AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Due Process and Habeas Corpus/Due Process/Excessive Force

**Hernandez v. Mesa, \_\_\_ U.S. \_\_\_** (2020)

*Sergio Adrian Hernandez Guereca, a fifteen year old citizen of Mexico, was playing with friends on a culvert that separated El Paso, Texas from Ciudad Juarez, Mexico. Jesus Mesa, Jr., a United States Border Patrol Agent, thought Guereca was trying to enter the United States illegally and fired several shots which killed Guereca. After the United States refused to prosecute Mesa and refused a Mexican request to extradite Mesa for trial in Mexico, Jesus Hernandez filed a lawsuit for damages against Mesa. He claimed that Mesa had violated his son’s Fourth and Fifth Amendment rights and that he was entitled to damages under* Bivens v. Six Unknown Fed. Narcotics Agents *(1971).* *That precedent entitles persons to damages in certain instances when federal officials have violated their constitutional rights. A lower federal court dismissed the suit and that dismissal was affirmed by the Court of Appeals for the First Circuit. After the Supreme Court remanded the case, the Court of Appeals again affirmed the dismissal. Hernandez appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote affirmed the decision of the Fifth Circuit. Justice Samuel Alito’s majority opinion held that* Bivens *actions should not normally be expanded, that the facts of* Hernandez *differed from the facts of* Bivens*, and that reasons existed for not expanding Bivens to cases when a federal agent is accused to a tort against a foreign national. How did Alito distinguish* Hernandez *from* Bivens? *Why does Justice Ginsburg disagree? Who has the better of that argument? What virtues does Ginsburg see in* Bivens *actions? Why is the majority skeptical? Are* Bivens *actions important means for protecting constitutional rights or do they infringe on the separation of powers. Given Alito’s skepticism of* Bivens *actions, why did the majority not join Justice Thomas and overrule the case?*

JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01) delivered the opinion of the Court.

. . . . [T] the Constitution's separation of powers requires us to exercise caution before extending *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) into this new field.

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In *Bivens v. Six Unknown Fed. Narcotics Agents* the Court broke new ground by holding 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 agents even though no federal statute authorized such a claim. . . . [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [was] the product[] 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.

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In later years, 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.” 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. No law “‘pursues its purposes at all costs.’”  Instead, lawmaking involves balancing interests and often demands compromise. Thus, a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages. For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.

This problem does not exist when a common-law court, which exercises a degree of lawmaking authority, fleshes out the remedies available for a common-law tort. But *Erie R. Co. v. Tompkins* (1938), held that “[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, and no statute expressly creates a [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) remedy. Justice Harlan's [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concurrence argued that this power is inherent in the grant of federal question jurisdiction, but our later cases have demanded a clearer manifestation of congressional intent.

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In constitutional cases, we have been at least equally reluctant to create new causes of action. We have recognized that Congress is best positioned to evaluate “whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government” based on constitutional torts.  We have stated that expansion of *Bivens* is “a ‘disfavored’ judicial activity,” and have gone so far as to observe that if “the Court's three [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) cases [had] been ... decided today,” it is doubtful that we would have reached the same result. . . .

When asked to extend [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we engage in a two-step inquiry. We first inquire whether the request involves a claim that arises in a “new context” or involves a “new category of defendants.” . . . When we find that a claim arises in a new context, we proceed to the second step and ask whether there are any “‘“special factors [that] counse[l] hesitation”’” about granting the extension.  If there are — that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants — we reject the request.

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The [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) claims in this case assuredly arise in a new context. . . . A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized. . . . *Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City; [*Davis*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979135133&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concerned alleged sex discrimination on Capitol Hill. There is a world of difference between those claims and petitioners' cross-border shooting claims, where “the risk of disruptive intrusion by the Judiciary into the functioning of other branches” is significant.

Because petitioners assert claims that arise in a new context, we must proceed to the next step and ask whether there are factors that counsel hesitation. As we will explain, there are multiple, related factors that raise warning flags.

