narcotic Bureau.<sup>23</sup> During this ordeal, Bivens was also interrogated by the agents and subjected to a visual strip search.<sup>24</sup> Although the complaint against Bivens was ultimately dismissed, he stated that the nature of his search and arrest caused him "great humiliation, embarrassment, and mental suffering."<sup>25</sup>

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<sup>19</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

<sup>20</sup> *Id.*

<sup>21</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 719 (2nd Cir. 1969).

<sup>22</sup> *Bivens*, 403 U.S. 388 at 389.

<sup>23</sup> *Bivens*, 409 F.2d 718 at 719.

<sup>24</sup> *Bivens*, 403 U.S. 388 at 389.

<sup>25</sup> *Bivens*, 409 F.2d 718 at 719.

As a result of this, Bivens brought suit against the agents, seeking damages for the unlawful search and seizure.<sup>26</sup> The district court dismissed the claim for lack of jurisdiction under 28 U.S.C. §1331, and alternatively for failure to state a claim on which relief could be granted.<sup>27</sup> The Court of Appeals for the Second Circuit found that the district court did in fact have jurisdiction under §1331, relying on the decision in *Bell v. Hood*.<sup>28</sup> In *Bell*, the Supreme Court held that district courts have jurisdiction to determine whether Fourth Amendment complaints state sufficient federal causes of action.<sup>29</sup> Despite this finding, the Second Circuit affirmed the district court's decision to dismiss the claim for failure to state a claim on which relief could be granted, and held that the Fourth Amendment does not authorize private suits for damages caused by unreasonable search and seizures brought under §1331 federal question jurisdiction.<sup>30</sup>

On appeal in the Supreme Court, the question previously reserved by the Court in *Bell* regarding whether violation of Fourth Amendment rights by federal agents gives rise to causes of action for damages was considered.<sup>31</sup> In its opinion, the Supreme Court highlighted the power inequalities between citizens and federal agents as a reason for reaching this decision.<sup>32</sup> An agent acting under the power of the United States has a far greater capacity for harm than an individual, which is why the Fourth Amendment operates as a limitation upon the exercise of federal power.<sup>33</sup> When that authorized power is abused, the courts must be able to adjust their remedies to grant the necessary relief.<sup>34</sup> As the Court explained, damages have historically been regarded as the ordinary remedy for invasions of personal interests in liberty, so it should be unsurprising

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 720.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Bivens*, 403 U.S. 388 at 389.

<sup>32</sup> *Id.* at 391.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

that damages may be obtained for injuries resulting from constitutional rights violations.<sup>35</sup>

Thus, the Supreme Court held that constitutional violations do give rise to civil causes of action for damages and that in *Bivens*' case his embarrassment and mental suffering, as well as the agents' lack of probable cause, constituted such a violation.<sup>36</sup> As a result, *Bivens* was entitled to recover money damages for any injuries he suffered as a result of the violations from each agent.<sup>37</sup>

### ***B. Ziglar v. Abbasi***

Following the Supreme Court's decision in *Bivens*, the implied cause of action theory adopted in that case was again considered by the Court in *Ziglar v. Abbasi*.<sup>38</sup> In *Ziglar*, the Court considered whether to allow an action for money damages in the absence of congressional authorization in regard to detention policy and prison abuse claims.<sup>39</sup>

After the September 11 terrorist attacks, hundreds of undocumented immigrants were taken into custody and held by order of the United States Government.<sup>40</sup> Although some of these detentions were based on well-grounded suspicions, many others were likely based on fear of Arabs and Muslims.<sup>41</sup> The Federal Bureau of Investigation (hereinafter "FBI") questioned more than 1,000 people with suspected links to the September 11 attacks, resulting in the arrest and detention of more than 700 individuals on immigration charges.<sup>42</sup> Although, if a detainee was designated as not being "of interest" to the investigation, they were processed according to normal procedures; if they were designated as "of

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<sup>35</sup> *Id.* at 395.

<sup>36</sup> *Id.* at 399.

<sup>37</sup> *Id.*

<sup>38</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1851 (2017).

<sup>39</sup> *Id.* at 1869.

<sup>40</sup> *Id.* at 1851.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1852.

interest” to the investigation, they were subject to a “hold-until-cleared policy” and held without bail.<sup>43</sup>

Many of these detainees were held for weeks or even months at a time under harsh conditions while agents tried to determine whether they were connected to the terrorism.<sup>44</sup> According to the complaint, detainees were held in “tiny cells for over 23 hours a day” with the lights left on 24 hours a day.<sup>45</sup> They were not afforded sufficient opportunities to exercise or participate in recreation, were denied access to even basic hygiene products such as soap and toothbrushes, and were shackled and escorted by four guards whenever they were removed from their cells.<sup>46</sup> In addition, they were not allowed to communicate with the outside world, were frequently strip-searched, and subjected to “physical and verbal abuse” from many of the prison guards.<sup>47</sup>

As a result, six of these detainees later filed suit for compensatory and punitive damages alleging Fourth and Fifth Amendment constitutional violations on their own behalf and on behalf of a putative class.<sup>48</sup> Three high executive officers in the Department of Justice and two of the detainees’ facility wardens were named as defendants in the complaint.<sup>49</sup> Although the District Court dismissed the claims against the Executive Officials, the United States Court of Appeals for the Second Circuit reversed and ruled that the complaint was sufficient for the action to proceed against the officials.<sup>50</sup>

When considering whether the officials could be sued for damages under a *Bivens* remedy, the Court discussed the interpretive framework under which there was a possibility that “the Court would keep expanding *Bivens* until it became the substantial

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1851.

