CONSTITUTIONAL LAW — *BIVENS* ACTIONS — NINTH CIRCUIT EXTENDS *BIVENS* REMEDY TO MEXICAN CITIZEN KILLED IN MEXICO BY CROSS-BORDER AGENT STANDING IN AMERICA. — *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018).

Congress has never provided a statutory damages remedy for the constitutional torts of federal officials,[1] but in 1971, the Supreme Court found one implied under the Constitution in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[2] Although the case was once thought to have ushered in a new era of federal accountability,[3] the Supreme Court has extended this remedy only twice[4]: in *Davis v. Passman*[5] in 1979 and *Carlson v. Green*[6] in 1980 (together, the "*Bivens* trilogy"[7]). The Court has since consistently rejected *Bivens* claims[8] and, in *Ziglar v. Abbasi*,[9] decisively stated a presumption against implied damages actions against federal officials, asserting that expanding *Bivens* is "disfavored."[10] Recently, in *Rodriguez v. Swartz*,[11] a divided Ninth Circuit panel extended a *Bivens* remedy to the mother of a Mexican boy shot and killed in Mexico by a border patrol agent standing on American soil.[12] In sustaining a supposedly "disfavored" remedy, the Ninth Circuit demonstrated the survival of *Bivens* as a remedial tool through a flexible interpretation of the Court's *Bivens* jurisprudence and highlighted its value in redressing egregious constitutional violations.

On October 10, 2012, sixteen-year-old José Antonio Elena Rodriguez (referred to by the court as J.A.) was walking home in his neighborhood

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[1] Bernard W. Bell, *Reexamining* Bivens *After* Ziglar v. Abbasi, 9 CONLAWNOW 77, 77–78 (2018).

[2] 403 U.S. 388 (1971) (holding that a plaintiff could sue federal agents who had performed an unconstitutional search of his home).

[3] *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 822–23 (2010).

[4] Lower courts have also extended *Bivens* to address additional constitutional violations. *See, e.g.*, Paton v. La Prade, 524 F.2d 862, 870 (3d Cir. 1975) (First Amendment); Apton v. Wilson, 506 F.2d 83, 93–94 (D.C. Cir. 1974) (Fifth Amendment); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 161–62 (D.D.C. 1976) (Sixth Amendment).

[5] 442 U.S. 228 (1979) (allowing a *Bivens* action under the Fifth Amendment against a congressman for gender discrimination).

[6] 446 U.S. 14 (1980) (allowing a *Bivens* action under the Eighth Amendment against prison officials for failure to adequately provide medical treatment to an inmate).

[7] Bell, *supra* note 1, at 85.

[8] *See* Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 937–38 (2018); *see also, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 555 (2007) (harassment claim against federal department); FDIC v. Meyer, 510 U.S. 471, 473 (1994) (Fifth Amendment claim against federal agency); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (claim against termination of Social Security benefits); Bush v. Lucas, 462 U.S. 367, 368 (1983) (First Amendment claim against federal employer).

[9] 137 S. Ct. 1843 (2017).

[10] *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

[11] 899 F.3d 719 (9th Cir. 2018).

[12] *Id.* at 748.

of Nogales in Mexico near the U.S.-Mexico border when he was shot and killed by Lonnie Swartz, a Customs and Border Protection (CBP) agent who was standing in Arizona.[13] Rodriguez was unarmed and, according to eyewitnesses, posed no threat when Swartz fired his gun.[14] Unknown to Swartz at the time of the shooting, J.A. was a Mexican citizen who had never been to the United States.[15] Araceli Rodriguez, J.A.'s mother, sued the border patrol agent under a *Bivens* remedial theory, alleging that Swartz violated J.A.'s Fourth and Fifth Amendment rights.[16] Swartz moved to dismiss, asserting qualified immunity and arguing that J.A. lacked constitutional rights because he was a Mexican citizen killed in Mexico.[17]

