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## Boumediene vs. Verdugo-Urquidez: The Battle for Control over Extraterritoriality at the Southwestern Border

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# **BOUMEDIENE VS. VERDUGO-URQUIDEZ: THE BATTLE FOR CONTROL OVER EXTRATERRITORIALITY AT THE SOUTHWESTERN BORDER**

## INTRODUCTION

On the night of October 12, 2010, as he was walking home in Nogales, Mexico,<sup>1</sup> sixteen-year-old Jose Antonio Elena Rodriguez was tragically killed by a Customs and Border Patrol (“CBP”) agent standing on the US side of the United States-Mexico border fence.<sup>2</sup> Rodriguez was found unarmed on Mexican soil lying in a pool of his own blood, and a later autopsy indicated he was shot through the steel fence at least ten times from behind.<sup>3</sup> The CBP agents present at the scene allege that on the night Rodriguez was killed, they witnessed smugglers drop drugs on the US side of the border and then return to Mexico.<sup>4</sup> According to the agents, individuals on the Mexican side of the border began assaulting the agents with rocks.<sup>5</sup> The agents verbally commanded the individuals to stop, but these warnings were ignored.<sup>6</sup> One agent then opened fire and hit one of the subjects, allegedly Rodriguez.<sup>7</sup>

Unfortunately, this violent interaction across the United States-Mexico border is not an isolated incident.<sup>8</sup> Incidents involving use of excessive

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1. Nogales is a city located in the northern part of Sonora, the Mexican state directly south of the United States-Mexico border fence near Arizona.

2. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1028–30 (D. Ariz. 2015); First Amended Complaint and Demand for Jury Trial at 1, *Rodriguez*, 111 F. Supp. 3d 1025 (No. 4:14-CV-02251-TUC-RCC).

3. *Rodriguez*, 111 F. Supp. 3d at 1028–30.

4. Catherine E. Shoichet, *Mother, ACLU Sue Border Patrol over Son's 'Brazen and Lawless' Shooting*, CNN (July 30, 2014, 8:24 AM), <http://www.cnn.com/2014/07/29/justice/border-patrol-shooting-aclu-lawsuit>, archived at [perma.cc/92PC-LCJS](https://perma.cc/92PC-LCJS).

5. Shoichet, *supra* note 4. Due to an extensive history of assaults against CBP agents at the Southwestern Border, agents face serious risk of physical injury from both lethal and non-lethal weapons, including rocks. See Anthony Kimery, *Potentially Lethal Attacks Pose Risks to CBP Personnel on SW Border*, HOMELAND SEC. TODAY (Mar. 29, 2013), <http://www.hstoday.us/columns/the-kimery-report/blog/potentially-lethal-attacks-pose-risks-to-cbp-personnel-on-sw-border/89556542e96b9df578bc8d1786537fb5.html>, archived at [perma.cc/AP5S-5FEK](https://perma.cc/AP5S-5FEK) (detailing violent attacks on CBP officers in the last decade).

6. Shoichet, *supra* note 4. Plaintiffs allege that Rodriguez was simply a bystander at the scene; neither he nor anyone near him was throwing rocks, using a weapon, or threatening the agents in any way. First Amended Complaint and Demand for Jury Trial, *supra* note 2, at 3; *Rodriguez*, 111 F. Supp. 3d 1025.

7. Shoichet, *supra* note 4.

8. See AM. CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS ON THE UNITED STATES-MEXICO BORDER 1 (Oct. 25, 2012), available at [https://www.aclu.org/files/assets/121024\\_aclu\\_](https://www.aclu.org/files/assets/121024_aclu_)

force by US government actors at the border have increased dramatically since 2001.<sup>9</sup> Recently, the surge of child immigrants<sup>10</sup> has refocused the spotlight on the systematic abusive policies of CBP agents towards foreign nationals at the United States-Mexico border.<sup>11</sup> Though the CBP plays a

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written\_statement\_ochcr\_side\_event\_10\_25\_12\_final\_0.pdf (“[A]t least 18 individuals have died since January 2010 as the result of alleged excessive use of force by U.S. Customs and Border Protection (CBP) officials, including six who were under the age of 21 and five who were U.S. citizens. At least two other individuals survived serious injuries inflicted by CBP officers in the same timeframe.”). A few examples include Guillermo Arévalo Pedroza (killed Sept. 3, 2012, when he was shot by a US Border Patrol Agent on a boat while picnicking with his wife and young daughters near the Texas side of the border), Juan Pablo Pérez Santillán (killed July 7, 2012, near Texas), Carlos Lamadrid (US citizen shot four times in the back and killed March 21, 2011, while allegedly fleeing from Arizona to Mexico), and Anastasio Hernández Rojas (killed May 28, 2010, when he was beaten and electroshocked to death near San Diego). *Id.* at 4. Yet there are many more similar incidents. *See id.* at 9 n.13. Most recently, litigation over cross-border killings of Mexican nationals by CBP agents has stirred controversy, sparked by the death of fifteen-year-old Sergio Adrián Hernández Guereca, who was killed on June 7, 2010, near El Paso, Texas, when he was shot in the face by a CBP agent. *See id.* at 5.

9. *See, e.g.*, Bob Ortega & Rob O’Dell, *Force at the Border: Tucson Sector*, ARIZ. REPUBLIC, Dec. 16, 2013, available at <http://www.azcentral.com/news/immigration/border/tucson.html> (noting 487 incidents of use of force reported between 2010 and 2012 in the Arizona sector alone). The US government formed the Department of Homeland Security (“DHS”) as a response to the tragic events of 9/11. DHS is tasked with protecting the United States from terrorist attacks and vigilantly guarding and securing our borders through the CBP. ACLU, *supra* note 8, at 2. Since then, the federal government has channeled resources to increasingly militarize law enforcement in an effort to tighten and strengthen security measures at the United States-Mexico border. *Id.* Between 2000 and 2011, the number of US government agents at the border more than doubled. Currently, the United States employs over 21,000 Border Patrol Agents, over 18,000 of them patrolling the Southwestern border. *Id.* Additionally, new infrastructure in the form of a 652-mile-long border fence and cutting edge technology, including mobile surveillance systems, ground sensors, and unmanned drones, are utilized as heightened vigilance tools alongside the increasing number of personnel patrolling the border. *Id.* These measures have dramatically contributed to increased incidents of use of force at the United States-Mexico border. MARIA JIMENEZ, AM. CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL CNTYS., HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 8 (2009), available at <http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf> (reporting that between 3861 and 5607 deaths have occurred as a result of the intensified border security practices in the past fifteen years).

10. Presidential Memorandum, Office of the Press Secretary, The White House, Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-un-accompanied-alien-children-acr>, archived at <http://perma.cc/HDE2-R4AZ> (declaring the influx of child immigrants at the United States-Mexico border to be an “urgent humanitarian situation” necessitating an immediate response).

11. More than 68,000 children, most of them unaccompanied, have been caught crossing the United States-Mexico border since October 2013. Haeyoun Park, *Q. and A.: Children at the Border*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html>. The recent influx of Central American child immigrants is largely motivated by poverty and violence in their home countries. *Id.* On the US side, drug smuggling and human trafficking are among the main concerns motivating strict patrolling of the border. *See* MIGUEL ANTONIO LEVARIO, MILITARIZING THE BORDER: WHEN MEXICANS BECAME THE ENEMY 121 (2012). Unfortunately, the surge of immigrants, coupled with increasingly strict border patrol policies, has led to a spike in excessive force incidents, most of which go unpunished. DANIEL E. MARTÍNEZ ET AL.,

crucial role in securing our borders, it should not do so at the expense of human rights.<sup>12</sup>

The Rodriguez lawsuit comes on the heels of *Hernandez v. United States*,<sup>13</sup> a landmark Fifth Circuit decision that originally extended constitutional protections under the Fifth Amendment to foreign nationals injured abroad by the conduct of CBP agents yet refused to recognize such rights under the Fourth Amendment.<sup>14</sup> However, en banc, the Fifth Circuit reversed in part and affirmed in part, declining to recognize any constitutional protections to foreign victims and granting immunity to government agents.<sup>15</sup> The Circuit's faulty application of Supreme Court precedent under the extraterritoriality doctrine<sup>16</sup> and strict interpretation of constitutional language sets a dangerous standard that encourages abuse of law enforcement power at the border at the expense of innocent human lives.<sup>17</sup>

This Note aims to track the *Hernandez*<sup>18</sup> reasoning, situate it within the historical development of the extraterritoriality doctrine, and evaluate its scope and implications. Part I provides a detailed overview of the development of the extraterritoriality doctrine of the US Constitution. It also describes the modern precedent governing this area of law. Part II critically examines the *Hernandez* decision in light of its theoretical approach to extending constitutional protections abroad. Part III evaluates

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AM. IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 3 (2014), available at [http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken\\_Final.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_Final.pdf).

12. US action to tighten security at the Southwest border began in the 1990s, with the adoption of several operations that sought to prevent illegal immigration through deterrence. AM. CIVIL LIBERTIES UNION, *supra* note 8, at 2. The guiding principle behind “prevention through deterrence” is the idea that making the illegal border-crossing journey extremely difficult and dangerous would discourage aliens from attempting it. *Id.* Originally, the United States sought to deter smugglers of illegal drugs (players in the drug cartel) and human traffickers (and victims of human trafficking). LEVARIO, *supra* note 11, at 121. However, after 9/11, US border security policy shifted from focusing on curbing illegal drug and human trafficking to preventing terrorism. Given the initial underlying purpose of “prevention and deterrence,” it may be an inappropriate strategy to patrol US borders effectively post-9/11. JIMENEZ, *supra* note 9, at 7.

13. 757 F.3d 249 (5th Cir. 2014).

14. *Hernandez*, 757 F.3d at 272.

15. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc).

16. In this Note, “extraterritoriality” is defined as the application of constitutional protections to individuals located in a geographic area beyond the *de jure*, or physical, border of the United States.