<sup>45</sup> *Id.* at 1853.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1854.

equivalent of 42 U.S.C. §1983.”<sup>51</sup> However, the Court also recognized that in cases following *Bivens* it cautioned that where Congress “intends private litigants to have a cause of action,” the “far better course” is for Congress to confer that remedy in explicit terms.<sup>52</sup> Therefore, the Court highlighted that when deciding whether to recognize an implied cause of action, the “determinative” question is one of statutory intent.<sup>53</sup> If Congress intended to create the private right of action asserted, then a cause of action may be recognized; however, absent such intent, recognizing an implied cause of action is inappropriate.<sup>54</sup>

As such, the Court made clear that expanding the *Bivens* remedy is now a “disfavored” judicial activity with separation-of-powers principles being central to the analysis, asking the question whether it should be up to Congress or the courts to decide whether to provide for a damages remedy.<sup>55</sup> Based on the Court’s precedents, a *Bivens* remedy will not be available if there are “special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>56</sup> Although the Court has not defined specific special factors, the inference is that any factor that would cause a court to hesitate before answering in the affirmative is such a factor.<sup>57</sup> Further, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action.<sup>58</sup>

Because the Court of Appeals failed to analyze the prisoner abuse claims regarding the presence of special factors counseling hesitation, the Supreme Court remanded to allow the Court of Appeals to consider the claim in light of such a determination.<sup>59</sup> However, in regard to the detention policy claims the Court held that

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<sup>51</sup> *Id.* at 1855.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1856.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1857.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1858.

<sup>58</sup> *Id.* at 1864.

<sup>59</sup> *Id.* at 1869.

an action for money damages was not allowed and the *Bivens* remedy should not be extended.<sup>60</sup>

### ***C. Hernandez v. Mesa***

In *Hernandez v. Mesa*, the United States Supreme Court returned an appeal to the Court of Appeals for the Fifth Circuit following a ruling from the Supreme Court that the issue of whether federal courts have the authority to craft implied damages actions for alleged constitutional violations needed to be more carefully considered.<sup>61</sup> After such considerations, the Fifth Circuit held that the transnational aspect of the particular facts of the case presented a new context under a *Bivens* cause of action, but that numerous special factors were counseling against federal court interference under a balance of powers analysis.<sup>62</sup>

As the facts in the complaint alleged, Sergio Hernandez, a 15-year-old boy, was shot and killed by Agent Mesa on June 7, 2010.<sup>63</sup> Hernandez was a Mexican citizen without family in or any other ties to the United States.<sup>64</sup> He was playing on the Mexican side of the border, in Ciudad Juarez, Mexico, while Agent Mesa was stationed on the United States side of the border, in El Paso, Texas.<sup>65</sup> While engaging in his law enforcement duties, Agent Mesa noticed a group of young men throwing rocks at him from the Mexican side of the border.<sup>66</sup> In response, Agent Mesa fired several shots toward the assailants and fatally wounded Hernandez in the process.<sup>67</sup>

Following the death of their son, Hernandez's parents brought suit in federal court against Agent Mesa, alleging, among other things, a *Bivens* cause of action under the Fourth and Fifth

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<sup>60</sup> *Id.*

<sup>61</sup> *Hernandez v. Mesa*, 885 F.3d 811, 814 (5<sup>th</sup> Cir. 2018).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Amendments.<sup>68</sup> Although the federal district court dismissed all claims, the Fifth Circuit Court of Appeals reversed and allowed the *Bivens* claim to proceed.<sup>69</sup> However, upon rehearing the appeal en banc, the Fifth Circuit ruled that the claim failed because Agent Mesa was shielded by qualified immunity from any claim under the Fifth Amendment.<sup>70</sup> On appeal in the Supreme Court, the Court remanded and ordered the Fifth Circuit to reconsider allowing *Bivens* claims to proceed on behalf of the Hernandez family in light of the Court’s decision in *Abbasi*, in which it remanded for reconsideration by the appeals court as to whether a *Bivens* claim could be maintained against a prison warden.<sup>71</sup>

In regard to possible alternative remedies, the Court of Appeals for the Fifth Circuit explained that because there is no federal statute authorizing damage actions by foreign citizens by federal law enforcement officers under these circumstances, the plaintiffs’ only possible recovery of damages exists if the federal courts approve a *Bivens* implied cause of action.<sup>72</sup> However, before approving an implied cause of action under *Abbasi*, the court first had to determine whether the circumstances of the case presented a “new context” for *Bivens* claims, and then, if so, whether the circumstances presented any “special factors counseling hesitation” against implying damage claims against an individual federal officer.<sup>73</sup>