The U.S. District Court for the District of Arizona granted in part and denied in part Swartz's motion.[18] Although the Supreme Court had previously held that the Fourth Amendment did not protect a Mexican citizen lacking substantial connections to the United States from a warrantless search in Mexico,[19] the district court pointed to the Supreme Court's more recent emphasis on "practical considerations" in evaluating the extraterritorial application of the Fourth Amendment.[20] Given the border's fluidity, J.A.'s family connections to the United States, and the border agent's location in America, the court concluded that the Fourth Amendment protected J.A. from an unreasonable seizure of the sort alleged.[21] It held that Swartz had violated this "clearly established" right and thus was not entitled to qualified immunity.[22]

After the district court's decision, the Supreme Court provided relevant guidance in two intervening cases. In *Ziglar v. Abbasi*, the Court rejected the *Bivens* claim of alien detainees who alleged abusive detention conditions.[23] Justice Kennedy characterized *Bivens* as an anachronism of the Court's prior readiness to recognize implied causes of action[24] and its expansion as a "'disfavored' judicial activity."[25] He outlined a two-step test for deciding *Bivens* cases, designed as a fine-meshed filter:

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[13] Rory Carroll, *Border Patrol Agent Found Not Guilty of Murder in Mexican Teen's 2012 Death*, THE GUARDIAN (Apr. 24, 2018, 1:51 PM), https://www.theguardian.com/us-news/2018/apr/23/border-patrol-shooting-jose-antonio-elena-rodriguez-lonnie-swartz [https://perma.cc/R95R-25EU].

[14] Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1029 (D. Ariz. 2015).

[15] *Rodriguez*, 899 F.3d at 727.

[16] *Rodriguez*, 111 F. Supp. 3d at 1028.

[17] *Id.* at 1030–31.

[18] *Id.* at 1028 (granting only Swartz's motion to dismiss the Fifth Amendment claim, *id.* at 1038).

[19] United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 274–75 (1990).

[20] *Rodriguez*, 111 F. Supp. 3d at 1035 (quoting Boumediene v. Bush, 553 U.S. 723, 759–66 (2008)).

[21] *Id.* at 1036–38.

[22] *Id.* at 1032.

[23] 137 S. Ct. 1843, 1853 (2017).

[24] *Id.* at 1856 (expressing doubt that the Court's three *Bivens* cases would have been decided the same way today).

[25] *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

First, a court must determine whether a case is "different in a meaningful way from previous *Bivens* cases decided by [the] Court,"[26] a filter catching essentially all claims that do not precisely mirror the facts of the *Bivens* trilogy.[27] Second, a court must determine whether (1) adequate alternate remedies exist (in which case, no remedy under *Bivens*)[28] and (2) whether "special factors counsel[] hesitation" in extending a *Bivens* remedy even if no other remedy exists.[29] Though the Court did not proffer an explicit evaluation scheme, it sanctioned a broad interpretation of qualifying factors, including any "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy."[30] Applying the test, Justice Kennedy declared that national security and immigration policy were relevant special factors and declined to extend *Bivens*.[31]

The second case, *Hernandez v. Mesa*,[32] which involved the killing of a Mexican boy in Mexico by a border patrol agent in Texas,[33] presented a close analogue to *Rodriguez*. The Court held that the *Bivens* question was "antecedent" to that of the extraterritorial application of the Fourth Amendment.[34] The Court also clarified that factors unknown to the officer at the time of the shooting, including the boy's citizenship, were irrelevant in determining whether qualified immunity should be granted[35] and remanded the case to the Fifth Circuit.[36] An en banc Fifth Circuit ultimately denied a *Bivens* remedy, holding that the cross-border element constituted a "new context," with national security and foreign policy presenting special factors counseling hesitation.[37]

Using both cases as guideposts, the Ninth Circuit affirmed the district court in *Rodriguez*.[38] Writing for the panel, Judge Kleinfeld[39] concluded that J.A. had a Fourth Amendment right to be free from the

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[26] *Id.* at 1859.

[27] Justice Kennedy gave examples of qualifying differences, including "the rank of the officers involved; the constitutional right at issue; [and] the generality or specificity of the official action." *Id.* at 1860.

