

The Supreme Court Hears Arguments regarding a cross boarder shooting

Hernandez v. Mesa

On, February 21, 2017 Supreme Court heard oral arguments in the case *Hernández v. Mesa*, <http://www.scotusblog.com/case-files/cases/hernandez-v-mesa/> The Transcript of the Oral Arguments for this case can be read here: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-118_3e04.pdf

The question presented is: Whether the U.S. Constitution protects a Mexican resident on the Mexican side of the Border from the use of excessive or unreasonable force by a U.S. Border Patrol Agent?

The facts of the case are as follows:

In June 2010, Sergio Hernandez, 15, was playing with two friends in the concrete culvert that marks the boundary between El Paso and Juarez, Mexico. Cellphone video shows the boys ran up the culvert on the U.S. side and touched the high fence. They turned to run back to the Mexican side when a U.S. border patrol agent, Jesus Mesa Jr. who was on a bicycle came upon them.

As Hernández was running away from the fence back toward Juarez, on the Mexican side of the border, Jesus Mesa fired at him from approximately 60 feet away, on the U.S. side of the border. Mesa’s shot struck Hernández in the head, and he died instantly.

Mesa initially claimed he acted in self-defense and that his “use of force was result of Hernández and the other individuals surrounding him and throwing rocks at him while refusing his verbal commands to stop.” While the video appeared to disprove that, Justice Department investigators later said Mesa was responding to reports of smugglers and had encountered rocks being thrown.

Mesa does not dispute that he shot Hernández from the other side of the U.S.-Mexico border. But while Hernández’s parents contend that their 15 year old son was fooling around with his friends in the culvert between El Paso, Texas, and Juarez, Mexico, Mesa contends and according to U.S. Department of Justice records – Hernández “had been arrested twice before for alien smuggling and had been given voluntary returns to Mexico” because he was a juvenile. Moreover, a DOJ investigation concluded “that the shooting took place while alien smugglers, including Hernández, unsuccessfully attempted an illegal border crossing and began to hurl rocks from close range at Agent Mesa while he was attempting to detain a suspect.”

Mexico charged him with murder but the U.S. officials **refused** to extradite Mesa to face charges in Mexico. They also declined prosecuting him under U.S. law.

Sergio's parents then sued Officer Mesa, alleging the shooting was an unjustified use of force prohibited by the US Constitution. In support of their claims, they relied on the 4th Amendment's ban on unreasonable seizures and the use of excessive force as well as the 5th Amendment, which says no person shall "be deprived of life or liberty ... without due process of law."

A federal judge threw out the suit on the grounds that the U.S. Constitution's protections stop at the border. The Judge said that since the Mexican teenager was killed on the Mexican side, his family could not sue the border patrol agent.

A divided panel of the U.S. 5th Circuit Court of Appeals briefly revived the suit. The majority cited the Supreme Court's ruling in cases regarding the U.S. detention facility at Guantanamo Bay, Cuba, in which the Justices said the Constitution and the right to habeas corpus (producing the defendant) extended to the naval base on Cuban soil because U.S. authorities exercised complete control there. Similarly, the judges said, U.S. agents controlled the area on the U.S-Mexico border. The full 15-member panel of the 5th circuit Court of Appeals concluded that because there had been no legal precedent established, the border patrol agent could not be held liable for Hernandez's death.

The family appealed to the Supreme Court, arguing the justices should not permit a "law-free zone in which U.S. agents can kill innocent civilians with impunity."

There are three main issues the Court must consider:

1. Does the Fourth Amendment's bar on unjustified deadly force apply when the victim of the shooting is outside the United States, and how do courts make that determination.
2. Did Mesa violate Hernández's rights under the Fifth Amendment? If so, at the time of the shooting, had it been "clearly established" that Mesa's actions were unconstitutional.
3. The Justices added an additional issue, whether Hernández's parents can bring their suit under the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents*, in which the Justices ruled that a plaintiff can bring a private federal action for damages against federal officials who allegedly violated his constitutional rights.

The case of Hernandez vs. Mesa will be the first argued in the Supreme Court by lawyers representing the Trump administration.

The family's attorney, Robert Hilliard of Corpus Christi, Texas, said the case has similarities to the legal battle over Trump's travel ban. "This is really about the separation of powers and whether the judiciary has a role in reviewing the conduct of the government." Hilliard was referring to the government's

contention that the Supreme Court should throw out the suit and shield U.S. agents from all such claims.

Defending the travel ban, government lawyers argued that the judges had no authority to second-guess the president's decision to exclude certain foreigners from entering the country. As in many past cases, Justice Anthony M. Kennedy appears to hold the key vote. Justice Kennedy has said the reach of the Constitution should turn on practical concerns, including whether U.S. officials are in control. If so, he could join with the court's liberals to say the Constitution constrains U.S. agents operating on a border, thereby clearing the family's lawsuit to proceed. Such a decision would surely be cited by lawyers and judges in the litigation over the travel ban.

But Justice Kennedy could also join with the Court's conservative Justices and refuse to open the door for noncitizens outside the country to bring legal claims against U.S. officials. If the court were to split, 4-4, **the Justices could choose to place a hold on the case and await the confirmation of a ninth justice.**

The Senate will begin hearings March 20 on Judge Neil Gorsuch, the president's nominee to fill the vacancy.