Fordham Law Review

Volume 88 | Issue 4 Article 5

2020

Breaking *Bivens*?: Falsification Claims After *Ziglar v. Abassi* and Reframing the Modern *Bivens* Doctrine

Alex Langsam
Fordham University School of Law

BREAKING *BIVENS*?: FALSIFICATION CLAIMS AFTER *ZIGLAR V. ABBASI* AND REFRAMING THE MODERN *BIVENS* DOCTRINE

*Alex Langsam**

The U.S. Supreme Court's 2017 decision in Ziglar v. Abbasi *purported to clarify the role of the judiciary in inferring* Bivens *suits directly from the Constitution, rather than a federal statute. Despite this effort, uncertainty has plagued the lower courts. While the Court's recent* Bivens *jurisprudence has focused on issues concerning national security, uncertainty also persists in* Bivens *claims in other domains. This Note examines* Bivens *claims seeking damages for constitutional violations by law enforcement agents who falsify evidence, lie to procure a search warrant, and commit other similar acts of misconduct. After recognizing a broad, unacknowledged circuit split on such claims, this Note offers a framework that would resolve the inconsistences that now abound while conforming to the principles of both* Ziglar v. Abbasi *and the original* Bivens *case.*

* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2008, Brown University. This work would not have been possible without the tremendous support of so many. First and foremost, I would like to thank Professor Benjamin C. Zipursky for his unwavering guidance and encouragement throughout this project's long and winding road. I would also like to thank Professor Andrew Kent for our frequent and inspiring discussions and Professor James J. Brudney for sparking my interest in legal scholarship. In addition, I must thank my parents for their invaluable suggestions and (often thankless) responses to my late-night ideas and questions. Finally, my deepest gratitude goes to Juliet, who has been my rock and greatest supporter throughout my entire law school career.

INTRODUCTION

A federal officer falsifies documents and manipulates witnesses, leading to two years of detention for a wrongfully charged defendant.[1] An FBI agent

1. *See* Farah v. Weyker, 926 F.3d 492 (8th Cir. 2019).

fabricates evidence to justify seizing an American citizen.[2] U.S. marshals plant a bullet in a man's apartment after arresting him while in search of someone else.[3] A DEA agent misrepresents critical information in a search warrant affidavit.[4] Though law enforcement's conduct in each instance seems an egregious violation of the Constitution, only some of the victims in these examples have been allowed their day in court to seek damages under a *Bivens* claim. Following the U.S. Supreme Court's decision in *Ziglar v. Abbasi*,[5] some lower courts have taken a remarkably restrictive turn, while others have not.

As any first-year law student knows from *Marbury v. Madison*, a fundamental principle of our legal system is that "where there is a legal right, there is also a legal remedy."[6] When it comes to the rights protected by the Constitution itself, the expectation that such a concept would hold true is especially intuitive. Yet the validity of this foundational principle has been called into question in some of these tragic cases, due to lower courts' attempts to apply the Supreme Court's current position on the availability of *Bivens*[7] remedies.

Abbasi, decided nearly three years ago, represents the culmination of a line of cases limiting the availability of *Bivens* claims.[8] *Bivens* claims were first recognized in their modern form by the Supreme Court in 1971 to permit monetary damages for certain constitutional wrongs inflicted by federal government officials.[9] Although Congress had never statutorily authorized this kind of suit against federal officials, as it had for their state and local counterparts in the aftermath of the Civil War,[10] the Court held it could imply a damages suit to vindicate the guarantees of the Fourth Amendment.[11] The *Abbasi* Court, however, declared that the creation of new kinds of *Bivens* claims should now be considered a "'disfavored' judicial activity."[12] Accordingly, the Court tightened an already strict framework for lower courts to determine if they could extend a new *Bivens* action: first, determine if the suit presents a "new *Bivens* context";[13] if so, decide whether there are "special factors counselling hesitation in the absence of affirmative action by

2. *See* Cantú v. Moody, 933 F.3d 414 (5th Cir. 2019).
3. *See* Jacobs v. Alam, 915 F.3d 1028 (6th Cir. 2019).
4. *See* Boudette v. Sanders, No. 18-CV-02420-CMA-MEH, 2019 WL 3935168 (D. Colo. Aug. 19, 2019).
5. 137 S. Ct. 1843 (2017).
6. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).
7. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
8. *See infra* Part I.D.
9. *See Bivens*, 403 U.S. at 397.
10. *See* 42 U.S.C. § 1983 (2018).
11. *See Bivens*, 403 U.S. at 396. For additional background on the original *Bivens* decision, see James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275 (Vicki C. Jackson & Judith Resnik eds., 2010).
12. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
13. *Id.* at 1859.

Congress."[14] For claims that allege constitutional violations in the investigative or prosecutorial process after arrest, answering yes to both of these questions requires immediate dismissal of the suit.[15]

Significant attention has followed the Supreme Court's most recent *Bivens* case,[16] which examined a foreign national's ability to bring a damages suit after being shot and killed on the foreign side of the border by a federal official on the U.S. side.[17] The Fifth and Ninth Circuits reached opposite conclusions in nearly identical circumstances, prompting the Court to address the issue.[18]

Beyond the cross-border claims that have drawn the most attention, however, lower courts have been just as inconsistent in applying *Abbasi* to another significant domain of *Bivens* claims,[19] which this Note terms "falsification claims."[20] These cases involve plaintiffs who assert that federal actors have engaged in a variety of unconstitutional acts including: fabrication of evidence, deliberate misrepresentation by law enforcement officers in judicial proceedings, malicious prosecution, and coercion.[21] These falsification claims surface in circumstances far more common than the cross-border claims in *Hernández v. Mesa*,[22] yet are subject to a similar degree of uncertainty across the country.[23] If anything, the lower federal courts' varied and often-conflicting analyses of these kinds of *Bivens* claims suggest a greater need for clarity; unlike the typical circuit split, there are more than two ways to treat these suits with respect to *Abbasi*.[24]

Additionally, falsification claims present other concerns unique to the *Bivens* doctrine. Though plaintiffs in these cases will always seek damages from a law enforcement official, as in the original *Bivens* case, each falsification claim invariably presents different circumstances and interests

14. *Id.* at 1857 (quoting *Bivens*, 403 U.S. at 396).

15. *Id.* at 1859–60.

16. *See, e.g.*, Linda Greenhouse, Opinion, *Will the Supreme Court Stand Up for an Unarmed Mexican Teenager Shot by a Border Agent?*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/opinion/supreme-court-mexico-border-patrol.html [https://perma.cc/MAP9-7EBE].

17. *See* Hernández v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018), *cert. granted*, 139 S. Ct. 2636 (2019).

18. *Compare Hernández*, 885 F.3d at 823 (dismissing a *Bivens* claim), *with* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018) (allowing a *Bivens* claim).

19. *See infra* Part II.

20. For purposes of simplicity and brevity, this Note classifies the relevant *Bivens* suits as "falsification claims." This covers fabrication of evidence; false testimony; misrepresentations relating to search warrants, arrests, and grand jury testimony; coercion of witness testimony; malicious prosecution; and any other claim examined in this Note.

21. *See infra* Part II.

22. *See* Sarah Macaraeg, *Fatal Encounters: 97 Deaths Point to Pattern of Border Agent Violence Across America*, GUARDIAN (May 2, 2018), https://www.theguardian.com/us-news/2018/may/02/fatal-encounters-97-deaths-point-to-pattern-of-border-agent-violence-across-america [https://perma.cc/JAJ6-BZHL] (reporting approximately six deaths per year over a fifteen-year period).

23. *See infra* Part II.

24. *See infra* Part III.

than the quintessential search-and-seizure case.[25] Moreover, there is a unique tension in this sphere of litigation where, on the one hand, Congress clearly intends redress for some of these claims[26] but, on the other, the Court has instructed that an alternative remedial structure might, on its own, prevent a *Bivens* suit.[27] Finally, the misconduct alleged in falsification claims, in addition to harming the specific plaintiff, harms the integrity of the entire judicial process. Therefore, the *Abbasi* Court's question of whether the judiciary is "well suited" to decide if a damages action should proceed is particularly relevant to these kinds of *Bivens* suits.[28]

This Note illuminates this lack of clarity, analyzes the inflection points, and resolves the conflicts embedded within the landscape of these falsification *Bivens* claims. Part I examines the history of *Bivens* claims generally, touching on the rich tradition of damages suits against government officials, before focusing on the progression from the foundational 1971 case to *Abbasi* in 2017. In this forty-six-year period, the policies and rationales the Court has sought to protect have evolved dramatically—so much so that the current Court views the original *Bivens* decision as part of an "*ancien regime*."[29] Whereas the *Bivens* Court focused on the judiciary's prerogative to enforce the rights guaranteed by the Constitution,[30] the current Court has emphasized separation-of-powers concerns when the Court, rather than Congress, authorizes a cause of action.[31] The Court's evolving jurisprudence, accompanied by little congressional guidance in the interim, has set the stage for a wide range of case law surrounding falsification claims in the lower courts.[32]

Part II reviews these falsification claims in the post-*Abbasi* landscape and assesses their viability across the federal circuits. This Part catalogs the results of these suits for unconstitutional conduct outside the traditional search-and-seizure context, with allegations like fabrication of evidence, false testimony, malicious prosecution, and coerced confessions. Ultimately, the survey finds that, since *Abbasi*, courts often reach very different conclusions about the viability of these *Bivens* claims. Some courts have embraced *Abbasi* to permit such claims, others to deny them, while a third group has refrained from applying *Abbasi* directly.

Having introduced the current landscape of these *Bivens* actions in Part II, Part III dissects them in terms of the specific analytical framework offered by *Abbasi*. This Part looks past the results of the cases to compare and contrast the three major guideposts for a post-*Abbasi Bivens* analysis. First,

25. *Compare infra* Part I.B (*Bivens*), *with infra* Part II (post-*Abbasi* falsification claims).

26. For a discussion on the Federal Tort Claims Act (FTCA), see *infra* note 77 and accompanying text.

27. Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

28. *Id.*

29. *Id.* at 1855 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)). The Court also noted that the results of the first three *Bivens* cases "might have been different if they were decided today." *Id.* at 1856.

30. *See infra* Part I.B.

31. *See infra* Part I.D.

32. *See infra* Part II.

it examines the antecedent question of whether the case presents a "new *Bivens* context."[33] Second, the relevant case law is discussed in terms of "special factors counselling hesitation."[34] Third, this Part turns to an analysis of how courts address these claims in light of a potential "alternative remedial structure."[35] Distilling these falsification claims to their core components, Part III draws out the distinctions that lie at the heart of the conflict in post-*Abbasi* claims of this nature.

Part IV addresses these conflicts and offers a new way of understanding *Abbasi* to resolve them. Although inconsistent interpretations of *Abbasi* at the lower courts might warrant abandoning *Abbasi* altogether,[36] this Part proposes a solution that conforms with its central reasoning, thereby rejecting a drastic overhaul of the doctrine. To that end, this Note offers narrower and more concrete guideposts to help the lower courts answer the following three essential questions: (1) whether the falsification claim constitutes a new *Bivens* context; (2) whether special factors counselling hesitation exist; and (3) whether there is an alternative remedial structure that bars the claim. Most importantly for each, Part IV establishes that *Abbasi*'s focus on separation of powers is best understood as prohibiting the judiciary from second-guessing the policy judgments of the political branches. This insight, familiar in other spheres of litigation concerning law enforcement misconduct,[37] would help transform what is often a nebulous and variable concept into a workable roadmap for deciding these cases. Finally, Part IV ends by asserting that the unique characteristics of falsification claims can help answer whether the courts are "well suited" to decide whether a *Bivens* remedy is warranted.[38] Finally, this Note concludes with a brief Addendum to address the Court's recent decision in *Hernández v. Mesa*,[39] its latest foray into *Bivens*. Though *Hernández* concerns very different circumstances than the falsification claims examined in this Note, it nevertheless confirms the centrality of *Abbasi* for lower court guidance in future *Bivens* claims. *Hernández* thus supports this Note's analysis of the modern *Bivens* doctrine generally and of falsification claims specifically.

I. THE DEVELOPMENT OF THE MODERN *BIVENS* DOCTRINE

The creation of the judicially inferred *Bivens* action in 1971 was, to some extent, the beginning of a new era for the Court in this kind of litigation.[40]

33. *Abbasi*, 137 S. Ct. at 1859.
34. *Id.* at 1857.
35. *Id.* at 1858.
36. *See generally infra* Parts II–III.
37. For example, see damages suits under the Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of the U.S.C.) and 42 U.S. § 1983 (2012). For additional examples, refer to *infra* note 77 and accompanying text and *infra* note 64 and accompanying text.
38. *Abbasi*, 137 S. Ct. at 1858.
39. No. 17-1678 (U.S. Feb. 25, 2020).
40. *Abbasi*, 137 S. Ct. at 1854 (framing the background of the 1971 *Bivens* decision). The Court pointed to the one-hundred-year period in which Congress had not created an analogous federal statute to the Civil Rights Act of 1871. *Id.*

Still, the notion that federal courts had the ability to fashion a damages remedy for personal wrongdoing by government actors was not exactly new.[41] The *Abbasi* decision, forty-six years after *Bivens*, solidified the Court's significant departure from the original doctrine, even if it was not entirely surprising in light of the Court's recent treatment of *Bivens* suits.[42] Part I frames these two seminal cases within their relevant legal backgrounds, starting with the Marshall Court, continuing to the Burger Court and the "retrenchment of *Bivens*,"[43] and finally to the current Court.

*A. Judicially Implied Damages Suits Pre-*Bivens

The American legal tradition has long permitted personal damages suits by private citizens against federal government officers.[44] In the early republic, the primary means of government accountability consisted of common-law suits against officials who had personally wronged individuals.[45] An example of such a case is *Wise v. Withers*,[46] in which the Supreme Court permitted an award of damages against a justice of the peace after he unlawfully entered the plaintiff's home to collect a fine.[47] In a similar case, the Court had little difficulty deciding that a customs official would be personally liable for the overcollection of taxes that occurred during the course of his ordinary duties.[48] Nearly fifty years later, the Court found that a federal marshal's execution of a writ of attachment on the wrong person and the subsequent taking of his property warranted personal damages.[49]

Even though Congress never explicitly authorized these suits, the Court assumed a cause of action would arise if the citizen was wronged.[50] Rather than resting on any statutory authorization, these cases proceeded on their common-law basis and ultimately served a pivotal function: they provided redress for the plaintiffs and also "allowed individuals to test the legality of government conduct."[51] Given the broad doctrine of sovereign immunity in the early republic, these suits were essential to the judiciary's ability to define the legality of government action and restrain its excesses.[52]

---

41. *See infra* Part I.A.

42. *See generally* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 948–52 (2019) (discussing the Court's "mounting resistance" to *Bivens* claims).

43. Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1141 (2014).

44. *See generally* Carlos Manuel Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531 (2013).

45. *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 6 (2017).

46. 7 U.S. (3 Cranch) 331 (1806).

47. *Id.* at 336–37.

48. *See* Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 158 (1836).

49. Lammon v. Feusier, 111 U.S. 17, 19 (1884).

50. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871 (2010).

51. *Id.*

52. *Id.* at 1876.

