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The Extraterritorial Application of the Fifth Amendment: A Need for Expanded Constitutional Protections.

Guinevere E. Moore

Robert T. Moore

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ARTICLE

THE EXTRATERRITORIAL APPLICATION OF THE FIFTH AMENDMENT: A NEED FOR EXPANDED CONSTITUTIONAL PROTECTIONS

GUINEVERE E. MOORE AND ROBERT T. MOORE*

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INTRODUCTION

On June 7 of 2010, a U.S. Border Patrol agent, while on bicycle patrol, shot and killed a fifteen-year-old Mexican boy on the Mexican side of the border.[1] A group of boys were running in a "drainage ditch and touching

* Guinevere E. Moore and Robert T. Moore are adjunct professors of law at St. Mary's University School of Law, teaching courses on international and comparative law. They are amici curiae in support of the Hernandez family, seeking redress through the U.S. Court of Appeals for the Fifth Circuit. Brief of Amicus Curiae for Professors Guinevere E. Moore & Robert T. Moore in Support of Plaintiff-Appellants in Favor of Reversal, Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014) (No. 12-50217), 2012 WL 11860817.

1. Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) ("United States Border Patrol Agent Jesus Mesa,

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a chain-link fence on the U.S. side of the Rio Grande."[2] When the agent detained one of the boys, the others "allegedly began to throw rocks."[3] The agent, while standing on U.S. soil, drew his firearm and shot one of the boys twice, including a fatal shot to the head.[4] When additional agents arrived on the scene, they failed to render aid to Hernandez.[5] The agent returned to his duties after three days on administrative leave, and no criminal charges were filed.[6] The governor of Chihuahua called for the agent's extradition, but the U.S. government has not confirmed whether a request has been received.[7] According to the agent's lawyer, it is unlikely the United States would honor such a request.[8]

The family filed a federal civil suit for a violation of the boy's Fifth Amendment rights, but the district court dismissed the suit for want of jurisdiction.[9] The district court cited *United States v. Verdugo-Urquidez*[10] in holding the boy, "an alien [who was] injured outside the United States," did not have sufficient voluntary attachments with the United States such that he gained the protections of the Fifth or Fourth Amendments.[11] On appeal, the Fifth Circuit followed the reasoning set forth in this article

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Jr. . . . standing in the United States, shot and killed . . . Hernandez . . . a Mexican citizen, standing in Mexico."); Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

2. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

3. Marisela O. Lozano & Aaron Bracamontes, *Chihuahua Officials Seek Extradition of Border Agent in the '10 Shooting Death of Teenager*, EL PASO TIMES, May 4, 2012, http://www.elpasotimes.com/ci_20544250/extradition-border-agent-sought.

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

5. Hernandez v. United States, 802 F. Supp. 2d 834, 838 (W.D. Tex. 2011).

6. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

7. *Id.*

8. Marisela O. Lozano & Aaron Bracamontes, *Chihuahua Officials Seek Extradition of Border Agent in the '10 Shooting Death of Teenager*, EL PASO TIMES, May 4, 2012, http://www.elpasotimes.com/ci_20544250/extradition-border-agent-sought.

9. *Hernandez*, 757 F.3d at 255–57.

10. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

11. *Hernandez*, 757 F.3d at 256. *Verdugo-Urquidez* involved a Mexican national who had been arrested and transported to the United States to stand trial. A search was carried out at his residence with the assistance of Mexican authorities, and the issue arose as to whether such a search, without a search warrant issued by a court in the United States, violated Verdugo-Urquidez's Fourth Amendment rights. The Court said that it did not, as he was a Mexican national, the search took place in Mexico, and there were insufficient "voluntary attachments" to allow the protections of the Fourth Amendment to extend to him. *Verdugo-Urquidez*, 494 U.S. at 274–75.

concerning the extraterritorial application of constitutional rights, at least as it pertains to the Fifth Amendment, in line with the United States Supreme Court's ruling in *Boumediene v. Bush*.[12] The parties sought en banc review before the Fifth Circuit, and an order granting review was issued on November 6, 2014.[13]

What is perhaps most troubling about this case is that it is not the first such shooting across the U.S.–Mexico border where a Border Patrol agent may have shown questionable judgment.[14] In June of 2011, United States Border Patrol agents fired upon and killed another Mexican national, this time near San Diego, California.[15] Again, there were allegations of "rock throwing" to support the officer's use of deadly force.[16] Additionally, it is alleged that in September of 2012, Border Patrol agents fired blindly upon a group of Mexican nationals standing on the Mexican side of the Rio Grande River, killing a man present with his family on a picnic.[17] In light of these actions, the Mexican government has raised serious concerns about the disproportionate use of force by U.S. agents present on the U.S.–Mexico border.[18] Since 2010, there have been 43 cases involving the use of deadly force by agents that have resulted in 10 deaths along the border.[19] Even in light of these statistics, the official policy, as articulated by Border Patrol Chief Michael J. Fisher, is that officers may still use

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12. Boumediene v. Bush, 553 U.S. 723, 766 (2008) ("[W]hether the Fifth Amendment applies here depends on the objective factors and practical concerns we recognized above."); *see also Hernandez*, 757 F.3d at 268 (quoting *Boumediene* factor language).

13. Hernandez v. United States, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014).

14. *See* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen ("[T]he [U.N.] High Commissioner for Human Rights has received other reports of alleged use of excessive force by Border Patrol agents."); Nick Valencia & Michael Martinez, *Police: Border Patrol Agent Fatally Shoots Rock-Throwing Migrant*, CNN (June 22, 2011, 9:34 PM), http://www.cnn.com/2011/US/06/22/california.border.shooting/ (describing a rock-throwing "altercation involv[ing] two Border Patrol agents and three migrants allegedly trying to cross the border" that resulted in the fatal shooting of a Mexican man by a U.S. Border Patrol agent).

15. Nick Valencia & Michael Martinez, *Police: Border Patrol Agent Fatally Shoots Rock-Throwing Migrant*, CNN (June 22, 2011, 9:34 PM), http://www.cnn.com/2011/US/06/22/california.border.shooting/.

16. *Id.*

17. Jason Buch, *Mexican Girl Clutched Her Dying Father*, SAN ANTONIO EXPRESS NEWS, Sept. 8, 2012, http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

18. *Id.*

19. Stephen Dinan, *Border Patrol Chief: Agents Can Still Shoot at Rock Throwers*, WASH. TIMES, Mar. 9, 2014, http://www.washingtontimes.com/news/2014/mar/9/border-patrol-chief-agents-can-still-shoot-at-rock/?page=all.

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deadly force where they "reasonably believe"—based upon the totality of the circumstances—that such rock throwing presents an "imminent danger" of death or serious injury.[20]

These incidents show an alarming trend, where the potential use of excessive force by law enforcement could escape review by the courts if the families of the victims have no means of seeking redress against the agents responsible. Furthermore, under the current model, all review of an agent's actions is conducted within the executive branch of government, demonstrating a potential lack of transparency and acting against principles of separation of powers. This is of course not to say that an officer may never use deadly force, but such an action should be subject to review by the courts. This issue raises the important questions of just how far the U.S. Constitution should extend extraterritorially and whether the ruling in *Boumediene v. Bush* now means that certain fundamental rights extend past U.S. borders. This would seem particularly relevant when the state action takes place within U.S. borders, yet the effects occur outside of U.S. sovereign territory.[21]

The purpose of this article is to discuss whether and how far constitutional protections should extend past U.S. borders, and whether it may be irrelevant if the state actor receives qualified immunity in line with *Bivens*.[22] A complete discussion must also review relevant international legal standards.[23] As globalization progresses, and borders become more amorphous, it is important to determine what rights may follow a person wherever she goes and equally important to discuss what limitations may exist on state action regardless of where that action happens.