In determining whether there was a new context in a particular case, the court stated that the relevant inquiry is whether “the case is different in a meaningful way” from prior *Bivens* cases.<sup>74</sup> This means that a case deriving from an unconstitutional search and seizure claim is not determinative, as even a modest

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 815.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 816.

extension is still an extension.<sup>75</sup> Because Hernandez was a Mexican citizen shot on Mexican soil and there has been no judicial guidance concerning the extraterritorial scope of the Constitution as it applies to foreign citizens on foreign soil, the court held that the facts presented a new context for a *Bivens* claim.<sup>76</sup>

Moving on to the special factors analysis, the court considered whether allowing a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim would present any special factors counseling hesitation.<sup>77</sup> In making this determination, the court explained that the presence of any special factors precludes a *Bivens* extension.<sup>78</sup> Focusing its inquiry on maintaining the separation of powers, the court found several special factors presented by the facts of the case.<sup>79</sup>

As one of the special factors, the court highlighted the threat to national security implicated by the involvement of the Border Patrol, as that is the prerogative of Congress and the President.<sup>80</sup> The court worried that permitting *Bivens* liability could undermine the Border Patrol's ability to perform national security duties by causing agents to "hesitate in making split second decisions" in the future.<sup>81</sup> The court also discussed the possible negative impact on foreign affairs and diplomacy in a broader sense that could be caused if a *Bivens* cause of action were allowed.<sup>82</sup> Finally, the court touched on Congress' failure to provide damages as a remedy in these circumstances and the extraterritorial nature of the claims as additional special factors counseling hesitation, considering Congress' silence as relevant and telling.<sup>83</sup>

Because the presence of any special factor counseling hesitation precludes a *Bivens* remedy, and several were enunciated

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 817.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 818.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 819.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 820.

in its opinion, the Fifth Circuit affirmed the district court's judgment and decided against extending *Bivens* to apply to the case.<sup>84</sup>

## V. Ninth Circuit Decision in *Rodriguez v. Swartz*

Swartz filed an appeal in the United States Court of Appeals for the Ninth Circuit to challenge the district court's denial of qualified immunity and the *Bivens* cause of action brought by Rodriguez.<sup>85</sup> In deciding whether to let Rodriguez's Fourth Amendment claim proceed, the court considered whether qualified immunity was applicable considering the circumstances of the case, whether the Fourth Amendment right to freedom from unreasonable force to "seize" a person applied in the case, and whether the *Bivens* cause of action could and should be extended in response to the case.<sup>86</sup> Because the court determined that qualified immunity was applicable, J.A.'s Fourth Amendment right was violated, and the *Bivens* cause of action could and should be extended, the Ninth Circuit affirmed the district court's decision to let Rodriguez's Fourth Amendment claim proceed.<sup>87</sup>

### B. Qualified Immunity

The Ninth Circuit court first looked at whether Swartz was entitled to qualified immunity because he was on duty as a United States Border Patrol agent at the time of the shooting.<sup>88</sup> Qualified immunity protects public officials, such as federal agents, from liability for civil damages so long as their conduct does not violate clearly established constitutional rights which a "reasonable person" would have known.<sup>89</sup> Therefore, in making this determination the court considered two main questions: (1) whether the officer's

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<sup>84</sup> *Id.* at 823.

<sup>85</sup> *Rodriguez*, 899 F.3d 719 at 728.

<sup>86</sup> *Id.* at 728-748.

<sup>87</sup> *Id.* at 728.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident.<sup>90</sup> A constitutional right is considered “clearly established” at the time of an incident if every reasonable officer would have understood that what he or she was doing violated that right.<sup>91</sup> The court held that no reasonable officer could have thought that they could kill J.A. without justification based on the facts at hand, so it found that J.A.’s Fourth Amendment right was both violated and clearly established at the time of the incident, and therefore that Swartz lacked qualified immunity.<sup>92</sup>

### **C. Fourth Amendment Rights**

As part of its qualified immunity analysis the Ninth Circuit court also considered whether Fourth Amendment rights applied to J.A. as a Mexican citizen, and whether those rights were violated when Swartz shot him.<sup>93</sup> The Fourth Amendment of the United States Constitution prohibits law enforcement officers from using “objectively unreasonable” force to “seize” a person.<sup>94</sup> Following the Supreme Court’s decision in *Graham v. Connor*, the court determined that the “reasonableness” of Swartz’s use of force should be based on the perspective of a reasonable officer on the scene at the time of the incident, in order to avoid causing hindsight bias.<sup>95</sup>

The court also cited the Supreme Court’s decision in *Tennessee v. Garner*, which held that even when a felony suspect tries to escape, where the suspect poses no immediate threat to the officer or others, the harm from failing to apprehend the suspect does not justify the officer’s use of deadly force.<sup>96</sup> Based on this, the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 729.