Though these actions typically proceeded as common-law torts, rather than as discrete constitutional violations, they nonetheless often vindicated the same interests.[53] For example, though the justice of the peace in *Wise* was liable for trespass,[54] a common-law tort, damages for unlawful entry by a government official into a private citizen's house also vindicated the guarantees of the Fourth Amendment.[55] As in *Wise*, the constitutional right would often become central to these cases since an officer operating within the scope of his duties could not escape liability under any circumstances if his actions were in violation of the Constitution.[56]

B. The Bivens *Suit: A "Remedy to Make Good the Wrong Done"*

When Webster Bivens sued six federal narcotics agents for an alleged violation of his Fourth Amendment rights, both the district court and the Second Circuit agreed that his suit should be dismissed.[57] Bivens alleged that the agents, lacking probable cause, had broken into his house without a search warrant, arrested him in front of his family, threatened to arrest his family, and then mistreated him at the police station.[58] Still, the Second Circuit held, in accordance with all other circuits that had recently examined the question,[59] that the Fourth Amendment itself, without additional statutory authority, did not authorize a private damages action.[60]

The Second Circuit's reference to statutory authority requires a brief note on § 1983 suits.[61] The damages provision of the Civil Rights Act of 1871 (better known as § 1983 pursuant to its codification) authorized damages suits for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" at the hands of *state* government officials under the color of state law.[62] In 1961, the Court held in *Monroe v. Pape*[63] that a city police officer was subject to suit under § 1983 for an unreasonable search

53. *See* Vazquez & Vladeck, *supra* note 44, at 537.

54. Wise v. Withers, 7 U.S. (3 Cranch) 331, 335 (1806).

55. *See* U.S. CONST. amend. IV. A court's pronouncement that a federal official was liable for trespass would also serve to prevent an unreasonable search. *See* Pfander & Hunt, *supra* note 50, at 1871 (discussing common law writs as checks on the government).

56. *See* Vazquez & Vladeck, *supra* note 44, at 532–33; *see also* Fallon, *supra* note 42, at 936 (noting that the defense of official authorization fails if the conduct violates the Constitution).

57. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

58. *See* Brief for Petitioner at 2–3, 403 U.S. 388 (1971) (No. 301), 1970 WL 136798, at *2–3; Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 295 (1995) (providing more details of the arrest).

59. *See, e.g.*, United States v. Fanseca, 332 F.2d 872 (5th Cir. 1964) (dismissing the damages suit); Johnston v. Earle, 245 F.2d 793 (9th Cir. 1957) (same).

60. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 409 F.2d 718, 720 (2d Cir. 1969), *rev'd*, 403 U.S. 388, 389 (1971).

61. For more discussion of the Court's § 1983 jurisprudence, see Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 182–90 (2012).

62. 42 U.S.C. § 1983 (2018).

63. 365 U.S. 167 (1961).

and seizure.[64] An officer's conduct could thus be covered by the parameters of § 1983 even if "wholly unauthorized by state law";[65] that is, if it were rogue action.

It was against this background that the Supreme Court reversed the Second Circuit's decision in 1971.[66] The Court held that, though the Fourth Amendment itself did not expressly provide a money damages remedy, federal courts nevertheless could "use any available remedy to make good the wrong done."[67] The Court framed the issue as whether damages, a remedy "normally available" through the federal courts, should be available in the present context.[68] The principle that the judiciary has the power to remedy legal wrongs, especially those violative of the Constitution, thus guided the Court's reasoning.[69] Flowing from that premise, damages were merely one of the tools at the Court's disposal to redress those wrongs and hardly unusual in the context of historical remedies for "invasion[s] of personal interests in liberty."[70] In doing so, the Court also eliminated the anomaly whereby plaintiffs could only seek redress if a state officer—but not a federal officer—had violated their Fourth Amendment rights.

Next, in words that would frame the legal debate for the next four decades, the Court further justified its holding by noting that there were "no special factors counselling hesitation in the absence of affirmative action by Congress."[71] Justice William Brennan's opinion distanced the case at hand from a previous matter of "federal fiscal policy," which would be one such special factor.[72] There, the Court opted not to infer damages since the plaintiff was the United States itself; the party seeking relief could thus legislate any liability it wished the courts to infer.[73] But even more importantly, in contrast to other cases in which the Court denied a damages remedy, *Bivens* was ultimately about a plaintiff seeking to vindicate his *constitutional* rights.[74]

The dissenters launched a three-pronged attack against the majority's decision. Chief Justice Warren Burger emphasized that the Court's creation of a remedy improperly intruded into the legislative sphere.[75] Justice Hugo Black added that Congress had authorized § 1983 suits for constitutional violations by state officials and thus could readily do the same for federal

64. *Id.* at 187.
65. *See* Kian, *supra* note 61, at 182.
66. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 398 (1971).
67. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
68. *Id.* at 397.
69. *See id.* at 395–96.
70. *Id.* (listing examples).
71. *Id.* at 396.
72. *Id.* (quoting United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)).
73. *Id.*
74. *Id.* at 396–97 (examining *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) and *United States v. Gilman*, 347 U.S. 507 (1954)).
75. *See id.* at 411–12 (Burger, C.J., dissenting).

officials.[76] Along those lines, he viewed the Federal Tort Claims Act (FTCA) as a model for how Congress could "take the lead" on this front.[77] Lastly, Justice Harry Blackmun wrote to endorse the Second Circuit's reasoning.[78] He agreed that the Framers likely did not intend a cause of action to arise directly from the Fourth Amendment, and, further, the exclusionary rule in criminal proceedings was the more natural remedy for violations of the Fourth Amendment.[79] All three expressed additional concerns about the potential "avalanche of new federal cases" that might flow from this new cause of action.[80]

Nevertheless, *Bivens* established that plaintiffs could proceed with damages suits against federal officers who had violated their Fourth Amendment rights. The majority was ultimately persuaded that the risk that the Fourth Amendment might become a "mere 'form of words'" was more troubling than any concerns about the judiciary stepping on Congress's toes.[81]

C. The Road from Bivens *to* Abbasi

In the decade following *Bivens*, the Court extended the availability of damages to claims under the Fifth and Eighth Amendments. In *Davis v. Passman*,[82] the Court allowed a due process claim under the Fifth Amendment to proceed.[83] That claim alleged a violation of equal protection when a congressman fired a staffer based on gender.[84] Turning to the Eighth Amendment a year later, the Court affirmed the availability of a *Bivens* suit after a federal prisoner died due to officials' deliberate indifference to his known medical needs, which constituted cruel and unusual punishment.[85] In

76. *See id.* at 427–28 (Black, J., dissenting).

77. *Id.* at 421 (Burger, C.J., dissenting). The FTCA waives sovereign immunity for the federal government for torts committed by its employees acting within the scope of their employment. *See generally* 28 U.S.C. §§ 1346(b), 2671–80 (2018). However, that waiver is subject to certain exceptions, perhaps most prominently, the discretionary function exception. *Id.* § 2680(a). Accordingly, the government is not liable if the conduct passes a two-pronged test: (1) the conduct involves "an element of judgment or choice" and (2) "that judgment is of the kind that the discretionary function exception was designed to shield." Berkovitz v. United States, 486 U.S. 531, 536 (1988). Pertinent to Part IV of this Note, the discretionary function exception is "meant to discourage courts from using the occasion of private litigation to second-guess legislative and executive branch policy decisions." JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 179 (2010). Additionally, the government is not normally liable for its employees' intentional torts, save a select few, if committed by law enforcement agents. 28 U.S.C. § 2680(h) (commonly known as the "law enforcement proviso"). Nor can the government be held liable for constitutional torts under the FTCA. FDIC v. Meyer, 510 U.S. 471, 478 (1994).

78. *Bivens*, 403 U.S at 430 (Blackmun, J., dissenting).

79. *Id.* (focusing on injunctive relief and the exclusionary rule).

80. *Id.*

81. *Id.* at 399 (Harlan, J., concurring) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 402 F.2d 718, 723 (2d Cir. 1969)).

82. 442 U.S. 228 (1979).

83. *Id.* at 230.

84. *Id.*

85. *See* Carlson v. Green, 446 U.S. 14, 20 (1980).

Carlson v. Green,[86] the Court also clarified that *Bivens* claims and FTCA suits were "parallel, complementary causes of action";[87] the possibility of an FTCA suit did not preclude a *Bivens* suit.[88] Though both suits would offer the victim an avenue for redress, beneath this lay an important difference: *Bivens* suits are also meant to *deter* unconstitutional conduct, which can be accomplished more readily if individuals, rather than the government, are held liable.[89] Thus *Davis* and *Carlson* supplemented the *Bivens* landscape by adding to the roster of constitutional wrongs susceptible to damages and also by explicitly stating the deterrence rationale that supports all *Bivens* actions.

At the time, it appeared that courts might extend the availability of *Bivens* to *all* constitutional violations, becoming a perfect federal analogue to § 1983 suits.[90] But *Carlson* was the last time the Supreme Court expressly endorsed an extension of *Bivens*.[91] In the nine cases at the Supreme Court between 1980 and 2017, the Court removed certain constitutional rights from the scope of *Bivens* in some[92] and further developed the prohibitive "special factors" in others.[93]

By the time *Abbasi* was heard in 2017, the Court had shaped an approach to determine the viability of a *Bivens* suit. First, courts should ask whether an alternative process existed that might be reason not to provide a new damages remedy.[94] Assuming there was no convincing reason on the alternative remedy front, a court must still do the work typical of a "common-law tribunal" and determine if special factors warranted refusal to extend the cause of action.[95]

---

86. 446 U.S. 14 (1980).

87. *Id.* at 20.

88. *Id.* at 19. The Court noted that Congress's 1974 amendment to the FTCA, which permitted FTCA suits for certain international torts by law enforcement officers, made it "crystal clear" that FTCA suits and *Bivens* suits were counterparts. *Id.* at 20. Any potential ambiguity was clarified by the legislative history. *Id.* at 19–20*; see* S. REP. NO. 93-588, at 3 (1973) (noting that the law enforcement proviso "should be viewed as a counterpart to the *Bivens* case and its progenty [sic]").

89. *Carlson*, 446 U.S. at 20–21.

90. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 821–22 (2010) (discussing the extension of *Bivens* remedies in the circuit courts to violations of the First, Fifth, Eighth, Ninth, and Fourteenth Amendments).

91. *See* Kent, *supra* note 43, at 1141 n.80 (listing the nine *Bivens* cases at the Supreme Court between *Carlson* and *Abbasi* that expressly addressed the *Bivens* question, all of which refused to allow any further extension).

92. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537 (2007) (rejecting a *Bivens* claim for retaliation); Bush v. Lucas, 462 U.S. 367 (1983) (rejecting a *Bivens* suit for a First Amendment violation).

93. *See, e.g.*, Hui v. Castenada, 559 U.S. 799 (2010) (precluding *Bivens* claims against Public Health Service employees following the passage of specific legislation); Schweiker v. Chilicky, 487 U.S. 412 (1988) (precluding a *Bivens* claim for a due process violation due to a complex administrative remedy process for Social Security benefits); Chappell v. Wallace, 462 U.S. 296 (1983) (noting that the military context was a special factor).

94. *Wilkie*, 551 U.S. at 550.

95. *Id.*

In sum, the Court gradually but steadily narrowed the availability of *Bivens* after *Carlson*, taking a multifaceted approach to stem the flow of *Bivens* claims. At times it opted to cut off entire categories of constitutional violations,[96] while at others, it chose to add to the roster of special factors that should counsel hesitation.[97] Still, even as late as 2012, the Court's guidance allowed for a certain amount of latitude; courts were instructed to understand their role as "a common-law tribunal" when deciding whether to recognize a *Bivens* remedy.[98]

D. Abbasi*:* Bivens *as a "Disfavored Judicial Activity"*

Against this backdrop, *Abbasi* followed along the path the Court had embarked on since it had last extended a *Bivens* remedy in *Carlson*. Yet the context for *Abbasi* was quite different than much of the Court's prior *Bivens* jurisprudence. In the years following 9/11, government efforts to combat terrorism included conduct that has since been questioned for its constitutionality.[99] These practices spurred a new class of *Bivens* suits by those allegedly mistreated by the national security apparatus.[100] Compared to the relatively straightforward search and seizure of Webster Bivens,[101] the national security elements of *Abbasi* had the potential to implicate novel and complex issues, including the constitutional rights of foreign nationals, extraterritorial rights in American and allied facilities abroad, and the consequences such suits might have on well-debated policy choices by the political branches.[102] In *Abbasi*, at least some of these difficult questions came to the forefront.

The *Abbasi* litigation arose from sweeping arrests of over 700 Middle Eastern undocumented immigrants by the FBI in the aftermath of 9/11.[103] Once detained, many were subjected to extremely harsh treatment, including physical abuse, frequent strip searches, deprivation of basic hygiene, inability to contact lawyers or others outside the detention facility, and twenty-three

96. *See, e.g.*, *Bush*, 462 U.S. at 380 (First Amendment claims).

97. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 486 (1994) (finding that the "potentially enormous financial burden" to an agency was a special factor).

98. Minneci v. Pollard, 565 U.S. 118, 122–23 (2012) (quoting *Wilkie*, 551 U.S. at 550).

99. *See* PFANDER, *supra* note 45, at 31, 42–43 (discussing detention in Guantanamo Bay, enhanced interrogation, extraordinary rendition, and prosecuting terrorism as war crimes).

100. *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, 1166–67 (2018). In one case, *Ashcroft v. Iqbal*, the Court dismissed the plaintiffs' complaint by establishing a heightened pleading standard, requiring "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009). For more on *Iqbal*, see PFANDER, *supra* note 45, at 42–44.

101. *See supra* Part I.B.

102. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861–62 (2017). For further elaboration on the implications of these *Bivens* claims, see Andrew Kent, *Thoughts on the Briefing to Date in* Hernandez v. Mesa*—the Cross-Border Shooting*, LAWFARE (Dec. 27, 2016, 1:59 PM), https://www.lawfareblog.com/thoughts-briefing-date-hernandez-v-mesa%E2%80%94-cross-border-shooting-case [https://perma.cc/G6ML-BXZZ].