Part I of this article discusses the evolution of U.S. case law on the issue of extraterritoriality of constitutional rights, beginning with a review of the *Insular Cases* and culminating with an analysis of *Boumediene* and the impact of that ruling on the application of constitutional rights extraterritorially and issues concerning separation of powers. Part II examines the issue of qualified immunity for the state actors in question and whether it is a bar to civil liability. Finally, Part III discusses pertinent international law and

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20. *Id.*

21. *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that the writ of habeas corpus extends to those being detained at Guantanamo Bay even where there is an absence of de jure sovereignty, as de facto sovereignty may be enough).

22. Bivens v. 6 Unknown Named Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

23. *See* U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

the responsibility of nations to honor their treaty obligations.

One of the issues raised by this case which will not be addressed is how far constitutional protections should extend past the border of the United States in the offensive action of unmanned aerial vehicles (UAV).[24] This is a separate issue, and if a functional approach is applied, the answer may be quite different in the circumstance of law enforcement along the border versus military or paramilitary action overseas.[25] Here the inquiry is limited to whether constitutional protections should extend a few feet past the border when the potentially tortious action occurred within the borders of the United States in a region where the United States, while lacking de jure sovereignty, may exercise de facto sovereignty.[26]

I. U.S. CASE LAW AND THE ISSUE OF EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION

The question of whether the Constitution extends past the borders of the United States is not a novel issue. At the beginning of the twentieth century, the U.S. Supreme Court faced the question of whether full constitutional rights extended to newly acquired territories in the *Insular Cases.* [27] The Court recognized that Congress had the power "to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States" itself.[28] However, the Court also observed that Congress's law-making power was not without limits.[29] If the Constitution limits Congress's legislative power in cases involving territorial government, it stands to reason executive power may also face limitations.[30] The Court

24. *See generally* Blake Stubbs, Note, *Technological Ubiquity and the Evolution of Fourth Amendment Rights*, 62 DRAKE L. REV. 575 (2014) (discussing the evolution of technology, such as unmanned aerial vehicles, and the Fourth Amendment implications).

25. *See Boumediene*, 553 U.S. at 726–46 (outlining the history of the practical considerations allowed by the Court).

26. *See id.* at 755–65 (determining habeas corpus rights extend to detainees if de facto sovereignty is present, even if de jure sovereignty is absent).

27. The *Insular Cases* discussed the constitutional rights and protections that might extend to the Philippines, Guam, and Puerto Rico after the United States acquired those territories following the end of the Spanish–American War. *See, e.g.*, Dorr v. United States, 195 U.S. 138, 149 (1904) (holding the U.S. Constitution does not require the enactment of the right to trial by jury in such territories).

28. *Dorr*, 195 U.S. at 142.

29. *Id.*; *see also* Balzac v. Porto Rico, 258 U.S. 298, 312 (1922) (identifying the most important issue in the *Insular Cases* as how limitations on legislative and executive power affect application of the Constitution in the territories).

30. *See Balzac*, 258 U.S. at 312 ("The Constitution . . . contains . . . limitations which . . . are

determined that these limitations are determined by the relationship of the territory to the United States.[31] However, the Court carefully elucidated that "fundamental" rights are still guaranteed, but that not every right within the Constitution rises to that level, particularly within a territory.[32] Thus, the Court reiterated that given the different culture and the fact that these island territories had been previously governed under a civil law system, the rights to indictment by a grand jury and a trial by jury may not rise to that fundamental level.[33] Of course, parties still had access to the courts and therefore to due process.[34] In the case at hand, that is precisely the right in dispute.[35]

In the *Insular Cases*, the Court recognized that the Constitution limited Congress's power in the territories.[36] The applicable provisions of the Constitution operated as a limitation on powers exercised within the territories.[37] Thus, "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines" or to Puerto Rico when the United States went there, but rather which "of its provisions were applicable by way of [a] limitation upon the exercise" of both legislative and executive power.[38] Certain fundamental and personal rights declared in the Constitution, which had from the very beginning enjoyed full application in these new territories, were now controlled by the United

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not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable . . . .").

31. *Dorr*, 195 U.S. at 142.

32. *Id.* at 144–45 (quoting Hawaii v. Mankichi, 190 U.S. 197, 217–18 (1903)).

33. *Id.* Under the civil law system, there is no right to a jury trial or right to an indictment by a grand jury. The Court reasoned that not all aspects of common law needed to be imposed upon these territories given that their own legal system allowed for adequate due process and for parties to appear before a court. *Id.* at 145–46.

34. *See id.* at 146 (describing how the Spanish civil law system adequately and effectively protects an accused criminal's rights and executes the criminal law in the Philippines).

35. *See* Hernandez v. United States, 757 F.3d 249, 267 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) ("The Appellants' claim implicates the substantive component of the Fifth Amendment's Due Process Clause.").

36. Downes v. Bidwell, 182 U.S. 244, 291 (1901) (White, J., concurring).

37. *See, e.g., id.* (discussing the existence of constitutional constraints on congressional acts and how they affect fundamental rights).

38. Balzac v. Porto Rico, 258 U.S. 298, 312 (1922). In *Balzac*, the defendant argued he was entitled to a trial by jury. The Court reiterated that certain fundamental rights, including that a person should not be denied the right to life, liberty, or property without due process, did extend to federal territories. However, a trial by jury was not necessarily required to satisfy due process requirements. *Id.* at 312–13.

States.[39] This necessarily included the notion that there must be adequate due process before a person was "deprived of life, liberty, or property."[40] Furthermore, even when examining the "plenary and exclusive power of the President" in the field of foreign relations, that power is subordinate to the applicable provisions in the Constitution.[41]

It was understood at the time that the United States was not going to control the Philippines indefinitely.[42] However, there was the clear understanding that the government could only act there in accordance with the Constitution.[43] This was not to say that every constitutional right would extend to those individuals present in the territories, particularly in light of the differences in culture and legal systems. The cases do recognize that certain fundamental rights must extend as an effective limit on legislative and executive power, even where that power is exercised thousands of miles from the United States.[44] To do otherwise is to create a place where the political branches of government may act without legal constraint.[45] This is particularly relevant to the case at hand concerning incidents of violence along the U.S.–Mexico border. When a member of the executive branch—here a Border Patrol agent—stands on the U.S. side of the border and causes harm or even death to someone standing merely a few feet away on the other side of the border, it seems logical that the Constitution would govern that agent's actions. In light of the *Insular Cases*, it seems appropriate that the Constitution could travel the necessary few feet to grant at least certain fundamental protections, such as due process, just as it traveled thousands of miles to provide those

39. *Id.*

40. *Id.* at 313.

41. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). Though not part of the *Insular Cases*, *Curtiss-Wright* is still a somewhat contemporaneous view of Constitutional limitations on governmental power. In particular, the Court discussed the fact that the foreign relations power lies exclusively with the President, and yet, like every other governmental power, it has limits imposed on it by the Constitution. *Id.* at 320.

42. Dorr v. United States, 195 U.S. 138, 143–44 (1904) ("The legislation upon the subject shows that . . . Congress [has] refrained from incorporating the Philippines into the United States . . . .").

43. *See id.* at 143 (stating laws governing the territories passed by Congress are subject to applicable constitutional restrictions).

44. *See, e.g.*, *id.* at 149 (holding the powers and protections of the Constitution apply in the Philippines).

