# Immigrant Torts

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*In 2022, the Supreme Court effectively gutted a long-standing constitutional remedy for torts committed by federal officers. In the process, it seemingly immunized even the most serious abuses committed by Border Patrol agents. Such dramatic legal transformation has occurred despite — and perhaps because of — the soaring numbers of migrants at the southern border and the sobering evidence of alleged abuses there. According to one study, since 2010, over 250 persons, including unarmed children, have died due to fatal encounters with Border Patrol agents.*

*While the Court has historically expressed skepticism toward this remedy since its inception in the landmark case* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, its recent expression of outright hostility toward it is relatively new. To justify such casual discarding of an established constitutional precedent, it cast* Bivens *as an unlawful judicial usurpation of legislative power.*

*Though scholars have probed the reasons for the remedy's demise, they have not focused on the important role that immigrants and immigration law have played in it. The Article's novel contribution is filling that gap by contextualizing the transformation of constitutional torts within immigration law and its animating principles. It frames the Court's separation-of-powers rationales as incomplete by showing that the remedy's erosion occurred primarily in cases involving immigrants, or immigration-related matters, and through the Court's reliance on the following three false narratives about*

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*them: (1) immigrant as terrorist, (2) immigrant as danger, and (3) immigrant as foreign. It then exposes constitutional torts' hidden connections to immigration law by locating the same three false narratives in a foundational immigration law theory that has been used to exclude immigrants from the ambit of constitutional protections for over a century. Finally, it examines the import and implications of the remedy's demise by exposing harms to both the law and the person.*

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## INTRODUCTION

A fifteen-year-old boy named Sergio Adrián Hernández-Güereca (Hernández) was walking with his friends along the U.S.-Mexico border when he was shot dead by a U.S. Border Patrol agent.[1] Hernández and his friends were playing a game that involved running across a small culvert separating El Paso, Texas from Ciudad Juarez, Mexico, touching the fence on the U.S. side, then running back to the Mexico side.[2] A U.S. Border Patrol agent named Jesus Mesa, Jr. arrived by bicycle and detained one of the boys who was on the U.S. side and running toward the Mexican side.[3] In response, Hernández ran in the same direction.[4] While Hernández stood still by the culvert, Mesa fired two shots at him from the U.S. side.[5] One bullet struck Hernández in the face, killing him instantly.[6] Hernández's parents alleged that the boy had been unarmed and did not pose a threat to Mesa.[7]

[1] Hernández v. Mesa (*Hernández I*), 582 U.S. 548, 550 (2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

The U.S. Department of Justice ("DOJ") investigated the killing and found that Mesa "did not act inconsistently with [U.S. Customs and Border Protection ("CBP")] policy or training regarding use of force."[8] The DOJ also declined to prosecute Mesa for federal civil rights violations, finding that he did not "act[] willfully and with the deliberate and specific intent to do something the law forbids."[9]

Hernández's parents sued Mesa for violations of their son's rights under the Fourth and Fifth Amendments of the U.S. Constitution.[10] They stated their claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, a U.S. Supreme Court decision that recognized an implied cause-of-action for monetary damages against federal officers for their torts that violate the Constitution.[11] That case involved the excessive use of force by federal officers during a warrantless search of a home. Since then, courts have accepted and applied *Bivens* to deter and compensate law enforcement abuses. Like the allegations under the Fourth Amendment in *Bivens*, Hernández also framed his harm as an unreasonable seizure that violated the Fourth Amendment. The Court disagreed.[12]

That the Court refused to recognize the remedy in *Hernández* is not altogether surprising, as it has significantly curtailed *Bivens*'s scope in recent years. What is surprising — and new — is the Court's more overt expression of hostility toward it, with several justices expressly calling for its overruling and arguably doing so.

*Bivens*'s erosion, and the reasons for it, have been the subject of much scholarly inquiry and debate.[13] What has been missing in that scholarly

[8] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Federal Officials Close Investigation into the Death of Sergio Hernández-Güereca (Apr. 27, 2012), http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-Hernández-guereca [https://perma.cc/V88C-SJ6R].

[9] *Id.*

[10] Hernández v. Mesa (*Hernández II*), 140 S. Ct. 735, 740 (2020).

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

[12] *Hernández II*, 140 S. Ct. at 743.

[13] *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 937-39 (2017) (capitalization marks omitted) (analyzing the appropriate role of torts damages for constitutional violations and the lack of a principled understanding of the role of judicial remedies in the Court's erosion of *Bivens*); Julie Goldscheid, *Sexual*

discourse is that the doctrine's recent dismantling has occurred primarily in cases involving immigrants and immigration-related matters. As I argue, the dominant factual predicate surrounding constitutional torts claims changed with *Ashcroft v. Iqbal*, which involved the detention of noncitizens following 9/11.[14] Of the constitutional torts cases the Court has decided since that fateful day, nearly half have involved immigrants or immigration-related matters,[15] including its most recent trio of cases.[16] Notably, no case decided by the Court before *Iqbal* appears to have involved immigrants or was immigration-related.

It is precisely within this factual context that the Court has systematically dismantled the remedy, discarding decades of precedent in the process. Such shift has occurred not because the facts are necessarily novel but because the Court chose to frame them as such and resurrected categorial assumptions and false narratives about immigrants — the same ones that have driven the developments in

*Assault by Federal Actors, #MeToo, and Civil Rights*, 94 WASH. L. REV. 1639, 1640-44 (2019) (describing the lack of remedy for survivors of sexual assault perpetrated by federal officers after Court's limiting of *Bivens*); Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125-39 (2014) (explaining the Court's reluctance to extend *Bivens* in the national security and foreign affairs contexts while acknowledging the costs of such approach); Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1972-75 (2021) (arguing that *Bivens* remedies could be continued, despite Court's concerns, to strengthen *stare decisis*); Carlos M. Vásquez, Bivens *and the Ancien Régime*, 96 NOTRE DAME L. REV. 1923, 1923-25 (2021) (explaining why Court's modern reluctance to imply remedies under statutes does not justify the same reluctance for constitutional remedies); Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2020 CATO SUP. CT. REV. 263, 263-64 (2020) (critiquing Court's proposition that *Bivens* usurps legislative power as resting on an incomplete interpretation of *Erie*). *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (2017) (documenting the Courts' failure to redress human rights abuses during the war on terror and arguing for greater government accountability, in part, through *Bivens*).

[14] Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

[15] *See* Egbert v. Boule, 142 S. Ct. 1793, 1800-01 (2022) (immigration-related matter involving U.S. citizen); *Hernández II*, 140 S. Ct. at 740 (immigration-related matter involving Mexican national); *Hernández I*, 582 U.S. 548, 550 (2017) (same); Ziglar v. Abbasi, 582 U.S. 120, 127 (2017) (immigrants); Ashcroft v. al-Kidd, 563 U.S. 731, 733 (2011) (immigration-related matter involving U.S. citizen); Hui v. Castaneda, 559 U.S. 799, 802-03 (2010) (immigrant); *Iqbal*, 556 U.S. at 666 (immigrant).

[16] *Egbert*, 142 S. Ct. at 1800-01; *Hernández II*, 140 S. Ct. at 740; *Ziglar*, 582 U.S. at 127.

immigration law to exclude immigrants from the ambit of constitutional protections for over a century.

This Article's novel contribution is contextualizing the recent transformation of constitutional torts in immigration law and its animating principles. It uncovers hidden connections to foundational principles in immigration law to explain *Bivens*'s erosion. It frames the Court's separation-of-powers rationales for the change in law as incomplete by showing that the remedy's erosion occurred primarily in cases involving immigrants or immigration-related matters and through the Court's reliance on, and promotion of, false immigrant narratives.

The Article proceeds in three parts. In Part I, I articulate a new framework for understanding the Court's constitutional torts jurisprudence that highlights the role of immigrant status. Under it, I locate the advent of *Bivens*'s undoing with *Iqbal*, the Court's first apparent *Bivens* case involving immigrant plaintiffs, and trace the Court's new hostility toward the remedy in a line of cases, all of which involved immigrants or immigration-related matters. I expose how under that lens, the Court discarded decades of precedent, in part, by relying on the following three false immigrant narratives: (1) immigrant as terrorist, (2) immigrant as danger, and (3) immigrant as foreign. Concerning the first narrative, I analyze the trio of *Iqbal*, *al-Kidd*, and *Ziglar* as depending on the over-determining view that immigrants are terrorists and national security risks. Concerning the second narrative, I illustrate how the Court's national security framing and its use of the "illegal alien" rhetoric promoted the false association of immigrants with notions of dangerousness. Concerning the third narrative, I demonstrate how the Court in *Hernández* and *Egbert* exaggerated the foreign dimensions in the case to drive its outcomes. Using these false narratives, the Court changed the law fundamentally by inventing a new legal standard that would exclude most claims — even suggesting that constitutional torts committed by Border Patrol agents should categorically be immunized.

In Part II, I amplify the novel connection I draw between constitutional torts and immigration law by locating the same three false immigrant narratives in a foundational immigration law theory that has been used to exclude immigrants from the ambit of constitutional protections for over a century: the plenary power

doctrine. Under it, the Court has either deferred to Congress or refused to review altogether federal statutes concerning noncitizens for compliance with the Constitution's substantive and procedural requirements[17] — even when Congress had relied on classifications that may be unconstitutional if applied to citizens, such as race, alienage,[18] gender,[19] and legitimacy.[20] I show how in immigration law, the Court has depended on the same three false immigrant narratives of immigrant as terrorist, immigrant as danger, and immigrant as foreign to foreclose remedies and require similar extraordinary deference to Congress by concluding that Congress's power over immigrants and immigration-related matters is plenary. Using prominent examples from history, I illustrate how such immigrant narratives have driven and defined significant legal and policy changes in immigration law.

Concerning the first immigrant narrative, I analyze the developments in law and policy from, and reflected in, (1) the "Red Scare" of the 1950s, (2) the "War on Terror" following 9/11, and (3) the Trump "travel ban" that viewed certain immigrants primarily through the national security lens of terrorism. Concerning the second immigrant narrative, I frame two landmark pieces legislation, the Illigal Immigration Reform and Immigration Responsibility Act ("IIRIRA") and the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and the "alien" metaphors that supported their enactment, as dependent on the exaggerated connection between immigrants and crime to perpetuate the false myth of immigrant dangerousness. Concerning the third immigrant narrative, I uncover the construction of certain immigrants as "the other" as moored in the false assumption that immigrants bear the taint of perpetual foreignness. I show how these three false narratives have supported the plenary power doctrine in immigration law and justified the Court's similar foreclosure of remedies there.

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[17] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984); *see* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1-2 (1984).

[18] Fong Yue Ting v. United States, 149 U.S. 698, 698-704 (1893) (race and alienage); Nishimura Ekiu v. United States, 142 U.S. 651, 658-661 (1892) (same); Chae Chan Ping v. United States, 130 U.S. 581, 589-91 (1889) (same).

[19] Fiallo v. Bell, 430 U.S. 787, 791-92 (1977) (gender and legitimacy).

[20] *Id.*

In Part III, I analyze the consequences of the remedy's demise by exposing harms to both the law and the person. For the law, I locate the remedy's erosion in the broader context of immigration law that has viewed immigrants as exceptional and "strangers"[21] to the Constitution. I also analogize the Court's exceptional treatment of immigrants and immigration-related matters in constitutional torts to other areas of the law where the Court has done the same. I argue that the Court's casual discarding of *Bivens* and precedent undermines *stare decisis* and other foundational principles. In the process, I advance the scholarly discourse on the exceptionalism of immigration law and show the harmful effects of its errant departure from established substantive and procedural legal norms.

For the person, I uncover what the lack of a constitutional torts remedy means for both noncitizens and citizens. I argue that the loss of the remedy falls disproportionately on certain immigrants and show how their lives stand on an even more precarious footing, particularly after the Court's seeming categorical foreclosure of claims against Border Patrol agents. I support that argument with the following four factual predicates: (1) Since 2001, immigrants or persons involved in immigration-related matters have filed a significant number of *Bivens* cases; (2) the number of encounters between such persons and law enforcement officers has soared recently and shows no evidence of stopping; (3) Hernández's death is far from an isolated incident in light of other similar deaths and documented complaints of serious physical and sexual abuse by CBP agents;[22] and (4) since 2010, over 250 immigrants or persons involved in immigration-related matters, including unarmed children, have died in fatal encounters with CBP agents.[23]

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[21] *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (developing the idea of immigrants as "strangers" to the Constitution).

[22] DANIEL E. MARTÍNEZ, GUILLERMO CANTOR & WALTER A. EWING, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 1-6, 8 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf [https://perma.cc/52J2-GH2L].

[23] *Fatal Encounters with CBP Since 2010*, S. BORDER CMTYS. COAL., https://www.southernborder.org/deaths_by_border_patrol#2021 (last updated July 7, 2023) [https://perma.cc/TJ6B-MGQ4] [hereinafter *CBP Fatal Encounters*].

Finally, I examine the spill-over effect of *Bivens*'s demise on U.S. citizens. I show that in the immigration enforcement context, both at and away from the border, U.S. citizens remain vulnerable because of the broad arrest and detention powers afforded law enforcement officers. Similarly, I demonstrate how such law enforcement abuses may arise in non-immigration-related enforcement contexts, for which the *Bivens* remedy was once available and for which the rationales of national security, dangerousness, and foreignness that applied to immigrants and upon which the Court relied to dismantle it, are inapposite. But because the Court in *Ziglar*, *Hernández*, and *Egbert* did not limit their holdings to immigrants, the border, or the immigration-related context, the erosion of the torts remedy leaves U.S. citizens vulnerable to even the most egregious constitutional abuses. I show how in the current era of increased migration across borders, and the increased enforcement that follows, the lack of a constitutional remedy exacts too high a price for both the law and the person.

## I. DEMISE OF THE *BIVENS* REMEDY AND A NEW TYPOLOGY OF CONSTITUTIONAL TORTS

In Part I, I articulate a new framework for understanding the Court's recent constitutional torts jurisprudence that highlights the role of immigrant status. Under that framework, I locate the advent of constitutional torts' demise with *Iqbal* and trace the Court's new hostility toward the remedy in a line of cases, all of which involved immigrants or immigration-related contexts. In Section A, I lay the foundations of constitutional torts law with *Bivens*, which recognized an implied cause-of-action for monetary damages against federal officers[24] — and two subsequent cases as representing the height of the constitutional torts remedy. Then I locate the advent of the remedy's recent demise in a line of cases involving immigrants and immigration-related matters and the Court's reliance on the following three false immigrant narratives: (1) immigrant as terrorist, (2) immigrant as danger, and (3) immigrant as foreign. In Section B, I analyze the trio of *Iqbal*, *al-Kidd*, and *Ziglar* as relying on the over-determining view of

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

certain immigrants as terrorists and national security risks. In Section C, I show that the Court's national security frame and its "illegal alien" rhetoric falsely equate those immigrants with dangerousness. Finally in Section D, I demonstrate how the Court exaggerated the foreign dimensions of *Hernández* and *Egbert* to support its outcomes. Through reliance on each false immigrant narrative, the Court transformed the law to exclude most claims — even suggesting that constitutional torts committed by Border Patrol agents should categorically be immunized.

### *A. A Prelude: Constitutional Torts' Foundations*

In 1971, the Supreme Court concluded that when a federal officer commits certain torts, the U.S. Constitution provides an implied cause-of-action for monetary damages.[25] There, Mr. Bivens alleged that agents of the Federal Bureau of Narcotics arrested him on drug-related charges and searched his home without a warrant.[26] He further alleged that he was subject to a "visual search of his private parts."[27] He sought damages for "great humiliation, embarrassment, and mental suffering."[28] The Court held that such allegations stated a claim under the Fourth Amendment of the Constitution and permitted recovery for monetary damages against the officers in their individual capacity.[29] It acknowledged that while neither the Constitution nor a statute explicitly provided a cause-of-action for such remedy, "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done."[30] In recognizing the judicial remedy, the Court emphasized the lack of "special factors" that would counsel hesitation by the Court when no affirmative action was taken by

[25] *Id.*

[26] *Id.*

[27] James E. Pfander, *The Story of* Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics, *in* FEDERAL COURTS STORIES 275, 280 (Vicki C. Jackson & Judith Resnick eds., 2010).

[28] *Bivens*, 403 U.S. at 389-90.

[29] *Id.* at 390-91. A suit under *Bivens* is an individual capacity suit against the officer in their personal capacity. *Id.* It is distinguishable from a suit under the Federal Tort Claims Act, which is a suit against the United States. *See* 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-80.

[30] *Bivens*, 403 U.S. at 396 (quotation and citation omitted).

Congress.[31] A core assumption that animated the Court was the importance of enforcing constitutional violations.

