
*Constitutional Remedies — Bivens Actions —
Search and Seizure — Hernández v. Mesa*

In its landmark decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹ the Supreme Court held that a federal agent’s violation of the Fourth Amendment gives rise to a cause of action for damages.² In two subsequent cases, the Court extended this reasoning to violations of the equal protection component of the Fifth Amendment’s Due Process Clause³ and the Eighth Amendment’s ban on cruel and unusual punishment.⁴ For a time, “it seemed likely that the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983.”⁵ The Court soon shifted course, however, and it has declined to recognize a *Bivens* cause of action in every subsequent case presenting the question.⁶ Last Term, in *Hernández v. Mesa*,⁷ the Court continued this trend by denying a *Bivens* claim to the parents of a Mexican teenager who was shot and killed by a Border Patrol agent.⁸ In doing so, the Court failed to fully grapple with the case’s similarity to *Bivens*, ignored the fact that the constitutional concerns it cited might require overruling *Bivens* altogether, and provided no rationale as to why damages pose a greater threat to the separation of powers than do injunctions. *Hernández* ultimately serves as another illustration of the Court’s failure to hold rogue government officials accountable for constitutional violations.

On June 7, 2010, Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican citizen, was playing with his friends in the culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico.⁹ Their game involved running up an embankment in American territory, touching a fence, and then running back down across the border.¹⁰ While they were playing, Border Patrol Agent Jesus Mesa, Jr., arrived on the scene and detained one of Hernández’s friends on the United States side of

¹ 403 U.S. 388 (1971).

² *Id.* at 389.

³ *Davis v. Passman*, 442 U.S. 228, 230 (1979).

⁴ *Carlson v. Green*, 446 U.S. 14, 17–18 (1980).

⁵ Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139–40 (2014). Section 1983 provides a damages cause of action for any constitutional violation by an official acting under color of state law. 42 U.S.C. § 1983.

⁶ See Gabriella A. Orozco, Note, *Bivens and Constitutional Integrity at the Border: Hernandez v. Mesa & Rodriguez v. Swartz*, 51 LOY. U. CHI. L.J. 245, 255 (2019).

⁷ 140 S. Ct. 735 (2020).

⁸ *Id.* at 740–41.

⁹ *Hernández v. Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam). The facts recounted here are taken from the allegations in the Hernándezes’ complaint, which the Court accepted as true because the case was resolved on a motion to dismiss. *Id.* Some of those facts have been disputed by Mesa. See *Hernández*, 140 S. Ct. at 740.

¹⁰ *Hernández*, 137 S. Ct. at 2005.

the border.¹¹ Hernández, who was also in American territory, ran back across the border into Mexico.¹² Mesa, standing on the United States side of the border, fired at least two shots in his direction.¹³ One of the shots struck Hernández in the face and killed him.¹⁴ The Department of Justice investigated the shooting and concluded that Mesa had not violated Border Patrol policy.¹⁵ As a result, he did not face criminal charges or any other official sanction.¹⁶

Hernández's parents brought a damages suit under *Bivens* in the United States District Court for the Western District of Texas, alleging, inter alia, that Mesa and the United States had violated Hernández's Fourth and Fifth Amendment rights.¹⁷ The district court granted the defendants' motion to dismiss.¹⁸ A Fifth Circuit panel affirmed the dismissal of the Fourth Amendment claim but held that the Fifth Amendment claim against Mesa could proceed.¹⁹ After rehearing en banc, the Fifth Circuit affirmed the district court's dismissal of both claims, finding that Hernández was not protected by the Fourth Amendment and that Mesa was entitled to qualified immunity on the alleged Fifth Amendment violation.²⁰ The court did not address whether a *Bivens* remedy would have been available if the plaintiffs had stated a valid constitutional claim.²¹

In a per curiam decision, the Supreme Court vacated and remanded for further proceedings.²² The Court noted that the Fourth Amendment issue was a "sensitive" one, and therefore the Fifth Circuit should "address the *Bivens* question in the first instance."²³ On the Fifth Amendment issue, the Court found that the Fifth Circuit had erred in granting qualified immunity because Hernández's nationality and lack of ties to the United States were not known to Mesa at the time of the shooting.²⁴

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.* The complaint alleged that Hernández was unarmed and posed no threat, *id.*, while Mesa claimed that Hernández and his friends were throwing rocks at him, *Hernández*, 140 S. Ct. at 740.

