

1 In other words, it's odd to say the
2 officer's conduct is reasonable so long as it turns out
3 the victim, you know, is -- is Mexican, but it's
4 unreasonable if the exact same conduct and it turns out
5 the victim is American. I'm not aware of any qualified
6 immunity case like that.

7 MR. ORTEGA: I don't know of any case that
8 fits that fact pattern, Mr. Chief Justice.

9 JUSTICE GINSBURG: Would you recognize
10 that -- let's say it was the -- the boy that the Border
11 Patrol grabbed and then shot him, so the -- the -- so
12 the death would have occurred in the United States,
13 Bivens claim?

14 MR. ORTEGA: Well, absolutely. Then he
15 would be in the territory of the United States, and all
16 constitutional protections would apply.

17 JUSTICE GINSBURG: So does it make a whole
18 lot of sense to say if the officer shoots somebody on
19 the U.S. side of the border, good Bivens claim? If the
20 officer standing in the same place shoots somebody who's
21 just across the border, no claim? That doesn't make a
22 whole lot of sense, does it, to distinguish those two
23 victims?

24 MR. ORTEGA: I think it's very
25 distinguishable because of the very real border. Wars

1 have been fought to establish borders. The border is
2 very real.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 Mr. Kneedler.

5 ORAL ARGUMENT OF EDWIN S. KNEEDLER
6 ON BEHALF OF THE FEDERAL RESPONDENTS

7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:

9 The antecedent question in this case is
10 whether this Court should create a cause of action for
11 damages under Bivens. As Justice Kennedy pointed out,
12 for many years, this Court has declined to extend Bivens
13 to new contexts because -- out of recognition that the
14 creation of causes of action is for Congress.

15 JUSTICE KAGAN: You're quite right,
16 Mr. Kneedler, but there is a difference between this
17 case and I think -- I think all -- maybe all but one --
18 of these other cases, which is in all of these others,
19 the Court has been able to point to some alternative
20 remedy. It might not have been the complete relief that
21 a plaintiff in a case wanted, but it was something. And
22 there was an ability to say, Congress has given you some
23 way to address the harm that you've suffered.

24 And here, there really is nothing. I mean,
25 there's the idea that you might prosecute this person

1 criminally, but what does the family get from that? And
2 anyway, you almost never do.

3 So -- so here, there's just no remedy. And
4 isn't that really quite different from all these other
5 Bivens cases that you referred to?

6 MR. KNEEDLER: First of all, the Court has
7 made clear in Stanley and Wilkie that the presence or
8 absence of a remedy is not the only factor, that there
9 is the additional --

10 JUSTICE KAGAN: Well, we said that, but, you
11 know, Stanley might be the only case on your side. And
12 Stanley is a military case where there is like the
13 ultimate special factor. So for the most part, every
14 time we've said no Bivens, we've said because there's an
15 alternative remedy. And here we can't say that.

16 MR. KNEEDLER: Well, when you say Stanley
17 and Chappell v. Wallace, ultimate special factors
18 because of the political branches' control over the
19 military. That is directly applicable here. Here, you
20 have a -- a cross-border incident which necessarily
21 gives rise to foreign relations problems, which are
22 committed to the political branches.

23 The -- the -- and when Congress has chosen
24 to address remedies as a statutory matter under the --
25 under the Federal Tort Claims Act, it has created an

1 exception for -- for injuries occurring in foreign
2 countries.

3 And in response to Justice Ginsburg's
4 question, as a matter of Federal law, under the FTCA,
5 under this Court's Sosa decision, if the injury occurs
6 outside the United States, it is excluded from liability
7 even if the conduct occurred in -- in the United States.

