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U.S. Supreme Court Again Declines to Expand *Bivens* Civil Rights Remedy

❖ Introduction

The U.S. Supreme Court, in a 5-4 opinion in *Hernandez v. Mesa*, #17-4678, 140 S. Ct. 735, 206 L. Ed. 2d 29, 2020 U.S. Lexis 1361, 2020 WL 889193, declined to extend the *Bivens* remedy (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, #301, 403 U.S. 488 (1971)) for civil rights violations by federal employees to the context of a shooting and killing by a U.S. Border Patrol Agent, standing on U.S. soil near the border with Mexico of a Mexican boy standing on Mexican soil. This was only the latest of a string of cases in which the Court, having first judicially created the *Bivens* remedy, has declined to expand it any further.

This article takes a look at the facts of the case, at the reasoning of the Court's ruling, at the background and history of *Bivens*, and at the rare opportunity that what some of the Justices wrote in *Hernandez* provides us to see what some on the Court are considering about the possible future, or lack thereof, of the *Bivens* line of cases. At the end of the article, there is a brief listing of some relevant resources and references.

❖ Facts of the Case

Sergio Adrián Hernández Güereca, a 15-year-old Mexican citizen, was with a group of friends in a concrete culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico. The border with the U.S. runs through the center of the culvert, which was designed to hold the waters of the Rio Grande River but is now largely dry.

Border Patrol Agent Jesus Mesa, Jr., detained one of Hernández's friends who had run onto the United States' side of the culvert. After Hernández, who was also on the United States' side, ran back across the culvert onto Mexican soil, Agent Mesa fired two shots at Hernández. One of these shots struck and killed him on the other side of the border.

The child's parents, who filed suit, and Agent Mesa disagreed about what Hernández and his friends were doing at the time of shooting. According to the plaintiffs, they were simply playing a child's game, running across the culvert, touching the fence on the U. S. side, and then running back across the border.

According to Agent Mesa, on the other hand, Hernández and his friends were involved in an illegal border crossing attempt, and they pelted him with rocks.

The shooting quickly became an international incident, with the United States and Mexico disagreeing about how the matter should be handled. On the United States' side, the Department of Justice conducted an investigation. When it finished, the Department, while expressing regret over Hernández's death, concluded that Agent Mesa had not violated Customs and Border Patrol policy or training, and it declined to bring charges or take other action against him.

Mexico was not and is not satisfied with the U. S. investigation. It requested that Agent Mesa be extradited to face criminal charges in a Mexican court, a request that the United States has denied.

Hernández's parents were also dissatisfied and therefore brought a civil lawsuit for damages in the United States District Court for the Western District of Texas. Among other claims, they sought recovery of damages under ***Bivens***, alleging that Mesa violated Hernández's Fourth and Fifth Amendment rights.

❖ **U.S. Supreme Court Ruling**

The U.S. Supreme Court declined to extend *Bivens v. Six Unknown Fed. Narcotics Agents*, #301, 403 U. S. 388 (1971), and create a damages remedy for a cross-border shooting. The majority opinion, authored by Justice Alito, noted that the "Constitution's separation of powers requires us to exercise caution before extending Bivens to a new 'context,' and a claim based on a cross-border shooting arises in a context that is markedly new. Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications." Further, Congress has been "notably hesitant" to create claims based on allegedly tortious conduct abroad.

Expansion of *Bivens* to recognize causes of action not expressly created by Congress, the Court stated, is "a disfavored' judicial activity." While the *Bivens* claims in this case were based on the same constitutional provisions as claims in cases in which damages remedies have been previously recognized, the Fourth and Fifth Amendment, the context—a cross-border shooting—is significantly different and involves a "risk of disruptive intrusion by the Judiciary into the functioning of other branches." The Court stated that foreign relations are "so exclusively entrusted to the political branches . . . as to be largely immune from judicial inquiry" and pointed to the risk of undermining border security.

Congress has "repeatedly declined," the Court reasoned, to authorize the award of damages against federal officials for injury inflicted outside U. S. borders. When Congress has provided compensation for such injuries, it has done it by empowering Executive Branch officials to make payments under "appropriate circumstances."

The Court found that "[o]ur reluctance to take that step [expanding *Bivens*] is reinforced by our survey of what Congress has done in statutes addressing related matters," including the "leading example" of 42 U. S. C. §1983, which permits the recovery of damages for constitutional violations by officers acting under color of state law. Congress chose to make §1983 available only to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." The plaintiffs in the immediate case, therefore, could not sue under 42 U.S.C. Sec. 1983 had the shooter

of a Mexican national standing on Mexican soil been a city or state law enforcement officer rather than a federal agent.

The Court also noted that "we recognized the continuing viability of state-law tort suits against federal officials as recently as Westfall v. Erwin, 484 U. S. 292 (1988). In response to that decision, Congress passed the so-called Westfall Act, formally the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U. S. C. §2679." That Act made the Federal Tort Claims Act (FTCA) "the exclusive remedy for most claims against federal government employees arising out of their official conduct, but it explicitly bars "[a]ny claim arising in a foreign country." §2680(k).

