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EXTRATERRITORIAL CONSTITUTIONALISM: A RULE PROPOSED

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ABSTRACT

Does the Fourth Amendment apply in cases of cross-border shootings of foreign nationals, when those shots were fired by United States Border Patrol agents from American soil, striking a victim in Mexico?

In oral argument, Petitioner failed to heed the trail of breadcrumbs strewn at his feet by inquisitive Supreme Court Justices. A workable, yet narrow rule that would plug the critically important gap in application of the United States Constitution to remedy such cross-border atrocities, was not articulated. I propose one here.

The world's busiest border is that which is shared between the United States and Mexico. Our countries are intertwined economically and historically and have a shared cultural identity. Justice demands an answer in the affirmative; that the Constitution applies cross-border not only to remedy this young man's death, but also to address inevitable future events.

INTRODUCTION

When United States Border Patrol agent Jesus Mesa murdered fifteen-year-old Mexican-national Sergio Hernandez, a constitutional conundrum erupted that would reach the Supreme Court. Agent Mesa shot the teen cross-border, invoking issues of unlawful seizures, officer immunity, and sovereignty. These shootings have long plagued the U.S.-Mexico border, as has the utter lack of accountability for the agents involved. These shootings cannot be justified. Yet, forty-two times in twenty-years, U.S. agents have shot Mexican nationals in cross-border incidents. No disciplinary, let alone criminal, measures have been taken. The

glaring lack of accountability re-raises a question often punted by the U.S. Supreme Court: Do the rights and privileges guaranteed by the United States Constitution extend beyond our borders and if so, in what capacity?

Century-old case law has never squarely addressed the question of whether the Constitution applies beyond our borders. However, in cases where extra-territorial constitutionalism is part of the legal equation, the High Court has repeatedly answered in the affirmative. Additionally, "there has been an ongoing debate in the courts and across the country for more than a century over which, if any, individual constitutional rights can be applied to restrain governmental actions against non-citizens outside the United States."[1]

The first piece of this puzzle is solved by deciding where, and when, the Constitution "stops." In the century-old "Insular *Cases*," the Court first sought to address the extraterritoriality of constitutional rights.[2] Insular's progeny, *Reid v. Covert* and *Johnson v. Eisentrager* spawned the "impracticable and anomalous" test which was relied upon, albeit to different ends in more modern-era; cases such as *United States v. Verdugo-Urquidez* and *Boumediene v. Bush*.[3] *Verdugo* and *Boumediene* pit the "functional" and "practical" approach doctrines against one another and also to the test, with the *Boumediene* Court seemingly expanding, once and for all, the notion that the Constitution does, in fact, extend extraterritorially. The remaining question to answer then, is "in what capacity" does it apply?[4]

In oral argument for *Hernandez*, the Court prodded Petitioner's counsel, unsuccessfully, for an articulation of a workable rule.[5] As satisfactory answers were lacking in argument, it is best to proceed by applying stare decisis and the cumulative

1. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1631 (2013).

2. *See* Boumediene v. Bush, 553 U.S. 723, 756-57 (2008) (citing Balzac v. Porto Rico, 258 U.S. 298 (1922)); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901) as cases in the long list of decisions handed down between 1901 and 1922 as part of The Insular Cases).

3. Reid v. Covert, 350 U.S. 985 (1956); Johnson v. Eisentrager, 339 U.S. 763 (1950); Boumediene v. Bush, 551 U.S. 1160 (2007); United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056 (1990).

4. *Boumediene*, 553 U.S. at 758 (quoting *Balzac*, 258 U.S. at 312, with approval, that "the real issue in the *Insular* Cases was not whether the Constitution extended to the Philippines or Puerto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.").

5. *Hernandez v. Mesa*, OYEZ, www.oyez.org/cases/2016/15-118 (last visited May 18, 2017).

doctrine discussed herein. Additionally, it is important to introduce fresh theories of application of these factors.

Section I, introduces the proposed "Rule" and discusses both the history and application of the "functional" and "practical" approaches utilized by the Court to test the "if" of extraterritorial constitutionality. In this part, theories of limited or partial United States control or influence at and across the riverine (dry culvert) Mexican border are advanced by examining maritime law doctrine and the border creation itself under the Treaty of Guadalupe Hidalgo.

Section II surveys and defines specific proximity contexts where the previous Section's Rule might arise, and narrows the scope of applicability.

Sections III and IV argue that the "force" of the Constitution is an extension of The United States' power which flows from the barrel of a gun, and attaches liability back across the border to agents acting under color of U.S. law.

Part V looks at the attenuated policy issues associated with this type of case, centering on questions of international relations as well as remedies such as a *Bivens* and other possible liabilities.[6]

Finally, these arguments are coalesced into a workable and practical rule the Court could use to address questions of law in narrow and limited legal circumstances like those shown in *Hernandez*.

In sum, it is argued that the Constitution, in limited circumstances, may apply extraterritorially, as held in *Boumediene*. So long as it is applied in a narrow context—here defined as a border area under at least *de minimus* joint U.S.-Mexican control and limited by a proximity test resting on the theories of curtilage, maritime law and cannon-shot doctrine—the Fourth Amendment's reasonability standard of the "Search and Seizure" Clause should apply in a case like *Hernandez*. Further, the creation of the U.S.-Mexican border itself is examined as a jointly-held responsibility under the Treaty of Guadalupe Hidalgo.[7]

Taking all previous factors as true, an unlawful action by a government agent renders them liable for such action and that a *Bivens*-type remedy ought to apply.

Finally, circumstances such as those seen in *Hernandez* are the political and international relations questions raised by such legal questions. The ever-present political question doctrine is always lurking in the shadows of cases such as *Hernandez*. Conventional wisdom would speculate that Congress has not acquiesced to government agent liability for constitutional violations of this sort by failing to enact remedies for foreign nationals injured by

6. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

7. Treaty of Guadalupe Hidalgo, art. V, Feb. 2, 1848, 9 Stat. 922.

government actors and agents when they fall dead on the "wrong" side of the border. Some contend this is proof that there *should not* be an application of even limited constitutional protections to a non-citizen, and thus, no remedy should be considered.