103. *See* Margulies, *supra* note 100, at 1166.

hour confinement in small cells.[104] The plaintiffs, six detainees, challenged those conditions and whether there had been any factual predicate for the FBI's suspicion of their ties to terrorism, which was the alleged basis for their monthslong detention.[105] Their *Bivens* suit sought damages from two groups of officials, which the Court classified as "Executive Officials"[106] and "Wardens."[107] Essentially, the plaintiffs made "detention policy claims" against the Executive Officials, alleging that they were subjected to unconstitutional treatment while detained, which was imposed on account of their race, religion, or national origin.[108] Additionally, they claimed the abuse they suffered due to the Wardens' conscious indifference also violated their Fifth Amendment rights.[109] While the district court originally dismissed the claims against the Executive Officials, the Second Circuit reinstated them.[110] The Supreme Court then granted certiorari to define "the reach and the limits" of their *Bivens* claims.[111]

In the decision's exposition of the history of *Bivens* and its progeny, the Court extolled the *Bivens* doctrine for its power to "vindicate the Constitution" and to oversee and guide federal law enforcement officers with respect to permissible conduct.[112] However, to the *Abbasi* Court, the central question was whether Congress or the courts should be authorizing damages suits in light of separation-of-powers principles.[113] For the majority, authorizing damages suits was a task better suited for Congress.[114]

Yet the Court also recognized that a drastic change might present stare decisis problems, given how frequently the claims arise in the law enforcement sphere.[115] As a result, the Court decided that courts should only question suits that arise in a "new *Bivens* context."[116] If it is not a new context, the suit should proceed; but if the court found the case presented a new context, it must then determine if there were "special factors" that might compel the court to reject extending a damages remedy.[117] Ultimately, the Court viewed this new context inquiry and special factors analysis as a two-pronged framework to focus lower courts' attention on the separation-of-powers issue it deemed central to the *Bivens* question.[118]

---

104. *Abbasi*, 137 S. Ct. at 1852.
105. *Id.* at 1853.
106. *Id.*
107. *Id.*
108. *Id.* at 1853–54, 1858. Holding the plaintiffs under punitive pretrial conditions would be a due process violation; intentional disparate treatment on account of race, religion, or national origin would violate equal protection. *See* U.S. CONST. amend. V.
109. *Abbasi*, 137 S. Ct. at 1853.
110. *Id.* at 1854.
111. *Id.*
112. *Id.* at 1856–57.
113. *Id.* at 1857.
114. *Id.* at 1860. *Abbasi* was a 4-2 decision from which Justices Gorsuch, Kagan, and Sotomayor recused themselves. *Id.* at 1843.
115. *Id.* at 1857.
116. *Id.* at 1859.
117. *Id.*
118. *Id.* at 1857–60.

Having set the stage, Justice Anthony Kennedy began his application of the Court's new standards by finding the claim presented a new *Bivens* context.[119] Most importantly, it was meaningfully different from the Court's three previous endorsements of *Bivens* claims.[120] Justice Kennedy defined the suit as an action challenging detention conditions that were enacted as the result of high-level policy decisions following a major terrorist attack.[121] As such, none of the three *Bivens* claims the Court had previously approved could support the suit.[122]

Turning to the special factors analysis, Justice Kennedy affirmed that *Bivens* was not meant to alter the policy of an executive agency; it served to deter an individual official's personal conduct.[123] When the policy decisions of high-level officers are susceptible to suit, it might inhibit discussion and deliberations or distract officials from their national security duties.[124] As it pertained to the Executive Officials, the alleged conduct was inextricably linked to policy decisions about national security, namely the creation of a strategy to find those involved in the 9/11 attacks and to prevent related future attacks.[125] To the Court, this was not the kind of conduct *Bivens* was meant to vindicate, nor could it plausibly deter.[126] This policy-focused analysis thus constituted the first special factor warranting dismissal.

The Court also touched on three other special factors that justified its rejection of the claim against the Executive Officials. First, the plaintiffs were not challenging "standard 'law enforcement operations'" but, rather, national security activity.[127] Second, in the sixteen years since 9/11, Congress had been silent about creating a damages remedy for this kind of claim despite its "frequent and intense" interest in terrorist detention.[128] Finally, the Court pointed out the plaintiffs had an alternative available remedy in the form of a habeas petition, which would have provided injunctive relief.[129]

Ultimately, *Abbasi* represented the Court's attempt to solidify the cautious approach it had developed since *Carlson* and to focus on separation of powers. Framing the question in terms of a "new *Bivens* context" and "special factors," the Court appeared to emphasize that it disfavored

---

119. *Id.* at 1860.

120. *Id.* at 1859. The Court offered a nonexhaustive list of potential differences that might make a case meaningfully different, including "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action." *Id.* at 1860.

121. *Id.*

122. *Id.*

123. *Id.* ("The purpose of *Bivens* is to deter the *officer*." (quoting FDIC v. Meyer, 510 U.S. 471, 485 (1994))).

124. *Id.* at 1860–61.

125. *Id.* at 1861–62.

126. *Id.*

127. *Id.* at 1861 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1990)). The Court added that "[n]ational-security policy is the prerogative of the Congress and President." *Id.*

128. *Id.* at 1860 (quoting Schweiker v. Chilicky, 487 U.S. 412, 425 (1988)).

129. *Id.* at 1863. For more on the element of injunctive relief in *Abbasi*, refer to Jules Lobel, Ziglar v. Abbasi *and the Demise of Accountability*, 86 FORDHAM L. REV. 2149 (2018).

extending *Bivens* claims while also acknowledging that *Bivens* remained important for enforcing certain constitutional guarantees and, in some respects, had developed into a settled body of law. Though it did not upend the Court's *Bivens* jurisprudence given its decisions after *Carlson*, it nonetheless appeared to present a much higher bar for *Bivens* claims to clear, regardless of the alleged conduct at issue.

II. AFTER *ABBASI*: THE UNCERTAIN STATUS OF FALSIFICATION CLAIMS IN THE CIRCUIT COURTS

Scholars predicted that *Abbasi* would be the death knell for *Bivens* claims that did not mirror the fact patterns of *Bivens*, *Davis*, and *Carlson*.[130] Much of the scholarly focus has been in the realm of national security, which *Abbasi* and other cases[131] had addressed directly.[132] But the *Abbasi* decision is obviously not limited to this context; it applies just as much to day-to-day law enforcement as to matters of terrorism and national security. In fact, as this Part of the Note explains, *Abbasi* has proven especially difficult to apply to claims concerning investigative and prosecutorial misconduct. Part II of this Note focuses on *Bivens* claims alleging misconduct in the realm of fabrication of evidence, false testimony to a grand jury, malicious prosecution, and the like, as they diverge across eight different circuits post-*Abbasi*. This Part illuminates an unacknowledged circuit split about these kinds of claims. Specifically, Part II.A examines those circuits that have interpreted *Abbasi* to prohibit these falsification claims. Part II.B presents the circuits that understand *Abbasi* to permit them. Finally, Part II.C turns to circuits in which the post-*Abbasi* status of falsification claims is unsettled.

A. Falsification Claims Prohibited: The Eighth Circuit in Farah *and the Fifth Circuit in* Cantú

To some circuit courts, *Abbasi* provided direct guidance that falsification claims should now be dismissed on their face. This section presents two such cases from the Eighth Circuit and the Fifth Circuit, each of which addressed these claims of law enforcement misconduct under the two-pronged *Abbasi* framework and determined that extending a *Bivens* claim to this falsification context was not warranted.

130. *See generally* Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167 (2018).

131. *See supra* note 100 and accompanying text (discussing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

132. *See generally* PFANDER, *supra* note 45; Andrew Kent, Bivens *in National Security Cases, Before and After* Ziglar v. Abbasi, *in* JUDGING NATIONAL SECURITY (Robert M. Chesney & Stephen I. Vladeck, eds. forthcoming 2020), https://ssrn.com/abstract=3417977 [https://perma.cc/8H87-9EEV]; Kent, *supra* note 43; Margulies, *supra* note 100 (discussing *Bivens* in the national security context).

1. *Farah v. Weyker*

The Eighth Circuit recently relied on *Abbasi* to decide whether to permit a *Bivens* claim alleging that a federally deputized police officer lied, manipulated witnesses, hid exonerating evidence, and falsified other evidence.[133] In 2008, federal investigators in Tennessee joined a Minnesota sex-trafficking investigation after an alleged victim of the suspected ring turned up in Nashville.[134] As the investigation developed, prosecutors charged nine individuals with various crimes flowing from a multistate conspiracy.[135] Some defendants were acquitted by a jury,[136] while others had their convictions vacated by the judge's directed verdict.[137] When the Sixth Circuit affirmed the district court's decision to set aside the guilty verdict, it raised the possibility that the entire alleged criminal enterprise might be fictitious.[138]

Following acquittal, the defendants sued Officer Weyker, the federally deputized leader of the investigation for the local Minnesota police department.[139] They alleged she had invented facts in her reports, deceived prosecutors and the grand jury, and manipulated witnesses to lie, which led to the defendants' detentions for periods ranging from four months to three years in violation of their Fourth Amendment rights.[140] The district court permitted a *Bivens* suit to proceed, but the Eighth Circuit reversed.[141]

The Eighth Circuit understood the claim at hand to be a new context for a variety of reasons.[142] Comparing Farah's case primarily to the original *Bivens* case, the court viewed "case-building activities," such as witness interviews and drafting reports, to be different from the apprehension-related conduct in *Bivens*, even if both claims were grounded in the Fourth Amendment.[143] The court also saw a meaningful difference in the nature of the injury: Officer Weyker's misconduct required intervening steps by third-party actors such as prosecutors or grand jurors to reach Farah; Webster Bivens suffered directly at the hands of the agents.[144] Finally, the court determined that fact-finding in Farah's case would require a level of intrusion into the executive branch that had not existed in Bivens's case.[145]

---

133. *See* Farah v. Weyker, 926 F.3d 492, 496 (8th Cir. 2019).
134. *Id.*
135. *Id.*
136. Press Release, U.S. Att'y's Office Middle Dist. of Tenn., Verdicts Returned in Somali Sex Trafficking Case (May 3, 2012), https://www.justice.gov/archive/usao/tnm/pressReleases/2012/5-4-12.html [https://perma.cc/MQ76-Q8YH].
137. *See* United States v. Fahra, 643 F. App'x 480, 489, 494 (6th Cir. 2016) (finding insufficient evidence for charges to reach the jury).
138. *See id.* at 484 (noting the court's "acute concern, based on our painstaking review of the record, that this story of sex trafficking and prostitution may be fictitious").
139. *Farah*, 926 F.3d at 496–97.
140. *Id.*
141. *Id.* at 503–04.
142. *Id.* at 498–99.
143. *Id.* at 499.
144. *Id.*
145. *Id.* at 501.

Turning to the second prong of the *Abbasi* framework, the panel focused on *Abbasi*'s proclamation that interference and intrusion into the executive branch could be special factors.[146] Building on its new context analysis, the court's refusal to allow a *Bivens* suit relied in large part on the rationale that, to succeed, the plaintiffs would need to show that Weyker's misconduct precipitated probable cause for their arrests and subsequent detentions.[147] This, in turn, would lead to a trial reconstructing the prosecutorial process.[148] The ensuing review of the inner workings of a federal prosecution constituted precisely the kind of executive branch intrusion that *Abbasi* cautioned against.[149]

The Eighth Circuit also viewed Congress's previous efforts to address these kinds of injuries as an additional special factor.[150] The Hyde Amendment[151] permitted courts to award attorney's fees to criminal defendants prosecuted in bad faith and, additionally, unjust conviction statutes offered damages remedies.[152] The court recognized this offered little to *acquitted* defendants represented by appointed counsel (like the plaintiffs). Nevertheless, it held that congressional involvement in this realm—but no damages remedy—suggested an intentional omission rather than an oversight.[153]

2. *Cantú v. Moody*

In the post-*Abbasi* landscape, the Fifth Circuit has also rejected the viability of a falsification claim. In *Cantú v. Moody*,[154] the Fifth Circuit examined a *Bivens* claim alleging that law enforcement had falsified evidence and given false testimony to justify seizing a suspect.[155] Like the Eighth Circuit, it found the case presented a new context and that special factors counseled against allowing it to proceed.[156] *Cantú* arose from an FBI sting operation in which an informant was setting up a drug sale.[157] The plaintiff alleged that FBI agents knew the operation was meant for another person but let it proceed against Cantú anyway and then fabricated evidence

146. *Id.* at 500.
147. *Id.*
148. *See id.* at 500–01.
149. *Id.* at 501.
150. *Id.*
151. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified as amended at 18 U.S.C. § 3006A (2018)). The Hyde Amendment to the Equal Access to Justice Act allows "a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." *Id.*
152. *See Farah*, 926 F.3d at 501. Additionally, 28 U.S.C. § 2255 (2018) and 28 U.S.C. § 1495 (2018) provide injunctive relief and damages for wrongfully convicted defendants, respectively.
153. *Farah*, 926 F.3d at 501.
154. 933 F.3d 414 (5th Cir. 2019).
155. *See generally id.*
156. *See id.* at 423.
157. *See id.* at 417.

to justify the seizure.[158] Cantú was arrested, tried, and then acquitted. After his acquittal, Cantú sued the FBI agents that had allegedly fabricated evidence to justify his initial seizure and sought *Bivens* damages for this Fourth Amendment violation.[159]

The Fifth Circuit distilled *Abbasi*'s test into two simplified questions: (1) do the plaintiff's claims fall into one of the three existing *Bivens* actions?; and (2) if not, should the court recognize a new *Bivens* action?[160] First, the court distinguished Cantú's complaint from the 1971 *Bivens* case, reasoning that the essence of the original case consisted of specific acts of home entry in violation of one's privacy.[161] Cantú's complaint, by contrast, lacked such specificity and, moreover, any privacy violation was far more attenuated.[162] Having established this "new context," the court devoted most of its decision to discussion of the special factors that prevented it from allowing the case to proceed.[163]

Three special factors dissuaded the court from allowing the suit to move forward. First, the FTCA already provided an elaborate statutory scheme with the possibility of a damages remedy.[164] Because the law enforcement proviso of the FTCA waived sovereign immunity for certain torts, like some of those alleged by Cantú, a *Bivens* remedy was not appropriate in light of the FTCA's available remedies.[165]

Second, the length of time that Congress had not affirmatively provided a cause of action indicated that their silence was "more than mere oversight."[166] The court reasoned that Congress understood, based on the long line of *Bivens* cases at the Supreme Court, that extending *Bivens* remedies to new contexts was disfavored by the judiciary.[167] Given this awareness of the status quo, Congress's failure to enact a damages regime was thus an affirmative statement that Congress did not approve of such an action.[168]

Finally, "the nature of the underlying federal law enforcement activity" was a stark contrast from the original *Bivens* case and also counseled hesitation.[169] Unlike the local nature of *Bivens*, this sting was part of a "multi-jurisdictional investigation into transnational organized crime" with

158. *Id.*
159. *Id.* at 418.
160. *Id.* at 422.
161. *Id.* at 423.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.; see also* 28 U.S.C. § 2680(h) (2018) (waiving sovereign immunity for false arrest, abuse of process, and malicious prosecution, among other law enforcement misconduct).
166. *Cantú*, 933 F.3d at 423 (quoting Ziglar v. Abassi, 137 S. Ct. 1843, 1862 (2017)).
167. *Id.*
168. *Id.* at 423–24.
169. *See id.* at 424.

implications for border security.[170] The three special factors thus combined to counsel sufficient hesitation to reject a *Bivens* remedy under *Abbasi*.[171]

B. Falsification Claims Permitted: The Sixth Circuit in Jacobs *and the Ninth Circuit in* Lanuza

Unlike the courts in the preceding subsection, the Sixth and Ninth Circuits have permitted falsification claims to proceed past the complaint stage. As explained here, not only do these courts reach opposite results as those in Part II.A, they also get there differently. Though the Fifth and Eighth Circuits addressed each prong of the *Abbasi* framework, of the circuits in this section, only the Ninth Circuit reached the special factors analysis.