¹⁵ *Hernández*, 140 S. Ct. at 740.

¹⁶ *Id.* Mexico requested that Mesa be extradited to face prosecution in a Mexican court, but the United States denied the request. *Id.*

¹⁷ *Id.*; *Hernández v. United States*, 802 F. Supp. 2d 834, 838 (W.D. Tex. 2011).

¹⁸ *Hernández*, 802 F. Supp. 2d at 847.

¹⁹ *Hernández v. United States*, 757 F.3d 249, 280 (5th Cir. 2014).

²⁰ *Hernández v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam).

²¹ *See id.* at 121 n.1 (Jones, J., concurring).

²² *Hernández v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (per curiam).

²³ *Id.* at 2007.

²⁴ *Id.* Justice Thomas filed a dissent, arguing that the circumstances were "meaningfully different from those at issue in *Bivens* and its progeny" and thus *Bivens* should not be extended. *Id.* at 2008 (Thomas, J., dissenting). Justice Breyer, joined by Justice Ginsburg, also dissented because he would have resolved the Fourth Amendment question in the Hernándezes' favor and remanded for consideration of the *Bivens* and qualified immunity questions. *Id.* at 2011 (Breyer, J., dissenting).

On remand, the en banc Fifth Circuit concluded that a *Bivens* remedy was not available to the Hernándezes.²⁵ In her majority opinion, Judge Jones²⁶ asserted that “this is not a garden variety excessive force case.”²⁷ Applying the two-part analysis set out in *Ziglar v. Abbasi*²⁸ — which requires courts to ask (1) whether the claim arises in a “new context,” and, if it does, (2) whether any “special factors” counsel against the extension²⁹ — she first held that a cross-border shooting presented a new context under *Bivens* due to the lack of any judicial guidance on the extraterritorial scope of the Constitution and whether it applies to foreign citizens on foreign soil.³⁰ Moving to the second prong, Judge Jones found that several special factors counseled against the extension of *Bivens*.³¹ These included potential interference with national security,³² delicate foreign affairs matters,³³ and the extraterritorial nature of the case.³⁴ As a result, the decision to deny a *Bivens* remedy was “not a close [one].”³⁵

In a 5–4 decision, the Supreme Court affirmed.³⁶ Writing for the Court, Justice Alito³⁷ first observed that *Bivens*, *Davis v. Passman*,³⁸ and *Carlson v. Green*³⁹ were decided in “an era when the Court routinely inferred ‘causes of action.’”⁴⁰ Eventually, however, the Court “came to appreciate more fully the tension between this practice and the Constitution’s separation of legislative and judicial power.”⁴¹ Since Congress, in the Court’s view, is best positioned to determine whether liability should be imposed on federal officials for constitutional torts, the expansion of *Bivens* is now a “‘disfavored’ judicial activity.”⁴²

²⁵ *Hernández v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc).

²⁶ Judge Jones was joined by Chief Judge Stewart and Judges Jolly, Davis, Smith, Clement, Owen, Elrod, Southwick, Higginson, and Costa. Judge Dennis concurred in the judgment, while Judge Haynes concurred in the judgment and with the conclusion that *Bivens* should not extend to the facts of the case.

²⁷ *Hernández*, 885 F.3d at 814.

²⁸ 137 S. Ct. 1843 (2017).

²⁹ *See id.* at 1859–60.

³⁰ *Hernández*, 885 F.3d at 815–17.

³¹ *Id.* at 818.

³² *Id.*

³³ *Id.* at 819.

³⁴ *Id.* at 821.

³⁵ *Id.* at 823. In a dissenting opinion, Judge Prado, joined by Judge Graves, agreed that the case presented a new context. *Id.* at 824 (Prado, J., dissenting). With respect to the special factors inquiry, however, he described the “empty labels of national security, foreign affairs, and extraterritoriality” as “all hat, no cattle.” *Id.* at 825.

³⁶ *Hernández*, 140 S. Ct. at 750.

³⁷ Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh.