45. *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008) (asserting that Constitutional protections, specifically the writ of habeas corpus, should not necessarily stop where de jure sovereignty stops).

fundamental protections at the time of the *Insular Cases*.[46]

The Court had occasion again to address the issue of just how far the Constitution extends in *Reid v. Covert*.[47] There, the Supreme Court acknowledged "that when the United States acts against [its own] citizens abroad it [cannot] do so free of the Bill of Rights."[48] The government may "only act in accordance with all the limitations imposed by the Constitution."[49] While *Reid* discusses the issue of rights of U.S. citizens on foreign soil, it seems a logical extension of that premise that members of the executive branch of the government should not be able to act while on U.S. soil against someone who is a non-citizen, across an international border, in a way that violates the Constitution.[50] Further, while a difference between *Reid* and the *Insular Cases* is that the territories in question had completely different traditions and, thus, not all rights extended there, where the traditions and institutions are the same, this should present less of an issue in extending constitutional protections.[51] Thus, in this circumstance, where the plaintiff is willing to come to the United States to seek redress, there should be fewer obstacles to extending at least basic fundamental rights such as due process.[52]

> The concept that the Bill of Rights and other constitutional protections against arbitrary government [actions] 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.[53]

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46. *See* Hernandez v. United States, 757 F.3d 249, 269 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) ("Border Patrol agents exercise their official duties within feet of where the alleged constitutional violation occurred. In fact, agents act on or occasionally even across the border they protect.").

47. *See* Reid v. Covert, 354 U.S. 1 (1957). The case involved the prosecution of two women for the murder of their husbands, active military members who were present on U.S. military bases in England and Japan; the defendants were tried before a military court, convicted and sentenced to death. The women, who were U.S. citizens, argued that they were entitled to a trial by jury. *Id.* at 3–5.

48. *Id.* at 5–6.

49. *Id.*

50. *Hernandez*, 757 F.3d at 262, 271 (using *Reid* in the court's analysis to determine that constitutional protections can be applied if they meet the functional test in *Boumediene*).

51. *See Reid*, 354 U.S. at 14 (implying that a right to trial by jury in the case was anchored in the fact that the defendants were United States citizens on a United States military base).

52. *See* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (noting that the parents of the victim traveled to the United States to pursue legal action).

53. *Reid*, 354 U.S. at 14.

In this case, a failure to extend at least certain constitutional protections where a Border Patrol agent on U.S. soil shoots and kills a person standing on the Mexican side of the border is asking for it to become a virtual "open season" at the U.S. border where agents may act with impunity so long as the victim dies on the other side of the border. At the very least, that agent's actions should be reviewable by a U.S. court, not just by the same administrative agency that employs the agent. Further, the family is willing to accept the inconvenience of coming to the United States to seek redress.[54] Indeed, the United States completely controls whether the family can obtain due process for their son in either Mexican or U.S. courts.[55] Even the *Insular Cases* recognized that fundamental, constitutional norms should be applied everywhere.[56]

One of the obstacles the *Reid* Court had to overcome was the case law that stated the U.S. Constitution can have no operation in another country.[57] However, the Court in *Reid* made it clear that this case is a "relic from a different era" and that it should be left in that different era.[58] The Court understood that this was no longer an acceptable interpretation of how far constitutional protections should extend beyond the borders of the United States.[59]

Justice Frankfurter concurred with the decision in *Reid* and felt that a more functional approach in determining where and how far the Constitution should extend was appropriate.[60] Justice Frankfurter believed that the territorial or *Insular Cases* required examining "the specific circumstances of each particular case" to harmonize different constitutional provisions.[61] Thus, in some circumstances and because of different cultural or legal traditions, certain constitutional protections were

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54. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

55. *Id.*

56. *Reid*, 354 U.S. at 13.

57. *See In re* Ross, 140 U.S. 453, 464 (1891) ("The [C]onstitution can have no operation in another country."). *Ross* dealt with the use of a consular court, where there was no jury trial, to try an American abroad for various offenses. The case involved a seaman on a ship in Japanese waters who killed a ship's officer. *Id.* at 454.

58. *Reid*, 354 U.S. at 12.

59. *Id.*

60. *See id.* at 54 (Frankfurter, J., concurring) (observing a need to consider the specific circumstances in each case to determine Constitutional limits on government power).

61. *Id.*

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not always feasible or just.[62] Of course, even absent a jury trial, access to the courts was always understood to exist, which is the central issue in the current case. In addition, a functional approach—one that Justice Kennedy adopted in *Boumediene v. Bush*—allows the Court to ensure that there is some justice.[63] For example, if a party has another court available to them that would be more appropriate, that would be a reason to deny access to certain constitutional protections, thus protecting the courts in the United States from becoming an open forum where anyone with a complaint can claim constitutional protections.[64]

Justice Harlan also concurred in the *Reid* decision, stating that the *Insular Cases* demonstrate "that there is no rigid and abstract rule" concerning the exercise of constitutional guarantees.[65] Rather, one must look to whether such application would be "impracticable" or "anomalous."[66] He added that the *Insular Cases* held that the setting, practical considerations, and possible alternatives are part of the calculus to determine just how far the Constitution extends.[67] Rather, the question is which constitutional guarantees should apply in view of the particular circumstances, "the practical necessities and the possible alternatives."[68] Applying that approach in the case concerning the shootings along the U.S. border seems to indicate that allowing the family to bring an action in a United States court is appropriate given the circumstances—the actual tort occurred on United States soil when the gun was fired, the only party truly inconvenienced by having to come to the United States is the family, and there are no possible alternatives since a Mexican court has no jurisdiction over the agent unless the agent goes to Mexico, which seems unlikely.

Johnson v. Eisentrager[69] has been argued as distinguishing the rules set out

62. *See id.* at 52 (quoting Dorr v. United States, 195 U.S. 138, 148 (1904)) (hypothesizing that applying the right to trial by jury in some circumstances could promote injustice, and counter the administration of justice).

63. *See* Hernandez v. United States, 757 F.3d 249, 271–72 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) (holding that the Fifth Amendment should be applied to the border shooting because of the functional language in *Boumediene*).

64. *See* Boumediene v. Bush, 553 U.S. 723, 759 (2008) (citing Justice Frankfurter's concurrence in *Reid* as a basis for why a functional approach is appropriate).

65. *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring).

66. *Id.*

67. *Id.*

68. *Id.* at 75.

69. Johnson v. Eisentrager, 339 U.S. 763 (1950).

in the *Insular Cases* and *Reid*.[70] There, the Court held that the petitioners, who were enemy aliens, were not entitled to access to the writ of habeas corpus because they had been captured, held, and tried outside of the United States where there was a lack of territorial jurisdiction.[71] That is the same argument that Agent Mesa made in *Hernandez*, where essentially all of the actions occurred outside the United States to a non-U.S. citizen, and hence no constitutional protections are owed.[72] However, Justice Kennedy's opinion in *Boumediene* distinguishes this case from *Eisentrager* in that the petitioners in *Eisentrager* had access to due process—something that is lacking in the current situation, as the district court ruled that the parties cannot even come to court.[73] This is precisely why a functional approach that considers various relevant factors is more appropriate when making these types of determinations than a bright-line rule that may in fact deny a party any avenue of redress.[74]

It is also important to note that the Supreme Court has said that the Fifth Amendment protects aliens, even those who are present in the United States unlawfully, unwillingly, or in a transitory capacity from being deprived "of life, liberty or property without due process of law."[75] Therefore, it seems a natural, logical extension of this principle would be that when the tort is committed by a member of the executive branch of government on U.S. soil, in this case a Border Patrol agent, the alien so harmed should be permitted to seek redress in a U.S. court, particularly when the right in question is life.[76] It is also generally understood that distinctions can be made amongst the various groups, but at a minimum

70. *See id.* at 776–77 (1950) (discussing whether an alien held and tried outside of the United States had access to the writ of habeas corpus).

71. *Id.* at 768.