1. *Jacobs v. Alam*

In *Jacobs v. Alam*,[172] decided more than eighteen months after *Abbasi*, the Sixth Circuit permitted a *Bivens* claim for fabrication of evidence, false arrest, and malicious prosecution.[173] Despite a colorful factual background that strains credulity at times, the panel nevertheless found that these types of claims were viable *Bivens* actions long available in the Sixth Circuit.[174]

The plaintiff's complaint described a dramatic turn of events leading up to the suit. In early January 2014, U.S. marshals searched the house above Jacobs's basement apartment looking for a fugitive related to Jacobs's neighbor and then "swept" Jacobs's basement apartment when they were unable to find the fugitive.[175] When Jacobs came home to find his apartment disheveled, he ran upstairs and encountered a stranger in his upstairs neighbor's house.[176] Unaware that this was a U.S. marshal, Jacobs reached for his holstered gun but before reaching it fell down the stairs, whereupon he was shot three times by the officers.[177] Criminal charges were brought against Jacobs, but a jury acquitted him on all counts.[178] He then brought a *Bivens* action, alleging that the marshals had planted a bullet from his gun in the upstairs apartment to bolster their claim that Jacobs fired at the officers.[179] He also claimed the officers lied at a preliminary examination and at trial to support their story.[180]

For the Sixth Circuit, the claims were the kind of "run-of-the-mill challenges" to law enforcement misconduct that *Bivens* was meant to

170. *Id.*
171. *Id.*
172. 915 F.3d 1028 (6th Cir. 2019).
173. *See id.* at 1035.
174. *See id.* at 1038–39.
175. *Id.* at 1033.
176. *Id.* at 1033–34.
177. *Id.* at 1034.
178. *Id.* at 1035.
179. *Id.* at 1042.
180. *See* Jacobs v. Alam, No. 15-10516, 2017 WL 3616487, at *13 (E.D. Mich. Aug. 23, 2017), *aff'd*, 915 F.3d 1028 (6th Cir. 2019).

address.[181] A special factors analysis was unnecessary because these claims did not present a new context in light of the circuit's clear precedent permitting fabrication of evidence and malicious prosecution *Bivens* claims.[182] The only real question about the viability of the action stemmed from the defendants' argument that Sixth Circuit precedent should be reexamined in light of the *Abbasi* decision.[183] But the court would reject this argument.[184]

Ultimately, the panel held that circuit precedent with respect to fabrication of evidence and malicious prosecution claims was not inconsistent with *Abbasi*.[185] Though the court was answering a slightly different question—whether *Abbasi* required reexamination of its prior *Bivens* jurisprudence—the court's analysis resembled the *Abbasi* framework nonetheless.[186] That is, the court found *Jacobs* did not present the "novel circumstances" that existed in *Abbasi*, like a high-level policy challenge or a national security issue, and thus its precedent need not be reexamined.[187] Moreover, the panel emphasized that the *Abbasi* Court itself affirmed the force of *Bivens* in these kinds of cases.[188] Not only did the federal judiciary have an especially important role in affirming the guiding principles for law enforcement in the search-and-seizure context, but this kind of *Bivens* claim was clearly settled law.[189] With the new context question settled, the special factors analysis was unnecessary and the panel allowed the suit to proceed.[190]

2. *Lanuza v. Love*

Although the Ninth Circuit has aligned itself with the Sixth Circuit on the viability of *Bivens* suits for falsification claims, it arrived there in a somewhat different way. In *Lanuza v. Love*,[191] the court ultimately permitted a claim against an ICE attorney who had forged an immigration document, but only after determining that there were no special factors to prevent extension of *Bivens* into this new context.[192] In contrast to *Jacobs*, the facts of *Lanuza*

181. *Jacobs*, 915 F.3d at 1038 (noting the malicious prosecution, false arrest, fabrication of evidence, and civil conspiracy claims in *Webb v. United States*, 789 F.3d 647 (6th Cir. 2015)).
182. *See id.*
183. *See id.* at 1036.
184. *See id.* at 1038.
185. *See id.* at 1036–37.
186. *See id.*
187. *Id.* at 1038.
188. *Id.* (explaining that *Abbasi* should not be understood to cast doubt on the viability of *Bivens* in the law enforcement context).
189. *See id.*
190. *See id.* at 1039.
191. 899 F.3d 1019 (9th Cir. 2018).
192. *Id.* at 1028. For more information about the facts of this case, see Mark Joseph Stern, *"This Case Is About a Lie,"* SLATE (Aug. 16, 2018, 6:58 PM), https://slate.com/news-and-politics/2018/08/ignacio-lanuza-got-deported-because-an-ice-agent-forged-a-document-ice-didnt-care-until-lanuza-sued.html [https://perma.cc/9MXN-KPP3].

made the new context obvious, which in turn made a special factors analysis unavoidable under the *Abbasi* framework.[193]

The case concerned a Mexican national, Ignacio Lanuza, who had been issued a final order of removal by an immigration judge after an ICE attorney presented a form Lanuza had signed.[194] The form interrupted the required ten-year period of residency and thus rendered Lanuza ineligible for cancellation of removal.[195] But Lanuza's counsel later determined that the form had been forged.[196] The ICE attorney who had forged the form would eventually be criminally charged,[197] but first, Lanuza sought *Bivens* damages for this due process violation under the Fifth Amendment.[198]

All parties to the suit agreed that the circumstances presented a new context.[199] The panel's analysis, therefore, immediately focused on answering the special factors question.[200] As *Abbasi* had counseled the lower courts, the Ninth Circuit analyzed potential special factors with separation-of-powers principles in mind.[201] The court explained that Lanuza's claim did not challenge a policy decision of the political branches.[202] It was not aimed at a high-level executive, which the Court had warned could unduly intrude on policy-forming deliberations, but at a low-level line prosecutor.[203] Any potential foreign relations or diplomatic concerns that might arise from the immigration context were thus not at stake.[204]

Outside the policy realm, the panel determined that Congress had not done anything to indicate its desire for the judiciary to refrain from extending a *Bivens* claim in this case.[205] First, in contrast to other *Bivens* cases, there had been no special interest in the case by the other branches of government.[206] Second, the failure of the Immigration and Nationality Act[207] (INA) to

193. *See Lanuza*, 899 F.3d at 1028.
194. *See id.* at 1021–22.
195. *See id.* at 1022; *see also* 8 U.S.C. § 1229b(b) (2018) (establishing the cancellation of removal process).
196. *See Lanuza*, 899 F.3d at 1022 (noting the seal of the Department of Homeland Security on a form that predated the agency's existence).
197. *See Former Seattle Immigration Prosecutor Gets 30 Days for Forging Document*, SEATTLE TIMES (Apr. 20, 2016, 3:40 PM), https://www.seattletimes.com/seattle-news/crime/former-seattle-immigration-lawyer-gets-30-days-for-forging-document/ [https://perma.cc/J5MU-9RVE].
198. *See Lanuza*, 899 F.3d at 1023. The Supreme Court has noted that "the Due Process clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
199. *See Lanuza*, 899 F.3d at 1028.
200. *See id.* at 1028–32.
201. *See id.* at 1028.
202. *Id.* at 1029.
203. *Id.*
204. *Id.* at 1030.
205. *See id.*
206. *Id.* (The panel pointed directly to the diplomatic conversations between the United States and Mexico surrounding the *Hernández* case).
207. *See generally* Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S.C.).

provide for damages did not mean Congress disapproved of the remedy. Rather, the statute's provision defining when an immigration officer was acting under the color of federal authority for liability purposes indicated that Congress had actively understood that immigration officials might be subject to suits such as Lanuza's.[208] Moreover, even if the INA provided some form of alternative remedy, that process would be unavailable when the misconduct was "designed to prevent individuals from accessing [the INA's] lawful forms of relief" in the first place.[209] Finally, the panel explained that falsification of evidence presented a concern especially important to the courts: the integrity and credibility of the judicial system.[210] To the extent *Bivens* claims presented separation-of-powers concerns, this one in particular also had special relevance for the deciding court.[211]

C. An Open Bivens *Question: Unsettled Law in the First, Second, Third, and Tenth Circuits*

Though the preceding sections of this Note have focused on circuits that directly address the post-*Abbasi Bivens* question, the Supreme Court has also recognized that deferring the *Bivens* question to resolve the matter on other grounds "is appropriate in many cases."[212] Perhaps with this in mind, other courts have either deferred the *Bivens* question or ignored it altogether, leaving the status of falsification claims unsettled despite the Court's refocused guidance in *Abbasi*. This section turns to these unsettled circuits.

1. The First Circuit in *Pagán-González v. Moreno*

The availability of falsification claims in the First Circuit post-*Abbasi* cannot be assessed confidently from the current case law. On the one hand, the court in *Pagán-González v. Moreno*[213] expressly endorsed the viability of a *Bivens* claim challenging a search based on officers' deception by denying the defendant's motion to dismiss.[214] On the other hand, that panel affirmed the district court's dismissal of a parallel malicious prosecution claim arising from the same incident, though on the basis of qualified immunity.[215] As this subsection shows, the ambiguity in this decision suggests the *Bivens* question for these kinds of claims may still be an open one in the First Circuit. It is not fully clear how the malicious prosecution dismissal should be understood: as a valid claim that simply failed on the

208. *See Lanuza*, 899 F.3d at 1030–31 (referring to 8 U.S.C. § 1357(g)(8)).
209. *Id.* at 1032.
210. *Id.* at 1032–33. Accordingly, the courts were especially well equipped to "weigh the costs of constitutional violations." *Id.* at 1032.
211. *See id.* at 1033.
212. Hernández v. Mesa, 137 S. Ct. 2003, 2007 (2017); *see also* Stevens v. Osuna, 877 F.3d 1293, 1308 (11th Cir. 2017) (addressing immunity for an immigration judge rather than an extension of a *Bivens* claim).
213. 919 F.3d 582 (1st Cir. 2019).
214. *See id.* at 602.
215. *See id.*

merits or one in which the court assumed the claim without deciding its viability, in order to dispose of it on other grounds.

In the suit, Pagán-González, the plaintiff, alleged that FBI agents deceived his parents into consenting to a warrantless search.[216] The agents, though actually investigating suspicions of child pornography, procured consent to search the plaintiff's computer by telling his parents that a computer in their house was sending viruses to Washington and they needed to address this potential emergency.[217] Under these false pretenses, the parents consented to the warrantless search, which first led to the agents seizing the computer, and then to the agents bursting into the house early the following morning to arrest the plaintiff.[218] Pagán-González was then arrested, detained for a week because he could not post bond, and then indicted by a federal grand jury on child pornography charges.[219] After the government later dropped all charges against Pagán-González, he filed the *Bivens* claim.[220]

The *Pagán-González* panel did not rely on *Abbasi* at all; the case was decided nearly two years after *Abbasi* yet did not cite the decision.[221] Nor did it employ the two-step analysis in other post-*Abbasi Bivens* cases.[222] Rather, the panel gave significant attention to the constitutional merits of the alleged conduct, but not to the antecedent question of whether a *Bivens* claim was even viable in this context.[223] To the extent the First Circuit's position on the viability of these *Bivens* claims can be deduced, it must be done indirectly. The court reinstated the challenge to the laptop search and dismissed the malicious prosecution claim but only after an extensive analysis finding the existence of qualified immunity.[224] Consequently, it is not entirely clear if, by addressing qualified immunity, *Pagán-González* supports the viability of a malicious prosecution claim or if it was merely assuming it without deciding. The panel's omission of any reference to *Abbasi* or analysis of the *Bivens* issue leaves this question unsettled.

2. The Second Circuit in *Ganek v. Leibowitz*

The Second Circuit's only post-*Abbasi* decision to address a falsification of evidence claim, *Ganek v. Leibowitz*,[225] also leaves questions about the viability of such a claim.[226] Like the First Circuit, the Second Circuit ignored the *Bivens* question and resolved the case on alternative grounds. It disposed

---

216. *Id.* at 586–87.
217. *Id.* at 587.
218. *Id.*
219. *See* González v. Moreno, 202 F. Supp. 3d 220, 223 (D.P.R. 2016), *aff'd in part and vacated in part sub nom.* Pagán-González v. Moreno, 919 F.3d 582 (1st Cir. 2019).
220. *Id.*
221. *Pagán-González* was decided on March 22, 2019, and *Abbasi* on June 19, 2017.
222. *See supra* Parts II.A, II.B.2; *infra* Parts II.C.3–4.
223. *See Pagán-González*, 919 F.3d at 591–95 (home entry and computer search); *id.* at 601–02 (malicious prosecution).
224. *See id.* at 601–02.
225. 874 F.3d 73 (2d Cir. 2017).
226. *See id.* The case was decided on October 17, 2017, approximately four months after *Abbasi*.

of a Fourth Amendment claim on qualified immunity grounds and a Fifth Amendment claim for failing to plead sufficiently plausible factual allegations.[227] In contrast to *Pagán-González*, *Ganek* provides a greater degree of insight into the Second Circuit's position on falsification claims, as this subsection will detail.[228] Still, by failing to address directly the *Bivens* question in light of *Abbasi*, the Second Circuit's position appears unsettled as well.

In *Ganek*, an investment fund partner alleged that FBI agents had lied in affidavits supporting a request for a search warrant when they indicated Ganek was personally aware of insider trading information and its sources.[229] Ganek's claim arose from the government's investigation and prosecution of his hedge fund for insider trading.[230] The FBI, aided by an informant employee who would later plead guilty, first raided the fund's offices.[231] The government indicted and tried one of Ganek's employees based on material obtained in the raid but never charged Ganek with any crime.[232] At that trial, testimony of both an employee and an FBI agent made it clear that nobody had ever told the FBI that Ganek had received inside information, despite the agent's pre-warrant affidavit claiming otherwise.[233] Upon learning this information at trial, Ganek filed a *Bivens* claim alleging that the search was unlawfully based on fabricated evidence in violation of the Fourth Amendment and that his Fifth Amendment right to due process had been violated when his $400 million hedge fund folded as a result.[234]

The court ultimately dismissed both of his claims: the Fourth Amendment claim on the basis of qualified immunity and the Fifth Amendment claim because Ganek had not pleaded facts that could plausibly support it.[235] In terms of its *Bivens* analysis, however, the court said very little, despite ruling on the case four months after the Supreme Court's most recent foray into *Bivens* with *Abbasi*. The decision's one reference to *Abbasi* was a footnote indicating it was assuming without deciding the availability of a *Bivens* remedy for the Fifth Amendment due process claim.[236] The court ostensibly recognized a potential conflict between *Abbasi* and its own precedent on due process claims, and so it sidestepped a potentially tricky question for an easier one.[237] Notably, the decision included no such footnote with respect to the Fourth Amendment claim, which it also decided without addressing the *Bivens* question. Perhaps that should then be understood as an

227. *See id.* at 90–91.
228. *See supra* Part II.C.1.
229. *See Ganek*, 874 F.3d at 78.
230. *See* Ganek v. Leibowitz, 167 F. Supp. 3d 623, 629 (S.D.N.Y. 2016), *rev'd in part*, 874 F.3d 73 (2d Cir. 2017).
231. *See id.* at 630.
232. *See id.* at 631.
233. *See id.* at 630–31.
234. *See Ganek*, 874 F.3d at 79.
235. *See id.* at 77, 90. For more about pleading standards, see *supra* note 100 and accompanying text.
236. *See Ganek*, 874 F.3d at 90 n.11.
237. *See id.*

endorsement of the Fourth Amendment claim. But even if much can be read between the lines of the *Ganek* opinion, the lack of a definitive statement regarding the availability of a *Bivens* claim in this context leaves the question at least partially unanswered.[238]

3. The Third Circuit: Conflicting Decisions at the District Courts

Since *Abbasi*, the Third Circuit's position on the viability of falsification claims under *Bivens* appears unsettled as well. However, unlike the First and Second Circuits, which have had panels resolve the claims on the merits without addressing the *Bivens* question, the Third Circuit itself has not decided such a case. Rather, as this subsection examines, cases at the district level have reached conflicting conclusions.

