

Hernandez v. Mesa: Preserving the Zone of Constitutional Uncertainty at the Border

Alexandra A. Botsaris

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

77 Md. L. Rev. 832 (2018)

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Note

HERNANDEZ V. MESA: PRESERVING THE ZONE OF CONSTITUTIONAL UNCERTAINTY AT THE BORDER

ALEXANDRA A. BOTSARIS*

In *Hernandez v. Mesa*,¹ the Court declined to address whether a Mexican citizen standing on Mexican soil was entitled to Fourth Amendment² protections when fatally shot by a United States Border Patrol Agent standing across the border in United States territory.³ This case exposes two critical problems facing our southwest border—the use of excessive force by Border Patrol agents and the lack of judicial remedy available to those subjected. While the Supreme Court’s willingness to hear the issue reaffirms its importance, the Court has yet to provide significant guidance on how to apply the Constitution extraterritorially to resolve these disputes. By remanding the case back to the Fifth Circuit,⁴ the Court left the law at a standstill where an immediate solution is necessary.

In Part I, this Note will provide a summary of the factual and procedural circumstances leading to the Court’s opinion.⁵ Part II will explore the evolution of the extraterritorial doctrine in the context of constitutional application and will introduce the historical foundations of the Fourth Amendment.⁶ Part III will explain the reasoning behind the Court’s decision.⁷ Finally, in Part IV, this Note will (1) present the context that gave rise to Agent Mesa’s fatal shooting of Hernández and explain how Border Patrol agents operate within an environment that fosters incidents of excessive force;⁸ (2) argue the

© Alexandra A. Botsaris.

* J.D. Candidate, 2019, University of Maryland Francis King Carey School of Law. The author wishes to thank the editors of the *Maryland Law Review* for their expert feedback and Professor David Gray for his invaluable guidance. The author would also like to thank her parents, Michael and Helen, for their unwavering encouragement, and her brother, Nicholas, for his loyal friendship. Lastly, the author would like to especially thank her partner, Kyle Dent, for his kind patience, thought-provoking insight, and steadfast support.

1. 137 S. Ct. 2003 (2017).
2. U.S. CONST. amend. IV.
3. *Hernandez*, 137 S. Ct. at 2005–08.
4. *Id.* at 2006.
5. *See infra* Part I.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Section IV.A.

Court should have extended Fourth Amendment protections by adopting the functional approach established in *Boumediene v. Bush*⁹ to provide a civil remedy to Hernández's family and deter similar actions by Border Patrol agents;¹⁰ and (3) contend that extending a remedy is consistent with the Fourth Amendment's historical purpose.¹¹

I. THE CASE

On June 7, 2010, Sergio Adrian Hernández Güereca ("Hernández"), a fifteen-year-old Mexican boy, was playing a game with his friends in the empty culvert that separates the United States and Mexico.¹² This area of the culvert is near the Paso Del Norte Port of Entry, an international port between El Paso, Texas, and Ciudad Juarez, Chihuahua, Mexico.¹³ The boys would run up the incline of the culvert to touch the barbed-wire fence on the United States' side of the border and then run back down into Mexico.¹⁴

During the game, United States Border Patrol Agent Jesus Mesa, Jr. ("Agent Mesa") arrived by bicycle and apprehended one of Hernández's friends.¹⁵ Hernández withdrew to the Mexican side of the border and hid behind a pillar of the railroad bridge that reaches across the culvert.¹⁶ While standing on American soil, Agent Mesa fired at least two shots across the border toward Hernández—one of which hit Hernández in the face and killed him.¹⁷ Agent Mesa, and the other United States Border Patrol Agents who responded to the incident, eventually left the scene without providing aid to Hernández.¹⁸ Hernández, who, according to the complaint, was "unarmed and unthreatening" throughout the encounter,¹⁹ was pronounced dead after Mexican authorities finally arrived.²⁰

9. 553 U.S. 723 (2008).

10. See *infra* Section IV.B. While there are other grounds for relief, this Note will solely focus on the avenues available through the Fourth Amendment.

11. See *infra* Section IV.C.

12. *Hernandez v. United States*, 802 F. Supp. 2d 834, 837 (W.D. Tex. 2011), *aff'd in part, rev'd in part*, 757 F.3d 249 (5th Cir. 2014), *aff'd on reh'g*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); see *Culvert*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining the term as "[a] channel, conduit, or tunneled drain of masonry or brick-work conveying a stream of water across beneath a canal, railway embankment, or road").

13. *Hernandez*, 802 F. Supp. 2d at 837.

14. *Id.* The border between the two countries runs through the middle of the culvert. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017).

15. *Hernandez*, 802 F. Supp. 2d at 837; *Hernandez*, 137 S. Ct. at 2005.

16. *Hernandez*, 802 F. Supp. 2d at 837.

17. *Id.* at 837–38.

18. *Id.* at 838.

19. *Hernandez*, 137 S. Ct. at 2005.

20. *Hernandez*, 802 F. Supp. 2d at 838.

A. Preliminary Investigation & District Court Ruling

After the Department of Justice (“DOJ”) declined to discipline Agent Mesa,²¹ Hernández’s parents sued the United States, Agent Mesa, his supervisors, and unknown federal employees, alleging eleven claims against the defendants.²² Claims One through Seven were brought under the Federal Tort Claims Act (“FTCA”)²³ “based on multiple allegations of tortious conduct.”²⁴ Claim Eight asserted the United States infringed upon Hernández’s Fourth²⁵ and Fifth Amendment²⁶ rights.²⁷ Claim Nine contended the United States “failed to adopt policies that would have prevented a violation of Hernández’s Fourth and Fifth Amendment Rights.”²⁸ Claim Ten purported Agent Mesa was liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*²⁹ for using “excessive, deadly force” in violation of the Fourth and Fifth Amendment.³⁰ In an amended complaint, the plaintiffs

21. The Department of Justice (“DOJ”) investigated the incident and concluded that Agent Mesa “did not act inconsistently with [Customs and Border Patrol] policy or training regarding use of force,” and “there was insufficient evidence” to accuse Agent Mesa of a federal civil rights violation. *Hernandez*, 137 S. Ct. at 2005 (quoting Press Release, Dep’t of Justice, Office of Pub. Affairs, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca>). Specifically, the DOJ found that the incident “occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a [Customs and Border Patrol] agent who was attempting to detain a suspect.” *Id.* (same). The DOJ noted, “Hernández ‘was neither within the borders of the United States nor present on U.S. property, as required for jurisdiction to exist under the applicable federal civil rights statute.’” *Id.* (same).

22. *Hernandez*, 802 F. Supp. 2d at 838. In this Section, Jesus C. Hernández and Maria Guadalupe Guereca Bentacour, the parents of the victim, will be collectively referred to as “the plaintiffs.”

23. 28 U.S.C. § 1346(b) (2012). The court stated:
The FTCA allows a person to sue the United States for the negligence or other tortious conduct of its employees acting within the scope of employment in situations where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the tort occurred.
Hernandez, 802 F. Supp. 2d at 840 (citing 28 U.S.C.A. § 1346(b)(1) (West 2011)).

24. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014), *reh’g granted*, 785 F.3d 117 (5th Cir. 2015); *see Hernandez*, 802 F. Supp. 2d at 838 (listing the specific FTCA claims brought by the plaintiffs).

25. U.S. CONST. amend. IV. The Fourth Amendment establishes, “[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against *unreasonable* searches and *seizures*, shall not be violated.” *Id.* (emphasis added).

26. U.S. CONST. amend. V. In relevant part, the Fifth Amendment provides, “[n]o person shall be . . . *deprived of life [or] liberty* . . . without due process of law.” *Id.* (emphasis added).

27. *Hernandez*, 802 F. Supp. 2d at 838.

28. *Id.*

29. 403 U.S. 388 (1971).

30. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014), *reh’g granted*, 785 F.3d 117 (5th Cir. 2015). Under *Bivens*, an individual may bring a cause of action against “a federal agent for money damages when the federal agent has allegedly violated that person’s constitutional rights.” *Id.* at 272 (quoting *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 622 n.1 (5th Cir. 2006));

added Agent Mesa's supervisors to the *Bivens* action, claiming they too violated Hernández's Fourth and Fifth Amendment rights.³¹ Lastly, Claim Eleven was grounded in the Alien Tort Statute ("ATS"),³² claiming Hernández's death was a violation of "international treaties, conventions and the Laws of Nations."³³

The United States moved to dismiss Claims One through Nine and Claim Eleven for lack of subject matter jurisdiction based on the plaintiffs' failure to establish the facts necessary to warrant relief.³⁴ The district court ultimately granted the United States' motion, which removed the United States from the case.³⁵ Regarding the plaintiff's FTCA claims, the district court found the FTCA's foreign country exception, which grants "immunity [to] Government employees against liability from torts arising in a foreign country,"³⁶ applied since Hernández was injured in Mexico.³⁷ Accordingly, the district court dismissed Claims One through Seven.³⁸ Based on similar reasoning, the court also dismissed Claim Eight and Nine because "the United States ha[d] not waived its sovereign immunity for constitutional torts under the FTCA."³⁹ In addressing the plaintiff's ATS claims, the court found the statutory language of the ATS⁴⁰ and the language of the treaties "form the

see *Graham v. Connor*, 490 U.S. 386, 394 (1989) (explaining when "an excessive force claim arises in the context of an arrest or investigatory stop . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees . . . the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person").

31. *Hernandez*, 757 F.3d at 256.

32. 28 U.S.C. § 1350 (2012). The ATS grants United States district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

33. *Hernandez*, 757 F.3d at 255 (quoting 28 U.S.C. § 1350).

