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The *Bivens* Term: Why the Supreme Court Should Reinvigorate Damages Suits Against Federal Officers

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Two of the most important cases that the Supreme Court will hear during its current Term involve the availability of "*Bivens* remedies"—judge-made causes of action that allow individuals to seek damages against federal officers who violate their constitutional rights.[1] That may be a mouthful, but, in a nutshell, *Bivens* is the only mechanism today through which individuals whose constitutional rights were violated by the federal government can obtain legal relief once the violation has ceased.

Although cases raising the scope of *Bivens* don't tend to generate the same headlines as those involving hot-button social issues such as abortion, affirmative action, health care, and immigration, the more general principle of which *Bivens* is a critical element—that federal courts have an obligation to provide remedies for unconstitutional federal government conduct—is a bulwark of our constitutional system. Without such remedies, there would be little reason for federal officers to comply with the Constitution—especially those provisions that are least likely to be protected through the political process. And as Justice John Marshall Harlan II wrote in his concurring opinion in *Bivens*, "it would be . . . anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will."[2]

In recent years, however, lower courts have embraced just such an anomalous understanding, and have, for arguably the first time in American history, left a growing array of plaintiffs (with meritorious constitutional claims) with no legal remedies whatsoever. And although these rulings have received some support from the Justices, the Supreme Court has yet to issue a decision squarely calling *Bivens* into question—or, more importantly, directly holding that a private citizen claiming a constitutional violation has no possible remedy. But two cases the Justices will decide this spring raise fundamental questions about the continuing viability of *Bivens*—and, in the process, about the broader role of the federal courts as a check on unconstitutional federal government conduct. To be sure, both *Ziglar* v. *Abbasi* and *Hernandez* v. *Mesa* (in which I am co-counsel to the Petitioners)[3] confront the Supreme Court with additional

[1] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
[2] *Id.* at 403–04 (Harlan, J., concurring in the judgment).
[3] Needless to say, the views expressed herein are mine alone, and do not necessarily reflect the views of the Petitioners in *Hernandez* or my co-counsel.

questions beyond the existence of a *Bivens* remedy. But now more than ever, as this Issue Brief explains, these cases also present a critical opportunity for the Justices to reassert the role of *Bivens*—and, through it, the judiciary—in vindicating the basic rights conferred by the Constitution, and in properly holding the federal government to account.

I. The Road to *Bivens*

Shortly after the Civil War (and the post-Civil War amendments, which enshrined new federal constitutional constraints on state actors), Congress created a general cause of action for anyone whose constitutional rights were violated by state officials. That remedy, codified today at 42 U.S.C. § 1983, has been an indispensable mechanism for holding state officers accountable for violations of the federal Constitution—and for ensuring not just the supremacy of federal law, but the role of the federal courts as a bulwark against unconstitutional state conduct. But Congress has never seen fit to provide a similar remedy against *federal* officers. Instead, victims of constitutional violations by *federal* officers have historically been left to asserting their constitutional rights as defenses to state (or federal) enforcement proceedings, or, more significantly, to judge-made civil remedies—remedies that, for the better part of the Nation's first two centuries, derived from *state*, rather than *federal* law. A pre-Civil War Supreme Court decision rejected the argument that federal jurisdiction in such cases ought to be exclusive,[4] and the Court would still explain as late as 1963 that, "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law."[5]

By that point, however, several flaws in the original model had crystallized. First, although it had been possible to loosely analogize certain constitutional protections to state tort law (*e.g.*, vindicating Fourth Amendment violations through trespass), that analogy did not hold up well as applied to many of the other constitutional rights (such as equal protection) into which the courts were then breathing new life. Second, the same period saw federal courts more routinely asserting the power to *enjoin* unconstitutional conduct by the federal government—even though, as with damages, no statute expressly authorized them to provide such relief—creating both a strange jurisdictional asymmetry between prospective and retrospective relief against federal officers and a precedent for a more aggressive federal judicial role. Third, and related, the 1950s and 1960s brought with them the rise of what Judge Henry Friendly called "the new federal common law," pursuant to which federal courts identified more specific—and more analytically coherent—grounds on which to fashion judge-made (as opposed to statutory) rules of decision, defenses, and causes of action.[6]