³⁸ 442 U.S. 228 (1979).

³⁹ 446 U.S. 14 (1980).

⁴⁰ *Hernández*, 140 S. Ct. at 741 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017)).

⁴¹ *Id.*

⁴² *Id.* at 742 (quoting *Abbasi*, 137 S. Ct. at 1857).

Justice Alito then turned to the two-step inquiry the Court employs when asked to extend *Bivens*.⁴³ First, he concluded that the petitioners' claims arose in a new context.⁴⁴ Although *Bivens* and *Davis* were also brought under the Fourth and Fifth Amendments, respectively, Justice Alito observed that "[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."⁴⁵ The cross-border shooting in *Hernández* was "meaningfully different"⁴⁶ from both *Bivens*, which involved an arrest and search in New York City, and *Davis*, which involved charges of sex discrimination against a member of Congress.⁴⁷ Since these circumstances presented a new context, Justice Alito moved to the special factors inquiry.⁴⁸

On the second prong of the analysis, multiple special factors counseled against extending *Bivens*.⁴⁹ Justice Alito first noted that the Court must be especially cautious before allowing a *Bivens* remedy that intrudes on the political branches' responsibility for foreign relations.⁵⁰ In addition, the potential *Bivens* claims implicated national security issues because Border Patrol agents are responsible for preventing the illegal entry of people and goods into the United States.⁵¹ Finally, he cited multiple statutes in which Congress declined to authorize damages claims for injuries suffered outside the United States,⁵² concluding that "[t]his pattern of congressional action . . . gives us further reason to hesitate about extending *Bivens* in this case."⁵³

Ultimately, Justice Alito stated, all of these special factors centered around one concern: "respect for the separation of powers."⁵⁴ In his view, courts are not well equipped to make decisions that implicate foreign policy and national security, and these institutional capacity concerns are "heightened" when it comes to judicially created constitutional remedies.⁵⁵ As a result, the Court agreed with the Fifth Circuit's finding that the *Hernándezes* had no cause of action under *Bivens*.⁵⁶

⁴³ *Id.* at 743.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 743–44.

⁴⁷ *Id.* at 744.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 746.

⁵² Justice Alito pointed to 42 U.S.C. § 1983, the Federal Tort Claims Act, and the Torture Victim Protection Act of 1991. *See id.* at 747–49.

⁵³ *Id.* at 749.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 750.

Justice Thomas filed a concurring opinion.⁵⁷ While he agreed with the majority's conclusion that *Bivens* should not be extended to cross-border shootings, he wrote separately to suggest that the Court discard *Bivens* altogether.⁵⁸ As he pointed out, the Court has already weakened the underpinnings of *Bivens* by repeatedly refusing to extend it.⁵⁹ In his view, "we have already repudiated the foundation of the *Bivens* doctrine; nothing is left to do but overrule it."⁶⁰ Allowing *Bivens* to survive in even a limited form, Justice Thomas argued, would pose serious separation of powers concerns.⁶¹ He thus would have gone further than the majority and explicitly abandoned the doctrine.⁶²

Justice Ginsburg dissented.⁶³ First, she disagreed with the majority's conclusion that the case presented a new context — to the contrary, it arose "in a setting kin to *Bivens* itself."⁶⁴ According to Justice Ginsburg, *Abbasi* made it clear that plaintiffs may bring *Bivens* claims for seizures that violate the Fourth Amendment, and using lethal force against someone "who 'poses no immediate threat . . . ' surely qualifies as an unreasonable seizure."⁶⁵ Furthermore, she argued that where Hernández was standing when Mesa shot him was irrelevant because "[t]he purpose of *Bivens* is to deter the *officer*" — and the officer was standing in the United States.⁶⁶

Even if the case presented a new context, Justice Ginsburg also disagreed with the majority's special factors analysis. With respect to foreign relations, she observed that courts frequently adjudicate cases involving smuggling and other illicit activities at the border even while diplomatic negotiations are ongoing.⁶⁷ In addition, she criticized the majority for speaking in general terms about national security while failing to explain precisely how a *Bivens* suit here would undermine border safety.⁶⁸ Justice Ginsburg concluded by noting that Hernández's death was "not an isolated incident" of alleged misconduct by Border Patrol agents.⁶⁹ This misconduct, however, rarely results in prosecution

⁵⁷ *Id.* (Thomas, J., concurring). Justice Thomas was joined by Justice Gorsuch.