While Congress may legislate, extraterritorial *Bivens* –type injuries raise constitutional questions. If the Constitution is applicable, a remedy must necessarily follow. I argue that application of U.S. law will aid, rather than harm U.S.-Mexican relations by applying accountability for both the United States constitutional and international legal standards of human rights and ethical responsibility.

I. THE RULE

In oral argument, the Court urged articulation of a rule applicable to *Hernandez*-type situations.[8] Justice Ginsburg herself crafted the framework for such a rule when she observed:

> [I]f all of the conduct happens in the United States and as a fact there is some exercise of control right at the border, then if the injury occurs in close proximity to that border, then that's a rule that would both be workable and would take care not only of the issue with Sergio Hernandez, but would also take care of the issue of the entirety of the southwest border of the United States where the conduct continues to occur even today.[9]

Unfortunately, Counsel for Petitioner was either not prepared to describe such a rule, or unwilling to state one with limitations. I propose one here. It is noteworthy that this proposed *Hernandez* rule would be applicable only to narrowly-construed similar factual situations. A narrow scope is essential when the Court considers questions of law as highly-charged, politicized, and controversial as applicability of U.S. constitutional rights extra-territorially. As such, the proposed rule may be applied only in jointly-maintained and patrolled U.S.- Mexican areas, such as the riverine/culvert border. It would also apply only in scenarios where a U.S. agent's unauthorized use of force crosses our boundaries and deprives a foreign national of a fundamental privilege or immunity recognized by U.S and or international law.

A. The Hernandez Rule (proposed):

When:

(1) An unreasonable seizure under the Fourth Amendment;
(2) by an agent of the United States;

8. Oral Argument at 15, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118), https://www.oyez.org/cases/2016/15-118.

9. Oral Argument at 25, *Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

> (3) in close proximity to or at a jointly-maintained U.S.-Mexico border area and;[10]
> (4) no alternative remedy exists; then
> (5) any privileges and immunities arising under The Fourth Amendment extend cross-border "as far as the bullet travels," or a distance of at least fifty meters, and liability arising from such action shall "travel back" to the actor standing on U.S. soil.

B. The Drone-Military Exception

During the *Hernandez* oral arguments, one question that was repeatedly raised was whether a workable rule governing cross-border shootings would impact U.S. military drone missions. To cleanly assuage fears of this idea, there ought to be a military exception for authorized military exercises or missions, including drone operations. Of course, drone missions into a sovereign's territory raises its own constitutional questions, but those need not be answered here.

II. LIMITED SCOPE OF EXTRATERRITORIAL FUNDAMENTAL RIGHTS AND PROTECTIONS ARISING UNDER THE FOURTH AMENDMENT.

In this section, the history and application of both "functional" and "practical" approaches used by the Court to decide the "if" of how any constitutional right applies extraterritorially are discussed. The theories of limited or partial United States control or influence at and across the Mexican border are advanced by examining maritime law doctrine, curtilage, cannon-shot doctrine and the border creation itself under the Treaty of Hidalgo.

In an eerily similar case which happened after *Hernandez*, The U.S. District Court for Arizona observed in *Rodriguez v. Swartz* that:

> [t]he U.S. Supreme Court stated three factors relevant to determining the extraterritorial application of the Constitution . . . : (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. The relevant obstacles include, but are not limited to, the consequences for U.S. actions abroad, the substantive rules that would govern the claim, and the likelihood that a favorable ruling would lead to friction with another country's government.[11]

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10. In which the United States exerts at least *de minimis* control.
11. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1035 (D. Ariz. 2015).

In large part, Hernandez's nationality is not relevant here. If he were a United States citizen gunned down in Mexico, the Fourth Amendment would apply. If he were a Mexican national, killed in the U.S. by a state actor, the Fourth Amendment would also apply.

In *Rodriguez*, a Mexican teen was walking home at night on the Mexican side of the border along a street near his house. He was alone, and not involved in any crime or aggressive action whatsoever. Without warning or cause, U.S. Border Patrol agent Swartz fired between 20-30 shots, striking the boy eight times, killing him instantly.[12]

The *Rodriguez* Court also examined the Formalist/Functionalist factors and concluded that "the U.S. Border Patrol's use of force exerted its authority and control over the immediate area on the Mexican side."[13]

Further, the Court observed that "U.S. control of the Mexican side of the border fence in Nogales and other areas along the Southern border is apparent and longstanding and recognized by persons living in this area."[14]

Finally, the *Rodriguez* Court held that the boy was granted Fourth Amendment protection, even though he was in Mexico at the time of his death, and that agent Swartz was not protected by immunity.[15]

A. American Stare Decisis: The Formalist - Practical Analysis Battle

American jurisprudence is replete with examples of Courts wrestling with applicability of constitutional rights and remedies extraterritorially. The concept of the Federal Constitution riding shotgun to the might of our nation is not new. In fact, these various roots are historic through the formation of the colonies through Westward Expansion. "There has been an ongoing debate in the courts and across the country for more than a century over which, if any, individual constitutional rights can be applied to restrain governmental actions against non-citizens outside the United States."[16]

The question of whether constitutional rights extended into our territories and protectorates came to the forefront of American jurisprudence in the notorious case of *Dred Scott*. There, the Supreme Court upheld constitutional property rights extraterritorially.[17] The question was then applied to U.S. colonial

12. *Id.* at 1028.
13. *Id.*
14. *Id.*
15. *Id.* at 1041.
16. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973, 974-75 (2009).
17. Scott v. Sandford, 60 U.S. 393 (U.S. 1857).

territories and protectorates in a series of cases collectively known as The *Insular* cases. In these colonial cases, "It was hard to argue that these territories were not under U.S. power, but did legal rights follow this power?"[18]

The *Insular* cases responded by "formulating a test known as the 'impracticable and anomalous' test," which became the standard by which extraterritorial applicability has been judged for over a century."[19] This test, however, bases questions of applicability heavily on policy concerns such as: whether applying the Constitution extraterritorially raises the possibility of conflicts in foreign policy, and if so, would the result be anomalous?