In *Karkalas v. Marks*,[239] the Eastern District of Pennsylvania rejected a doctor's claim against an investigator and prosecutor for malicious prosecution and knowingly testifying falsely to the grand jury.[240] The court analyzed the *Bivens* question under the Third Circuit's version of the *Abbasi* approach, which directed courts not only to determine if the case presented a new context but also to perform an additional two-part inquiry into whether an alternative remedial structure existed and whether there were special factors that counseled hesitation.[241] Despite this minor tweak of the framework, the essential elements of *Abbasi* still guided its analysis.

The court first determined that Karkalas's claim was meaningfully different from *Bivens*, the closest potential Supreme Court analogue given its grounding in the Fourth Amendment.[242] Though the claim alleged a Fourth Amendment violation, as in *Bivens*, the court characterized the claim at a more granular level; its allegations of false statements to the jury in a prosecution under the Controlled Substances Act thus constituted a new context.[243]

Next, the court found an alternative remedial structure existed for this kind of claim and, additionally, special factors prevented this new type of

238. District courts in the Second Circuit reflect the approach established by the *Ganek* court. In *Bey v. Fernandez*, the court dismissed a malicious prosecution claim on qualified immunity grounds without addressing the question of the claim's viability. No. 15-CV-7237(PKC)(ST), 2018 WL 4259865, at *5 (E.D.N.Y. Sept. 5, 2018). Another district court, in *Parker v. Blackerby*, dismissed a *Bivens* claim arising out of the arrest of a mental patient who had threatened the president. 368 F. Supp. 3d 611, 618 (W.D.N.Y. 2019). By following the approach of the *Ganek* panel, the district courts similarly suggest the availability of such a claim though ultimately leave the question unsettled.

239. No. 19-948, 2019 WL 3492232 (E.D. Pa. July 31, 2019).

240. *See id.* at *1. Karkalas brought the suit after being acquitted at trial for knowingly prescribing a controlled substance. *Id.*

241. *See id.* at *7. In an unrelated *Bivens* case, decided two months after *Abbasi*, the Third Circuit seemed to follow the Supreme Court's test from *Wilkie v. Robbins*, 551 U.S. 537, 550–54 (2007), rather than the one provided in *Abbasi*. *See* Vanderklok v. United States, 868 F.3d 189, 200–01 (3d Cir. 2017).

242. *Karkalas*, 2019 WL 3492232, at *9–10.

243. *Id.*

claim.[244] With respect to a remedial structure, the Hyde Amendment permitted an award of attorney's fees for bad-faith prosecutions, and Congress had also passed a law allowing damages for unjust convictions.[245] That Karkalas did not seek fees under the Hyde Amendment (and though his codefendants were denied them) did not diminish the structure's existence.[246] As to special factors, the court noted three principal concerns. First, the claim would have to inquire into the secrecy of grand jury testimony.[247] Second, one of the defendants was a "diversion investigator," not a typical law enforcement officer familiar with probable cause standards.[248] Third, the Ryan Haight Act Online Pharmacy Consumer Protection Act of 2008[249] (the "Ryan Haight Act"), which amended the Controlled Substances Act in 2008 to allow states to sue online pharmacy companies for damages, expressly noted that it did not create a private right of action.[250]

Other district courts in the Third Circuit dismissed similar *Bivens* claims. In one such case, a court dismissed a malicious prosecution suit because that kind of claim did not resemble any of the Supreme Court's three *Bivens* endorsements; it did not even address special factors.[251] In another, *Lee v. Janosko*,[252] a coerced confession amounted to a new context and was barred by special factors.[253] The court reasoned that Congress had addressed coerced confessions by prohibiting their admissibility at trial but purposefully had not provided a damages remedy.[254] It also noted the chilling effect such suits would have on law enforcement and the potential to flood the federal courts with constitutional damages claims.[255]

But another district court reached an altogether opposite conclusion.[256] In *Graber v. Dales*,[257] a Secret Service agent allegedly lied in an affidavit supporting an arrest warrant resulting from Graber's protests at the Democratic National Convention.[258] The claim was ultimately allowed to

244. *See id.* at *11.
245. *See id.* See also *supra* note 151 for more on the Hyde Amendment and 18 U.S.C. § 3006A (2018) pertaining to unjust convictions.
246. *Karkalas*, 2019 WL 3492232, at *11.
247. *Id.* at *12.
248. *Id.*
249. Pub. L. No. 110-425, 122 Stat. 4820 (codified as amended in scattered sections of 21 U.S.C.).
250. *See Karkalas*, 2019 WL 3492232, at *13. The Ryan Haight Act was primarily aimed "to address the problem of rogue Internet pharmacies." S. REP. NO. 110-521, at 2 (2008).
251. *See* Lane v. Schade, No. 15-01568(PGS)(LHG), 2018 WL 4571672, at *7 (D.N.J. Sept. 24, 2018).
252. No. 2:18-CV-01297, 2019 WL 2392661 (W.D. Pa. June 6, 2019).
253. *See id.* at *4–6.
254. *See id.* at *5 (describing 18 U.S.C. § 3501 (2018)). In *Dickerson v. United States*, 530 U.S. 428, 444 (2000), the Supreme Court found that 18 U.S.C. § 3501 was unconstitutional to the extent that it attempted to override the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).
255. *Lee*, 2019 WL 2392661, at *5 (citing Vennes v. An Unknown No. of Unidentified Agents, 26 F.3d 1448, 1452 (8th Cir. 1994)).
256. *See* Graber v. Dales, No. 18-3168, 2019 WL 4805241, at *6 (E.D. Pa. Sept. 30, 2019).
257. No. 18-3168, 2019 WL 4805241 (E.D. Pa. Sept. 30, 2019).
258. *Id.* at *3.

proceed after the court determined the new context question was a "close call," but, regardless, there were no special factors.[259] The court was conflicted about whether to characterize the claim as a seizure without probable cause—which would not constitute a new context—or if the differences between the case at hand and *Bivens*—even if trivial—amounted to an extension under *Abbasi*.[260] The plaintiff's special factors argument clarified any uncertainty; it persuaded the court that the classification of the event as a "National Special Security Event" was unrelated to the national security policy at issue in *Abbasi*.[261] Moreover, the affidavit was not a heat-of-the-moment decision implicating the Secret Service's instant reactions but a measured statement after the suspect was already in custody.[262]

The law in the Third Circuit, lacking a decision by the circuit court itself to clarify the conflicting district court decisions, thus remains unsettled with respect to *Bivens* claims addressing falsification by law enforcement. Unlike the First and Second Circuits, however, it is a result of unresolved conflict rather than lack of guidance on the post-*Abbasi Bivens* question.

4. The Tenth Circuit: The District of Colorado in *Boudette v. Sanders*

A Tenth Circuit appellate panel has not yet addressed the viability of a falsification claim under the Supreme Court's refined *Bivens* framework. But in *Boudette v. Sanders*,[263] the District of Colorado determined that a *Bivens* remedy for malicious prosecution is categorically unavailable under *Abbasi*.[264] Though a magistrate judge had determined that *Abbasi* did not preclude a *Bivens* suit for malicious prosecution, the district court rejected that part of the recommendation in *Boudette*.[265]

The suit alleged that a DEA agent made false statements in an affidavit to procure a search warrant.[266] After a lengthy analysis of the new *Abbasi* standard, the court briefly concluded that the suit would intrude into the decision-making of prosecutors and thus presented a new context relative to the Supreme Court's three *Bivens* cases.[267] Turning to special factors, the court found that the low bar for dismissal established under *Abbasi* had been met by the risk that the suit would "interfere with prosecutorial discretion" or disincentivize cooperation between both law enforcement and prosecutors—and between citizens and law enforcement.[268]

Like the other circuits examined in Part II.C, the Tenth Circuit's view on the viability of falsification claims is ultimately unsettled. Unlike the others,

259. *Id.* at *4.
260. *Id.* at *3–4.
261. *Id.* at *5.
262. *Id.*
263. No. 18-CV-02420-CMA-MEH, 2019 WL 3935168 (D. Colo. Aug. 19, 2019).
264. *Id.* at *5.
265. *See id.*
266. *See id.* at *2.
267. *See id.* at *7.
268. *Id.*

however, that is not because of a failure to address the issue[269] or a conflict among the district courts.[270] Rather, the *Boudette* court's decision staked a clear position as to the viability of these kinds of suits; they are not permissible following *Abbasi*. But until the district court's holding in *Boudette* is further developed by other district courts in the circuit, or the circuit itself, the court's holding stands on uncertain ground.

III. UNDERSTANDING THE *ABBASI* "ELEMENTS" IN THE CURRENT LANDSCAPE: NEW CONTEXT, SPECIAL FACTORS, AND ALTERNATIVE REMEDIAL STRUCTURES

As Part II describes, the viability of *Bivens* claims arising from falsification of evidence varies widely.[271] Having laid out the landscape of cases and their divergent results across the circuits, this section compares these cases from the perspective of the *Abbasi* "elements": new context, special factors, and alternative remedial structures. Because much of each court's analysis is driven by the facts of the specific complaint, a definitive, results-focused determination of whether a falsification claim is allowed proves difficult in the abstract. As a result, Part III dissects these cases into their component parts under *Abbasi* to better understand how each component functions in falsification claims. While questions concerning the potential existence of a new context, special factors, and an alternative remedial structure overlap, addressing each separately allows for a narrower guidepost and a more direct comparison to *Abbasi* itself.

A. Step One: A New Context?

The question of whether a suit presents a new *Bivens* context is especially important in determining the viability of the claim. As *Abbasi* established, if the case does not present a new context, the claim may proceed; a special factors analysis is unnecessary.[272] Because the Supreme Court has not addressed a falsification claim directly, there is some breathing space for the circuit courts to determine if this kind of claim presents a new context. The circuits have mostly explored this space in terms of how they address this question, rather than the answer they reach. For the most part, falsification claims have constituted a new *Bivens* context.

Generally, the cases present four kinds of new context analyses: (1) those determining if *Abbasi* requires reexamination of established precedent; (2) those applying *Abbasi*'s guidance directly to the falsification context; (3) those assessing new context in terms of the factual circumstances at hand; and (4) those ignoring the new context analysis altogether. The Sixth Circuit, which had clearly established the viability of these kinds of claims prior to *Abbasi*, held that nothing in *Abbasi* required the court to reexamine the

269. *See supra* Parts II.C.1–2.
270. *See supra* Part II.C.3.
271. *See supra* Part II.
272. *See* Zipursky, *supra* note 130, at 2172 (explaining that "nearly any kind of difference will create an obligation to consider 'special factors'"); *see also supra* Part I.D.

validity of that precedent.[273] Though it set out to answer whether reexamination was required—a slightly different question—in doing so, the Sixth Circuit essentially determined it was not a new context under *Abbasi*. By distinguishing *Abbasi* from the case at hand, rather than analogizing it to the three prior Supreme Court cases, the court found that the *Abbasi* new context analysis was unnecessary. Similarly, a district court in the Third Circuit appeared inclined to find that false testimony in an affidavit supporting an arrest warrant was not a new context.[274] But since it was a "close call," it assumed the new context and decided on special factors.[275]

In contrast, other courts have strongly intimated the falsification of evidence itself presented a new context. In *Cantú*, the Fifth Circuit found that the law enforcement conduct at issue could not be reconciled with what happened in *Bivens* and thus was a new context.[276] Similarly, much of the Eighth Circuit's analysis in *Farah* spoke to the falsification issue at least indirectly; the case-building nature and the indirect injury were both meaningful differences.[277] The Eastern District of Pennsylvania, differing from another district in the Third Circuit, found that false testimony to the grand jury presented a new context.[278]

In other cases, the factual circumstances were so different from the Supreme Court's three cases that the lower courts considered the context to be new without much consideration of the falsification issue. For example, when the Ninth Circuit acknowledged that a forged document in a deportation proceeding presented a new context, it emphasized the actor—a federal immigration prosecutor—and the setting—a deportation proceeding.[279]

But many of the cases avoided the new context analysis altogether. Though the First and Second Circuits each had a history of permitting fabricated evidence and malicious prosecution *Bivens* claims before *Abbasi*, neither performed a new context analysis in the post-*Abbasi* cases.[280] These courts ruled on motions to dismiss based either on qualified immunity or pleading standards, rather than employing the *Abbasi* framework. This may suggest the courts did not view these claims as a new context, but the failure to address the question ultimately leaves it open.

In sum, the lower courts' treatment of the *Abbasi* new context question is by no means perfectly consistent, but it mostly arrives at the same result. Some courts directly identify the circumstances of falsification as a new context; others have determined the claim to be a new context but based on factual circumstances unrelated to falsification; and still others have avoided

273. *See supra* Part II.B.1.
274. *See supra* Part II.B.3 (discussing *Graber v. Dales*).
275. *See supra* Part II.B.3 (discussing *Graber v. Dales*).
276. *See supra* Part II.A.2; *see also* Cantú v. Moody, 933 F.3d 414, 423 (5th Cir. 2019).
277. *See supra* Part II.A.1; *see also* Farah v. Weyker, 926 F.3d 492, 499 (8th Cir. 2019).
278. *See supra* Part II.C.3 (contrasting *Karkalas* with *Graber*).
279. *See supra* Part II.B.2; *see also* Lanuza v. Love, 899 F.3d 1019, 1027–28 (9th Cir. 2019).
280. *See supra* Parts II.C.1–2.

the analysis altogether. Only the Sixth Circuit has been sufficiently satisfied that the falsification claim did not present a new context as to forgo the special factors question altogether. Considering the significant conflicts in terms of special factors and alternative remedies, which the next two subsections address, this near-consensus on new context constitutes a degree of consistency. Because the new context question is the only truly dispositive element of the test—a case may proceed, even in the presence of special factors, if it is *not* a new context—this tendency to find a new context puts even more weight on the special factors analysis.

B. Step Two: Special Factors?

While Part III.A shows that the first step of the *Abbasi* framework has produced mild variation among the lower courts, *Abbasi*'s second step opens the door to a far wider array of potentially relevant considerations. Adding to the complexity of this task is the lack of a baseline for special factors. *Abbasi* provided an inherent baseline for comparison for the new context question, namely the cases that constitute the "old" context.[281] The guidelines for the special factors analysis, on the other hand, are less concrete. As Part I.D set out, the Supreme Court sought to focus the attention of lower courts on special factors that would implicate separation-of-powers concerns. But it did not provide a hypothetical list of examples of special factors, as it had for the new context question.[282] As a result, lower courts have looked to both the specific special factors presented in *Abbasi* and also to any other special factor that implicates separation of powers. Unsurprisingly, as Part II detailed on a case-by-case basis, this has produced conflict as to which factors to use, on the one hand, and whether the factor is in fact *special* enough to counsel hesitation, on the other. This section develops this conflict, drawing out pivotal differences in the often-dispositive domain of the special factors analysis.