⁵⁸ *Id.*

⁵⁹ *Id.* at 752.

⁶⁰ *Id.*

⁶¹ *Id.* (describing adherence to *Bivens* as a "usurpation of legislative power").

⁶² *Id.* at 753.

⁶³ *Id.* (Ginsburg, J., dissenting). Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan.

⁶⁴ *Id.* at 756.

⁶⁵ *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

⁶⁶ *Id.* (alteration in original) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017)). Justice Ginsburg also pointed out that Hernández's parents would have had a *Bivens* claim if he had been standing in the United States when he was shot, as Mesa's counsel conceded at oral argument. *Id.*

⁶⁷ *Id.* at 758.

⁶⁸ *See id.*

⁶⁹ *Id.* at 759.

or official disciplinary measures.⁷⁰ As she wrote, “it is all too apparent that to redress injuries like the one suffered here, it is *Bivens* or nothing. . . . I resist the conclusion that ‘nothing’ is the answer required in this case.”⁷¹

It has been forty years since the Supreme Court last recognized the existence of a new *Bivens* cause of action.⁷² *Hernández* continued that trend, but the Court’s reasoning fell short in several respects. For one, the majority failed to give adequate attention to the significant factual similarities between *Hernández* and *Bivens*. In addition, the Court relied heavily on constitutional concerns about the separation of powers, but it did not explain whether those concerns would be dispositive in a case with the same facts as *Bivens*. And the Court did not provide any justification as to why judicially created causes of action for damages are more threatening to the separation of powers than are judicially imposed injunctions. While congressional intervention to reinvigorate *Bivens* is still possible, *Hernández* continued the Court’s pattern of failing to provide meaningful oversight of rogue government actors.

In light of the Court’s refusal to extend *Bivens* in the years since *Carlson*, commentators have frequently described the doctrine as dead or significantly weakened.⁷³ Justice Kennedy’s analysis in *Abbasi*, however, provided at least some glimmer of hope that *Bivens* might retain its force with respect to Fourth Amendment violations. He explicitly stated that the decision was “not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context

⁷⁰ See *id.* at 760.

⁷¹ *Id.*

⁷² See *Carlson v. Green*, 446 U.S. 14, 17–18 (1980). In the years since *Carlson*, the Court has rejected a cause of action under *Bivens* at least nine times. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 547–49 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); *United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304–05 (1983); *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

⁷³ See, e.g., Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006–2007 CATO SUP. CT. REV. 23, 26 (“[After *Robbins*,] the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery.”); Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255, 257 (2010) (observing that the “consensus view” regarded *Iqbal* as “an unremarkable addition to a long line of Supreme Court decisions over the past quarter-century in which the Court has effectively limited *Bivens* to its facts”); Michael Dorf, *SCOTUS Severely Narrows Civil Rights Suits Against Federal Officers*, DORF ON LAW (June 19, 2017), <http://www.dorfonlaw.org/2017/06/scotus-severely-narrows-civil-rights.html> [<https://perma.cc/3RZK-SM3H>] (asserting that the decision in *Abbasi* “all but overrules *Bivens*”). *Hernández* was no exception to this trend. See, e.g., Ian Millhiser, *The Supreme Court Just Held that a Border Guard Who Shot a Child Will Face No Consequences*, VOX (Feb. 25, 2020, 12:50 PM), <https://www.vox.com/2020/2/25/21152643/supreme-court-hernandez-mesa-bivens-border-guard-cross-mexico> [<https://perma.cc/GE3A-8RDA>] (“*Bivens* is probably in its final days.”).

in which it arose.”⁷⁴ Furthermore, Justice Kennedy emphasized that the *Abbasi* plaintiffs were challenging “large-scale policy decisions.”⁷⁵ Unlike the plaintiffs in *Bivens* and *Davis*, they were not attacking “individual instances of discrimination or law enforcement overreach, which . . . are difficult to address except by way of damages actions after the fact.”⁷⁶ Even after *Abbasi*, then, it seemed that — at least for Fourth Amendment violations — there might be room for *Bivens* to survive outside of its original facts.⁷⁷

