



Is There Liability for Cross-Border Shooting?

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In 2010, a border patrol agent, standing in the United States, shot and killed a 15-year old Mexican boy standing across the border in Mexico. The Hernandez’s parents sued. Last June, the Supreme Court returned the case to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) for further legal proceedings. *Hernandez v. Mesa*. The Fifth Circuit has now **ruled** that the Hernandez family may not sue the border patrol agent under an implied-cause-of-action *Bivens* theory.

Bivens refers to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, a 1971 case in which the Supreme Court held that a victim of an unconstitutional search and seizure enjoyed an implied cause of action against the offending agents for damages in the absence of any other legal remedy. In later cases, the Supreme Court has **hesitated** to recognize an implied cause of action for other constitutional violations. Whether the Court will recognize an implied cause of action in these new-context cases turns on the existence of any special factors suggesting that the existence of any remedy for the constitutional violation should be left to Congress. The Court **returned** *Hernandez* to the Fifth Circuit for this “special factor” analysis. The Fifth Circuit **identified** special factors that it held precluded recognition of an implied cause of action.

Background

Although many of the facts are in dispute, all parties seem to agree that Border Patrol Agent Mesa shot and killed Sergio Hernandez across the U.S.-Mexico border. The boy’s parents sued Agent Mesa, the United States, and several federal agencies under various theories. The district court **dismissed** claims under the **Federal Tort Claims Act** and the **Alien Tort Statute**. The boy’s parents also asserted a *Bivens* cause of action for violations of the Fourth and Fifth Amendments. They contended unsuccessfully that the shooting and death constituted use of excessive force and thus an unreasonable seizure under the Fourth Amendment and a substantive due process violation under the Fifth Amendment.

Agent Mesa for his part **invoked** qualified official immunity. Qualified official **immunity** precludes a suit for money damages against government officials arising out of actions occurring in performance of their official duties. The immunity does not extend to conduct that is contrary to clearly established law with which an official would be familiar. Agent Mesa argued that no Fourth or Fifth Amendment precedent clearly covered conduct in a foreign nation.

A Fifth Circuit panel **affirmed** the district court’s dismissal of the Federal Tort Claims Act and Alien Tort statute claims. A full complement of the judges of the Fifth Circuit, sitting en banc, **concluded** that Agent Mesa was entitled to qualified immunity with respect to the Fifth Amendment *Bivens* claim. The judges

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affirmed dismissal of the Fourth Amendment claims because they concluded that the Fourth Amendment did not apply outside of the United States to foreign nationals without ties to the United States.

The case arrived before the Supreme Court shortly after the Court had agreed to review another *Bivens* claims case, *Ziglar v. Abbasi*. Writing for the Court in *Abbasi*, Justice Kennedy emphasized the Court's reluctance to recognize implied causes of action. Justice Kennedy explained that "*Bivens* will not be extended to a new context if there are 'special factors' counselling hesitation in the absence of affirmative action by Congress." He stated further that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III."

The Supreme Court then turned to *Mesa*. The Court concluded the Fifth Circuit's qualified immunity holding was in error because it failed to address the fact that Agent Mesa had no idea whether the boy was a U.S. citizen. The Court set aside the question of whether Hernandez's Fourth Amendment rights had been violated and returned the case to the Fifth Circuit for a threshold determination of whether the Hernandez family enjoyed a *Bivens* implied cause of action.

Back in the Fifth Circuit

When the case returned from the Supreme Court, the **Fifth Circuit** decided that the case presented a "new context" for *Bivens* purposes and that "special factors" counselled against recognizing an expanded implied *Bivens* cause of action. If a case does not present a "new context" – that is, if a case is not "different in a meaningful way" from the cases in which the Supreme Court has recognized a *Bivens* implied cause of action – then an implied cause of action exists. The **Fifth Circuit** pointed out that *Hernandez* presents unresolved and novel Fourth and Fifth Amendment claims.

As for special factors, the **Fifth Circuit** acknowledged the possibility of an implied cause of action in some new-context cases, but concluded that here the special factors were too many and too weighty for the plaintiffs to overcome. The Fifth Circuit identified five special factors that it believed indicated that establishing a cause of action should be left to Congress. First, the Border Patrol is statutorily authorized to deter and prevent illegal entry by terrorists, gun and drug smugglers, and unauthorized individuals, "duties essential to national security." Second, "extending *Bivens* in this context also risks interference with foreign affairs and diplomacy." Third, Congress might have, but refrained, from establishing a cause of action against federal officials in the Federal Tort Claims Act and elsewhere. Fourth, Congress has established other remedies for the alleged in the form of criminal prosecution. Fifth, "the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues."

One judge **concurred**, but would have resolved the case on the basis of qualified official immunity. In his view, the absence of clearly established precedent settled the case in Agent Mesa's favor. Two judges **dissented**. They agreed that the case presented the issue in a new context. However, they did not consider the majority's special factors all that special. Instead, in their view, the "case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away." They would have recognized an implied cause of action should the Hernandez family establish either a Fourth or Fifth Amendment violation.

At this point, the Hernandez family is free to petition the Supreme Court to review the Fifth Circuit's handiwork. It remains to be seen whether the family will petition for review and how the Court would respond to the petition if the family asks for review. On one hand, the Court in *Abbasi* characterized *Bivens* and its progeny as the work of an "*ancient regime*" (*i.e.*, the standard of a bygone day), a view that would seem to foreclose future recognition of virtually any new *Bivens* implied causes of action. On the other hand, the special factors the Court identified in *Abbasi* were fairly unique (high level executive policy decisions relating to detention following the 9/11 terrorist attacks). The Court may want to take the

opportunity to explain just how special *Bivens*-defeating special factors must be. In any event, Congress is free to address the situation legislatively.

Author Information

Charles Doyle
Senior Specialist in American Public Law

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