17. *See, e.g.*, Brief for Amicus Curiae Dean Erwin Chemerinsky in Support of the Petitioners at 4, *Hernandez v. Mesa*, No. 15-118 (Nov. 30, 2015) [hereinafter Chemerinsky Amicus Brief] (describing the Fifth Circuit decision as endorsing “a free-fire zone where children at play steps away from the United States have lesser protection than aliens imprisoned as our country’s most dangerous enemies”).

18. “*Hernandez*” collectively refers to the panel decision and the en banc decision. Parts II and III will make a clear distinction where the two decisions diverge.

the implications and limitations of *Hernandez* and proposes a more accurate interpretation of the extraterritoriality doctrine as a guide for resolving this and future incidents of violence by CBP agents. Ultimately, this Note argues that the court's narrow interpretation of constitutional language and inadequate application of extraterritorial principles when deciding whether to deny or extend rights to foreign nationals injured abroad at the hands of government actors is dangerous. Such interpretation encourages inconsistencies and perpetuates a system of lawless law enforcement at the border, where CBP agents have plenary power to act with little oversight and accountability by US magistrates. Instead, this Note proposes an alternative framework for analyzing future extraterritorial incidents of violence at the United States-Mexico border.

#### I. THE DEVELOPMENT OF THE EXTRATERRITORIAL CONSTITUTION

During much of the United States' history, there was little need to examine the Constitution's geographic reach.<sup>19</sup> During the nineteenth century, the United States looked to expand its boundaries by admitting new states into the Union.<sup>20</sup> As the United States seized territory and began to build an overseas empire after the Spanish-American War,<sup>21</sup> the question of whether the Constitution follows the flag began to seep into domestic courts.<sup>22</sup> In a series of cases known collectively as the *Insular Cases*,<sup>23</sup> the Supreme Court addressed issues of when constitutional protections apply abroad.<sup>24</sup> Such examination of the limitations of the

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19. *Boumediene v. Bush*, 553 U.S. 723, 755 (2008).

20. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 799 (2005).

21. Through the Treaty of Paris, ratified in 1899, the United States seized and acquired sovereignty over the islands of the Philippines, Puerto Rico, and Guam. *Id.* at 805–06. As a consequence of its loss, Spain also relinquished claims to sovereignty over Cuba. *Id.* Though the United States declared it had no intention to assert sovereignty over the island, the United States obtained temporary control over Cuba. *Id.*

22. *Id.* at 805.

23. The *Insular Cases* generally refer to a series of opinions brought down between 1901 and 1922. *See id.* at 809–10 (compiling a comprehensive list of opinions considered part of the *Insular Cases*).

24. The *Insular Cases* are most famous for their articulation of the territorial incorporation doctrine. *Id.* at 807; *see also infra* note 26. Though this doctrine was conceived in order to address issues of constitutionality in formally annexed territories, these cases are continually cited as good law and are applied in contexts where the United States lacks formal control but nevertheless exercises sovereignty. Burnett, *supra* note 20, at 813.

Constitution ultimately developed into the extraterritoriality doctrine.<sup>25</sup> Today, the extraterritoriality doctrine defines the contours of the force and effect of the Constitution abroad—particularly the applicability of constitutional rights beyond the physical, or *de jure*, borders of the United States.<sup>26</sup>

A. *Extraterritoriality's Humble Beginnings: The Slow Progression from Formalism to Functionalism*

The Supreme Court first clearly addressed issues of extraterritoriality in *In re Ross*.<sup>27</sup> There, the Court denied habeas corpus rights to a US citizen sentenced to death by the American consular tribunal in Japan following his conviction for a murder committed aboard a private American ship in the harbor of Yokohama.<sup>28</sup> Drawing a hard line at the border, the Court invoked a strictly formalistic approach and held that American citizens do not enjoy the same rights abroad as they do at home because “[t]he Constitution can have no operation in another country.”<sup>29</sup> Despite the seemingly definitive rule that the US Constitution was null abroad, the Court briefly reasoned that enforcing constitutional rights abroad would also “be impracticable from the impossibility of obtaining a competent grand or petit jury.”<sup>30</sup>

Next, in a series of opinions known as the *Insular Cases*,<sup>31</sup> the Court addressed the question of extraterritoriality in the context of its applicability to any territory that is not a State; specifically, the insular geographic areas of Puerto Rico,<sup>32</sup> Guam, Hawaii,<sup>33</sup> American Samoa, and

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25. *Boumediene v. Bush*, 553 U.S. 723, 759 (2008); *see also* Burnett, *supra* note 20, at 797–98 (“[T]he *Insular Cases* remain good law . . . doing service in recent cases dealing with the extraterritorial applicability of the Constitution.”).

26. *Boumediene*, 553 U.S. at 755–56.

27. 140 U.S. 453 (1891).

28. *Id.* at 480.

29. *Id.* at 464.

30. *Id.*

31. *See supra* notes 23–24 and accompanying text.

32. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (holding that the Sixth Amendment did not apply in Puerto Rico because the territory was not incorporated into the United States but simply belonged to it); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding the Uniformity Clause of the Constitution inapplicable in Puerto Rico because the territory was unincorporated and therefore not a part of the United States).

33. *See, e.g., Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903) (finding the Fifth and Sixth Amendments inapplicable in Hawaii after annexation because rights are simply procedural and not fundamental).

the Philippines.<sup>34</sup> The Court formulated the doctrine of territorial incorporation,<sup>35</sup> standing for the proposition that “the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.”<sup>36</sup> As early as the turn of the twentieth century, the Court recognized that even in unincorporated territories, the federal government of the United States was bound to extend certain guarantees of fundamental rights to foreign nationals residing in those territories.<sup>37</sup> The Court heavily considered the practical difficulties<sup>38</sup> inherent in “enforcing all constitutional provisions always and everywhere,” but maintained that appropriate constitutional provisions should apply where most necessary.<sup>39</sup> This way, the Court slowly but surely moved away from the strict formalistic approach to extraterritoriality suggested in *Ross*, and toward a more functionalist approach that takes into account the practical considerations of applying constitutional provisions abroad in territories subject to some sort of US control.<sup>40</sup>

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34. *See, e.g.*, *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding that the Fifth Amendment did not apply in the Philippines); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (holding that trial by jury is not a fundamental right and was therefore inapplicable in the Philippines, an unincorporated territory).

35. The territorial incorporation doctrine divided annexed territories subject to US sovereignty into incorporated and unincorporated territories. Incorporated territories consisted of places that were intended to form an integral part of the United States, while unincorporated territories were places that simply belonged to the United States. Burnett, *supra* note 20, at 800.

36. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (interpreting the importance of the *Insular Cases*). *But see* Burnett, *supra* note 20, at 801–02 (noting that the significance of the *Insular Cases* is the preservation of the option to relinquish control over a territory, rather than to draw a distinction between areas where constitutional provisions apply and ones where such provisions are inapplicable).

37. *Boumediene*, 553 U.S. at 757 (interpreting importance of the *Insular Cases*).

38. A major and recurring practical difficulty inherent in applying constitutional provisions in full to unincorporated territories is imposing American law, thereby displacing the existing legal system within the territory altogether. *See, e.g.*, *Dorr*, 195 U.S. at 148 (stating that the United States may impose its system of law only in incorporated territories where “under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept . . . a system of trial unknown to them and unsuited to their needs”).

39. *Boumediene*, 553 U.S. at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)) (internal quotation marks omitted).

40. Eva L. Bitran, 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, 232 (2014). Some scholars have argued that the functional approach is fundamentally flawed and should not be used to resolve issues of constitutionality abroad. *See, e.g.*, Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1017–18 (2009). Though the functional approach’s main strength is its responsiveness to specific circumstances and case-by-case analysis in determining the application of a constitutional provision abroad, such careful attention is also its fundamental flaw. This approach confers “considerable discretion on judges . . . [and] made it possible for courts to be excessively attentive to considerations of governmental convenience, and

Roughly half a century later, in *Johnson v. Eisentrager*,<sup>41</sup> the Court refused to extend constitutional rights under Articles I and III and the Fifth Amendment to alien enemy combatants detained by the US Army in a prison located in an American occupied part of Germany.<sup>42</sup> Respondents were twenty-one German nationals who petitioned for writs of habeas corpus after they were captured, tried, and convicted in China by the US military for violations of the laws of war.<sup>43</sup> In his dissent, Justice Black posited that the majority utilized a strict interpretation of extraterritoriality principles in its decision to deprive habeas corpus rights to aliens detained by US government actors abroad “solely because they were convicted and imprisoned overseas.”<sup>44</sup>

However, moving away from the formalistic approach applied in *Ross* to deny rights to foreign nationals strictly on the basis of their nationality, the *Eisentrager* Court considered several important factors. First, the Court both recognized a “generous and ascending scale of rights” that broadens as noncitizens strengthen their ties with the United States and identified a universal distinction “between citizens and aliens” as well as between “aliens of friendly and of enemy allegiance.”<sup>45</sup> Second, the Court emphasized that the “prisoners at no relevant time were within any territory over which the United States is sovereign” as well as the fact that the “scenes of [the prisoners’] offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”<sup>46</sup> Most importantly, the Court considered the practical difficulties in extending the privilege of habeas corpus abroad in this case.<sup>47</sup>

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insufficiently attentive to arguably relevant doctrinal developments at home.” *Id.* at 1018. Consequently, limiting an extraterritorial analysis of a constitutional provision to “an evaluation of the feasibility of [its] application . . . effectively smuggle[s] a version of strict territoriality—precisely the standard [the functional approach] purports to reject—into the jurisprudence through the back door.” *Id.* at 1019.

41. 339 U.S. 763 (1950).

42. *Id.* at 781.

43. *Id.* at 765.

44. *Id.* at 795 (Black, J., dissenting). Justice Black, with whom Justice Douglas and Justice Burton concurred, warned that “the Court’s opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent.” *Id.* at 796. Further, he states that though not every constitutional provision is or should be applicable abroad, this “does not mean that the Constitution is wholly inapplicable in foreign territories that we occupy and govern.” *Id.* at 796–97.

45. *Id.* at 769–70.

46. *Id.* at 778.