34. *Hernandez v. United States*, 802 F. Supp. 2d 834, 837, 838–39 (W.D. Tex. 2011), *aff'd in part, rev'd in part*, 757 F.3d 249 (5th Cir. 2014), *aff'd on reh'g*, 785 F.3d 117 (5th Cir. 2015), *vacated sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *see id.* at 389 (setting out the Government's argument).

35. *Id.* at 837.

36. *Id.* at 841 (citing 28 U.S.C.A. § 2680(k) (West 2011)). The central focus of the inquiry is on the location in which the injury was suffered, not the location in which the tortious act occurred. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (holding that "the FTCA's foreign country exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred").

37. *Hernandez*, 802 F. Supp. 2d at 844.

38. *Id.*

39. *Id.* (citing *Spotts v. United States*, 613 F.3d 559, 569 n.7 (5th Cir. 2010)).

40. *See supra* note 32 (providing the exact language of the ATS).

substantive basis” for the claim but did not contain an “unequivocally expressed” waiver of sovereign immunity.⁴¹ Consequently, the court dismissed Claim Eleven.⁴²

Following the United States’ successful motion, Agent Mesa moved to dismiss the *Bivens* claim against him based on qualified immunity.⁴³ Qualified immunity shields an officer from liability unless the officer violated a constitutional right that was “clearly established at the time of the [officer’s] alleged misconduct.”⁴⁴ In granting the motion, the court reasoned no clearly established constitutional right existed because Hernández did not have the sufficient voluntary connections to the United States required under *United States v. Verdugo-Uquidez*⁴⁵ to invoke Fourth Amendment protections.⁴⁶ Furthermore, the court explained *Graham v. Connor*⁴⁷ negated the Fifth Amendment claim because it held, “[E]xcessive force claims should be analyzed only under the Fourth Amendment.”⁴⁸ Similarly, Agent Mesa’s supervisors moved to dismiss all claims brought against them.⁴⁹ The district court granted the motion, reasoning that the plaintiff’s “failed to show ‘the Defendants were personally involved in the June 7 incident’ or there was a causal link ‘between the Defendants’ acts or omissions and a violation of Hernández’s rights.’”⁵⁰

B. Review by The Fifth Circuit

The plaintiffs appealed the adverse judgments to the United States Court of Appeals for the Fifth Circuit.⁵¹ In its initial opinion, the Fifth Circuit af-

41. *Hernandez*, 802 F. Supp. 2d at 845. For liability to “be imposed upon the United States,” Congress must have (1) “unequivocally expressed in statutory text” the intent to waive sovereign immunity, and “(2) there must be a source of substantive law that provides a claim for relief.” *Id.* at 840 (first quoting *In re Supreme Beef Processors, Inc.* 468 F.3d 248, 260 (5th Cir. 2006) (Dennis, J., concurring); then quoting *Freeman v. United States*, 556 F.3d 326, 334–35 (5th Cir. 2009); and then quoting *In re Supreme Beef Processors*, 468 F.3d at 260)).

42. *Id.*

43. *Hernandez v. United States*, 757 F.3d 249, 256 (5th Cir. 2014), *reh’g granted*, 785 F.3d 117 (5th Cir. 2015).

44. *Id.* at 260 (quoting *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013)).

45. 494 U.S. 259 (1990).

46. *Hernandez*, 757 F.3d at 256.

47. 490 U.S. 386 (1989).

48. *Hernandez*, 757 F.3d at 256.

49. *Id.*

50. *Id.*

51. *Id.* at 257.

firmed the judgment in favor of the United States and Agent Mesa's supervisors.⁵² Additionally, the court affirmed the district court's conclusion regarding the inapplicability of the Fourth Amendment⁵³ but ultimately reversed the judgment in favor of Agent Mesa on Fifth Amendment grounds.⁵⁴ The court held that the appellants,⁵⁵ by defeating qualified immunity, alleged a viable Fifth Amendment *Bivens* action against Agent Mesa.⁵⁶

The Fifth Circuit reheard the case en banc to consider whether Agent Mesa was entitled to qualified immunity and, necessarily, whether Hernández was protected by the Fifth Amendment.⁵⁷ The en banc court unanimously affirmed the district court's dismissal of the claim.⁵⁸ The court reasoned the Fifth Amendment right against excessive force claimed by the appellants on behalf of Hernández was not a "clearly established" right "at the time of [the] alleged misconduct," which is a necessary prong in the qualified immunity analysis.⁵⁹ Specifically, the case law at the time of the shooting did not "reasonably warn[] Agent Mesa"⁶⁰ that a non-citizen, with no significant voluntary connections to the United States standing on foreign soil, was protected against the use of excessive force by a United States official standing within United States territory.⁶¹ The en banc court, therefore, successfully escaped the constitutional question—that is, the applicability of the Fifth Amendment to Hernández—in accordance with "the general rule of constitutional avoidance."⁶²

52. *Id.* at 280.

53. *Id.* at 267.

54. *Id.* at 280.

55. In the discussion of the Fifth Circuit's holding, Jesus C. Hernández and Maria Guadalupe Guereca Bentacour, the victim's parents and the plaintiffs below, will now be collectively referred to as "the appellants."

56. *Hernandez*, 757 F.3d at 280.

57. *Hernandez v. United States*, 785 F.3d 117, 119–20 (5th Cir. 2015) (en banc), *vacated sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). The en banc court agreed with the panel court's decision to affirm "the dismissal of . . . claims against the United States and against Agent Mesa's supervisors." *Id.* at 119 (citation omitted) (citing *Hernandez*, 757 F.3d at 257–59, 280). Additionally, the court concurred in the panel court's holding that "Hernández, a Mexican citizen who had no 'significant voluntary connection' to the United States, and who was on Mexican soil at the time he was shot, cannot assert a claim under the Fourth Amendment." *Id.* (citation omitted) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). Therefore, the en banc court only considered the issue of qualified immunity and, accordingly, the application of the Fifth Amendment to Hernández. *Id.* at 119–20.

58. *Id.* at 119.

59. *Id.* at 120, 121 (alteration in original) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

60. Under this analysis, "a right is clearly established only where 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* at 120 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

61. *Id.*

62. *Id.* at 121 (quoting *Callahan*, 555 U.S. at 241); see *Constitutional-Avoidance Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the rule of constitutional avoidance as "[t]he

On July 23, 2015, the appellants petitioned the Supreme Court of the United States to review the Fifth Circuit's en banc decision, and the Court granted certiorari.⁶³ Three questions were presented for review: (1) whether the appellants can assert a *Bivens* claim for damages; (2) whether Hernández's Fourth Amendment rights were violated when Agent Mesa fatally shot him; and (3) whether qualified immunity can protect Agent Mesa from the appellant's claim that Hernández's Fifth Amendment rights were violated when Agent Mesa fatally shot him.⁶⁴

II. LEGAL BACKGROUND

The debate surrounding the extraterritorial application of the Constitution has deep historical roots.⁶⁵ Traditionally, the Supreme Court maintained a strictly formalist approach,⁶⁶ halting constitutional protections at the border.⁶⁷ As time progressed, however, the Court became more favorable to functionalist considerations but has yet to overrule its formalist precedent.⁶⁸ The law is accordingly in a variable state, leaving lower courts free to choose their own route when considering the extraterritoriality of constitutional privileges. The following sections will elaborate on the history of this judicial trend by (1) discussing the Court's early attempts at drawing this line,⁶⁹ (2) highlighting the major points of transition in the extraterritorial doctrine,⁷⁰ and (3) summarizing the modern interpretation.⁷¹ Subsequent to this discussion, this Part will provide a brief introduction to the historical foundations of the Fourth Amendment.⁷²

doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion").

63. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017); Petition for a Writ of Certiorari, *Hernandez*, 137 S. Ct. 2003 (No. 15-118), 2015 WL 4537883.

64. *Hernandez*, 137 S. Ct. at 2004–05.

65. See generally *In re Ross*, 140 U.S. 453 (1891) (discussing, for the first time, the extraterritorial reach of the Constitution).

66. See *Formalism*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining formalism as "[d]ecision-making on the basis of form rather than substance; . . . an interpretive method whereby the judge adheres to the words rather than pursuing the text's unexpressed purposes . . . or evaluating its consequences").

67. See *infra* Section II.A.

68. See *infra* Section II.B–C; *Functionalism*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining functionalism as "[a] methodological approach to law focusing on the effects of rules in practice . . . rather than on the precise statements of the rules themselves").

69. See *infra* Section II.A.

70. See *infra* Section II.B.

71. See *infra* Section II.C.

72. U.S. CONST. amend. IV; see *infra* Section II.D.

A. *Early Developments: Defining the Limits of Constitutional Protection*

In 1891, the Court first considered the reach of the Constitution abroad in *In re Ross*.⁷³ John M. Ross, a Canadian crew-member on an American ship anchored in a Japanese harbor, was sentenced to death by the American Consular Tribunal in Japan for the murder of a fellow seaman.⁷⁴ In seeking a writ of habeas corpus, Ross argued his presence on an American ship and trial by an American tribunal should have entitled him to the “same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution.”⁷⁵ The Court held the rights Ross sought, such as the right to an impartial trial by jury and to an indictment by a grand jury, were only available to United States citizens and those within the nation’s borders, “not to residents or temporary sojourners abroad.”⁷⁶ Accordingly, persons upon an American vessel were not entitled to the protections of the Constitution until they entered United States territory.⁷⁷ Ultimately, the Court adopted a strictly formalist approach and concluded the Constitution has no effect outside the bounds of the United States.⁷⁸

From 1901 to 1922, the Court considered whether the Constitution extended to United States territories in a series of cases known collectively as the Insular Cases.⁷⁹ Through these decisions, the Court developed the doctrine of territorial incorporation,⁸⁰ which provides that the Constitution applies with full force in territories that Congress intended to “incorporate” as part of the United States.⁸¹ The Court’s decisions were also motivated by the

73. 140 U.S. 453 (1891).