*Bivens* was novel since no other court before it found the Constitution to imply such a remedy. Many saw this novelty as an impermissible judicial intrusion into Congress's domain and the product of the "activist" court.[32] That view continues to hold sway today among some scholars and judges, including some members of the current Court. According to it, *Bivens* should be understood as an anomalous byproduct of an "*ancien regime*," during which the Court routinely found remedies in the Constitution that the Founders never intended and left for Congress to fashion.[33]

In other respects, *Bivens* was not so novel when considered in historical context — a point that even its most vocal critics may acknowledge. The Court decided *Bivens* at a time when it viewed clear violations of rights to require a remedy that it could fashion — particularly for constitutional violations.[34] For example, in *Ex Parte Young* and progeny, the Court had fashioned a similar cause-of-action to enjoin constitutional violations.[35] By 1971, suits to enjoin both federal and state officials for alleged constitutional violations had become routine.[36] Concerning monetary damage suits, as early as 1871, Congress had created a cause-of-action for money damages for constitutional violations in the Civil Rights Act of 1871, later codified under 42 U.S.C. § 1983.[37] Section 1983 permitted individuals to sue state officials for constitutional torts — a remedy that proliferated during the civil rights era of the 1950s and 1960s when the Court expanded it to encompass the conduct of not only state government officials but also local

[31] *Id.*

[32] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (casting doubt on *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . .").

[33] *Hernández II*, 140 S. Ct. 735, 741 (2020); Ziglar v. Abbasi, 582 U.S. 120, 131-32 (2017).

[34] *Bivens*, 403 U.S. at 396 ("[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (internal quotation marks and citations omitted)).

[35] Fallon, *supra* note 13, at 948.

[36] *Id.*

[37] 42 U.S.C. § 1983.

government officials[38] and municipal entities.[39] Thus, it was anomalous that federal officers would be immune from similar suits when suits at law were permitted and common against both state and local officials and municipalities. Moreover, federal officials, like state officials, were not immune from suits at equity or suits for injunctive relief. Understood in that context, *Bivens* was not novel. Rather, it was merely the application of damage suits already permitted against state officials and suits for injunctions already permitted against both state and federal officials.[40]

After *Bivens*, the Court allowed the constitutional torts remedy in *Davis v. Passman*[41] and *Carlson v. Green*[42] — in new factual contexts and beyond the Fourth Amendment. In *Davis*, an administrative assistant sued her employer congressperson for termination on account of sex.[43] The Court held that she stated a claim for sex discrimination under the Fifth Amendment. In *Carlson*, the plaintiff's son was a federal prisoner who died while incarcerated.[44] The plaintiff alleged that the prison knew that his son suffered from chronic asthma, kept him in the facility against medical professionals' advice, and refused to provide medication for eight hours following an asthma attack.[45] The Court permitted the cause-of-action under the Eighth Amendment for deliberate indifference.[46]

### *B. Immigrant as Terrorist*

A dramatic shift in the Court's constitutional torts jurisprudence occurred with a trio of cases decided after 9/11. In this section, I argue that this trio represents the advent of the remedy's undoing. To be sure,

[38] Monroe v. Pape, 365 U.S. 167, 191-92 (1961).

[39] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701-02 (1978).

[40] Fallon, *supra* note 13, at 948.

[41] 442 U.S. 228 (1979).

[42] 446 U.S. 14 (1980).

[43] *Davis*, 442 U.S. at 230-33.

[44] *Carlson*, 446 U.S. at 16-18.

[45] *Id.* at 16 n.1.

[46] *Id.* at 18-19.

after *Carlson*, the Court found ways to limit *Bivens* in numerous ways.[47] With the exception of one case decided twenty years later, the Court had declined to find a *Bivens* remedy in every case since *Carlson*.[48] However, in those cases, the Court did not exhibit the outright hostility following *Iqbal*. Rather, it limited the remedy in application and kept the law's basic framework. For example, before *Iqbal*, the Court had rejected claims by concluding that the plaintiff failed to meet the substantive legal standard under *Bivens*[49] or due to the presence of alternative remedies that precluded a *Bivens* one.[50] The Court had also rejected claims by finding special factors counseling hesitation without an

[47] The Court's concerns about the proliferation of tort claims premised on violations of the Constitution and its reluctance to expand them may have predated the cases following *Carlson*. For example, as early as 1976, the Court in *Paul v. Davis* concluded, in the context of a section 1983 claim, that state officials' defamation did not violate the plaintiff's Fifth Amendment rights under the Due Process Clause. 424 U.S. 693, 700-02 (1976). As Richard Fallon notes, the Court "[i]n explaining its decision . . . expressed anxiety that the Due Process Clause should not become a 'font of tort law.'" Fallon, *supra* note 13, at 951.

[48] See Groh v. Ramirez, 540 U.S. 551, 557-63 (2004) (recognizing *Bivens* claim).

[49] *See* Will v. Hallock, 546 U.S. 345, 355 (2006) (dismissing an allegation of damage to computer disc drives seized by federal officials under the Fifth Amendment for jurisdiction); Hartman v. Moore, 547 U.S. 250, 261-63 (2006) (ruling that an allegation of malicious prosecution under the First Amendment did not meet evidentiary standards); Christopher v. Harbury, 536 U.S. 403, 420-22 (2002) (dismissing an allegation that government officials intentionally deceived plaintiff about her husband's execution by Guatemalan army officers who were paid by the CIA construed as an insufficient access to courts claim); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70-71 (2001) (dismissing an allegation of injury during incarceration against a private corporation, in part, because Court construed claim as not an individual capacity claim); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 484-85 (1994) (dismissing an allegation of termination against employer under Fifth Amendment Due Process Clause because it was not an individual capacity suit); Farmer v. Brennan, 511 U.S. 825, 848-51 (1994) (ruling that an allegation of sexual violence in prison may not have met deliberate indifference standard under the Eighth Amendment to state a claim).

[50] *See* Wilkie v. Robbins, 551 U.S. 537, 561-62 (2007) (dismissing allegations of intimidation and harassment by federal officials concerning land dispute under Fifth Amendment, in part, because of other available remedies); Schweiker v. Chilicky, 487 U.S. 412, 424 (1988) (dismissing allegation of denial and delay of social security disability benefits under the Fifth Amendment, in part, because availability of alternative remedies under statute); Bush v. Lucas, 462 U.S. 367, 381-86 (1983) (dismissing allegation of employment demotion for criticizing employer under First Amendment for availability of other remedies).

affirmative action by Congress,[51] or based on defendants' immunity defenses.[52]

With *Iqbal*, *al-Kidd*, and *Ziglar*, the Court did not just limit *Bivens*. It started the process of discarding it. It did so by carving out the factual context of terrorism involving immigrants or immigration-related matters as new and requiring particular deference to Congress. Yet, as I show, the terrorism context was not new since the Court had confronted *Bivens* claims in the terrorism context before. What was new, then, was not the presence of terrorism, but the presence of immigrant terrorism and the import placed on it. More specifically, the distinguishing factor appears to be the presence of the immigrant terrorist, not the citizen terrorist.

[51] *See* United States v. Stanley, 483 U.S. 669, 679 (1987) (dismissing allegation of unconsented to medical experimentation against Army superiors due to special factors counseling hesitation in miliary setting); Chappell v. Wallace, 462 U.S. 296, 298-99 (1983) (dismissing allegation of adverse employment consequences on account of race in the Navy due to special factors counseling hesitation in military setting).

[52] *See* Saucier v. Katz, 533 U.S. 194, 208-09 (2001) (ruling that a plaintiff who was protesting vice president's speech with a banner in front row allegedly grabbed and removed by military police officer did not violate clearly established law under Fourth Amendment, entitling defendants to qualified immunity); Wilson v. Layne, 526 U.S. 603, 617-19 (1999) (dismissing allegation of violation of Fourth Amendment for qualified immunity); Hanlon v. Berger, 526 U.S. 808, 810 (1999) (ruling that an allegation of Fourth Amendment violation for search of ranch under warrant executed with the news media did not violate clearly established law under qualified immunity analysis); Hunter v. Bryant, 502 U.S. 224, 228-29 (1991) (dismissing allegation of unreasonable search and seizure under Fourth Amendment for qualified immunity); Siegert v. Gilley, 500 U.S. 226, 231-33 (1991) (dismissing allegation of defamation that led to termination of employment under the First Amendment for qualified immunity); Anderson v. Creighton, 483 U.S. 635, 641-46 (1987) (dismissing allegation of mistaken warrantless search of property under Fourth Amendment because qualified immunity protects officials for reasonable mistakes); Cleavinger v. Saxner, 474 U.S. 193, 206-08 (1985) (dismissing allegation of adverse treatment of inmates for protesting conditions that led to death of other inmates for qualified immunity); Mitchell v. Forsyth, 472 U.S. 511, 535-36 (1985) (dismissing allegation of a warrantless wiretap under the Fourth Amendment; although warrantless wiretaps currently violated the Constitution, at the time conduct done, constitutional violation was unclear); Harlow v. Fitzgerald, 457 U.S. 800, 819-20 (1982) (remanding allegation of adverse employment consequences for exercise of First Amendment rights for questions of immunity).

1. "New" Factual Construct: The "War on Terror"

The Court decided the trio of *Iqbal*, *al-Kidd*, and *Ziglar* under the specter of the "War on Terror." Javaid Iqbal, a citizen of Pakistan, was part of a group of immigrants detained on immigration charges and designated as "of high interest" to an investigation into the 9/11 terrorist attacks.[53] He was held in maximum security, locked down for twenty-three hours a day, and prevented from communicating with most other prisoners and those in the outside world.[54] He sued members of the DOJ, including Attorney General John Ashcroft, Bureau of Prisons, and the FBI for violations of his statutory and constitutional rights under the First and Fifth Amendments. He alleged that during his confinement, jailers "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification; conducted serial body-cavity and strip searches when he was not a security risk to others; and declined his requests to pray with other Muslim men because "no prayers for terrorists" were allowed.[55] Further, he alleged that the defendants, including Attorney General Ashcroft and FBI Director Robert Mueller, "each knew of, condoned, and willfully and maliciously agreed to subject" him to such harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin."[56] The Court dismissed the claim on pleading grounds, finding the allegations conclusory and implausible.[57]

In *al-Kidd*, Abdullah al-Kidd sued Attorney General Ashcroft for his purported role in authorizing federal prosecutors to use the federal material witness statute to detain individuals with suspected terrorism ties, even when prosecutors had no intention of calling them as witnesses in a federal criminal proceeding, as the statute required.[58] Though a U.S. citizen, FBI agents arrested al-Kidd at the airport before his flight to Saudi Arabia, where he had planned to study Arabic and Islamic law. They detained him for sixteen days and placed him on

[53] Ashcroft v. Iqbal, 556 U.S. 662, 667-68 (2009).

[54] *Id.*

[55] *Id.* at 688-89 (Souter, J., dissenting).

[56] *Id.* at 662, 669.

[57] *Id.* at 662, 682.

[58] Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011).

supervised release for fourteen months, in the trial of another person suspected of terrorism, even though he was never called as a witness.[59] The Court dismissed al-Kidd's claims and concluded that Attorney General Ashcroft was entitled to qualified immunity because an "objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant" is not unconstitutional.[60]

Like *Iqbal*, the Court in *Ziglar* confronted claims of unconstitutional detention and conditions of confinement for plaintiffs who were detained on suspicion of terrorism after 9/11. There, six men of Arab or South Asian descent, five of whom were Muslim, were detained for a period ranging from three to eight months.[61] The plaintiffs brought a *Bivens* suit against high level DOJ officials and two wardens of the facility under the Fifth Amendment for subjecting them to harsh conditions of confinement and abuse — including being slammed against the wall, shackled, and exposed to nonstop lighting (presumably to prevent sleep) — on account of race, religion, or national origin and under the Fourth Amendment for subjecting them to strip searches with a punitive purpose.[62] The Court invented and applied a new two-step test to conclude that the facts, however similar to the conditions of confinement claims in *Carlson*, constituted a new context because the plaintiffs brought their case under the Fifth Amendment, unlike the Eighth Amendment claim in *Carlson*.[63] Moving to step two, the Court found special factors counseling hesitation. For the claims against DOJ executive officials, the Court concluded that judicial inquiry into the detention policy would intrude upon the functions of the executive branch.[64] For claims against all other defendants, the Court pointed to the presence of alternative remedies, congressional silence and intent not to provide a remedy, and national security.[65]

This trio of post-9/11 cases differs from prior *Bivens* cases. The plaintiffs were all immigrants or involved in immigration-related

[59] *Id.*

[60] *Id.* at 741-44.

[61] Ziglar v. Abbasi, 582 U.S. 120, 120, 128 (2017).

[62] *Id.* at 128-129.

[63] *Id.* at 147-48.

[64] *Id.* at 140-41.

[65] *Id.*

matters.[66] In the thirty-eight years since the Court decided *Bivens*, constitutional torts doctrine developed under a factual context that involved U.S. citizens or where citizenship or immigrant status did not appear to have played a role in the Court's outcome. But starting with *Iqbal*, a majority of cases decided by the Court have involved immigrants or immigration-related contexts. From 2009 to 2017, when *Iqbal* and *Ziglar* respectively were decided, the Court considered seven cases involving *Bivens* claims.[67] Of those, four involved immigrants or immigration-related contexts.[68] As I discuss in Parts I.C. and I.D., the Court's most recent three *Bivens* cases all feature immigrants or are immigration related.

2. New Legal Construct

Against this factual context, the Court made dramatic jurisprudential moves that further eroded *Bivens*. First, in *Iqbal*, the Court invented a new — and heightened — pleading standard that significantly curtailed the remedy by requiring more than what Rule 8 of the Federal Rules of Civil Procedure traditionally required. In his majority opinion in *Iqbal*, Justice Kennedy clarified that the plausibility requirement articulated by Justice Souter in *Twombly* required the pleading of sufficient factual allegations that would nudge the claim across the line from conceivable to plausible — notably over the dissent by Justice Souter in *Iqbal*.[69] That

[66] *Iqbal* involved citizens of Pakistan, Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009), *al-Kidd* involved a U.S. citizen with ties to Saudi Arabia, Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011), and *Ziglar* involved claims brought by "aliens," *Ziglar*, 582 U.S. at 125.

[67] *Iqbal*, 556 U.S. at 662; Hui v. Castaneda, 559 U.S. 799, 801 (2010); *al-Kidd*, 563 U.S. at 731; Minneci v. Pollard, 565 U.S. 118, 120 (2012); Reichle v. Howards, 566 U.S. 658, 662 (2012); Wood v. Moss, 572 U.S. 744, 754 (2014); *Ziglar*, 582 U.S. at 120.

[68] Like the plaintiffs in *Iqbal*, *al-Kidd*, and *Ziglar*, the plaintiff in *Hui* was an immigrant in ICE custody who alleged that U.S. Public Health Services personnel denied his requests for medical treatment while in custody which eventually led to his death a year after his release. *Hui*, 559 U.S. at 802-03.

[69] *Iqbal*, 556 U.S. at 677-78; *see id.* at 687-88 (Souter, J., dissenting); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557, 570 (2007); *see also* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 829-30 (2010); A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192 (2010).

new standard, the Court clarified, applied to all claims, not just *Bivens* claims.

Second, in its special factors analysis, the Court in *Ziglar* articulated as a reason for deference to Congress and the Executive that was focused on national security.[70] While prior cases have refused the *Bivens* remedy to maintain separation-of-powers and to guard the Executive Branch's autonomy to protect its methods and communications,[71] the Court in *Ziglar* underscored that judicial inquiry there would necessitate "inquiry into sensitive issues of national security"[72] and counselled deference to the political branches because the matters there implicated national security.[73] Significantly, in its argument that the plaintiffs' claims raised a new factual context compared to that in *Bivens* and progeny, the Court characterized the plaintiffs' claims as "challeng[ing] major elements of the Government's whole response to the 9/11 attacks."[74] It then stated that such a challenge "assumes dimensions far greater than" *Bivens* and its progeny and "any putative *Bivens* case yet to come before the Court."[75] In other words, the claims in *Ziglar* are unique because they challenge policy concerning and implicating national security.

Indeed, the Court's focus on national security after 9/11 may not be altogether surprising. There is an obvious connection between terrorism — and the means and methods to deter and punish those who engage in it — and national security. However, what is novel about the Court's approach is its willingness to see the connection between national security and terrorism only in terrorism cases involving immigrants, or non-citizens specifically, while ignoring domestic terrorism involving U.S. citizens or persons whose immigrant or citizenship status was not in question.

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[70] *Ziglar*, 582 U.S. at 142-43.

[71] *See* Cheney v. U.S. Dist. Ct., 542 U.S. 367, 382 (2004); Christopher v. Harbury, 536 U.S. 403, 420 n.19 (2002); De La Paz v. Coy, 786 F.3d 367, 373, 378 (5th Cir. 2015); Arar v. Ashcroft, 585 F.3d 559, 575-76 (2d Cir. 2009).

[72] *Ziglar*, 582 U.S. at 142.