[28] *Id.* at 1858.

[29] *Id.* at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)). Justice Kennedy did not expressly define the special factors but noted 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." *Id.* at 1857–58.

[30] *Id.* at 1858.

[31] *Id.* at 1860–63.

[32] 137 S. Ct. 2003 (2017) (per curiam).

[33] *Id.* at 2005.

[34] *Id.* at 2006 (quoting Wood v. Moss, 134 S. Ct. 2056, 2066 (2014)).

[35] *Id.* at 2007.

[36] *Id.* at 2008.

[37] Hernandez v. Mesa, 885 F.3d 811, 816–20 (5th Cir. 2018) (en banc).

[38] *Rodriguez*, 899 F.3d at 726.

[39] Judge Kleinfeld was joined by Judge Korman, sitting by designation from the Eastern District of New York.

unreasonable use of deadly force.[40] Citing *Hernandez*, he stated that J.A.'s nationality and U.S. ties were unknown to Swartz and therefore irrelevant in evaluating Swartz's conduct.[41] The court held that Swartz's use of force was "objectively unreasonable."[42] Additionally, the court found that Swartz lacked qualified immunity because it was, at the time of the incident, "clearly established that it was unconstitutional for an officer on American soil to use deadly force without justification against a person of unknown nationality on the other side of the border."[43]

The Ninth Circuit extended a *Bivens* remedy with noted reluctance.[44] Applying the *Abbasi* test, Judge Kleinfeld first determined that the case presented a new context: although, like *Bivens*, the case addressed an unconstitutional seizure, the seizure here occurred abroad.[45] Moving to the second step, he concluded that (1) Rodriguez lacked an adequate alternative remedy because she could not sue the U.S. government nor recover from Mexican courts.[46] Analyzing the implications for national security and foreign policy, he furthermore found that (2) no special factors counseled hesitation.[47] Asserting that "national-security concerns" could not be waved like a "talisman,"[48] he stated that "no one suggests that national security involves shooting people who are just walking down a street in Mexico" and that "holding Swartz liable . . . would not meaningfully deter Border Patrol agents from performing their duties."[49] Likewise, extending a *Bivens* remedy would not implicate foreign policy; rather, American courts' refusal to recognize "gross violation[s]" of another country's sovereignty would "threaten international relations."[50] Judge Kleinfeld concluded "there [was] no reason to infer that Congress deliberately chose to withhold a remedy."[51]

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[40] *Rodriguez*, 899 F.3d at 728–32.

[41] *Id.* at 733 (quoting *Hernandez*, 137 S. Ct. at 2007).

[42] *See id.* at 731–32.

[43] *Id.* at 733.

[44] *Id.* at 748.

[45] *Id.* at 738. The dissent also highlighted what it perceived as meaningful differences. *Id.* at 752–53 (Smith, J., dissenting) ("'[N]o court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone a case implicating both.' The Court also has never upheld a *Bivens* claim against Border Patrol agents . . . ." (citation omitted) (quoting Meshal v. Higgenbotham, 804 F.3d 417, 424–25 (D.C. Cir. 2015))).

[46] *Id.* at 739–44 (majority opinion) (explaining that Rodriguez could not bring a tort claim under the Federal Tort Claims Act, restitution from a parallel criminal proceeding would be inadequate, and there was no evidence that Mexican courts could grant a remedy).

[47] *Id.* at 744.

[48] *Id.* at 745 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017)).

[49] *Id.* at 745–46.

[50] *Id.* at 746.

[51] *Id.* at 748.