8 JUSTICE GINSBURG: That's the U.S. -- U.S.
9 liability, not the officer liability.

10 MR. KNEEDLER: Well, but I -- but I think if
11 the Court is considering whether to fashion a judicially
12 created remedy, looking to what Congress has done where
13 it has acted -- and 1983 is another very prime
14 example -- and where Congress has chosen to create
15 monetary compensation for persons injured abroad by the
16 United States, it has always done it in an
17 administrative --

18 JUSTICE BREYER: Well, why -- why -- why do
19 you use words like "create," "extend," et cetera,
20 "fashion," if, in fact, a Federal policeman, a Federal
21 agent violates the Fourth Amendment and seizes someone
22 unreasonably in Alaska, does the victim have a Bivens
23 remedy?

24 MR. KNEEDLER: Yes, but --

25 JUSTICE BREYER: Of course. Now, if he does

1 it in Puerto Rico, does the victim have a Bivens remedy?
2 I'll tell you by making this up, but there never has
3 been a Bivens action in Puerto Rico. It's the first
4 one.

5 Does he have a Bivens action?

6 MR. KNEEDLER: Yes, but there's --

7 JUSTICE BREYER: Yes. Okay.

8 MR. KNEEDLER: But there's something --

9 JUSTICE BREYER: Now, let's see where I've
10 gotten -- I'm trying to go somewhere with the question.

11 MR. KNEEDLER: But -- but there's something
12 fundamentally different about creating a Bivens remedy
13 for --

14 JUSTICE BREYER: Well, why creating? I
15 would have thought if you want to say in there --

16 MR. KNEEDLER: Or extend --

17 JUSTICE BREYER: Wait. Extending. You see,
18 there those words assume the answer to the question.

19 I can absolutely see you're saying that if
20 this Court fashions a civil remedy for a violation of
21 the Third Amendment or the Second Amendment, you would
22 be extending Bivens, but I thought Bivens made
23 absolutely clear that where a Federal agent hurts
24 someone by violating the Fourth Amendment, there is a
25 Bivens action. Now we have an exception. And the

1 exception is the military.

2 So I think you can look at this either way.
3 But I think the -- the more -- I would tend to look at
4 it as saying, of course there is a Bivens remedy if
5 there is a Fourth Amendment violation unless you're in
6 the military, which no one says this is true.

7 So that's how I've been thinking about the
8 Bivens action. I've been thinking the answer to that
9 question turns on the answer to the Fourth Amendment
10 question.

11 Now you can tell me why it's better to use
12 the words you've been using.

13 MR. KNEEDLER: No. The -- the Court -- just
14 because the Court has recognized a Bivens action for
15 violation of a particular constitutional provision in
16 one context or with respect to one set of defendants, it
17 doesn't mean that it should extend it. And that's the
18 word the Court has used.

19 JUSTICE BREYER: Oh, yes. In, like, Puerto
20 Rico?

21 MR. KNEEDLER: Well, no, in the -- under the
22 Eighth Amendment, under -- in *Carlson v. Green*, the
23 Court recognized a Bivens remedy against Federal
24 employees that --

25 JUSTICE BREYER: That's Eighth versus

1 Fourth.

2 MR. KNEEDLER: I --

3 JUSTICE BREYER: I'm saying that's Fourth in
4 Puerto Rico.

5 MR. KNEEDLER: No, I'm -- I'm -- what -- my
6 point about the Eighth Amendment is that the Court
7 declined to recognize a Bivens remedy for Eighth
8 Amendment violations --

9 JUSTICE KAGAN: Mr. Kneedler, you --

10 Mr Kneedler: -- for private confirmations.

11 JUSTICE KAGAN: -- you get the point. The
12 point of it is that it's the heartland of Bivens for a
13 law enforcement officer to use deadly force in violation
14 of the Fourth Amendment. That's the heartland of
15 Bivens. We don't have to make up anything new. We
16 don't have to extend it. We don't have to create
17 anything. That's just Bivens.

18 MR. KNEEDLER: It is the heartland of
19 Bivens' special factors analysis for the Court to create
20 a damage remedy in a situation fraught with foreign
21 relations issues. And this ties directly into your
22 point about --

23 JUSTICE KAGAN: Well, could you say -- let's
24 talk about that. How is this fraught with foreign
25 relations issues? Because Mexico would surely prefer

1 that -- that its citizen have a Bivens remedy.