court determined that any reasonable law enforcement officer should know not to shoot to kill unless the suspect presents an immediate threat to the officer or others or their escape will result in a serious threat of injury to others.<sup>97</sup> Because J.A. presented no immediate threat, or any threat at all, to Swartz or others, and further was not even suspected of any crime let alone a felony, the use of deadly force was not justified and could not have been considered justified by any reasonable officer on the scene at the time.<sup>98</sup> Therefore, the court held that Swartz did not have to determine how much force to use to be considered “reasonable,” as he was not permitted to use any force whatsoever against someone innocently walking down the street in Mexico.<sup>99</sup>

However, despite this clear finding of unreasonable force by Swartz, the circuit court also had to consider Swartz’ argument that he did not violate the Fourth Amendment because it did not apply to the search and seizure of a non-citizen’s property that was located abroad, as held in *United States v. Verdugo-Urquidez*.<sup>100</sup> As J.A. was a Mexican citizen who was shot, and thus “seized,” in Mexico, the court had to determine whether the Fourth Amendment applied under those conditions.<sup>101</sup> Although J.A. was a Mexican citizen shot on Mexican soil, the court found that those factors were not dispositive to a finding against Fourth Amendment protection because neither citizenship nor voluntary submission to American law is a prerequisite for constitutional rights.<sup>102</sup>

Instead, the court distinguished this case from *Verdugo-Urquidez* in that Swartz acted on American instead of Mexican soil and therefore was controlled by American law, and unlike the agents in that case, did not know whether J.A. was an American citizen or not.<sup>103</sup> The court also held that the concerns in *Verdugo-Urquidez*

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 734.

<sup>100</sup> *Id.* at 729.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 731.

regarding regulating conduct on Mexican soil were not relevant in this case because rather than searches and seizures conducted on Mexican soil, this case concerned the use of deadly force against a Mexican citizen on American soil.<sup>104</sup> For those reasons, the court held that there were no practical reasons to caution against extending Fourth Amendment protection to include innocent people shot by American officers. It further found that J.A. had a Fourth Amendment right to be free from the objectively unreasonable use of force by an American agent acting on American soil, despite his status as a Mexican citizen and the fact that he was shot on Mexican soil.<sup>105</sup>

#### **D. Extending the *Bivens* Remedy**

After determining that Swartz did not have qualified immunity and J.A. had a Fourth Amendment right to freedom from unreasonable force, the Ninth Circuit court next turned to the question of whether *Bivens* could and should be extended to allow Rodriguez to sue for money damages.<sup>106</sup> The Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* held that a violation of the Fourth Amendment by federal agents gave rise to a cause of action for money damages after *Bivens* was arrested and his home was searched by federal agents without probable cause or a search warrant.<sup>107</sup> In that case the Court held that *Bivens* was entitled to sue the agents for money damages because: (1) there were no “special factors” counseling hesitation in the absence of affirmative action by Congress, and (2) because damages were the “only possible remedy” for *Bivens*.<sup>108</sup>

The *Bivens* remedy has been extended by the Supreme Court in subsequent cases to include other causes of action as well, such as employment discrimination in violation of the Fifth Amendment

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 734.

<sup>107</sup> *Id.* at 735.

<sup>108</sup> *Id.* at 736.

in *Davis v. Passman* and inadequate medical attention in prisons in violation of the Eighth Amendment in *Carlson v. Green*.<sup>109</sup> The Court has explained that *Bivens* actions are desirable deterrents against abusive federal employees by allowing plaintiffs to sue agents directly for certain constitutional violations.<sup>110</sup> Although *Bivens* remedies are not appropriate in every situation or for every constitutional violation and courts should therefore exercise caution in determining whether to extend *Bivens*, in cases where a new context that is meaningfully different from previous *Bivens* cases decided by the Supreme Court is presented such extension is proper.<sup>111</sup>

As such, in determining whether a *Bivens* remedy should be extended in this case, the Ninth Circuit court looked at whether there were any special factors counseling hesitation in the absence of affirmative action by Congress, whether money damages were the only possible remedy, and whether this represented a new context that is meaningfully different from previous *Bivens* cases decided by the Supreme Court.<sup>112</sup> Turning first to the latter requirement, the court decided that this case presented a new *Bivens* context that was meaningfully different from previous cases.<sup>113</sup> Although, like *Bivens*, this case involved a federal law enforcement officer violating the Fourth Amendment, unlike *Bivens* the remedy would be applied to an alien who was killed outside of the United States.<sup>114</sup> Thus, this difference is adequate to represent a new context justifying extension.<sup>115</sup>

#### **a. Adequate Alternative Remedies**

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 737.