These developments came to a head in *Bivens*—a case arising out of an unconstitutional raid of a home by six agents of the Federal Bureau of Narcotics (today's DEA). Bivens—who was never charged as a result of the unlawful search, and therefore had no opportunity to vindicate his rights through a motion to suppress—instead sought damages directly under the Fourth Amendment for the violation. Tellingly, the Nixon administration's argument in response was not that the Constitution denied Bivens a remedy; it was that the appropriate remedy for his constitutional claim was provided by New York state law—and that

[4] Teal v. Felton, 53 U.S. (12 How.) 284 (1852).
[5] Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (citing Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10, 12 (1817)); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 87–90, 135–37 (1997).
[6] Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389–91 (1964); *see also* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 761.

judge-made *federal* damages remedies would only be appropriate in cases in which they were "indispensable for vindicating constitutional rights."[7]

Writing for a 5-3 majority (with Justice Harlan concurring in the judgment), Justice William Brennan disagreed. So long as Congress had not provided an adequate, alternative remedy, and so long as the dispute did not involve "special factors counseling hesitation in the absence of affirmative action by Congress," private individuals whose constitutional rights had been violated by federal officers were entitled to pursue damages remedies in the federal courts. To be sure, valid defenses—including official immunity—might still preclude relief on the merits in such cases. The key contribution of *Bivens* was to suggest that, where there were no such obstacles, and where a plaintiff was entitled to relief on the merits, the federal courts had the authority to award damages—not just to vindicate the constitutional rights of private individuals, but, in the words of Chief Justice William Rehnquist, "to deter individual federal officers from committing constitutional violations."[8]

II. *Bivens* After *Bivens*

The 45 years in which *Bivens* has been on the books can best be broken down into two periods: Expansion and retrenchment. Thus, in the Supreme Court's first two cases after *Bivens* to revisit the 1971 ruling, the Court expanded its analysis to also encompass equal protection claims under the Fifth Amendment's Due Process Clause,[9] and claims against federal prison officials under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[10] And although the *Bivens* dissenters had objected that judicial recognition of a self-executing cause of action for damages was an arrogation of judicial power and a usurpation of the legislative function, Congress, when it amended the Federal Tort Claims Act in 1974 (the statute authorizing ordinary tort suits against the federal government), signified its *approval* of *Bivens*—extending the FTCA to encompass intentional torts by law enforcement officers while expressing its view of the FTCA as complementing, rather than displacing, such judge-made remedies.[11]

Beginning in the 1980s, though, the narrative grew more equivocal. First, the Supreme Court began declining to recognize *Bivens* remedies in cases in which federal statutes provided *any* remedy to redress the underlying constitutional harm—even where the statutory remedy was not commensurate with the kind of damages that would have been available under *Bivens*. Thus, for example, in *Schweiker* v. *Chilicky*, the Court held that the Social Security Act's remedy for wrongful termination of benefits—which was nothing more than the restoration of benefits and payment of any unlawfully withheld funds—was enough to preclude a damages claim under the Fifth Amendment's Due Process Clause.[12] Second, in a pair of cases brought by servicemember plaintiffs, the Court for the first time identified "special factors counseling hesitation" against recognizing a *Bivens* remedy, holding that separation of powers considerations militated against the civilian federal courts fashioning remedies for servicemembers against their superior officers.[13] Subsequent Supreme Court decisions expanded this "special factors" analysis to encompass claims against government

[7] Brief for Respondents at 24, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (No. 301), 1970 WL 116900.
[8] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 (2001).
[9] Davis v. Passman, 442 U.S. 228 (1979).
[10] Carlson v. Green, 446 U.S. 14 (1980).
[11] *See id.* at 19–20.
[12] Schweiker v. Chilicky, 487 U.S. 412 (1988).
[13] United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983).

agencies (as opposed to individual officers),[14] and claims against private prison corporations,[15] even though the plaintiffs in both cases may well have been able to pursue relief under *Bivens* or state law against different defendants.