In his dissent, Judge Milan D. Smith, Jr., focused solely on whether *Bivens* should be extended. He claimed that it was "obvious" that only Congress possessed the authority to extend *Bivens* to the cross-border context because of the necessity of weighing multiple policy considerations.[52] Although Judge Smith argued that the case should be dismissed based on the first *Abbasi* prong, he also explained that special factors counseled hesitation.[53] Citing *Abbasi*, Judge Smith reasoned that the lack of alternative recourse was not alone persuasive because congressional silence indicated a decision not to provide a remedy.[54] Moreover, the case was "brimming" with reasons Congress may have declined to provide a damages remedy: national security and foreign policy concerns weighed against interfering with border security agents.[55] He predicted the Supreme Court would "chasten[]" the majority's approach.[56]

The Supreme Court's jurisprudence since the 1980s has suggested that *Bivens* would not survive beyond its immediate progeny.[57] But neither *Abbasi* nor *Hernandez* explicitly overruled *Bivens*. In fact, the Court implied that new *Bivens* remedies could be inferred[58] but declined to provide concrete guidance regarding when and how, particularly with respect to the "special factors." Predictably, circuits have thus diverged in their approaches to applying *Abbasi*.[59] Contrary to the dissent's suggestion, the majority in fact closely hewed to the confines of the *Abbasi* framework in judging the context as new and then undergoing special factors analysis.[60] The *Rodriguez* court simply abandoned the pretense of trying to fit new cases neatly into the confines of the *Bivens* trilogy. Its evaluation of the special factors was a valid exercise of the discretion left to lower courts by *Abbasi*. *Rodriguez* thus demonstrated a flexibility inherent in the *Abbasi* framework that may permit courts to overcome

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[52] *Id.* at 749–50 (Smith, J., dissenting).

[53] *Id.* at 753.

[54] *Id.* at 755 ("'Congress' failure to provide a damages remedy' . . . cannot be ascribed to 'mere oversight' . . . . The majority's decision . . . is precisely the sort of '"congressionally uninvited intrusion" [that] is "inappropriate" action for the Judiciary to take.'" (alteration in original) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017))); *see also* Hernandez v. Mesa, 885 F.3d 811, 821 (5th Cir. 2018) ("[T]he *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension.").

[55] *Rodriguez*, 899 F.3d at 753 (Smith, J., dissenting).

[56] *Id.* at 752.

[57] *See, e.g.*, Godfrey, *supra* note 8, at 944–45; *The Supreme Court, 2016 Term — Leading Cases*, 131 HARV. L. REV. 223, 313–22 (2017).

[58] *See Abbasi*, 137 S. Ct. at 1858 ("[I]f equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations.").

[59] An alien shot on foreign soil by a CBP agent now has recourse under *Bivens* if the agent was standing in California or Arizona but not Texas. *Rodriguez*, 899 F.3d at 758 (Smith, J., dissenting).

[60] *Id.* at 738 (majority opinion) (arguing that "[*Abbasi*'s] instruction for a lower court to consider extension would have been superfluous if courts were barred from extending *Bivens*"); *see also Abbasi*, 137 S. Ct. at 1860 (noting that, because the case presented a new context, "a special factors analysis was required before allowing [the] damages suit to proceed").

*Bivens*'s judicial disfavor: courts may extend *Bivens* remedies to new contexts as long as they carefully consider the extent to which congressional action, public policy, and the nature of the case would implicate separation of powers principles or result in judicial overreach. Openly conducting this step — seldom reached in modern *Bivens* jurisprudence — is vital for crafting coherent, uniform limits to the judiciary's remedial power.

The *Rodriguez* opinion does depart from typical *treatment* of the *Bivens* question: since the 1980s, the Court has rejected every *Bivens* claim it has evaluated[61] and specifically has halted cases that touch on national security,[62] even while recognizing the lack of alternate remedies.[63] Lower courts have followed suit.[64] This practice has been justified by a desire not to cabin the discretion of federal officers in performing their duties and on separation of powers grounds — to preserve the exclusive domain of Congress and the Executive, to which the Constitution grants nearly plenary power over foreign relations and which establish national security policy.[65] The Ninth Circuit departed from this conventional view, and because other courts may weigh the special factors differently, it is possible that *Rodriguez* will not withstand higher review.[66] But notwithstanding the longevity of the decision, the Ninth Circuit's interpretation of *Abbasi* — encouraging courts to meaningfully evaluate a claim's impact on Congress's and the Executive's authority before denying recourse — offers guidance for other courts. This approach is normatively beneficial because it prevents dismissal of claims

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[61] *See Abbasi*, 137 S. Ct. at 1855.