<sup>111</sup> *Id.* at 738.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Even though the court decided that the *Bivens* remedy could be extended in this case because it represented a new context, in order for an extension to be appropriate there must also be a finding of no other adequate remedy and no special factors counseling hesitation.<sup>116</sup> Focusing next on the alternative adequate remedy requirement, the court determined that Rodriguez had no other adequate remedies and therefore that that requirement was satisfied.<sup>117</sup> Although Swartz argued that Rodriguez had satisfactory alternative remedies in the form of tort claims, restitution, and through the Mexican judicial system, the court disagreed.<sup>118</sup>

Because the United States has sovereign immunity under the Federal Tort Claims Act (hereafter “FTCA”), it cannot be sued without its consent, specifically for claims “arising in a foreign country,” as they do here.<sup>119</sup> Therefore, since J.A. was shot while in Mexico, the United States cannot be sued under a tort claim for J.A.’s deadly injury under the FTCA.<sup>120</sup> However, this does not preclude a *Bivens* remedy because it arises under United States constitutional law, rather than Mexican law, and does not implicate the application of substantive foreign law, which was what Congress sought to avoid by the FTCA foreign country exception.<sup>121</sup> Additionally, under a *Bivens* cause of action, agents can be sued individually and held accountable for his or her own actions, while under the FCTA the United States is held liable for agents’ actions when they were acting as a federal agent within the scope of their employment at the time of the incident.<sup>122</sup> However, there is an exception under the FCTA that allows *Bivens* claims to proceed against individuals when a civil action is brought against an employee of the Government for a violation of the Constitution of

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 739.

<sup>118</sup> *Id.* at 739-743.

<sup>119</sup> *Id.* at 739.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 740.

the United States.<sup>123</sup> Because this case involves the violation of the Fourth Amendment, it is a proper context for a *Bivens* remedy in order to prevent Swartz from dodging liability from his own constitutional violations by imposing it onto the government.<sup>124</sup>

Further, the court also held that Rodriguez has no adequate alternative remedy under a state law tort claim against Swartz.<sup>125</sup> Disagreeing with the United States' suggestion that Rodriguez could sue Swartz for wrongful death under Arizona tort law, the court explained that such a claim would be barred by the Westfall Act, which accords federal employees absolute immunity from common law tort claims arising out of acts they undertake in the course of their official duties.<sup>126</sup> Because Swartz shot J.A. while on duty as a Border Patrol agent on the United States side of the fence, it must be assumed that he acted within the scope of his employment.<sup>127</sup> Therefore, even though he violated clearly established rules regulating employee conduct, Rodriguez cannot sue him in a state law tort action without converting it into an FTCA suit against the United States, and the foreign country exception would bar an FTCA suit because the injury occurred in Mexico.<sup>128</sup>

Additionally, restitution was also held by the court not to be an adequate alternative justifying precluding extending a *Bivens* remedy.<sup>129</sup> Even though Swartz was indicted and tried by the United States for the murder of J.A., and acquitted of murder by a jury, which could have led to Swartz being required to pay restitution to J.A.'s estate if he had been convicted, this is still not an adequate alternative remedy for various reasons.<sup>130</sup> One reason is that a criminal charge is the government's remedy, not the victim's, as it is up to their discretion whether to charge the agent.<sup>131</sup> Another

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 741.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 742.

reason is that the preponderance of evidence of guilt beyond a reasonable doubt required in criminal cases is higher than that required by *Bivens* claims, which only require a jury to find that it was more likely than not that the agent used unreasonable force.<sup>132</sup> This means that even if acquitted of his criminal charges, Swartz could still be liable for money damages under a *Bivens* remedy.<sup>133</sup> Because of this disparity, the court held that the potential restitution that could result from a murder conviction was not a sufficient alternate remedy to justify preventing Rodriguez' *Bivens* claim from proceeding.<sup>134</sup>

Finally, because Swartz did not provide an adequate argument suggesting that Rodriguez would be able to bring a claim in the Mexican judicial system, the court also held that there was no adequate alternative remedy in that regard.<sup>135</sup> Because Swartz provided no alternative remedies, the court next turned to a determination of whether any factors counseling hesitation would justify preventing a *Bivens* claim from being brought by Rodriguez.<sup>136</sup>

#### **b. Special Factors Counseling Hesitation**

Although the Ninth Circuit court determined that Rodriguez' only available adequate remedy was a *Bivens* action, it still could not extend *Bivens* unless no "special factors" counseled hesitation against doing so.<sup>137</sup> In making this determination the court looked at highly case specific factors such as governmental policies, national security, foreign policy and extraterritorial remedies, rather than those at cross-border shootings at an abstract level.<sup>138</sup> In regard to governmental policies, the court held that because Rodriguez did not challenge any governmental policies, and Swartz did not follow any

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 744.