The *Insular* cases confirmed that the Constitution, in its entirety, applies to an "incorporated" territory (such as Puerto Rico) and only fundamental rights applied *ex proprio vigore*, or, "of their own force" beyond an unincorporated territory.[20] "It would follow then, that any applicability to any place beyond the actual [United States-Mexican] border would necessarily need to be similarly limited."[21]

Next, the Constitution's "application to U.S. governmental action against aliens abroad has differed with respect to 'structural limitations' on governmental power and those provisions that set forth 'individual rights.'"[22] The courts have "generally treated structural constitutional limitations, such as separation-of-powers restraints, as applicable whenever and wherever the U.S. government acts," as held recently in *Hamdan v. Rumsfeld*.[23]

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18. Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*, 328 45 LAW & SOC'Y REV. 511, 512 (2009).

19. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973, 974-75 (2009).

20. *Id.* at 983.

21. *Id.*

22. *See, e.g.*, Boumediene v. Bush, 476 F.3d 981, 995-98 (D.C. Cir. 2007) (Rogers, J., dissenting), *rev'd,* 553 U.S. 723 (2008); Brief of Certain Former Federal Judges as Amici Curiae Supporting Petitioner (Separation of Powers: Enforceable at Guantanamo), Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) [hereinafter Brief of Former Federal Judges]; Raustiala, *supra* note 18, at 244-45 ("Structural provisions, such as bans on title of nobility, are arguably different [from individual-rights provisions]. Because they determine the scope of federal power, they apply everywhere the federal government acts."); Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 641-42 (2007) (supporting Judge Rogers' position of a "non-rights based, limited-government theory"); Jean-Marc Piret, *Boumediene v. Bush and the Extraterritorial Reach of the U.S. Constitution: A Step Towards Judicial Cosmopolitanism?*, UTRECHT L. REV. 81, 98 (2008) ("[T]he Suspension Clause is as much a limitation on Congressional power as it is a source of individual rights."); Jessica Powley Hayden, Note*, The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237 (2007).

23. *See Hamdan*, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-3666, 120 Stat. 2600; Little v. Barreme, 6 U.S. 170 (1804).

Conversely, "only some of the constitutional provisions which grant individual rights restrain government actions against aliens abroad," which is exactly the scenario here.[24]

The stage then, has been set for the impracticable and anomalous test of the *Insular* cases to spar with modern jurisprudence in two important cases pitting competing theories of constitutional extraterritoriality against each other.

B. United States v. Verdugo-Urquidez: A Formalist Approach

The Petitioner's brief asks whether "a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area patrolled by the United States?"[25]

In *Verdugo-Urquidez*, the Supreme Court granted certiorari on the question of whether the "Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[26] Verdugo-*Urquidez* held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[27] This approach was based in part on the notion that "constitutional protection of noncitizens necessarily stops where "*de jure* sovereignty" ends," a hallmark of Formalist reasoning.[28]

Justice Kennedy's concurrence, disagreeing with the four-justice opinion instead applied Justice Harlan's *Insular* Rule standard of "impracticable and anomalous" to the question of a warrantless search abroad, listing "several 'conditions and considerations' that 'would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous,'" including "[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."[29]

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24. United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990) (rejecting application of the Fourth Amendment's Warrant Clause to a search conducted in Mexico); Dorr v. United States, 195 U.S. 138, 144-45 (1904) (deciding that the Sixth Amendment's right to a jury trial was inapplicable to certain overseas territories).

25. Brief of Petitioner on the Merits at I, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353).

26. *United States v. Verdugo-Urquidez*, 494 U.S. 259.

27. *Id.* at 261.

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

29. *United States v. Verdugo-Urquidez*, 494 U.S. at 278.

In this case, applicability of the implacability test would yield different results. Unlike *Verdugo-Urquidez*, the violation of the Fourth Amendment is unquestioned in *Hernandez*. Instead, the question is simply, do the rights and protections afforded by the Fourth Amendment apply under these circumstances? Looking for impracticability in enforcing the Fourth Amendment cross-cross border in this case, one must ask: would such an application offend Mexican law or offend U.S.-Mexican foreign policy? As Justice Sotomayor observed during oral arguments in this case, the answer is certainly the opposite, remarking that the Mexican government would be offended at the thought of a United States government actor's ability to kill a Mexican citizen without reproach or recourse.[30] Applying Fourth Amendment protection to Hernandez in this case would produce neither an impracticable or anomalous result.

C. Boumediene v. Bush: A Practical Approach

When last faced with the question of extraterritorial application of the Fourth Amendment, the Court in *Boumediene* soundly rejected Formalism and the impracticable and anomalous test by refusing the argument that "as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[31] "*De jure* sovereignty is a factor that bears upon 'which constitutional guarantees apply to a noncitizen,' but it is not 'the only relevant consideration' in determining the geographic reach of the Constitution."[32]

Conversely, The Court settled the debate between Formalist and Practical approaches to the application of the Fourth Amendment in a cross-border incident by adopting Justice Kennedy's functional extraterritoriality test put forth in his *Verdugo-Urquidez* concurrence holding that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[33]

Under Kennedy's test, the Fourth Amendment's prohibition of the "unjustified use of deadly force applies in the narrow context presented in this case: a close- range shooting by a U.S. border agent standing on U.S. soil."[34] Answering impracticability once again, nothing in this holding would offend Mexican-U.S. relations or conflict with U.S. or Mexican law. The result, then, would not be anomalous, rather it would help improve U.S.-Mexican relations by

30. Oral Argument at 118, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

31. *Boumediene,* 553 U.S. at 755.

32. *Id.* at 764.

33. *Id.*

34. Brief of Petitioner on the Merits at 27, *Mesa*, 137 S. Ct. 2003 (No. 15-118).

eliminating the current "lawless border zone" currently operating at the U.S. Mexican border.

Further, applying Fourth Amendment protections and allowing a *Bivens* claim for abuses at border checks the currently unrestrained Executive power to "use lethal force on innocent civilians just outside our gates."[35] *Bivens* then, can be seen as a modern application of this right to sue those acting under color of law for constitutional torts.