[62] *See, e.g.*, *id.* at 1861 (rejecting plaintiff's claim partly because it would "of necessity requir[e] an inquiry into sensitive issues of national security"); United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 273–74 (1990) (concluding that respondent's claim would have "significant and deleterious consequences" for national security, which may prevent a *Bivens* remedy). In *Abbasi*, Justice Kennedy opined that balancing the harm of unconstitutional conduct by federal officials and national security concerns should be left to Congress. *Abbasi*, 137 S. Ct. at 1861–63 ("If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis." *Id.* at 1863.).

[63] *See, e.g.*, Hernandez v. Mesa, 885 F.3d 811, 815 (5th Cir. 2018) (suggesting that a plaintiff in Rodriguez's situation could not recover except by *Bivens* because "[n]o federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer").

[64] *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 575 (2d Cir. 2009) (concluding that national security implications counseled against extending *Bivens* to new context of alien's extraordinary rendition); El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 263 (D. Conn. 2008) (finding that "the relationship between the federal government and its alien visitors . . . implicate[s] foreign relations concerns"); *see also* Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125 (2014) ("Five of the federal circuit courts have held . . . it is inappropriate to authorize a *Bivens* damages remedy against federal officials in suits involving sensitive national security or foreign relations issues, even when the plaintiff had no other effective remedy for the allegedly unconstitutional conduct of the U.S. government." (footnote omitted)).

[65] *See* Kent, *supra* note 64, at 1125–26 (collecting cases).

[66] A petition for a writ of certiorari was filed on September 7, 2018. Petition for Writ of Certiorari, Swartz v. Rodriguez, No. 18-309 (Sept. 7, 2018).

that only tangentially implicate a special factor. For example, the *Rodriguez* court recognized that, although it dealt with border enforcement, Rodriguez's claim did not implicate national security. Holding Swartz liable would neither impermissibly impede border agents' discretionary authority nor challenge government policy[67] because Swartz's use of force contravened federal regulations.[68] The court recognized the role of CBP agents in ensuring national security but distinguished Swartz, a "rank-and-file officer," from the "policy-making official" defendants in *Abbasi*.[69] In examining the specific violation in the case, the majority concluded that the specter of national security was illusory, and thus no policy goals would be hindered by extending a remedy.[70]

*Rodriguez*'s approach provides much-needed accountability in remedying egregious constitutional harms — those involving clearly bad faith violations of constitutional rights,[71] including the unwarranted use of deadly force along the border. Damages remedies have typically addressed such law enforcement overreach.[72] For example, the *Bivens* trilogy of cases "all involve[d] officials who were not subject to meaningful constraint" on their unconstitutional conduct.[73] *Bivens* liability is warranted "where official action is unconstrained by either internal administrative review or judicial review."[74] Border patrol is one such domain; agents exercise significant authority, and very few violations are reviewed officially.[75] These conditions may contribute to abusive

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[67] *Rodriguez*, 899 F.3d at 745.

[68] *See* 8 C.F.R. § 287.8(a)(2)(ii) (2012). The government prosecuted Swartz for second-degree murder, and he was acquitted. Scott Neuman, *Border Patrol Agent Acquitted in 2012 Fatal Shooting of Mexican Teen*, NPR (Apr. 24, 2018, 1:24 AM), https://n.pr/2HmAjIv [https://perma.cc/T4XV-XXJF].

[69] *See Rodriguez*, 899 F.3d at 745. While courts review excessive force claims against state police under § 1983, there is no similar evaluation for claims against Border Patrol. *See* Julie Hunter, Comment, *Breaking Legal Ground: A* Bivens *Action for Noncitizens for Trans-Border Constitutional Torts Against Border Patrol Agents*, 15 SAN DIEGO INT'L L.J. 163, 194–95 (2013). Moreover, unlike with the military, no unique disciplinary structure cautions against extension. *Cf.* Chappell v. Wallace, 462 U.S. 296, 304 (1983).