47. *Id.* at 778–79. The Court points out that granting the writ in this case would be economically impractical because the army would have to transport the prisoners overseas for the hearing. Such a burden “would require allocation of shipping space, guarding personnel, billeting and rations . . . .

Overruling *Ross*, the Court in *Reid v. Covert*<sup>48</sup> explicitly abandoned a strictly formalistic approach to extraterritoriality and, for the first time, held that the Constitution in its entirety applies to American citizens living abroad.<sup>49</sup> In *Reid*, wives of military men were denied the constitutional right to a jury trial and, instead, were forced to stand trial in a military court, for charges of murder committed abroad.<sup>50</sup> The Court rejected “the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”<sup>51</sup> Further, the Court expressed that “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”<sup>52</sup> Importantly, the Court warned that it would not tolerate lawless government action by making clear that “[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.”<sup>53</sup>

In his concurrence, Justice Harlan set the tone for future analysis by articulating the underlying scheme of the functional approach. Rejecting the adoption of a bright-line rule, Harlan noted that “[t]he proposition is, of course, not that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.”<sup>54</sup> Instead, he recognized that the extraterritorial application of constitutional rights should depend on whether doing so would be “altogether impracticable and anomalous.”<sup>55</sup>

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[and] transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.” *Id.* at 779. Granting the writ would also be politically undesirable because “[s]uch trials would hamper the war effort and bring aid and comfort to the enemy . . . [and] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.” *Id.*

48. 354 U.S. 1 (1957).

49. *Id.* at 12–13, 18–19.

50. *Id.* at 3.

51. *Id.* at 5.

52. *Id.* at 6. The Court distinguished this case from the *Insular Cases* on the basis of practical considerations. *Id.* at 14. The Court dictates that the *Insular Cases* present a set of practical considerations, such as applying Congressional power to “provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions” which ultimately weigh heavily against the application of Constitutional protections abroad. *Id.* These considerations were not present in this case because governmental power was established through US citizenship. *Id.*

53. *Id.* at 14.

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

55. *Id.*

Moreover, Harlan suggested that when determining whether a certain constitutional guarantee should apply abroad, the Court should consider “the particular local setting, the practical necessities, and the possible alternatives” which Congress had before it.<sup>56</sup> Using this “impractical and anomalous” test to examine practical considerations, including the gravity of the offense, Harlan concluded that in this case—the commission of a capital crime—extending constitutional provisions abroad was appropriate.<sup>57</sup>

*B. Modern Supreme Court Precedent: Conflict and the Eventual Adoption of the Liberal Functionalist Approach*

The *Reid* decision, extending constitutional rights to United States citizens abroad, left the Court in *United States v. Verdugo-Urquidez*<sup>58</sup> to determine whether constitutional provisions also applied to foreign nationals injured abroad. In *Verdugo-Urquidez*, a plurality held that the Fourth Amendment did not protect a Mexican citizen and resident from the unreasonable warrantless search and seizure of his property, located in Mexico, by US government agents.<sup>59</sup> Justice Rehnquist, writing for a plurality, first distinguished the Fourth Amendment<sup>60</sup> from other Amendments, such as the Fifth<sup>61</sup> and Sixth<sup>62</sup> Amendments, on the basis

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56. *Id.* at 75. Importantly, citizenship did not appear to be a decisive factor in Justice Harlan’s reasoning. He neither agreed with the idea that the Constitution is wholly inoperative abroad under all circumstances nor with the “suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world.” *Id.* at 74. For him, the question was simply: “[T]o what extent do . . . provisions of the Constitution apply outside the United States?” *Id.* The impractical and anomalous test should be applied in the same manner in all cases.

57. *Id.* at 75, 77–78.

58. 494 U.S. 259 (1990).

59. *Id.* at 261. The United States Drug Enforcement Agency (“DEA”) suspected Verdugo-Urquidez to be among the leaders of a violent Mexican organization responsible for smuggling narcotics into the United States. *Id.* at 262. The US Government obtained a warrant for his arrest and eventually arrested him in California through collaboration with the Mexican police force. *Id.* Awaiting trial, DEA agents, with the help of Mexican authorities, searched Verdugo-Urquidez’s residence and seized certain documents believed to reflect quantities of marijuana Verdugo-Urquidez smuggled into the United States. *Id.* at 262–63.

60. The Fourth Amendment stipulates: “The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .” U.S. CONST. amend. IV (emphasis added).

61. The Fifth Amendment mandates: “No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall *any person* be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

that the Fourth Amendment's reach extends only to "the people."<sup>63</sup> He subsequently concluded that this term of art "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>64</sup> The plurality then devised a test where "aliens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country."<sup>65</sup> In addition to the sufficient connections test, the plurality highlighted that extending constitutional protections to aliens abroad in this case "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."<sup>66</sup> In the process, Rehnquist reasoned that our increasingly interconnected society warranted restricting Fourth Amendment protections to persons with sufficient connections to the United States. For example, "[s]ituations threatening to important American interests [that] arise halfway around the globe . . . [may] require an American response with armed force."<sup>67</sup> In these cases, any "restrictions on searches and seizures which occur incident to such American action[s] . . . must be imposed by the political branches through diplomatic understanding, treaty, or legislation."<sup>68</sup>

In his concurrence, Justice Kennedy flatly rejected placing any weight on the plurality's reference to "the people" as restricting the Fourth

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liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V (emphasis added).

62. The Sixth Amendment provides: "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI (emphasis added).

63. *Verdugo-Urquidez*, 494 U.S. at 265. Justice Rehnquist strongly believed that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government . . . [and not] intended to restrain the actions of the Federal Government against aliens outside of the United States territory." *Id.* at 266.

64. *Id.* at 265. Therefore, Rehnquist concluded that Verdugo-Urquidez "is an alien who has had no previous significant voluntary connection with the United States." *Id.* at 271.

65. *Id.* at 271.

66. *Id.* at 273. A couple of practical concerns guided the plurality's decision to deny Verdugo-Urquidez Fourth Amendment protections. First, the plurality acknowledged that the United States "frequently employs Armed Forces outside this country . . . for the protection of American citizens or national security." *Id.* Thus, applying the "Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-74. Furthermore, extending these protections abroad could encourage "aliens with no attachment to this country . . . [to] bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id.* at 274. Second, a US warrant is a "dead letter outside the United States" and has no effect in foreign soil. *Id.* Thus, the Court concluded that extending Fourth Amendment protections abroad in this case would push government actors "into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Id.*

67. *Id.* at 275.

68. *Id.*

Amendment's protections to a class of people.<sup>69</sup> Instead, he interpreted the phrase to “underscore the importance of the right, rather than to restrict the category of persons who may assert it.”<sup>70</sup> Echoing Justice Harlan in *Reid*, Kennedy explicitly adopted the functionalist “impractical and anomalous” approach to applying constitutional protections extraterritorially.<sup>71</sup> Using this test, he concluded that the practical considerations present in this case weighed against applying Fourth Amendment protections abroad.<sup>72</sup>

Most recently, in *Boumediene v. Bush*,<sup>73</sup> the Court explicitly applied functionalist principles when it held that aliens detained at Guantanamo Bay have the constitutional privilege of habeas corpus.<sup>74</sup> In extending constitutional rights to aliens beyond US borders, the Court quickly disposed of the idea that the Constitution is uncompromisingly invalid in territories not under the *de jure* sovereignty of the United States.<sup>75</sup> In doing so, the Court flatly rejected the formalistic reading of precedent on extraterritoriality<sup>76</sup> by concluding that “questions of extraterritoriality turn

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69. *Id.* at 276 (Kennedy, J., concurring).

70. *Id.* (“The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’”).

71. *Id.* at 277–78. For a description of the impractical and anomalous approach, see *supra* note 54 and accompanying text.

72. *Id.* at 278. Here, much like in the *Insular Cases*, Kennedy believed that the warrant requirement of the Fourth Amendment would impose unwelcomed US laws upon foreign states. *Id.* Furthermore, Kennedy stated, due to “[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials . . . the Fourth Amendment’s warrant requirement should not apply in Mexico as it does in this country.” *Id.* Varying slightly from Justice Harlan in *Reid*, Kennedy factored in the citizenship status of the respondent in his balancing test. Since “[t]he rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case,” Kennedy ultimately concluded that Verdugo-Urquidez’s alien status weighed against extending him Fourth Amendment protections. *Id.*

73. 553 U.S. 723 (2008).

74. *Id.* at 732, 771. Justice Kennedy delivered the opinion of the Court.

75. *Id.* at 754–55 (noting that previous decisions “undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends”). The Court further acknowledged that “it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.” *Id.* at 754.

76. *See id.* at 756–64. Most prominently, the Court rejected the formalistic reading of *Eisenrager*, specially noting that “[n]othing in *Eisenrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution.” *Id.* at 764. The Court further expressed separation-of-powers concerns inherent in adopting a formal sovereignty-based test. *Id.* at 765 (“The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”).

on objective factors and practical concerns, not formalism.”<sup>77</sup> Subsequently, the Court devised a test for the extraterritoriality doctrine, ultimately identifying that the three factors relevant in determining the Suspension Clause’s<sup>78</sup> reach are:

- (1) [T]he 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.<sup>79</sup>

With these in mind, the Court held that “Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”<sup>80</sup>

### C. Circuit Courts’ Interpretation of Modern Precedent: Split Ideas and Application

Though the *Boumediene* Court formally codified the functionalist approach for the Constitution’s extraterritorial reach with respect to non-resident aliens, the opinion left lower courts without clear guidance on whether or how to reconcile it with the doctrinal principles and substantial connections test outlined in *Verdugo-Urquidez*.<sup>81</sup> Most notably, lower

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77. *Id.* at 764.

78. The Suspension Clause protects the right of habeas corpus by stating: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

79. *Boumediene*, 553 U.S. at 766. As to the first factor, the Court acknowledged that the detainees were aliens. However, unlike in *Eisentrager*, where it was undisputed that the petitioners were enemy combatants, the detainees in this case were denied appropriate procedures to determine their status. *Id.* at 767. As to the second factor, the Court considered the fact that the detainees were apprehended abroad, but ultimately concluded that extending constitutional protections to the territory is consistent with both *Eisentrager* and the *Insular Cases* because US control in Guantanamo Bay is not transient. *Id.* at 768–69. Rather, in this case, the detainees were “held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.” *Id.* at 771. As to the third factor, the Court expressed that none of the practical considerations present in *Eisentrager* were present in this case—there was no threat of judicial interference with military efforts to contain enemy fighters and there was no risk that that adjudication in this case would cause friction with the Cuban government. *Id.* at 769–70.