[73] *Id.*

[74] *Id.*

[75] *Id.*

Before *Iqbal*, national security could have formed the basis for denying *Bivens* relief in several cases involving domestic terrorism. Yet terrorism, or its connection to national security, was not the focus of the Court's special factors analysis, nor did the Court provide a national security reason for denying relief. First, in *Mitchell v. Forsyth*, what led to the Attorney General's authorization of a warrantless wiretap of members of a domestic antiwar group was the FBI's awareness of a group's plot to blow up tunnels leading into the nation's capital and to potentially kidnap the National Security Advisor.[76] The Court dismissed the plaintiff's *Bivens* claim on qualified immunity because even though warrantless wiretaps violated the Constitution, it was unclear that such conduct violated the Constitution at the time of conduct.[77] In its reasoning, the Court did not focus on national security or domestic terrorism as special factors that counseled hesitation in fashioning a judicial remedy despite the serious investigation and clear national security basis for the warrantless wiretap of the plaintiff. Instead, it decided the case on narrower grounds of qualified immunity.[78]

*Hunter v. Bryant* also presumably involved a U.S. citizen, or a person whose immigrant or citizenship status was not in question, and politically motivated threats of violence alleged against a high-ranking government official.[79] There, the plaintiff delivered to administrative offices at the University of Southern California two copies of handwritten letters describing a plot to assassinate President Ronald Reagan.[80] The campus law enforcement authorities contacted the Secret Service, whose agents questioned various university employees who told the agents that the plaintiff had previously stated that President Reagan should have been assassinated in Bonn, Germany.[81] Based on that information, federal authorities arrested the plaintiff and detained him for a week without bond before dismissing the criminal complaint against him on their own motion.[82] In dismissing the plaintiff's claim

[76] 472 U.S. 511, 513-15 (1985).

[77] *Id.* at 535-36.

[78] *See id.*

[79] *See* 502 U.S. 224, 224-26 (1991).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 226.

under the Fourth Amendment, the Court engaged in qualified immunity analysis to conclude that even mistaken actions by law enforcement officers were reasonable because the case involved the president.[83] Unlike in *Ziglar*, the Court did not focus on national security, nor did it engage in special factors analysis of how a judicial remedy would intrude upon Congress or the Executive's policy decisions that may implicate and potentially comprise sensitive sources and methods concerning national security.[84]

Finally, the facts of *Saucier v. Katz* could also be construed to involve a potential act of domestic terrorism. There, Vice President Al Gore gave a speech to inaugurate the opening of a national park at the former site of a military base with a medical facility.[85] The plaintiff, a U.S. citizen, made a cloth banner to protest the facility's medical experimentation on animals, sat in the front row, and opened it.[86] Military officers were warned of a protest and upon the plaintiff's deployment of the banner grabbed and removed him from the area.[87] After detaining him at the police station, the officers released him.[88] The Court dismissed the plaintiff's Fourth Amendment claim for qualified immunity, concluding that a reasonable officer in the defendants' position could have believed that such force was necessary to protect the Vice President.[89] Like *Mitchell* and *Hunter*, the facts involved federal officers' use of force for potential threats of violence against a high-ranking government official, yet unlike in *Ziglar*, the Court in *Saucier* did not focus on national security rationales to justify its denial of the *Bivens* claim.

The Court's refusal to invoke the national security justification in *Mitchell*, *Hunter*, and *Saucier* — cases involving U.S. citizens or persons whose immigrant or citizenship status was not in question — and its willingness to do so only in cases involving immigrants or immigration-related matters of *Ziglar*, *al-Kidd*, and *Iqbal* not only undermines the veracity of the national security justifications raised in these latter

[83] *Id.* at 228.

[84] *See* Ziglar v. Abbasi, 582 U.S. 120, 120, 140 (2017).

[85] Saucier v. Katz, 533 U.S. 194, 197 (2001).

[86] *Id.* at 197-98.

[87] *Id.*

[88] *Id.* at 198.

[89] *Id.* at 208-09.

cases, but also suggests that its national security justifications may be pretextual. Certainly, by the time *Saucier*, *Hunter*, and *Mitchell* were decided, threats posed by citizen terrorists were well-understood by law enforcement and the public alike, with Timothy McVeigh and Ted Kaczynski, among others, being firmly in the public's consciousness.[90] As I show more fully in Part II.C., the Court's approach does more than simply rely on the immigrant as danger narrative. Its promotion of this false narrative is precisely what is dangerous.

### *C. Immigrant as Danger*

In this section, I expose the Court's use of the factual frames of terrorism and national security to promote the false narrative that associates certain immigrants with dangerousness. I also show that by promoting such a false narrative, the Court made a significant change to the legal framework, which presages the remedy's effective demise in *Egbert*.

#### 1. "New" Factual Construct: Unlawful Status as Dangerousness

The Court does more than simply underscore the national security context involved in this trio of cases. It uses that factual frame to imbue the plaintiffs with notions of dangerousness. In its rhetoric, the Court both depends on and perpetuates the false immigrant as danger narrative by promoting the unfounded connection between unlawful immigrant status and dangerousness.

In *Ziglar*, the Court deploys the "illegal alien" rhetoric and construct to describe immigrants. There, the Court underscored the fact that the plaintiffs may have been "illegally" present in the U.S.[91] In addition to describing their presence or actions as illegal, the Court's language characterizes the person as being illegal. In the opening sentence of the opinion, the Court frames the government's policy of taking into custody "illegal aliens" [to determine whether they] had connections to

[90] *See* John W. Harris, Jr., *Domestic Terrorism in the 1980's*, 56 FBI L. ENF'T BULL. 5, 5-7 (1987); Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists? Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33, 38-42 (2013).

[91] Ziglar v. Abbasi, 582 U.S. 120, 128-29 (2017); *id.* at 168-69 (Breyer, J., dissenting).

terrorism."[92] The Court uses this language seemingly to justify the harshness of its detention policy.[93] Such rhetoric does more than associate the immigrants' conduct as unlawful. It equates the person — and not the underlying acts that may have produced the unlawful legal status — as unlawful.

The Court's conflation of unlawful status with dangerousness is inaccurate, overbroad, and overstates the actual dangers that may stem from one's unlawful presence.[94] First, unlawful presence is usually construed as a civil violation, and not necessarily a criminal one.[95] Second, a noncitizen can lose their lawful status due to a relatively low-value offense, such as a visa-overstay, and not criminal activity. Third, while an unlawful border crossing, which can also produce unlawful status, can be attendant with elements of danger and crime, that is not necessarily true, for example, in the case of a migrant fleeing persecution to seek asylum in the U.S. Finally, as I show in Part II, the Court's use of such exclusionary language is prevalent in its immigration jurisprudence and, like its unsupported and pretextual references to national security risks, has served as a tool to exclude and stigmatize immigrants in immigration law.[96]

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[92] *Id.* at 125.

[93] For example, the Court stated that "confinement conditions imposed on illegal aliens [were done] pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." *Id.* at 140.

[94] While some perpetrators of 9/11 had unlawful status, and the association was accurate in that instance, in others the association of dangerousness with someone without lawful status is inaccurate. One common example of becoming undocumented is by entering without inspection and by overstaying or violating the terms of a visa. *See* Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 581 (2004). Both are usually treated as civil violations of the INA. 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection); *id.* § 1182(a)(9)(B) (unlawful presence).

[95] 8 U.S.C. § 1182(a)(6)(A)(i) (entry without inspection); *id.* § 1182(a)(9)(B) (unlawful presence).

[96] *See generally* Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76 (2020) [hereinafter *Penalizing Presence*] (theorizing undocumented status as stigma).

2. New Legal Construct

By relying, in part, on the immigrant as dangerousness narrative, the Court in *Ziglar* made a significant change to the doctrine. It announced a new two-step test that functionally forecloses most claims and presaged the doctrine's further demise in *Egbert*. To do so, it[97] relied on the following conclusion it drew in *Iqbal*: "Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'"[98] The Court further opined that "it is possible that the analysis in the Court's three [] cases [that recognized *Bivens* liability] might have been different if they were decided today."[99]

To buttress its former point, the Court cited *Malesko* and *Wilkie*. While the quoted language from *Malesko* supports its position of general reluctance to extend *Bivens* liability "to any new context or new category of defendants,"[100] nowhere in *Malesko* does it state that implied causes-of-action are categorically disfavored. Likewise, the Court's citation to *Wilkie* is misplaced, as *Wilkie* does not support that conclusion either. While *Wilkie* said that "in most instances [the Court has] found a *Bivens* remedy unjustified,"[101] it also said that a "freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee" and exercised that judgment by endorsing and applying the framework established in *Bivens* and progeny.[102] While it had not expanded *Bivens* liability to include new contexts, it had not explicitly narrowed its scope either.[103]

[97] Before Justice Kennedy's expressed hostility in *Iqbal*, Justices Scalia and Thomas had expressed doubts about *Bivens*'s viability, urging its holding to be limited to "the precise circumstances that they involved." Wilkie v. Robbins, 551 U.S. 537, 568 (Thomas, J., concurring) (2007); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). But they were in concurring opinions, not majority opinions.

[98] *Ziglar*, 582 U.S. at 135; Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

[99] *Ziglar*, 582 U.S. at 134.

[100] *Malesko*, 534 U.S. at 68 (stating "[s]ince *Carlson*, we have consistently refused to extend *Bivens* liability to any new context or new category of defendants").

[101] *Wilkie*, 551 U.S. at 550.

[102] *Id.*

[103] *See Ziglar*, 582 U.S. at 161 (Breyer, J., dissenting) ("It is by now well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently

Using that claim, the Court invented a new approach to the two-step process in *Ziglar*. The first step requires it to ask whether the claim presents a "new context." If so, then it proceeds to the second step where it considers the presence of special factors counseling hesitation.[104] As I explain, the Court's new approach — and its uneven application of it, which construes step one unduly narrowly and step two unduly broadly — effectively foreclosed the remedy.

For step one, the Court defined a "new context" as one that is "meaningfully different" from the factual premise of *Bivens*, *Davis*, and *Carlson*. Abandoning *Malesko*'s established standard of whether the factual context is "fundamentally different," it opted for the more easily satisfied standard of "meaningful[ly]" different,[105] which dooms most claims at the step two special factors inquiry. Such interpretation of "new context" would encompass any claims that differed from the *Bivens* progeny, even on account of the most subtle factual distinctions. The effect is to foreclose most, if not all, new claims, since no two cases present the same facts.[106]

For example, the Court gave the following factors for how a claim "may differ [meaningfully] from *Bivens*" and progeny:

> [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the individual action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of

bring them, courts accept them, and scholars defend their importance."); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S 471, 485 (1994) (preventing the "evisceration of the *Bivens* remedy" to preserve its "deterrent effects").

[104] *Ziglar*, 582 U.S. at 136-41.

[105] *Id.*

[106] *See, e.g.*, Keil v. Triveline, 661 F.3d 981, 983 (8th Cir. 2011) (implicitly recognizing the availability of Fourth and Fifth Amendment claims but finding that defendants were entitled to qualified immunity); DeMayo v. Nugent, 517 F.3d 11, 12-13 (1st Cir. 2008) (implicitly recognizing the availability of Fourth Amendment claim and remanding for correct qualified immunity analysis); Trulock v. Freeh, 275 F.3d 391, 397 (4th Cir. 2001) (implicitly recognizing First and Fourth Amendment claims).

> potential special factors that previous *Bivens* cases did not consider.[107]

Justice Thomas, in concurrence, further explained that *Bivens* and progeny should be limited to "the precise circumstances that they involved."[108] On the first factor, a claim alleged against a high-ranking official, as here, may *per se* be foreclosed, because *Bivens* and progeny did not involve suits against high-ranking officials. This, taken to its logical end would mean that an egregious violation of the Constitution by a high-ranking official without an available defense would face no *Bivens* liability; whereas, a line officer who commits the same conduct would be treated differently.[109]

On the second factor, the Court's consideration of the nature of the constitutional rights at issue is not new; under it, it has in prior cases limited the remedy only to allegations of excessive force under the Fourth Amendment,[110] unlawful discrimination under the Fifth Amendment,[111] and deliberate indifference to medical need during confinement under the Eighth Amendment.[112] What is new is the narrow application of these factors to the claims in *Ziglar*. Simply put, *Ziglar* involved a challenge to the conditions of confinement akin to *Carlson*. The plaintiffs alleged that they were confined in a small cell with unsanitary conditions, subjected to twenty-three hours of continuous lighting to prevent sleep, and deprived of necessary medical care.[113] Additionally, like *Bivens*, the plaintiffs alleged unreasonable use of force when they were placed in shackles and subject to frequent strip searches and suffered physical abuse that included being slammed into walls during which they suffered arms, wrists, and fingers that were twisted to the point of being broken.[114] Finally, like *Davis*, the plaintiffs attributed such actions by federal officials to unlawful discrimination.

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[107] *Ziglar*, 582 U.S. at 140.

[108] *Id.* at 157 (Thomas, J., concurring in part and concurring in the judgment).

[109] *Id.* at 176-77 (Breyer, J., dissenting).

[110] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397(1971).

[111] Davis v. Passman, 442 U.S. 228, 228, 238 (1979).

[112] Carlson v. Green, 446 U.S. 14, 16-19, 16 n.1 (1980).

[113] *Ziglar*, 582 U.S. at 128.

[114] *Id.*

Specifically, they alleged that officials insulted their religion, referred to them as terrorists, and subjected them to sexual harassment on account of their race and religion.[115] Despite the factual similarities between *Ziglar* and the *Bivens* progeny, the Court focused on the technicality that the conditions of confinement claim in *Carlson* was predicated on the Eighth Amendment, while in *Ziglar* it was under the Fifth Amendment, to conclude that the factual context here was new.[116]

The Court rightly drew the distinction between the status of the plaintiffs in *Ziglar*, who were pre-trial detainees, and the plaintiff in *Carlson*, who was not. But that distinction explains precisely why the plaintiffs here could not have alleged their conditions-of-confinement claim under the Eighth Amendment, which is available only to criminal defendants and not to pre-trial immigrant detainees.[117] Even in cases where the *Bivens* remedy was unavailable, the Court has explicitly recognized its availability for federal pre-trial detainees who challenge their conditions of confinement, subject to any available defenses.[118] The availability of the *Bivens* remedy for pre-trial detainees challenging their conditions of confinement has long been accepted and is not exceptional.

For step two, special-factors consideration, the Court also invented a new test, which, as stated, functionally forecloses, most, if not all, claims. Under it, courts "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and

[115] *Id.*

[116] *Id.* at 148.

[117] *See, e.g.*, Malam v. Adducci, 452 F. Supp. 3d 643, 651-52 (E.D. Mich. 2020) (allowing only injunctive relief, but not a *Bivens* claim for damages, for plaintiff's challenge to conditions of confinement under the Fifth Amendment); *see also* Fatma Marouf, *Immigration Detention and Illusory Alternatives to Habeas*, 12 U.C. IRVINE L. REV. 969, 997-99 (2022).

[118] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) ("If a federal prisoner in a [Bureau of Prisons] facility alleges a constitutional depravation, he may bring a *Bivens* claim against the offending officer, subject to the defense of qualified immunity."); Farmer v. Brennan, 511 U.S. 825, 848 (1994) (dismissing *Bivens* claim due to lack of sufficient evidence of knowledge of risk to plaintiff, but acknowledging the availability of the conditions of confinement claim in a BOP facility); *see* Sell v. United States, 539 U.S. 166, 193 (2003) (Scalia, J., dissenting) (stating that a *Bivens* remedy is "available to federal pretrial detainees challenging the conditions of their confinement").

weigh the costs and benefits of allowing a damages action to proceed."[119] Sweeping the detention policy claims under the broad umbrella of national security and the purported accompanying dangerousness, it concluded that allowing a *Bivens* remedy in such context would intrude upon the sensitive functions of the Executive in formulating policy, [120] and because "[n]ational-security policy is the prerogative of the Congress and President."[121] The Court's unduly narrow focus here on the capabilities of the judiciary relative to the elected branches of government is problematic. Rarely — if ever — will the judiciary be better situated than Congress to determine whether a damages action should proceed.[122] That is particularly true once the government invokes national security since "[n]ational-security policy is the prerogative of the Congress and President."[123] The Court in *Mitchell* recognized the dangers of how the government's invocation of national security "may cover a multitude of [its] sins" and declined to extend absolute immunity to shield the conduct of even the Attorney General to police "high federal officials [who] will disregard constitutional rights in their zeal to protect the national security."[124] Moreover, even for claims involving national security, the Court can determine, and review, the limitations of the Executive's Article II authority — a point that even the majority acknowledged in *Ziglar*.[125]

To be sure, *Ziglar*, as in prior cases, could have reached the same outcome and denied the remedy under a more traditional step two, special-factors analysis or under qualified immunity grounds. What is exceptional about *Ziglar* is its invention of a new legal standard, and the uneven application of it, to all but guarantee claims that are not identical to the facts of *Bivens* and progeny will fail the Court's new test. Indeed,

[119] *Ziglar*, 582 U.S. at 136.