74. *Id.* at 454. President Hayes pardoned Ross on the condition that he receive a life sentence of hard labor. *Id.* at 455.

75. *Id.* at 463.

76. *Id.* at 464 (citing *Cook v United States*, 138 U.S. 157, 181 (1891)).

77. *Id.*

78. *Id.*

79. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

80. *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (explaining the doctrine of territorial incorporation).

81. *Balzac*, 258 U.S. at 305–06. The territories included in this doctrine were also classified as “[t]erritories surely destined for statehood.” *Boumediene*, 553 U.S. at 757.

practical obstacles involved in extending the Constitution outside the continental United States, recognizing constitutional provisions “are not always and everywhere applicable” and demonstrating an initial interest in functionalist thinking.⁸²

The Court was silent on the issue of extraterritoriality until 1950 when it heard *Johnson v. Eisentrager*.⁸³ In *Johnson*, twenty-one German nationals petitioned for writs of habeas corpus after being tried and convicted for war crimes by a United States military commission in China.⁸⁴ The prisoners claimed their trial by military commission and subsequent convictions violated Article I, Article III, and the Fifth Amendment.⁸⁵ The Court held the Constitution does not protect alien prisoners tried and detained abroad.⁸⁶ In recognizing constitutional protections extend to resident aliens, the Court explained, “[I]t was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”⁸⁷ Accordingly, the prisoners in this case had no grounds to base their constitutional claim since they “at no relevant time were within any territory over which the United States [was] sovereign.”⁸⁸ In addition, similar to the Insular Cases, the Court exhibited receptiveness to functionalism when it considered several practical complications inherent in extending the right of the writ to the prisoners abroad.⁸⁹

In his dissent, Justice Black focused his analysis on the functionalist approach to extraterritoriality.⁹⁰ He cautioned that the majority’s territorial approach was “a broad and dangerous principle” as it “inescapably denie[d] courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad.”⁹¹ Justice Black continued to consider a number of functional factors to explain why the Constitution, and specifically habeas corpus review, should have extended to “[the] petitioners and

82. *Balzac*, 258 U.S. at 312.

83. 339 U.S. 763 (1950).

84. *Id.* at 765–66. Specifically, the prisoners were “collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces” and, thereby, were found guilty of “engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan.” *Id.* at 766.

85. *Id.* at 767. While not relevant to this discussion, the prisoners also claimed that their trial, conviction, and subsequent imprisonment violated “provisions of the Geneva Convention governing treatment of prisoners of war.” *Id.*

86. *Id.* at 785.

87. *Id.* at 771.

88. *Id.* at 778.

89. *Id.* at 779; *see, e.g., id.* (explaining that the practical complications would include the costs of transportation of petitioners and witnesses, the implication that this would make the writ available to enemies in times of war, which would “hamper the war effort and bring aid and comfort to the enemy,” and the lack of potential reciprocity).

90. *Id.* at 791 (Black, J., dissenting).

91. *Id.* at 795–96.

others like them.”⁹² Justice Black concluded, “Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live.”⁹³ Moving into the late 1950s, the question of extraterritoriality hinged on the geographic location of those wishing to invoke constitutional protections.

B. The Transition: The Constitution Moves Overseas

In 1957, the Court decided *Reid v. Covert*,⁹⁴ a case involving two military wives who were tried in a United States military court overseas for murdering their husbands.⁹⁵ Both women sought a writ of habeas corpus “on the ground that the Constitution forbade [the] trial [of civilians abroad] by military authorities.”⁹⁶ The Court agreed, holding, on the basis of Section 2 of Article III, the Fifth Amendment, and the Sixth Amendment, that their trial was unconstitutional.⁹⁷ The Court reasoned, when the United States government “reache[d] out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away just because he happen[ed] to be in another land.”⁹⁸ Constitutional protections, the Court said, not only extend to citizens abroad, but the constitutional restraints placed upon government actors similarly follow those officials as they perform their duties outside the territory of the United States.⁹⁹ With this holding, the Court effectively overruled *In re Ross* and moved even further away from the strict formalism it adopted.¹⁰⁰

Notably, Justice Harlan’s concurrence exemplifies the modern functionalist approach. He argued, “[T]here is no rigid and abstract rule.”¹⁰¹ Instead, when considering the extraterritoriality of the Constitution, the question should be “which guarantees of the Constitution should apply in view of the

92. *Id.* at 797; *see, e.g., id.* at 797–98 (considering the control the United States has over that occupied area of Germany, that United States laws were applied, the unlikelihood that these prisoners would receive relief elsewhere, and the general constitutional principle that “all people, whether our citizens or not . . . have an equal chance before the bar of criminal justice”).

93. *Id.* at 798.

94. 354 U.S. 1 (1957).

95. *Id.* at 3–4.

96. *Id.* at 4.

97. *Id.* at 5, 7–8.

98. *Id.* at 6.

99. *Id.* at 7.

100. *Id.* at 12. The Court explained, “The Ross approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases” and “should be left as a relic from a different era.” *Id.*

101. *Id.* at 74 (Harlan, J., concurring).

particular circumstances, the practical necessities, and the possible alternatives.”¹⁰² The Court, Justice Harlan explained, should be free to use its judgment, as opposed to strict adherence to a set rule, to avoid “impracticable and anomalous” results.¹⁰³ Accordingly, as of 1957, the Constitution followed both United States citizens and officials abroad, providing all the same protections and restrictions as it would if they were standing within United States territory.¹⁰⁴

C. *The Modern Approach: Functionalism or Formalism?*

The case law surrounding the extraterritoriality of the Constitution remained undisturbed until 1990, when the Court decided *United States v. Verdugo-Urquidez*.¹⁰⁵ Rene Martin Verdugo-Urquidez, a Mexican citizen arrested and convicted for his leadership role in “a large and violent organization in Mexico that smuggles narcotics into the United States,” moved to dismiss his case on the basis that the warrantless search of his home in Mexico by United States agents violated the Fourth Amendment.¹⁰⁶ The Court disagreed,¹⁰⁷ reasoning the protections against arbitrary government embedded in the Fourth Amendment extended only to “the people” of the United States and were not “intended to restrain the actions of the Federal Government against aliens *outside* of the United States territory.”¹⁰⁸ Looking to precedent, the Court concluded, “[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial [voluntary] connections with this country.”¹⁰⁹ The Court ultimately held Verdugo-Urquidez did not meet this requirement.¹¹⁰ The Court emphasized its formalist approach by concluding strict limits to constitutional application at the border are necessary to ensure the nation’s ability to “functio[n] effectively in the company of sovereign nations.”¹¹¹

In his concurrence, Justice Kennedy objected to the majority’s reliance on the language of the Fourth Amendment to determine its scope,¹¹² but he

102. *Id.* at 75 (emphasis omitted).

103. *Id.* at 74.

104. *See supra* notes 98–99 and accompanying text.

105. 494 U.S. 259 (1990).

106. *Id.* at 262–63.

107. *Id.* at 275.

108. *Id.* at 266 (emphasis added).

109. *Id.* at 271.

110. *Id.* at 271–72. The Court explained that Verdugo-Urquidez’s presence within the United States was involuntary, as he was forcibly brought into the country by United States officials, and he had been present in the country for only a few days. *Id.*

111. *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)).

112. *Id.* at 276 (Kennedy, J., concurring). Justice Kennedy explains, “The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms.” *Id.*

agreed with the Court's holding because "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous."¹¹³ Justice Brennan, however, in his dissent, argued the majority "create[d] an antilogy," as the Constitution permits "our Government [officials] to enforce our criminal laws abroad" but, per the Court's holding, did not require the Fourth Amendment to "travel with them."¹¹⁴ The United States considers itself to be "the world's foremost protector of liberties," Justice Brennan proclaimed, but he continued to ask, "How can we explain to others—and to ourselves—that these long cherished ideals are suddenly of no consequence when the door being broken belongs to a foreigner?"¹¹⁵

In *Boumediene v. Bush*,¹¹⁶ the Court's most recent decision on extraterritoriality, the Court held, by applying the functionalist approach, aliens detained at Guantanamo Bay are entitled to the constitutional right of habeas corpus.¹¹⁷ The Court explained, there is a "common thread" between its precedent cases¹¹⁸—"the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."¹¹⁹ The Court identified three relevant factors to consider: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."¹²⁰ After considering each factor, the Court concluded the detainees were "entitled to the privilege of habeas corpus to challenge the legality of their detention."¹²¹ Evidently, this decision declined to follow the formalist precedent and relied primarily on functionalist thinking.¹²² The Court, however, did not explicitly overrule the formalist approach used in its prior precedent.¹²³ Moving forward, the Court left open two routes to the extraterritorial analysis based on opposing theories of legal interpretation.

113. *Id.* at 276, 278.

114. *Id.* at 282 (Brennan, J., dissenting).

115. *Id.* at 285–86.

116. 553 U.S. 723 (2008).

117. *Id.* at 732.

118. *Id.* at 764 (citing the Insular Cases, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Reid v. Covert*, 354 U.S. 1 (1957)).

119. *Id.*

120. *Id.* at 766.