D. Common Law Roots of Extraterritorial Application of the Right to Hold Liable Government Officials for Tort and Other Actions

The notion of holding government officials liable for tortious conduct against foreign nationals predates our Constitution.[36] The Common-Law tradition set forth by Lord Mansfield was embraced in early American jurisprudence by Chief Justice John Marshall, James Madison, and Justice Joseph Story.[37]

Under English Common Law, British officers were subject to English courts "even when acting abroad."[38] Further, "an officer could override the presumption in favor of applying English law, but only if he could show that he acted under the sheltering arm of another country's law that provided greater protections for his conduct."[39]

Here, no sheltering arm is provided, because Mesa is not afforded protection of Mexico's laws. In contrast, officer Mesa was charged with murder under Mexican law.[40] Moreover, United States law also provides no safe harbor for Mesa's actions. Few doubt that Mesa's killing of Sergio Hernandez was unreasonable inside or outside of United States law. Indeed, Mesa's counsel concedes that point, and instead relied on qualified immunity and

35. *Id.*

36. Brief for Professors James E. Pfander, Carlos M. Vasquez, and Anya Bernstein as Amici Curiae Supporting Petitioners at 16, *Mesa*, 137 S. Ct. 2003 (No. 15-118); *see also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1865–66 (2010).

37. Brief for Professors Supporting Petitioners at 15, *Mesa*, 137 S. Ct. 2003 (No. 15-118).

38. *Id.* at 16; *see also* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 510-12 (2006); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (1774) (opinion of Lord Mansfield: Minorcan civilian successfully sued English military governor for damages for unlawful detention in and subsequent banishment from Minorca).

39. Brief for Professors Supporting Petitioners, *supra* note 37, at 9; *see also Mostyn*, 98 Eng. Rep. at 1023.

40. Brief for the Government of the United Mexican States as Amici Curiae Supporting the Petitioners at 10, *Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

Formalist theory under *Verdugo-Urquidez.*[41] They argue that even though Mesa violated the Fourth Amendment, he is immune from liability as the victim was both a foreign national and happened to fall dead on Mexican soil.[42]

Further, Mesa contends that because no liability attaches to him, and because applying the *Boumediene* Practical Approach would create an anomalous effect regarding U.S.-Mexican political relations, qualified immunity applies to insulate Mesa.[43]

The application of extraterritorial claims against government officials then, necessitates the remediation of extraterritorial claims of harm. For example, the Story Court held that "U.S. revenue law did not authorize federal officials to seize French ships in foreign waters, but that general U.S. tort law did authorize the owners of the French vessel to recover damages from those officials in U.S. courts."[44]

Justice Story's holding highlights the requirement of remedies for unlawful conduct of U.S. agents beyond our borders. This remedial duty is explained in detail in his *Apollon* opinion as the following:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.[45]

In short, a long, rich history stretches from English Common Law, extending to and touching modern American jurisprudence. Today, one may comfortably describe the right of a foreign national to sue an American agent for constitutional tort which includes the right to redress those grievances in U.S. Courts. Consequently, the presence of a Fourth Amendment claim against an actor under color of U.S. law necessitates the availability of a remedy.[46] As Chief Justice Marshall's holding in *Madison v. Marbury*, suggests; where

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41. Brief of Respondent on the Merits, *Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

42. *Id.*

43. Brief of Respondent on the Merits, *supra* note 41, at 17-20.

44. Apollon, 22 U.S. 362 (1824); *see also* Brief for Professors Supporting Petitioners, *supra* note 37, at 18.

45. *Apollon*, 22 U.S. at 366-67.

46. It has long been thought that there can be no *damnum absque injuria* ("loss without injury"); *see also* Holmes, O.W., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

there is a right, there is a remedy. Justice Story then adds, "no matter where that harm has occurred.[47]

E. International Law Also Requires Cross-Border Remedies for Human Rights Violations

U.S. law has long taken notice of International Law, in that it has "always been part of the federal common law, such that any tort arising out of a violation of law of nations would be one arising out of federal law."[48] This is evident in the reliance on the law of nations in the Alien Tort Statute, or ATS, which provides aliens within the United States a tort claim mechanism for violations of the law of nations, treaty, or United States law.[49]

At first glance, the ATS would seem applicable here, but remedy is foreclosed by the foreign country exception 2680(k) under the Federal Tort Claims Act, through which ATS claims flow. This exception bars claims "arising in a foreign country" as the U.S. Supreme Court held in *Sosa v. Alvarez-Machain*.[50] The *Sosa* Court, however, "recognized new claims under the law of nations."[51] It would also be correct to assume that "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations beyond those torts corresponding to Blackstone's three primary offenses: violation of

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47. *Id.*

48. Kurtis A. Kemper, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350)—Tort in Violation of Law of Nations or Treaty of United States*, 64 A.L.R. FED. 2d 417 (2012); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980) (explaining that legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* ("law of the place where the delict [tort] was committed") is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred).

49. 28 U.S.C.A. § 1350 (1948).

50. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

51. *Id.* at 697 ("When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); Ware v. Hylton, 3 Dall. 199 U.S. 199, 281 (1796) (Wilson, J.). In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other: "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights," E. DE VATTEL, LAW OF NATIONS, PRELIMINARIES § 3 (J. Chitty et al. transl. and ed. 1883) [hereinafter Vattel] (footnote omitted), or "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other." 1 J. KENT, COMMENTARIES ON AMERICAN LAW *1. This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 [hereinafter Commentaries] ("[O]ffences against" the law of nations are "principally incident to whole states or nations.").

safe conducts; infringement of the rights of ambassadors; and piracy."[52]

Simply stated, U.S. Courts ought to be receptive of constitutional tort claims for cross-border wrongs and injuries. When the violation of a fundamental right, such as a Fourth Amendment claim for an extrajudicial killing is at issue, the court should be especially receptive.