[120] *Id.* at 141-43.

[121] *Id.* at 142.

[122] *But see* PFANDER, *supra* note 13, at 82-85, 98 (arguing that courts are capable of evaluating the lawfulness of extraordinary rendition without assessing national security justifications and characterizing *Bivens* litigation as "an essential tool of judicial oversight").

[123] *Ziglar*, 582 U.S. at 142.

[124] Mitchell v. Forsyth, 472 U.S. 511, 523-24 (1985).

[125] *Ziglar*, 582 U.S. at 142-44.

the legal framework established in *Ziglar* is prelude to the doctrine's further erosion in *Hernández* and *Egbert*.

### *D. Immigrant as Foreign*

Like *Ziglar*, *al-Kidd*, and *Iqbal*, the Court's two most recent *Bivens* cases concern either immigrants or immigration-related matters. In both *Hernández* and *Egbert*, the new factual framework the Court highlighted to dismantle the *Bivens* remedy relied on the immigrant as foreign narrative. Particularly in *Hernández*, the Court underscored the noncitizen status of the plaintiff to deny relief.

#### 1. "New" Factual Construct: Foreign Affairs and the Foreign

As I described in the Introduction, *Hernández* involved an unarmed child who was fatally shot by a Border Patrol agent.[126] Applying *Ziglar*'s new standard at step one, the Court concluded that the facts of *Hernández* were "meaningfully different" from *Bivens* and progeny by characterizing the instant case as a "cross-border shooting claim" involving noncitizens, whereas *Bivens* concerned "an allegedly unconstitutional arrest and search carried out in New York City" and *Davis* involved "alleged sex discrimination on Capitol Hill."[127] Throughout the opinion, the Court highlighted the transnational dimension of the shooting, even going so far as to describe it as an "international incident" while emphasizing the noncitizen status of the plaintiff.[128]

The Court's characterization of the incident as "international" is debatable. The support for that claim depends on the characterization of the shooting as "cross-border," which is equally specious. That view appears to be based on the bullet entering Hernández's body while he was on the southern side of the culvert — which presumably represents

[126] *Hernández I*, 582 U.S. 548, 550 (2017). The first time the case came before the Court, it remanded the case back down to the Fifth Circuit to apply the new legal standard for step two special factors analysis articulated in *Ziglar*. The second time the case came before the Court, it affirmed the Fifth Circuit's foreclosure of a *Bivens* remedy.

[127] *Hernández II*, 140 S. Ct. 735, 743-44 (2020).

[128] *Id.* at 737, 740, 744.

the border between the U.S. to the north and Mexico to the south — and Mesa shooting from the north.

As Justice Breyer noted in his dissent, there does not appear to be consensus that the culvert itself represents the border since border crossing posts and fencing exist on either side of it.[129] While in a border-related area, the culvert represents what is called a "limitrophe" area in international law, under which it may be subject, and historically represented an area that both the U.S. and Mexico have exercised jurisdiction over through treaties and agreements.[130] Nevertheless, such construct proved outcome-determinative in *Hernández*.

The Court in *Egbert* also framed the events there as "cross-border," which proved equally determinative. Such a claim is equally spurious, as is the Court's attempt to analogize its facts to *Hernández*. *Egbert* involved an owner of a bed-and-breakfast near the U.S.-Canada border, which had been used to facilitate unlawful border crossings during his ownership of the property.[131] He subsequently became a paid confidential informant for the government.[132] A dispute with a CBP officer concerning information about one of his guests from Turkey led to a physical altercation with the officer.[133] That incident formed the basis for his *Bivens* claim under the Fourth and First Amendments, a claim which the Court refuse to recognize and saw as fit for a political resolution, not a judicial one.[134] But unlike *Hernández*, where the characterization of the shooting as "cross-border" was arguably more apt because the bullet may have crossed borders, the incident in *Egbert* occurred completely within the U.S., not across or even at the border.[135]

The Court's characterization of the incident as "international" and implicating foreign affairs similarly fails. In *Hernández*, the Court framed the event as "international" because it involved the shooting of a Mexican citizen by a U.S. citizen. The argument was that recognizing a *Bivens* remedy would intrude upon the executive's domain to conduct

[129] *Hernández I*, 582 U.S. at 557.

[130] *Id.* at 557-59 (Breyer, J., dissenting).

[131] Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

[132] *Id.*

[133] *Id.* at 1801-02.

[134] *Id.*

[135] *Id.* at 1801; *Hernández II*, 140 S. Ct. 735, 740-41 (2020).

foreign affairs. Notwithstanding the validity of that assumption, the salient difference the Court ignores in framing *Egbert*'s facts as "international" and implicating foreign affairs is that the incident occurred between two U.S. citizens in *Egbert*, making the claim of its international nature tenuous and reliance on *Hernández* inapposite.

2. New Legal Construct

Using the "international" and "cross-border" factual constructs, the Court in *Hernández* and *Egbert* ushered in a sweeping change to the law. While the Court in *Hernández* retained the two-step framework in *Ziglar*, *Egbert* abandoned it altogether for a single-step inquiry that functionally renders the *Bivens* remedy dead. What *Hernández* and *Egbert* share is an overt hostility toward the *Bivens* remedy itself. They represent the culmination of the Court's systematic dismantling of the remedy.

*a.* Hernández v. Mesa

Under the "international" and "cross-border" factual frames, the Court applied an unduly narrow construction of step one and an overbroad construction of step two in the analysis from *Ziglar* to deny relief. At step one, the Court concluded that the facts were meaningfully different from *Bivens* and progeny because of the cross-border nature of the incident and the presence of a noncitizen plaintiff.[136] First, even assuming the culvert represents the border, the undue importance the Court puts on the precise place where the officer fired and where the bullet struck the boy is misguided. The facts did not establish with any clarity that the officer or the boy knew on which side of the border they were, much less that the officer fired knowing where his bullet would land.[137] The outcomes in *Bivens* and progeny did not depend on the fact that the alleged constitutional violation occurred in "New York City" or on "Capitol Hill,"[138] as *Hernández* suggests, nor did they demand a near identical match to their facts to state a valid claim.

Absent such fixed focus on the place of the alleged violation, *Hernández*'s facts are analogous to *Bivens* and countless cases that

[136] *Hernández II*, 140 S. Ct. at 743-44.

[137] *Id.* at 757 (Ginsburg, J., dissenting).

[138] *Id.* at 743-44.

followed it involving allegations of unreasonable use of force under the Fourth Amendment. The excessive use of force, particularly deadly force, has constituted the core of what may be unreasonable seizure under the Fourth Amendment. It is uncontested that the use of deadly force by an officer against a person who did not pose a threat to the officer or others is a seizure of a person that is subject to the reasonability requirement under the Fourth Amendment.[139] The plaintiff alleged in *Hernández* that he was not armed and did not pose a threat to the officer or to others.[140] In those circumstances, courts have both recognized and accepted the availability of the *Bivens* remedy, and generally have not required the sort of identical factual match that this Court did in *Hernández*.[141] Under that precedent, the use of deadly force is not a new context. It is no different — "fundamentally" or even "meaningfully" — from the numerous claims that have traditionally come under *Bivens*'s ambit.

Second, the Court does more than construct the events under the "international" and "cross-border" frames. It highlights Hernández's noncitizen status to promote the immigrant as foreign narrative. The Court relies on it to foreclose the remedy not only at step one, but also at step two special factors, which it construes broadly to find factors counseling hesitation. According to it, matters implicating foreign relations are for the political branches of government, which have the capability or responsibility to "weigh foreign policy concerns," and not the courts.[142] Further, it concluded that "matters relating to the conduct of foreign affairs . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[143]

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[139] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

[140] *Hernández II*, 140 S. Ct. at 756 (Ginsburg, J., dissenting).

[141] *See, e.g.*, Mourales v. Chadbourne, 793 F.3d 208, 211-12 (1st Cir. 2015) (Fourth Amendment claim); George v. Rehiel, 738 F.3d 562, 579 (3d Cir. 2013) (implicitly allowing plaintiff to bring Fourth Amendment claim by implication, but finding officials not liable under qualified immunity); Cortez v. McCauley, 478 F.3d 1108, 1131-32 (10th Cir. 2007) (Fourth Amendment claim).

[142] *Hernández II*, 140 S. Ct. at 735-744 (2020).

[143] *Id.*

It is significant that the prior quoted language originates not from a *Bivens* context. Rather, and as I show in Part II, the Court cited a case that resurrected century-old language from foundational immigration law precedent that has been used to exclude immigrants not only from entry into the U.S., but also from the scope of constitutional protections altogether. According to the Court's logic, because the plaintiff was Mexican, this matter implicates foreign affairs, a province of the Executive upon which courts cannot intrude. But it is unclear how recognizing a remedy here would intrude upon the Executive or implicate foreign affairs. It is true that the Mexican government sought Mesa's extradition for criminal prosecution and that the incident led to bilateral discussions between the two countries.[144] But the mere presence of actual or potential discussions between two countries does not show how the judicial recognition of a *Bivens* remedy would, or has in this case, affected foreign relations. Indeed, Mexico's request to extradite Mesa for criminal prosecution suggests that not recognizing Hernández's request for a remedy for the loss of their son would have precisely the impact on our foreign relations with Mexico that the Court feared. Indeed, the Government of Mexico made this very argument in its amicus brief, where it urged the Court to recognize *Bivens* liability for the officer, explaining that "refus[ing] to consider [Hernández's] parents' claim on the merits . . . is what has the potential to negatively affect international relations."[145]

The Court's focus on Hernández's noncitizen status advances not only the immigrant as foreign narrative but also the immigrant as terrorist and danger narratives. As in *Ziglar*, the Court in *Hernández* made a national security-based argument for why the *Bivens* remedy should not be extended in its special-factors inquiry. It explained that allowing the remedy would be tantamount to "regulating the conduct of agents at the border," which "unquestionably has national security implications" and would "risk undermin[ing] border security."[146] In support, the Court relied on evidence of a large volume of "illegal cross-border traffic" between Mexico and the U.S. and the "daunting task" law

[144] *Id.* at 745; *id.* at 758 (Ginsburg, J., dissenting).

[145] *Id.* at 758 (Ginsburg, J., dissenting).

[146] *Id.* at 747.

enforcement agencies have in policing the "large quantities of drugs [being] smuggled across the border" and "powerful criminal organizations operating on both sides of the border."[147]

Moreover, the Court's characterization of such "illegal cross-border traffic" included not only goods, but also the more than 850,000 persons who were apprehended for illegal entry at the border.[148] Like *Ziglar*'s reliance on the trope of "illegal aliens" and their associated dangerousness, the Court in *Hernández* advances a similar association between noncitizens and criminality. Irrespective of the veracity of such characterization, the Court's presentation of and reliance on it in *Hernández* is gratuitous since no allegations of "illegal cross-border traffic" existed there. To the extent that the boy crossed into the U.S., it was not with the intent to "enter [] illegally," and hardly constitutes "illegal cross-border traffic."[149] To be clear, the allegations involved a boy who was playing near the border and who did not pose a risk that would have justified the use of deadly force.

*b. Egbert v. Boule*

The legal analysis and application in *Egbert* are even more overbroad and categorical. Instead of working within the modified two-step framework articulated in *Ziglar*, the Court in *Egbert* invented a single-step inquiry that all but guts the *Bivens* remedy: "whether there is *any* rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damage action to proceed."[150] As Justice Gorsuch admitted in his concurrence, the answer will always be yes.[151] Further, the Court seems to have categorically immunized the conduct of "Border Patrol agents generally" by concluding that courts are not "competent to authorize damage actions" against their misconduct.[152]

[147] *Id.* at 746.

[148] *Id.*

[149] *Id.* at 740; *id.* at 756 (Ginsburg, J., dissenting).

[150] Egbert v. Boule, 142 S. Ct. 1793, 1805 (2022).

[151] *Id.* at 1809-10 (Gorsuch, J., concurring).

[152] *Id.* at 1806.

To justify such a dramatic change, the Court relied on the same specious link to foreign affairs it made in *Hernández*. Here, the Court's factual framing of the events as "cross-border" is even less persuasive than in *Hernández* since the alleged use of force occurred completely within U.S. territory — not across or even at the border.[153] So, too, is its reliance on the immigrant as foreign narrative to highlight the link to national security. In *Hernández*, the national security argument was premised on the notion that preventing the unlawful entry of immigrants at the border is related to protecting American national security interests.[154] Here, Egbert was not directly engaged in preventing the unlawful entry of a noncitizen in the way Mesa arguably was in *Hernández*. Egbert was not even at the border when the event giving rise to the plaintiff's claim occurred. While Egbert was there to inquire about the arrival of a foreign national from Turkey, that person had already lawfully entered at JFK International Airport, after inspection and authorization by an immigration officer.[155]

Without the exaggerated framing of the incident as "international" or "cross-border," this is a traditional excessive force claim between citizens that courts have routinely recognized under the Fourth Amendment involving a law enforcement officer who enters the property of another without a warrant and uses excessive force. That is precisely the allegation recognized in *Bivens* and in other cases that have applied it.[156] Justice Gorsuch's concurrence admitted as much: "The plaintiff is an American citizen who argues that a federal law enforcement officer violated the Fourth Amendment in searching the curtilage of his home. Candidly, I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself."[157]

After *Egbert*, it is difficult to imagine a scenario where the Court will again recognize the *Bivens* remedy. As Justice Gorsuch observed about the majority opinion, "[T]his court leaves a door [to a *Bivens* remedy]

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[153] *Id.* at 1801.

[154] *Hernández II*, 140 S. Ct. at 735, 746.

[155] 8 U.S.C. § 1101(a)(13)(A).

[156] *See, e.g.*, Harris v. Roderick, 126 F.3d 1189, 1194 (9th Cir. 1997) (recognizing Fourth Amendment excessive force claim against federal law enforcement officers under *Bivens*).

[157] Egbert v. Boule, 142 S. Ct. at 1793, 1810 (2022) (Gorsuch, J., concurring).

ajar and holds out the possibility that someone, someday might walk through it even as it devises a rule that ensures no one [] ever will."[158] That new rule, of course, only asks whether a court is "better equipped" than Congress to weigh the value of a new cause-of-action. As both the majority and Justice Gorsuch's concurrence conclude, the answer to that question will be an emphatic no.[159]

As Part I has exposed, the most dramatic changes to the *Bivens* remedy occurred primarily in cases involving immigrants or immigration-related contexts. From 1971, when the Court first recognized the *Bivens* remedy, to 2009, when the Court decided *Iqbal*, every single *Bivens* claim the Court decided involved U.S. citizen plaintiffs or those whose immigrant or citizenship status was not in question. Since, and including, *Iqbal*, a clear majority of cases has been brought by and involved immigrants or persons in immigration-related matters. During this period, the Court decided a total of nine cases involving a *Bivens* claim. Of these, six involved claims brought by or concerning immigrants or immigration-related matters.[160] The three latest cases, all decided since 2014, all involved immigrants or immigration-related matters.[161]

While the correlation between *Bivens*'s demise and immigrants is significant, so too is the Court's treatment of immigrants and its false assumptions about them. As I have shown, the Court has relied on the false immigrant as terrorist, danger, and foreign narratives to support its outcomes. In the process, it has resurrected and perpetuated century-old stereotypes that have historically conflated immigrants with notions of dangerousness and perpetual foreignness — a narrative that has driven much of U.S. immigration law and policy, as Part II documents.

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[158] *Id.* (internal quotation marks omitted).

[159] *Id.* at 1804-07; *id.* at 1810 (Gorsuch, J. concurring).

[160] *See id.* at 1800-01; *Hernández II*, 140 S. Ct. 735, 740 (2020); *Hernández I*, 582 U.S. 548, 550 (2017); Ziglar v. Abbasi, 582 U.S. 120, 126-29 (2017); Hui v. Castaneda, 559 U.S. 799, 802-03 (2010); Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009). The plaintiff in *al-Kidd* was a U.S. citizen born in Kansas but was suspected of terrorism due to his ties to Saudi Arabia. Ashcroft v. al-Kidd, 563 U.S. 731, 733 (2011).

[161] *See Egbert*, 142 S. Ct. at 1800-01; *Hernández II*, 140 S. Ct. at 740; *Hernández I*, 582 U.S. at 550; *Ziglar*, 582 U.S. at 126-29.