[70] *Rodriguez*, 899 F.3d at 746 (noting the government had not "identified any policy that might be undermined").

[71] Adamson v. Comm'r, 745 F.2d 541, 545 (9th Cir. 1984) (interpreting a bad faith constitutional violation as conduct "a reasonable officer should know is in violation of the Constitution").

[72] *See* Peter S. Margulies, *Curbing Remedies for Official Wrongs: The Need for* Bivens *Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, 1174 (2018); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017) (noting that "individual instances of . . . law enforcement overreach . . . are difficult to address except by [ex post] damages actions").

[73] Bell, *supra* note 1, at 86.

[74] *Id.* at 85.

[75] *See* Alexandra A. Botsaris, Note, Hernandez v. Mesa*: Preserving the Zone of Constitutional Uncertainty at the Border*, 77 MD. L. REV. 832, 848–50 (2018) (explaining that CBP agents possess greater authority than traditional law enforcement officers, have become increasingly militarized, and undergo inadequate training and screening); Brian Bennett, *Border Patrol Agents Rarely Disciplined in Abuse Cases, Records Show*, L.A. TIMES (May 9, 2014, 9:16 PM), http://www.latimes.com/nation/la-na-border-force-20140510-story.html [https://perma.cc/8VYX-SPCR].

practices along the U.S.-Mexico border (which is policed by the United States[76]), where hundreds of incidents involving the use of force by agents take place every year.[77] Victims who are Mexican citizens often lack civil recourse in American courts,[78] a predicament that contributes to the problem of moral hazard in allowing agents to fall short of official policy.[79] Permitting remedies for egregious actions, especially those already in breach of federal law, would not reduce agents' permissible discretion in the performance of their duties.[80] It may instead better deter federal officers from engaging in future unconstitutional conduct, one aim of *Bivens*.[81]

Not every violation of a constitutional right mandates a remedy. However, given that *Bivens* has not been overruled, egregious violations resulting in significant harm are exactly the narrowly tailored conditions under which the theory may still prove valuable. *Rodriguez* applies the Court's heightened standards toward the *Bivens* question in a transparent manner that takes into account the need to deter unconstrained official action. Although its specific application may not endure, *Rodriguez* highlights the gravity of preserving an important tool for, at the very least, those flagrantly wronged by the conduct of federal agents.

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[76] The area is policed by approximately 16,600 U.S. Border Patrol agents. U.S. CUSTOMS & BORDER PROTECTION, U.S. BORDER PATROL FISCAL YEAR STAFFING STATISTICS (FY 1992–FY 2017) (2017), https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-staffing-statistics-fy-1992-fy-2017 [https://perma.cc/7ZM6-94NV].

[77] *CBP Use of Force Statistics*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/cbp-use-force [https://perma.cc/UG77-Z85T] (last modified Nov. 2, 2018). Studies report widespread abuse by CBP. *See, e.g.*, UNIV. CHI. LAW SCH. INT'L HUMAN RIGHTS CLINIC, ACLU SAN DIEGO & IMPERIAL CTYS. BORDER LITIG. PROJECT & ACLU BORDER RIGHTS, NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION (May 2018), https://chicagounbound.uchicago.edu/ihrc/1/ [https://perma.cc/LG5C-M8LL]; Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov./Dec. 2014), https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220 [https://perma.cc/933T-Z6L3].

[78] *See* Hunter, *supra* note 69, at 171–75.

[79] *See* Margulies, *supra* note 72, at 1176.

[80] *See* Joseph C. Alfe, *Extraterritorial Constitutionalism: A Rule Proposed*, 50 J. MARSHALL L. REV. 787, 810 (2017).

[81] Reinert, *supra* note 3, at 814; *cf.* Bell, *supra* note 1, at 84 (explaining that courts have more often than not "under-defined constitutional norms").