But the most significant development for *Bivens* during this time period is also the least understood: Whereas the choice that cases like *Bivens* had thus far presented was, as in *Bivens* itself, between federal damages remedies and state damages remedies, Congress in 1988 amended the FTCA to provide that *all* state-law tort claims against federal officers acting within the scope of their employment had to be brought in federal court under the FTCA (but not *Bivens* claims, which were expressly exempted).[16] As Professor Carlos Vázquez and I have argued at some length, thanks to the *Bivens* exemption, the 1988 amendment—known as the Westfall Act—was actually *unclear* as to whether it also applied to state-law claims for federal *constitutional* violations, such as that which the Nixon administration had supported in *Bivens*. Indeed, as we've explained, there are compelling reasons to conclude that it did not—and that it left intact the power of state courts to provide damages against federal officers for constitutional violations.[17]

But what *is* clear about the Westfall Act on this point is how it has been read by every subsequent court—to (perhaps incorrectly) also encompass state-law claims for federal constitutional violations. In other words, whereas the choice the *Bivens* Court faced was between state-law damages and damages under the federal Constitution, the choice that federal courts have confronted in post-1988 *Bivens* cases (at least where there is no alternative remedy) is "*Bivens* or nothing." And increasingly, the lower courts, at least, have chosen "nothing," without acknowledging the dramatically different consequences of such a ruling today as compared to before the Westfall Act. Indeed, as I've summarized elsewhere, there are now decisions from at least six different circuits refusing to infer *Bivens* remedies for private plaintiffs who would otherwise be left with *no* remedy for violations of their constitutional rights under state or federal law.[18]

Part of the lower courts' justification for the rising hostility to *Bivens* can be traced to Justice Antonin Scalia's concurrence in a 2001 *Bivens* case—*Malesko v. Correctional Services Corp.* Writing for himself and Justice Clarence Thomas, Scalia attacked *Bivens* head-on, decrying it as a "relic of the heady days in which this Court assumed common-law powers to create causes of action," powers that the Court was in the midst of dramatically scaling back in the context of *statutory* claims.[19] Thus, he concluded, *Bivens* and the two other Supreme Court decisions approving comparable claims ought to be limited to their facts.[20]

But the rest of the Court has never endorsed such skepticism, and for good reasons: First, unlike statutory rights (the existence and scope of which are wholly a matter of legislative grace), constitutional rights are the province of the federal judiciary, which is "supreme in the exposition of the law of the Constitution,"[21]

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[14] FDIC v. Meyer, 510 U.S. 471 (1994).
[15] *Malesko*, 534 U.S. 61.
[16] *See* 28 U.S.C. § 2679(b) (1988).
[17] *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).
[18] *See* Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035 (2016).
[19] *Malesko*, 534 U.S. at 75 (Scalia, J., concurring).
[20] *Id.*
[21] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

including the means by which that law must be enforced. Second, and related, the purpose of constitutional rights is to constrain the political branches, and not the other way around. Thus, whatever separation of powers problems might arise from judicial recognition of implied statutory remedies, recognition of implied *constitutional* remedies is a central means of vindicating, rather than aggrandizing, separated powers. Third, as Justice Harlan emphasized in his *Bivens* concurrence, objections to *Bivens* remedies sounding in judicial power ring especially hollow in light of the far more coercive authority the federal courts have long (and rightly) exercised to *enjoin* unconstitutional federal conduct without an express cause of action.