<sup>138</sup> *Id.* at 744-746.

governmental policies, there was no special factor counseling hesitation in that regard.<sup>139</sup> A special factor is present when a plaintiff challenges high-level executive branch policies because a *Bivens* claim is not a proper vehicle for altering the entity's policy, but that is not the case here.<sup>140</sup> Rodriguez did not sue a policy-making official, but rather an officer, and federal regulations expressly prohibited Swartz's conduct in using deadly force under the circumstances.<sup>141</sup> Therefore, because this case involved "standard law enforcement operations" and "individual instances of law enforcement overreach" rather than governmental policies or policymakers, a *Bivens* remedy is still applicable.<sup>142</sup>

Next, the court looked at whether extending *Bivens* would implicate national security, which would be a special factor counseling hesitation.<sup>143</sup> Although the court considered the concerns highlighted in *Ziglar v. Abbasi*, in which the Court held that there were national security concerns because the plaintiffs in that case challenged the government's response to September 11 and how best to protect the United States, it also cautioned against not using national security concerns to "ward off inconvenient claims."<sup>144</sup> While national security concerns are implicated with Border Patrol agents as they protect the United States from unlawful entries and terrorist threats, it is not reasonable to suggest that part of national security involves shooting innocent people walking down the street in Mexico.<sup>145</sup> In addition, the court claimed that holding Swartz liable for his constitutional violation would not deter other Border Patrol agents from performing their duties, because the conduct exhibited by Swartz was not typical of the conduct generally required, expected, and accepted of Border Patrol agents.<sup>146</sup>

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<sup>139</sup> *Id.* at 745.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Therefore, the court held that national security was not a special factor applicable in this case, and did not justify precluding Rodriguez' *Bivens* claim.<sup>147</sup>

The court also looked at whether any problematic foreign policy implications could be caused by extending *Bivens* in this case.<sup>148</sup> Although, as argued by the United States, the nature of cross-border shootings implicates foreign policy, the court determined that in this case a *Bivens* application would not undermine any American foreign policy.<sup>149</sup> The court found that there is no American foreign policy endorsing shootings like the one presented here involving a Border Patrol agent shooting an innocent Mexican citizen.<sup>150</sup> In fact, as the court explained, if a *Bivens* cause of action was not extended international relations between America and Mexico would likely be threatened, because it would allow Swartz to escape civil liability for his unreasonable use of deadly force.<sup>151</sup> Therefore, no special factor in regard to foreign policy counseled hesitation against allowing Rodriguez to bring a *Bivens* claim.<sup>152</sup>

Finally, the court considered whether any presumption that would constitute a special factor against extraterritorial remedies had been rebutted.<sup>153</sup> Although the court did not disagree with the dissent's suggestion that the presumption against the extraterritorial application of statutes suggested an analogous presumption against extraterrestrial *Bivens* claims, it still found that the presumption could be overcome because actions touching and concerning the territory of the United States with sufficient force to displace the presumption existed.<sup>154</sup> Because Swartz was acting within his capacity as a United States Border Patrol agent and shot J.A. from

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 746.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 747.

<sup>154</sup> *Id.*

his location on American soil, his actions touched and concerned the territory of the United States.<sup>155</sup> Further, the United States' interest in regulating the conduct of government officials on American soil was reflected by its willingness to apply criminal law extraterritorially when it charged Swartz with murder.<sup>156</sup> Because this interest in deterring unconstitutional misconduct of officers is sufficient to overcome the presumption against extraterrestrial *Bivens* claims, the court held that there was no special factor counseling hesitation in that respect and Rodriguez' claim was not barred.<sup>157</sup>

Therefore, the Ninth Circuit court decided that Swartz was not entitled to qualified immunity in this case, the Fourth Amendment was applicable, and the *Bivens* remedy could be extended due to the inadequacy of other alternative remedies and the lack of special factors counseling hesitation against extension.<sup>158</sup>

### **E. Dissent**

In his dissent, Justice Smith's main disagreement with the majority opinion is that it oversteps separation of powers principles and that its determination of a lack of special factors counseling hesitation against extending *Bivens* is inaccurate.<sup>159</sup> He also argues that the majority places undue significance on insufficient alternative remedies, as only the presence of one is relevant as it precludes a *Bivens* expansion.<sup>160</sup> In regard to separation of powers, Justice Smith argues that the majority oversteps by deciding on the issue of whether to provide a damages remedy when such a question should be answered by Congress.<sup>161</sup> His opinion states that the judiciary lacks the authority to extend *Bivens* to the case's cross-

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 748.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 749.

<sup>160</sup> *Id.* at 756.

<sup>161</sup> *Id.* at 749.

border context, especially in light of the case presenting a new *Bivens* context, which he claims the majority downplays in its analysis.<sup>162</sup> He disagrees with the majority primarily because previous *Bivens* remedies have not involved extraterritorial components or national security implications.<sup>163</sup>

Additionally, Justice Smith also finds that the majority overlooked several special factors counseling hesitation.<sup>164</sup> Focusing on the Supreme Court's determination that "the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," he argues that the implication of foreign relations, border security, Congress' failure to provide a damages remedy, and the cross-border nature of the case are all special factors.<sup>165</sup> Because only one special factor is necessary to preclude *Bivens* claims proceeding, Justice Smith argued against the majority's opinion to allow the claim and agreed with the Fifth Circuit's opinion in *Hernandez*.<sup>166</sup>

## VI. Analysis

The Ninth Circuit Court's decision in *Rodriguez* following the Fifth Circuit's contrary decision in *Hernandez* created a circuit split that has yet to be resolved. This is especially problematic as it means that two of the three Mexican-United States border touching federal circuit courts are split, which has significant negative implications for border-related issues. Although both cases recognize that the relevant circumstances present a new *Bivens* context, they disagree over the existence of any special factors counseling hesitation against extending a *Bivens* cause of action, and the importance of the presence, or lack thereof, of alternative remedies. Both cases have similar facts, involving cross-border

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<sup>162</sup> *Id.* at 752.