F. Agent Mesa's Extrajudicial Cross-Border Killing of Sergio Hernandez Also Violates the Torture Victim Protection Act (TVPA)

The TVPA preempts the ATS by requiring liability for torture or extrajudicial killings for claims under the law of nations or a treaty of the United States.[53] To state a claim under the TVPA, the Hernandez family must show that Sergio was the victim of an extrajudicial killing.[54] Under the Act, an extrajudicial killing is defined as:

> (a) For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

There is little question that the extrajudicial killing of Hernandez was unlawful. The act of extrajudicial killing then triggers liability acting under any authority of or color of law any foreign nation.[55]

The Charter of the United Nations expressly states that in this modern age a state's treatment of its own citizens is a matter of international concern.[56] Moreover, the Universal Declaration of

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52. Kuris A. Kemper, *Construction and Application of Alien Tort Statute* (28 U.S.C.A. § 1350) – *Tort in Violation of Law of Nations or Treaty of United States*, 64 A.L.R. Fed. 2d 417, 2.

53. 28 U.S.C.A. § 1350 (83) (1948).

54. Mamani v. Berzain, 21 F.Supp.3d 1353 (S.D.Fla. 2014) *affirmed in part*, *appeal denied in part* 825 F.3d 1304 ("holding that Bolivian citizens sufficiently alleged that the deaths of their relatives were extra-judicial killings, as required to state a claim under the *Torture Victim Protection Act* (TVPA) against former president and defense minister of Bolivia, where citizens alleged that the government ordered military operations in several towns during period of civil unrest, the government ordered soldiers to shoot at "anything that moved," many of the relatives were killed while far away from protests or attempting to flee military personnel, and that military personnel chased and killed unarmed civilians.").

55. 28 U.S.C.A. § 1350 (a) (1948).

56. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980); *see also* 59 Stat. 1033 (1945).

Human Rights declares in plain language and definitively that "no person should be subject to torture" *or extrajudicial killings* [emphasis added].[57] This Charter expressly embodies in it the Universal Declaration precepts that "constitute basic principles of international law."[58]

The General Assembly lays out its precepts of torture and extrajudicial killings in its Declaration on the Protection of All Persons from Being Subjected to Torture[59] which provide the basis for a claim under the TVPA. Specifically, the murder of Hernandez violates multiple articles of the resolution.[60] Article 11 expressly provides for an avenue of redress for such violations, in contrast to the claims by the United States that redress is unavailable to Hernandez.

What the foregoing means is a simple truth: the extrajudicial killing of Sergio Hernandez by agent Mesa not only violated U.S. law, it violated international law and United States Treaty. In doing so, it triggers rights and protections under the TVPA and the Declaration of Human Rights, ensuring that a remedy should be made available to Hernandez.

G. Agent Mesa Violated Border Patrol Protocol When He Used Deadly Force

Even before the *Hernandez* and *Rodriguez* cases, the U.S. Border Patrol has been reviewing its protocols and guidelines to address the use of deadly force in border situations. The long list of shootings and murders, and no doubt the negative public backlash on both sides of the border, culminated in a 2013 Use of Force Study commissioned by the Police Executive Research Forum.[61]

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57. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

58. G.A.Res. 2625 (XXV) (Oct. 24, 1970).

59. G.A. Res. 3452, Declaration on the Protection of All Persons from Being Subjected to Torture (1975).

60. U.S. CONST. art. IV. ("Each state shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction."); U.S. CONST. art. V. ("The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons."); U.S. CONST. art. XI ("Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.").

61. THE POLICE EXECUTIVE RESEARCH FORUM, U.S. CUSTOMS AND BORDER PROTECTION USE OF FORCE REVIEW: CASES AND POLICIES 6 (2013).

The report specifically covers rock throwing incidents, which was the initial justification for the shooting.[62] Officials went so far as to claim agent Mesa was attempting to apprehend smugglers trying to enter the U.S., who then "hurled rocks from close range."[63] This was later debunked when several eyewitness' cellphone videos surfaced, none of which showed Hernandez (or anyone else) throwing rocks.[64]

In the report, the Commission found that, in instances where agents claimed rock throwing as justification, "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force."[65] Indeed, the report advised that "Officers/agents are prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them." [66]

Further, the Commission recommends that Border Patrol officials should "train agents to de-escalate these encounters by taking cover, moving out of range and/or using less lethal weapons. Agents should not place themselves into positions where they have no alternative to using deadly force."[67]

Agent Mesa's actions on the day he shot Hernandez were virtually opposite of protocol and recommended use of force guidelines, which the investigative team denied and found that Mesa had acted reasonably.[68]

Official Border patrol policy is "[a] *respect* for human life shall guide all members of U.S. Customs and Border Protection in the use of force. CBP officers/agents shall use only the force that is *objectively reasonable* to effectively bring an incident under control, while protecting the life of the officer/agent or others. Excessive force is strictly prohibited."[69] Clearly, agent Mesa acted anything but reasonably in light of the circumstances.

III. PROXIMITY: LIMITING SCOPE TO AREAS OF JOINT, OR AT LEAST LIMITED OR PARTIAL UNITED STATES CONTROL

The *Boumediene* Court held that questions of extraterritoriality turn on objective factors and practical concerns,

62. Brief of Respondent at 13, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

63. *Id.*

64. *Video Shows Border Shooting Scene*, YOUTUBE.COM, https://youtu.be/oa2LjgL40KE (last visited Oct. 20, 2017).

65. THE POLICE EXECUTIVE RESEARCH FORUM, *supra* note 61.

66. *Id.*

67. *Id.* at 9.

68. Brief of Respondent on the Merits, *supra* note 41, at 9.

69. THE POLICE EXECUTIVE RESEARCH FORUM, *supra* note 61, at 10.

not formalism.[70] These factors, then, necessarily implore us to define the scope and limits of U.S. control at the U.S.-Mexican border.

A. Boumediene Factors of United States Control

In *Boumediene*, applying functional theory to the circumstances yields practical results. Functionality demands that circumstances of Hernandez's reason for being in close proximity to, or even across the actual border, as well as wider socio-economic and cultural reasons to place him at that border are considered.

Further, the *Boumediene* Court identified three main factors when applying its functional analysis: (1) "the citizenship and status" of the person claiming protection, (2) the "nature" and "physical location" where the alleged violation "took place," and (3) the "practical obstacles inherent" in applying protection. To these can be added a fourth: whether the right asserted is "a fundamental precept of liberty," such as "freedom from unlawful restraint."[71]

We focus then on the most controversial second element; the "nature" and "physical location" in which the incident took place. The nature of the location provides the pivot on which the rule turns. To understand the micro-location of the actual U.S.-Mexican border in an urban setting such as El Paso-Juarez, we must look beyond the culvert that contains the line of demarcation and expand our focus to the unique characteristics of the entire border community.