Perhaps for those reasons, the Supreme Court in the 15 years since *Malesko* has continued to express skepticism about *Bivens*, but nothing more—and has yet to hold, in a case presenting a private plaintiff for whom the choice really is "*Bivens* or nothing," that the plaintiff should be left with nothing. Instead, in cases such as *Wilkie* v. *Robbins*,[22] *Hui* v. *Castaneda*,[23] and *Minneci* v. *Pollard*,[24] the Court has relied upon alternative federal and state remedies as its justification for refusing to recognize a *Bivens* claim. And when cases have come to the Justices presenting the starker choice—between *Bivens* and nothing—their approach, at least until this Term, has been to duck the matter by denying certiorari.

But on October 11, the Justices granted certiorari in *Abbasi*, in which one of the questions presented was whether non-citizen immigration detainees could pursue a *Bivens* claim arising out of their allegedly unconstitutional treatment while detained as part of the post-9/11 roundup of Muslim and Arab immigrants in and around New York (a divided panel of the Second Circuit had said "yes"). On the same day, the Justices also granted review in *Hernandez*—a case arising out of a U.S. Border Patrol agent's allegedly unconstitutional cross-border shooting of an unarmed 15-year-old Mexican national. And, most curiously, although the lower court rulings in *Hernandez* had focused on whether the Constitution even applied in such a case (and, if it did, the agent's entitlement to a qualified immunity defense—which the en banc Fifth Circuit unanimously sustained), the Justices *added* to the cert. grant in *Hernandez* the question whether "the claim in this case [may] be asserted under *Bivens*." Taken together, then, the grants in *Abbasi* and *Hernandez* bespeak a renewed interest on the Justices' part in *Bivens*—and in a pair of cases, unlike any *Bivens* case the Court has heard since the Westfall Act was enacted, in which the choice truly *is* "*Bivens* or nothing."

III. The Stakes of *Abbasi* and *Hernandez*

Although they took very different paths to the Supreme Court, *Abbasi* and *Hernandez* both have at their core constitutional claims for which there are no alternative remedies. In *Abbasi*, the plaintiffs are eight non-citizens who lacked lawful immigration status at the time they were arrested as part of the post-9/11 roundup—but who also were, as the Court of Appeals concluded, "unquestionably never involved in terrorist activity." The plaintiffs did not challenge their arrest and detention, but rather a series of decisions taken by both lower-level and senior FBI, DOJ, and immigration officials to subject them to the same harsh and punitive treatment as those detainees who *were* terrorism suspects, arguing that such carelessness violated their rights under the Free Exercise Clause of the First Amendment, the Fourth Amendment, and the Due Process Clause of the Fifth Amendment. In a lengthy, divided decision, the Second Circuit

[22] 551 U.S. 537 (2007).
[23] 559 U.S. 799 (2010).
[24] 132 S. Ct. 617 (2012).

allowed the plaintiffs' *Bivens* claims under the Fourth and Fifth Amendments to proceed, but held that the First Amendment claim would require extending *Bivens* into a "new context," and was thus not appropriately the basis for a *Bivens* claim.

In her dissent, Judge Raggi argued that "national security" was a special factor counseling hesitation before recognizing a cause of action under the Fourth and Fifth Amendments. As she wrote, "when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical *Bivens* scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages."[25]

But whereas the lower courts *have* at times invoked "national security" as a special factor counseling hesitation before recognizing a *Bivens* remedy, the Supreme Court has never followed suit—perhaps because, as in *Abbasi*, it would effectively immunize government officers from any constitutional violations arising out of policies labeled as being related "national security," even when the alleged violations themselves have no plausible connection to national security considerations. Indeed, overreaching out of a desire to protect the country may very well go to the *reasonableness* of the government's conduct under the Fourth Amendment, or the strength of the government's interest under the Fifth Amendment. But to allow it to cut against a cause of action altogether is to foreclose relief even when the government's conduct is unreasonable under the Fourth Amendment or lacks a sufficiently strong interest under the Fifth Amendment. In other words, there are easy and obvious ways adequately to accommodate the government's legitimate concerns in these cases without using *Bivens* analysis to foreclose all relief.