2 So you seem to be using foreign relations as
3 if sort of this touches some other country. But in the
4 usual case, I think we've asked what's the interference?
5 What's the disruption? So tell me what the interference
6 or the disruption is.

7 MR. KNEEDLER: Any -- any --

8 JUSTICE KAGAN: The problem we would
9 create --

10 MR. KNEEDLER: Any time --

11 JUSTICE KAGAN: -- not just the fact that it
12 has something to do with another country.

13 MR. KNEEDLER: Any time -- any time the
14 officers of one country injure someone in another
15 country, that creates the potential for a foreign
16 relations incident and it's illustrated here by a number
17 of factors.

18 Mexico requested the extradition of -- of
19 Mesa in this case, and the United States refused because
20 it had done its own investigation of this incident and
21 concluded that the -- that prosecution should not be
22 brought --

23 JUSTICE KAGAN: I'm sure Mexico cared a lot
24 about this. The question I'm asking is how does the
25 presence of the Bivens remedy disrupt or interfere with

1 the United States' ability to carry out its foreign
2 policy?

3 MR. KNEEDLER: And another illustration, and
4 I think -- I think it's tied to that is one of the
5 reasons is that -- why there is not a remedy in Mexico
6 is because Mexico would recognize the official immunity
7 of Officer Mesa in this circumstance according to the
8 amicus briefs. I have no reason to disagree with that.
9 That is a recognition by Mexico itself that the conduct
10 of a -- of a U.S. officer in these circumstances
11 involves foreign sovereign problems.

12 And the -- another -- another issue here is
13 that the plaintiff here is -- plaintiffs here are
14 seeking to insert the courts into the resolution of a
15 dispute about which the United States and Mexico have
16 a -- a different view of the facts. And -- and --

17 JUSTICE GINSBURG: But suppose -- suppose
18 the -- the victim, the same -- the same location across
19 the border, but were a U.S. citizen, as Justice Breyer
20 mentioned, many -- and many transients will go -- go
21 across from Juarez to El Paso. Suppose it had been a
22 U.S. citizen that was the victim of the shooting?

23 MR. KNEEDLER: We -- we think there would
24 not be a Bivens remedy there either because of the
25 extraterritorial applications.

1 JUSTICE GINSBURG: And then if it were, if
2 it were the young man who was grabbed by the Border
3 Patrol guard and shot on the U.S. side, Bivens?

4 MR. KNEEDLER: Yes, there would be. But --
5 but in -- in terms of the questions about line drawing
6 that were raised before, the two nations have drawn a
7 line here, and this is a circumstance where this -- the
8 conduct here is clearly extraterritorial. The fact that
9 there may be joint maintenance of the culvert is a very
10 minor factor considering that the only law that
11 governs --

12 JUSTICE BREYER: If it -- but that's the
13 point. If, in fact, all that mattered were the
14 existence of a well-recognized boundary line, this case
15 is over. You win.

16 But that well-recognized boundary line was
17 present in *Boumediene*, and certainly *Boumediene*
18 suggests, while it is a factor, it is not the only
19 factor that determines the reach of the Fourth
20 Amendment. So there -- there we are. We're in court,
21 because it is not the only factor.

22 And now you add in all the stuff about the
23 culvert and who's playing there and who might be playing
24 there, and the 500,000 people who cross every day, and
25 the joint maintenance of the culvert, and the fact that

1 all this conduct happened in the United States, that's
2 what your opponent brother over there is trying to do.

3 MR. KNEEDLER: Boumediene had to do with
4 the -- the substantive application of the Fourth
5 Amendment, which I want to get to in just a minute.

6 But the antecedent question is whether this
7 Court should answer those questions in a private damage
8 remedy when it hasn't recognized a new context for one
9 in 35 years.