Instead, the Court failed to grapple with the fact that *Hernández* involved a situation similar to the one *Abbasi* seemed to contemplate: a single rogue agent, not acting in conformity with any official policy,⁷⁸ executed an unlawful seizure.⁷⁹ As then-Judge Kavanaugh put it just a few years earlier, “[t]he classic *Bivens* case entails a suit alleging an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment.”⁸⁰ Of course, *Hernández* differed from *Bivens* insofar as it implicated the border, but lower courts had previously considered similar claims to be viable.⁸¹ And as Justice Ginsburg pointed out, *Hernández* — unlike *Abbasi* — did *not* differ from *Bivens* with respect to the “rank of the officers involved; the constitutional right at

⁷⁴ *Abbasi*, 137 S. Ct. at 1856; see also *id.* at 1857 (“The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.”).

⁷⁵ *Id.* at 1862.

⁷⁶ *Id.*

⁷⁷ See Orozco, *supra* note 6, at 281–83 (suggesting that recognizing a *Bivens* action for cross-border shootings would be consistent with *Abbasi*); see also *Hernández v. Mesa*, 885 F.3d 811, 826 (5th Cir. 2018) (en banc) (Prado, J., dissenting) (arguing that *Hernández* presented “the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist”).

⁷⁸ See 8 C.F.R. § 287.8(a)(2)(ii) (2020) (permitting immigration officers to use deadly force only when they have “reasonable grounds to believe that such force is necessary to protect [themselves] or other persons from the imminent danger of death or serious physical injury”).

⁷⁹ See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”).

⁸⁰ *Meshal v. Higgenbotham*, 804 F.3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring).

⁸¹ See *Rodriguez v. Swartz*, 899 F.3d 719, 727, 748 (9th Cir. 2018) (upholding a *Bivens* claim for the mother of a Mexican teenager who was shot and killed while walking down a street in Mexico by a Border Patrol agent standing in Arizona), *judgment vacated*, 140 S. Ct. 1258 (2020). Until 1988, plaintiffs such as *Rodriguez* and the *Hernándezes* might have been able to bring common law tort suits, see SCOTT MICHELMAN, CIVIL RIGHTS ENFORCEMENT 102 (2020), and in fact the *Hernándezes* would have likely had a claim under Texas law, see Brief for the Petitioners at 19, *Hernández*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3714475 (citing *Delgado v. Zaragoza*, 267 F. Supp. 3d 892, 898 (W.D. Tex. 2016)). The passage of the Westfall Act, however, “raise[d] the stakes” of denying *Bivens* actions because it immunized federal officers from state tort claims, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 989 (2019), thereby leaving some of these plaintiffs in an even worse position than they would have been in before *Bivens* was decided, cf. William Baude, *Bivens Liability and Its Alternatives*, SUMMARY, JUDGMENT (Feb. 27, 2020), <https://www.summarycommajudgment.com/blog/a-few-thoughts-about-bivens-liability> [<https://perma.cc/9JBZ-2TUE>] (“[I]f the Court is going to abolish the 20th century remedies for unconstitutional conduct, can we at least have the 19th century remedies back?”).

issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [or] the statutory . . . mandate under which the officer was operating.”⁸² With all of these similarities, one might have expected the Court to provide more than just a few sentences of conclusory analysis stating that the presence of a new context was “glaringly obvious.”⁸³

Furthermore, while relying so heavily on separation of powers concerns,⁸⁴ the Court failed to acknowledge that such considerations were also present in *Bivens* itself.⁸⁵ While those concerns are arguably more pronounced in *Hernández* because of the border context,⁸⁶ the Court also criticized the constitutional implications of *Bivens* claims more generally.⁸⁷ But if *Bivens* actions really pose such a grave threat to the separation of powers, then it seems the Court should have overruled the doctrine altogether rather than just hollowing it out further. Justice Thomas’s concurrence suggested as much, asserting that “adherence to even a limited form of the *Bivens* doctrine appears to ‘perpetuat[e] a usurpation of the legislative power.’”⁸⁸ Instead, the three Justices who declined to extend *Bivens* but would not entirely abandon it planted

⁸² *Hernández*, 140 S. Ct. at 756 n.3 (Ginsburg, J., dissenting) (alteration in original) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017)).