80. *Id.* at 771.

81. See Bitran, *supra* note 40, at 238 (noting that some lower courts apply *Boumediene* narrowly, limiting its reach to the Suspension Clause and Guantanamo Bay; some strictly apply *Verdugo-Urquidez*’s substantial connections test; and some apply *Boumediene*’s functional approach in concert with *Verdugo-Urquidez*); see also *Hernandez v. United States*, 785 F.3d 117, 121 (5th Cir. 2015) (en banc) (Jones, J., concurring) (assuming *Boumediene* Court explicitly confined its holding only to the extraterritorial reach of the Suspension Clause); *Al Bahlul v. United States*, 767 F.3d 1, 33 (D.C. Cir. 2014) (en banc) (Henderson, J., concurring) (insisting the Supreme Court in *Boumediene* “limits its holding to the Suspension Clause”); *Ali v. Rumsfeld*, 649 F.3d 762, 772 (D.C. Cir. 2011) (interpreting

courts have attempted to synthesize *Boumediene* and *Verdugo-Urquidez* and apply the opinions in tandem.

For example, in *Ibrahim v. Department of Homeland Security*,<sup>82</sup> the Ninth Circuit applied both *Boumediene* and *Verdugo-Urquidez* to hold that a Malaysian student completing her Ph.D. in the United States had standing to bring claims of First and Fifth Amendment violations that took place while she was traveling to Malaysia to present her research at a conference sponsored by her university.<sup>83</sup> First, the court cited *Verdugo-Urquidez*'s sufficient connections test and factually distinguished this case from *Verdugo-Urquidez*.<sup>84</sup> Next, the court cited *Boumediene*'s functionalist approach but failed to apply it.<sup>85</sup> Instead, the court simply drew factual similarities between Ibrahim and the plaintiffs in *Boumediene*<sup>86</sup> and likened the government's proposed test in this case with the "bright-line 'formal sovereignty-based test'" the government in *Boumediene* proposed.<sup>87</sup> While the court declared that it was bound by both "the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo-Urquidez*," it ultimately relied solely on *Verdugo-Urquidez*.<sup>88</sup> Although reconciling the two opinions is possible, as proposed in Part III.C, the court in *Ibrahim* failed to accurately apply the more specific test of *Verdugo-Urquidez* in the context of the

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*Boumediene* narrowly limiting its reach to Guantanamo Bay); *Al Maqaleh v. Gates*, 605 F.3d 84, 93–97 (D.C. Cir. 2010) (interpreting *Boumediene* narrowly, limiting its reach to Guantanamo Bay, but recognizing that *Boumediene* was not restricted to the Suspension Clause and instead applied more broadly to constitutional restrictions on government action exercised extraterritorially); *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (interpreting *Boumediene* narrowly, limiting its reach to the Suspension Clause). For an explanation of the sufficient connections test, see *supra* notes 64–65 and accompanying text.

82. 669 F.3d 983 (9th Cir. 2012).

83. *Id.* at 994–97. Ibrahim was legally in the United States completing her Ph.D. at Stanford University. She alleges that she had been mistakenly placed on the government's "No-Fly List." *Id.* at 986. Ibrahim was initially detained at the San Francisco airport but was allowed to fly to Malaysia the next day. *Id.* However, she was prevented from returning to the United States. *Id.*

84. *Id.* at 995–96. The court concluded that, unlike in *Verdugo-Urquidez*, Ibrahim had voluntarily established, and wished to maintain, connection with the United States. *Id.* at 996. Ibrahim's brief departure abroad to attend an academic conference to present her research performed in connection with her studies at Stanford did not sever her established connections with the United States. *Id.* Rather, Ibrahim undertook the trip with the intent to further develop her connections with the United States. *Id.*

85. *Id.* at 996–97.

86. *Id.* at 997 ("Ibrahim shares an important similarity with the plaintiffs in *Boumediene*. The *Boumediene* plaintiffs and Ibrahim both sought (or seek) the right to assert constitutional claims in a civilian court in order to correct what they contend are mistakes.").

87. *Id.*

88. *Id.* ("Under *Boumediene* and *Verdugo-Urquidez*, we hold that Ibrahim has 'significant voluntary connection' with the United States.").

broader principles of *Boumediene*. Similarly, the *Hernandez* decision neglected to do so successfully.

## II. THE *HERNANDEZ* DECISION

### A. *The Appellate Panel Decision*

On June 30, 2014, in *Hernandez v. United States*,<sup>89</sup> a Fifth Circuit panel held for the first time that a foreign national may invoke constitutional protection under the Fifth Amendment for an injury that occurred at the hands of US government agents outside the *de jure* sovereign territory of the United States.<sup>90</sup> On June 7, 2010, Sergio Adrian Hernandez Guereca, a fifteen-year-old Mexican national, was fatally shot in the face by a CBP agent.<sup>91</sup> At the time of his death, Sergio was playing a game with his friends that involved running up the cement culvert separating the United States and Mexico, touching the barbed-wire fence, and retreating down the incline.<sup>92</sup> CBP agent Mesa, standing on US soil, fired at least two shots at Hernandez, striking him once in the face and killing him.<sup>93</sup>

Hernandez's parents brought suit, asserting multiple claims against several parties, including the United States, Agent Mesa, and unknown federal employees.<sup>94</sup> Relevant here, his parents sought to hold Agent Mesa liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>95</sup> for his use of deadly force, a violation of Hernandez's Fourth

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89. 757 F.3d 249 (5th Cir. 2014).

90. *Id.* at 272.

91. *Id.* at 255.

92. *Id.*

93. *Id.* Agent Mesa arrived at the scene as the boys were playing. He detained one of Hernandez's friends, causing Hernandez to retreat and observe from beneath the pillars of a nearby bridge. Further, despite Hernandez's assertion that the assault arose in the United States because Agent Mesa was standing on US soil when he cocked the gun and placed his finger on the trigger, the court held that the location where the claim arises is determined by where the injury is suffered. *Id.* at 258. Since it was "undisputed that Hernandez was standing in Mexico when he was shot," the claim therefore arose abroad. *Id.*

94. *Id.* at 255. Hernandez's parents brought eleven claims, including the *Bivens* claim described in the text. The first seven alleged tortious conduct under the Federal Tort Claims Act ("FTCA"). The next two claims alleged that the United States and the unknown federal employees knowingly adopted inappropriate procedures regarding the use of deadly force and failed to adopt appropriate procedures regarding the use of reasonable force when effecting arrests, thereby violating Hernandez's Fourth and Fifth Amendment rights. Additionally, Hernandez's parents invoked jurisdiction under the Alien Tort Statute ("ATS") and alleged that their son "was shot in contravention of international treaties, conventions and the Laws of Nations." *Id.*

95. 403 U.S. 388 (1971). *Bivens* stands for the proposition that there is an implied cause of action for money damages against federal agents who violate an individual's constitutional rights. *Id.* at 397.

and Fifth Amendment rights.<sup>96</sup> According to *Bivens*, Agent Mesa would not be entitled to qualified immunity if his conduct violated a clearly established constitutional right such that it would have been clear to a reasonable officer that the conduct was unlawful.<sup>97</sup> The pertinent issue before the court, therefore, was whether the facts Hernandez alleged made out a constitutional violation at the time of his injury.<sup>98</sup>

At the onset of its analysis, the court flatly rejected Agent Mesa's argument that "the Constitution does not guarantee rights to foreign nationals injured outside the sovereign territory of the United States" because such "uncomplicated presentation of the Constitution's extraterritorial application . . . no longer represents the Supreme Court's view."<sup>99</sup> The court looked to *Boumediene* where "the Supreme Court provided its clearest articulation of the standards governing the application of constitutional principles abroad."<sup>100</sup> The court took special notice of *Boumediene*'s interpretation of precedent on the Constitution's geographic scope, in particular noting that, under *Boumediene*, weighing practical considerations is essential in determining whether a constitutional right is applicable beyond US borders.<sup>101</sup> The court found it clear that "*de jure*

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A *Bivens* action essentially operates as the federal equivalent of a § 1983 action, holding individual federal agents civilly liable for constitutional violations committed in the course and scope of their official duties. See Julie Hunter, Note, *Breaking Legal Ground: A Bivens Action for Noncitizens for Trans-border Constitutional Torts Against Border Patrol Agents*, 15 SAN DIEGO INT'L L.J. 163, 175 (2013); Steve Helfand, *Desensitization to Border Violence & The Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 108 (2000).

96. *Hernandez*, 757 F.3d at 255.

97. *Id.* at 260.

98. *Id.*

99. *Id.* Agent Mesa's argument was simple. He asserted that since any constitutional injury occurred in Mexico and since the Constitution does not afford rights to foreign nationals injured beyond US sovereign territory, Hernandez could not claim a constitutional violation. *Id.* On the other hand, Plaintiffs advanced several arguments, including one disputing that the facts of this case necessitated an extraterritoriality analysis. Supplemental En Banc Brief for Appellant at 18, *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014), *en banc hearing granted*, 771 F.3d 818 (5th Cir. 2014) (No. 11-50792), 2014 WL 7036175. Plaintiffs claimed the extraterritoriality doctrine was inapplicable since Defendant Mesa's conduct occurred in the United States and "[e]very case considering whether to apply the Constitution 'extraterritoriality' has involved U.S. conduct committed either entirely or in significant part abroad." *Id.* According to this argument, the fact that the injury occurred across the border in Mexican territory was irrelevant since extraterritoriality doctrine acts as a check and balance on cases involving government action beyond US territorial boundaries. Brief for American Civil Liberties Union Foundation et al. as Amici Curiae Supporting Appellants at 4-7, *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014) (No. 11-50792), 2014 WL 7036175 [hereinafter ACLU Amicus Brief].