## II. A PARALLEL DEVELOPMENT AND FOUNDATIONAL THEORY IN IMMIGRATION LAW

In Part II, I expose and amplify the connection between constitutional torts and immigration law by locating the three false immigrant narratives that supported the erosion of the *Bivens* remedy in a central animating principle in immigration law: the plenary power doctrine. In Section A, I explain how under it, the Court has either deferred to Congress or refused altogether to review federal statutes concerning noncitizens for compliance with the Constitution's substantive and procedural requirements — even when Congress had relied on classifications that may be unconstitutional if applied to citizens, like race,[162] alienage, gender,[163] and legitimacy.[164] I argue that the plenary power doctrine has also relied on the same three false immigrant narratives to foreclose remedies and urge similar extraordinary deference to Congress by concluding that its power over immigrants and immigration-related matters is unreviewable. Specifically, I unveil how these false immigrant narratives have driven and defined legal and policy changes by offering a synthesis of significant moments in U.S. immigration history.

First, in Section B I analyze three examples of historical developments in U.S. immigration law and policy that relied on the immigrant as terrorist narrative — the McCarthyism of the 1950s, the "War on Terror" following 9/11, and the Trump "travel ban," all of which viewed certain immigrants primarily through the lens of terrorism. Second, in Section C I frame two landmark pieces of immigration-related legislation IIRIRA and AEDPA, and the "alien" metaphors used to support their enactment, as depending on, and exploiting the exaggerated connection between certain immigrants and crime to perpetuate the myth of immigrant dangerousness. Finally, in Section D I situate the construction of certain immigrants as "the other" as exemplifying the immigrant as foreign narrative and moored in the false

[162] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 698-704 (1893) (race and alienage); Nishimura Ekiu v. United States, 142 U.S. 651, 651-57 (1892) (same); Chae Chan Ping v. United States, 130 U.S. 581, 581-91 (1889) (same).

[163] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 791-92 (gender and legitimacy).

[164] *See, e.g.*, *id.* (gender and legitimacy).

assumption that sees certain immigrants as perpetually foreign and incapable of full integration into U.S. society.

### *A. A Prelude: Immigration Law's Foundations*

Laws governing and relating to immigrants are exceptional.[165] The application of certain customary legal principles in immigration law has yielded anomalous results precisely because of the subjects of regulation.[166] Immigrants are "strangers" to the Constitution.[167] For example, noncitizens seeking admission into the U.S. have virtually no rights guaranteed by the Constitution. That is because the Court, over a century ago, stated that "over no conceivable subject is the legislative power of Congress more complete" than it is over the regulation of the admission and exclusion of noncitizens.[168] Since then, it has either strongly deferred to the political branches or even refused to review altogether certain federal statutes concerning immigration for compliance with the substantive and procedural requirements under the Constitution. Under this plenary power doctrine, one scholar plainly noted that "the [C]ourt has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit."[169] For example, it has deferentially reviewed — if at all — certain congressional reliance on classifications that may be constitutionally problematic if applied to citizens, such as race and alienage.[170]

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[165] Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 537 (2017) [hereinafter *Deportation Deadline*].

[166] *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (advocating for a model of immigration exceptionalism that considers rights, federalism, and separation of powers dimensions as a whole).

[167] *See generally* NEUMAN, *supra* note 21 (developing the idea of immigrants as "strangers" to the Constitution).

[168] Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

[169] Peter J. Spiro, *Trump's Anti-Muslim Plan is Awful. And Constitutional*, N.Y. TIMES (Dec. 8, 2015), https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html [https://perma.cc/A6S6-Q27E].

[170] Fong Yue Ting v. United States, 149 U.S. 698, 698-704 (1893) (race and alienage); Nishimura Ekiu v. United States, 142 U.S. 651, 651-57 (1892) (same); Chae Chan Ping v. United States, 130 U.S. 581, 581-91 (1889) (same).

Originally, the plenary power doctrine's grant of near-absolute authority to the political branches of government without meaningful judicial oversight was articulated in, and should have been limited to, laws relating to immigration. For example, the foundational cases of *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* concerned Congress's ability to admit or deport noncitizens into or from the U.S.[171] But since then, the Court has imported the plenary power doctrine into laws relating to the regulation of noncitizens generally, even if such laws do not concern admission or deportation decisions, to refuse meaningful review of congressional or executive actions.[172] Under the plenary power doctrine, for both laws relating to immigration and noncitizens, the political branches have exercised near unreviewable power.

### *B. Immigrant as Terrorist*

One rationale the Court has articulated to support the plenary power doctrine is sovereignty.[173] This rationale supported the Court's refusal to review the immigration statute in *Chae Chan Ping*, where it construed the power to exclude noncitizens as "an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution."[174]

In support of its sovereignty theory, the Court often frames its discussion in terms of protecting national security, using the rhetoric of war — even in cases like *Chae Chan Ping* where the immigrant posed no national security risk and national security was not the basis for his

[171] *Ting*, 149 U.S. at 698-704 (deportation of long-term U.S. residents); *Ekiu*, 142 U.S. at 651-57 (exclusion of initial entrant with familial ties to U.S.); *Ping*, 130 U.S. at 581-91 (exclusion of long-term U.S. resident).

[172] For example, in refusing to meaningfully consider the constitutionality of the political branches' decision to detain noncitizens, the Court has often relied on the following language: "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953). For a discussion and development of the selection/regulation dichotomy in immigration law, see Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 341-45 (2008).

[173] Legomsky, *supra* note 17, at 273-74.

[174] *Ping*, 130 U.S. at 609.

exclusion under the statute.[175] The case involved a long-term U.S. resident who came to the U.S. lawfully to work before the 1882 law excluding Chinese nationals. Under that law, Chinese residents who were already in the U.S. could leave and return by obtaining a certificate of residency. Ping complied with the law, obtained the certificate, and left for China. But during his return voyage in 1888, Congress changed the law to exclude even certificate holders, and Ping was denied entry.[176] That change in law was motivated primarily by labor-related concerns and the threat of cultural differences posed by the growing presence of the Chinese in California, not national security.[177] Yet, in its justification for not reviewing the statute's constitutionality, and thereby Ping's exclusion under it, the Court framed the sovereignty arguments in terms of national security by using the rhetoric of war. It described California's concerns for the growing presence of Chinese nationals as "approaching the character of an Oriental invasion, [which is] a menace to our civilization."[178] It considered the sovereign right to exclude noncitizens as necessary, in part, for "security against foreign aggression and encroachment" and "protection and security" — whether such threats come from foreign nations or "from vast hordes of [] people crowding in upon us."[179] Despite the absence of a war between China and the U.S. at that time, the sovereignty justification for the unreviewable exclusion of Ping was supported by references to war and the political branches' power to wage it. Indeed, the Court specified that if the "legislative department[] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed," even during times of peace.[180]

Since *Chae Chan Ping*, the Court has deployed the national security rationale premised on sovereignty to justify the regulation of not only immigration but of immigrants generally. I focus on three prominent examples from U.S. immigration history when the government

[175] *Id.* at 593-95.

[176] *Id.* at 589-90.

[177] *Id.* at 595-96.

[178] *Id.* at 595.

[179] *Id.* at 606.

[180] *Id.*

overstated the connection between national security risks and certain noncitizens to justify laws and policies that would be unlawful if applied to citizens: first, during the McCarthyism of the 1950s; second, after the terrorist attacks of 9/11; and third, the "travel ban" during the Trump presidency.[181] In all three, the connection drawn to national security — reflected in two Supreme Court cases regarding the first, in legislative and policy decisions regarding the second, and in executive orders and proclamations regarding the third — was exaggerated and arguably pretextual.

1. McCarthyism and the "Red Scare"

During the 1950s, Senator Joseph McCarthy stoked fear and paranoia about the national security threat posed by communism by launching a series of investigations into the lives of Americans inside and outside the U.S. government.[182] It disproportionately burdened certain immigrants who became the targets of suspicion based on their national origin.[183] Against that context, the Court decided a pair of cases where it deferred almost exclusively to the political branches of government in refusing to meaningfully review constitutional claims brought by immigrants. Its conclusions were premised on the under-substantiated and over-determining assumption that viewed them primarily as national security and terrorist threats.

[181] While these examples exemplify the recent illustrations of the application of the plenary power doctrine, they are not meant to be exhaustive. For law's use of national security rationales to justify the infringement on civil liberties generally, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 959 (2002) (discussing interment of persons of Japanese ancestry during World War II and the Enemy Alien Act of 1798, which predates even the Chinese Exclusion Acts).

[182] Burt Neuborne, Harisiades v. Shaughnessy*: A Case Study in the Vulnerability of Resident Aliens*, *in* IMMIGRATION LAW STORIES 97 (David A. Martin & Peter H. Schuck eds., 2005). Before the 1950s, with the establishment in 1918 of the Communist regime in the Soviet Union, fear swept in the United States that Bolshevik agitators may strike at U.S. institutions, which continued into the 1940s. *Id.* at 95.

[183] *See generally* Charlotte Brooks, *Numbered with Fear: Chinese Americans and McCarthyism*, PBS: THE ASIAN AM. & PAC. ISLANDER EXPERIENCE (Dec. 20, 2019), https://www.pbs.org/wgbh/americanexperience/features/mccarthy-numbed-with-fear-chinese-americans/ [https://perma.cc/PSM8-Z4RQ] (discussing targeting of Chinese-Americans during McCarthy era).

In *Harisiades v. Shaughnessy*, long-term lawful permanent residents with significant ties to the U.S. challenged their deportability under the Alien Registration Act of 1940, which enabled the deportation of resident noncitizens who had been past members of the Communist Party.[184] In rejecting their claims under the First and Fifth Amendments, the Court framed the law as a "policy toward aliens [that is] vitally and inextricably interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" — matters that are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"[185] — the very language resurrected in *Hernández* and rooted in the foundational immigration law cases of *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* that articulated the plenary power doctrine. The Court then explained that the basis for their deportation was a statute enacted due to "congressional alarm about a coalition of Communist power [outside] and Communist conspiracy within the United States," against the backdrop of "a world war . . . threatening to involve us," and with reasons for Congress to believe that "[c]ommunists in our midst are inimical to our security."[186]

Similarly in *Shaughnessy v. United States ex rel. Mezei*, a long-term U.S. resident was excluded on national security grounds and detained indefinitely on Ellis Island.[187] Rejecting Mezei's request for an evidentiary hearing under the procedural Due Process Clause, the Court characterized the power to "expel or exclude" noncitizens as "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[188] It then characterized Mezei's exclusion as "grounded on danger to the national security" which "presents different considerations."[189]

In both cases, the purported national security connection was not fully explained or exaggerated. While the petitioners in *Harisiades* had at one time been members of the Communist Party, their membership

[184] Harisiades v. Shaughnessy, 342 U.S. 580, 581-82 (1952).

[185] *Id.* at 588-89.

[186] *Id.* at 590.

[187] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 206-07 (1953).

[188] *Id.* at 210.

[189] *Id.* at 215-16.

was terminated by the time they were found deportable.[190] Moreover, the law making past membership in the Communist Party a ground for deportation was not enacted until after their membership had been terminated. The purported national security danger was equally tenuous in *Mezei*. The event that precipitated Mezei's exclusion from the U.S. was a visit to his dying mother in Romania.[191] Because he was denied entry there, he remained in Hungary for nineteen months, as he could not secure an exit visa.[192] Even though the U.S. consulate there eventually granted him an entry visa to the U.S., he was detained at Ellis Island for two years upon his arrival.[193] Because neither the U.S. nor another country would admit him, Mezei faced indefinite detention.[194] Even so, the Attorney General refused to hold a hearing or disclose any evidence under the broad brush of national security. Despite the serious infringement to liberty interests posed by indefinite detention, the Court deferred to the Executive Branch's national security rationale under the plenary power doctrine, concluding that the power to "expel or exclude" noncitizens is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[195] Under that view, the Court did not seem to review, even for mere rationality or under the most deferential review standard, the executive action, despite the lack of a factual predicate for the government's national security rationale. In both cases, the Court relied on an exaggerated connection to national security and on the immigrant as terrorist narrative.

2. 9/11 and the "War on Terror"

The terrorist attacks of 9/11 had a profound societal impact, both domestically and internationally. In the U.S., they served as a justification for two wars and led to significant policy changes, including a flurry of new legislative and regulatory activity that tested the

[190] *Harisiades*, 342 U.S. at 582-83.

[191] *Mezei*, 345 U.S. at 208.

[192] *Id.*

[193] *Id.* at 220 (Jackson, J. dissenting).

[194] *Id.*

[195] *Id.* at 210.

constitutional balance between security and liberty. That the attacks were carried out by nineteen noncitizens of Arab and Middle Eastern descent drove not only a renewed suspicion of certain immigrants as terrorist threats,[196] but also dramatic changes to immigration law and policy premised on the overbroad immigrant as terrorist narrative. Here, I select examples of policies concerning immigrant profiling, immigrant detention, and immigrant removal — all of which relied on the immigrant as terrorist narrative.

*a. Immigrant Profiling*

Even before the enactment of the Patriot Act,[197] Attorney General Ashcroft issued regulations under the existing Immigration and Nationality Act ("INA") that made it easier to surveil certain noncitizens of Middle Eastern descent by requiring special registration that involved being photographed, fingerprinted, and interviewed by immigration authorities.[198] The National Security Entry-Exit Registration System ("NSEERS") remained in effect through 2011 and served as a pretextual tool for facilitating the detention and removal of thousands of noncitizens who were already in the U.S.[199] Under it, more than 13,000 persons who came forward to register were eventually placed into removal proceedings for immigration violations.[200] But the NSEERS program was not successful as a counter-terrorism tool, and more successful as a deportation one.[201] In exchange for volunteering information to immigration authorities to assist in the government's counter-terrorism measures, noncitizens were issued Notices to Appear that started their deportation process.[202] Tellingly, not a single

[196] Cole, *supra* note 181, at 957.

[197] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272.

[198] *See id.* § 403.

[199] Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 692 (2017).

[200] *Id.*

[201] *See id.* at 692-93.

[202] *Id.* at 692.

terrorism-related conviction resulted from their coming forward to volunteer information.[203]

Attorney General Ashcroft justified the legal basis for NSEERS under INA §§ 263(a) and 265(b), which permitted the registration and monitoring of non-immigrants, or noncitizens in the U.S. on a short-term visa.[204] While NSEERS was challenged on various constitutional grounds, courts have upheld it under the broad sweep of national security. While these cases did not specifically mention the plenary power doctrine, they gave similar reasons for deferring to the political branches of government — framing the program under a national security lens and relying on the overbroad and unsubstantiated immigrant as terrorist narrative.[205]

*b. Immigrant (Mandatory) Detention*

According to the DOJ's Office of Inspector General, law enforcement authorities after 9/11 detained more than 1,200 persons, both citizens and noncitizens and within and outside the U.S., on terrorism-related grounds.[206] Initially, the purported authority justifying such detention was existing federal immigration laws and regulations.[207] An emergency order permitted the detention of hundreds of noncitizens, held without a charge and for an extended period of time.[208] That changed with the enactment of the Patriot Act, which also relied on the overdetermining view of the noncitizen criminal (or noncitizens generally) as a national

[203] *Id.*

[204] Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77642 (Dec. 18, 2002).

[205] *See* Rajah v. Mukasey, 544 F.3d 427, 437-39 (2d Cir. 2008); Daud v. Gonzales, 207 F. App'x 194, 202 (3d Cir. 2006); Hadayat v. Gonzales, 458 F.3d 659, 663-65 (7th Cir. 2006); Kandamar v. Gonzales, 464 F.3d 65, 73-75 (1st Cir. 2006); Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1376 (11th Cir. 2006).

[206] *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS ch. 1 (2003), https://oig.justice.gov/sites/default/files/archive/special/0306/index.htm [https://perma.cc/6JCN-DJA8].

[207] *Id.* ch. 3.

[208] Custody Procedures, 66 Fed. Reg. 48334 (Sept. 20, 2001) (codified at 8 C.F.R. pt. 287) (permitting detention in "the event of an emergency or other extraordinary circumstance").

security threat. Under that view, the Patriot Act changed immigration laws by not only expanding the definition of terrorism — thereby the grounds for excluding and deporting noncitizens for terrorism-related offenses and affiliations[209] — but also made it easier to detain them.[210] It established a mechanism for certifying noncitizens suspected of involvement in or affiliation with a terrorist organization and made their detention mandatory.[211] It did not require a finding of dangerousness or flight risk prior to imposing such mandatory detention.[212]

The impact of such broad discretion and deference given to the Executive in the name of national security extended beyond those who truly posed a national security risk due to tangible evidence of connections to terrorism. As applied, the policy affected noncitizens generally, and Middle-Eastern identities specifically. According to DOJ's OIG Report, the majority of the 762 detention cases it reviewed came from Muslim-majority countries, with the largest number from Pakistan and Egypt, respectively.[213] The OIG Report raised significant concerns about the conditions of confinement, including a pattern of physical and verbal abuse by some correctional officers; unduly harsh conditions, such as the illumination of the detainees' cell for twenty-four hours a day; and the lack of access to counsel, among others.[214] The findings also underscored the government's failure to distinguish between national security risks and general criminal risks, concluding that "the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism."[215] Due to the mandatory nature of

[209] *See* 8 U.S.C. § 1182(a); USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); Lisa Finnegan Abdolian & Harold Takooshian, *The USA Patriot Act: Civil Liberties, The Media, and Public Opinion*, 30 FORDHAM URB. L.J. 1429, 1431 (2003); Shirin Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419, 1422 (2003).