For cases in which courts determine that special factors do *not* exist, there are generally three approaches employed. First, the court may examine the special factors present in *Abbasi* and then determine that those are absent in the case at hand. For the most part, the Ninth Circuit relied on this approach in *Lanuza*. There, the plaintiff's claim was permitted to proceed because he had not challenged executive policy or the conduct of high-level officials and, additionally, congressional silence with respect to a damages remedy did not equate to disapproval.[283] In essence, the *Abbasi* factors were absent.

Second, a court may reject the special factors that inevitably will be proposed by the defendant. The Sixth Circuit did this implicitly when it simply ignored the officers' argument that the impact on the "U.S. Marshals Service systemwide operations" was a special factor.[284] The district court in

281. *See supra* Part I.D.

282. *See supra* note 120 and accompanying text.

283. *See supra* Part II.B.2.

284. Reply Brief of Defendants-Appellants Raymon Alam & David Weinman at 9, Jacobs v. Alam, 915 F.3d 1028 (6th Cir. 2019) (No. 18-1224), 2018 WL 3617091, at *9.

Graber was more direct: it expressly rejected the defendant's argument that the Secret Service's designation of the Democratic National Convention as a "National Special Security Event" was a special factor.[285] National security *policy*, it held, was a valid special factor when it was legitimately at issue, but that had not been the case there.[286]

Third, the court might hypothesize special factors that, had they been present, would prevent a *Bivens* claim. In their absence, then, the court allows the claim to proceed. For example, the Ninth Circuit conceded that immigration, at its highest levels, could implicate foreign policy and diplomacy, which were indeed matters best left to the political branches.[287] But when the matter only consisted of one person's mistreatment at the hands of a low-level prosecutor, foreign relations and diplomacy would be irrelevant.[288] Similarly, the *Graber* court recognized that second-guessing a Secret Service agent's split-second decision in a life-or-death matter would be problematic, but the facts of the case at issue had not presented such a condition.[289]

On the other hand, courts that *find* special factors often use the special factors outlined in *Abbasi* as models, but do not always limit themselves to these factors. Intrusion into the executive branch and congressional inaction, which the *Abbasi* Court addressed, arise most frequently.[290] But beyond the *Abbasi* factors, the unique facts of the case—for example, the nature of the law enforcement action or the type of officer being sued—often come into the special factors discussion.[291]

Turning to intrusion into the executive branch, a concern pulled directly from *Abbasi*, courts have found a variety of circumstances that fall under this umbrella. Interference with the prosecutorial process has constituted such an intrusion.[292] The risk of chilling communication between prosecutors and officers or between law enforcement and the public has been deemed another intrusion.[293] Piercing the veil of the grand jury, as might be required in a case alleging false testimony by a law enforcement officer, is another activity best avoided by the judiciary.[294] Other *Abbasi* considerations, like national security and foreign policy, appear as well.[295]

---

285. Graber v. Dales, No. 18-3168, 2019 WL 4805241, at *4 (E.D. Pa. Sept. 30, 2019).
286. *Id.*
287. *See* Lanuza v. Love, 899 F.3d 1019, 1029–30 (9th Cir. 2018).
288. *See id.*
289. *See Graber*, 2019 WL 4805241, at *5.
290. *See supra* Part II.
291. *See, e.g.*, *supra* Part II.B.2 (examining *Cantú*); *supra* Part II.C.3 (examining *Karkalas*).
292. *See supra* Part II.B.1.
293. *See supra* Part II.C.4.
294. *See, e.g.*, Karkalas v. Marks, No. 19-948, 2019 WL 3492232, at *11–12 (E.D. Pa. July 31, 2019) ("The secrecy of grand jury proceedings counsels against implying a *Bivens* action.").
295. *See supra* Part II.B.2 (discussing foreign policy); *supra* Part II.C.3 (discussing national security).

Next, courts interpret the action or inaction of Congress in various circumstances as a proxy for its intent that the courts should not provide a damages remedy. Often, a relevant statute that fails to provide a damages remedy might suggest this desire. Multiple courts have found that the Hyde Amendment's provision to award attorney's fees for bad-faith prosecutions—but no other monetary damages—implies that Congress intended to draw a clear line at that remedy.[296] Other courts have reached a similar conclusion with respect to the Ryan Haight Act and 18 U.S.C § 3501.[297] Even in the absence of a relevant statute, certain courts have relied on congressional silence—on its own—to conclude that the judiciary should not provide a damages remedy for the unconstitutional conduct at issue. In *Cantú*, the Fifth Circuit panel referred to the "length of time" that Congress was aware of the Supreme Court's "disfavored" disposition towards creating new *Bivens* claims.[298] Accordingly, Congress's failure to create a remedy must be understood as an affirmative endorsement of that holding.

Finally, these falsification cases have encompassed new special factors beyond the scope of *Abbasi* and more narrowly tailored to the specific case at issue. The nature of law enforcement's activity is one such circumstance that applies.[299] For example, the investigation of "transnational organized crime" proved to be a special factor for the Fifth Circuit.[300] Another court found a special factor in a defendant's job as a DEA "diversion investigator" because this less traditional law enforcement role meant that she was unfamiliar with the probable cause standard essential to malicious prosecution claims.[301] These ad hoc special factors thus round out the types of special factors commonly found in the post-*Abbasi* falsification claims.

C. A "Special" Special Factor?: Alternative Remedial Structures

Part II, in its review of the post-*Abbasi* landscape of falsification cases, introduced cases in which existence of an alternative remedial structure warranted dismissal.[302] That analysis derived from *Abbasi* itself. There, the Court drew on its prior *Bivens* jurisprudence[303] to explain that, when an alternative remedial structure existed, "that alone" might be sufficient to prohibit a court from inferring a *Bivens* action.[304] Of the conflicts that arise from this element of *Abbasi*, most important to falsification claims is the

296. *See* Farah v. Weyker, 926 F.3d 492, 501 (8th Cir. 2019); *Karkalas*, 2019 WL 3492232, at *11.

297. *See Karkalas*, 2019 WL 3492232, at *13 (discussing the Ryan Haight Act); Lee v. Janosko, No. 2:18-CV-01297, 2019 WL 2392661, at *5 (W.D. Pa. June 6, 2019) (describing 18 U.S.C. § 3501 (2018)).

298. Cantú v. Moody, 933 F.3d 414, 423 (5th Cir. 2019). The "disfavored" term was first used in *Iqbal* but, as Part I explained, the Court had not extended *Bivens* to a new context since *Carlson*. *See supra* Part I.C.

299. *See Cantú*, 933 F.3d at 424.

300. *Id.*

301. *Karkalas*, 2019 WL 3492232, at *13.

302. *See supra* Parts II.A.1–2, II.C.3.

303. *See* Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

304. Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

dispute about whether the court should focus on the formal existence of a structure or, conversely, on the meaningfulness of the remedy it provides in the specific case. Relatedly, courts disagree on how various statutory regimes fit, if at all, into this structure.

This subsection shows how the courts, in attempting to understand properly what constitutes an alternative remedial structure, engage in a functionalist-formalist debate of sorts with the respect to the possibility of relief. That is, for some courts, the mere existence of the structure, regardless of its accessibility to the specific plaintiff or its adequacy, is sufficient. The Eighth Circuit, for example, reasoned that the lack of a remedy for the plaintiff was unfortunate but not a proper basis for a *Bivens* claim given the existence of a remedial scheme.[305] By contrast, other courts have found that the unavailability of relief for the plaintiff in practical terms meant the scheme was inadequate and thus would not bar a *Bivens* claim.[306]

More often, though, courts dive into the specific statutory schemes relevant to the complaint at hand.[307] Of course, the distinction between courts' discussions of statutory schemes under the rubric of special factors versus alternative remedies is subtle. In the former scenario, the statutes speak to whether the failure to provide a damages remedy was an intentional decision by Congress. In the latter, the statutes speak less to congressional intent and more to whether, out of prudential considerations imposed by the Supreme Court, a sufficient remedial structure exists to make judicial involvement unnecessary. Either way, statutes that qualify as an alternative remedial structure in one court often fail in others.[308] One of which, the FTCA, is especially relevant to falsification claims because it expressly allows suits for certain intentional torts *against law enforcement officers* that would otherwise be unactionable, such as false arrest, abuse of process, and malicious prosecution.[309] Many, if not all, *Bivens* claims alleging falsification of evidence would thus potentially give rise to suit under the FTCA as well, so preclusion would be especially impactful.

The Fifth Circuit raised the very possibility that the FTCA could operate as an alternative remedial structure to bar falsification claims in the *Bivens* context. In *Cantú*, the first special factor that the Fifth Circuit listed was the statutory scheme provided by the FTCA.[310] Other courts, outside the

305. *See supra* Part II.A.1.

306. *See supra* Part II.B. Additionally, the Ninth Circuit also embraced this "functionalist" approach in a nonfalsification *Bivens* case, *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018). The court addressed a list of potential sources of compensation for the plaintiff, all of which were unavailable for Rodriguez. *Id.* at 739–43. Damages under the FTCA were unavailable because of the foreign country exception; a state-law tort action was barred by the Westfall Act; restitution under the criminal proceeding against the defendant was inadequate; and a suit in Mexico was not feasible. *Id.*

307. *See supra* Parts II.B, II.C.3

308. *Compare supra* Part II.A.1, *and supra* Part II.C.3, *with supra* Part II.B.2.

309. *See* 28 U.S.C. § 2680(h) (2018); *supra* note 165 and accompanying text (discussing the law enforcement proviso further).

310. *See* Cantú v. Moody, 933 F.3d 414, 423 (5th Cir. 2019).

falsification context, occasionally reach a similar conclusion.[311] For the most part, however, courts addressing *Bivens* falsification claims do not even address the FTCA as a potential bar via the alternative remedial structure route.[312] Parallel FTCA actions in *Lanuza*, *Jacobs*, and *Farah* did not enter into the *Bivens* analysis for the courts that decided those cases.[313] Even in the midst of narrowing the availability of *Bivens* claims, the Supreme Court has still affirmed its conclusion that "Congress views FTCA and *Bivens* as parallel, complementary causes of action" grounded in the legislative history of the FTCA itself.[314]

The status of less prominent statutory provisions and schemes is less clearly established. The Hyde Amendment, which allows recovery of reasonable attorney's fees for bad-faith prosecutions, is especially pertinent given the frequency with which plaintiffs in this context have been acquitted of criminal charges.[315] The Eighth Circuit concluded that a *Bivens* remedy would "upset the existing 'remedial structure'" established by Congress through the Hyde Amendment and the statutes permitting damages against the government for wrongful convictions.[316] Only one other court, the Eastern District of Pennsylvania, introduced this scheme as a potential alternative remedy.[317] And a case two months later in the same court ignored both statutes as it permitted a suit based on a Secret Service agent's falsified affidavit.[318]

In sum, alternative remedial structures, which are clearly relevant considerations in the Supreme Court's *Bivens* cases, present even more unanswered questions for the lower courts in post-*Abbasi* falsification claims. Courts differ on whether to treat alternative remedies as a separate bar or a special factor, which, in turn, affects the weight given to the alternative remedy. Similarly, though most courts appear to treat potentially overlapping FTCA and *Bivens* suits as complementary and not interchangeable, at least one does not.[319] Other statutory regimes, such as

311. *See, e.g.*, Rivera v. Samilo, 370 F. Supp. 3d 362, 370 (E.D.N.Y. 2019) (FTCA was an "alternative avenue for redress" in an excessive force *Bivens* case); Abdoulaye v. Cimaglia, 15-CV-4921 (PKC), 2018 WL 1890488, at *6 (S.D.N.Y. Mar. 30, 2018) (FTCA as a potential remedy counseled hesitation in extending a *Bivens* claim.). *But see* Oliva v. United States, EP-18-CV-00015-FM, 2019 WL 136909, at *4 (W.D. Tex. Jan. 8, 2019) (FTCA was not alternative remedy for an excessive force claim.).

312. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 133 (2009). The expansion of the FTCA to include certain intentional torts by law enforcement officers was designed to supplement, not displace the *Bivens* action. *Id.*

313. *See supra* Parts II.A.1, II.B.1–2.

314. Carlson v. Green, 446 U.S. 14, 20 (1980); *see also* Wilkie v. Robbins, 551 U.S. 537, 553 (2007); Bush v. Lucas, 462 U.S. 367, 378 (1983). For more on the complementary nature of the FTCA and *Bivens*, see *supra* note 88 and accompanying text.

315. *See supra* Parts II.A.1–2, II.B.1.

316. Farah v. Weyker, 926 F.3d 492, 502 (8th Cir. 2019) (citing 18 U.S.C. §§ 1495, 2513 (2018), which establishes the cause of action to sue the government for damages up to $50,000 for each year of wrongful incarceration (and $100,000 for each year if sentenced to death)).

317. *See* Karkalas v. Marks, No. 19-948, 2019 WL 3492232 at *11 (E.D. Pa. July 31, 2019).

318. *See* Graber v. Dales, No. 18-3168, 2019 WL 4805241, at *6 (E.D. Pa. Sept. 30, 2019).

319. *See supra* Part II.A.2

certain statutes governing bad-faith prosecutions and unjust convictions, are even more widely contested.

IV. SECOND-GUESSING *BIVENS*?: A POLICY-FOCUSED RESOLUTION

Given the divergent results laid out in Part II and the conflicting interpretations of the *Abbasi* elements in Part III, it would be tempting to try to formulate a bright-line rule as to whether falsification of evidence claims are permitted under the *Abbasi* framework. However, the fact-specific and multifactored nature of Justice Kennedy's test would make any rule too rigid to be helpful. Rather, Part IV offers more definitive guidance on how each element of the *Abbasi* framework—new context, special factors, and alternative remedial structures—should be understood in falsification claims. These suggestions are grounded *within* the *Abbasi* framework to be compatible with the current Court's focus on separation of powers but also steeped in the traditional deterrence rationale of *Bivens*.[320] Ultimately, a proper understanding of these two guideposts points to the idea that courts should reject extending *Bivens* claims when the suit would require the courts to second-guess the policy of one of the political branches.

Fleshing out this idea, Part IV.A first argues that falsification claims will almost always amount to a new context as the term is expressed in *Abbasi*. Additionally, although *Abbasi* recognized both law enforcement's and citizens' reliance interests in the guidance provided by *Bivens* suits, lower court precedent that predates *Abbasi* should always be reexamined. Next, Part IV.B argues that the separation-of-powers focus at the heart of *Abbasi*'s special factors analysis is best understood as prohibiting courts from second-guessing policy. Part IV.C then suggests a practical and flexible test for determining whether a statutory regime constitutes an alternative remedial structure which bars a *Bivens* claim.

Finally, this section offers a brief coda contending that the nature of the harm in falsification claims has special relevance in answering the *Bivens* question posed in *Abbasi*. Though *Abbasi* is typically viewed as being on the other end of the spectrum from *Bivens*, the underlying interests are actually not too far apart, especially as they relate to falsification claims. As this section explains, *Abbasi*'s focus on separation of powers is really about policy, whereas the original three *Bivens* cases were grounded in deterring constitutional violations. But these are actually two sides of the same coin. Deterrence cannot be achieved when an officer is merely carrying out policy. Ultimately, this section's application of *Abbasi* to the current landscape of falsification claims is more about finding the common ground—rather than the space—between *Abbasi* and *Bivens*.