<sup>163</sup> *Id.* at 753.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 753-756.

<sup>166</sup> *Id.* at 758.

shootings of Mexican citizens by United States Border Patrol Agents, and implicate particular issues relevant to such circumstances. Nevertheless, in *Hernandez* the court decided not to extend a *Bivens* remedy and held that the agent was entitled to qualified immunity, while in *Rodriguez* the court disagreed and held that qualified immunity did not apply and allowed a *Bivens* remedy.

### **A. New *Bivens* Context**

Both the Fifth Circuit court in *Hernandez* and the Ninth Circuit Court in *Rodriguez* agreed that these circumstances would represent a new *Bivens* context, although they disagreed on the impact of that determination on allowing such a cause of action to proceed. While the Fifth Circuit found creating a new context to be a factor weighing against allowing a *Bivens* cause of the action, the Ninth Circuit merely took it as the first step in its overall analysis. Although the Fifth Circuit was correct to exercise some caution in allowing a new context as the Supreme Court has stated that doing so is judicially disfavored, it is not meant to be a complete bar. When necessary and so long as the other requirements are satisfied, *Bivens* is permitted to be extended in order to provide civil remedies to individuals whose constitutional rights have been violated. Therefore, by focusing too much on its concerns about allowing a new context in the first place, the Fifth Circuit's analysis was skewed in favor of confirming qualified immunity from the beginning, before the rest of the analysis involving special factors counseling hesitation and adequate alternative remedies was even discussed.

In circumstances such as these, where a foreign citizen has been shot from across the border by a United States border patrol agent without provocation, it is clear that *Bivens* would have to be extended to allow a remedy to go through. Previous *Bivens* contexts approved by the Supreme Court have included constitutional violations of the Fifth Amendment Equal Protection Clause in *Davis v. Passman*, and of the Eighth Amendment right to be free from cruel and unusual punishment in *Carlson v. Green*. Although

extension happens rarely, that does not mean it should not happen when appropriate. Furthermore, in these types of cases, where *Bivens* causes of action are the only remedy of individuals whose constitutional rights have been so egregiously violated and no special factors counsel hesitation, it is not only appropriate but necessary to ensure justice.

### **B. Special Factors Counseling Hesitation**

The disagreement over the existence of special factors counseling hesitation represents the main reason for the disparity in holdings between the Fifth and Ninth Circuit Courts. The threshold for such factors is low, as the presence of even one precludes *Bivens* claims from reaching fruition. However, even though the Fifth Circuit enumerated several relevant factors, the Ninth Circuit identified none. These alternate conclusions show that this type of analysis is dependent on the view from which it is taken and significantly influenced by the opinions of those making the determination. By focusing on the possibility of potential negative outcomes in the abstract, however likely or unlikely, the Fifth Circuit was able to identify several possible factors. In contrast, by focusing more on the likely outcomes of each case-specific component, the Ninth Circuit found no factors counseling hesitation. More guidance as to what constitutes “hesitation” and how to go about the analysis being provided by the Supreme Court could help overcome these disagreements and prevent circuit splits such as the one that has occurred here.

The factors found by the Fifth Circuit to be special and counseling hesitation were the impact on foreign affairs, the threat to national security, and the extraterritorial nature of the case. In regard to foreign affairs, the court worried that allowing civil liability could cause a negative impact on foreign affairs by creating tension between the American and Mexican governments. However, the same could also be true for not allowing civil liability. The killing of unarmed Mexican citizens across the border by United States government agents, especially the killing of children who did

nothing to provoke those agents, is a highly sensitive and complicated issue. In such cases those individuals have the constitutional right to be free from unreasonable seizures, and not providing the families of those individuals the ability to access civil remedies in response to those violations is far more concerning than any inevitable tension that may result from the litigation in the first place. Although foreign affairs implications are certainly a major consideration in the *Bivens* analysis, under these circumstances the potential negative impacts of *not* allowing civil litigation to proceed are more like a special factor counseling hesitation against denying a *Bivens* extension.