B. Defining United States-Mexican Border Overlap

In many instances and locations, the U.S.-Mexican border is an inextricably intertwined community with centuries of history. Indeed, deciphering where one community ends and another begins is all but impossible in a practical sense, and the U.S.-Mexican relationship has been described as "a relationship of unprecedented closeness and cooperation."[72]

1. Inter-Dependent Economics of the Region

In the location in question, the cities of El Paso and Juarez were considered one city before the bifurcation imposed upon them by the treaty of Hidalgo. Today, border or no border, the cities share many common elements such as school systems, a central business district, and other amenities. In addition, "because of the deep

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

71. Brief of Petitioner on the Merits, *supra* note 34, at 32.

72. *Remarks by President Bush and President Fox*, N.Y. TIMES (Sept. 5, 2001), http://nyti.ms/2fk865q.

interconnectedness of the two communities, locals on both sides—including 'the mayors [who] represent these two cities'—regard the separation as "more or less a fiction."[73] In terms of manufacturing and trade, the maquiladoras (factories in Mexico that receive raw materials from the U.S. and return finished goods) spark a local shared economy in excess of 70 billion dollars annually.[74]

2. United States Cross-Border Power and Influence

Because of historical U.S. policy and dominance of the region, the "U.S. has long wielded military, political, and economic authority over northern Mexico."[75] This translates in modern times to the U.S. Border Patrol and other law enforcement agencies conducting operations at or across the border regularly, and "their presence—and the power they exercise—is not 'transient,' but 'constant.'"[76] In recent years, U.S. policy has been to "project power outwards" from the border, resulting in over 42 cross-border shootings.[77]

IV. THE POWER AND INFLUENCE OF THE UNITED STATES "PROJECTING OUTWARD": A MODERN CANNON-SHOT DOCTRINE, MARITIME LAW, AND THE TREATY OF GUADALUPE-HIDALGO

The United States has long-enjoyed some, if not much, influence and control over Mexican sovereign territory near the border.[78] Often, control has gravitated well beyond the physical border, extending deep into Northern Mexico.[79] In the early part of the nineteenth century, U.S. influence over Northern Mexican territory was often military borne, and once U.S.-Mexican military

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73.Leeser & Mocken, *President Obama: Castner Connects The Past And Future*, HUFFINGTON POST (Aug. 17, 2016), http://huff.to/2fVay0A; *see also* OECD Regional Stakeholders Committee, *The Paso del Norte Region, U.S.-Mexico: Self Evaluation*, OECD REVIEWS OF HIGHER EDUCATION IN REGIONAL AND CITY DEVELOPMENT (2009), www.oecd.org/unitedstates/44210876.pdf.

74. State of Texas Comptroller's Office, COMPTROLLER.TEXAS.GOV, https://comptroller.texas.gov/economy/docs/ports/96-1791-elpaso.pdf (last visited Feb. 9, 2018).

75. Bitran, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 244-48 (2014).

76. Boumediene v. Bush, 553 U.S. 723, 768-69 (2008); *see* App. 85a-86a.

77. *Testimony of Michael J. Fisher, Chief, United States Border Patrol, DHS, Feb. 15, 2011, Securing Our Borders—Operation Control and the Path Forward: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 11 Cong. 8 (2011).

78. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

79. *Id.*

hostilities ceased under the Treaty of Guadalupe Hidalgo, U.S. control and influence turned on economic interests.

A. Cannon-Shot Doctrine

When faced with determining how far "outward" United States influence projects from our border, whether into a marine environment or un-annexed territory, early Common Law and maritime law jurisprudence set that figure arbitrarily as "the territorial limits of the United States extend a marine league from shore, [or] a cannon shot."[80] The distance the average cannonball could be thrown was three miles. That length became the standard by which cross-territory influence of the United States was deemed to extend.[81] This doctrine confirms a long-held notion that, regardless of border, at least *some* United States influence extends past any line of demarcation.

Applying doctrine to context, the implications are clear: American power and influence does in fact travel across the U.S.-Mexican border. For further conceptual exemplification, maritime jurisprudence is especially handy.

1. Modern Cannon-Shot Doctrine: As Far as the Bullet Flies

The question then turns to the heart of the matter: if *stare decisis* over the last century established that fundamental constitutional rights are applicable abroad (in a limited fashion), then those limits must be defined. The danger, of course, is announcing a rule broadly endorsing encroachment into another's sovereign territory. The Rule must be limited, then, only to circumstances where the incident is at or in close proximity to the jointly maintained U.S.-Mexican border (as in *Hernandez*), and arising from harms inflicted by an individual acting under color of U.S. law, *while standing on U.S. soil.* The missing piece then becomes: how far should such constitutional protections reach?

A common sense (practical) modern approach ought to limit "outward projection" to the effective range of border patrol standard issue firearms. While the typical 9mm round may travel over 2,000 meters before falling to the ground, effective range is only 100 meters or so.[82] For this Rule, the practical limit should be 50 meters, or the approximate width of the border river-culvert which serves as the modern Rio Grande riverbed and border. This limitation serves two purposes: (1) it now allows the concrete proximity point of reference for application of the rule desired by the Court; and (2)

80. United States v. New Bedford Bridge, 27 F. Cas. 91, 120 (C.C.D. Mass. 1847).

81. United States v. Stone, 69 U.S. (2 Wall.) 525, 535 (1865).

82. *Range of a Handgun Bullet*, THE PHYSICS FACTBOOK, http://hypertextbook.com/facts/2002/DomnaAntoniadis.shtml (last visited Oct. 20, 2017).

generally keeps the question of cross-border applicability of the Fourth Amendment within the jointly maintained U.S.-Mexican border proximity.