320. *See supra* Parts I.B–C; *supra* note 89 and accompanying text.

A. New Context Renewed

Of the three disputed elements of the *Abbasi* framework, the new context inquiry appears to be the most settled.[321] Putting aside the circuits that have not directly addressed the *Bivens* question,[322] only one has found that a falsification claim *failed* to present a new context.[323] The *Abbasi* Court was clear that the baseline of comparison for a new context should be the three cases in which it endorsed a *Bivens* claim.[324] Accordingly, only *Bivens* itself will likely be applicable to claims involving fabrication of evidence, misrepresentations to the grand jury, and malicious prosecution. Though these claims may check off many of the boxes from the suggested points of comparison in *Abbasi*,[325] the dispositive question is whether the case differs "in a meaningful way."[326] These kinds of claims almost certainly will. At its core, *Bivens* is concerned with the vindication of constitutionally protected privacy interests, as to both body and property,[327] that are simply not present in the falsification claims. That is not to say that the constitutional violations at issue in falsification claims are less meaningful or less worthy of relief. Rather, as most courts already recognize, they simply constitute a new context under *Abbasi* and thus warrant further discussion under the special factors analysis.

The Sixth Circuit's new context analysis, however, raises an additional and important question: how are courts to treat their own pre-*Abbasi* precedent?[328] That is, must settled law be reopened and compared to the three Supreme Court cases? For the Sixth Circuit, its own well-established *Bivens* claims for fabrication of evidence and malicious prosecution essentially preempt the new context question.[329] While that would seem to conflict with *Abbasi* to the extent that existing precedent differs from the three Supreme Court–approved contexts, the Sixth Circuit's position is not unreasonable in light of the *Abbasi* Court's particular emphasis on the stare decisis interest for claims in the law enforcement sphere.[330] There is undoubtedly value in affirming established boundaries for law enforcement where the other side of that line often means an unconstitutional deprivation of liberty.[331] Given the gravity of the consequences, then, it might be preferable for the rules relied on by law enforcement to stand.

Yet the very fact that the *Abbasi* Court considered the stare decisis interest in its new framework ultimately underscores that courts must reexamine their

---

321. *See supra* Part III.A.
322. *See generally supra* Parts II.C.1–2 (discussing the First and Second Circuits).
323. *See supra* Part II.B.1.
324. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).
325. *See supra* note 120 and accompanying text. The list the Court provided, however, was merely illustrative.
326. *Abbasi*, 137 S. Ct. at 1859.
327. *See supra* Part I.B.
328. *See supra* Part III.A.
329. *See supra* Part II.B.1.
330. *See supra* note 115 and accompanying text.
331. *See supra* Parts II.A.1–2, II.B.1 (discussing cases where the plaintiffs were detained for extended periods of time).

pre-*Abbasi* precedent when challenged. The Court carefully recognized and then weighed the special reliance concerns presented in the sphere of law enforcement but nevertheless imposed the new context prong of its new *Bivens* test.[332] Therefore, even in circuits where precedent permits falsification claims to proceed under *Bivens*, those claims present a new context under *Abbasi*. It does not follow, however, that such precedent must be overturned. Rather, *Abbasi* requires that *Bivens* claims for fabrication of evidence and malicious prosecution, even if permitted under established precedent, undergo a special factors analysis.

B. Special Factors as Separation of Policy

In contrast to the lower courts' near-consensus on the new context question,[333] the post-*Abbasi* courts agree far less on what amounts to a special factor.[334] Part III.B presented an empirical inquiry into how special factors impact recent falsification claims, ultimately finding significant conflicts across the circuits.[335] This section addresses the two conflicts that came to the forefront. First is the question of what *Abbasi*'s guidance on special factors means on a practical level. Using the FTCA's discretionary function exemption as an example, this section suggests that courts addressing falsification claims should understand *Abbasi*'s focus on separation of powers to be about second-guessing policy decisions. Second, this section argues that the three most prominent special factors in the post-*Abbasi* landscape are best understood not to constitute special factors in light of this reoriented policy focus.

This reframing of the separation-of-powers analysis is especially important given the contradictory nature of the inquiry. On the one hand, there is arguably an inherent presumption *in favor of* allowing a new *Bivens* remedy based on the mechanics of the test. The burden, if you will, is on the defendant to show that a special factor counselling hesitation exists in the first place.[336] On the other hand, courts have found that the threshold for a consideration to become a special factor is quite low—a moment of hesitation is all that may be required.[337] In reality, then, even if the defendant is required to affirmatively point to a special factor, that is hardly a high bar to clear. Further, the plaintiff is also tasked with the philosophical hurdle of proving the *absence* of special factors. The *Abbasi* framework is not a formal burden-shifting test, so a plaintiff's falsification claim would almost always affirmatively assert that all potential special factors are absent.[338] Thus, the plaintiff essentially has the added difficulty of proving a negative. Though the inconsistency across the courts, on its own, suggests the need for a more

332. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
333. *See supra* Part III.A.
334. *See supra* Part III.B.
335. *See supra* notes 283–302 and accompanying text.
336. *See supra* Part I.D.
337. *See supra* Part III.A.
338. *See supra* Part I.D.

workable understanding of special factors, the inherent contradictions in the framework make this section's proposal all the more necessary. The policy focus proposed in this section does just that.

1. The *Abbasi* Special Factors Reconsidered

To resolve the lower courts' disagreements on which considerations rise to the level of a special factor in falsification claims, *Abbasi*'s guidance must be reconsidered. It is pivotal to center that discussion on separation of powers, the Court's principal focus,[339] but that is not enough. According to *Abbasi*, a special factor arises when a relevant concern of the case presents a separation-of-powers problem.[340] While that may provide a compass towards a desired *Bivens* outcome, it is hardly a map. More guidance is required if special factors are to be applied consistently in falsification claims. To that end, it cannot be sufficient that separation of powers is merely *implicated*. After all, a *Bivens* claim, by definition, will at the very least involve multiple branches of government. In each suit, a citizen seeks a judgment from the courts imposing damages on an executive or legislative official for violating rights protected by the Constitution. There must, therefore, be a boundary where the separation-of-powers concern becomes so insurmountable that the suit must be dismissed on its face. And there is: second-guessing the policy decisions of the political branches. The Court's *Bivens* jurisprudence, and *Abbasi* specifically, emphasized that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'"[341] But that is not a mere corollary to the separation-of-powers concerns—that *is* the concern. That the *Abbasi* Court addressed that issue first, before getting into the case-specific special factors, speaks to its profound importance.[342] Consequently, *Abbasi* is best understood as saying that separation-of-powers concerns become insurmountable when a case requires the judiciary to second-guess the policy decision of another branch of government.

The discretionary function exception to the FTCA provides a model for this principle. Despite the FTCA's broad waiver of sovereign immunity for torts committed by government employees, the discretionary function exception bars recovery where an employee's wrongdoing resulted from carrying out an agency policy.[343] In the same way that the discretionary function exception's restrictions still permit suits for discretionary decisions unrelated to policy, so too should *Abbasi*'s limitations still allow suits for rogue action unrelated to policy. Though the government's broad acceptance of vicarious liability in the FTCA would seem to be the total opposite of a *Bivens* suit, which is aimed only at a federal official in his or her personal capacity, that is not the case. As in *Abbasi*, separation of powers is at the core of the judiciary's interpretation of the discretionary function

339. *See supra* notes 113–13 and accompanying text.
340. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
341. *Id.* at 1860 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001)).
342. *See supra* notes 123–21 and accompany text.
343. *See supra* note 77 and accompanying text.

exception.[344] If the principal question, then, is whether a specific suit would infringe on another branch of government, the fact that the Court was interpreting a statute does not rob it of its persuasiveness. Moreover, regardless of whether the original *Bivens* case would have been decided differently today, the Court has accepted it for the judicially inferred remedy that it is.[345]

The unspoken problem, then, seems to revert back to the modern judiciary's discomfort with creating causes of action.[346] Yet that concern lies outside the four corners of *Abbasi*. Given *Abbasi*'s clear acknowledgement that courts *may* infer new *Bivens* claims (the second prong of the framework would, after all, be superfluous if a new context always barred suit), that argument attacks the existence of all *Bivens* claims in a way that *Abbasi* did not. First, it bears repeating that the *Bivens* remedy is more accurately described as judicially *implied* than judicially *created*. The remedy is not judge-made so much as it is a derivative of the rights guaranteed in the Constitution.[347] But more importantly, the Court has already accepted the judicially inferred nature of the suit. Therefore, when the *Abbasi* Court refocused the *Bivens* inquiry on separation of powers, the judicial "creation" of a cause of action was already priced in. True, the Court likely would have decided *Bivens* differently if it heard the case today, but its judicially implied nature has nonetheless been affirmed.[348] The inquiry, then, must be about something else: judicial second-guessing of the political branches' policy decisions.

2. Reapplying Special Factors to Falsification Claims

The preceding subsection refined the general directions *Abbasi* provided for the special factors analysis in new *Bivens* claims into a more functional roadmap. Rather than addressing claims under the nebulous auspices of separation-of-powers principles in the abstract, the conflicting view on special factors can now be understood in light of the policy second-guessing that lies at the core of *Abbasi*. The most pressing conflicts are thus whether to treat the following as special factors: (1) intrusion into the functions of law enforcement, (2) congressional inaction or silence, and (3) the nature of

344. *See* Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1021 (9th Cir. 1989) (explaining that the discretionary function exception is "[g]rounded in separation of powers concerns").

345. *See supra* Parts I.C–D (discussing the modern *Bivens* doctrine). *But see* Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (arguing that *Bivens* should be limited to its facts).

346. *See, e.g.*, *supra* notes 160–61 and accompanying text (examining the *Cantú* court's unwillingness to create a cause of action); *see also* Bandes, *supra* note 58, at 294 (discussing an alternate theory envisioning a more expansive *Bivens* doctrine where "the separation of powers principle *demands* judicial enforcement" even without any congressional authorization (emphasis added)).

347. *See supra* Part I.B. In the original *Bivens* case, Justice Blackmun recognized the comparison to the other judicially implied remedies for Fourth Amendment violations—the exclusionary rule and injunctive relief. *See supra* note 79 and accompanying text.

348. *See supra* Part I.C (discussing the progression of the modern *Bivens* doctrine).

the law enforcement activity. Ultimately, the lessons of the preceding section suggest that these concerns will not rise to the level of special factors that preclude a *Bivens* claim.

a. Interference with the Political Branches

One of the most glaring points of contention for post-*Abbasi* falsification claims is whether the burden of a *Bivens* suit on the executive branch amounts to a special factor.[349] The idea is that a suit would impermissibly intrude into the functioning of the executive branch through the revelation of the deliberations of law enforcement personnel or of a grand jury.[350] Under the framework provided above, the answer is quite simple: if the suit would amount to judicial second-guessing of a policy decision, it should be barred. But that will rarely be the case for falsification claims for three principal reasons. First, the policy-laden decision of whether to charge or investigate will not be at issue.[351] Second, the burden discussed in *Abbasi* relates to deliberations regarding policy formation, not routine law enforcement activities.[352] And finally, other restraints, such as market factors and complaint pleading standards, counteract the concern that *Bivens* claims will unfairly intrude on the executive branch.

Though falsification claims will inherently require the judiciary to review law enforcement decisions, these claims ultimately will not implicate policy considerations reaching the level of a special factor. Admittedly, law enforcement decisions can be difficult to isolate from the policy priorities related to law enforcement's limited resources in certain cases. At first glance, examining such decisions would impermissibly implicate policy, as laid out above. But there is an important distinction with respect to falsification *Bivens* claims: the second-guessing is primarily directed towards the validity of a *legal* standard made by a *judicial* body, not a policy-informed decision of the executive branch. As the post-*Abbasi* cases suggest, lack of probable cause is often the benchmark for relevant suits like malicious prosecution.[353] That determination, whether in the form of a search warrant or an arrest, is already made by the court. Any intrusion would be less about executive discretion than about a legal standard already well within the competence of the courts.[354]

Further, *Abbasi*'s concern about the burden of an inquiry into the functions of the other branches arose from the prospect of dredging up deliberations on the *formation* of policy.[355] Mere review of executive functions, even if

349. *See, e.g.*, *supra* notes 146–149, 202–204 and accompanying text.

350. *See supra* note 247 and accompanying text.

351. *See generally supra* Part II (finding that discretionary decisions to start an investigation were not at issue in any falsification claim examined).

352. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860–61 (2017).

353. *See supra* Part II.C.3 (discussing *Karkalas* and the diversion investigator's lack of familiarity with probable cause as a special factor).

354. The risk that the fact finder is improperly prejudiced by certain discretionary elements of the officer's conduct is real but would not be unique to falsification *Bivens* claims.

355. *See supra* notes 99–105 and accompanying text.

intrusive, did not pose the separation-of-powers concerns that worried the Court.[356] An examination of high-level policy decisions, on the other hand, could chill the policy-creating process altogether.[357] This reasoning is consistent with the fact that the quintessential *Bivens* claim naturally reviews certain decision-making processes of law enforcement. With this in mind, if a *Bivens* claim alleging fabrication of evidence, for example, were aimed at challenging a policy, the intrusion concern would rise to the level of a special factor precluding a *Bivens* claim.[358] But the nature of falsification claims should make this very unlikely. Fabrication of evidence, malicious prosecution, lying to a grand jury, and the like will all constitute rogue action outside the scope of agency policy, almost by definition. The *Abbassi* Court's concern about chilling legitimate executive deliberation or conduct would thus be inapplicable to falsification claims.

Part III.B also catalogued cases where intrusion into the secrecy of the grand jury or into prosecutorial discretion amounted to a special factor.[359] While secrecy of the grand jury is pivotal to ongoing law enforcement operations, it is also for the benefit of the as yet uncharged, unconvicted, and unrepresented defendant.[360] Grand jury testimony may also be disclosed "in connection with a judicial proceeding."[361] Admittedly, the possibility of court-imposed damages could inhibit prosecutorial discretion to a certain extent. But only to the extent that a prosecutor's office regularly deliberates about unethical and unconstitutional conduct—hardly a significant imposition.

A final argument supporting the proposition that these suits would unduly intrude on the executive branch is that the sheer volume of the suits would grind that branch's normal operations to a halt.[362] But other restraints already exist to combat this. The heightened pleading standard established by the Supreme Court in *Iqbal* speaks to this directly;[363] *Abbasi* does not. *Abbasi*, therefore, should not provide judicial cover to dismiss a *Bivens* claim simply because the facts of an adequately pleaded complaint seem implausible.[364]

356. *See supra* notes 123–24 and accompanying text.

357. *See supra* note 124 and accompanying text.

358. For example, *Lanuza* discusses the actions of the ICE attorney as being line-level infractions. *See* Lanuza v. Love, 899 F.3d 1019, 1029 (9th Cir. 2019). A class action suit, however, might be different. Ironically, this suggests that a more egregious violation (i.e., a more widespread one) would be permitted to stand in a way an individual violation would not. But this conforms with the idea that the politically accountable branches are better suited to make widespread changes and that such a policy change does not align with the deterrence rationale of the suit.

