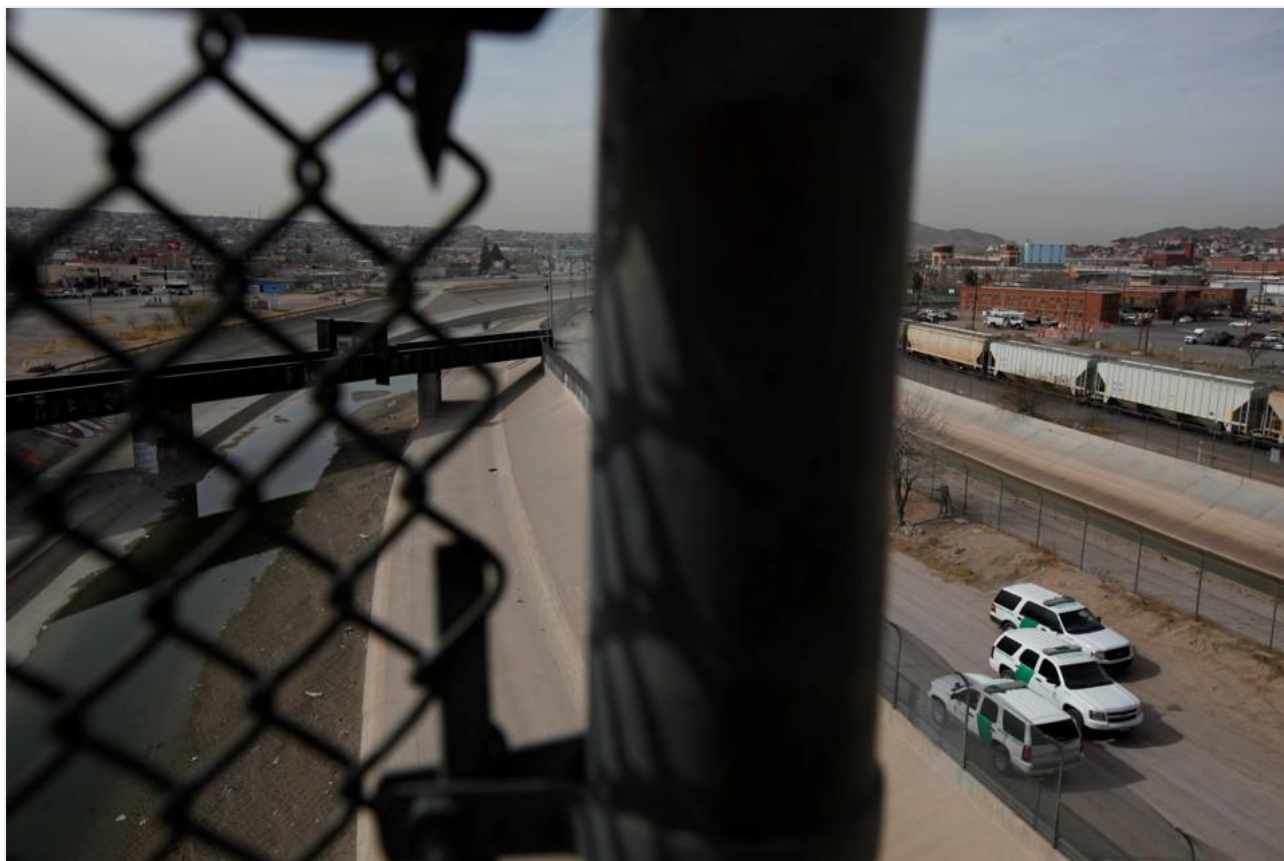


The Atlantic

Is the Southern Border a Constitution-Free Zone?

The Supreme Court considers a case involving a youth on the Mexican side of the border killed by an American border patrol agent on the U.S. side.



Cars of the U.S. border patrol are parked next to the banks of the Rio Bravo and the natural border between the U.S. and Mexico in El Paso, United States.

Jose Luis Gonzales / Reuters

GARRETT EPPS

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“No matter whether the Constitution follows the flag or not,” Finley Peter Dunne’s [Mr. Dooley](#) said long ago in an obsolete dialect, “the Supreme Court follows the election returns.”