The first is the potential effect on foreign relations. “The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” . . . “Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in [these matters].” . . .

A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests. Such an incident may lead to a disagreement between those countries, as happened in this case.

The United States, through the Executive Branch, which has “ ‘the lead role in foreign policy,’ ” *Medellín v. Texas* (2008), has taken the position that this incident should be handled in a particular way—namely, that Agent Mesa should not face charges in the United States nor be extradited to stand trial in Mexico. . . . The Government of Mexico has taken a different view of what should be done. It has requested that Agent Mesa be extradited for criminal prosecution in a Mexican court under Mexican law, and it has supported petitioners' [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) suit. . . .

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In the absence of judicial intervention, the United States and Mexico would attempt to reconcile their interests through diplomacy—and that has occurred. The broad issue of violence along the border, the occurrence of crossborder shootings, and this particular matter have been addressed through diplomatic channels. In 2014, Mexico and the United States established a joint Border Violence Prevention Council, and the two countries have addressed cross-border shootings through the United States-Mexico bilateral Human Rights Dialogue. . . .

Petitioners are similarly incorrect in deprecating the Fifth Circuit's conclusion that the issue here implicates an element of national security.

One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task. The United States' border with Mexico extends for 1,900 miles, and every day thousands of persons and a large volume of goods enter this country at ports of entry on the southern border. The lawful passage of people and goods in both directions across the border is beneficial to both countries.

Unfortunately, there is also a large volume of illegal cross-border traffic. . . . On the United States' side, the responsibility for attempting to prevent the illegal entry of dangerous persons and goods rests primarily with the U.S. Customs and Border Protection Agency, and one of its main responsibilities is to “detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States.” . . . For these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security, as the Fifth Circuit understood.

. . . . We have declined to extend [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) where doing so would interfere with the system of military discipline created by statute and regulation, and a similar consideration is applicable here. Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) into this field.

Our reluctance to take that step is reinforced by our survey of what Congress has done in statutes addressing related matters. . . . When foreign relations are implicated, it “is even more important ... ‘to look for legislative guidance before exercising innovative authority over substantive law.’ ” Accordingly, it is “telling” that Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders.

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[Section 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s express limitation to the claims brought by citizens and persons subject to United States jurisdiction is especially significant, but even if this explicit limitation were lacking, we would presume that [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) did not apply abroad. We presume that statutes do not apply extraterritorially to “ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” If this danger provides a reason for caution when Congress has enacted a statute but has not provided expressly whether it applies abroad, we have even greater reason for hesitation in deciding whether to extend a judge-made cause of action beyond our borders. . . . Where Congress has not spoken at all, the likelihood of impinging on its foreign affairs authority is especially acute.

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When Congress has enacted statutes creating a damages remedy for persons injured by United States Government officers, it has taken care to preclude claims for injuries that occurred abroad. Instead, when Congress has provided compensation for injuries suffered by aliens outside the United States, it has done so by empowering Executive Branch officials to make payments under circumstances found to be appropriate. . . . This pattern of congressional action—refraining from authorizing damages actions for injury inflicted abroad by Government officers, while providing alternative avenues for compensation in some situations—gives us further reason to hesitate about extending [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in this case.

In sum, this case features multiple factors that counsel hesitation about extending [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,*but they can all be condensed to one concern—respect for the separation of powers. “Foreign policy and national security decisions are ‘delicate, complex, and involve large elements of prophecy’ for which ‘the Judiciary has neither aptitude, facilities[,] nor responsibility.’ ”  To avoid upsetting the delicate web of international relations, we typically presume that even congressionally crafted causes of action do not apply outside our borders. These concerns are only heightened when judges are asked to fashion constitutional remedies. Congress, which has authority in the field of foreign affairs, has chosen not to create liability in similar statutes, leaving the resolution of extraterritorial claims brought by foreign nationals to executive officials and the diplomatic process.