[210] 8 U.S.C. § 1226a(a); USA Patriot Act § 412.

[211] USA Patriot Act § 412.

[212] Sinnar, *supra* note 209, at 1424.

[213] Wadhia, *supra* note 199, at 691.

[214] OFF. OF THE INSPECTOR GEN., *supra* note at 206, ch. 10.

[215] *Id.*

detention and the bureaucratically slow process for clearing persons from detention, the effect was the prolonged detention of persons whose detention may have been erroneous in the first place. For example, the Report documented a case of a person who was detained for several months, almost a month after receiving clearance from the FBI,[216] and whose release was delayed for nearly six months due to administrative errors.[217]

*c. Immigrant Removal*

The changes to immigration law and policy that led to more surveillance and detention of certain noncitizens also led to more removals, including those with no connections to terrorism. The Patriot Act broadened the grounds for exclusion and deportation of noncitizens.[218] Under it, certain noncitizens who did not pose a threat to national security were detained and ultimately removed. One study found that of the more than 1,200 persons detained after 9/11,[219] many remained in detention for weeks and months without a charge.[220] Of those arrested, most were charged with immigration violations.[221] Not one was indicted for crimes related to 9/11.[222]

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[216] OFF. OF THE INSPECTOR GEN., *supra* note 206, at 64-65.

[217] *Id.* at 64.

[218] *See* 8 U.S.C. § 1182(a); USA Patriot Act, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345-50 (2001).

[219] Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism,"* 16 PACE INT'L L. REV. 19, 27-28 (2004).

[220] *Id.*

[221] Muzaffar A. Chishti, Doris Meissner, Demetrios G. Papademetriou, Jay Peterzell, Michael J. Wishnie & Stephen W. Yale-Loehr, *America's Challenge: Domestic Security, Civil Liberties, and National Security After September 11*, 80 INTERPRETER RELEASES 1193, 1194-95 (2003); McDonnell *supra* note 219 (noting that 752 were charged with immigration violations).

[222] McDonnell, *supra* note 219, at 28; *see also* Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES (June 8, 2003), https://www.nytimes.com/2003/06/08/weekinreview/back-page-palmer-raids-redux-pursuit-immigrants-america-after-sept-11.html [https://perma.cc/HUX5-JTWN] (stating that "[n]one of the detainees . . . were charged with engaging in or aiding terrorism, though nearly all were guilty of overstaying visas, entering the country illegally or other immigration violations [and that] [m]ost have been deported, some after long periods of unwarranted detention.").

Such evidence suggests that the national security rationales that justified the aggressive immigration enforcement policies following 9/11 were pretext for achieving more removals.[223] What began as national security enforcement soon became immigration enforcement generally as the government blurred the distinction between the risks posed to the country due to national security threats and the risks posed to a local community due to unlawful conduct, which in most instances did not constitute crimes but were relatively low-value, civil offenses like a visa overstay. Such conflation of national security with community security persisted after 9/11 and is reflected in ICE's own enforcement directives that sought to "[t]arget and remove aliens that pose criminal/national security threats."[224] — literally blurring the distinction between national security threats and criminal threats.

The resulting harms to noncitizens have been significant and well-documented elsewhere.[225] Under the pretext of national security, certain noncitizens have been subject to profiling based on race, national origin, and religion and experienced diminished constitutional protections during the removal process. But these harms have extended beyond noncitizens and have also reached citizens. Under traditional applications of criminal law, the government cannot rely on race in its investigations without a specific report that the perpetrator of a crime is of a particular race.[226] However, under DOJ's enforcement guidance issued after 9/11, the government could rely on race for its "[n]ational [s]ecurity and [b]order [i]ntegrity" activities "to the extent permitted

[223] Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1862 (2007) (providing examples of cases where government relied on national security as reasons for immigrant removals).

[224] Chacón, *supra* note 223, at 1876-77; Press Release, Off. of Pub. Affs., Immigr. & Customs Enf't, U.S. Dep't of Homeland Sec., Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior 2 (Apr. 20, 2006), https://www.fosterglobal.com/news/DHSUnveilsComprehensiveImmigEnforcement.pdf [https://perma.cc/7C7Q-TZ7B].

[225] *See, e.g.*, Cole, *supra* note 181, at 957 (exposing erosion of civil liberties of noncitizens); Sadiq Reza, *Privacy and the Post-September 11 Immigration Detainees: The Wrong Way to a Right (and Other Wrongs)*, 34 CONN. L. REV 1169, 1169-73 (2002) (exposing government secrecy and erosion of privacy).

[226] Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 82 (2004).

by the Constitution and laws of the United States."[227] The law enforcement response to 9/11 has relied on race and religion to arrest and detain noncitizens of Arab and Muslim identities, at times without an individualized suspicion of wrongdoing.[228] But because people of racial backgrounds often have varied physical appearances, reliance on race is often an inaccurate investigative tool and can lead to abuses,[229] including the wrongful arrest and detention of both noncitizens and citizens who are not of Arab or Muslim identities but appear to be similar in physical appearance. Such an approach both relies on and perpetuates the false and harmful immigrant as terrorist narrative.

3. The Trump "Travel Ban"

On January 6, 2017, then-President Trump issued an executive order that temporarily banned travel to the U.S. from seven predominantly Muslim countries.[230] That led to chaos at airports and for certain families throughout the world. After a series of lawsuits challenging its constitutionality, President Trump replaced it with another executive order on March 6[231] and a presidential proclamation on September 24,[232] both of which sought to address the deficiencies in the initial executive order.

What the three presidential documents have in common is their undue reliance on the immigrant as terrorist narrative. The second order justified the "travel ban" by citing the U.S. State Department Country Reports on Terrorism as a basis for its determination that the listed countries were either state sponsors of terrorism or ones that did not cooperate with U.S. counterterrorism efforts.[233]Likewise, the presidential proclamation's stated rationale was to target nationals of

[227] C.R. DIV., U.S. DEP'T OF JUST., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 3 (2003).

[228] Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327-42 (2002); Johnson, *supra* note 226, at 77-87.

[229] Johnson, *supra* note 226, at 77-87.

[230] Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

[231] Exec. Order No. 13780, 82 Fed. Reg. 13209, 13209 (Mar. 6, 2017).

[232] Proclamation No. 9645, 82 Fed. Reg. 45161, 45161 (Sep. 24, 2017).

[233] Exec. Order No. 13780, 82 Fed. Reg. at 13210-13.

countries that were state sponsors of terrorism, unable or unwilling to share certain information about their citizens, or unwilling to cooperate with the U.S. on immigration matters.[234] Such explanations were sufficient for the Court, which rejected the plaintiffs' statutory claim that the proclamation exceeded its statutory authority under the INA and plaintiffs' constitutional claim for violation of the Establishment Clause.[235] Under a deferential review, the Court refused to look beyond the stated reasons in the proclamation and consider extrinsic evidence of anti-Muslim and anti-immigrant statements made by then-candidate Trump, who named the first executive order a "Muslim Ban," advocated for the "total . . . shutdown of Muslims entering the United States" because of his view that "Islam hates us," and conflated all Muslim-majority countries with terrorism.[236]

First, what these statements evidence is that the reliance on national security for the "travel ban" may have been pretextual and that anti-Muslim animus may have motivated it. While the second order and third proclamation do provide some reasons related to national security, they appear to be an ad-hoc add-on, in response to pending litigation. Even assuming the sincerity of the national security justifications, there is little factual predicate, in the way of "find[ings]," as required under the INA,[237] for the argument that entry of nationals from the named countries would be detrimental to the interests of the United States.

Second, the executive orders and proclamation viewed certain immigrants only through the over-determining lens of terrorism. They did not distinguish among persons from each country or attempt to make more targeted assessments about the presence of national security risks. Rather, they painted with a broad brush an entire citizenry as national security risks. The connections drawn to national security, particularly in the context of the anti-immigrant statements, were speculative and reflect the immigrant as terrorist narrative.

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[234] Proclamation No. 9645, 82 Fed. Reg. at 14164-54.

[235] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[236] Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 392-93 (2018).

[237] 8 U.S.C. § 1182(f).

### *C. Immigrant as Danger*

#### 1. "Alien" Metaphors and the Entrenchment of the Immigrant as Danger Myth

Underlying the immigrant as terrorist narrative is the false association of certain immigrants with notions of dangerousness. Indeed, the immigrant as terrorist narrative is a form of the immigrant as danger narrative, but one that even predates the "travel ban," 9/11, and McCarthyism. The immigrant as danger narrative is moored in the conflation of unlawful legal status with danger that has animated immigration law and policy for over a century. For example, the association of unlawfulness, and even criminality, with certain immigrants is reflected in the commonly used metaphor of the "illegal alien." That metaphor has its origins in the statutory text itself, which uses the term "alien" to distinguish between citizens and noncitizens.[238] But its use in immigration law can be traced back as early as the Alien Act of 1789, which permitted the President at the time to remove from the U.S. any person who posed a danger to the country.[239] Thus, the concept of "alien" has its roots in the very notion of dangerousness. While the statutory use of "alien" arguably may not be intended to be pejorative, in the cultural context in which the term is deployed, it connotes dehumanizing notions of extraterritoriality and strangeness.[240] And when paired with the term "illegal," the effect is an entrenchment of an inaccurate and harmful narrative that conflates

[238] *Id.* § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *see also* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 272-73 (1996-97) (explaining the use of the term "alien" in immigration law).

[239] 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE §§ 2.02-04 (2023).

[240] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990) (noting the pejorative connotations); D. Carolina Núñes, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1519-20 (2013) (showing the word's association with otherness, invasion, and criminality); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classification After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 426 n.4 (1997) (underscoring foreignness connotations of "alien").

immigrants, as persons, with the concept of unlawfulness.[241] It would be accurate to describe the act that produced the unlawful status, such as a visa overstay, as unlawful, but unlawfulness should not be ascribed to the person. There is no corresponding description in either law or culture that calls a U.S. citizen who has committed a civil or criminal violation as an "illegal citizen" or "illegal person." Yet, the use of "illegal immigrant" is pervasive, not only in the culture but in the law. Federal judges continue to use the term,[242] as do congresspersons[243] and executive branch officials.[244]

The use of the phrase and the corresponding harm have spilled over to other immigrants, even those with lawful status and citizenship. The term has been applied to those who are perceived as undocumented, irrespective of their actual immigration status.[245] That is because the public's perception of undocumented status often, but erroneously, depends on race and ethnicity. According to Mae Ngai, the Mexican migrant has become the prototypical "illegal alien,"[246] as undocumented status has become racialized and conflated with race and ethnicity. Such conflation is not limited to members of the public. Members of law enforcement have relied on racial stereotypes to enforce immigration

[241] For a more comprehensive discussion, see Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95, 120-26 (2016).

[242] Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1573 (2011) (conducting empirical study of judicial opinions, showing common use of both "illegal" and "alien").

[243] Philip Bump, *How Members of Congress (and Actual Americans) Refer to Immigrants*, WASH. POST (Nov. 21, 2014, 12:07 PM EST), https://www.washingtonpost.com/news/the-fix/wp/2014/11/21/how-members-of-congress-and-actual-americans-refer-to-immigrants/ [https://perma.cc/55DZ-YYKZ].

[244] Betsy Klein & Kevin Liptak, *Trump Ramps Up Rhetoric: Dems Want "Illegal Immigrants" to "Infest Our Country,"* CNN (June 19, 2018, 2:45 PM EDT), https://www.cnn.com/2018/06/19/politics/trump-illegal-immigrants-infest/index.html [https://perma.cc/JJ7S-K2KU]; Tal Kopan, *Justice Department: Use "Illegal Aliens," Not "Undocumented,"* CNN (July 24, 2018, 8:12 PM EDT), https://www.cnn.com/2018/07/24/politics/justice-department-illegal-aliens-undocumented/index.html [https://perma.cc/XMQ9-FF4D].

[245] Chacón, *supra* note 223, at 1839.

[246] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59, 71 (2004).

laws.[247] One study found that numerous U.S. citizens and lawful permanent residents have been stopped and questioned by law enforcement on multiple occasions "for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language."[248]

Perhaps the specific unlawfulness most commonly associated with immigrants are the "illegality" resulting from an unauthorized border crossing[249] or a visa overstay. Both are commonly treated as civil offenses in immigration law. First, the use of "illegal alien" to describe even those who have overstayed their visas or entered without inspection is not only stigmatizing but also legally inaccurate since their legality has yet to be determined.[250] Even if the noncitizen concedes deportability during an adjudication, there may be forms of relief that may permit either a temporary or more permanent stay in the U.S.[251] Second, the identity harms and the legal inaccuracy associated with ascribing unlawfulness to undocumented immigrants particularly and to immigrants generally are compounded by the use of the "illegal alien" metaphor to ascribe not only unlawfulness, but also criminality. But the effect of reliance on the "illegal alien" metaphor has been just that: the perpetuation of the false myth that has come to associate immigrants generally with crime and as threats to public safety. Such conflation is now reflected in the law, and the myth of immigrant criminality has been used to enact it.

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[247] KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 29-32 (2004) (discussing the role of racial stereotypes in immigration enforcement that affects not only Mexican citizens but also Mexican-Americans).

[248] Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 121 (2007).

[249] NGAI, *supra* note 246, at 71 (noting the image of the prototypical "illegal alien" as the "undocumented Mexican laborer who crossed the border to work").

[250] Kim, *Penalizing Presence*, *supra* note 96, at 87-96 (identifying identity-related harms associated with "illegal alien").

[251] For example, cancellation of removal permits certain noncitizens who are unlawfully present with continuous presence, good moral character, and hardship to avoid removal and attain permanent residence status. 8 U.S.C. § 1229b(a)-(b).

2. Advent of IIRIRA and AEDPA

The Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA")[252] and the Antiterrorism and Efficient Death Penalty Act ("AEDPA")[253] were enacted, in part, to address just this concern about certain immigrants and criminality. Notably, the myth of immigrant danger was used to justify both. While AEDPA was enacted to prosecute terrorism-related offenses, it made significant changes to immigration laws that had no relationship to terrorism. AEDPA expanded the grounds for removal for noncitizens convicted of certain crimes. For example, it made conviction for all drug-related offenses to be a deportable offense, even for simple possession of marijuana.[254] It also expanded the definition of a crime involving moral turpitude, a category of deportation, to include any crime with a sentence of one year or more.[255] It made detention mandatory for noncitizens who were convicted of a wide range of offenses, including minor drug offenses.[256] At the same, it eliminated most discretionary forms of waivers of deportations.[257]

IIRIRA also expanded the grounds for deportation while limiting the avenues for relief. It targeted undocumented immigrants by allowing the removal of certain immigrants based solely on the fact of their "unlawful presence," rather than the circumstances surrounding their entry.[258] It also targeted lawful permanent residents and subjected them to deportation for convictions for a wider range of crimes, even relatively minor and non-violent ones.[259]

[252] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 301, 110 Stat. 3546, 3579 (part of the Omnibus Consolidated Appropriations Act, 1997).

[253] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 414, 110 Stat. 1214, 1270.

[254] 8 U.S.C. § 1227(a)(2)(B)(i); AEDPA § 422(b).

[255] 8 U.S.C. §1227(a)(2)(A)(i); AEDPA § 435.

[256] *See* 8 U.S.C. § 1226(c)(1)(B); AEDPA § 435.

[257] *See* 8 U.S.C. § 1227(a)(2)(A)(i)(I). The exception was for convictions for crimes punishable by less than one year. See 8 U.S.C. § 1227(a)(2)(A)(i)(II).

[258] 8 U.S.C. § 1225(a)(1)(A); IIRIRA § 301(b)(1).

[259] *See* 8 U.S.C. § 1101(a)(43)(G); IIRIRA § 321(a)(3).

