

A *Bivens Encomium* — or *Elegy*

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Review of *Constitutional Torts and the War on Terror*,
by James E. Pfander (Oxford University Press, 2017)

James Pfander’s invaluable new monograph, *Constitutional Torts and the War on Terror*, arrives at an especially fortuitous moment in the history of the *Bivens* doctrine—which recognizes circumstances in which judges can recognize a damages remedy for victims of constitutional violations by federal officers even though no statute authorizes such relief. Sometime in the next six weeks, the Supreme Court could hand down its most important rulings on the scope of the doctrine in the 46 years it’s been on the books. And at least based on how the oral arguments went in *Ziglar v. Abbasi* and *Hernández v. Mesa* (in which I’m co-counsel to the Petitioners), the signs aren’t too optimistic for those who agree with the younger Justice Harlan, who closed his concurrence in *Bivens* with the observation that “it would be . . . anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining

the Government as an instrument of the popular will.”

As Pfander’s book explains, careful study of the history of civil remedies arising out of federal government misconduct suggests that it would indeed be anomalous to so conclude, especially in the context of challenges to post-September 11 counterterrorism policies. That the Supreme Court may nevertheless be on the cusp of doing so, especially at this particular moment in our nation’s history, should be deeply disturbing to even the most casual reader.

Bivens has been controversial since soon after it was handed down, and was dismissed by Justice Scalia in a 2001 concurrence as “a relic of the heady days in which [the Supreme] Court assumed common-law powers to create causes of action — decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.” In fact, though, as Pfander recounts in his book (and as others have explained elsewhere), *Bivens* was not a bolt from

the blue, but rather an incremental step along a centuries-long historical chain that started with a Founding-era model in which federal officers were routinely held liable for damages — but under state laws and in state courts.

Unlike implied statutory causes of action, which sprang from broad (and contested) progressive theories of the judicial role vis-à-vis Congress, *Bivens* had its origins in a long-standing common-law tradition of judge-made remedies against federal officers—just with state law and state courts doing most of the work. Indeed, in *Bivens* itself, the Nixon Administration’s argument against a judge-made federal damages remedy was not that the plaintiff should be left with nothing, but rather that *state* tort law was a more than sufficient remedy to punish the unconstitutional conduct of six federal narcotics agents. The Court rejected the government’s reliance upon state law, recognizing, as I’ve suggested elsewhere, three flaws in the state-law, state-court model:

First, although it had been possible to loosely analogize certain constitutional protections to state tort law (*e.g.*, vindicating Fourth Amendment violations through trespass), that analogy did not hold up well as applied to many of the other constitutional rights (such as equal protection) into which the courts were then breathing new life. Second, the same period saw federal courts more routinely asserting the power to *enjoin* unconstitutional conduct by

the federal government—even though, as with damages, no statute expressly authorized them to provide such relief—creating both a strange jurisdictional asymmetry between prospective and retrospective relief against federal officers and a precedent for a more aggressive federal judicial role. Third, and related, the 1950s and 1960s brought with them the rise of what Judge Henry Friendly called “the new federal common law,” pursuant to which federal courts identified more specific—and more analytically coherent—grounds on which to fashion judge-made (as opposed to statutory) rules of decision, defenses, and causes of action.

It would be easy enough for contemporary critics of *Bivens* to argue for a return to the state-law, state-court model. But as Pfander explains, the reason why state remedies aren’t usually available in similar circumstances today is because of the 1988 Westfall Act, which, whether intentionally or not, preempted such state-law claims, leaving most plaintiffs in modern *Bivens* cases with a choice of damages under *Bivens* or nothing. Thus, whereas early critiques of *Bivens* tended to suggest that such remedies were unnecessary because of existing state law alternatives, today’s arguments sound more in attacks on the judicial power to recognize damages under *any* source of law — by identifying classes of cases in which courts ought to stay their hand before

fashioning damages remedies in the absence of more specific legislative authorization.

That's the frame in which the *Abbasi* and *Hernández* cases have reached the Supreme Court this Term. In *Abbasi*, one of the questions presented is whether non-citizen immigration detainees could pursue a *Bivens* claim arising out of their allegedly unconstitutional treatment while detained as part of the post-9/11 roundup of Muslim and Arab immigrants in and around New York (a divided panel of the Second Circuit had said "yes"). On the same day that the Court agreed to hear the federal government's petition for review of that decision, the Justices also granted review in *Hernández*—a case arising out of a U.S. Border Patrol agent's allegedly unconstitutional cross-border shooting of an unarmed 15-year-old Mexican national. And, most curiously, although the lower court rulings in *Hernández* had focused on whether the Constitution even *applied* in such a case (and, if it did, the agent's entitlement to a qualified immunity defense — which the en banc Fifth Circuit unanimously sustained), the Justices *added* to the cert. grant in *Hernández* the question whether "the claim in this case [may] be asserted under *Bivens*." It therefore seems clear that the Justices themselves have decided to re-enter the *Bivens* fray—although it remains to be seen (and we may soon discover) whether their goal is to reinvigorate the doctrine or inter it once and for all.

Hence, the propitious timing of Pfander's book, which provides a simply stunning historical, doctrinal, and normative account of *why*

damages remedies for unconstitutional federal conduct are so important — especially, as the book's title suggests, in the context of post-September 11 counterterrorism policies in general, and detainee mistreatment in particular. As Pfander explains late in the Introduction, "[t]his book shows that the officer suit for damages, a workhorse of the common-law tradition, has a key role to play in our system of government accountability. . . . With a revived action at their disposal, federal courts can put aside political, geographical, and national security considerations and confront the fact of government-sponsored torture in the war on terror."

But perhaps the most important feature of Pfander's work is its overclaimed modesty. Although the monograph points to the torture of post-September 11 detainees as the constitutional violation most in need of judicial accountability via *Bivens*, the sobering reality is that it has become increasingly difficult for plaintiffs to invoke *Bivens* across the board, including in contexts increasingly removed both geographically and substantively from contemporary counterterrorism policy. Congress, of course, could solve this problem by enacting a federal statute akin to 42 U.S.C. § 1983 (which provides a cause of action for violations of federal law by *state* officers). But it's never shown an interest in doing so before, and surely won't be in a hurry to do it now.

That's why, as Pfander rightly concludes, the resurrection of *Bivens* is going to have to be a common-law

project—led by courts, if at all. It would be hard for even the most skeptical jurist to read Pfander’s book and not be convinced that judge-made damages remedies for constitutional violations by federal officers are both a necessary and appropriate exercise of judicial power in most (if not all) cases. Instead, the real question about Pfander’s book is whether, with decisions in *Abbasi* and *Hernández* in the offing, its essential lessons will reach their intended audience too late.

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