

# US appeals court grants immunity to border patrol agent who killed Mexican teenager

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The United States Court of Appeals for the Fifth Circuit unanimously granted “qualified immunity” last Friday to a border patrol agent standing on US territory who shot an unarmed 15-year-old boy in the face near the Mexican border. The ruling further erodes basic constitutional rights and strengthens the arbitrary powers of the police, especially at the border.

The lawsuit arose from the shooting of a 15-year-old Mexican boy, Sergio Adrián Hernández Güereca, on June 7, 2010, near the Paso del Norte Bridge in Texas. According to Sergio’s parents, the boy was playing with his friends running up and down a cement culvert standing between the US and Mexico when agent Jesus Mesa Jr. arrived on the scene and detained one of Sergio’s friends.

As the boy retreated beneath the pillars of the Paso del Norte Bridge to observe, agent Mesa fired two shots, one of which struck Sergio in the face. Agent Mesa alleged that he responded to the boy throwing rocks.

The officer was not charged with murder or any other crime. Instead, as is common practice in American law enforcement agencies, the officer received paid administrative leave (i.e., a paid vacation) before he resumed his normal duties.

Last Friday’s ruling affirms most of a previous decision last June by a three-judge panel of the court. The plaintiffs had filed the lawsuit alleging, among other things, that the shooting violated Sergio’s Fourth Amendment right not to be subjected to unreasonable searches and seizures, including excessive force, as well as his Fifth Amendment right not to be deprived of life, liberty or property without due process of law. Both amendments are part of the Bill of Rights.

The Obama administration vigorously defended the border patrol agent, asserting that he was entitled to “qualified immunity.” The government’s position exposes the true content of its immigration policy. While

Obama postures as sympathetic to the plight of immigrants, his government treats them with contempt—as “aliens” with absolutely no rights, not even the right to live.

The unanimous decision by the Fifth Circuit was the culmination of five years of litigation by the victim’s parents. The Fifth Circuit held that the plaintiffs “fail to allege a violation of the Fourth Amendment.” According to the ruling, Sergio “had no ‘significant voluntary connection’ to the United States.” Moreover, he “was on Mexican soil at the time he was shot,” and therefore “cannot assert a claim under the Fourth Amendment.”

The Fifth Circuit also held that the plaintiffs could not sue under the Alien Tort Statute, a section of US Code that has traditionally allowed foreign citizens to seek remedy in US courts in cases of human rights violations occurring outside the US, because the US did not “consent” to be sued.

Finally, although the court was split on whether agent Mesa’s conduct might violate the Fifth Amendment, it ruled that “the Fifth Amendment right asserted by the plaintiffs was not clearly established at the time of the complained-of incident,” since “the person injured by a US official standing on US soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred.”

Since the right was allegedly not “clearly established,” the Fifth Circuit ruled that the agent was entitled to “qualified immunity.” Qualified immunity is a reactionary and pseudo-legal doctrine that has no basis in the Constitution. However, it is increasingly being used throughout the judiciary to shield killer cops from legal accountability.

In this case, the invocation of “qualified immunity” is absurd on its face. The Fifth Amendment, which has been the supreme law of the United States since 1791, is perfectly clear. It provides that no person “shall be

deprived of life ... without due process of law.”

The deadly implication of the Fifth Circuit’s ruling is that it is no longer “clearly established” that US border patrol agents cannot open fire on unarmed children on the Mexican side of the border. Instead, with respect to shootings at the border, the decision practically proclaims that it is “open season.”

A year ago, the American Civil Liberties Union reported that since 2010, at least 28 civilians “died following an encounter with US Customs and Border Protection (CBP) personnel.” All but one died as the result of the use of force. Around a third of the victims were children.

In 2012, 16-year-old Jose Antonio Elena Rodriguez met his brother for a snack in Nogales, Sonora, Mexico, near the border when he was killed by CBP agents. Ten bullets entered the back of his head, eight bullets struck him as he was already on the ground and two of the agents were alleged to have shot at least 14 times.

No charges were filed and no explanation was given for such a horrific and barbaric event, except a perfunctory explanation that children were throwing rocks behind a 60-foot tall fence.

In the context of an intensified persecution and criminalization of undocumented immigrants, the Fifth Circuit’s ruling marks a further step in the escalation of authoritarian measures aimed at dismantling democratic rule.

The Obama administration bears primary responsibility for the brutality at the border. Obama’s immigration policy has set a record in deportations and substantially militarized the border with Mexico. As the US has expanded the militarization of its border, migrants’ drownings while crossing the Rio Grande have increased.

Moreover, Obama’s deportation of children, without due process or even an appearance in court, has attracted international condemnation. In many cases, children are deported back to countries where there are high chances that they will be killed.



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