72. Hernandez v. United States, 757 F.3d 249, 279 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014).

73. Boumediene v. Bush, 553 U.S. 723, 767 (2008) (noting the parties in *Eisentrager* were charged with a Bill of Particulars and enjoyed an adversarial process where they were permitted to introduce evidence, cross-examine witnesses, and be represented by counsel); *see also* Rasul v. Bush, 542 U.S. 466, 476 (2004) (distinguishing petitioners in *Rasul* from *Eisentrager* detainees in that petitioners were not afforded access to a tribunal), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

74. *See* Reid v. Covert, 354 U.S. 1, 54 (1957) (Frankfurter, J., concurring) (advocating for a fact-intensive analysis to determine the applicability of due process requirements in cases involving U.S. action on foreign soil).

75. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

76. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

they all receive the right to due process.[77] This distinction, then, could also be a means of limiting who would have access to a U.S. court in this type of circumstance where the connection with the United States is perhaps too attenuated.[78]

Presence within the United States is not inevitably required in order for certain constitutional rights to still extend to an individual. Specifically, in the context of a foreign prisoner, their "presence within the territorial jurisdiction" of a federal district court is not "an invariable prerequisite."[79] The Supreme Court has held that the writ of habeas corpus acts upon the jailer, not the prisoner.[80] However, the jailer must be available for service of process.[81] This of course makes sense when one considers that the purpose of the writ is to hold the jailer to account as to whether the detention is lawful or not.[82] It seems that if a state actor is to be held accountable for the erroneous deprivation of liberty, the same state actor would be held responsible for the potentially erroneous deprivation of life.[83] In this case, the only way for the family to obtain due process and hold the Border Patrol agent to account is to come to the United States where all other parties are present and where a United States court has jurisdiction.[84]

The Supreme Court reaffirmed the idea that being within sovereign territory is not an "invariable prerequisite" in their ruling in *Boumediene*.[85] The Court made it clear that de jure sovereignty over the territory would

77. *Mathews*, 426 U.S. at 78–80.

78. *See id.* (declaring that all persons are entitled to due process while noting a distinction between the rights afforded citizens and those afforded aliens whose ties with the United States can vary).

79. Rasul v. Bush, 542 U.S. 466, 478 (2004) (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2739.

80. *See id.* ("[T]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–495 (1973))).

81. *Id.* at 478–79 (2004).

82. Boumediene v. Bush, 553 U.S. 723, 745 (2008).

83. U.S. CONST. amend. V.

84. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen; *see also* United States v. McLemore, 45 U.S. 286, 288 (1846) (establishing the United States may not be sued without its consent).

85. *See Boumediene*, 553 U.S. at 754–55 (refusing to accept the premise that a criterion of habeas corpus jurisdiction is de jure sovereignty); Rasul v. Bush, 542 U.S. 466, 478 (2004) (using the "invariable prerequisite" language), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2739.

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not always be required as de facto sovereignty could also be sufficient.[86] The Court stated that it was not "uncommon for a territory to be under the de jure sovereignty of one nation, and under the plenary control or practical sovereignty of another," thus creating de facto sovereignty.[87] In the border context, the United States exercises certain police powers in the immediate area of the border between the United States and Mexico, and thus while the United States certainly does not have de jure sovereignty over the territory that is within Mexico, it seems that de facto sovereignty may exist.[88] Hence, extending other constitutional protections, such as due process, may be appropriate under a functionalist approach.[89]

Justice Kennedy interprets the *Insular Cases* and *Reid* to both take a functionalist approach in determining just how far the Constitution will stretch.[90] Justice Kennedy points out that "[t]he 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."[91] The powers of the United States are not absolute or unlimited, but subject instead "to such restrictions as are expressed in the Constitution."[92] Further, to allow the political branches of government to "have the power to switch the Constitution on or off at will" would destroy the principle of separation of powers, leading Congress and the President to say what is permissible under the Constitution rather than the courts.[93] One factor, such as the lack of de jure sovereignty, is not enough to determine whether constitutional protections exist, particularly when that one factor may allow Congress or the President to sidestep important limitations on their powers and create a situation where the government acts without legal constraint.[94] Hence, executive action, particularly on U.S. soil, should be subject to those limitations as they appear in the Constitution.

In articulating his functionalist approach, Justice Kennedy looks to three factors: first, the status and citizenship of the detainee and the sufficiency

86. *Boumediene*, 553 U.S. at 754–55.

87. *Id.*

88. *See* Hernandez v. United States, 757 F.3d 249, 270 (5th Cir. 2014) (rejecting the existence of de facto sovereignty, but suggesting the situation at the border lends itself to the idea of constitutional reach), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014).

89. 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, 244–45 (2014).

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

91. *Id.* at 765.

92. *Id.* (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

93. *Id.*

94. *Id.*

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of process in making that determination; second, the nature of the location where apprehension and detention took place; and third, practical obstacles inherent in determining a "prisoner's entitlement to the writ."[95] Applying this approach to the case at hand, the aggrieved party is a citizen of Mexico, but thus far has not had adequate due process in that they may not even appear before a U.S. court.[96] The action took place both on the United States side of the border and in Mexico, though the sole action to occur in Mexico was the death of the boy.[97] Under Conflict of Laws principles, "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[98] While one important factor to consider in this analysis is "the place where the injury occurred," this is not the sole factor.[99] Other important factors include "the place where the conduct causing the injury occurred," and "the place where the relationship, if any, between the parties is centered."[100] Hence, it would seem that the second prong of Justice Kennedy's test seems to favor the position that the Constitution should apply in this instance as a limitation on the agent's actions and as a means for the family to gain redress. The majority of the actions occurred on the U.S. side of the border, with the boy's death being the only meaningful event that happened in Mexico.[101] Furthermore, in order to obtain jurisdiction over all of the parties, and thus why the relationship is centered within the United States, the family must go before a U.S. court.[102] Finally, in looking at the practical considerations, since the family is willing to come to the United States and the United States has

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95. *Id.* at 766.

96. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

97. Hernandez v. United States, 757 F.3d 249, 255 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014); Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

98. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145(1) (1971).

99. *Id.* § 145.

100. *Id.* § 145(2).

101. *Hernandez*, 757 F.3d at 254; *see also* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (recounting a U.S. Department of Justice report indicating that Hernández Güereca was shot in Mexico).

102. *Hernandez*, 757 F.3d at 254–55 (5th Cir. 2014).

been able to adequately investigate the nature of the shooting,[103] there does not seem to be a practical obstacle that would prevent an extension of the constitutional protection against being deprived of life at the hands of the state without adequate due process.

To not require adequate due process is to essentially declare a no-man's zone at the border where so long as the individual has crossed into Mexico or has indeed never even crossed into the United States, a government actor may shoot that individual with no real review of the circumstances by an Article III court.[104] Justice Kennedy's functionalist approach allows for courts to determine that only the most fundamental rights should apply extraterritorially in line with the *Insular Cases*.[105] Thus, it would not open up the U.S. court system to spurious or trivial claims, but would allow for a protection of important fundamental rights even beyond the borders of the United States.

Justice Kennedy first articulated this functionalist approach in his concurrence in *United States v. Verdugo-Urquidez*.[106] There the Court held that absent certain "voluntary connections," an alien was not entitled to Fourth Amendment protections when the search took place outside of the United States, even though the individual was now detained and awaiting trial within the United States.[107] The Court focused on the fact that the

103. *See* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (reporting on a U.S. Department of Justice investigation and meeting with the Hernandez family).

104. *See id.* ("[T]he Justice Department's decision create[s] a dangerous precedent for cases of transnational aggression involving U.S. law enforcement officers."). Although there was a review conducted by the Department of Homeland Security and the Department of Justice, that does not necessarily constitute adequate due process in that it is the executive branch reviewing its own conduct. This was precisely why the Supreme Court finally allowed for a writ of habeas corpus to be filed by those detained at Guantanamo Bay Detention Camp in order to respect the principle of separation of powers. *See* Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").

105. Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 273 (2009) (noting Justice Kennedy analogized to the *Insular Cases* to justify extending the writ of habeas corpus outside of the United States); *see also* Jules Lobel, Essay, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1649 (2013) ("[T]he Court [in *Boumediene*] pointedly relied on both individual rights and separating of powers, noting that habeas corpus is 'a right of first importance' and 'an essential mechanism in the separation-of-powers scheme.'" (quoting Boumediene v. Bush, 553 U.S. 723, 743 (2008))).

106. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (analogizing to the *Insular Cases* to analyze the Fourth Amendments reach to a search conducted by U.S. agents in Mexico).

107. *Id.* at 274.

Fourth Amendment protects the *people* from unreasonable search and seizure.[108] Of course, the Fifth Amendment has no such limitation, and in *Verdugo-Urquidez*, all actions occurred outside of the United States.[109] It would seem then that in some ways, *Boumediene* acts to limit the ruling in *Verdugo-Urquidez*, where neither voluntary connections nor de jure sovereignty can be an end to the inquiry on how far at least certain constitutional protections should extend.[110] It seems that if a person is in U.S. custody, seized by law enforcement or otherwise, that person is entitled to certain rights.[111] This is at least in part because a doctrine where a foreigner may be abducted and then denied all constitutional protection because of a lack of those voluntary connections seems absurd and perverse.[112]

Indeed, an equally perverse situation occurs when a Border Patrol agent can shoot a minor and the family lacks the ability to hold the agent accountable for his actions, which may or may not have been justified, in an Article III court. Federal courts, particularly the D.C. Circuit, have rejected this idea as to whether or not U.S. officials may torture foreign

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108. *Id.* at 266 (noting that Justice Rehnquist stated that the Fourth Amendment applies to the people of the United States, and that they should be free from unreasonable search and seizure by their government); *see also* U.S. CONST. amend. IV (granting the right to be secure from unreasonable searches and seizures).

109. *Verdugo-Urquidez*, 494 U.S. at 269 ("Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."). In this instance, the search took place in Mexico and was authorized by the Director General of the Mexican Federal Judicial Police. *Id.* at 262.

110. *See* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 870 (2013) ("[I]n *Boumediene* it was an 'uncontested fact that the United States, by virtue of its complete jurisdiction and control over the [Guantanamo Bay] base, maintain[ed] de-facto sovereignty' over it. Justice Kennedy also reasoned that the Court's prior decisions 'undermine[d]' any 'argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.'" (quoting Boumediene v. Bush, 553 U.S. 723, 755 (2008))); Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 272 (2009) (recognizing that *Boumediene*'s holding is inconsistent with the "voluntary connection" rationale of *Verdugo-Urquidez*).

111. *See* 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, 249 (2014) ("If the Court was willing to grant constitutional protections to alleged enemies of the state, surely it would consider extending rights to noncitizens outside U.S. custody who are far from a battlefield and unlikely enemies."); Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 286 (2009) (opining on the entitlement of non-citizens being detained in the United States to certain fundamental rights).

112. *See* Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 272 (2009) ("Abducting an innocent foreigner and then denying him all constitutional protection precisely because he was abducted is too perverse a doctrine to maintain in the modern era.").

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nationals abroad.[113] Again, this is because it is absurd and also dangerous to assume that the Constitution either stops at the border or that the victim must always have some sort of voluntary connection with the United States in order to obtain at least certain, fundamental, constitutional protections. It also seems logical where members of the executive branch may not torture individuals abroad, surely they should not be able to arbitrarily kill individuals abroad either.

In point of fact, the current administration has even articulated the minimum amount of due process required when targeting a U.S. citizen with an attack by a UAV outside of U.S. territory.[114] Such an attack is lawful and comports with due process when the following elements are met: "[f]irst, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles."[115] Hence, there is an acknowledgment that even terrorists are entitled to some due process, though these requirements focus on the situation where the target is a U.S. citizen. Nevertheless, it seems perverse that a terrorist and enemy of the state is entitled to due process from half a world away and yet a minor shot a few feet from the border by a U.S. Border Patrol agent is not. What is more, it is not about the guilt or innocence of the agent at this point, but rather adequate due process for the family to seek redress and for the agent to plead his case.

One further issue to consider is the need to maintain appropriate separation of powers among the three branches of government. The Constitution seeks to divide the powers of the federal government to ensure that each branch may exercise their own powers and nothing

113. *See id.* ("Some lower courts, and the D.C. Circuit in particular, have demonstrated by their actions the unacceptable consequences of this proposition, including the notion that the Constitution generally permits U.S. agents to torture foreign nationals abroad."); *see also* Harbury v. Deutch, 233 F.3d 596, 603-04 (D.C. Cir. 2000) ("In fact, the Second Circuit, treating the torture and abduction as part of the pre-trial process, focused on the fact that allowing the government to seize and torture defendants before bringing them to trial would threaten the integrity of the United States judicial process."), *rev'd on other grounds sub nom.* Christopher v. Harbury, 536 U.S. 403 (2002), *vacated*, No. 99-5307, 2002 WL 1905342 (D.C. Cir. 2002).

114. *See* Eric Holder, Att'y Gen., National Security Speech at Northwestern University School of Law (Mar. 5, 2012) (transcript available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law) (outlining the appropriate amount of due process, in the Executive's view, that should be accorded to those whom the administration seeks to use drones against when the target is a U.S. citizen).

115. *See id.* (describing the circumstances under which an operation using lethal force in a foreign country, targeted against a U.S. citizen would be lawful).

more.[116] In order to preserve the checks that prevent abuses of power, the carefully defined limits of each branch of government must not be eroded.[117] Justice Kennedy echoes this sentiment when he discusses the fact that the political branches of government must not be allowed to govern unfettered by the restrictions upon them that the Constitution imposes.[118] Judicial review is a necessary check on executive authority in both the administrative context and in cases that deal with physical access to the courts.[119] Such judicial review "does not imply a lack of respect for a coordinate branch" of government, but rather ensures that the checks that are in place within the Constitution are enforced.[120] Essentially, executive action should be reviewable by an Article III court in order to maintain adequate checks and to ensure that there is no abuse of power.[121] Here, review of the shooting was conducted by the agency, meaning that the executive branch made all of the determinations.[122] A lack of access to the courts in this type of situation will allow for the destruction of separation of powers principles within the Constitution, and will ultimately lead to the potential for a further abuse of power.

Thus, the idea that the Constitution should, at least in some circumstances, extend its protections extraterritorially is not a new concept to U.S. law.[123] However, those extensions must be applied judiciously to where perhaps only the most fundamental rights should extend past the

116. *See e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983) (rejecting the idea of a legislative veto and reaffirming the necessity of both bicameral passage of an act and presentment for signature of that act to the President).

117. *Id.* at 957 ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress'[s] power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps.").

118. *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008) ("Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.").

119. *See* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2145 (2009) (emphasizing the importance of judicial review as a necessary check on decisions that would otherwise be unreviewable).

120. Goldwater v. Carter, 444 U.S. 996, 1001 (1979).

121. *See* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2145 (2009) (arguing that executive action should be reviewable by an Article III court to maintain separation of powers).

122. Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen.

123. *See* Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1631 (2013) (acknowledging the ongoing debate in the court system about the applicability of constitutional rights to noncitizens outside of the United States).

borders of the United States. A functionalist approach, where the court may weigh various factors, permits a limit on the types of cases that may properly be brought before a court in the United States, but also provides meaningful redress when one of those fundamental rights is breached.[124] Perhaps even more importantly, executive power should not be allowed to run amok with no limitation and no accountability simply because some of the actions may have taken place outside of the territory of the United States. Hence, in this instance the family should have the power to bring the matter of the death of their son to a U.S. court, and have the agent held accountable, particularly when all of the actions occurred within the United States save the death of the boy.