Both IIRIRA and AEDPA transformed the "aggravated felony" ground for deportation. For immigration purposes only, both stretched the meaning of "aggravated felony" beyond reason to encompass conduct that was neither aggravated nor a felony under state criminal laws. For example, a conviction for simple battery or shoplifting with a one year suspended sentence under most state laws is a misdemeanor.[260] Yet, under IIRIRA, it is an aggravated felony, which triggers deportation.[261] IIRIRA and AEDPA's expansion of the criminal categories of removal reflects the false assumption that associates noncitizens with criminality and relies on the unsubstantiated myth of the immigrant as danger narrative.[262]

### *D. Immigrant as Foreign*

#### 1. *Chae Chan Ping*: The Immigrant as Foreign Narrative and the Threat of Cultural Differences

Another support underlying the plenary power doctrine is the view that immigration matters implicate foreign affairs. According to it, because the issue of foreign affairs is a political question reserved to the political branches of government, total deference is owed to Congress. This view operates on two central assumptions: first, that immigration decisions indeed affect foreign affairs and second, that decisions affecting foreign affairs are political questions that shield them from judicial review.[263] As Stephen Legomsky has argued, both assumptions require analysis and are not necessarily true.[264] Yet, the Court's refusal to conduct meaningful review — or any review — of immigration

[260] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

[261] *Id.* In addition to expanding the grounds for removal, both narrowed the substantive and procedural protections from removal. 8 U.S.C. §§ 1158(a)(1)(B), (2)(B); IIRIRA § 604(a). Both also limited procedures for administrative and judicial review by making certain removal orders and denials of discretionary forms of relief unreviewable. 8 U.S.C. § 1227(b)(1)(A)(iii)(II).

[262] Chacón, *supra* note 223, at 1848. According to Chacón, the efforts to control crime through accelerated deportations has been largely unsuccessful. *Id.*

[263] Legomsky, *supra* note 17, at 261-62.

[264] *Id.*

matters has been supported by a conclusory and unsubstantiated reference to both.[265]

One obvious connection between immigration law and foreign affairs is that the primary subject of immigration law is the foreign national.[266] But in the foundational case that articulated the plenary power doctrine, it is the foreign nature of the subject of its regulation, rather than the purported influence on foreign affairs, that seemingly drives the outcome. In *Chae Chan Ping*, the Court considered the constitutionality of the Chinese Exclusion Acts of 1882. With a few exceptions, the law prohibited the entry of the Chinese into the U.S. for ten years.[267] The law was motivated, in part, by labor concerns. While the Chinese had been welcomed into the U.S. to fill labor shortages in the Pacific West during the gold rush of 1848 and to complete the trans-continental railroad between 1864 and 1869, they became a glut on the labor market when both of those events ended and with the onset of a drought and financial depression. During this time of economic hardship, the anti-Chinese sentiment grew along with fears that the Chinese were taking scarce jobs away from U.S. workers.[268]

At the same time, the political rhetoric supporting the enactment of the Chinese Exclusion Acts shows concerns beyond labor, including cultural differences. The following are quotes from U.S. congresspersons in support of the Chinese Exclusion Act:[269]

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[265] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588-91 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Fong Yue Ting v. United States, 149 U.S. 698, 705-06 (1893).

[266] Legomsky, *supra* note 17, at 262.

[267] Ping v. United States, 130 U.S. 581, 597 (1889).

[268] Michael Luo, *The Forgotten History of the Purging of Chinese from America*, NEW YORKER (Apr. 22, 2021), https://www.newyorker.com/news/daily-comment/the-forgotten-history-of-the-purging-of-chinese-from-america [https://perma.cc/WQ2W-K7KK].

[269] *Becoming American: The Chinese Experience, Program One: Gold Mountain Dreams* (Public Affairs Television broadcast, Mar. 2003), https://www-tc.pbs.org/becomingamerican/program1_transcript.pdf [https://perma.cc/L89G-7T6Y] (transcript at 22-23). John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates of the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 61-63 (1996); Lea VanderVelde & Gabriel J. Chin, *Sowing the Seeds of Chinese Exclusion as the Reconstruction Congress Debates Civil Rights Inclusion*, 25 ASIAN PAC. AM. L.J. 29, 36 (2021).

> The question lies in my mind thus: either the Anglo-Saxon race will possess the Pacific coast or the Mongolians will possess it. This is servile labor, worse than slave labor and we have this day to choose whether we will have for the Pacific Coast the civilization of Christ or the civilization of Confucius.
>
> Senator James Blaine, Maine

> Should we be a mere slop-pail into which all the dregs of humanity should be poured? . . . The Chinaman can live on a dead rat and a few handfuls of rice.
>
> Senator Aaron Sargent, California

> The Chinese are machine-like . . . they are automatic engines of flesh and blood; . . . . They herd together like beasts . . . . We ask you to secure the American Anglo Saxon civilization without contamination or adulteration.
>
> Senator John Franklin Miller, California

> The Chinese do not and will not assimilate with our people, they come only to get money and return. They secretly maintain laws and a government of their own.
>
> Senator Willard Saulsbury, Delaware

Such language depicts the Chinese as posing a threat not just to the employability of the American worker, but to American civilization itself. The fear is one of cultural differences and the perception that the Chinese either cannot or will not assimilate into the prevailing American culture. Under this frame, the Chinese Exclusion Acts exemplified a protectionist impulse to not only defend American sovereignty from perceived foreign invaders,[270] but also to preserve the American home and family and to secure it from a people that posed an apparent threat to American values rooted in a particular conception of marriage and family.[271]

[270] *Ping*, 130 U.S. at 595 ("[T]heir immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.").

[271] *See* Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7, 10-11 (2013) (noting exceptions in the Chinese exclusion acts for immigrants that conformed to the

2. "Othering" and the Taint of Perpetual Foreignness

While the immigrant as foreign narrative, and the fear of cultural differences, arose in a particular political and social context, it is not limited to the Chinese Exclusion Acts or confined to 19th-century America. The fear of cultural differences — and of the threats posed by the foreigner more broadly, culturally, or otherwise — have been advanced to exclude noncitizens throughout U.S. history.[272] The construction of the "other" as oppositional to the U.S. polity is a well-documented phenomenon applicable to various groups of immigrants in U.S. immigration history. But as numerous scholars have documented, the "othering" of certain Asian immigrants — in opposition to the dominant Eurocentric culture in the U.S. — has been particularly pronounced historically.[273]

The particular cultural and racial stereotypes on which the Chinese Exclusion Acts relied highlighted the foreignness of the Chinese to exclude them from the U.S. The argument against them was based on cultural differences and their purported lack of ability or willingness to assimilate into the U.S. culture.[274] Moreover, this "othering" of certain Asian immigrant identities both predated and lasted beyond the Chinese Exclusion Acts.[275] It is a global phenomenon. According to Edward Said's definition of "Orientalism," the Western colonial perspective constructed the "Orient" by a process of negation, defining it in opposition to the Occident.[276] According to Keith Aoki, the national identity of the U.S. has similarly been defined in opposition to the

American conceptions of marriage and family); Shoba Sivaprasad Wadhia, *Discretion and Disobedience in the Chinese Exclusion Era*, 29 ASIAN AM. L.J. 49, 52-53 (2022) (Chinese immigrants described as immoral and not being able to assimilate to American way of life).

[272] Chacón, *supra* note 223, at 1835-36 (cataloging examples of the foreigner as a threat); Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681, 687-90 (2017); Paul Yin, *The Narratives of Chinese-American Litigation During the Chinese Exclusion Era*, 19 ASIAN AM. L.J. 145, 156-59 (2012).

[273] Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 3-4 (1996).

[274] See *supra* Part II.D.1.a.

[275] Aoki, *supra* note 273, at 3-4.

[276] EDWARD W. SAID, ORIENTALISM 1, 5 (1979).

"other," like Asian identities, through a process he defines as "American Orientalism."[277] That othering has been racialized,[278] as Asian or Asian-American has been conflated with non-whiteness and non-American.[279]

In the U.S., one needs to look no further than the Court's own language for evidence of "othering" based on race and culture. In *Fong Yue Ting*, the Court described the Chinese laborers in the following way:

> [O]f a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.[280]

This language was repeated years later by the same Court.[281] In another opinion, Justice Harlan described the "Chinese race" as "so different from our own that we do not permit those belonging to it to become citizens of the United States."[282]

Such "othering" of the Chinese is largely on account of notions of foreignness.[283] According to the Court, they are "strangers" to the U.S., in part, because of their "tenacious[] adhere[nce] to the customs and usages of their own country" and their "apparent[] incapab[ility] [to] assimilat[e] with our people."[284] Such perceptions of foreignness, combined with the construction of certain Asian identities primarily in

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[277] Aoki, *supra* note 273, at 5-6. For other examples of "othering" based on race and ethnicity, see Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* *in* ASIAN AMERICANS AND THE SUPREME COURT 1087, 1095-96 (Hyung-chan Kim ed., 1994) [hereinafter *Asian American Rights*]; Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1286-89 (1993); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1596-97 (1993).

[278] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 STAN. L. REV. 1, 21-28 (1991).

[279] Aoki, *supra* note 273, at 3-6.

[280] Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893).

[281] United States v. Wong Kim Ark, 169 U.S. 649, 731 (1898) (Fuller, C.J., dissenting).

[282] Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

[283] Aoki, *supra* note 273, at 5-6.

[284] *Ting*, 149 U.S. at 717.

opposition to white identities and culture, have subordinated them under the "Orientalist" gaze.[285] This "racialization" of identity helped perpetuate the exaggerated perceptions of foreignness, and such phenomenon appears to apply only to certain racial and cultural minorities.[286] As Neil Gotanda argues, certain immigrants who are "racialized" as white or African-American are presumed be socially American and legally a U.S. citizen.[287] That same presumption is not extended to certain "racialized" identities, like certain Asian immigrants, whose identity is imbued with the taint of foreignness.[288]

Moreover, such taint of foreignness is perpetual. It is reflected in the Court's own view of the apparent incapability of certain Asian identities to ever assimilate. As numerous scholars have documented, the concept of foreignness has been difficult to shed for Asian identities generally, even for long-term lawful permanent residents and U.S. citizens.[289] That perception has not only influenced immigration law, but has led to, justified, and helped explain salient moments of the Asian and Asian-American experience in the U.S.[290] Just a few notable historical examples include the experience of some Americans of Japanese descent who were incarcerated during World War II while Americans of German or Italian descent, who like Japanese-Americans could be characterized as "foreign" or with similar connections to countries with whom the U.S. was at war, did not experience the same treatment.[291] Such perception of foreignness may also explain the more recent violence against Asians and Asian-Americans, including Vincent Chin's murder in Detroit during the

[285] Aoki, *supra* note 273, at 9.

[286] Gotanda, *Asian American Rights*, *supra* note 278, at 1095-96; Neil Gotanda, *Reflecting on Race, Law, and White Supremacy: Asian American and Muslim American Experiences*, 45 W. ST. U. L. REV. 147, 149 (2018).

[287] Gotanda, *Asian American Rights*, *supra* note 278, at 1095-96.

[288] *Id.*

[289] *See, e.g.*, Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 33 (1994) ("When people first meet me, it is not unusual for them to comment, 'You speak so well, you don't have an accent,' intending their observation to be a complement. 'Where are you from?' they continue, expecting my response to be a more foreign and exotic place than Texas or Pennsylvania.").

[290] *See id.*

[291] Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 70 n.38 (1998).

1980s,[292] the violence against Korean and Korean-American businesses in Los Angeles during the 1990s,[293] and the rise of hate crimes during the recent COVID-19 pandemic due to the blanket association of certain Asian identities in the U.S. with China and the perceived origins of the virus there.[294] The racialized perceptions of foreignness concerning certain Asian identities is just one example of the immigrant as foreign narrative that has driven immigration law and policy in the U.S.

## III. IMPORT AND IMPLICATIONS: HARMS TO LAW AND PERSON

In Part III, I analyze the implications of the demise of the *Bivens* remedy for both the law and the person. I argue that the Court's treatment of immigrant status leads to bad outcomes by exposing both legal and identity harms. For the law, I locate the remedy's demise in the broader context of immigration law that has viewed certain immigrants as exceptional and "strangers" to the Constitution. I also analogize the Court's exceptional treatment of immigrants and immigration-related matters in constitutional torts to other areas of the law, including international and criminal laws, where the Court has done the same. I argue that the Court's discarding of *Bivens* and precedent undermines *stare decisis* and other foundational principles. In the process, I advance the discourse on the exceptionalism of immigration law and show the harmful effects of its errant departure from established substantive and procedural legal norms.

For the person, I uncover what the lack of a viable *Bivens* remedy means for both noncitizens and citizens. I argue that the loss of this remedy would fall disproportionately on certain immigrants and show how their lives stand on even more precarious footing, particularly after the Court's seeming categorical foreclosure of claims against Border Patrol agents. I support that argument with the following four factual

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[292] Frank H. Wu, *Scattered: The Assimilation of Sushi, the Internment of Japanese Americans, and the Killing of Vincent Chin, A Personal Essay*, 26 ASIAN AM. L.J. 109, 115-17 (2019).

[293] Ikemoto, *supra* note 277, at 1581-85.

[294] Terry Tang, *More than 9,000 Anti-Asian Incidents Since Pandemic Began*, ASSOCIATED PRESS (Aug. 12, 2021, 11:16 AM PDT), https://apnews.com/article/lifestyle-joe-biden-health-coronavirus-pandemic-race-and-ethnicity-d3a634080211a247ba764d40355ecbe2a [https://perma.cc/KLK2-6P3T].

predicates: (1) Since 2001, immigrants or persons involved in immigration-related matters have filed a significant number of *Bivens* cases; (2) the number of encounters between such persons and law enforcement officers has soared recently and shows no evidence of stopping; (3) the death of Hernández is far from an isolated incident in light of other similar deaths and other recent documented complaints of physical, sexual, and verbal abuse by CBP agents;[295] and (4) since 2010, over 250 immigrants or persons involved in immigration-related matters, including unarmed children, have died in fatal encounters with CBP agents.[296]

Finally, I examine the spill-over effects of *Bivens*'s erosion by demonstrating that such abuses can also reach U.S. citizens. I show that in the immigration enforcement context, both at and away from the border, U.S. citizens remain vulnerable because of the broad arrest and detention powers afforded law enforcement officers. Similarly, I demonstrate how such law enforcement abuses may arise in a non-immigration enforcement context, for which the *Bivens* remedy was once available and for which the rationales of national security, dangerousness, and foreignness that applied to immigrants and upon which the Court relied to dismantle it, are inapposite. But because the Court in *Ziglar*, *Hernández*, and *Egbert* did not limit its holdings to noncitizens, the border, or the immigration-related context, the erosion of *Bivens* leaves U.S. citizens without a torts remedy for even the most egregious constitutional violations. I argue how in an era of increased migration across borders, and the increased enforcement that follows, the erosion of a constitutional remedy exacts too high a price, for both the law and the person.

### *A. Legal Harms*

Immigration law is exceptional. Due to the subjects it regulates, immigration law violates legal norms and principles established in other areas of the law. As I showed in Part II, the articulation and application of the plenary power doctrine in immigration matters has meant either non-review or very deferential review by the Court of federal statutes

[295] Martinez et al., *supra* note 22, at 1-6, 8.

[296] *CBP Fatal Encounters*, *supra* note 23.

for compliance with the Constitution's substantive and procedural protections, even when Congress has relied on classifications that may be unconstitutional if applied to citizens.[297] Its effect on international law in certain cases has been to undermine the United Nations Convention and Protocol Relating to the Status of Refugees and the principle of non-refoulement when the Court approved an executive order that permitted the interdiction of Haitians, many of whom were fleeing persecution, in international waters and returning them back to Haiti.[298]

In criminal law and procedure, there has been an emerging trend of criminalizing immigration law,[299] with the advent of law enforcement partnerships like the Priority Enforcement Program, and its predecessor Secured Communities, that has enabled local, state, and federal law enforcement agencies to share biometric information of criminal defendants with the immigration enforcement agencies, which has led to an increase in the apprehension, detention, and removal of noncitizens.[300] While immigration law has incorporated such criminal investigative and enforcement norms, it has not imported norms of criminal justice and the constitutional and procedural protections afforded criminal defendants because courts have deemed the violation of immigration law to be a civil offense for which constitutional protections in criminal procedure do not attach.[301] Despite the punitive

[297] See *supra* Part II.

[298] *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 186-87 (1993).

[299] Scholars have invented a new area of study called "crimmigration." *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (discussing the theorical underpinnings of the confluence of criminal and immigration law). *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015) (providing overview of salient features and development of crimmigration law).

[300] *See* AM. IMMIGR. COUNCIL, IMMIGRATION DETAINERS UNDER THE PRIORITY ENFORCEMENT PROGRAM 1-4 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_under_the_priority_enforcement_program.pdf [https://perma.cc/7U25-RCZ6]; Camilo Montoya-Galvez, *ICE Immigration Arrests and Deportations in the U.S. Interior Increased in Fiscal Year 2022*, CBS NEWS (Dec. 30, 2022, 3:32 PM), https://www.cbsnews.com/news/ice-immigration-arrests-and-deportations-us-interior-increased-fiscal-year-2022/ [https://perma.cc/FT57-3MCV].

[301] *See* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1302 (2011).

rationales that underpin deportations, they do not constitute punishment under the Constitution.[302] The result is the importation of criminal justice norms into immigration law that is "asymmetric"[303] and disproportionate. While immigration law has adopted the harsh enforcement techniques and practices of criminal law and procedure, it has failed to incorporate their more ameliorative dimensions, including the greater constitutional protections afforded criminal defendants.[304]

In constitutional, international, and criminal laws, the Court has carved out exceptions to doctrines, norms, and principles due to the subjects of regulation. The jurisprudential shift in constitutional torts can be understood in this context. As I have shown, in a line of cases beginning with *Iqbal*, the recent transformation of a long-standing constitutional remedy occurred in the context of immigrants, or in immigration-related matters, and their associated false narratives.