And although the *Abbasi* case brings with it at least the specter of national security, it is difficult to see a similar shadow looming over the *Hernandez* case—where the constitutional claim is simply that a single, rogue officer (what Judge Raggi called "the typical *Bivens* scenario") committed an unjustified act of lethal force against an unarmed Mexican boy while patrolling the U.S.-Mexico border. In opposing certiorari in *Hernandez*, the government suggested that "foreign relations" concerns are a special factor justifying judicial skepticism of a *Bivens* remedy—even though the Mexican government has repeatedly clamored *for* a U.S. remedy (including in an amicus brief filed in the Supreme Court last month), given the unavailability of means by which Officer Mesa can be held to account under Mexican law. The government has also suggested that "extraterritoriality" is a special factor—that courts should never recognize *Bivens* claims where the underlying conduct took place across the U.S. border, analogizing to the presumption against extraterritorial application of statutes. But again, this both ignores the difference between constitutional and statutory rights and conflates the merits with the cause of action question. *Hernandez* raises an important and interesting question about how the Fourth and Fifth Amendments apply in the unique context of the U.S.-Mexico border—one of the questions on which the Court granted review. But if either provision *does* apply, and if Officer Mesa's conduct violated the victim's constitutional rights, then to decline to recognize a *Bivens* remedy in *Hernandez* is potentially to sanction such reckless conduct in the future—since there will never be a way to obtain injunctive relief *before* such an unlawful shooting takes place.

[25] Turkmen v. Hasty, 789 F.3d 218, 265 (2d Cir. 2015) (Raggi, J., concurring in part and dissenting in part).

Don't get me wrong—there may indeed be cases in which there are compelling reasons why the federal courts should stay their hand before allowing a plaintiff to sue directly under the Constitution for damages. The critical point, though, is that such special factors must be reasons to disfavor judicial intervention *assuming* that the plaintiffs' allegations are true, that their rights were violated, and that no defense otherwise precludes recovery. That is, even when the plaintiff should win, we should be of the view that no remedy is appropriate.

The problem both *Abbasi* and *Hernandez* highlight is the blurring of these necessarily distinct ideas—and, in the process, the potential categorical foreclosure of damages remedies to enforce constitutional rights. As Seventh Circuit Judge Ann Williams wrote in 2012, such a restrictive approach to *Bivens* portends "a doctrine of constitutional triviality where private actions are permitted only if they cannot possibly offend anyone anywhere. That approach undermines our essential constitutional protections in the circumstances when they are often most necessary. It is no basis for a rule of law."[26]

IV. Conclusion

The timing of the upcoming oral arguments in *Abbasi* and *Hernandez* is more than a little ironic: *Abbasi*, the second case to be heard on Wednesday January 18, will be the very last argument that the Justices hear during the Obama administration. And *Hernandez*, which will be argued in February, is likely to be one of the very first cases in which the Justices will hear from the Trump Justice Department. But whatever else separates the two administrations, one point of common cause will surely be their opposition to recognition of *Bivens* remedies in either case.

It was not true in *Bivens*—and has not been true in most of the *Bivens* cases to reach the Supreme Court in the ensuing decades—that the federal judiciary was properly presented with a choice between a remedy under *Bivens* or nothing. But it *is* true in both *Abbasi* and *Hernandez*. As Justice Harlan explained 45 years ago, "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances."[27] Indeed, it may be more important now than ever.

About the Author

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[26] Vance v. Rumsfeld, 701 F.3d 193, 230–31 (7th Cir. 2012) (en banc) (Williams, J., dissenting), *cert. denied*, 133 S. Ct. 2796 (2013).
[27] Bivens, 403 U.S. at 411 (Harlan, J., concurring in the judgment).

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