II. QUALIFIED IMMUNITY

The *Hernandez* case is not limited to an inquiry of whether or not the Constitution should extend extraterritorially, but also questions whether or not the agent in question enjoys "qualified immunity" pursuant to *Bivens*.[125] Immunity can be granted based upon the principle that the Federal Government enjoys immunity for its actions.[126] Qualified immunity is designed to "protect government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[127] The purpose of qualified immunity is to prevent illusory claims against officials.[128] However, "[w]henever a federal officer or agent exceeds his authority, in so doing he [or she] no longer represents the [g]overnment and hence loses the protection of sovereign immunity from suit."[129] Generally, there is no reason for a party injured by a U.S. government agent to be precluded from recovering monetary damages when that agent has violated that party's constitutional right.[130]

124. *See* 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, 237 (2014) (discussing the factors the *Boumediene* court applied in its analysis).

125. Bivens v. 6 Unknown Named Agents of Fed. Bureau of Narcotics, 276 F. Supp. 12, 14 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1971).

126. *Id.*

127. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

128. *Id.*

129. *Bivens*, 276 F. Supp. at 15.

130. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that monetary damages may be awarded for injuries caused by an agent's violation of one's constitutional rights); *see also* Davis v. Passman, 442 U.S. 228, 247 (1979) (agreeing

Qualified immunity would be overcome if the government "official 'knew or reasonably should have known that the action [they] took within [the] sphere of [their] official responsibility would violate the constitutional rights of the [individual], or if [the agent] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.'"[131] The analysis that the Court may use focuses on two issues: first, whether "the facts alleged show the officer's conduct violate[s] a constitutional right"; and second, whether "the right was clearly established."[132] Following the order of the inquiry is not required, but the Supreme Court has said that it is beneficial to do so.[133] In this instance, a reasonable person would understand that taking a life, particularly in an official capacity as a state actor, would potentially violate the Fifth Amendment's prohibition on doing so absent adequate due process. Second, there must be a clearly established constitutional right at stake in a *Bivens* action, not just that a principle of law has been violated.[134] This idea has been used to limit when a party may recover for actions that violate a constitutional right, for example the potential mistreatment of Iraqi and Afghani plaintiffs while detained in U.S. custody.[135] There is no express right in the Constitution to be free from harsh treatment. However, in those instances the issues involved military actions, something that is perhaps better left to be governed by the law of war rather than domestic law.[136] This perhaps highlights the difference between military action versus the police action in this instance. In

with the reasoning in *Bivens* and finding that monetary damages may be awarded for an agent's violation of the Fifth Amendment).

131. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *see also* Wood v. Strickland, 420 U.S. 308, 322 (1975) (acknowledging qualified immunity for board member's actions, which he should have known would deprive the student of constitutional rights).

132. Saucier v. Katz, 533 U.S. 194, 201 (2001).

133. Pearson v. Callahan, 555 U.S. 223, 236 (2009). *Pearson* acts to modify *Katz*, where previously a court examining this issue would have to look at the first issue concerning whether or not the facts alleged show a violation of a constitutional right. However, after *Pearson*, following the exact order of the protocol is no longer mandatory, but may still be beneficial.

134. Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 80 (2011).

135. *See id.* at 79–80 (discussing how a *Bivens* remedy has previously not been extended to Iraqi and Afghani plaintiffs); *see also In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85, 95 (D.D.C. 2007) ("No matter how appealing it might be to infer a *Bivens* remedy . . . the reality is that several controlling cases compel the inescapable conclusion that the [Iraqi and Afghani] plaintiffs . . . are not entitled to such a cause of action because the Fifth and Eighth Amendments do not apply to them."), *aff'd sub nom.* Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011).

136. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 794 (1950) (denying habeas petitions because the petitioners were convicted in a military tribunal for war crimes).

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contrast, the right to not be deprived of life without adequate due process is clearly established and in fact reiterated in the Fourteenth Amendment as a limit not just on Federal governmental action pursuant to the Fifth Amendment, but upon state action as well.[137] Therefore, it would be reasonable for the agent to know that in taking a life, that action would be subject to review to ensure that the action was not arbitrary or without legal justification.[138] While self-defense may be viable in this situation, that is a matter to be argued at trial, not something that should excuse the review of those actions because of immunity.[139]

One other issue that must be addressed is whether or not this is truly an issue concerning the Fourth Amendment. Generally speaking, any claim that involves excessive force by law enforcement should be examined in light of the Fourth Amendment when such action occurs pursuant to "arrest, investigatory stop, or other 'seizure' of a free citizen."[140] Hence, this would be a means of arguing that under *Verdugo-Urquidez*, there can be no violation of the minor's Fourth Amendment right because Hernandez lacked voluntary connections with the United States and his death occurred in Mexico.[141] However, generally speaking a state's police authority ends at the border, meaning that the Border Patrol agent lacked jurisdiction to conduct an arrest, other seizure, or investigatory stop absent consent from Mexico.[142] That consent would seem to be lacking here as the Mexican government wishes to hold the agent accountable for his actions.[143]

137. U.S. CONST. amend. XIV, § 1.

138. *See* Hernandez v. United States, 757 F.3d 249, 279 (5th Cir. 2014), *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) ("This is not a reasonable misapprehension of the law entitled to immunity."); *see also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (establishing prior case with fundamentally similar facts is not required to determine a clearly established constitutional right).

139. *See Hernandez*, 757 F.3d at 279–80 (holding against the agent's claim of qualified immunity).

140. Graham v. Connor, 490 U.S. 386, 395 (1989).

141. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 260 (1990) (refusing to extend constitutional rights to an alien because the alien lacked prior significant voluntary connections with the United States).

142. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.").

143. *See* Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 2–3, Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (No. 12-50217), 2012 WL 3066823 (challenging the United States' position that the Border Patrol agent did not violate any constitutional rights); Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/

The U.S. government may not "have its cake and eat it too." Either the action was a valid police action in terms of an investigatory stop because the United States was exercising de facto sovereignty at the border, and thus the Constitution should apply there, obviating the need for "voluntary connections" since the action essentially occurred in a part of U.S. territory where the United States merely lacks de jure sovereignty; or it was not a seizure because there was no power to arrest, seize or stop the individual, and thus it becomes a question of not depriving an individual of life absent adequate due process.[144] In either instance, the matter should be justiciable before a U.S. federal court. Either this is a question of excessive force, and thus may be brought before the Court in terms of a violation of the Fourth Amendment where the officer would have known that such excessive force may violate that constitutional right, or it was a deprivation of life without due process under the Fifth Amendment, and again the officer should have known that such an act would violate that constitutional right.[145] In either event, both potential rights at issue are clearly established, and the officer should have been aware of that. Hence, qualified immunity should not apply here.[146]

III. DUE PROCESS AT INTERNATIONAL LAW

The concept of fundamental rights is hardly new. Thomas Jefferson wrote in the Declaration of Independence that "all men are created equal . . . [and] endowed by their Creator with certain unalienable Rights, [and] among these are [the right to] Life, Liberty and the pursuit of Happiness."[147] By "unalienable," Jefferson meant that such rights were inherent in man and could not be taken. This concept was later enshrined

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ci_20770760/us-officials-set-visit-parents-slain-teen ("[T]he Mexican government sent a diplomatic note to its American counterpart protesting the decision.").

144. *See Hernandez*, 757 F.3d at 280–81 (Dennis, J., concurring) (arguing that both the Fourth and Fifth Amendments can apply to a non-citizen). Justice Dennis agreed with the court to apply the Fifth Amendment exclusively, but addressed concerns with the practical problems of the extraterritorial application of the Fourth Amendment, while arguing that *Boumediene* and *Verdugo* could not be squared. *Id.* at 281.

145. *See id.* at 279 (majority opinion) ("[Q]ualified immunity does not shield conduct that is known to be unlawful merely because it is unclear that such unlawful conduct can be challenged.").

146. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (describing the objective requirement of qualified immunity, which presumes that officers know basic fundamental constitutional rights); *see also* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (promulgating a process for determining when a law enforcement officer should be aware of a constitutional right that diminishes qualified immunity); Saucier v. Katz, 533 U.S. 194, 201 (2001) (addressing the sequence for determining a constitutional right and establishing when law enforcement should know qualified immunity is not applicable).

147. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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within the Bill of Rights that no one shall "be deprived of life, liberty, or property, without due process of law."[148] The purpose of the Bill of Rights was and is to ensure limits and prevent abuse of power on behalf of the federal government.[149] That protection against abuse of power in the form of adequate due process was later enforced against the individual states.[150]

However, this concept has gone beyond the U.S. Constitution and has become an important, widely accepted norm at international law. The Universal Declaration of Human Rights specifically states that "[e]veryone has the right to life, liberty and the security of person."[151] It also provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts [that] violat[e] the fundamental rights [that are] granted [to a person either] by the [C]onstitution or by law."[152] While this document is a General Assembly Resolution, and therefore not formally binding, it provided the groundwork for treaties that would become binding.

The International Covenant on Civil and Political Rights (ICCPR) provides under Article 6 that "[e]very human being has the inherent right to life . . . [and] [n]o one shall be arbitrarily deprived of [that] life."[153] In addition, under Article 2, every state under the covenant is required to provide "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" provided that the right is one protected by the treaty.[154] Essentially, even where the wrong was committed by a state actor, a party should be able to gain an effective remedy to address that action so long as the right violated is recognized within the treaty. Since the right to life is expressly protected and may not be taken in an arbitrary fashion, if such a taking occurred, an effective remedy is available through the judicial, legislative or administrative authorities.[155] The ICCPR also encourages the development of a judicial remedy to these issues, indicating that this is the preferred method for

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148. U.S. CONST. amend. V.

149. *Id.* Bill of Rights pmbl.

150. *Id.* amend. XIV, § 1.

151. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 3 (Dec. 10, 1948).

152. *Id.* art. 8.

153. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

154. *Id.* art. 2, ¶ 3(a).

155. *Id.* art. 2, ¶ 3(b).

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resolving these types of issues.[156]

This is particularly relevant to the case at hand. The United States has signed and ratified the ICCPR.[157] Therefore, pursuant to Article VI of the Constitution, this treaty is now "the supreme Law of the Land."[158] Thus, the United States is obligated under international law to provide an "effective remedy" for the violation of the right to life, which in this case would be adequate review through the domestic court system.[159] The United Nations High Commissioner, in an amicus brief for *Boumediene*, urged that human rights obligations under the ICCPR should apply not only in a state's sovereign territory, but also territory under the state's effective control and individuals within a state's effective control regardless of location.[160] This mirrors the situation at hand. The United States was exercising effective control of territory that is not technically its sovereign territory. However, with effective control comes the need for the United States to abide by its international treaty obligations.[161] Or, at the very least, the individuals in question were under the United States' effective control, and the location does not matter in that a Border Patrol agent attempted to detain an individual standing on the Mexican side of the border—thus international law dictates that the ICCPR should apply.[162] Either way, under international law, the United States should provide an "effective remedy" to determine whether the agent's actions were lawful, and ideally that should be done before a court of law as opposed to an

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156. *Id.* Although the Article provides for an administrative remedy, we would argue that the type of remedy preferred is judicial as it is the first option mentioned, and there is also emphasis added that developing these judicial remedies is a goal.

157. *Id.*

158. U.S. CONST. art. VI, cl. 2.

159. ICCPR, *supra* note 153, art. 2(a).

160. *See* Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners at 14, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195, 06-1196), 2007 WL 2441586 ("The United States' obligations under the Covenant extend to '*all* individuals within its territory and subject to its jurisdiction . . . *without distinction of any kind* . . .'" (emphasis added) (quoting ICCPR, *supra* note 153, art. 2, ¶ 1)).

161. *Id.* at 5.

162. *See* Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 7, Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (No. 12-50217), 2012 WL 3066823 ("It is well established that a nation's human rights obligations are not limited to its borders but apply whenever it exercises power or effective control over a person."); Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (expanding on what the Border Patrol agent's actions were and why the ICCPR should apply).

administrative agency.[163] This move to enforce due process is in light of the understanding that "[p]rinciples of due process are of the utmost importance because they are fundamental to the protection of [basic] human rights."[164] The purpose of due process is to protect people from the abuses of state power.[165] That would seem to include instances when that state power is not necessarily exercised within its own sovereign territory or when the state is exercising effective control of an individual.[166]

This idea of providing for due process as a requirement at international law is a concept that has been widely adopted.[167] The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), formulated by the Council of Europe, provides that the right to life is protected at law and that no one should be deprived of that right intentionally save as part of a punishment for a crime.[168] Furthermore, the ECHR states that everyone whose freedoms and rights are "violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[169] In perhaps an even more progressive approach, the Treaty also acts as a waiver to sovereign immunity, meaning members may not use sovereign immunity as a shield from liability where the violation of

163. *See* ICCPR, *supra* note 153, art. 2. ¶ 3(a)-(b) (establishing that an effective remedy is a right ensured by the covenant under international law).

164. Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L L. 673, 732 (2011); *see also* RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS 550 (2d ed. 2009) (contending that the protection of human rights begins with fair trial rights).

165. *See* Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 GEO. J. INT'L L. 673, 732 (2011) ("In fact it has been said . . . that 'the protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for 'substantive protection' against state power.'" (quoting RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS 550 (2d ed. 2009))).

166. *See* Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners at 11, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195, 06-1196), 2007 WL 2441586 (emphasizing that it would be conflicting to the goal of the Covenant if State parties were not held responsible for taking "actions on foreign territory that violate the rights of persons subject to their sovereign authority").

167. *See, e.g.*, Arab Charter on Human Rights art. 14, para. 6, May 22, 2004, *reprinted in* 24 B.U. INT'L L.J. 147, 154 (2006), *available in English translation at* http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to proceedings before a court, in order that a court may decide without delay on the lawfulness of his arrest or detention . . . .").

168. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

169. *Id.* art. 13.

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fundamental human rights is concerned.[170] This highlights the understanding that in order to enforce the protection of human rights, a party must be able to vindicate those rights directly against the state.[171] The American Convention on Human Rights, promulgated by the Organization of American States, also declares that everyone has the right to life, and the right not to be deprived of that life arbitrarily.[172] The Convention also provides that *everyone* has the right to "effective recourse" to a competent tribunal or court for acts that violate a person's fundamental rights that are recognized by the Constitution, the laws of the state, or by the Convention itself.[173] Again, this right applies even where a state actor committed the action in carrying out official duties.[174]

Additional regional organizations also provide for these protections. The African Charter on Human and Peoples' Rights recognizes the right to life and that it should not be arbitrarily taken.[175] The Charter, again, also recognizes the right of persons whose fundamental rights have been violated, as articulated in various conventions, to have their cause heard by a competent national organ.[176] Finally, the Arab Charter on Human Rights recognizes the inherent right to life and that there should be no arbitrary deprivation of that life.[177] Under the charter, "[e]ach [s]tate [p]arty . . . shall ensure that any person whose rights or freedoms recognized in the present Charter are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons

170. *Id.* at 122. The exact language in the preamble speaks of the need for "collective enforcement" of certain fundamental human rights. *Id.* Article 19 goes on to establish the European Court of Human Rights itself in order to "ensure the engagements" and undertakings of the contracting parties. *Id.* art. 19. Article 46 grants the court jurisdiction over matters pertaining to the interpretation and application of the convention, and Article 32 provides that all judgments are binding upon the parties. Essentially, by signing the convention, the parties have surrendered part of their sovereignty, including immunity from suit, when it comes to the vindication of a fundamental human right. *Id.* arts. 32, 46.

171. *Cf. id.* art. 13 (establishing that a violation of rights and freedoms comes with a consequence to violators and a remedy for those violated).