That change to precedent has implications for the law generally. It erodes legal norms and disrupts a system that depends on consistency, certainty, and predictability for its credibility and standing.[305] It violates *stare decisis*, a foundational principle in our legal tradition, where change occurs incrementally and over time — not abruptly and over the course of a few terms — and based on careful distinctions of facts — not based on a change to the Court's composition and its ideological makeup.[306]

Fidelity to *stare decisis* and precedent also means that like cases should be decided alike.[307] To be sure, citizens and noncitizens have differing rights and responsibilities, and the law does and should recognize that distinction. What I have argued is that the Court has overstated this distinction and relied on an over-determining narrative that has falsely

[302] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[303] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007).

[304] Kim, *Deportation Deadline*, *supra* note 165, at 539.

[305] *See* Kimble v. Marvel Ent., 576 U.S. 446, 455 (2015); Payne v. Tennessee, 501 U.S. 808, 848-49 (1991) (Marshall, J., dissenting). *See generally* Randy J. Kozel, *supra* note 13 (arguing that *Bivens* remedies could be continued, despite Court's concerns, to strengthen *stare decisis*).

[306] *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624 (1958); Kozel, *supra* note 13, at 1994-2004 (analyzing *Bivens* as a strong case for stare decisis and making an argument for why it should be reaffirmed).

[307] Hart, *supra* note 306 at 624.

equated certain noncitizens with terrorism, dangerousness, and foreignness to justify their exceptional treatment under the law. Such an approach also undermines other important legal norms and principles, including those guaranteed by the Constitution itself, like the due process protections that are afforded to all "persons," and not just to citizens.[308]

Finally, what the recent transformation of constitutional torts jurisprudence and the exceptionalism of immigration law show is the role that certain immigrants have played in the development of not just immigration law, but the law generally. In constitutional torts, the Court has not just carved out exceptions for immigrants and immigration-related matters. It has changed the law for everyone. The gutting of *Bivens* deprives both citizens and noncitizens alike of a long-standing constitutional remedy.

### *B. Identity Harms*

#### 1. To Noncitizens

In the last twenty years, the number of *Bivens* suits brought against federal officials has been significant. According to one study, since 9/11, over 200 *Bivens* cases have been litigated in federal district courts across the country.[309] After *Egbert*, plaintiffs may lack redress for even the most egregious constitutional violations and human rights abuses. That appears to be true particularly at the border where the Court in *Egbert* seemingly immunized the conduct of "Border Patrol agents generally" by announcing its lack of "compet[ence] to authorize a damages action."[310] U.S. Border Patrol is part of CBP, "one of the world's largest law enforcement organizations" with more than 60,000 employees, according to the agency.[311] As Justice Sotomayor noted in her dissent, the majority's conclusion "contradicts decades of precedent requiring a

[308] *See* U.S. CONST. amend. V.

[309] *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 836-37 tbls. 1 & 2 (2010).

[310] Egbert v. Boule, 142 S. Ct. 1793, 1806 (2022).

[311] *About CBP*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about (last visited Aug. 14, 2023) [https://perma.cc/VCP4-5DCN].

context-specific determination of whether a particular claim presents special factors counseling hesitation."[312] Moreover, by seeming to categorically immunize the misconduct of Border Patrol agents, the Court again treats as exceptional the immigration context, leaving certain immigrants at the border vulnerable to potential abuses.

The effect will be profound. According to the Pew Research Center, U.S. Border Patrol reported more than 1,659,206 encounters[313] with noncitizen migrants along the U.S.-Mexican border during the 2021 fiscal year,[314] and over two million encounters during the 2022 fiscal year. Those numbers reflect the highest ever recorded and eclipse the total of 851,508 encounters during the prior major wave of migrations in fiscal year 2019.[315] These numbers are not atypical. Since 1980, there have been two other times when the number of encounters with migrant noncitizens exceeded over 1.6 million: in 2000 when the number of encounters reached a high of 1,643,679 and in 1986 when the number was 1,615,844.[316] While the number of encounters at the southern border has fluctuated during this time, it has always been significant, never falling below 303,916.[317]

In addition to the increase in numbers of encounters, more countries are sending migrants to the U.S. For example, during the migration wave in fiscal year 2000, of the 1,643,679 encounters, the vast majority (1,615,081) involved Mexican nationals, with just 28,598 representing nationals from other countries. Yet, by fiscal year 2021, the vast majority of encounters at the border involved non-Mexican nationals, who

[312] *See Egbert*, 142 S. Ct. at 1820-21 (Sotomayor, J., concurring in part).

[313] According to CBP, "encounters" includes both expulsions and apprehensions. This category was created beginning in fiscal year 2020; whereas in prior years the annual totals reflected apprehensions only. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last modified July 18, 2023) [https://perma.cc/2L8Y-3DTY].

[314] John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico border in 7 charts*, PEW RSCH. CTR. (Nov. 9, 2021), https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/ [https://perma.cc/MC6B-XNW6]; *Southwest Land Border Encounters*, *supra* note 313.

[315] Gramlich & Scheller, *supra* note 314. The 2020 fiscal year saw a decrease to around 400,000 due to COVID-19.

[316] *Id.*

[317] *See id.*

comprised 1,051,169 encounters, with Mexican nationals comprising 608,037.[318] Since 2000, there has been a steady increase in a number of encounters among this group. Most of the non-Mexican nationals in 2021 were from the Northern Triangle countries of Honduras, El Salvador, and Guatemala, but encounters with migrant noncitizens from other countries, including Ecuador, Brazil, Nicaragua, Venezuela, Haiti, and Cuba have risen precipitously.[319] There is no conclusive evidence that this trend will not continue.

The potential for conflict and constitutional injury among the large number of encounters is not just theoretical. There have been numerous documented allegations of abuse and the unreasonable uses of force, including deadly force, by Border Patrol agents that have occurred since Hernández's death in 2010. Ramses Torres, a teenager, was shot and killed in Nogales, Sonora in 2011.[320] That same year, Jose Yanez Reyes also died at the hands of Border Patrol agents in Tijuana.[321] In 2012, Jose Antonio Elena Rodriguez , a teenager, was shot ten times, with eight bullets striking his back and two in the head, head through the fence into Nogales, Mexico for allegedly throwing rocks at officers.[322] That same year, Pablo Perez Santillan was also fatally shot while standing on the bank of the Rio Grande.[323] All incidents involved decedents who were allegedly standing in Mexican territory and unarmed.[324] These incidents show that Hernández's death was not an isolated event. Rather, there

[318] *Id.*

[319] *Id.*

[320] Melissa Del Bosque, *U.S. Border Patrol Agent Fatally Shoots Man Across Border*, TEX. OBSERVER (Aug. 30, 2012, 6:58 PM CDT), https://www.texasobserver.org/us-border-patrol-agent-fatally-shoots-man-across-border/ [https://perma.cc/Q5L3-38NZ].

[321] Chuck Levitan, *Death on the Border*, SAN DIEGO READER (June 29, 2011), https://www.sandiegoreader.com/weblogs/fulano_de_tal/2011/jun/29/death-on-the-border/ [https://perma.cc/M7VZ-PA7T].

[322] Rory Carroll, *Border Patrol Agent Found Not Guilty of Murder in Mexican Teen's 2012 Death*, GUARDIAN (Apr. 24, 2018, 1:51 PM ET), https://www.theguardian.com/us-news/2018/apr/23/border-patrol-shooting-jose-antonio-elena-rodriguez-lonnie-swartz [https://perma.cc/WA2X-5YUJ].

[323] Del Bosque, *supra* note 320.

[324] *See* Melissa Del Bosque, *Are U.S. Agents Who Shoot Mexicans Across the Border Above the Law?*, TEX. OBSERVER (Oct. 22, 2012, 7:47 PM CDT), https://www.texasobserver.org/lawsuit-could-grant-constitutional-protections-to-mexicans-shot-on-mexican-side-of-the-border-fence/ [https://perma.cc/Q3LQ-92XG].

appears to be a pattern of Border Patrol agents who shoot across the Mexican border and kill unarmed persons, many of whom are children. Under the *Egbert* majority's conclusion concerning Border Patrol agents generally, there likely is no constitutional torts remedy for these killings.

In addition to the uses of deadly force, there have been other documented allegations of serious abuse and misconduct committed by Border Patrol agents, which one scholar characterized as "widespread."[325] While some of these cases involved noncitizens who were targeted while attempting to cross the border, others, like Hernández, did not.[326] According to findings from one study, the allegations included verbal, physical, and sexual abuse.[327] Specific reported allegations of conduct by Border Patrol agents that warranted an investigation by the agency included the commission of the following conduct: kicking during apprehension causing miscarriage; kicking an already handcuffed person; physically beating with a baton and pepper spraying a person; unconsented, inappropriate touching; calling a person "faggot and homo" during a strip search; and stomping on the back of a person already on the ground after arrest.[328] The study also found that between 2009 and 2012, over 800 such complaints were made with the agency.[329] Yet, the agency took no action against the individual officers in ninety-seven percent of the complaints that resulted in a formal decision.[330] Furthermore, most of these cases did not result in a criminal prosecution of the offending agent.[331] Under the *Egbert*

[325] *See* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1124-40 (2008).

[326] *See* Brief for Petitioners at 1-2, *Hernández II*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3854462 [hereinafter Brief for Petitioners].

[327] MARTÍNEZ ET AL., *supra* note 22, at 1.

[328] *Id.* at 5.

[329] *Id.* at 1.

[330] *Id.*

[331] *See* Andrea Flores & Shaw Drake, *Border Patrol Violently Assaults Civil Rights and Liberties*, AM. C.L. LIBERTIES UNION (July 24, 2020), https://www.aclu.org/news/immigrants-rights/border-patrol-violently-assaults-civil-rights-and-liberties [https://perma.cc/U92R-L24W].

majority's conclusion concerning Border Patrol agents generally, there likely is no constitutional torts remedy for such abuses.

Without the real prospect of agency discipline or criminal prosecution, civil liability under *Bivens* remains an important — and sometimes the only — option for redress.[332] The Court's decision to do nothing imposes costs beyond the lack of a remedy for the victims. Without the threat of, and real exposure to, administrative, civil, and criminal penalty, the law's aim of deterring unconstitutional conduct will not be achieved, as neither the agency nor the individual officers will be incentivized to change their behavior. Indeed, that undercuts an important animating principle underlying *Bivens* liability — its deterrent effect.[333] Unlike a suit against the government under the Federal Tort Claims Act ("FTCA"), a claim under *Bivens* is an individual-capacity suit against the officer. As an individual-capacity suit, *Bivens* liability can justify the imposition of possible punitive damages, not just for its retributive effect, but more importantly for its deterrent one.[334]

2. To Citizens

The Court's potential exclusion of the *Bivens* remedy at the border would have far-reaching effects that extend beyond the border and noncitizens. It could reach citizens, within the U.S. and independent of the border context, who for decades have relied on the *Bivens* remedy to redress Fourth Amendment violations for unreasonable uses of force during an arrest or detention. First, it is important to note that Border Patrol agents possess the legal authority to act beyond the confines of the border. For example, certain agents are authorized to conduct

[332] *See Hernández II*, 140 S. Ct. 735, 760 (2020) (Ginsburg, J., dissenting).

[333] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70-71 (2001) ("*Bivens* . . . is concerned solely with deterring the unconstitutional acts of individual officers."); Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 SAINT JOHN'S L. REV. 713, 722 (2014) (noting the deterrence effect of the remedy).

[334] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (contrasting compensatory damage awards with punitive damage awards, which have broader retributive and deterrence effect); *cf.* Benjamin C. Zipursky, *Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005) (developing theory of punitive damages in the civil context as related to the plaintiff's right to be punitive, rather than the system's need for it).

searches and make warrantless arrests up to 100 miles away from it.[335] The wide latitude courts have traditionally given to law enforcement efforts at the border relies on the link between border security on the one hand and national security and sovereignty on the other, but that same latitude is extended beyond the border context where the connection to national security and sovereignty is more tenuous.

Moreover, outside the border context, immigration enforcement encounters are more likely to include U.S. citizens, in addition to noncitizens. Border Patrol agents' use of force authority is both derived from, and independent of, immigration laws. The INA specifically empowers certain immigration officers to "make arrests" for "any offense against the United States . . . if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such [offense]" while performing duties related to enforcing immigration laws.[336] Under this statutory subsection, an immigration officer, away from the border, can arrest and detain for a non-immigration-related criminal violation a U.S. citizen who may be swept up as part of a broader immigration-related investigation or enforcement. Indeed, that scenario is not merely hypothetical as the reality of today's law enforcement efforts can involve both personnel and goals that are broader than immigration enforcement. For example, in the federal government, the FBI's Joint Terrorism Task Force ("JTTF") comprises members from not only the FBI, but also numerous other law enforcement and intelligence agencies, including the immigration agencies.[337] Such cross-agency cooperation also extends to state and local law enforcement agencies and personnel. The Attorney General can deputize state and local officials to perform immigration enforcement activities.[338] During the course of such coordinated inter-agency law enforcement efforts, a U.S. citizen may encounter constitutional violations while being investigated, arrested, or detained.

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[335] 8 U.S.C. § 1357(a); 8 C.F.R. § 287.1(a)(2) (2023).

[336] 8 U.S.C. § 1357(a)(5)(A)-(B).

[337] *Joint Terrorism Task Force*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/partnerships-centers/jttf (last visited Sept. 12, 2023) [https://perma.cc/DZ34-S5QE].

[338] 8 U.S.C. § 1357(g)(1).

Indeed, constitutional torts do arise in a context wholly divorced from and unrelated to immigration-related enforcement. For decades and prior to *Iqbal*, courts have endorsed the *Bivens* remedy for alleged constitutional violations during an arrest and detention — where the rationales of sovereignty, national security, and danger that have animated the immigration context and upon which the Court relied to erode the *Bivens* remedy there[339] were and still remain inapposite.

The Court itself has recognized immigration enforcement's adverse spill-over effect onto U.S. citizens in another legal context, when it considered a challenge to four provisions of Arizona's Senate Bill 1070, a law designed to decrease and deter unlawful immigration. Section 2B of that law required state and local police to make a reasonable attempt to verify the immigration status of the person they had stopped, detained, or arrested if they had reasonable suspicion the person was unlawfully present in the U.S.[340] That section was challenged under the Equal Protection Clause for its potential to result in unlawful racial profiling of U.S. citizens and lawful permanent residents since the likely basis for the stop or arrest would be race or national origin.[341] The Court refused to strike down the law because the law itself specified that officers may not consider race, color, or national origin in enforcing the law, but recognized the law's potential problem and left the door open to a possible as-applied challenge in the future.[342] Similarly here, the spill-over effects onto citizens of the erosion of the *Bivens* remedy could extend beyond the immigration enforcement context. It could encompass the routine encounters between citizens and federal officers that have occurred and will continue to occur. It could encompass the factual situation in *Bivens* where the officer employed unreasonable use of force during an arrest and search of a citizen — precisely the situation for which the Court recognized the need for the remedy in the first place. And it could encompass an officer's use of deadly force against an unarmed U.S. citizen — a tragedy that has become much too common and may become more widespread without a *Bivens* remedy to deter it.

339 *See supra* Part II.

340 Arizona v. United States, 567 U.S. 387, 394 (2012).

341 Valle del Sol v. Whiting, No. CV-10-1061, 2012 WL 8021265, at *2 (D. Ariz. Sept. 5, 2012).

342 *Arizona*, 567 U.S. at 411-15.

## CONCLUSION

This Article has contextualized the recent transformation of the U.S. Supreme Court's constitutional tort jurisprudence within immigration law and its animating principles. I have exposed how *Bivens*'s recent effective demise has occurred primarily in cases involving immigrants or immigration-related matters. I have argued that it was precisely within that factual context that the Court systematically dismantled what was left of the doctrine, rendering the remedy effectively dead. I have shown that it did so, in part, by relying on the false immigrant narratives of immigrant as terrorist, immigrant as danger, and immigrant as foreign — the same three false narratives that have also driven significant developments in U.S. immigration law for over a century.

The consequences are significant. For the law, I have uncovered the hidden connections between constitutional torts and immigration law. For the person, the effective demise of *Bivens* likely means that constitutional violations may go unremedied, particularly for noncitizens under the majority's conclusion in *Egbert* that seemingly immunizes the conduct of Border Patrol agents. While immigrants, and the false narratives about them, have contributed to the erosion of *Bivens*, the consequences are born by both citizens and noncitizens alike — both of whom stand at a greater risk of constitutional torts, at the border and beyond.