B. Applying Maritime Law Concepts in a Cross-Border Riverine Scenario

For the most part, cannon-shot doctrine is no longer used. This is not because the concept is void, but, as a rule, cross-territorial questions of law in which a three-mile incursion would not cause an international incident are rarities. That is not to say that *no length* of cross-border incursion is the rule. For example, portions of the U.S.-Canadian border between Quebec and Maine are subject to confusing treaty and maritime law disputes over access to riverine border waters.[83] There, U.S. shipping intrudes upon sovereign Canadian waters regularly to reach inland U.S. ports.[84]

Thus, in situations where a formal border line of demarcation exists, there is much precedent for United States influence, and thus United States law to extend.

C. The United States-Mexican Border at El Paso-Juarez is a Navigable Riverine Border Despite the Currently Dry Conditions and thus Subject to Maritime Law, United States-Mexican Water Rights Treaty, and the Treaty of Guadalupe-Hidalgo

1. The Treaty of Guadalupe Hidalgo (1848)

On February 2, 1848, the United States and Mexico signed the Treaty of Guadalupe Hidalgo, which ended military hostilities between the two nations.[85] This Treaty then, is the instrument that, among other things, details the creation of the border itself. Article V of the Treaty enshrines the riverine border line of demarcation as, "The Rio Grande, otherwise called the Rio Brave del Norte … from thence up the middle of that river, following the deepest channel …" which holds true today.[86] However, today's [dry] Rio Grande is, at the location of the Hernandez murder, an artificial construct of concrete and steel, jointly built and maintained by the United States and Mexico. Article XI of the Treaty further provides that the United States would defend incursions of "the savage tribes" cross-

83. Article: *The law of the sea and LNG: Cross-Border law and politics over Head Harbor*, 37 CAN.-U.S. L.J. 131 (2012).

84. *Id.*

85. Treaty of Guadalupe Hidalgo, 9 Stat. 922, Art. V. (1848).

86. *Id.*

border into Mexican territory, further delineating U.S. rights of extension of cross-border policy.

What the Treaty also provides, is a base for the agreement of water use rights for the United States that encroaches significant distances into Mexico proper.

2. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944)

The "Water Rights Treaty of 1944"[87] formalized agreement to decades of controversy between Mexico and the U.S. for the rights of riverine border waters including the Rio Grande.[88] This Treaty specifically clarifies Article IV of the Treaty of Guadalupe Hidalgo and establishes clear United States control over water rights well into Mexican sovereign territory, incorporating or referencing several other U.S.-Mexican Treaties in the process.[89]

Thus, U.S. influence and control, extending cross-border, has been sound policy since the borders creation, and extends to this day in a significant manner.

V. ANALYZING CROSS-BORDER APPLICATION OF THE FOURTH AMENDMENT UNDER THE *BOUMEDIENE* PRACTICABLENESS FRAMEWORK PRESUPPOSES A *BIVENS* CLAIM

A. Applying Bivens

Christina Duffy Burnett, in her Columbia Law Review article, approached the question of extraterritorial application of the Fourth Amendment by asking two questions: "whether a constitutional guarantee applies in a given circumstance, and that of how an applicable guarantee may be enforced."[90] Arguably, the

87. 59 stat.1219 (1944).

88. *Id.*

89. Convention between the United States of American and the United States of Mexico Touching the International Boundary Line Where It Follows the Bed of the Rio Grande and the Rio Colorado, Mex.-U.S., Nov. 12, 1884, 24, Stat. 1011; Convention between the United States of America and the United States of Mexico to Facilitate the Carrying Out of the Principles Contained in the Treaty of November 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes which Take Place in the Bed of the Rio Grande and that of the Colorado River, Mex.-U.S., Mar. 1, 1889, 26 Stat. 1512; Convention between the United States of American and the United States of Mexico, Extending for an Indefinite Period the Treaty of March 1, 1889, between the Two Governments, known as the Water Boundary Convention, Mex.-U.S., Nov. 21, 1990, 31 Stat. 1936.

90. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973, 978 (2009).

first question has already been resolved, both here as well as by the *Boumediene* Court. The second turns on enforceability, which necessarily indicates a remedy satisfied only by *Bivens* action.

The Fifth Circuit in *Hernandez* acknowledged that "[u]nder *Bivens* a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights."[91] The Court then quickly backpedaled by stating that *Bivens* was "not automatic" and that The Court has refused to expand the scope of *Bivens.*[92] While the foregoing may be true, it is apparent that The *Hernandez* Court eagerly sought to extend *Bivens* as evidenced by judicial commentary during oral arguments.[93] I suspect that the opinion will bear this out.[94]

Examining judicial comments during oral arguments, we find the following exchanges by Justices observations during arguments. Justice Kagan starts the discussion by asking if there should be a *Bivens* claim, to which counsel replied "[y]ou have a U.S. law enforcement officer exercising unreasonable force, and Sergio Hernandez is in the group of victims that are injured because of excessive force. The issue is, is where he fell and where he shot, does it take it out of his right to a Bivens?"[95]

B. If Bivens Applies, a Remedy Must Follow

Here, the Court reverts to the proximity question: How close in proximity to a mutually managed border culvert does the incident need to be to trigger constitutional protection, and thus, a *Bivens* claim? As discussed above, the answer should apply within the culvert itself, or approximately 50 meters (a curtilage of sorts). Applying this rule, the Hernandez family would likely be able to pursue a *Bivens* claim and, thus, a remedy.

Bivens, of course, found that it was well settled law that "when a person's rights were violated, and there was a federal statute that provided a right to sue, that the courts could apply any available remedy."[96]

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91. Hernandez v. United States, 757 F.3d 249, 272 (5th Cir. 2014) (quoting Martinez-Aguero, 459 F.3d 618, 622 n.1 (2006)).

92. Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (*Bivens* is "not an automatic entitlement"); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("The Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants.").

93. Oral Argument, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

94. *Hernandez v. Mesa* has not been decided at this writing.

95. *Id.* at 17.

96. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

1. An Agent Under Color of Law Should Not be Granted Qualified Immunity

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[97] This immunity is measured by the objective reasonableness test, assessed "in light of the legal rules that were 'clearly established' at the time."[98] This reasonableness factor is analyzed by the Court from the prospective of a "reasonable officer on the ground" and thus allows for reality that law enforcement officials often are required to make instant decisions under stress and danger.[99]

Qualified immunity provides "a sweeping protection from the entirety of the litigation process," and not just a simple defense.[100] It also provides a shield from "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[101] When an agent of the state is sued for their conduct under color of law, courts must balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[102]

Courts must decide which of the two prongs of qualified immunity analysis to address first.[103] If the Court finds that one or more constitutional rights were violated, and those rights "at issue were clearly established at the time," the next prong is then considered.[104] The second prong being a reasonableness analysis establishing where "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[105] Qualified immunity is then only applicable where both prongs are satisfied.[106]

The *Rodriguez* Court held that the teen's Fourth Amendment was violated by agent Swartz. The Respondent's in *Hernandez* excuses fall short, as it is clear Hernandez also suffered a Fourth Amendment violation. Applying the two-prong test, agent Mesa, like agent Swartz, clearly fail, and thus no qualified immunity applies.

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97. Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1028 (2015); *see* Messerchmidt v. Millender, 132 S.Ct. 1235, 1244-45 (2012) (citing Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2085 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

98. *Id.*

99. *Rodriguez v. Swartz*, 111 F. Supp. 3d at 1028.

100. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

101. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

102. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

103. *Rodriguez v. Swartz*, 111 F.Supp.3d at 1039.

104. *Id.*

105. *Id.*; Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (citations omitted).

106. *Id.*; *Pearson*, 555 U.S. at 232.

2. Bivens Special Factors Analysis

Because Congress has failed to act and create a remedy available for Mexican nationals harmed by unlawful action by U.S. agents, we must also look for any "special factors that "counsel hesitation" in applying *Bivens.*[107] The Court identified one such "special factor" in their "drone" line of questioning.[108] Here, though perhaps quantified as a "quasi-military" agency, Border Patrol agents are not subject to *Feres* protection.[109]

Another possible special factor may be that, by allowing recourse against federal agents in the course of their duty, a chilling effect on agent authority and operational effectiveness could result. This argument, of course, is completely without weight as *Bivens* already provides a remedy against federal agents who unlawfully violate a person's constitutional rights. The only difference here is what side of the border Hernandez fell dead at.

The only other potential special factor that could "counsel hesitation" is the effect of imposing such a remedy on U.S.-Mexican relations. In this case, Mexico certainly has an interest in protecting their citizens from being killed by U.S. agents, and they are especially interested in providing for a remedy in those cases. Extending U.S. constitutional protections in this case would not interfere with the laws or policies of the Mexican government. Indeed, applying the Fourth Amendment protections in case would "show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals."[110] In its *Amicus Curiae* brief, the Mexican government expressly states that not granting a remedy would be harmful to U.S.-Mexican relations.[111] Surely, this is exactly the sort of "special factor" that the Court envisioned when contemplating a *Bivens* claim.

3. As of Now, the Hernandez Family Lacks a Remedy

The Fifth District found that, because they applied the *Verdugo-Urquidez* formalistic approach and treated the border as a "bright line," there is no Fourth Amendment violation. Following this flawed reasoning—never mind that agent Mesa's actions were unlawful and certainly a Fourth Amendment abuse had Hernandez died on the U.S. side—that no violation occurred. And if no violation

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107. Oral Argument at 4, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

108. Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

109. Feres v. United States, 340 U.S. 135 (1950).

110. Brief of the Government of the United Mexican States as Amici Curiae Supporting the Petitioners at 4, Hernandez, v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

111. *Id.* at 5.

occurred, by fateful virtue of Hernandez falling dead within Mexico, then no *Bivens* claim and thus no remedy is available.

I reject this line of thinking. The *Boumediene* Court rejected this line of thinking. Regardless of where Hernandez's body fell, agent Mesa was standing on U.S. soil when he pulled the trigger. It is recognized in both U.S. and international law that when "an illegal act is committed in one country and has a direct effect in another country, it is well recognized that both countries have jurisdiction to prescribe the applicable law, to punish violations and to adjudicate disputes."[112]

Because there are no impracticable or anomalous results when applying U.S. law here, and because both the U.S. and Mexico have fundamental rights and duties to protect their citizens, the *Boumediene* and *Bivens* factors are satisfied, and thus a remedy ought to follow.

4. Special Policy Considerations

Despite admitting that agent Mesa's actions were unjustified and unlawful, the U.S. has steadfastly refused to extradite Mesa or any other border patrol agent for cross-border unjustified killings. This sends a dangerous message. Allowing agents acting under color of U.S. law to murder foreign nationals with no recourse sends the message that the reverse may also be true. It is only a matter of time before Mexican nationals decide that, they too can murder United States citizens or Border Patrol agents without facing any justice whatsoever. Is the idea of Mexican authorities looking the other way as pot-shots are taken at U.S. Border Patrol agents inconceivable?

By not providing Hernandez with a claim for remedy in U.S. Courts, we are, by default, tendering our tacit approval of extrajudicial killings without recourse or justice. This policy, it is certain, is far more harmful to U.S.-Mexican relations than any conceivable impracticalities of applying the Constitution. The United States has everything to gain foreign relations wise, by granting constitutional protections to victims of unjustified cross-border murders, and everything to lose by refusing.

CONCLUSION

Applying our newly minted *Hernandez* Rule to this case, we find that because agent Mesa was acting under color of U.S. law, and because agent Mesa was standing on U.S. soil when he shot Hernandez cross-border, and because that unjustified killing occurred at or in close proximity to the jointly governed and

112. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. d, §§ 421(2)(i)-(j), 431(1) (1987).

maintained border area and within 50 meters of that proximity, then United States force, and thus United States law, and thus United States constitutional protections under the Fourth Amendment flowed through the barrel of agent Mesa's gun and travelled cross-border. Subsequently, a claim and a remedy flow back to agent Mesa.

Because this is true, Hernandez was a victim of an unjustified killing, which violated his right to life under international law, and violated his protection from unreasonable seizure under the Fourth Amendment. The place Hernandez's body fell has no bearing. Therefore the Fourth Amendment should govern, and Hernandez has a cause of action against agent Mesa in a U.S. court under *Bivens*, and a remedy ought to be made available.