Both of these—the traveling flag and the election returns—formed a complicated subtext Tuesday at the first argument the Supreme Court has heard in Trump’s America, along with the nature of life along a wall on the Southern border. The question presented, boiled down to its essence, was this. If a Border Patrol officer in the U.S. is so vexed by the antics of a Mexican teenager standing on Mexican soil that he shoots the boy dead across the border, does the Constitution even apply? And if so, does the law give the boy’s father a remedy?

The Justices’ questions of the parties showed little sign that they are considering this issue in a country that has changed—is changing—its attitudes toward foreigners, immigrants, and law enforcement almost hourly, and for the worse. (Indeed, the Administration released its [sweeping new guidance memos](#), which target for deportation a wide swatch of immigrant America, literally while the Court was sitting.)

Those changes in the atmosphere make *Hernandez v. Mesa* a complicated straw in what may be a very ill wind indeed. The facts are these: on June 7, 2010, a group of Mexican teenagers began playing a silly and aggravating game near a border checkpoint on the Rio Grande between El Paso, Texas, and Ciudad Juarez, in the Mexican state of Chihuahua. The border at this area is a culvert containing the 33-foot-wide Rio Grande; the culvert has sloping concrete inclines on both sides, with fences outside. The teens began running up the incline to touch the fence on the U.S. side, then running back. Agent Jesus Mesa of the U.S. Border Patrol arrived and grabbed one of the boys by the arm as he tried to scamper down the incline. Another boy, Sergio Hernandez, fled past the agent and hid behind a pillar supporting the bridge nearby. Agent Mesa drew his pistol. When Sergio Hernandez looked out from behind the pillar, the agent shot him through the head. The distance was 60 feet.

Hernandez was 15 years old. He died on the spot. He was not armed and, when shot, he was on Mexican soil.

There is dispute about some of these facts. Immediately after the shooting, the CBP claimed that Mesa had fired in self-defense against a rock-throwing crowd. Cellphone videos then surfaced that cast doubt on this. The *Arizona Republic* reported that one video shows Sergio “peeping out from behind a pillar beneath a train trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead.”

There’s been no public official accounting of what happened. The CBP did an investigation itself and concluded there were no grounds to charge Mesa with a crime. Mexico charged him with murder and asked the U.S. to extradite him, which the federal government refused to do. Then Sergio’s parents filed a lawsuit in U.S. federal court against the government and CBP officials, including Agent Mesa. A court dismissed the claims against all defendants; but a

panel of the Fifth Circuit reinstated the action against Mesa, holding that the family was entitled to a trial of its claim that the killing of their son amounted to a violation of the Due Process Clause of the Fifth Amendment. The full Fifth Circuit then reversed that decision, dismissing the family's claims.

Before a trial could be held on the merits, the Supreme Court granted review of that judgment, asking the parties to argue whether the Fourth Amendment (which forbids "unreasonable searches or seizures," including arrests and shootings) applied to the case; whether that rule was so clear at the time of the shooting that any "reasonable officer" would have known it; and whether the family should be able to sue Mesa under a 1971 case called *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. Because there is no general statute permitting civil-rights suits against federal agents, that case is the vehicle for individual lawsuits against federal officials who violate "clearly established" rights. But it is not a favored child of the current court; indeed, as Justice Anthony Kennedy pointed out in argument Tuesday, "Since 1988, this court has not recognized a single [new kind of] *Bivens* action."

So Sergio's family faced an uphill slog, and its progress wasn't made easier by their lawyer, Robert C. Hilliard, a successful products liability and personal injury lawyer from Corpus Christi, Texas, who seemed out of his depth in the well of the Supreme Court. Representing Agent Mesa was El Paso attorney Randolph Ortega, a specialist in criminal defense. The government—supporting dismissal of the family's claim—had Edwin Kneedler of the Solicitor General's office. Kneedler, who is a veteran of well over 100 arguments in front of the court, was at ease; the other two less so.

Watching oral argument is always an exercise in attempted telepathy: what is going on in the fine legal minds sitting on the bench? Seldom has that seemed more true than in late winter of 2017, as the Trump administration begins assembling the legal and logistical machinery necessary for an all-out assault on America's undocumented population. The court this term has already heard cases examining whether the Department of Homeland Security can hold aliens indefinitely while seeking to deport them, and whether courts can hold federal officials accountable when evidence shows they deliberately subjected detainees to punitive and unconstitutional conditions in detention. Hernandez—baldly put, asks whether the border is a law-free zone.

