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SCOTUS Sharply Limits Bivens Claims—and Hints at Further Retrenchment

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By Cassandra Robertson

The U.S. Supreme Court's recent decision in *Hernandez v. Mesa* raises significant questions about the future of civil-rights remedies against federal officials.

Nearly half a century ago, the Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* that plaintiffs could seek civil damages against federal officers for the violation of their Fourth Amendment rights. Within the next decade, the Court subsequently extended a *Bivens* remedy to the violations of Fifth and Eighth Amendment rights.

More recently, however, the Court has expressed its reluctance to further extend *Bivens* remedies. In 2017, the Court concluded in *Zigler v. Abbasi* that *Bivens* and its progeny were decided at a time "when the prevailing law assumed that a proper judicial function" was to create remedies to enforce statutes. The current Court, however, "has since adopted a far more cautious course," choosing instead to defer to legislative drafters. In *Abbasi*, the Court reconciled those positions by continuing to recognize that "*Bivens* is well settled law in its own context," but that "expanding the Bivens remedy is now considered a

'disfavored' judicial activity." Thus, the Court held that *Bivens* remedies would not be allowed either in a "new context" or where there are other factors "counselling hesitation."

No *Bivens* Remedy for Cross-Border Shooting

The Court had the opportunity to apply that standard in *Hernandez v. Mesa*. The case arose on the Texas-Mexico border, where a 15-year-old boy was playing with his friends, "running up the embankment on the United States side, touching the barbed-wire fence, and running back down to the Mexican side." A border-patrol agent stopped one of the boys on the U.S. side, and the other ran back to the Mexican side. The agent then fired his weapon across the border, killing the boy in Mexico. His parents brought a *Bivens* claim against the officer.

In a 5-4 opinion authored by Justice Alito, the Court affirmed the dismissal of the family's claim. The Court concluded that the cross-border context of the action was a "new context," and that additional factors counselled hesitation—including the potential effect on foreign relations, the risk of undermining border security, and the fact that Congress has "repeatedly declined" to create remedies for harm occurring outside the United States.

Justice Ginsburg authored the dissenting opinion. The dissent disputed that the cross-border nature of the claim was a "new context"; instead, the case dealt with a Fourth Amendment violation very similar to that found in *Bivens* itself. Even though the officer's bullet hit a child on the Mexican side of the border, the officer's own action took place in the United States—and, Justice Ginsburg pointed out, the Supreme Court had acknowledged in *Abbasi* that, "the purpose of *Bivens* is to deter the *officer*."

The dissent also disagreed that other factors should counsel hesitation. Justice Ginsburg noted that the shooting arose from "the rogue actions of a rank-and-file law enforcement officer acting in violation of rules controlling his office," and that recognizing a civil claim would honor "our Nation's international

commitments" under the International Covenant of Civil and Political Rights. The dissent further warns against an overly broad definition of "national security," stating that national security "must not become a talisman used to ward off inconvenient claims" or act as cover for the "unjustified killing" at issue in the case. Finally, the dissent notes that although Congress has not specifically adopted a damages remedy, it has also never "endeavored to dislodge" the *Bivens* remedy.

Life after *Bivens*

The majority opinion's very narrow approach to *Bivens* suggests that the Court has already largely limited *Bivens* to its particular factual context. The ruling doesn't bode well for future claims, as almost any case can be distinguished on its facts.

A concurrence joined by Justices Thomas and Gorsuch recognizes that the Court has already largely gutted *Bivens*, writing that the Court has "cabined the doctrine's scope, undermined its foundation, and limited its precedential value." The concurring Justices would therefore go a step further and "abandon the doctrine altogether."

With two justices willing to eliminate *Bivens* claims and three who would largely limit it to its facts, it seems clear that plaintiffs can no longer rely on *Bivens* to offer a remedy for violations of constitutional rights. If so, what comes next?

One possibility, of course, is that Congress acts to create liability for federal officers. Even those who have proposed such action, however, have recognized that "the likelihood of enactment is small." Even if Congress were to consider such a bill, it seems highly unlikely that Congress would act without a formal overruling of *Bivens*.

Another intriguing possibility is the idea of reviving state claims against rogue federal officers. University of Chicago professor Will Baude says that such suits were allowed in earlier eras, writing: "I think at this point we're entitled to wonder, if the Court is going to abolish the 20th century remedies for unconstitutional conduct, can we at least have the 19th century remedies back?"

Given the current state of affairs, however, there is significant concern that plaintiffs will find themselves without an effective remedy in future cases. An amicus brief from the Institute of Justice warns that abandoning *Bivens* would undermine "Founders' vision of the Constitution," by allowing damages "constitutional violations go unaddressed." Justice Ginsburg's dissent similarly quotes the petitioner's argument that "to redress injuries like the one suffered here, it is *Bivens* or nothing," noting that she "resist[s] the conclusion that 'nothing' is the answer required in this case."

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