[For more discussion of the Federal Tort Claims Act (FTCA) see Civil Liability of U.S. Government Under the Federal Tort Claims Act For Actions of Federal Law Enforcement Officers – Part 1 of 2, 2020 (3) AELE Mo. L.J. 101 And Civil Liability of U.S. Government Under the Federal Tort Claims Act For Actions of Federal Law Enforcement Officers – Part 2 of 2, 2020 (4) AELE Mo. L.J. 10].

In reaching the result in this case, the Court briefly examined the history of the development of the *Bivens* civil rights remedy and how its approach to *Bivens* has changed over the years.

❖ Background of Bivens

In *Bivens v. Six Unknown Fed. Narcotics Agents*, #301, 403 U. S. 388 (1971), the U.S. Supreme Court "broke new ground" by ruling that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible federal agents even though no federal statute authorized such a claim. The Court subsequently extended *Bivens* to cover two additional constitutional claims,

In *Davis v. Passman*, #73-6072, 442 U. S. 228 (1979), a former congressional staffer's Fifth Amendment claim of dismissal based on sex, and in *Carlson v. Green*, #78-1261, 446 U. S. 14 (1980), a federal prisoner's Eighth Amendment claim for failure to provide adequate medical treatment were both recognized as claims that could be remedied under Bivens.

After those three decisions, however, the U.S. Supreme Court changed course. *Bivens*, *Davis*, and *Carlson*, as Alito's majority decision noted, "were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated."

During that era, the Court "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose . . . . Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself."

In later years, the opinion continues, "we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power. The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only 'judicial power.' Art. III, §1. But when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power."

The opinion further notes that since *Erie R. Co. v. Tompkins*, #367, 304 U. S. 64, 78 (1938) "[t]here is no federal general common law," and therefore federal courts today cannot fashion new claims in the way that they could before 1938.

With the demise of federal general common law, a federal court's authority to recognize a damages remedy "must rest at bottom on a statute enacted by Congress." Bivens did not rest on any such statute, and it is now 40 years since the remedy first created by *Bivens* was last further extended by the U.S. Supreme Court. The opinion lists nine other Supreme Court cases in the intervening years in which the Court has declined to extend *Bivens* to new claims. There are no cases during the same time period reaching the opposite result.

❖ A Future for *Bivens*?

The issue in *Hernandez* was whether *Bivens* should be extended to apply to the new unique circumstances of a cross-border shooting. The issue of whether *Bivens* was still good law or should be overruled as wrongly decided was not a question presented, and accordingly was not briefed or argued.

Yet Justice Thomas, in a concurrence in the case joined by Justice Gorsuch, argued just that—that Bivens was wrongly decided to begin with and that it should be overruled and abandoned. In raising this, some have suggested, the two Justices essentially issued a public invitation to someone to please present and argue that issue in a subsequent case.

The two Justices concurred with the result reached in the immediate case, but would go farther, arguing that "the time has come to consider discarding the ***Bivens*** doctrine altogether." The foundation for Bivens—the practice of creating implied causes of action in the statutory context—"has already been abandoned," Thomas stated. Prior cases declining to extend Bivens have on a number of occasions seemed to suggest that Bivens and the cases that followed it "were wrongly decided."

Relying on stare decisis to avoid overturning a prior precedent, they suggested, might amount to perpetuating "a usurpation of the legislative power,"

In ***Bivens***, Justice Thomas noted, the "Court acknowledged that Congress had not provided a statutory cause of action for damages against federal officers and that **'**the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages.'"

Subsequently, the Court's approach has been that "private rights of action to enforce federal law must be created by Congress," while the "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Without such intent, the Justices argued, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."

"Thus, it appears that we have already repudiated the foundation of the Bivens doctrine; nothing is left to do but overrule it."

Even more troubling, it was suggested, Congress has "demonstrated that it knows how to create a cause of action to recover damages for constitutional violations when it wishes to do so," as 42 U. S. C. §1983, provides a cause of action that allows persons to recover damages for certain deprivations of constitutional rights by state and local officers, yet Congress has never attempted to amend Sec. 1983 to also apply to federal employees.

The concurrence calls into question the stability of the principles established in Bivens, and much of the concurrence's reasoning is implicitly supported by the section of the majority opinion examining the history and reasoning of *Bivens* and how the Court's approach to it has altered over the past 40 years.

❖ Resources

The following are some useful resources related to the subject of this article.

- Bivens v. Six Unknown Named Agents. Wikipedia article.
- Federal Tort Claims Act. AELE Civil Case Summaries.

❖ Relevant Monthly Law Journal Articles

- Civil Liability of U.S. Government Under the Federal Tort Claims Act For Actions of Federal Law Enforcement Officers – Part 1 of 2, 2020 (3) AELE Mo. L.J. 101.
- Civil Liability of U.S. Government Under the Federal Tort Claims Act For Actions of Federal Law Enforcement Officers – Part 2 of 2, 2020 (4) AELE Mo. L.J. 101.

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