Questions don't always telegraph a Justice's position, but they are the best evidence we have. The court's four moderate liberals seemed to be laboring to help Hilliard construct a proposed rule that might win five votes; Chief Justice John Roberts and Justice Samuel Alito seemed to be worried that applying the Constitution to this case might lead to tort actions against U.S.

drone pilots who sit in the U.S. and guide drone aircraft on bombing strikes abroad; and Justice Kennedy seemed to be agonized about the potential bad effects of federal courts blundering into “the most sensitive areas of foreign affairs.”

Hilliard asked the Court to hold that any time a civilian law enforcement officer acts inside the U.S. in a way deprives a foreign civilian on foreign soil of his life, and the other country’s government does not object to U.S. court jurisdiction, the survivors have a cause of action.

“That’s a test that, surprisingly, fits the exact facts of your case,” Roberts interrupted.

Hilliard replied that the “intent of our rule is simply to involve this Court in addressing an ongoing domestic routing law enforcement issue along our southwest border”—that is, the repeated shootings by CBP personnel of Mexicans on both sides of the border, which, he said “has resulted in at least ten cross-border shootings and six Mexican national deaths.” Later he said, “the interaction at the border, at our southwest border, has resulted often in shots being fired across the border.”

This is not a good strategy in an appellate court, because it seems to invite the court to become a kind of super-police commission, rather than doing its job, which is to lay down rules of law. Justice Stephen Breyer explained to Hilliard what was needed. His words could be a wall plaque in any aspiring appellate lawyer’s office, because a workable rule is what courts beg lawyers to give them.

[A]re we, in deciding for you ... deciding as well that anyone who suffers a drone strike can come to New York and bring a law case? Are we deciding that the matter is unclear so that when the proper authorities get advice from their lawyers over in the Executive Branch, they have to say we're confused? Okay? So what are the words that we write that enable you to win, which is what you want, and that avoid confusion, uncertainty, or decide these other cases the proper way? That's the question you've been given three times, and I would certainly like to know your answer.

Hilliard never succeeded in giving one. Breyer suggested a rule permitting liability in a special area like the Rio Grande culvert, which is maintained jointly by Mexico and the U.S. Ortega, representing Agent Mesa, repeatedly insisted that “[t]he border is very real and very finite. It's not elastic. . . .” Justice Ruth Bader Ginsburg tartly responded that “I don't understand all

this about Mexico. It's the United States law operating on the United States official who's acting inside the United States. This case has, as far as the conduct is concerned, United States written all over it.”

Shouldn't the Justices see what is happening in the country and shy away from any rule that suggests the border is a gateway to a law-free zone?

Ginsburg then suggested that “when there's an act outside that causes injury inside, the regulating rule can come from the place where the conduct occurred.” In other words, U.S. law and the Constitution would apply to Mesa, who was in the U.S., even if the harm he caused was outside. That argument seemed to appeal slightly to Justice Kennedy, whose vote would be crucial to any decision for the family.

Kennedy mostly seemed to lean toward the government, on the grounds that lawsuits in cross-border shooting cases might complicate relations with Mexico. (Mexico enthusiastically supports the family's case and has filed a brief on their side with the Supreme Court; but perhaps that would be different in other cases.) “[I]sn't this an urgent matter of separation of powers for us to respect the duty ... the principle role that the executive and the legislative have with respect—respect to foreign affairs?” he asked Hilliard.

Ousting courts from this kind of suit, of course, might leave victims and their families with no remedy at all. Shouldn't the Justices see what is happening in the country and shy away from any rule that suggests the border is a gateway to a law-free zone?

Perhaps; but the job of an appellate court, as I said above, is not to solve crises but to fashion rules—rules to function in a system of laws. It is to imagine a world in which the Constitution is respected, and the government acts for the common defense and the general welfare, and the courts have every reason not to extend themselves too far into the conduct of foreign and military affairs.

Do we live in that world? If not, is it the job of the Court to create it—or does that task fall to the rest of us?

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