121. *Id.* at 771. The Court based its decision on (1) the inadequacy of the review process to determine the status of the detainees/enemy combatants, (2) the United States' "[non-]transient" and complete control over Guantanamo Bay, and (3) the minimal burdens, balanced with the United States' inability to provide evidence to the contrary, involved in extending the writ in these circumstances. *Id.* at 766–71.

122. *See supra* note 119 and accompanying text.

123. *See Hernandez v. United States*, 757 F.3d 249, 265, 266 (5th Cir. 2014) (explaining how the court is "bound to apply the sufficient connections requirement of *Verdugo-Urquidez* . . . in

D. The Fourth Amendment: Overview of the Historical Foundations

To provide context to the forthcoming analysis, this Section will briefly summarize the historical basis of the Fourth Amendment through a discussion of one of the Court's early founding precedents, *Boyd v. United States*.¹²⁴ In *Boyd*, the United States seized thirty-five cases of imported plated glass from Boyd & Sons on the grounds that the owners had committed fraud in violation of an 1874 customs revenue law.¹²⁵ As provided by the statute, the company was ordered to furnish the invoice for the seized cases to establish the basis for the charge.¹²⁶ The company complied but objected to the use of the invoice as evidence, claiming, "[T]he statute, so far as it compel[ed] production of evidence to be used against [the company] [was] unconstitutional and void" based on the Fourth Amendment.¹²⁷ After recognizing this case presented "a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen,"¹²⁸ the Court found, "[A] compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment . . . because it is a material ingredient, and effects the sole object and purpose of search and seizure."¹²⁹ The Court held the notice requiring Boyd & Sons to produce the invoice and the law that legitimized it was in violation of the Fourth Amendment.¹³⁰

To support its conclusion, the Court relied on the historical foundations of the Fourth Amendment.¹³¹ The Court summarized the rejection of the early English writs of assistance¹³² and general warrants¹³³ as an abuse of

light of *Boumediene's* general functional approach" because the court "cannot ignore a decision from the Supreme Court unless directed to do so by the Court itself"), *reh'g granted*, 785 F.3d 117 (5th Cir. 2015).

124. 116 U.S. 616 (1886).

125. *Id.* at 617.

126. *Id.* at 618.

127. *Id.* at 618, 621. In addition to the Fourth Amendment, Boyd & Sons also based their claim on the Fifth Amendment. *Id.* at 621. While intertwined with the Court's analysis of the Fourth Amendment, the Fifth Amendment argument will not be discussed.

128. *Id.* at 618.

129. *Id.* at 622.

130. *Id.* at 638.

131. *Id.* at 624–25.

132. Writs of assistance were issued to "revenue officers" and allowed them to "search suspected places for smuggled goods." *Id.* at 625.

133. General warrants were issued by the Secretary of State and allowed officials to search one's home for the "discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." *Id.* at 625–26.

arbitrary power and hindrance to liberty by the Crown that fueled this nation's movement toward independence.¹³⁴ The Court contended it was with this backdrop—“[t]he struggles against arbitrary power . . . [that were] too deeply engraved in their memories”—that the Framers crafted the Fourth Amendment.¹³⁵ In accordance with this historical framework, the Court further noted, the “essence” of a Fourth Amendment violation revolved less around “the breaking of [one's] doors, and the rummaging of [one's] drawers,” but instead focused on “the invasion of [one's] infeasible right of personal security, personal liberty.”¹³⁶ The Framers, accordingly, “never would have approved . . . such insidious disguises of the old grievance which they had so deeply abhorred.”¹³⁷

III. THE COURT'S REASONING

On June 26, 2017, the Supreme Court vacated the Fifth Circuit's ruling and remanded the case back to the Fifth Circuit for further consideration.¹³⁸ The Court first addressed whether the appellants may assert a *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹³⁹ claim for damages and held it would be more “appropriate” for the Court of Appeals to reconsider the issue in light of the Court's recent decision in *Ziglar v. Abbasi*.¹⁴⁰ In *Abbasi*, the Court “clarified what constitutes a ‘special factor counseling hesitation,’” which is a necessary consideration when deciding whether to extend a *Bivens* remedy to a situation beyond the pre-established types of factual circumstances that provide the basis for a cause of action.¹⁴¹ Specifically, under *Abbasi*, the special factors analysis focuses on the Judici-

134. *Id.* at 625; *see id.* at 626–30 (praising Lord Camden's opinion in *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (K.B.) (20.3.1), as “the true and ultimate expression of constitutional law” that informed the Framers as they drafted the Fourth Amendment).

135. *Id.* at 630.

136. *Id.*

137. *Id.*

138. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2008 (2017). On remand, the Fifth Circuit affirmed the ruling of the district court, holding there are special factors counseling hesitation against extending a *Bivens* remedy in this new context. *Hernandez v. Mesa*, No. 12-50217, slip op. at 18–19 (5th Cir. Mar. 20, 2018). The court reasoned, “extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs[,] . . . flout Congress's consistent and explicit refusal to provide damages remedies for aliens injured abroad[,] [a]nd . . . create a remedy with uncertain limits.” *Id.* at 18. The court further noted, “The myriad implications of an extra-territorial *Bivens* remedy require this court to deny it.” *Id.* at 19.

139. 403 U.S. 388 (1971).

140. 137 S. Ct. 1843 (2017); *Hernandez*, 137 S. Ct. at 2006–07.

141. *Hernandez*, 137 S. Ct. at 2006 (alteration omitted). *Bivens* does not apply when “there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’” *Id.* (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

ary's ability, "absent congressional action or instruction," to assess the consequences of moving forward with a new category of action for damages.¹⁴² In support of its decision to remand the issue, the Court ended this analysis by recognizing its role as a reviewing court, not a court of first impression.¹⁴³

Next, the Court addressed the Fourth Amendment issue within the context of the *Bivens* claim.¹⁴⁴ The Court held, "It would be imprudent for this Court to resolve that issue" considering the "intervening guidance provided in *Abbasi*," which may ultimately eliminate the Fourth Amendment issue as the presence of special factors counseling hesitation may prevent a *Bivens* remedy from emerging within the context of the instant case.¹⁴⁵ In support of avoiding the constitutional question, the Court further reasoned, without enumerating specific examples, that the Fourth Amendment inquiry is "sensitive and may have consequences that are far reaching."¹⁴⁶

Finally, considering the Fifth Amendment¹⁴⁷ claim, the Court held, "The en banc Court of Appeals . . . erred in granting qualified immunity" because the court relied on facts that were unknown to Agent Mesa at the time of the shooting.¹⁴⁸ Specifically, Agent Mesa did not know Hernández was a Mexican citizen with no significant voluntary connection to the United States when he shot him.¹⁴⁹ In the context of determining whether a right is clearly established,¹⁵⁰ the Court explained the inquiry "is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question."¹⁵¹ The Court, accordingly, concluded, "Facts an officer learns after the incident . . . are not relevant" in determining whether qualified immunity should be granted or denied.¹⁵² The Court remanded the case to the Fifth Circuit to reconsider the issue.¹⁵³

142. *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

143. *Id.* at 2007 (quoting *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017)).

144. *Hernandez*, 137 S. Ct. at 2007.

145. *Hernandez*, 137 S. Ct. at 2007. If special factors counseling hesitation, in light of the Court's clarification in *Abbasi*, prevent a *Bivens* remedy in the situation presented here, no need exists to consider the constitutional element of the *Bivens* action (i.e., the Fourth Amendment question) because the entire *Bivens* claim will have deteriorated. *Id.*

146. *Id.*

147. U.S. CONST. amend. V.

148. *Hernandez*, 137 S. Ct. at 2007.

149. *Id.*

150. See *supra* notes 44, 62 and accompanying text.

151. *Hernandez*, 137 S. Ct. at 2007 (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam)).

152. *Id.*

153. *Id.* at 2006.

Justice Breyer, in his dissent, wrote on the Fourth Amendment issue the majority failed to address.¹⁵⁴ Specifically, Justice Breyer would have reversed the lower court's judgment that Hernández lacked significant voluntary connections to the United States to invoke Fourth Amendment protections.¹⁵⁵ Accordingly, under Justice Breyer's approach, "reversal would ordinarily bring with it the right" to allege a *Bivens* claim for damages.¹⁵⁶ Justice Breyer explained, the Court's "precedents make clear that 'questions of extraterritoriality turn on objective factors and practical concerns, not formalism'" or *de jure* sovereignty.¹⁵⁷ Justice Breyer proceeded to list six factors and concerns which "convince[d] [him] that Hernández was protected by the Fourth Amendment."¹⁵⁸

First, Agent Mesa was a federal officer who did not know the citizenship of the boy he was targeting nor whether the bullet would land on the Mexican or United States side of the border.¹⁵⁹ Second, the culvert, where the shooting took place, "has special border-related physical features" as "fences and border crossing posts are not in the culvert itself [where the borderline actually resides] but lie on either side."¹⁶⁰ Third, the culvert has historically been the nontechnical border, as it was built to relocate the Rio Grande River—the original border between Mexico and the United States.¹⁶¹ Fourth, the culvert was constructed and is now managed by a "jointly organized international boundary commission" that contains "representatives of both nations."¹⁶² Fifth, the culvert, as a "limitrophe" area,¹⁶³ imposes "special obligation[s] of co-operation and good neighborliness" upon bordering nations as prescribed by international law.¹⁶⁴ Sixth, if the Fourth Amendment is not extended to the culvert, "serious anomalies" will result.¹⁶⁵ Justice Breyer expounded:

154. *Id.* at 2008 (Breyer, J., dissenting).

155. *Id.*

156. *Id.*

157. *Id.* at 2008–09 (quoting *Boumediene v. Bush*, 553 U.S. 723, 764 (2008)). *De jure* sovereignty refers to sovereignty that "[e]xist[s] by right or according to law." *De jure*, BLACK'S LAW DICTIONARY (10th ed. 2014).