359. *See supra* Part III.B (summarizing the lower courts' special factors conflicts).

360. *See generally* Andrew D. Leipold, *Grand Jury Secrecy*, *in* 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 106 (4th ed. 2010).

361. FED. R. CRIM. P. 6(e)(3)(E)(i).

362. *See, e.g.*, Maria S. v. Garza, 912 F.3d 778, 784–85 (5th Cir. 2019) (pointing to a "tidal wave of litigation" if a *Bivens* claim is allowed to proceed), *cert. denied*, 140 S. Ct. 81 (2019) (mem.).

363. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009).

364. *See supra* note 100 and accompanying text.

Moreover, market forces, in the form of attorneys taking on plaintiffs' cases, will aid in preventing frivolous claims.[365]

b. Congressional (In)Action

Another common special factor among the circuit courts, congressional inaction, comes directly from *Abbasi*.[366] Those courts that rejected falsification claims almost always found congressional silence to counsel hesitation in extending a new *Bivens* claim.[367] But this is a problematic position for these kinds of claims. Reading meaning into congressional inaction is difficult enough when the baseline for that inaction is a statute of Congress's own making.[368] When that baseline is a judicially implied doctrine, affixing positive meaning is an even trickier—if not altogether futile—proposition. Accordingly, courts go too far when they view Congress's failure to legislate in conjunction with a purported awareness that the Supreme Court has consistently narrowed *Bivens*.[369] There are just as many indicators pointing in the other direction: the *Bivens* doctrine has existed for nearly fifty years; Congress rejected a proposal to subsume *Bivens* into the FTCA when it added the law enforcement proviso in 1974;[370] and Congress ratified *Bivens* when it amended the FTCA with the Westfall Act in 1988.[371] Regardless of whether these countervailing actions are definitive proof of Congress's intent, they caution against reading too much into congressional inaction in this context.

The *Abbasi* Court's analysis of congressional silence also stressed the "frequent and intense" focus Congress had recently directed on terrorism.[372] In contrast, case law for falsification claims presents little evidence that Congress has given any special attention to this issue.[373] While the Eighth

365. The floodgates argument is valid only insofar as it permits frivolous claims to proceed. Meritorious claims of constitutional violations, if they rise to the volume that would overwhelm the courts, would, of course, be a systemic problem requiring *more* attention, not less.

366. *See supra* notes 127–28, 291–98 and accompanying text.

367. *See supra* Parts II.A.1–2 (discussing the Fifth and Eighth Circuits); *supra* Parts II.C.3–4 (discussing the Third and Tenth Circuits); *supra* Parts III.B (explaining how congressional inaction fits together across the circuits).

368. *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). Many scholars have cast doubt on its relevance, and some went so far as to suggest that legislative inaction "is *a fortiori* a forbidden source of law." Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 517 (1982). *But see* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 75–94 (1994) (defending the use of legislative inaction as an interpretive tool in certain circumstances).

369. *See supra* Part II.A.2 (detailing the Fifth Circuit's position).

370. *See* Pfander & Baltmanis, *supra* note 312, at 131.

371. *See* Vazquez & Vladeck, *supra* note 44, at 579.

372. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017).

373. *See supra* Part II.

Circuit[374] and a district court in the Third Circuit[375] pointed to the Hyde Amendment as proof of Congress's scrutiny of the issue, the Hyde Amendment was simply a last-minute rider to a large appropriations bill for several large executive departments and the judiciary.[376] Moreover, it provided for damages from *the government*. This lies in stark contrast to the theme of individual accountability, and the resulting deterrence, that has always been at the heart of *Bivens*.[377] To suggest that this small provision for attorney's fees in the middle of a massive appropriations bill was intended to preempt *Bivens* for falsification claims also reads too much into congressional inaction. Consequently, the current landscape of congressional activity (and inactivity) is best understood not to constitute a special factor for falsification claims.

c. Unique Law Enforcement Operations

A final special factor that often arose in Part II's examination was the nature of the law enforcement action.[378] In these cases, the fact-specific examination turned up some unique characteristic of the investigation or prosecution that counseled hesitation. For one court, it was the pursuit of a transnational organized crime group;[379] for another, the defendant was not a typical officer but a diversion investigator.[380] Having clarified the *Abbasi* focus on separation of powers,[381] the task again turns to the question of whether these unique circumstances second-guess the policy decisions of the other branches. And, again, the nature of these *Bivens* claims should require an answer in the negative. The common fact patterns for these cases—lying to a grand jury, fabricating evidence, manipulating witnesses—will not concern discretionary decisions. Although a claim of retaliatory prosecution might implicate such a policy decision, falsification claims turn on conduct that clearly lacks the imprimatur of an agency's policy decision.

C. Aligning Alternative Remedies with Abbasi

Beyond the conflicting perspectives on special factors, there is a unique tension within falsification claims due to the fact that some, such as malicious prosecution, are expressly permitted under the FTCA.[382] As a result, the Supreme Court's recognition that the existence of an alternative remedial structure might displace a *Bivens* remedy altogether[383] butts directly against Congress's clear intention to provide redress for certain law enforcement

374. *See supra* Part II.A.1.
375. *See supra* Part II.C.3.
376. *See supra* note 152 and accompanying text.
377. *See supra* Part I.C (discussing the deterrence rationale made explicit in *Carlson*).
378. *See supra* Part III.B (noting the use of specific circumstances of the investigation as a special factor by various courts).
379. *See supra* notes 169–69 and accompanying text.
380. *See supra* note 248 and accompanying text.
381. *See supra* Part IV.B.1.
382. *See supra* note 165 and accompanying text.
383. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017).

abuses.[384] The most obvious conflict is thus whether the FTCA should bar these falsification *Bivens* claims, as the Fifth Circuit held.[385] Despite the fact that there might be overlap, the Supreme Court has been clear that Congress intended *Bivens* and FTCA actions to complement—not replace—one another.[386] But even if that issue is readily resolved, the underlying tension surfaces in another way. The lower courts disagree on whether an alternative remedy must provide meaningful relief to bar a *Bivens* suit or if its mere existence suffices, even if relief is effectively unavailable to the plaintiff.

A modified approach to this conflict, eschewing both rigid formalism and a functional test that always mandates qualitative relief, would align most closely with *Abbasi*. There, the habeas petition and injunction the Court viewed as alternative remedies were hardly meaningful in light of the communication blackout imposed on the plaintiffs during their confinement.[387] But even if ineffective under the circumstances, those remedies at least had the potential to vindicate the wrongful imprisonment and the constitutional interests at stake. The suggestion by some courts that the Hyde Amendment, various wrongful conviction statutes, or the Ryan Haight Act[388] constitute alternative remedies is too formalistic. The potential for reasonable attorney's fees under the Hyde Amendment, sought at the conclusion of a criminal trial, hardly resembles a civil damages action. Moreover, the law enforcement misconduct at issue in a *Bivens* claim frequently occurs well before trial, and many criminal-defendants-turned-*Bivens*-plaintiffs had their charges dropped before formal prosecution, not at the conclusion of a criminal trial.[389] The original *Bivens* case makes clear that a wrongful arrest or unlawful privacy invasion, without developing into prosecution, requires the potential counterweight of a damages remedy.[390] Further, the wrongful conviction statute would not have provided relief in a single post-*Abbasi* case examined in this Note, and the Ryan Haight Act was quite clearly designed to regulate the pharmaceutical industry, not to protect constitutional rights.[391] These proposed remedies will therefore rarely have the potential to remedy the wrong, as at least a habeas petition or injunction could have in *Abbasi*.

Courts should instead look to whether the proposed alternative remedial structure has the potential to address the underlying constitutional violation, at least at an abstract level, if not under the precise circumstances of the case. To be sure, the plaintiff is not entitled to the guarantee that the alternative remedy will provide meaningful and specific relief. But the remedial

384. *See supra* note 165 and accompanying text.

385. *See supra* Part III.C (discussing how, of the cases examined, only the Fifth Circuit in *Cantú* suggested that an FTCA claim would preclude a *Bivens* claim arising from the same facts).

386. *See supra* note 88 and accompanying text (detailing the legislative history of the 1974 amendment to the FTCA).

387. *See supra* note 105 and accompanying text.

388. *See supra* notes 249–49 and accompanying text.

389. *See supra* Parts II.A.1, II.C.1.

390. *See supra* Part I.B.

391. *See supra* note 250 and accompanying text.

structure must at least speak to a *constitutional* violation, on the one hand, and permit the possibility for individual deterrence on the other. If it does, the court should find that it prevents the extension of the *Bivens* suit to the new context. The purpose of the legislation would be an important consideration in this analysis—whether the unconstitutional conduct alleged in the *Bivens* suit was clearly the kind of harm sought to be remedied by the legislation. For example, the Privacy Act of 1974,[392] which provides a private action for compensatory damages for illegal surveillance, would speak to certain Fourth Amendment claims.[393] The possibility of punitive damages might be another factor worth considering in light of the individual deterrence rationale. While this proposal would not create a bright-line rule for falsification claims, it would give clearer guidance on the issue while remaining true to *Abbasi*. It also leaves open the possibility that future criminal justice reform legislation might constitute an alternative remedial structure for these kinds of *Bivens* claims, even if proposed and passed outside the *Bivens* context.

D. Coda: Well Suited to the Bivens *Task*

Though the three preceding sections addressed what *Abbasi* viewed as essential components of a new *Bivens* suit, there was more to the Court's guidance. It introduced these elements with a more overarching question: is the judiciary "well suited" to determine if a *Bivens* claim should exist?[394] In falsification claims, however, a meritorious claim means that there will be another victim besides the plaintiff: the courts. That is, in contrast to most other *Bivens* suits, the alleged misconduct will also be an affront to the integrity of the judiciary. When an officer fabricates evidence or a prosecutor misrepresents facts to a grand jury or a magistrate judge, the result, in part, is damage to the confidence and effectiveness of the court system. Consequently, as long as the separation-of-powers concerns are satisfied—which they will be if the court is not asked to second-guess the policy of the political branches—a court will more often than not be well suited to determine whether extending a *Bivens* claim is warranted. Unlike other *Bivens* cases, the unique consequences of this kind of *Bivens* claim on the judicial process itself provide a special guarantee of competency when the courts make this judgment.

CONCLUSION

Since *Abbasi*, the viability of a *Bivens* suit for monetary damages in claims alleging fabrication of evidence or other intentional misrepresentation by federal law enforcement officials is unsettled and inconsistent. The availability of a damages remedy has long depended on whether the

392. 5 U.S.C. § 552a (2018).

393. *See id.* § 552a(g); Attkisson v. Holder, 925 F.3d 606, 624 (4th Cir. 2019) (rejecting a *Bivens* claim for unlawful electronic surveillance).

394. Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

misconduct was perpetrated by a state or federal officer. But in falsification claims after *Abassi*, that availability also depends on the federal judicial district or circuit in which the misconduct occurred. Moreover, the diversity of results and approaches makes reliance by citizens or officers nearly impossible. This Note seeks to alleviate this problem by providing further clarification of the determining factors for these kinds of *Bivens* claims while remaining within the boundaries of *Abbasi*. This Note proposes an understanding of separation of powers that focuses on the courts' refraining from second-guessing executive or legislative policy judgments and goes hand in hand with the traditional deterrence rationale in *Bivens* suits. It ultimately leads to a solution that places *Abbasi* more in line with *Bivens* than is commonly thought.

ADDENDUM

As this Note was going to press, the Supreme Court decided *Hernández v. Mesa*,[395] a *Bivens* case concerning a U.S. Customs and Border Protection agent who shot and killed a fifteen-year-old Mexican national standing on the other side of the border.[396] Justice Samuel Alito, writing for a 5-4 majority, affirmed the Fifth Circuit's decision to dismiss the claim, finding that the foreign relations and national security issues at stake constituted special factors under the *Abbasi* framework.[397] At first glance, the Court's rejection of a suit arising from such unique circumstances—a cross-border, international incident—seems to add little to the modern *Bivens* doctrine. Yet *Hernández* adds three pertinent points, each of which supports this Note's findings and conclusions.

First, as a preliminary matter, *Hernández* confirms this Note's analytical framework for falsification claims. Perhaps it is unsurprising that the Court followed the precedent it had established just three years ago; still, *Abbasi* and its "two-step inquiry" remains the primary source of instruction for lower courts in *Bivens* cases.[398] Accordingly, this Note's examination of the lower courts' treatment of falsification claims appropriately follows *Abbasi* as its lodestar, as confirmed by *Hernández*.

Second, and more importantly, *Hernández* underscores *Abbasi*'s separation-of-powers focus while highlighting the vast difference between cases like *Hernández* and *Abbasi*, on the one hand, and the falsification claims examined in this Note, on the other. The Court held that the special factors in *Hernández*—the foreign policy and national security implications of the cross-border shooting—could ultimately "be condensed to one concern—respect for the separation of powers."[399] In addition to reemphasizing separation of powers, however, the *Hernández* special factors also make clear the kind of executive branch action that the Court considers

395. No. 17-1678 (U.S. Feb. 25, 2020).
396. *See supra* notes 16–24 and accompanying text.
397. *Hernández*, slip op. at 1, 9–12.
398. *Id.* at 7.
399. *Id.* at 19.

to be beyond the judiciary's purview via *Bivens*. Foreign policy and border security issues are "delicate, complex" matters of executive policy in areas where the executive branch has historically had vast discretion.[400] Falsification claims directed at rank-and-file federal law enforcement officers, by contrast, are mostly of a different order. Consequently, *Hernández* further supports this Note's principal conclusion that, where falsification claims do not ask the judiciary to second-guess the political branches' policy decisions, they should generally be permitted to proceed.

Finally, the *Hernández* Court rejected Justice Clarence Thomas's plea to "abandon the doctrine altogether."[401] It thus retained the possibility of new *Bivens* suits, at least insofar as they conform to the (admittedly narrow) *Abbasi* framework. This was not necessarily a given; five members of the current Court took no part in the *Abbasi* decision in 2017[402] and the Court's ideological center has almost certainly shifted since Justice Anthony Kennedy's retirement and Justice Brett Kavanaugh's appointment. Yet Justice Thomas's concurrence, in which he argued that it was "time to correct this Court's error" by eliminating the *Bivens* suit, garnered only Justice Neil Gorsuch's support.[403] Justice Thomas was unable to build on the two-justice opposition he had assembled nearly thirteen years ago in *Wilkie*;[404] seven members of the Court remain committed to *Bivens*. Understood in this context, the *Hernández* decision leaves no doubt as to the strength of the stare decisis interest in *Bivens* suits. As *Abbasi* made clear, that interest is strongest in the "recurrent sphere of law enforcement," like falsification claims.[405] In sum, *Hernández* supports this Note's view that the unacknowledged split with respect to falsification claims can be resolved by asking whether the suit will require judicial second-guessing of the political branches' policy discretion. Given the inherent nature of the falsification claims surveyed here, this Note concludes they will not and in most cases should be permitted to proceed.

400. *Id.* (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring)).
401. *Id.* at 5 (Thomas, J., concurring).
402. *See supra* note 114.
403. *Hernández*, slip op. at 5 (Thomas, J., concurring).
404. *See supra* note 345.
405. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).