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When evaluating whether to extend [*Bivens,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the most important question “is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts?” The correct “answer most often will be Congress.” That is undoubtedly the answer here.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01) joins, concurring.

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. . . [T]he time has come to consider discarding the *Bivens*doctrine altogether. The foundation for [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—the practice of creating implied causes of action in the statutory context—has already been abandoned. And the Court has consistently refused to extend the *Bivens*doctrine for nearly 40 years, even going so far as to suggest that [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and its progeny were wrongly decided. *Stare decisis* provides no “veneer of respectability to our continued application of [these] demonstrably incorrect precedents.” . . .

“ ‘[*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is a relic of the heady days in which this Court assumed common-law powers to create causes of action.’ ” . . . This misguided approach to implied causes of action in the statutory context formed the backdrop of the Court's decision in [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). There, the Court held that federal officers who conducted a warrantless search and arrest in violation of the Fourth Amendment could be sued for damages.  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.”  But it concluded, consistent with the then-prevailing understanding of implied causes of action in the statutory context, that federal courts could infer such a “remedial mechanism.”

. . . . From the ratification of the Bill of Rights until 1971, the Court did not create “implied private action[s] for damages against federal officers alleged to have violated a citizen's constitutional rights.” . . . . [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) thus opened the door to a new avenue for recovering damages from federal officers. . . . The Court, however, eventually corrected course. In the statutory context, the Court “retreated from [its] previous willingness to imply a cause of action where Congress has not provided one.” . . . “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, “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.”

. . . . For nearly 40 years, the Court has “‘consistently refused to extend *Bivens*liability to any new context or new category of defendants.’” In doing so, our decisions have undermined the validity of the *Bivens*doctrine. . . . And we have now repeatedly acknowledged the shaky foundation on which [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rests. . . . Thus, it appears that we have already repudiated the foundation of the *Bivens*doctrine; nothing is left to do but overrule it.

Our continued adherence to even a limited form of the [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) doctrine appears to “perpetuat[e] a usurpation of the legislative power.”  Federal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law. . . . I see no reason for us to take a different approach if the right asserted to recover damages derives from the Constitution, rather than from a federal statute. . . . This usurpation of legislative power is all the more troubling because 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. In [42 U.S.C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Congress provided a cause of action that allows persons to recover damages for certain deprivations of constitutional rights by *state officers*. Congress has chosen not to provide such a cause of action against *federal officers*. In fact, it has pre-empted the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers.  “[I]t is not for us to fill any *hiatus* Congress has left in this area

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JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01), with whom JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01), JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01), and JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I975640ad57c411eabf0f8b3df1233a01) join, dissenting.

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. . . . Rogue U.S. officer conduct falls within a familiar, not a “new,” *Bivens*setting. Even if the setting could be characterized as “new,” plaintiffs lack recourse to alternative remedies, and no “special factors” counsel against a [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) remedy. Neither U.S. foreign policy nor national security is in fact endangered by the litigation. Moreover, concerns attending the application of our law to conduct occurring abroad are not involved, for plaintiffs seek the application of U.S. law to conduct occurring inside our borders. I would therefore hold that the plaintiffs' complaint crosses the [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) threshold.

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The plaintiff in *Bivens*alleged that, during an unjustified search of his home, rogue federal law enforcement officers unlawfully seized him, employing “unreasonable force ... in making the arrest.”  This Court afforded him a federal damages remedy against the federal agents who had disregarded the Fourth Amendment's prohibitions against unreasonable searches and seizures. The Court did so directly under the Constitution, for Congress had provided no statutory claim for relief to redress the wrongful conduct. “Historically,” the Court observed, “damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”  Given the circumstances presented in [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court found “no special factors counselling hesitation [despite] the absence of affirmative action by Congress Justice Harlan concurred in the judgment, emphasizing that damages were “the only possible remedy for someone in [the plaintiff 's] alleged position.”