10 JUSTICE ALITO: Well, what would the
11 government --

12 MR. KNEEDLER: If they're thinking --
13 think --

14 JUSTICE ALITO: What would the government of
15 Mexico say if we wrote an opinion that says because the
16 United States spent a lot of money to pave this culvert,
17 we think that the United States' authority with respect
18 to the culvert is basically the same as the authority
19 that we have in Guantanamo.

20 MR. KNEEDLER: I think the Mexican
21 government would be very offended by it.

22 JUSTICE KAGAN: I'm sure it wouldn't have to
23 be written that way.

24 (Laughter.)

25 MR. KNEEDLER: This -- this case -- this --

1 no, but this -- this -- this case is -- this case is
2 fundamentally different than Boumediene.

3 In Boumediene, the Court said that the
4 United States is not answerable to anyone else. Here
5 the United States is answerable to Mexico. In
6 Boumediene, the Court said only --

7 JUSTICE GINSBURG: How? How?

8 MR. KNEEDLER: Pardon?

9 JUSTICE GINSBURG: You did say in your brief
10 the United States is answerable to Mexico for any
11 cross-border use of force. How is the United States
12 answerable to Mexico?

13 MR. KNEEDLER: Mexico -- Mexico holds us
14 accountable for doing something about it. We
15 investigated criminally and -- and concluded that a
16 criminal prosecution should not be brought, but Mexico
17 regards it as the United States' responsibility to
18 control this conduct.

19 JUSTICE GINSBURG: The responsibility to
20 Mexico is prosecution in the United States? That's --

21 MR. KNEEDLER: To -- to control -- to
22 control the conduct, yes.

23 And -- and let me just reemphasize here.
24 Where Congress has -- has decided the damage remedies
25 are important, it has never provided for judicial

1 remedies. It has provided for administrative remedies
2 and it has not done it in this context.

3 JUSTICE KENNEDY: So you wanted to talk
4 about the Fourth Amendment?

5 MR. KNEEDLER: Yes. This Court's decision
6 in *Verdugo*, as we read in this, established a
7 categorical rule that the Fourth Amendment does not
8 apply to some mass of persons outside the United States.
9 Nothing in *Boumediene* changes that.

10 *Boumediene*, looking at the insular cases and
11 whatnot, was talking about territory over which the
12 United States exercised jurisdiction, independent of the
13 incident that was at issue there.

14 Here the United States --

15 JUSTICE SOTOMAYOR: Can we --

16 MR. KNEEDLER: Does not --

17 JUSTICE SOTOMAYOR: -- go back to my
18 hypothetical. Border policemen are shooting
19 indiscriminately from within the United States across
20 the border. This is the allegation in this complaint.
21 And I understand you say the government has investigated
22 and sees the facts differently.

23 Have you seen the -- the film that appeared
24 on the YouTube?

25 MR. KNEEDLER: I have.

1 JUSTICE SOTOMAYOR: I did, and I can't
2 square the police officer's account of this incident
3 with that film.

4 MR. KNEEDLER: There were other videos.
5 The -- the -- the press release -- nothing in the record
6 and nothing in a -- in a public account --

7 JUSTICE SOTOMAYOR: That's fine.

8 MR. KNEEDLER: But there was --

9 JUSTICE SOTOMAYOR: I'm just curious.

10 MR. KNEEDLER: -- there was other evidence
11 and other video -- surveillance videos that were taken
12 into account in the investigation. If I could --

13 JUSTICE KENNEDY: Let me ask one other
14 question.

15 Are -- are there examples in the past ten
16 years of the Congress of the United States passing
17 special laws for -- to compensate victims for instances
18 somewhat like this where the United States has either
19 accidentally or deliberately transgressed on the rights
20 of foreign persons?

21 MR. KNEEDLER: I don't know if the -- if
22 there have been private bills, but that would be the
23 solution. This is -- this is something that should be
24 up to Congress.

25 And, again, on the application --

1 JUSTICE KENNEDY: Of course, I guess you
2 could say that with reference to Bivens acts generally,
3 even in the United States.

4 MR. KNEEDLER: Well, and this -- this Court,
5 in deciding whether to apply Bivens, has -- has looked
6 to the question of whether Congress is the right body to
7 decide rather than the courts.