100. *Hernandez*, 757 F.3d at 260.

101. *Id.* at 260-61; see also *Hernandez*, 785 F.3d 117, 139 (5th Cir. 2015) (en banc) (Prado, J., concurring) (emphasizing the importance of analyzing extraterritorial application of constitutional provisions in the context of *Boumediene*).

sovereignty is not ‘the only relevant consideration in determining the geographic reach of the Constitution.’”<sup>102</sup> Rather, the “inquiry involves the selective application of constitutional limitations abroad,” which requires the balancing of “the potential of such application against countervailing government interests.”<sup>103</sup> Echoing Harlan’s concurrence in *Reid*, the court then concluded that the question is “not whether a constitutional principle can be applied abroad; it is whether it should.”<sup>104</sup>

Tracking *Boumediene*’s analysis, the court dictated that the three objective factors specifically relevant to determining the extraterritorial reach of the constitution are “(1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right.”<sup>105</sup> Though it found *Boumediene* informative, the court additionally insisted that an extraterritorial determination, like any other case of constitutional interpretation, requires “an analysis of the operation, text, and history of the specific constitutional provision involved.”<sup>106</sup> Under this framework, the court analyzed the Fourth and Fifth Amendment violations.

#### 1. *Fourth Amendment Analysis: The Court’s Departure from Boumediene*

Rather than beginning its analysis with *Boumediene* as it set out to do, the court looked to *Verdugo-Urquidez* to determine the extraterritorial reach of the Fourth Amendment.<sup>107</sup> Although the court noted the applicability of the sufficient connections test outlined in *Verdugo-Urquidez*, it also noted that Kennedy’s concurrence suggested that the impracticable and anomalous test is better suited for extraterritorial analysis.<sup>108</sup> Though it acknowledged inconsistencies in Supreme Court precedent and admitted that the “*Boumediene* Court appears to repudiate the formalistic reasoning of *Verdugo-Urquidez*’s sufficient connections test,” the *Hernandez* court nevertheless felt bound to apply the test and

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102. *Hernandez*, 757 F.3d at 262 (quoting *Boumediene v. Bush*, 553 U.S. 723, 764 (2008)).

103. *Id.*

104. *Id.*

105. *Id.* (noting that although “[t]hese factors are not exhaustive, as the relevant considerations may change with the facts of an individual case, . . . they do provide a baseline for addressing questions of extraterritoriality”).

106. *Id.* at 263. The court specifically stated that since not all constitutional provisions will have equal application abroad, special attention should be paid to the geographic references contained within the provision in question. *Id.* at 262.

107. *Id.* at 263.

108. *Id.* at 264–65.

believed it “must do so in light of *Boumediene*’s general functional approach.”<sup>109</sup> The court asserted it was not impossible to follow *Verdugo-Urquidez* while staying within the bounds of *Boumediene*, since the *Verdugo-Urquidez* Court did not exclusively rely on the text of the Fourth Amendment; rather, “[i]t relied on the history of the Amendment, prior precedent, and practical consequences.”<sup>110</sup>

Claiming to analyze extraterritoriality through this hybrid approach, the court simply reiterated *Verdugo-Urquidez* and “conclude[d] that Hernandez lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment.”<sup>111</sup> Although Hernandez’s lack of territorial presence in the United States was not dispositive, that fact coupled with his failure to accept some societal obligations contributed to the court’s finding.<sup>112</sup> To support the idea that an individual’s sustained connection is necessary to invoke constitutional protections, the court cited to *Boumediene*, where it claimed “detainees at Guantanamo Bay have been held for the duration of a conflict that . . . [was] already among the longest wars in American history.”<sup>113</sup> This is inconsistent because the court in *Boumediene* relied on Guantanamo’s connection to the United States, rather than the detainees’ connection.<sup>114</sup> Here, on the other hand, the court did not consider the border region’s connection with the United States, but rather looked at the individual’s connection.

Additionally, the court explained that its reluctance to extend Hernandez Fourth Amendment protections relied on a number of practical considerations,<sup>115</sup> most notably, considerations of national interests at

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109. *Id.* at 265–66. Hernandez’s parents relied on Kennedy’s concurrence to counter the government’s argument that Hernandez did not satisfy the sufficient connections test. They argued that since Kennedy did not place any weight on the text of the Fourth Amendment and its reference to “the people,” only a plurality agreed to the sufficient connections test, and therefore it was not binding. *Id.* at 265. Hernandez’s parents further argued that in *Boumediene*, the sufficient connections test was replaced with the practical and functional test Kennedy articulated in his *Verdugo-Urquidez* concurrence. *Id.*

110. *Id.* at 266 (citations omitted).

111. *Id.*

112. *Id.* The court’s sole consideration for this conclusion was that the facts only alleged that at the time he was injured, “Hernandez played a game that involved touching the border fence and had no interest in entering the United States.” *Id.* (internal quotation marks omitted).

113. *Id.* (quoting *Boumediene*, 553 U.S. at 766) (internal quotation marks omitted).

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

115. For example, since the United States’ Southwestern border area is one of the busiest in the world, the number of CBP agents has nearly doubled in the last decade. As a result, the court feared that extending Fourth Amendment protections to foreign nationals in the border area would open the floodgates of litigation. Additionally, the court noted that the advanced technology recently utilized to monitor the border comes with a “host of implications for the Fourth Amendment,” and further

stake along the border.<sup>116</sup> Recognizing that the border area between the United States and Mexico is among the busiest in the world, the court feared that increased security surveillance measures along the Southwestern border, including an influx of Border Patrol agents and advanced technologies, “might carry with them a host of implications for the Fourth Amendment.”<sup>117</sup> As such, the court believed that “[a]pplication of the Fourth Amendment to [these] circumstances could significantly 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.”<sup>118</sup>

## 2. *Fifth Amendment Analysis: The Court’s Reinstatement of Boumediene*

Despite its flawed Fourth Amendment analysis, the *Hernandez* court correctly utilized *Boumediene* in its analysis of the Fifth Amendment’s extraterritorial reach.<sup>119</sup> Here, the court claimed that *Verdugo-Urquidez*’s sufficient connections test was not binding because, unlike the Fourth Amendment’s use of “the people,” the Fifth Amendment text “does not limit the category of individuals entitled to protection.”<sup>120</sup> Adopting the impracticable and anomalous test in this context, the court declared it will “enforce the applicable constitutional principle, unless textual, precedential, or practical barriers bar judicial redress of constitutional violations.”<sup>121</sup> Therefore, relying solely on *Boumediene*’s objective factors and practical concerns, the court ultimately concluded that “a noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States may invoke the protections provided by the Fifth Amendment.”<sup>122</sup>

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complicating the matter by extending Fourth Amendment rights abroad would interfere with the political branch’s ability to respond to foreign situations. *Hernandez*, 757 F.3d at 266–67.

116. *See id.*

117. *Id.*

118. *Hernandez*, 757 F.3d at 267 (quoting *Verdugo-Urquidez*, 494 U.S. at 273–74) (internal quotation marks omitted) (alterations in original).

119. Though claims of excessive force *must* be analyzed under the Fourth Amendment when it applies, the court asserts that in cases, such as here, where the amendment is inapplicable, excessive force claims can be brought under the Fifth Amendment and analyzed as violations of due process. *Id.* at 267–68.

120. *Id.* at 268.

121. *Id.* at 271.

122. *Id.* at 272.

The court considered Hernandez's citizenship and status and decided that although his citizenship as a Mexican national weighs against extraterritorial application, his status as a "civilian killed outside an occupied zone or theater of war" does not.<sup>123</sup> Second, the court examined the nature of the site where the violation occurred. It recognized that *Boumediene* emphasizes the level of control the United States exerts over a site and concluded that the United States exercises significant control in the border area.<sup>124</sup> Furthermore, the court considered the long history of US political involvement in the border area with policies that often extend beyond the nation's territorial borders.<sup>125</sup> Thus, the court flatly rejected the government's argument that control over the border area is similar to *Eisentrager*, where control was transient. Instead, it likened US exercise of non-temporary control at and across the border area to US control in Guantanamo Bay, concluding that CBP agents "are influential repeat players in a 'constant' border relationship."<sup>126</sup> Though the court refused to recognize that the United States has *de facto* sovereignty or formal control over the Mexican side of the border, it found that "the heavy presence and regular activity of federal agents across a permanent border . . . weigh in favor of recognizing some constitutional reach."<sup>127</sup>

Lastly, when addressing practical concerns, the court noted that those concerns presented by the Fourth Amendment, such as national interest in self-protection, constant surveillance with advanced technologies, and concerns over enforcing varying degrees of reasonableness based on an agent's location, "do not carry the same weight" in the context of the Fifth Amendment because different, more egregious standards govern the Fifth Amendment.<sup>128</sup> Interestingly, the court determined that the relevant location for a Fifth Amendment analysis is where the alleged perpetrator committed the unconstitutional act, rather than the site where the injury occurred, as it did in its preceding Fourth Amendment analysis.<sup>129</sup> Through

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123. *Id.* at 268–69.

124. *Id.* at 269. The court took into account the fact that Agent Mesa was standing inside the United States, clearly under US control, when he killed Hernandez. When committing such acts, "Border Patrol agents exercise hard power across the border at least as far as their U.S.-based use of force injures individuals." *Id.*

125. *Id.* at 270.

126. *Id.*; see also Bitran, *supra* note 40, at 245–46 (demonstrating, through the collection of historical data, that there has been a consistent US presence along the northern Mexico border region since the mid-nineteenth century).

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

128. *Id.* at 270–71 ("The Fourth Amendment protects against unreasonable searches and seizures, while, in this context, the Fifth Amendment protects against arbitrary conduct that shocks the conscience.")