158. *Hernandez*, 137 S. Ct. at 2009 (Breyer, J., dissenting).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 2009–10.

163. *Id.* Limitrophe describes "a special border-related area" that "consist[s] of an engineer's 'imaginary line'" as opposed to a traditional border created by "rivers, mountain ranges, and other [physical] areas." *Id.*

164. *Id.* at 2010; *see, e.g., id.* at 2009–10 (discussing the joint responsibilities of the limitrophe as proscribed by the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Mex.-U.S., art. II-IV, Nov. 23, 1970, 23 U.S.T. 371).

165. *Id.* at 2010.

The Court of Appeals' approach create[d] a protective difference depending upon whether Hernández had been hit just before or just after he crossed an imaginary mathematical borderline running through the culvert's middle. But nothing else would have changed . . . [g]iven the near irrelevance of that midculvert line (as compared with the rest of the culvert) for most border-related purposes, as well as almost any other purpose, that result would seem anomalous.¹⁶⁶

A consideration of these factors as a whole, Justice Breyer concluded, establishes sufficient support for extending Fourth Amendment protections to the entire culvert.¹⁶⁷ Accordingly, Justice Breyer would have addressed the Fourth Amendment question and remanded the *Bivens* and qualified immunity issues.¹⁶⁸

IV. ANALYSIS

This Part will begin by introducing the context in which Hernández lost his life, explaining how Border Patrol agents operate under conditions that encourage the use of excessive force.¹⁶⁹ Next, this Part will argue the Court should have allowed a civil remedy—an immediate form of deterrence to curb the future use of excessive force—by holding the Fourth Amendment can apply in this case through the *Boumediene v. Bush*¹⁷⁰ objective factors analysis, which this Part will argue fundamentally overrules the significant voluntary connections test established in *United States v. Verdugo-Urquidez*.¹⁷¹ Lastly, this Part will contend providing a remedy is consistent with the Fourth Amendment's historical objectives.¹⁷²

A. Contributing Circumstances

The combination of internal obstacles with the lack of external accountability has created conditions that breed excessive force incidents,¹⁷³ like the

166. *Id.* Justice Breyer added, “[T]he anomalies would multiply” as there are “[n]umerous bridges span[ning] the culvert” that are used daily by Mexicans and Americans. *Id.* Therefore, he concluded, it does not seem practical or logical “to distinguish for Fourth Amendment purposes among these many thousands of individuals on the basis of an invisible line of which none of them is aware.” *Id.* at 2011.

167. *Id.*

168. *Id.*

169. *See infra* Section IV.A.

170. 553 U.S. 723 (2008).

171. 494 U.S. 259 (1990); *see infra* Section IV.B.

172. *See infra* Section IV.C.

173. From January 2010 to May 2016, out of the fifty-three deaths caused by Border Patrol agents, forty-eight were attributed to the “use of force or coercion.” AM. CIV. LIBERTIES UNION OF N.M., DEATHS AND INJURIES IN CBP ENCOUNTERS SINCE JANUARY 2010, at 24 (2016),

one in the present case, and foster minimal mechanisms of deterrence.¹⁷⁴ Access to a civil remedy could provide an incentive for Border Patrol agents to limit their abusive use of force and ensure the 500,000 individuals that cross the border daily,¹⁷⁵ those most vulnerable to such mistreatment, have access to potential recourse if so subjected. This Section will summarize the internal and external factors contributing to the present state of Border Patrol.

There are a number of significant internal factors, when combined, that provide the basis for excessive use of force by Border Patrol agents. First, the Agency has become increasingly militarized despite being a civilian force.¹⁷⁶ Many agents are recent veterans who served in Afghanistan and Iraq,¹⁷⁷ and there have been upgrades to military quality surveillance and defense equipment.¹⁷⁸ Relatedly, agents “consider themselves the country’s first line of defense, . . . vowing to ‘never surrender a foot of U.S. soil.’”¹⁷⁹ This mentality is reinforced by the Department of Homeland Security (“DHS”). The DHS explicitly instructs agents to “fight back” against criminal organizations that operate around the border, which implicitly encourages the mentality that everyone near the border is a “bad guy” and mirrors the state of mind held by soldiers on the battlefield where deadly force is a means of survival.¹⁸⁰ Furthermore, Border Patrol agents are also granted significantly greater powers than traditional law enforcement officers.¹⁸¹ For example, agents may conduct searches without reasonable suspicion, probable

https://www.aclu.org/sites/default/files/field_document/may_2016_dead_and_injured_by_cbp_officials.pdf.

174. Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 3, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118) [hereinafter Brief by Former Officials of CBP].

175. Brief of Amici Curiae Border Scholars in Support of Petitioners at 4, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118) [hereinafter Brief by Border Scholars] (citing *TransBorder Freight Data*, U.S. DEP’T OF TRANSP., https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last visited Mar. 27, 2018)).

176. Brief by Former Officials of CBP, *supra* note 174, at 3.

177. *Id.* at 6 (noting “more than one-third of Border Patrol agents are former military personnel”). While not inherently negative, the high number of former service men and women, nonetheless, contributes to the militarized environment of Border Patrol. *Id.* at 5–6.

178. *Id.* Examples include Blackhawk helicopters, fixed-winged jets, and predator drones. *Id.* (citing Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2014), <http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html>).

179. *Id.* at 7 (quoting Mark Binelli, *10 Shots Across the Border*, N.Y. TIMES (Mar. 3, 2016), <https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>).

180. *Id.* It is noteworthy to acknowledge that many policymakers are in support of a stronger force at the border. *See, e.g.*, Press Release, More Praises for President Trump’s Commitment to Border Security, WHITE HOUSE (Aug. 23 2017), <https://www.whitehouse.gov/briefings-statements/praise-president-trumps-commitment-border-security/> (summarizing a number of favorable responses to increased border security). The author, however, does not intend to argue a particular policy stance on border security but only attempts to illustrate the current trends that have contributed to excessive force incidents.

181. Brief by Former Officials of CBP, *supra* note 174, at 5–6.

cause, or a warrant if the target of their search is within 100 feet of the border.¹⁸²

Second, training on appropriate use of force for Border Patrol agents is lacking, which is demonstrated by the numerous reports filed claiming excessive use of force and by the multitude of deaths caused by Border Patrol agents.¹⁸³ This is likely the result of the low supervision rates of trainees due to insufficient funds caused by the “hiring surge.”¹⁸⁴ Specifically, an audit of the use of force training programs revealed, at one location, “many agents and officers do not understand use of force and the extent to which they may or may not use force.”¹⁸⁵ The most frequent example of lack of training arises in incidents involving rock throwing.¹⁸⁶ Rock throwing, a common occurrence at the border, is considered to be a lethal threat and agents have developed an “unofficial” policy of responding with the use of deadly force “instead of taking cover or calling for backup.”¹⁸⁷ Agents routinely remained in reach of the rock throwers despite the fact that “moving out of range was a reasonable option.”¹⁸⁸

Third, pre-employment screening measures are deficient, which is similarly a likely result of limited resources combined with the “rapid” increase of new hires.¹⁸⁹ From 2006 to 2009, only 10 to 15 percent of new agents

182. *Id.* at 6–7 (citing Lori Johnson, *Preserving the Excessive Force Doctrine at Our Nation's Borders*, 14 HOLY CROSS J. L. & PUB. POL'Y 89, 90 (2010)).

183. From 2007 to 2012, there have been 1187 reports of use of excessive force by agents. *Id.* at 18 (citing OFFICE OF INSPECTOR GEN., DEP'T. OF HOMELAND SEC., CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS 6–7 (Sept. 2013) (redacted), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf); *see supra* note 173.

184. Brief by Former Officials of CBP, *supra* note 174, at 12, 15 (explaining “resource constraints” left CPB “unable to match [the] hiring surge with adequate . . . training programs” and the agent-to-supervisor ration range from 7-1 and up to 11-1). The lack of funds for agent training can be further demonstrated through current fund allocation trends. Based solely on an assessment of CBP's current funding priorities, the 2019 budget report allocates over three times the amount of funding to wall construction, infrastructure development, and equipment upgrades than to training initiatives. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2019, at 2–3 (2018), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.

185. OFFICE OF INSPECTOR GEN., DEP'T. OF HOMELAND SEC., *supra* note 183, at 17.

186. For ten out of the twenty-four incidents of fatal shootings from 2010 to 2014, rock throwing was given as justification for the use of force. Brief by Former Officials of CBP, *supra* note 174, at 9 (citing Brian Bennett, *Border Patrol Sees Little Reform on Agents' Use of Force*, L.A. TIMES (Feb. 23, 2015), <http://beta.latimes.com/nation/la-na-border-abuse-20150223-story.html>).

187. *Id.* Furthermore, agents have used lethal force even when inside their vehicles despite Border Patrol's policy to use lethal force only when reasonably necessary. *Id.* at 10.