⁸³ *Id.* at 743 (majority opinion). The Court’s decision is especially problematic because complaints against Border Patrol agents are common, and damages suits provide perhaps the only meaningful avenue to deter future misconduct. *See id.* at 759–60 (Ginsburg, J., dissenting); *see also* Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 35, *Hernández*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3854465 (“[T]he prospect of civil liability plays a proper and important role in deterring Border Patrol officers from using excessive force in confrontations with individuals at and across the border.”). According to one report, over 800 complaints alleging physical, verbal, or sexual abuse were made against Border Patrol agents between 2009 and 2012. *See Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting) (citing DANIEL E. MARTÍNEZ, GUILLERMO CANTOR & WALTER A. EWING, AM. IMMIGR. COUNCIL, NO ACTION TAKEN 1–8 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf [<https://perma.cc/NTZ4-4Y9W>]). And at least ninety people have died as a result of encounters with Border Patrol agents since 2010. *See* Brief of Border Network for Human Rights et al. as Amici Curiae in Support of Petitioners at 8, *Hernández*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3854460.

⁸⁴ *See, e.g., Hernández*, 140 S. Ct. at 749–50.

⁸⁵ *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411–12 (1971) (Burger, C.J., dissenting) (“We would more surely preserve the important values of the doctrine of separation of powers — and perhaps get a better result — by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.”).

⁸⁶ *But see Abbasi*, 137 S. Ct. at 1862 (“[N]ational-security concerns must not become a talisman used to ward off inconvenient claims . . .”).

⁸⁷ *See, e.g., Hernández*, 140 S. Ct. at 742 (“[F]inding 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.”).

⁸⁸ *Id.* at 752 (Thomas, J., concurring) (alteration in original) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring)).

themselves in an uncertain middle ground between Justice Ginsburg's view that separation of powers concerns were not dispositive and Justice Thomas's assertion that *Bivens* should be overruled.

The Court's rationale is also underdeveloped because the majority did not even attempt to explain why damages pose a uniquely grave threat to the separation of powers. In suits where a plaintiff seeks *injunctive* relief for a constitutional violation by a federal official, there is a line of cases — dating back to *Ex parte Young*⁸⁹ — indicating that courts have inherent equitable power to issue injunctions without identifying any specific cause of action.⁹⁰ More recently, the Supreme Court has held that courts may, in some circumstances, grant injunctive relief for violations of federal law by federal officials.⁹¹ If such a “judge-made remedy”⁹² is appropriate in the context of injunctive actions, why does it pose such a danger to the separation of powers when it comes to damages actions?⁹³ Justice Kennedy at least tried to answer this question in *Abbasi*, suggesting that separation of powers concerns are significant in the damages context because “[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.”⁹⁴ But those concerns are arguably even more serious in suits for injunctive relief, where courts may order the government to stop a military operation or release someone in military custody.⁹⁵ Furthermore, the suggestion that officials will second-guess their own actions if damages liability is imposed fails to recognize that successful *Bivens* claims almost never result in officers

⁸⁹ 209 U.S. 123 (1908).

⁹⁰ See MICHELMAN, *supra* note 81, at 99–100.

⁹¹ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The Court also made clear, however, that courts' inherent equitable power is not without limits. Injunctive relief is unavailable if (1) Congress provided an alternative remedial scheme, and (2) the provision at issue is “judicially unadministrable.” *Id.* at 1385.

⁹² *Id.* at 1384.

⁹³ The Court's inconsistent treatment of judicial lawmaking is also apparent in the development of its qualified immunity jurisprudence. See James E. Pfander, Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN ST. L. REV. 1387, 1405 (2010) (noting that the Court has “embraced judge-made law with gusto in adapting the rules of qualified immunity” but has also “expressed a grave reluctance to recognize what it chooses to characterize as new rights of action under *Bivens* to enforce the Constitution”); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1785 (1991) (observing that immunity doctrines are “often crafted to reflect judicial notions of sound policy, not constitutional commands”).

⁹⁴ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017).

