

SLATE

Why Do Children Keep Dying in U.S. Custody? Maybe Because Nobody Is Holding CBP Accountable.

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Each week, we continue to learn more and more about the epidemic of misconduct by Customs and Border Protection agents, and the agency's complete lack of accountability. Last week, it was reported that a 10-year-old Salvadoran girl named Darlyn Cristabel Cordova-Valle died in Health and Human Services custody in September after being detained by CBP. The news came just days after a 16-year-old Guatemalan boy named Carlos Gregorio Hernández Vásquez died in U.S. custody, bringing the known recent total of such child deaths to six.

Meanwhile, earlier this week, the Supreme Court agreed to hear the case of another child death in which CBP had apparent culpability, *Hernández v. Mesa*. In that case, the court will determine whether the parents of Sergio Adrián Hernández Güereca, a Mexican child who was killed by Border Patrol Agent Jesus Mesa Jr. in a cross-border shooting, can sue Mesa. *Hernandez* could come down to complex technical questions about liability for international incidents. Whatever the court's answer, though, it won't solve the underlying problems with CBP violence and the lack of remedies currently available to victims.

This is the second time the *Hernández* case will come before the high court. In the first hearing in 2017, the court sent the case back to the 5th U.S. Circuit Court of Appeals on technical grounds without deciding the central question. Now the case has circled back for a final decision on whether the child's parents can bring a particular type of civil lawsuit against the agent. The lawsuit was brought as a *Bivens* claim, a type of case that sometimes allows lawsuits against federal agents for violating constitutional rights. In the original 1971 case, *Bivens v. Six Unknown Agents*, Webster Bivens sued individual narcotics agents for damages and injunctive relief after they entered his apartment, arrested him, and searched for narcotics without a warrant or probable cause, violating his Fourth Amendment rights. The court decided that such suits were allowed under a principle that courts could use "any available remedy" to "make good the wrong done" for such constitutional claims.

Since the original case, however, courts have attempted to reign in *Bivens*, particularly in cases involving immigration enforcement. It seems likely that in *Hernández*, the court will prohibit a *Bivens* action. Without a *Bivens* action, Hernández Güereca's parents will be left

without any legal redress at all. In other words, there would be absolutely no legal remedy—aside from the unlikely event of a prosecution—for the cross-border killing of a child by a Border Patrol agent. (In this case, Mesa was not prosecuted.)

Unfortunately, this family won't be alone in its inability to win any type of justice: CBP officers have victimized thousands. CBP is one of the largest law enforcement agencies in the entire world. According to self-reported numbers, that makes it responsible for arresting more than 1,100 individuals every day, which equates to almost half a million people per year. So far in 2019, it's engaged in 464,817 "apprehensions," which includes arrests.

With these high arrest numbers come high instances of uses of force. In the fiscal year 2017, CBP reported almost 1,000 uses of force, ranging from shootings to what it classifies as "less-lethal force." This includes physical assaults and the use of things like batons, stun guns, pepper spray, and dog attacks. Of course, these numbers are self-reported and only reflect violence undertaken in the course of duty. The numbers also do not account for the dozens of alleged instances of sexual assault by CBP agents on a year-to-year basis.

It's not only CBP officers' use of force at work that is concerning, though. When CBP employees aren't on duty, many of them are themselves getting arrested. In 2014, Politico reported that between the years of 2004 and 2010, one CBP officer was arrested nearly every single day. In 2016, 251 CBP employees were arrested by police, about one every 36 hours. Border Patrol agents were subject to arrest most often. The most common reasons for arrest? Drug abuse, alcohol abuse, and domestic violence. In 2017, that number fell by six to 245 arrests. Although complete numbers for 2018 aren't yet available, at least one border patrol agent, Juan David Ortiz, was accused that year of being a serial killer. Another agent is accused of stabbing his partner and their infant son to death last year. In total, advocacy group Southern Border Communities Coalition has cataloged at least 83 deaths at the hands of Border Patrol agents.

A 2017 report from the libertarian Cato Institute showed that Border Patrol agents are 54 percent more likely than Bureau of Prisons guards to be fired for disciplinary infractions or poor performance, six times as likely to be fired as FBI agents, 7.1 times as likely to be fired as Drug Enforcement Administration agents, and 12.9 times as likely to be fired as Secret Service agents.

On top of violence at the hands of officers, those arrested by CBP often have to contend with the potential for contracting illnesses in the cramped and filthy "hieleras" or iceboxes where they are held during processing. CBP itself admits that the processing facilities are inadequate for housing children or families, and advocates argue that conditions of the hieleras may have contributed to the recent deaths of detained children. Those held in hieleras don't have access to beds, showers, or medical care and often are not provided with edible food or potable water.

CBP agents and the agency as a whole are running roughshod over border communities, but as the *Hernández* case shows, victims have little recourse. Complaints to the agencies are routinely ignored or mishandled. While criminal charges are sometimes brought against agents for their abuses, it isn't common. Again, notably, prosecutors did not indict Mesa for killing Hernández Güereca.

On the civil side, remedies for victims and families are few, and cases are increasingly difficult to win. More and more, courts seem to be capitulating to government demands that Department of Homeland Security and sub agencies be placed above the law. A Federal Tort Claims Act claim against Mesa was already dismissed after the 5th Circuit found that FTCA claims are not available for injuries arising in a foreign country. Now, the Supreme Court may limit *Bivens* cases for victims of CBP agents.

The grim reality is that the precarious position of most of CBP's victims means that they rarely have the knowledge or resources to fight a civil case. Whether or not the Supreme Court decides to allow a *Bivens* claim in *Hernández v. Mesa*, CBP will continue to create victims. The only question left is when we will finally be ready to wrangle the constantly expanding, deeply alarming green monster.