188. POLICE EXEC. RESEARCH FORUM, U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE REVIEW: CASES AND POLICIES 6 (2013), <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

189. Brief by Former Officials of CBP, *supra* note 174, at 12, 14.

received pre-employment polygraphs despite the “border region [being] considered the ‘highest threat environment for government corruption.’”¹⁹⁰ The results of the administered polygraphs indicated “60 percent [of applicants] were determined unsuitable for service . . . because they admitted . . . to prior criminal activity, including violent crimes and involvement with drug cartels and smugglers.”¹⁹¹ Despite these results, Customs and Border Patrol (“CBP”) did not require pre-employment polygraph examinations for all applicants until 2012.¹⁹² In fact, cartel members have been hired, there have been instances of infiltration, and current agents have been arrested for serious crimes (e.g., smuggling, money laundering, and conspiracy) and other lesser offences (e.g., drunk driving, domestic violence, and assault).¹⁹³

Lastly, Border Patrol agents practice a “culture of protectionism” that hinders internal investigations of claims involving excessive force.¹⁹⁴ Agents have developed a “code of silence”—an understanding between agents that nothing is to be said that may incriminate another agent, even if they have clearly violated the law.¹⁹⁵ Their motto is: “What happens in the field stays in the field.”¹⁹⁶

These internal hurdles that have contributed to unregulated action are heightened when combined with the external obstacles limiting accountability. First, the United States has never extradited an agent to Mexico to be prosecuted for the use of lethal force on a Mexican citizen.¹⁹⁷ The United States has no obligation to extradite its own citizens under the relevant treaty,¹⁹⁸ and it is highly unlikely it would do so voluntarily.¹⁹⁹ Second, only one agent has ever been charged in the United States for a cross-border shooting.²⁰⁰ The obstacles facing internal investigation and the preference against

190. *Id.* at 13 (quoting Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO MAG., Nov.–Dec. 2014, <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>).

191. *Id.*

192. *Id.* at 14.

193. *Id.* at 16–18; see, e.g., Randal C. Archibold, *Hired by Customs, but Working for Mexican Cartels*, N.Y. TIMES (Dec. 17, 2009), <http://www.nytimes.com/2009/12/18/us/18corrupt.html> (providing instances where CBP employees facilitated smuggling activity).

194. Brief by Former Officials of CBP, *supra* note 174, at 4.

195. *Id.* at 21.

196. *Id.* (quoting Graff, *supra* note 190).

197. *Id.* at 29.

198. Extradition Treaty Between the United States of America and the United Mexican States, Mex.–U.S., art. 9, May 4, 1978, 31 U.S.T. 5059 (“Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority . . . shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.”).

199. Brief by Former Officials of CBP, *supra* note 174, at 29.

200. *Id.* at 4. The victim, José Antonio Elena Rodríguez, was shot ten times in the back while walking home along the Mexican side of the border fence. Taylor Dolven, *Over the Line*, VICE NEWS (June 9, 2017), <https://news.vice.com/story/what-happens-when-u-s-border-patrol-kills-in>

prosecution make it highly unlikely this will become a trend. In addition, from 2009 to 2012, ninety-seven percent of complaints reporting abuse by agents resulted in “No Action Taken.”²⁰¹

The present conditions illustrate the need for an immediate means of accountability, redress, and deterrence.²⁰² The need for a judicial remedy²⁰³ becomes amplified when considering the vast number of people subjected to the authority of Border Patrol.²⁰⁴ The border area where the shooting in the instant case occurred runs through Paso del Norte, which is “a single metropolitan” consisting of El Paso, Texas, and Ciudad Juárez, Chihuahua, Mexico.²⁰⁵ Five hundred thousand Mexicans and Americans cross every day for work, school, family, shopping, doctor visits, and other regular activities.²⁰⁶ These binational characteristics are not limited to the community surrounding Paso del Norte but instead are commonly shared by the communities that run up and down the southwestern border, which have also had their share of cross-border shootings resembling the facts surrounding the death of Hernández (i.e., a non-threatening encounter where the agents claimed rocks were being thrown).²⁰⁷ Accordingly, the Court’s decision to avoid providing an

mexico. The trial was set to be heard on October 24, 2017. *Judge Delays Trial of Border Patrol Agent in Fatal Shooting*, U.S. NEWS (Aug. 11, 2017), <https://www.usnews.com/news/best-states/arizona/articles/2017-08-11/judge-delays-trial-of-border-patrol-agent-in-fatal-shooting>. The trial, however, was delayed to March 2018. Rafael Carranza, *Family of Teen Killed by Border Patrol Agent Denounces Trial Delays*, AZCENTRAL (Oct. 11, 2017), <https://www.azcentral.com/story/news/politics/border-issues/2017/10/11/family-jose-antonio-elena-rodriguez-killed-border-patrol-agent-lonnie-swartz-decries-trial-delays/748092001/>.

201. Brief by Former Officials of CBP, *supra* note 174, at 28.

202. While recognizing the argument in favor of leaving the means and method of accountability, redress, and deterrence in the hands of Congress, the Court has taken the position “that individuals need not await legislative action before asserting a fundamental right.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (“The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”). On remand, the Fifth Circuit acknowledged the only possible grounds for recovery stem from a judicial remedy created under *Bivens*. *Hernandez v. Mesa*, No. 12-50217, slip op. at 4 (5th Cir. Mar. 20, 2018) (“No federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. Thus, plaintiff’s recovery for damages is possible only if the federal courts approve a *Bivens* implied cause of action.”).

203. The Court has recognized deterrence through judicial accountability in other instances. *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (recognizing “that the purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

204. *See supra* note 175.

205. Brief by Border Scholars, *supra* note 175, at 2.

206. *Id.* at 2, 6.

207. *Id.* at 4; *see* Steven D. Schwinn, *Can the Parents of a Mexican Youth Sue a U.S. Border Officer in Federal Court for Fourth and Fifth Amendment Violations After the Officer Shot and Killed the Youth While the Officer Was on the U.S. Side of the Border, but the Youth Was on the*

immediate remedy will have far reaching effects on both American and Mexican nationals.²⁰⁸

B. Finding a Solution Through *Boumediene*

As described in Part II,²⁰⁹ there are two modern approaches to the extra-territorial application of the Constitution—the significant voluntary connections test established in *United States v. Verdugo–Urquidez*²¹⁰ and the objective factor analysis applied in *Boumediene v. Bush*.²¹¹ While these positions seem directly at odds with each other, as one incorporates the functional approach and the other adopts the formalist interpretation, the Court failed to proclaim which is the commanding inquiry and avoided applying either to determine the Fourth Amendment’s extraterritorial reach.²¹² This Section will argue that *Boumediene* should have controlled,²¹³ and then it will apply the *Boumediene* objective factor test to conclude the Fourth Amendment extends extraterritorially under the facts of the instant case.²¹⁴ Its extraterritorial reach will provide the basis of a civil cause of action that will serve as a remedy for Hernández’s family and a deterrence for Border Patrol Agents from continuing the use of excessive force.²¹⁵

1. *Boumediene* Controls

Instead of declining to address the issue in its entirety, the Court should have applied the functionalist analysis established in *Boumediene* to determine the extraterritorial application of the Fourth Amendment over the formalist approach established earlier in *Verdugo–Urquidez* for two reasons. First, *Boumediene* essentially overrules the significant voluntary connections test used in *Verdugo–Urquidez* to apply the Fourth Amendment extraterritorially because its strict territorial approach is at odds with the more recent

Mexican Side?, 44 PREVIEW OF U.S. S. CT. CASES 145, 145–46 (2017) (explaining how a cellphone video disproves the Government’s position that Hernández was throwing rocks at Agent Mesa); *see, e.g.*, Dolven, *supra* note 200 (telling the stories of individuals killed by Border Patrol agents); AM. CIV. LIBERTIES UNION OF N.M., *supra* note 173 (providing the facts of fatal encounters with Border Patrol agents from 2010 to 2016).

208. Brief by Border Scholars, *supra* note 175, at 4.

209. *See supra* Section II.C.

210. 494 U.S. 259 (1990).

211. 553 U.S. 723 (2008).

212. *See Hernandez v. United States*, 757 F.3d 249, 265–66 (5th Cir. 2014) (explaining how courts have attempted to reconcile *Verdugo–Urquidez* with the newer functionalist precedent established in *Boumediene* in the absence of direction from the Court), *reh’g granted*, 785 F.3d 117 (5th Cir. 2015).

213. *See infra* Section IV.B.1.

214. *See infra* Section IV.B.2.

215. *Id.*

decision's functional objective factor analysis.²¹⁶ As the Fifth Circuit's panel opinion recognized, "[T]he *Boumediene* Court appear[ed] to repudiate the formalistic reasoning of *Verdugo-Urquidez*["²¹⁷

Second, even if *Verdugo-Urquidez* is still good law, its significant voluntary connections test is minimally persuasive because it was decided by plurality and has been recognized as dicta by lower courts.²¹⁸ In addition, the facts of the instant case are distinguishable from those in *Verdugo-Urquidez*, as that case involved a warrantless search of property,²¹⁹ while the instant case revolves around the use of unreasonable lethal force, triggering the prohibition of excessive force proscribed by the Fourth Amendment.²²⁰ Therefore, in either circumstance, the Court should have relied on the *Boumediene* analysis.

2. Applying *Boumediene*

By using the *Boumediene* analysis, the Court should have concluded the Fourth Amendment applied extraterritorially. The *Boumediene* Court provided three objective factors for consideration: "(1) the citizenship and status of the [victim] and the adequacy of the process through which that status determination was made; (2) the nature of the sites where [the incident] took

216. See *Boumediene*, 553 U.S. at 764 (holding that the "questions of extraterritoriality turn on objective factors and practical concerns, not formalism").

217. *Hernandez*, 757 F.3d at 265; see also Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 272 (2009) (explaining how "*Boumediene* provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez*").

218. D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 90 (2011) (noting, "[m]any courts . . . [have] characterize[d] the 'substantial connections' test as mere dictum in a divided opinion"); see, e.g., *United States v. Guitterez*, 983 F. Supp. 905, 915 (N.D. Cal. 1998) (emphasizing that "a majority of the justices did *not* subscribe to Chief Rehnquist's opinion" before declining to follow the rule established in *Verdugo-Urquidez*), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999); *United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992) (recognizing, before rejecting its application to the case at hand, that the holding in *Verdugo-Urquidez* was "not joined by the majority of the justices"), *rev'd in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993). *But see* *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (announcing that "this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements").

219. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) ("The question presented by this case is whether the Fourth Amendment applies to *the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.*" (emphasis added)).

220. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2004, (2017) (stating that the second question presented asked: "Whether the *shooting* violated the victim's Fourth Amendment rights" (emphasis added)).

place; and (3) the practical obstacles inherent in resolving the [victim's] entitlement to" Fourth Amendment protections.²²¹ The following subsections will apply each factor in turn.

a. Citizenship & Status of Hernández

It is undisputed that Hernández is not a United States citizen.²²² *Boumediene*, however, makes clear that citizenship is "not dispositive" by providing constitutional protection to "a limited 'class of noncitizens.'"²²³ By extending the Constitutional protections to Hernández, a similar limited class of noncitizens would be established, those that live their daily lives on and around the border. Furthermore, the citizenship of Hernández was unknown to Agent Mesa at the time of the shooting.²²⁴ This exemplifies the need to create such a class of protected noncitizens, or at least requires a restricted emphasis placed on this factor when used in the border context, because it is nearly impossible to determine the citizenship of individuals crossing the border before excessive force is employed due to the daily intermingling of both American and Mexican citizens.²²⁵ Lastly, Hernández's status as "a civilian killed outside an occupied zone or theater of war" weighs in his favor.²²⁶

b. Nature of the Culvert & Surrounding Border Area

In considering the nature of the site where the incident occurred, the *Boumediene* court emphasized that *de jure* sovereignty is not the "only relevant consideration in determining the geographic reach of the Constitution."²²⁷ Instead, the analysis focuses on the control exerted by the United States over the particular area and whether the United States "intend[s] to govern indefinitely."²²⁸ Border patrol agents work within feet of the border

221. *Boumediene*, 553 U.S. at 766.

222. *Hernandez v. United States*, 757 F.3d 249, 268 (5th Cir. 2014), *reh'g granted*, 785 F.3d 117 (5th Cir. 2015).

223. *Id.* (applying the citizenship prong of the *Boumediene* analysis). The class created in *Boumediene* were the detainees at Guantanamo Bay. *Id.*; *Boumediene*, 553 U.S. at 732.

224. *Hernandez*, 137 S. Ct. at 2009 (Breyer, J., dissenting).

225. *See supra* notes 205–207 and accompanying text.

226. *See Hernandez*, 757 F.3d at 268–69 (distinguishing Hernández's status from the "enemy aliens' detained during the Allied Powers' post-World War II occupation in *Eisentrager*" and the "enemy combatants' held pursuant to the Authorization of Use of Military Force in *Boumediene*" within the context of the War on Terror (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950)); *Boumediene*, 553 U.S. at 734, 767).

227. *Boumediene*, 553 U.S. at 764.

228. *Id.* at 768–69.

every day, maintaining a “heavy presence” over the entire border area.²²⁹ Specifically, agents frequently “exercise hard power across the border,” such as aggressive or coercive tactics, and regularly do their job over the line by conducting “preinspection[s]” before allowing individuals or vehicles to cross into the United States.²³⁰ As explained by the Chief of United States Border Patrol, “U.S. border security policy ‘extends [the nation’s] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many.’”²³¹

The control exerted by United States’ officials is not a recent development, as the United States has historically had a “constant presence on both sides of the line.”²³² Like the *Boumediene* Court’s description of Guantanamo Bay, the United States’ presence and control over the southwest border can be similarly characterized as not “transient” since “[i]n every practical sense [the border] . . . is within the constant jurisdiction of the United States.”²³³ As the Fifth Circuit concluded, “[E]ven though the United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a permanent border without any . . . accountability weigh in favor of recognizing some constitutional reach.”²³⁴ Nonetheless, Agent Mesa was, in fact, within the territory of the United States when the act was committed, indicating his conduct was entirely controlled by the authority of the United States.²³⁵

While not explicitly required by the *Boumediene* Court, a court should consider the features of the culvert and the surrounding community when determining the nature of the site where the incident took place to provide a complete picture of the area under examination. The surrounding area represents a binational community, consisting of El Paso, Texas, and Ciudad Juárez, Chihuahua, Mexico, that cannot simply be divided by an invisible line.²³⁶ A recent poll found there is a “sense of community and dependency

229. *Hernandez*, 757 F.3d at 269–70; see U.S. CUSTOMS & BORDER PROT., BORDER PATROL STRATEGIC PLAN 18 (2012–2016), https://www.cbp.gov/sites/default/files/documents/bp_strategic_plan.pdf (explaining the objective to expand the enforcement presence on and around the Southwest border).

230. *Hernandez*, 757 F.3d at 269, 270 (quoting 8 C.F.R. § 235.5(b) (1997)).

231. *Id.* at 270 (quoting *Securing Our Borders—Operational Control and the Path Forward: Hearing Before the Subcomm. on Border and Mar. Sec. of the H. Comm. on Homeland Sec.*, 112th Cong. 8 (2011) (statement of Michael J. Fisher, Chief of United States Border Patrol)) (alterations omitted).

232. Eva L. Britran, Note, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 244–46 (2014) (“Since the mid-nineteenth century, the United States has wielded military, political, and economic authority over northern Mexico.”).

233. *Boumediene*, 553 U.S. at 768–69.

234. *Hernandez*, 757 F.3d at 270.

235. *Id.* at 269.

236. Brief by Border Scholars, *supra* note 175, at 2, 14.

between [these] sister cities across the border.”²³⁷ The interconnectedness of the two cities and their lack of awareness of the artificial border claiming to separate them can be demonstrated in a variety of ways: eligible Mexican students who attend University of Texas at El Paso pay in-state tuition,²³⁸ there are regular joint cultural celebrations and activities, such as the Run International United States-Mexico 10K²³⁹ and the blended El Dia de los Muertos celebrations;²⁴⁰ and Ciudad Juárez, Chihuahua, Mexico switched to daylight savings because children began showing up an hour early for school.²⁴¹ Furthermore, there are a number of cross-border institutions that work together to solve collective problems.²⁴² Specifically, and most noteworthy, the culvert was built and is now maintained by a joint United States-Mexico boundary commission.²⁴³ The commission contains “representatives of both nations” and exercises control of the border area of the culvert.²⁴⁴ Relatedly, as Justice Breyer explained, this portion of the culvert is a “limitrophe” area,²⁴⁵ which is subjected to “co-operation and good neighborliness.”²⁴⁶ Additionally, as Justice Breyer also illustrated, the actual borderline is ambiguous, as “[i]t does not itself contain any physical features of a border.”²⁴⁷ Instead, fences lie on either side of the culvert delineating the two countries.²⁴⁸ As Border Patrol itself has recognized,²⁴⁹ it is impossible to identify where the actual borderline is situated.²⁵⁰ When considering the im-

237. Alfredo Corchado, *Common Ground*, DALLAS MORNING NEWS (July 18, 2016), <http://interactives.dallasnews.com/2016/border-poll/>.

238. Brief by Border Scholars, *supra* note 175, at 11–12.

239. *Id.* at 12. The run “begins in El Paso, crosses the Stanton Street Bridge into downtown Juárez, and then turns back to a finish line at the summit of the Paso del Norte Bridge (the bridge beside which Sergio Hernández was killed).” *Id.*

240. *Id.*

241. *Id.* at 13.

242. *See, e.g., id.* at 18–20 (describing the United States-Mexico Border Governors Conference, the United States-Mexico Border Legislative Conference, and the collaboration between emergency services).

243. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2009 (2017) (Breyer, J., dissenting).

244. *Id.* at 2010.

245. *See supra* note 163 (defining “limitrophe”); *see also* Jennifer Pitt, *Dredging for Diplomacy? Colorado River Management at the United States-Mexico Border*, 19 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 47, 47 (2006) (explaining that limitrophe is “a unique nomenclature that means ‘at the border’ in both English and Spanish”).

246. *Hernandez*, 137 S. Ct. at 2010 (Breyer, J., dissenting).

247. *Id.* at 2009.

248. *Id.*

249. *See Border Patrol Overview*, U.S. CUSTOMS AND BORDER PROT. <https://www.cbp.gov/border-security/along-us-borders/overview#wcm-survey-target-id> (last visited Mar. 27, 2018) (describing the borderline as “barely discernible”).

250. *See Hernandez*, 137 S. Ct. at 2009, 2010–11 (Breyer, J., dissenting) (describing the nature of the actual borderline).

moderate amount of control the United States exerts over this closely intertwined area, in which the borderline has become a fruitless feature, it seems this is precisely the type of zone that deserves constitutional protection—an area where it is impossible to determine where the Constitution stops and where it begins.

c. Practical Obstacles to Affording Hernández Fourth Amendment Protections

To determine whether there are practical obstacles involved in extending constitutional protections, the Court considers a broad range of potential barriers relevant to the constitutional provision at issue.²⁵¹ Those discussed in this Subsection include the possibility of (1) additional expenditures and undue burdens, (2) conflicts with other nations, and (3) adverse consequences that may emerge in future contexts. This Subsection will also explore the practical effects involved in failing to extend Fourth Amendment protections in the context of this case.

