



## Justices hesitant to expand civil liability for federal officials

**Federal officials have for years enjoyed broad immunity on constitutional claims thanks to narrow interpretations of precedent.**

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A U.S. Customs and Border Protection agent is posted at the U.S.-Mexico border wall in Abram-Perezville, Texas, as agents take migrants into custody on March 21, 2021. (Julio Cortez/AP) WASHINGTON (CN) — Stuck between a rock and a hard place, the Supreme Court showed discomfort Wednesday morning about a case that could widen the decades-old precedent governing federal officials who violate constitutional protections.

“I’m just stuck, right,” Justice Neil Gorsuch said. “What is a good and faithful judge supposed to try and do with all of this mess, acknowledging the fact, too, that this court hasn’t recognized a new *Bivens* action in decades. As you say, the law was very different in 1988, and it is today. Help.”

The Trump appointee was referring to *Bivens v. Six Unknown Named Agents*, bedrock precedent that says an individual can file a lawsuit for damages against federal officers for constitutional violations. While previous *Bivens* claims have involved Fourth, Fifth and Eighth Amendment abuses, recent decisions have diminished the precedent. In 2020, the high court notably did not apply *Bivens* in a case where a Border Patrol agent shot a Mexican national across the border. Wednesday’s arguments sprang from the suit that bed-and-breakfast operator Robert Boule brought under the First and Fourth Amendments after he faced an IRS investigation based on what he believes was a retaliatory report from Border Patrol agent Erik Egbert.

Boule worked as an informant for years but hurt his back in an altercation with Egbert and then reported the incident to Egbert’s superiors.

Though the agent initially prevailed against Boule’s case at summary judgment, the Ninth Circuit reversed after determining that Boule had valid claims.

During arguments Wednesday, the justices acknowledged their previous skepticism towards expanding *Bivens*.

“You’re up against the fact that we have declined to apply or extend *Bivens* in recent history,” Justice Clarence Thomas said. “We’ve almost universally declined to expand into new contexts.” While the particulars of the case stumped the justices at times during the arguments, Chief Justice Roberts said the court shouldn’t be worried about the details of the case and should instead focus on what Congress would think about consequences for border agents.

“We're stepping into the authority that would normally be vested in Congress,” the Bush appointee said.

He continued: “If Congress were sitting down saying, shouldn't it be a cause of action, it's not going to be parsing the particular facts. ... Presumably, they would say Border Patrol agents are not liable for actions on the part of this or something like that. And shouldn't we take that into account and not be so terribly concerned about the particular facts but more what Congress would think about the consequences for its border agents and whether it would draw a particular line on that basis?”

Egbert's attorneys and the government urged the justices not to expand the precedent and warned of a possible explosion of retaliation claims.

“Plaintiffs could portray virtually any governmental action as unconstitutional if taken for retaliatory reasons, creating especially amorphous *Bivens* liability,” said Sarah Michelle Harris, an attorney with Williams & Connolly representing Egbert. “Further, allowing First and Fourth Amendment claims against agents involved in border security also implicates national security.” They also claim Congress has already spoken clearly on these issues.

“Congress has also determined that law enforcement at the border is different from other kinds of law enforcement,” Michael Huston, assistant to the U.S. solicitor general, said. “All those features give ample reason to doubt that Congress would have wanted an individual damages remedy in the circumstances here.”

Boule's attorney said that while *Bivens* may be narrow that doesn't mean the court can't recognize a new remedy in this case.

“Although the reach of *Bivens* may be narrow, the need for the remedy persists, and the argument that the court should not recognize a *Bivens* remedy in any new case flies in the face of this court's decision just five terms ago and *Abbassi*,” Felicia Ellsworth, an attorney from Wilmer Cutler Pickering, said. “And also would contravene the historical foundations allowing individual damages to right a federal officer's constitutional wrong.”

An amicus brief from the American Civil Liberties Union, CATO Institute, National Immigration Litigation Alliance and others said closing the door to expanding *Bivens* in any way would overrule 50 years of precedent.

“There is no justification for overruling this longstanding approach, and doing so would contravene both *stare decisis* and Congress's approval of the Court's *Bivens* jurisprudence in the 1974 amendments to the Federal Tort Claims Act and in the Westfall Act of 1988,” the ACLU Foundation's Cecillia Wang wrote in its brief.

The National Police Accountability Project denied that recognizing a remedy under *Bivens* in this case would lead to national- or border-security problems but said the court would create a gap in accountability for federal law enforcement officers if it sides with Egbert.

“The universe of cases of abuse for which available evidence satisfies the higher criminal standard of proof is by definition only a small subset of cases, even before factoring in the exercise of prosecutorial discretion and resource constraints,” Melanie Bostwick, who is with Orrick, Herrington & Sutcliffe, wrote in their brief. “DOJ has told the public that the practical limitations of proving a case under § 242 tie its hands in many cases. This Court should listen.”