Moving next to national security considerations, the Fifth Circuit again argued that allowing a *Bivens* extension in these types of cases could have a negative impact, this time on the national security of the United States. Specifically, the court worried that allowing a *Bivens* remedy could cause border patrol agents to hesitate when making split second decisions in the future and therefore undermine their ability to perform their duties. What that court failed to consider, however, was that imparting increased hesitation on border patrol agents in the future may in fact be a good thing. When there are multiple instances of border patrol agents shooting innocent people, innocent children, without hesitation, that suggests that split second decisions can cause agents to overreact and end lives for no legally or morally sufficient reason. Such actions obviously constitute an infringement on justice and constitutional rights. Furthermore, punishing agents who react in this way would only have an impact on agents who are acting unreasonably, because only those who act unreasonably lose the protection of qualified immunity in the first place. Holding agents accountable for their unreasonable actions would not undermine the effectiveness of those agents who act appropriately, and actually may improve the overall success of national security by creating increased caution and awareness in border patrol agents in general. The Ninth Circuit was therefore sound in its reasoning that this factor, although highly relevant, is not one counseling hesitation against allowing a *Bivens* cause of action.

Finally, the Fifth Circuit also highlighted the extraterritorial nature of the claims as a special factor counseling hesitation. Although in the abstract this may seem to be logical, looking more narrowly at the specific facts of the case shows that the contrary opinion may also be reached. The previous factors of foreign affairs and national security overlap with this factor, so it makes sense that a court that found that those factors counseled hesitation would find the same for this factor as well, while a court that reached the opposite conclusion would again disagree. By looking at the specific facts of these cases, wherein innocent Mexican children were shot from across the border by United States Border Patrol agents, a court could actually find that not allowing civil liability is what really counsels hesitation. Although the cross-border nature of these claims caused increased complications and tensions between both governments, that alone is not dispositive to preclude *Bivens* claims. Because even foreign citizens residing in foreign countries have constitutional protections under these circumstances, they should not be denied the possibility of obtaining civil remedies for such heinous violations merely because they were on the opposite side of the border.

### **C. Alternative Remedies**

Although both the Fifth and Ninth Circuit Courts agreed that in these cases the affected individuals had no other adequate remedies, the Fifth Circuit did not find this to be very impactful on the overall *Bivens* analysis, while the Ninth Circuit made it a focus. The unequal weight given to this component suggests that additional clarification by the Supreme Court on the importance of a lack of adequate alternative remedies would be helpful going forward. The Fifth Circuit seems to suggest that Congress' failure to provide a damages remedy in these circumstances is telling, and therefore that a lack of adequate alternative remedies does not necessitate allowing the creation of a new *Bivens* context. The Ninth Circuit, on the other hand, discussed the lack of alternative remedies such as tort claims, restitution, and the Mexican court system at length in its opinion,

ultimately concluding that the lack not only allowed the analysis to proceed to the determination of special factors counseling hesitation, but that it weighed in favor of extending a *Bivens* remedy.

Although having clear damages remedies provided by Congress in these circumstances would be extremely helpful for determining when qualified immunity may be overcome, the lack of such clarity does not mean qualified immunity must therefore always be permitted. That would negate the purpose of the Supreme Court allowing *Bivens* claims from the outset. Instead, the presence, or lack thereof, of alternative remedies should be treated as one factor in the overall analysis. In this case, as enunciated by the Ninth Circuit, there are not adequate alternative remedies other than through a *Bivens* cause of action. This means that the only civil remedy the mothers of these children who were killed by United States border patrol agents have is to pursue such a claim. The only way that justice can be upheld, and the agents held civilly accountable is for the courts to take this lack of alternative remedies significantly into consideration when deciding whether to extend *Bivens* and defeat qualified immunity.

#### **D. Overall Effect of Extending *Bivens***

All of these individual components must be considered when determining whether or not to extend *Bivens*. Although doing so is indeed considered a judicially disfavored action that must be treated with caution, too much caution could alternatively frustrate the original purpose of preventing the infringement by government officials on individuals' constitutional rights. Additionally, if the Fifth Circuit Court's determination that special factors counseling hesitation exist is correct, a negative impact could occur in regard to foreign affairs, national security, and extraterritorial matters. And in the abstract, that may seem to be the case. However, from a case-specific point of view, the opposite realization becomes relevant as well. If the United States fails to allow these individuals to seek civil liability and overcome qualified immunity in light of the lack of adequate alternative remedies and special factors counseling

hesitation, that could cause even worse and farther-reaching ramifications for those issues.

## **VII. Conclusion**

These are complicated issues and analyses that are by no means meant to be taken lightly. Without further guidance from the Supreme Court, lower courts will likely continue to struggle with these types of situations and come to different opinions regarding the appropriate decisions. However, until that guidance is provided, it is important that courts strive to find the delicate balance between not overturning qualified immunity overzealously, but also not allowing it to obstruct judicious outcomes. Although both courts in this instance came to logical conclusions based on their understandings of the Supreme Court's rulings, the Ninth Circuit seems to have reached the most effective, unbiased outcome. Precluding *Bivens* remedies in these cases precludes not just one means of overcoming qualified immunity, but all possibilities of civil remedy in general. Because of the unreasonable nature of the actions committed by the relevant border patrol agents, *Bivens* should be extended so that qualified immunity should not obstruct justice and accountability.