172. American Convention on Human Rights art. 4, ¶ 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

173. *Id.* art. 25, ¶ 1.

174. *See id.* (showing that the right to effective recourse still stands even if a person was acting within the course of their official duties when the violation occurred).

175. African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217.

176. *See id.* art. 7, ¶ 1 ("Every individual shall have the right to have his cause heard.").

177. Arab Charter on Human Rights art. 5, May 22, 2004, *reprinted in* 24 B.U. INT'L L.J. 147, 152 (2006), *available in English translation at* http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf.

acting in an official capacity."[178]

There exists an almost universal acceptance that when there is a deprivation of life, even by state actors who were acting within their official capacity, there must be an effective remedy.[179] Here, the only effective remedy is the ability to bring suit before a U.S. federal court, as that is the only court that would have jurisdiction over all of the parties.[180] If the United States will not allow for such an action to be brought, then it denies the check on governmental power that the Constitution provides, and the United States violates its duty at international law.[181] Furthermore, if the United States refuses extradition, then the United States is also in violation of the principle of *aut dedere, aut iudicare*, which is a state's duty under international law to either give the individual up for extradition or try the individual itself.[182] Guilt or innocence of the agent is irrelevant at this point as that is for a jury to decide.[183] First, however, the parties have to be able to bring the matter before a competent domestic court. That right to have adequate due process is enshrined in the Constitution and is now accepted widely at international law.[184] If the United States denies that right to due process in this instance, it will pave the way for the U.S.–Mexico border to become a place where the government acts without legal constraint—the very thing that Justice Kennedy warned of in *Boumediene*.[185] It will also set a dangerous

178. *Id.* art. 23.

179. *Cf.* American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing an example of the acceptance of the right to effective remedy).

180. *See* Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 16, Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (No. 12-50217), 2012 WL 3066823 ("As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts."); Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (illustrating that an individual can bring a civil rights suit before a U.S. court only if the civil rights violation was committed within U.S. territory).

181. U.S. CONST. art. I–III.

182. *See* Sunil Kumar Gupta, *Sanctum for the War Criminal: Extradition Law and the International Criminal Court*, 3 CAL. CRIM. L. REV. 1, 82–83 (2000) ("[S]tates are able to strictly adhere to the principle of *aut dedere, aut iudicare*—that is, they should either extradite or prosecute domestically.").

183. *Cf.* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (supporting that the guilt or innocence of the agent is not the main concern).

184. U.S. CONST. amend. XIV, § 1.

185. *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008) ("The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party . . . it would be possible for the political branches to govern without legal constraint.").

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precedent at international law, where states may act as they choose and potentially violate fundamental human rights with impunity so long as the violation occurs in a territory that is not under sovereign control of the state.[186]

CONCLUSION

The Constitution was created with the purpose of limiting governmental power.[187] It has also been understood since the time of the *Insular Cases* that while not all rights would extend to territories that are not part of the United States, certain fundamental rights would be applicable.[188] One such right is the ability to seek due process in a court of law.[189] Moreover, after Justice Kennedy's decision in *Boumediene*, it seems clear that following a functionalist approach where different factors are weighed to determine just how far the Constitution should travel outside of U.S. sovereign territory is the new requirement.[190] This follows both Justice Frankfurter and Justice Harlan's reasoning in their respective concurrences in *Reid*.[191] By evaluating the question of how far the Constitution should extend through a functionalist approach, the Court is able to ensure that the Constitution does not extend too far nor fail to extend far enough.[192]

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186. *Cf.* Alejandro Martinez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES, June 3, 2012, http://www.elpasotimes.com/ci_20770760/us-officials-set-visit-parents-slain-teen (providing an example of the effects of a precedent that denies due process).

187. U.S. CONST. art. I–III.

188. *See* Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) ("The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable . . . [but] certain fundamental personal rights declared in the Constitution . . . [have] full application . . . ."); Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 264 (2009) ("The *Insular Cases* doctrine extended only a subset of 'fundamental' constitutional rights to so-called 'unincorporated territories' not expected to come states of the Union.").

189. *See Balzac*, 258 U.S. at 313 ("[N]o person [can] be deprived of life, liberty, or property without due process of law . . . .").

190. *See Boumediene*, 553 U.S. at 727 ("[E]xtraterritoriality questions turn on objective factors and practical concerns, not formalism."); *see also* Hernandez v. United States, 757 F.3d 249, 266 (5th Cir. 2014, *reh'g en banc granted*, No. 11-50792, 2014 WL 5786260 (5th Cir. Nov. 6, 2014) (balancing the requirements of *Verdugo* with the *Boumediene* factors).

191. *See* Reid v. Covert, 354 U.S. 1, 53 (1957) (Frankfurter, J., concurring) ("The 'fundamental right' test is the one which the Court has consistently enunciated in the long series of cases . . . dealing with claims of constitutional restrictions on the power of Congress to 'make all needful Rules and Regulations' for governing the unincorporated territories." (quoting U.S. CONST. art. IV, § 3, cl. 2)).

192. *Cf.* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing the balance of power the Constitution laid out).

This is an important check on executive power, which is not unlimited.[193]

Qualified immunity through *Bivens* should also not be used in this instance to shield a member of the executive branch of government from judicial review.[194] While the purpose of qualified immunity is to prevent frivolous lawsuits, it is not intended for use as a shield to protect those who may have engaged in wrongdoing.[195] In this instance, a life was taken, and that deprivation is either the result of excessive force in conjunction with a seizure in line with the Fourth Amendment, or a potential arbitrary deprivation of life in violation of the Fifth Amendment.[196] Judicial review should be required in either instance, and the officer should have known that taking that life would result in such a review as it could possibly violate a constitutional right.[197] In line with this reasoning, the Fifth Circuit correctly upheld the suit against Agent Mesa based upon a deprivation of the Fifth Amendment right and a rejection of qualified immunity.[198] It is yet to be seen whether the Supreme Court will take up the case, but it is hoped that if they do, they too will continue along the path set out in *Boumediene.*

Finally, the United States has a duty at international law to provide for an effective remedy in determining whether or not the agent's actions were lawful or justified or whether the actions were an arbitrary deprivation of life.[199] The question at this point is not whether or not the agent acted improperly, but instead whether or not the family may come to a U.S. court to have that question answered. If the family is not permitted to do this, then there is no real possibility for an effective remedy as a court in Mexico lacks jurisdiction over the agent civilly, and it is unlikely that the

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193. *Cf. id.* (emphasizing that the power vested in the President "must be exercised in subordination to the applicable provisions of the Constitution").

194. *See Hernandez*, 757 F.3d at 279 ("This is not a reasonable misapprehension of the law entitled to immunity. It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person."); Saucier v. Katz, 533 U.S. 194, 203 (2001) (discussing the reasonableness standard in qualified immunity).

195. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (demonstrating one of the purposes of qualified immunity).

196. U.S. CONST. amend. IV–V.

197. *See Pearson*, 555 U.S. at 231 ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

198. *See Hernandez*, 757 F.3d at 281at 280 ("[W]e reverse the judgment in favor of Agent Mesa and remand for further proceedings consistent with [the] opinion.").

199. *See* ICCPR, *supra* note 153, art. 2, ¶ 3(a), ("To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . .").

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United States would extradite the agent to stand trial for murder. If this matter is not allowed to proceed before a court, it will also set a dangerous precedent where so long as the individual dies across the border, even where the shooting may have been unlawful, there will be a lack of transparency and accountability. In essence, the government must not be allowed to switch the Constitution and Bill of Rights on and off when it is convenient; to allow this is to destroy the benefit of a written Constitution and allow the government to act with impunity.[200] This is the very thing that the Constitution was designed to prevent.

200. *See* Reid v. Covert, 354 U.S. 1, 14 (1957) ("The 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 . . . .").