

William & Mary Law School

William & Mary Law School Scholarship Repository

Popular Media

Faculty and Deans

2-28-2020

Justices Make the Tough– But Right– Call in Cross-Border Shooting Case

A. Benjamin Spencer

Follow this and additional works at: https://scholarship.law.wm.edu/popular_media



Part of the [Constitutional Law Commons](#), [Law Enforcement and Corrections Commons](#), [Legal Remedies Commons](#), and the [Supreme Court of the United States Commons](#)

Copyright c 2020 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

https://scholarship.law.wm.edu/popular_media

Justices make the tough — but right — call in cross-border shooting case

The U.S. Supreme Court held last week in [Hernandez v. Mesa](#) that the parents of a Mexican national shot and killed in Mexico by a U.S. Border Patrol agent cannot sue that agent in federal court. The decision was 5-4, dividing the court along what many observers regard to be predictable ideological lines.

But to view this decision through the lens of partisan ideology would be a mistake.

The incident that launched the case is horrifying. When 15-year-old Sergio Adrián Hernández Güereca was playing in a cement culvert between El Paso, Texas, and Ciudad Juárez, Mexico, in 2010, the Border Patrol agent detained his friend — and [shot Hernández](#) in the face, killing him. Hernández was standing in Mexican territory.

At bottom, this case was not about whether Hernández's family deserves an avenue for seeking redress for the alleged violation of their son's Fourth and Fifth Amendment rights. Rather, it is about the power of federal courts to provide a remedy where Congress has provided none.

The key legal precedent at issue in Hernandez originates from [Bivens v. Six Unknown Federal Narcotics Agents](#), a 1971 decision in which the Supreme Court held that a person victimized by an unlawful arrest and search could bring a claim for damages in federal court directly under the Fourth Amendment, even though neither the text of that amendment nor any federal statute authorized such a claim.

That decision has been called into question by the court in recent years, based on the idea that recognizing claims not provided for in the Constitution or by Congress risks engaging federal courts in the exercise of legislative rather than judicial power.

The question in the Hernandez case was whether to extend the Bivens decision into the new context of a cross-border incident that was alleged to have violated the victim's constitutional rights. In light of the international context of this dispute, the court concluded that fashioning a judicial remedy not created by Congress risked interfering not only with Congress's legislative authority but also with the president's authority, as it pertains to national security and international affairs.

In other words, if the federal courts are effectively going to make up a right to sue that no constitutional or statutory text endorses — perhaps an altogether dubious enterprise — they at least should avoid such an undertaking in circumstances presenting considerations of foreign relations and border protection; such considerations are meant to be addressed by the executive branch, and involve the weighing of costs and benefits of a kind the judiciary is ill-suited to assess.

True, the result of acknowledging that federal courts lack the power to improvise judicial remedies in this context means that the victim's parents in this case cannot recover damages in a federal civil action. But the proper way to address that undesirable outcome is to urge Congress to enact legislation that would authorize the lawsuit that Hernandez's parents seek.

There are several statutes in which Congress has authorized claims against government officials for alleged wrongdoing. [Section 1983 of Title 42 of the U.S. Code](#) permits the recovery of damages for constitutional violations by state officials. The [Federal Tort Claims Act](#) provides a remedy for most claims against federal government employees, but it does not apply to claims arising in a foreign country.

Either of these provisions could be amended to extend the ability to sue federal government officials for conduct that violates rights of persons abroad. The fact that neither of these statutes — nor any other statute — permits these suits provides a fairly strong indication that it would be inappropriate for the federal courts to permit them on their own initiative.

It is indeed tragic that Hernandez lost his life in this incident. It is also tragic that his parents cannot seek monetary damages for their loss in U.S. federal courts. But the culprit in this tragedy should not be seen as a block of conservative ideologues on the Supreme Court but, rather, a Congress that has opted not to open our courthouse doors to those whom our officials harm abroad.

A. Benjamin Spencer is the Bennett Boskey Visiting Professor of Law at Harvard Law School and the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. Follow him on Twitter [@PROFSPENCER](#).