8 And here we think it clearly is because of
9 the foreign relations implications, not to mention the
10 deeply-rooted presumption against extraterritoriality,
11 all the more so in -- in with respect to this Court's
12 creation --

13 JUSTICE GINSBURG: As far --

14 MR. KNEEDLER: -- of a cause of action.

15 JUSTICE GINSBURG: As foreign relations are
16 concerned, at least a Justice of this Court has said
17 that the behavior of our law enforcement agents abroad
18 sends a powerful message about the rule of law to
19 individuals everywhere. And you're asking us to make a
20 distinction that if the law enforcement agent shoots and
21 kills somebody who's on one side of the border, there is
22 Bivens liability, you tell me that. If it's just on the
23 other side, although the conduct is identical, the
24 officer is standing in exactly the same place. I don't
25 know what kind of powerful message about the rule of law

1 that would send.

2 MR. KNEEDLER: Well, Bivens has to do with a
3 particular remedy and -- and who should create that
4 remedy. The rule of law can be enforced and
5 demonstrated in other ways; by discipline, by -- the --
6 the Border Patrol --

7 JUSTICE GINSBURG: Yeah, but it doesn't
8 happen. We know that.

9 MR. KNEEDLER: No. The border -- the Border
10 Patrol, since this incident -- and we -- we cite this in
11 our brief, has undertaken numerous reforms. It has
12 changed its training, it has given more detailed
13 instructions on the use of deadly force, it has
14 adopted -- and this -- this does go to the rule of law.
15 Adopted a transparent system of investigations after --

16 JUSTICE KAGAN: If the.

17 MR. KNEEDLER: And the --

18 JUSTICE KAGAN: -- if the Border Patrol
19 agent stood where he stood and took the shot he did, and
20 the only difference was that the teenager in the culvert
21 was an American citizen, is there a Bivens action?

22 MR. KNEEDLER: We think there would not be,
23 but that -- that's obviously a different question
24 than -- than whether an alien should have a cause of
25 action given 1983, and Congress's action in this area,

1 which indicates a judicial remedy should not be
2 available.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 And, Mr. Hilliard, you have a minute left.

5 REBUTTAL ARGUMENT OF ROBERT C. HILLIARD

6 ON BEHALF OF THE PETITIONERS

7 MR. HILLIARD: Thank you, Mr. Chief Justice.

8 To Justice Ginsburg's hypothetical, both of
9 my friends on the other side have now said there's a
10 Bivens claim for the boy who shot next to the officer.

11 Take that position into this hypothetical.
12 The officer shoots the bullet -- shoots the gun. The
13 bullet leaves the gun. It's constitutionally -- there's
14 constitutional consequences as the bullet travels all
15 the way to the border.

16 If there's a boy between the bullet -- I
17 mean, the gun and Sergio, and that bullet goes through
18 that boy in the -- in the U.S., and then the same bullet
19 hits Sergio, their position is that there's a Bivens
20 claim and there's a constitutional constraint as to the
21 first boy who dies, but not the second boy that dies.

22 The -- the -- the conduct occurring in the
23 United States, a hundred percent of it, if it gives a
24 Bivens claim, if it gives a normal, standard Bivens
25 claim to the boy who shot somewhere with the -- with the

1 bullet and then does not give one to Sergio Hernandez
2 is -- ends up being anomalous.

3 As to Justice Kennedy's question on the
4 Fourth Amendment, Boumediene decided that it is a -- it
5 is a functional test. It's a question of judgment, not
6 compulsion, as Justice Harlan said in Reid, and as -- as
7 Boumediene suggested.

8 Verdugo has nothing to do with the
9 application of the seizure by shooting someone dead to
10 the search inside the property. I think Boumediene --
11 Boumediene confirms that the fact pattern of someone
12 being killed is enough in a practical way to provide
13 limited constraints.

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 11:06 a.m., the case in the
18 above-entitled matter was submitted.)

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