129. *Id.* at 271.

this lens, the court concluded that “a strict, territorial approach would allow agents to move in and out of constitutional strictures, creating zones of lawlessness,” ultimately establishing “a perverse rule that would treat differently two individuals subject to the same conduct merely because one managed to cross into our territory.”<sup>130</sup>

### B. *The En Banc Decision*

After reviewing the case en banc, a unanimous court concluded that Hernandez’s claims failed to constitute a Fourth Amendment violation.<sup>131</sup> Though ultimately reaching the same conclusion, rather than affirming the three-judge panel’s opinion recognizing *Boumediene*’s applicability, the en banc court quickly disposed of the issue by exclusively invoking the *Verdugo-Urquidez* test. Thus, it held that Hernandez, as 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.”<sup>132</sup>

In the remaining portion of its short opinion, the en banc court addressed Hernandez’s Fifth Amendment claim, holding that Agent Mesa is entitled to qualified immunity because the law regarding Hernandez’s Fifth Amendment rights was not clearly established at the time of the incident.<sup>133</sup> To support its position, the court drew upon *Boumediene* and concluded that the decision, as the Agent’s only potential guidance on the matter, may be limited in scope and applicable only to foreign detainees’ rights under the Suspension Clause.<sup>134</sup> As a result, “nothing in that opinion presages, with the directness that the ‘clearly established’ standard

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130. *Id.* The court reasoned that holding CBP agents accountable for arbitrary conscious-shocking acts against foreign nationals outside the border is not imposing a new standard. Rather, it is simply extending the preexisting standard to a new, but similar, group of individuals. *Id.*

131. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc).

132. *Id.* (citation omitted). In a concurring opinion, Judge Dennis reverts instead to the panel’s reasoning for denying Hernandez Fourth Amendment protection. Noting that the “*Verdugo-Urquidez* view cannot be squared with the Court’s later holding in *Boumediene v. Bush*,” he declined to apply the Fourth Amendment in this case “out of concern for pragmatic and political questions rather than on a formal classification of the litigants involved.” *Id.* at 133 (Dennis, J., concurring).

133. *Id.* at 120–21 (majority opinion). Under the Fifth Amendment, Border Patrol agents, as government actors, are entitled to qualified immunity unless the court decides a two-prong test is satisfied. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Under this test, (i) the facts alleged must constitute a “violation of a constitutional right” and (ii) “the right at issue [must have been] ‘clearly established’ at the time of [the] alleged misconduct.” *Id.* Here, the court only holds that whether or not a Fifth Amendment right existed, the law was unclear at the time of the incident, thus absolving Agent Mesa of accountability under the qualified immunity defense. *Hernandez*, 785 F.3d at 121.

134. *Hernandez*, 785 F.3d at 120–21.

requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment.”<sup>135</sup>

In deciding the case on these grounds, the court deliberately failed to decide whether Hernandez had a Fifth Amendment right at the time he was killed.<sup>136</sup> In fact, the court specifically noted that it remains divided on the issue of *Boumediene*'s applicability beyond the Suspension Clause.<sup>137</sup> This issue, which ultimately turns on the recognition that Hernandez, or an individual in his position, has Fifth Amendment rights, and whether Agent Mesa's conduct violated that right, was left unresolved.<sup>138</sup>

### III. A CLOSER LOOK: THE IMPLICATIONS OF *HERNANDEZ*

The *Hernandez* en banc decision muddied the water regarding the applicability of the Constitution at the Southwestern border. Specifically, it failed to appreciate the importance of *Boumediene* in the development of the doctrine of extraterritoriality—particularly regarding the Fourth and Fifth Amendment rights of foreign nationals. Following that opinion, it is appropriate to set a clear framework within which to analyze incidents of violence in that region.

The *Hernandez* panel properly looked to *Boumediene* for extraterritoriality guidance and followed it throughout the Fifth Amendment claim analysis, but the en banc court failed to decide the issue. As such, when analyzing Fifth Amendment claims of foreign nationals injured abroad at the hands of US government agents, the en banc opinion should be rejected in favor of the *Hernandez* panel opinion. However, analyzing Fourth Amendment claims in this context requires

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135. *Id.* at 121.

136. *Id.*

137. *Id.* On one side of the spectrum, though conceding that the Court in *Boumediene* consulted precedent concerned with the territorial reach of the Constitution, Judge Jones maintains that the Court ultimately expressly limited *Boumediene*'s holding to the Suspension Clause. *Id.* at 127 (Jones, J., concurring). On the other hand, Judge Prado, who authored the three-judge panel's opinion, maintains that, although tasked with deciding whether alien enemy combatants detained in Guantanamo Bay enjoyed the constitutional privilege of the Suspension Clause, “[i]n *Boumediene*, the Court provided its clearest and most definitive articulation of the principles governing the application of constitutional provisions abroad.” *Id.* at 136 (Prado, J., concurring).

138. Concurring justices harshly criticized this tactic, recognizing the issue of excessive force at the Southwestern border as far from unique to this case and urging resolution of the issue. *See, e.g., id.* at 121 (Jones, J., concurring) (describing the court's decision as taking the “path of least resistance” which “delays the day of reckoning until another appellate panel revisits non-citizen tort claims for excessive force resting on extraterritorial application of the United States Constitution”). *But see id.* at 134 (Prado, J., concurring) (noting that though “similar lawsuits have begun percolating in the federal courts along the border,” it is ultimately, and necessarily, up to the Supreme Court to decide whether *Boumediene* is applicable at the Southwestern border).

further clarification. In analyzing the Fourth Amendment claim, both the en banc court and the panel's opinion failed to follow *Boumediene*, instead strictly applying *Verdugo-Urquidez*—inadvertently in the case of the latter and deliberately in the former. Such selective analysis ultimately leads not only to inconsistencies, but to injustices as well. The remainder of this Part summarizes the main downfalls of the *Hernandez* decision and then proposes an alternative, more holistic framework to govern Fourth Amendment claims that arise extraterritorially.

First, the sufficient connections test proposed by *Verdugo-Urquidez*, which the *Hernandez* court relied exclusively upon, is not good law as *Boumediene* essentially overruled it. Even if *Boumediene* did not overrule the sufficient connections test, *Verdugo-Urquidez* is not binding since it is a plurality decision. Second, *Verdugo-Urquidez* is limited in applicability to cases involving the extension of the Warrant Clause of the Fourth Amendment and is irrelevant in cases of excessive force.

Lastly, should *Verdugo-Urquidez* apply to extraterritorial analysis beyond the Warrant Clause, its relevance in light of *Boumediene* mandates adopting a new approach to extraterritorial analysis, which synthesizes the two opinions. Indeed, *Boumediene* added an important nuance to the extraterritoriality doctrine when it adopted the functional approach: the examination of the nature of the site where the constitutional violation took place, with the emphasis on US control of the territory in question. The *Hernandez* court failed to recognize this nuance when it attempted to apply *Verdugo-Urquidez*'s sufficient connections test in light of *Boumediene*.

In response, this Note proposes a three-step balancing test that integrates *Verdugo-Urquidez* to clarify and streamline extraterritorial analysis after *Boumediene*. First, a court should examine the nature of the site where the constitutional violation took place. Second, the citizenship and status of the appellant should be considered. The sufficient connections test of *Verdugo-Urquidez* should be applied under this step. Third, the court should evaluate the practical obstacles inherent in extending the constitutional provision to the territory in question.

#### A. *Verdugo-Urquidez Is Not Good Law*

The sufficient connections test, articulated by Justice Rehnquist in *Verdugo-Urquidez*, was essentially overruled in *Boumediene*. Justice Kennedy, delivering the opinion of the court in *Boumediene*, explicitly

adopted a functionalist approach to extraterritorial analysis.<sup>139</sup> This approach flatly rejects *Verdugo-Urquidez*'s formalistic and citizenship-dependent test.<sup>140</sup> *Boumediene* instead held that, though relevant, citizenship is not dispositive in determining whether a constitutional provision applies beyond US borders.<sup>141</sup> Instead, it is among several factors that a court should consider in extraterritorial analysis.<sup>142</sup> Thus, this simplistic interpretation of *Verdugo-Urquidez* is inapplicable after *Boumediene*.<sup>143</sup> Furthermore, it is debatable whether *Verdugo-Urquidez*'s intention was to impose a categorical rule barring non-citizens without sufficient connections to the United States.<sup>144</sup> Though refraining from

139. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

140. Interestingly, *Boumediene* rarely mentions *Verdugo-Urquidez*, and it only does so to reject the formalistic approach to extraterritorial analysis. See *id.* at 761 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring)) (holding that extraterritoriality relies “not on the basis of the citizenship of the petitioners, but on practical considerations”).

141. *Id.* at 761–62 (“If citizenship had been the only relevant factor [in extraterritorial analysis], it would have been necessary for the Court to overturn *Ross* . . .”).

142. *Id.* at 766 (identifying “at least three” factors relevant in extraterritorial analysis).

143. Though no opinion expressly addresses the issue, most scholars agree that *Verdugo-Urquidez*'s sufficient connections test is inapplicable after *Boumediene*. See, e.g., Burnett, *supra* note 40, at 1018–19 (“[T]he impracticable and anomalous test made its way from Harlan’s opinion in *Reid*, to the territorial cases, to Kennedy’s opinion in *Verdugo* . . . . Indeed the test has now crossed yet another permeable boundary, finding its way into *Boumediene*, where it was endorsed, and a version of it applied with respect to Guantanamo . . . .”); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2261 n.173 (2010) (“It appears that, given his pendular position, Justice Kennedy was able to convert the functional approach he began to articulate in concurrence in *Verdugo-Urquidez* into the majority position on constitutional extraterritoriality.”); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 272, 285 (2009) (“*Boumediene* provides a long overdue repudiation of Rehnquist’s opinion in *Verdugo-Urquidez* . . . [and] makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration.”); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1614 (2010) (“*Boumediene* rejects the bright-line distinction between citizens and aliens set forth in Justice Rehnquist’s opinion in *Verdugo-Urquidez*.”). But see Jeffrey Kahn, *Zoya’s Standing Problem, Or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 678 n.16 (2010) (“I disagree with Professor Neuman that Justice Kennedy’s functionalism will replace the substantial-connections test because I do not share his view that *Boumediene* has provided an unambiguous rejection of the substantial-connections test in all of its dangerous permutations.”). Though it is generally accepted in academia that the sufficient connections test is no longer operative, it is possible for the government in *Hernandez* to argue that *Verdugo-Urquidez* nevertheless held that it would be impracticable and anomalous to extend Fourth Amendment protections to noncitizens injured abroad who lack sufficient connections to the United States. Bitran, *supra* note 40, at 239 n.84.