First, extending Fourth Amendment protections would not “require expenditure of funds by the Government and [would not] divert the attention of [Border Patrol] personnel from other pressing tasks.”²⁵² The right would merely provide a means of recourse and a method of deterrence, simply by making Border Patrol agents think carefully before using their weapons in unreasonable circumstances.²⁵³ Nonetheless, even if some costs and diversions did arise, they would require no more than an “incremental expenditure of resources.”²⁵⁴ Relatedly, extending a remedy through the Fourth Amendment would not hinder Border Patrol agents’ ability to do their job because they would still be permitted to use force under reasonable circumstances and deadly force when necessary—a standard they should already be applying.²⁵⁵ No additional burden, therefore, would be placed on the agents.

251. *Boumediene*, 553 U.S. at 769–70.

252. *Id.* at 769. The *Boumediene* court in fact recognized that extending the habeas corpus privileges to detainees “may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks” but nonetheless granted detainees this right by explaining that this consideration is not “dispositive.” *Id.*

253. Brief by Former Officials of CBP, *supra* note 174, at 30 (“[T]he prospect of civil liability plays a proper and important role in deterring Border Patrol officers from using excessive force in confrontations with individuals at and across the border.”).

254. *Boumediene*, 553 U.S. at 769.

255. See U.S. CUSTOMS & BORDER PROT., USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 1, 3 (2014), <https://www.cbp.gov/sites/default/files/documents/Useof-ForcePolicyHandbook.pdf> (proscribing that agents may use “‘objectively reasonable’ force only when it is necessary to carry out their law enforcement duties” and that they may use deadly force “only when necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of serious physical injury or death to the officer/agent or to another person”).

Second, extending Fourth Amendment protections would not “cause friction” with Mexico.²⁵⁶ In fact, as set out in the Amicus Brief filed in support of Hernández by Mexico, “[A]pplying U.S. law in this case would not interfere with operations of the Mexican government within Mexico . . . [but would instead] show appropriate respect for Mexico’s sovereignty on its own territory and for the rights of its nationals.”²⁵⁷ Mexico further explained that applying the Constitution in this case would not infringe upon Mexico’s sovereignty.²⁵⁸ Notably, Mexico clarified, “Any invasion of Mexico’s sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy’s parents sought to hold Agent Mesa responsible for his actions.”²⁵⁹ Similarly, there are reciprocity implications involved, as the United States would expect Mexico to hold its agents accountable if similar situations occurred in reverse.²⁶⁰

Third, the concerns surrounding Border Patrol’s, and other United States agencies’, increased use of “sophisticated systems of surveillance” and the implications that may result if the Fourth Amendment is extended into the border zone are unfounded.²⁶¹ The right could be narrowly construed to apply where it is needed the most—in the immediate border vicinity. Additionally, the facts of the instant case limit its holding only to those subjected to excessive deadly force by Border Patrol agents and not to circumstances of warrantless searches that may result from the use of advanced surveillance technology.²⁶² Therefore, the right would not reach those outside this limited class of non-citizens—those within close proximity to the border and a victim of a Border Patrol agent’s excessive use of force.²⁶³

256. *Boumediene*, 553 U.S. at 770.

257. Brief of the Government of the United Mexican States as Amicus Curiae in Support of Petitioners at 4, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118) [hereinafter Brief by Mexico].

258. *Id.* at 7.

259. *Id.*

260. *See id.* at 3 (“The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed a U.S. national standing on U.S. soil.”).

261. *Hernandez v. United States*, 757 F.3d 249, 267 (5th Cir. 2014) (explaining “[t]hese sophisticated systems of surveillance might carry with them a host of implications for the Fourth Amendment[.] . . . [as they could] ‘disrupt the ability of the political branches to respond to foreign situations involving our national interest’ and could also plunge Border Patrol agents ‘into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad’ (first citing *Kyllo v. United States*, 533 U.S. 27, 40 (2001); and then quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990), *reh’g granted*, 785 F.3d 117 (5th Cir. 2015))).

262. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (“Routine searches of the persons and effects of [those at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant.”).

263. *See also Hernandez v. Mesa*, No. 12-50217, slip op. at 26 (5th Cir. Mar. 20, 2018) (Prado, J., dissenting) (noting “Hernandez’s parents do not seek to hold any high-level officials liable for

By *not* extending Fourth Amendment protections in this case, a number of practical concerns emerge. Failing “to apply the Fourth Amendment to the culvert,” Justice Breyer explained, “would produce serious anomalies.”²⁶⁴ The actions of Agent Mesa remain the same no matter what side of the indiscernible borderline he was on—the “lethal impact” does not vary.²⁶⁵ Considering the vast number of people who cross the border every day, the anomalous effects are only likely to multiply.²⁶⁶ As Justice Breyer reasoned, “It does not make much sense to distinguish for Fourth Amendment purposes among these many thousands of individuals on the basis of an invisible line of which none of them is aware.”²⁶⁷ Through the application of the *Boumediene* factor analysis, the Court should have concluded the Fourth Amendment reached Hernández and, accordingly, extends to those who may find themselves in similar circumstances.

C. Fourth Amendment Historical Considerations

Providing a remedy in this instance is not at odds with the Fourth Amendment, as *Verdugo-Urquidez* would suggest, but is actually consistent with the Amendment’s historical purpose. As used by the Fifth Circuit to deny Hernández Fourth Amendment protections,²⁶⁸ the *Verdugo-Urquidez* approach focuses on the Fourth Amendment’s use of the phrase “the people” and concludes it only refers to citizens of the United States.²⁶⁹ Under this approach, noncitizens, at least those without significant voluntary connections, cannot invoke the Fourth Amendment because its protections do not reach those outside of “the people.”²⁷⁰

When the Framers drafted the Fourth Amendment, however, their fundamental aim was to curb unfettered power exercised by the government.²⁷¹ More precisely, the “founders sought to guarantee a general right of security . . . through the enforcement of policies and procedures capable of constraining government agents and limiting the discretionary authority of those

the acts of their subordinates . . . [but] are suing an individual federal agent for his *own* actions” (emphasis added)).

264. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2010 (2017) (Breyer, J., dissenting).

265. Brief by Mexico, *supra* note 257, at 8.

266. *Hernandez*, 137 S. Ct. at 2010 (Breyer, J., dissenting).

267. *Id.* at 2011.

268. *Hernandez v. United States*, 757 F.3d 249, 266 (5th Cir. 2014).

269. *Id.* at 263.

270. *See id.* at 263 (explaining this textual approach).

271. DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 154 (2017) (“[T]he Fourth Amendment was motivated by founding-era struggles with abuses of power.”); *see id.* at 69–70 (explaining how the Fourth Amendment specifically arose as a response to “experiences in England and the colonies with general warrants and writs of assistance,” which “provided executive agents with what amounted to unlimited licenses to conduct searches and seizures without fear of being held accountable for their conduct”).

wielding the truncheon of state power.”²⁷² Granting Hernández’s family the ability to bring their suit under the Fourth Amendment would, accordingly, create a means of deterrence to dissuade Border Patrol agents from abusing the power bestowed upon them.²⁷³ In other words, it would create a “procedure[] capable of constraining government agents.”²⁷⁴ The protection of the “state of security and tranquility” the Fourth Amendment attempts to preserve is, therefore, furthered by limiting the insecurity that a Border Patrol agent may take the life of another under unreasonable circumstances with immunity.²⁷⁵

Furthermore, the Fourth Amendment right at question here is not an individual right, but it is a collective right held by “those who compose a community.”²⁷⁶ Hernández, while disqualified from “the people,” is nonetheless a representative of the collective subject to Border Patrol’s authority. Holding Agent Mesa liable for his actions against Hernández, therefore, protects this community as a whole and serves to impose restraints on the overreaching authority the Fourth Amendment prohibits.

As these historical considerations have illuminated, the central question revolves around the conduct of the government actor and less on the status of the victim. Agent Mesa’s use of excessive deadly force in this case is, accordingly, in direct conflict with the essential purpose of the Fourth Amendment—irrespective of Hernandez’s nationality. Providing a remedy in this instance aligns precisely with the Framers’ intentions when drafting the Fourth Amendment.²⁷⁷

272. *Id.* at 169.

273. *See* Brief by Former Officials of CBP, *supra* note 174, at 3 (arguing that the “because of the conditions within the Border Patrol, similar incidents will likely continue to occur if agents cannot be held accountable in civil suits”).

274. GRAY, *supra* note 271, at 169.

275. *Id.* at 157.

276. *Id.* at 147–48 (describing that the inclusion of “the” before “people” signifies that it refers to a right of collective protection).

277. *See supra* note 271–272 and accompanying text.

V. CONCLUSION

In *Hernandez v. Mesa*,²⁷⁸ the Court declined to address whether the Fourth Amendment extended steps across the border to protect Hernández from Agent Mesa's deadly use of force.²⁷⁹ Agent Mesa's actions were not an anomaly but were instead an example of a much larger problem—the chronic use of excessive force by Border Patrol agents and the lack of recourse available to victims.²⁸⁰ Presented with an opportunity through the instant case, the Court should have provided a mechanism of deterrence and redress by establishing the basis for a civil remedy.²⁸¹ By applying the functionalist approach established in *Boumediene*, the Court had the means to reach the conclusion that the Fourth Amendment applies to the limited class of non-citizens subjected to Border Patrol's authority.²⁸² This conclusion reflects the Framers' intended purpose of the Fourth Amendment—to prevent government officials from abusing the discretionary power that thwarts the ability of the people to feel secure.²⁸³ To curb the excessive force used at the border and to prevent others from meeting the same harrowing end as Hernández, the Constitution must extend as far as the bullet can travel.

278. 137 S. Ct. 2003 (2017).

279. *Hernandez*, 136 S. Ct. at 2008.

280. *See supra* Part IV.

281. *See supra* Part IV.

282. *See supra* Section IV.B.

283. *See supra* Section IV.C.