

Supreme Court hears arguments in murder of Mexican teen by US Border Patrol

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The Supreme Court heard oral arguments Tuesday in a case that exposes the brutality and illegality that characterize the operations of US border police along the militarized boundary between the United States and Mexico. The case takes on added significance coming at the same time as the Trump administration's enactment of measures to escalate the persecution, detention and deportation of undocumented workers, mainly from Mexico.

The case, *Hernandez v. Mesa*, concerns the June 2010 murder of an unarmed 15-year-old Mexican youth, Sergio Hernandez Guereca, who was shot in the head at close range by Jesus Mesa, a Border Patrol agent. Mesa, standing on US territory near El Paso, Texas, shot and killed the teenager, who was seeking protection behind a trestle on the Ciudad Juarez side of the border.

The slaying of Sergio Hernandez was part of a pervasive pattern of wanton violence carried out on the Mexican border by the 44,000-strong force of US Border Patrol agents and Customs and Border Protection officers. In 2013, the *Arizona Republic* published an investigative report documenting the death of at least 42 people, including a minimum of 13 Americans, at the hands of US border police over the previous eight years. It noted that none of the border cops involved in the killings had faced consequences. On at least three occasions, agents shot unarmed teenagers in the back.

This force for terror on the border is to be dramatically expanded under Trump, who has ordered the hiring of an additional 10,000 Customs and Border Protection officers and 5,000 more Border Patrol agents. He has also ordered the expansion of existing detention facilities and the construction of new ones along the southwestern border of the US.

These forces are being given a green light to escalate their violence, turning the border into a virtual free-fire zone and increasing the toll of dead and wounded

Mexican nationals. In his press briefing on Tuesday, White House press secretary Sean Spicer said of the new immigration policy, "The president wanted to take the shackles off individuals in these agencies..."

In keeping with its policy of mass deportations and "strengthening" of the border, the Obama administration refused to prosecute Mesa, the Border Patrol agent who killed Hernandez, and turned down an extradition request from the Mexican government, which charged Mesa with murder. The Federal Bureau of Investigation initially claimed that the victim had thrown rocks at Mesa, justifying his use of deadly force. But cellphone videos of the incident exposed that as a fabrication.

They showed that the 15-year-old was one of four youth who were playing a game, daring one another to run to the other side of the narrow, dry river bed of the Rio Grande, touch the US border fence, and run back to the Mexican side of the unmarked international border in the middle of the culvert.

The videos showed Mesa grabbing one of the youth and then firing his weapon at Hernandez, who, far from threatening the cop, was cowering behind a bridge structure.

The Justice Department terminated its investigation of the case in 2012 and released an equally specious report claiming that Mesa was responding to rock throwing by a group of border smugglers and therefore acting in accordance with Border Patrol guidelines.

In the absence of criminal prosecution of their son's murderer, the parents of Sergio Hernandez filed a civil suit for damages against Mesa in US federal court. A federal district judge in Texas threw out their suit on the grounds that they had no legal standing because Sergio Hernandez was not covered by the US Constitution, since he was an alien and was shot on Mexican territory.

The court also said that even if the teenager was constitutionally protected, the parents' suit would not

pass muster because Mesa would be entitled to “qualified immunity,” on the grounds that he was unaware his actions might violate Hernandez’s rights. The doctrine of qualified immunity has been continually expanded in recent decades to shield police from being held accountable for illegal acts.

The district court ruling was upheld by the Fifth Circuit Court of Appeals. The parents then appealed to the Supreme Court, asking that it allow their suit to go forward.

The Obama Justice Department sided with Mesa and the border police, arguing in court that the murder victim had no rights under the US Constitution and the parents had no legal recourse within the US judicial system. The Trump administration is simply maintaining the same position in its arguments before the Supreme Court.

The family’s lawyers contend that the parents have a right to sue under the Fourth Amendment to the US Constitution, which has long been interpreted as proscribing the use of excessive force, and the Fifth Amendment, which guarantees due process rights to all “persons,” without limiting its coverage to US citizens or residents.

The Mexican government filed a brief in support of the Hernandez family, noting US Customs and Border Protection statistics citing the use of deadly force involving firearms 243 times from October 2010 through August 2016. Nearly all of these incidents occurred at or near the US-Mexico border.

In court papers, Mexico pointed out that many of its residents “spend much of their day within shooting distance” of Border Patrol agents. It also stated acidly that if a Mexican officer fired across the border and killed an unarmed American, the United States would demand that the killer be brought to justice.

In the course of the one-hour oral argument Tuesday morning, it became clear that the court was split along predictable lines, with the four more liberal justices seemingly inclined to reverse the lower courts and give the parents their day in court, and the right-wing bloc, consisting of Chief Justice John Roberts, associate justices Samuel Alito and Clarence Thomas, and the nominal “swing” justice Anthony Kennedy indicating support for the lower courts.

There are presently only eight justices on the court due to the unfilled seat vacated by the death last year of Antonin Scalia. Should the court deadlock four-to-four, the lower court rulings will stand. The court could also decide to rehear the parents’ appeal when the vacancy is

filled. It is expected that Trump’s nominee, Neil Gorsuch, will be confirmed by April, but it is highly unlikely that he would side with Hernandez.

In the oral argument before the court, Robert Hilliard, a lawyer for the Hernandez family, argued: “If left standing, the Fifth Circuit’s decision will create a unique no-man’s land—a law-free zone in which US agents can kill innocent civilians with impunity. This court should make clear that our border is not an on/off switch for the Constitution’s fundamental protections.”

However, the overriding concern of virtually all of the justices, including the nominal liberals, was to avoid setting a legal precedent that might allow the victims of American imperialist crimes around the world to sue for damages in US courts. This was stated most openly by Chief Justice John Roberts, who said a decision in the parents’ favor could have implications in many directions, including “a drone strike in Iraq where the plane is piloted from Nevada.”

Justice Kennedy worried that a ruling for Hernandez would negatively impact “a critical area of foreign affairs” and suggested that the issue be left to Congress and the executive branch to resolve.

Associate justices Stephen Breyer and Elena Kagan sought to fashion a narrow rationale for allowing the Hernandez suit to proceed that would have minimal impact on US operations internationally. Breyer suggested that the lower courts could be reversed on the grounds that the location of the shooting, an unclearly marked border overseen by both US and Mexican authorities, was, for practical purposes, under joint control.

Kagan worried, “There might be problems in other situations as well. There might be problems when US officials go into a foreign nation’s territory.” She subsequently seconded Breyer’s proposal, adding that the “dividing line” between the two countries at the site of the shooting “isn’t even marked on the ground ... it’s a *sui generis* kind of case.”

A decision is expected by the end of June.



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