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Concerning future invocations of [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), *Ziglar v. Abbasi* (2017) provided several guides. On whether a case presents a new [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) context, the Court stated: “If the case is different in a meaningful way from previous [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) cases decided by this Court, then the context is new.”  And on whether to extend [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) to a new context, *Abbasi*identified as the critical inquiry: Is “the Judiciary ... well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed”? While reining in this Court's *Bivens*jurisprudence, the Court cautioned in *Abbasi* that its “opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens*in the search-and-seizure context in which it arose.” . . . The Court also reiterated that suits against “the *individual* official for his or her own acts” deter behavior incompatible with constitutional norms, a consideration key to the [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) decision.  “[I]ndividual instances of ... law enforcement overreach,” the Court recognized, are by “their very nature ... difficult to address *except* by way of damages actions after the fact.”

Plaintiffs' [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) action arises in a setting kin to [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself: Mesa, plaintiffs allege, acted in disregard of instructions governing his conduct and of Hernández's constitutional rights. *Abbasi*acknowledged the “fixed principle” that plaintiffs may bring [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) suits against federal law enforcement officers for “seizure[s]” that violate the Fourth Amendment.  Using lethal force against a person who “poses no immediate threat to the officer and no threat to others” surely qualifies as an unreasonable seizure. . . .

The only salient difference here: the fortuity that the bullet happened to strike Hernández on the Mexican side of the embankment. But Hernández's location at the precise moment the bullet landed should not matter one whit. After all, “[t]he purpose of *Bivens* is to deter the*officer*.”  . . . [A]lthough the bullet happened to land on the Mexican side of the culvert, the United States, as in [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), unquestionably has jurisdiction to prescribe law governing a Border Patrol agent's conduct. That prescriptive jurisdiction reaches “conduct that ... takes place within [United States] territory.” . . .

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It was “of central importance” to the Court's disposition in *Abbasi* that the case was “[un]like [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) ... in which ‘it [was] damages or nothing.’ ” Here . . . “[i]t is uncontested that plaintiffs find no alternative relief in Mexican law, state law, the Federal Tort Claims Act (‘FTCA’), the Alien Tort Statute (‘ATS’), or federal criminal law.” . . .

The special factors featured by the Court relate, in the main, to foreign policy and national security. But, as suggested earlier, see *supra*, at 756, no policies or policymakers are challenged in this case. Plaintiffs target the rogue actions of a rank-and-file law enforcement officer acting in violation of rules controlling his office. . . . True, cross-border shootings spark bilateral discussion, but so too does a range of smuggling and other border-related issues that courts routinely address “concurrently with whatever diplomacy may also be addressing them.”  The Government has identified no deleterious effect on diplomatic negotiations in any case after the Ninth Circuit held that the mother of a boy killed in a cross-border shooting could institute a [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) action.

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[R]ecognizing a *Bivens*suit here honors our Nation's international commitments. Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR) provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” The United States ratified the ICCPR with the “understandin[g]” that Article 9(5) “require[s] the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity.” One fitting mechanism to obtain compensation is a *Bivens*action.

The Court also asserts, as cause for hesitation, “the risk of undermining border security.”  But the Court speaks with generality of the national-security involvement of Border Patrol officers. It does not home in on how a *Bivens*suit for an unjustified killing would in fact undermine security at the border. . . .

Congress, although well aware of the Court's opinion in [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), has not endeavored to dislodge the decision. . . .

Regrettably, the death of Hernández is not an isolated incident. . . . One report reviewed over 800 complaints of alleged physical, verbal, or sexual abuse lodged against Border Patrol agents between 2009 and 2012; in 97% of the complaints resulting in formal decisions, no action was taken. According to *amici*former Customs and Border Protection officials, “the United States has not extradited a Border Patrol agent to stand trial in Mexico, and to [*amici*'s] knowledge has itself prosecuted only one agent in a cross-border shooting.” These *amici* warn that, “[w]ithout the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border.” In short, it is all too apparent that to redress injuries like the one suffered here, it is [*Bivens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127105&pubNum=0000780&originatingDoc=I975640ad57c411eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))or nothing.

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