144. In an Amicus Brief filed for the *Hernandez* decision, the ACLU argued that even the four justices who joined in *Verdugo-Urquidez*'s plurality opinion “did not view the noncitizen’s lack of substantial connections as dispositive, and instead stressed the anomaly of applying the Fourth Amendment’s warrant clause to searches in foreign countries.” ACLU Amicus Brief, *supra* note 99, at 15–16. Instead, the ACLU suggests that *Verdugo-Urquidez* should be read broadly to emphasize the context-specific nature of extraterritorial analysis. *Id.* at 16. It further posits that a narrow reading of *Verdugo-Urquidez*, that limits extraterritorial analysis to the petitioner’s citizenship and ties to the

using the exact phrasing, *Verdugo-Urquidez*'s plurality stressed the anomaly and impracticability of applying the Warrant Clause of the Fourth Amendment in Mexico.<sup>145</sup>

Even if *Boumediene* did not implicitly overrule the sufficient connections test of *Verdugo-Urquidez*, the language was never binding. Only three other justices joined Rehnquist's *Verdugo-Urquidez* opinion in both reasoning and judgment,<sup>146</sup> thereby forming a plurality whose opinion is simply dicta. Justice Kennedy and Justice Stevens concurred in judgment, but their reasoning departed from Rehnquist.<sup>147</sup> In particular, Justice Kennedy wrote a concurring opinion primarily to express his rejection of the plurality's sufficient connections test.<sup>148</sup> Instead, Kennedy applies the impracticable and anomalous test codified in *Boumediene* to conclude that the Fourth Amendment's Warrant Clause does not apply in Mexico.<sup>149</sup> The remaining three justices dissented, explicitly rejecting the plurality's emphasis on citizenship and connections to the United States.<sup>150</sup> Given these circumstances, it is hardly surprising that the Supreme Court

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United States, runs against well-established personal jurisdiction case law recognizing that "foreign individuals or business entities without a presence in the United States and with few or no connections to the country are nonetheless entitled to due process rights when they are sued in U.S. courts." *Id.* at 16–17.

145. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–75 (1990).

146. Justices White, O'Connor, and Scalia joined Chief Justice Rehnquist's opinion in full, and though Justice Kennedy agreed with Rehnquist's ultimate conclusion, he filed a concurring opinion offering alternative reasoning.

147. Justice Stevens did not comment on whether the sufficient connections test was the correct approach but disagreed with the plurality's conclusion that *Verdugo-Urquidez* was not "among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment." *Id.* at 279 (Stevens, J., concurring). Rather, he invoked an impracticable and anomalous analysis when concurring in judgment. *Id.* ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.").

148. *Id.* at 276 (Kennedy, J., concurring) ("I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections. . . . The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'").

149. *Id.* at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

150. In his dissent, joined by Justice Marshall, Justice Brennan rejects the plurality's interpretation of "the people" as a drafting technique used to restrict rights rather than grant them. He concluded that the plurality unjustifiably applied the sufficient connections test to decide that the Fourth Amendment is inapplicable abroad. *Id.* at 287–90 (Brennan, J., dissenting). Though Justice Blackmun does not address the sufficient connections test explicitly, he nevertheless invokes a version of the impracticable and anomalous test in concluding that "an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country." *Id.* at 297.

has not applied *Verdugo-Urquidez*'s sufficient connections test since,<sup>151</sup> and many lower courts have refused to recognize the sufficient connections test as binding.<sup>152</sup>

### B. *Verdugo-Urquidez Is Inapplicable in Cases of Excessive Force*

*Verdugo-Urquidez* is a narrow opinion that only bars Fourth Amendment protections to “the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.”<sup>153</sup> Thus, it is inapplicable to claims of excessive force analyzed under the Fourth Amendment.<sup>154</sup> Though the plurality relied heavily on the

151. In *District of Columbia v. Heller*, in the context of a Second Amendment analysis, the Supreme Court reaffirmed *Verdugo-Urquidez*'s definition of “the people” as “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). However, this case did not have an extraterritorial aspect, but rather concerned a statute restricting the possession of useable handguns for US citizens in their homes in the United States. *Id.* at 574.

152. See, e.g., *United States v. Boynes*, 149 F.3d 208, 211 n.3 (3d Cir. 1998) (“[T]wo of the six justices in the *Verdugo-Urquidez* majority coalition did not join the other four justices’ reasoning completely . . . . As a result, the Supreme Court’s *Verdugo-Urquidez* decision cannot be interpreted to suspend the warrant requirement . . . .”); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (emphasis added) (“To a plurality of the Court, the use of the phrase ‘the people’ suggested that the Framers of the Constitution intended the amendment to apply only to those persons who were part of or substantially connected to the national community.”); *Ramos v. United States*, Nos. EP-10-CV-108 & EP-05-CR-856-KC-1, 2012 WL 10921, at \*21 (W.D. Tex. Jan. 3, 2012) (“A majority of the justices voiced disagreement with the analysis of ‘the people’ advanced by Chief Justice Rehnquist. Justice Kennedy, in his separate concurrence, expressly rejected the idea that the opinion provides any authority for restricting the category of persons protected by the Fourth Amendment.”); *United States v. Guitterez*, 983 F. Supp. 905, 915 (N.D. Cal. 1998) (“The fact that a majority of the justices disagreed with the analysis advanced by Chief Justice Rehnquist is significant, as the Ninth Circuit does not construe Supreme Court plurality decisions as *binding* precedent.”); *United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev’d in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993) (“The broad language of the Chief Justice was not required for the holding and was not joined by the majority of the justices.”). *But see Hernandez v. United States*, 785 F.3d 117, 124–25 (5th Cir. 2015) (en banc) (Jones, J., concurring) (arguing that the substance of Justice Kennedy’s concurring opinion in *Verdugo-Urquidez* reinforces rather than undermines the plurality’s opinion and thus cannot be said to fundamentally depart from the plurality’s opinion); *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 996 (9th Cir. 2012) (recognizing and applying *Verdugo-Urquidez* as binding).

153. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

154. In *Graham v. Connor*, the Supreme Court held that claims of excessive deadly force in the course of a seizure are properly analyzed under the reasonableness standard of the Fourth Amendment, which guarantees the rights of individuals to be secure in their person against unreasonable seizures of the person. *Graham v. Connor*, 490 U.S. 386, 395 (1989); see also *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985) (analyzing excessive force claim under the Fourth Amendment when police officers used deadly force to apprehend an unarmed suspect). One interpretation of *Graham*, promoted by Judge Jones in her concurring opinion to the *Hernandez* en banc decision, mandates that all claims of excessive force by law enforcement be analyzed only under the Fourth, and not the Fifth, Amendment. *Hernandez*, 785 F.3d at 123 (Jones, J., concurring). Other interpretations suggest that a Fourth Amendment analysis is warranted only when the Fourth Amendment covers a claim. *Id.* at 134 (Prado,

petitioner's ties to the United States, it specifically considered whether extending Fourth Amendment rights to foreign nationals injured abroad "would have significant and deleterious consequences for the United States."<sup>155</sup> The Court was careful to specify that "[u]nder these circumstances, the Fourth Amendment has no application."<sup>156</sup>

The practical concerns articulated by the plurality in *Verdugo-Urquidez* are specific to the warrant requirement and are inapplicable to excessive deadly force claims against US government agents. For example, the plurality expressed concern that requiring US government agents to answer to the Fourth Amendment's reasonableness requirement when conducting business abroad would "plunge them into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad."<sup>157</sup> The Court consequently concluded that the Fourth Amendment was inapplicable because a warrant approved by US magistrates would be a "dead letter" beyond US borders.<sup>158</sup> Justice Kennedy raised the same concern in his concurrence.<sup>159</sup> In excessive force, and particularly deadly force, claims, there is no worry as to what is reasonable because it is understood everywhere—whether the victim is within US territory or two feet from the border—that use of such force is unreasonable.<sup>160</sup> As a result, there is no concern for potential conflict of laws or conflicts with foreign sovereigns.<sup>161</sup>

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J., concurring). Thus, with questions of extraterritoriality, when the facts of the case do not lend themselves to Fourth Amendment analysis under *Verdugo-Urquidez*, it is appropriate to analyze excessive force claims under the Fifth Amendment. *Id.*

155. *Verdugo-Urquidez*, 494 U.S. at 273.

156. *Id.* at 275.

157. *Id.* at 274.

158. *Id.*

159. *Id.* at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

160. See ACLU Amicus Brief, *supra* note 99, at 24 (arguing that the physical location of a victim does not affect the substantive standards in adjudicating an excessive force claim under *Graham*); see also *Lopez v. United States*, 17 F.3d 395, 395 (9th Cir. 1994) (applying the *Garner* standard of deadly force to a Mexican citizen shot in Mexico by a CBP officer); *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1041 (D. Ariz. 2015) (holding that a trained Border Patrol agent was not entitled to qualified immunity in an extraterritorial excessive force claim simply because of "an after-the-fact discovery that the individual he shot was not a United States citizen").

161. The ACLU has argued that not extending Fourth Amendment protections in excessive force claims would actually engender conflict with foreign sovereigns. ACLU Amicus Brief, *supra* note 99, at 25. They further argue that injuries, including deaths, of Mexican nationals in the United States-Mexico border region at the hands of US government agents have already created conflict between the US and Mexican governments. *Id.* The ACLU reasons that conflict would be reduced if victims were allowed to "seek redress in U.S. courts for harmed suffered at the hands of border authorities." *Id.* Furthermore, the Mexican government has specifically expressed desire for US courts to hold

### C. Applying Verdugo-Urquidez in Light of Boumediene

Although it has been argued that *Verdugo-Urquidez* is inapplicable after *Boumediene* and may not have been binding law to begin with, the Supreme Court has not explicitly overruled *Verdugo-Urquidez*. As such, it is useful to propose a framework providing for the possibility of interpreting the two opinions as complementary decisions that can operate in concert. In fact, some courts<sup>162</sup> and many scholars argue that the two opinions should be read and applied together in a manner that refines the formalistic approach adopted by Justice Rehnquist's opinion in *Verdugo-Urquidez*.<sup>163</sup> However, the *Hernandez* court misinterpreted the role that each opinion plays in the doctrine of extraterritoriality, and thus its attempt to apply both opinions simultaneously was ineffective.<sup>164</sup> Yet, if utilized correctly, the *Verdugo-Urquidez* decision could be reconciled with *Boumediene* in a manner that clarifies the application of the extraterritoriality doctrine abroad, particularly in the border region.