⁹⁵ See Steve Vladeck, *The Incoherence of the Normative Case Against Bivens*, LAWFARE (June 21, 2017, 2:53 PM), <https://www.lawfareblog.com/incoherence-normative-case-against-bivens> [<https://perma.cc/6EEK-MHGT>].

paying out of their own pockets.⁹⁶ And regardless of which view is correct, the *Hernández* majority did not even address the issue.⁹⁷

Hernández thus reaffirmed the Court's hostility to *Bivens* claims and failed to provide meaningful oversight of rogue officers at a time when it is deeply necessary. This summer, the massive swell of protests after the killings of Ahmaud Arbery, Breonna Taylor, George Floyd, and many others led to renewed calls to increase accountability for law enforcement officials.⁹⁸ Incidents such as the use of tear gas on protestors in Lafayette Square by police officers and members of the National Guard⁹⁹ — compounded by the increased presence of federal officers in some cities¹⁰⁰ — further highlight the importance of deterring misconduct by rogue government actors.¹⁰¹ And even though Congress could create a statutory cause of action,¹⁰² the judiciary remains responsible for ensuring that existing laws do not become “a dead letter.”¹⁰³ Instead, the Court's decision in *Hernández* marked another step away from the ideal expressed by Chief Justice Marshall that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”¹⁰⁴

⁹⁶ See James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 566 (2020) (analyzing 171 *Bivens* cases and finding that individual officers “almost never contribute any personal funds to resolve claims arising from allegations that they violated the constitutional rights of incarcerated people”).

⁹⁷ The Court's failure to do so is even more puzzling given the historical pedigree of damages claims. In *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, Justice Scalia emphasized that courts' authority to issue injunctions for constitutional violations “reflects a long history of judicial review of illegal executive action, tracing back to England.” *Id.* at 1384. But there is arguably just as illustrious a history supporting damages relief. See Brief for the Petitioners, *supra* note 81, at 10–14 (describing several cases in the eighteenth and nineteenth centuries where the Court “recognized common law damages claims against rogue federal officers who had acted unlawfully,” *id.* at 10–11).

⁹⁸ See, e.g., Joanna Schwartz, James Pfander & Alexander Reinert, Opinion, *The Simple Way Congress Can Stop Federal Officials from Abusing Protesters*, POLITICO (June 10, 2020, 11:58 AM), <https://www.politico.com/news/magazine/2020/06/10/the-simple-way-congress-can-stop-federal-officials-from-abusing-protesters-309959> [<https://perma.cc/P93L-KQDQ>].

⁹⁹ See Katie Rogers, *Protesters Dispersed with Tear Gas so Trump Could Pose at Church*, N.Y. TIMES (July 28, 2020), <https://nyti.ms/36VrPSm> [<https://perma.cc/Y8X9-99N3>]. A civil rights group subsequently brought suit under *Bivens*. See Complaint at 24–25, Black Lives Matter D.C. v. Trump, No. 20-cv-01469 (D.D.C. June 4, 2020), 2020 WL 3076344 (alleging First and Fourth Amendment violations under *Bivens*).

¹⁰⁰ See Kevin Liptak, *Trump Announces “Surge” of Federal Officers to Chicago as He Campaigns on “Law and Order” Mantle*, CNN (July 22, 2020, 6:45 PM), <https://www.cnn.com/2020/07/22/politics/donald-trump-federal-law-enforcement-chicago-albuquerque/index.html> [<https://perma.cc/W3EL-NB3N>].

¹⁰¹ See Mark Joseph Stern, *Democrats' Police Reform Bill Lets Federal Agents off the Hook*, SLATE (June 8, 2020, 6:58 PM), <https://slate.com/news-and-politics/2020/06/democrats-police-reform-bill-federal-agents.html> [<https://perma.cc/Z8B6-UBW6>] (noting that federal law enforcement officials “have inflicted egregious violence on immigrants” and also “taken a more active role policing crime traditionally handled by local cops”).

¹⁰² See, e.g., Bivens Act of 2020, H.R. 7213, 116th Cong. (2020) (amending 42 U.S.C. § 1983 to cover federal as well as state officials).

¹⁰³ THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

¹⁰⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).