Though *Boumediene* articulates three factors that are relevant in extraterritorial analysis, it is clear that the Court pays particular attention to the second factor, which requires an examination of the nature of the site where the injury occurred.<sup>165</sup> Under this factor, the Court looks at the nature of the control the United States exerts over the territory in question. This suggests that a constitutional provision is applicable if US presence in the territory is constant and influential enough to imply that the United

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government actors accountable for their actions in Mexican territory. See Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 2-3, *Hernandez v. United States*, No. 12-50217 (5th Cir. July 2, 2012), 2012 WL 30666823.

162. See, e.g., *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1035-38 (D. Ariz. 2015) (applying both *Verdugo-Urquidez* and *Boumediene* and extending Fourth Amendment protection to a victim of a cross-border shooting with facts almost indistinguishable from *Hernandez*).

163. See, e.g., Neuman, *supra* note 143, at 261 ("The [Boumediene] Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights . . ."); D. Carolina Nuñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 134 (2011) ("Together, *Verdugo* and *Boumediene* suggest that strict territoriality no longer exclusively describes the Supreme Court's distribution of important constitutional rights.").

164. The *Ibrahim* court, among others, has likewise misinterpreted the role of the *Verdugo-Urquidez* and *Boumediene* opinions. See *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012).

165. Though the Court goes into roughly equal depths when discussing each factor before holding that the Constitution has full effect in Guantanamo Bay, it specifically notes that this case involves a territory with which the United States has an ongoing conflict that, "if measured from September 11, 2001, to the present, is already among the longest wars in American history." *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). In effect, the Court here emphasizes that the United States' ongoing involvement with the territory is a primary reason for concluding a constitutional provision applies there.

States has control within it.<sup>166</sup> In *Boumediene*, the Court emphasized that US presence in Guantanamo Bay was “not transient” and held that Guantanamo, “while technically not part of the United States, is under the complete and total control of [the US] Government.”<sup>167</sup> The nature of US control over Guantanamo was thus a key piece of the Court’s extraterritorial analysis. Essentially, *Boumediene* stands for the proposition that individuals within a particular territory subject to clear and heavy US control are part of “the people” the Constitution is meant to protect.<sup>168</sup> As a result, when determining whether a particular constitutional provision applies extraterritorially, a court should begin its analysis by examining the nature of the control of the United States over the foreign territory in question.<sup>169</sup>

Once a court evaluates the nature of US control over a territory, it should proceed to examine the remaining factors laid out in *Boumediene*: the citizenship and status of the petitioner, and the practical obstacles inherent in extending a particular constitutional provision abroad.<sup>170</sup> When

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166. *Id.* at 768–69 (emphasizing the non-transient nature of the US presence in Guantanamo Bay in holding that the territory, “[i]n every practical sense . . . is not abroad . . . [but] within the constant jurisdiction of the United States”); see also Bitran, *supra* note 40, at 247; Chemerinsky Amicus Brief, *supra* note 17, at 14 (“U.S. agents continuously monitor and routinely project force just over the border where Hernandez was killed in order to secure the area.”).

167. *Boumediene*, 553 U.S. at 768, 771. However, the *Boumediene* court was careful not to make *de facto* control over a territory dispositive when declaring that the Suspension Clause applied in Guantanamo Bay. Bitran, *supra* note 40, at 247. This leaves the door open to the argument that a threshold lower than *de facto* sovereignty should also weigh in favor of extending a constitutional protection in the border region or other such “space where two countries’ fates are so inextricably intertwined, and where cross-border cooperation is so crucial.” *Id.* It is possible to argue that, though undeniable, the presence of the US government in the border area between the United States and Mexico is different from the US presence in Guantanamo because the United States does not intend to govern Mexico permanently. *Id.* at 248. However, the extensive history of US involvement in the border area and the recent increased involvement in the region weigh in favor of recognizing practical permanence of US control there. *Id.*; see also *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (recognizing US “*de facto* control and influence over Nogales, Sonora, Mexico”); Chemerinsky Amicus Brief, *supra* note 17, at 14 (“The ‘objective degree of control’ matters more than *de jure* sovereignty when deciding extraterritoriality, and the United States exerts substantial *de facto* control in the place where Hernández was fatally shot.”).

168. Though *Boumediene* does not clearly define the category of individuals outside US territory who are entitled to constitutional protections, the decision has been interpreted to suggest that US control over the individual within a foreign territory supersedes US *de facto* sovereignty over the territory. See, e.g., Bitran, *supra* note 40, at 243; Neuman, *supra* note 143, at 272. Importantly, *Boumediene* only specifically considered individuals within the physical custody of the United States to be within its “control.” Thus, it does not explicitly decide whether individuals not in custody, but injured in the physical territory of a region subject to US government activity, are considered, for the purposes of extraterritorial analysis, under US control. Bitran, *supra* note 40, at 252.

169. See Bitran, *supra* note 40, at 253 (noting that control is a “better metric for assessing entitlement to constitutional protection than territoriality or custody”).

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

weighing the citizenship and status of the petitioner, a court may apply the sufficient connections test to determine whether or not the petitioner's ties to the United States are strong enough to weigh in favor of extending the constitutional provision in question abroad.<sup>171</sup> Since the impracticable and anomalous test "decreases the importance of alien status when deciding extraterritorial constitutional issues," if US control in the territory in question is very strong, the citizenship and status of the petitioner should carry less weight in the analysis.<sup>172</sup> Conversely, if US control in the region is weak, citizenship and status should weigh more heavily. In these instances, *Verdugo-Urquidez*'s sufficient connections test properly fits within the second step of an extraterritorial analysis. Lastly, a court should evaluate any practical obstacles inherent in extending the constitutional provision to the territory in question, including potential conflicts with local laws and customs.

The *Hernandez* court failed to follow this suggested approach to extraterritorial analysis. Instead, although recognizing that it was "bound to apply the sufficient connections requirement of *Verdugo-Urquidez* . . . in light of *Boumediene*'s general functional approach," the *Hernandez* court began its analysis by applying *Verdugo-Urquidez*'s sufficient connections test rather than first examining *Boumediene*'s factors, beginning with the nature of the site where the constitutional violation took place.<sup>173</sup> In fact, the *Hernandez* court ignored this factor completely and only emphasized two of *Boumediene*'s factors: the citizenship and status of the petitioner<sup>174</sup> and the practical obstacles inherent in extending

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171. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015) (ultimately concluding that the plaintiff's ties and voluntary connections to the United States weighed in favor of extending him Fourth Amendment rights).

172. Ernesto Hernández-López, Kiyemba, *Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193, 207 (2012). If US control over a territory is persistent and robust, there should also theoretically be less practical obstacles weighing against extending the constitutional provision in question.

173. *Hernandez v. United States*, 757 F.3d 249, 266 (5th Cir. 2014). At the onset of its analysis, the court applied *Verdugo-Urquidez* and concluded that "Hernandez lacked sufficient voluntary connections with the United States to invoke the Fourth Amendment." *Id.*

174. The court did not even engage in a discussion relating to Hernandez's status as *Boumediene* mandates. In *Boumediene*, the petitioners were allegedly enemy combatants, yet the Court held that their status as enemy combatants was improperly determined, and thus this factor did not weigh against the extension of the writ of habeas corpus. *Boumediene*, 553 U.S. at 767. Here, there is no question that Hernandez's status is that of a civilian, not an enemy combatant. The court overlooks this fact and instead heavily emphasizes Hernandez's citizenship and his insufficient ties to the United States. *Hernandez*, 757 F.3d at 266–67. If the status of alleged alien enemy combatants in *Boumediene* did not weigh against extending a fundamental right of habeas corpus, surely a status of a friendly alien civilian should not weigh against extending the fundamental protections of the Fourth Amendment just beyond the border.

a particular constitutional provision abroad.<sup>175</sup> This led the court's analysis down a narrow path, primarily basing its decision on Hernandez's citizenship and applying the very formalistic approach the *Boumediene* court sought to prevent.<sup>176</sup> If the court had first proceeded to examine the nature of the site where the injury occurred—the Southwestern border area—rather than the location where the act that resulted in the injury was perpetrated, its analysis would have been more thorough, setting precedent for extraterritorial analysis while ultimately yielding a more equitable result.

### CONCLUSION

By codifying the functionalist approach to extraterritorial analysis, the *Boumediene* decision set a groundbreaking precedent for constitutional rights of foreign nationals brutally injured abroad at the hands of government agents, particularly at the Southwestern border. Unfortunately, the *Hernandez* court incorrectly applied, and arguably failed to apply altogether, the practical and anomalous test approved by the Supreme Court in *Boumediene*. By relying exclusively on *Verdugo-Urquidez*'s citizenship-based sufficient connections test, the court has not only effectively ignored Supreme Court precedent, leading to inconsistencies in the lower courts, but more importantly unfoundedly restricted, rather than expanded, the rights of foreign plaintiffs such as Jose Rodriguez to relief under the Constitution. Such application of extraterritorial principles perpetuates a system of lawless law enforcement at the border at the expense of innocent human lives. This Note urges the Supreme Court to grant certiorari in order to adopt a more promising method for engaging in extraterritorial analysis that reconciles the *Verdugo-Urquidez* decision with *Boumediene*. Doing so is a critical step towards achieving lasting peace at the border.

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175. *Hernandez*, 757 F.3d at 266–67.

176. *Boumediene*, 553 U.S. at 765.

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