Breaking Legal Ground: A *Bivens* Action for Noncitizens for Trans-border Constitutional Torts Against Border Patrol Agents

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TABLE OF CONTENTS

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I. INTRODUCTION

On June 7, 2010, Sergio Adrian Hernandez, a fifteen-year-old Mexican national, played a game with a few friends in the concrete drainage ditch that runs between the United States-Mexico border under the Paso del Norte Bridge.[1] According to family members and eyewitnesses, the boys would run up to touch the chain link fence on the United States ("U.S.") border and then run back down the incline into the ditch.[2] Apparently under the belief that the adolescents were trying to enter the country illegally, U.S. Border Patrol Agent Jesus Mesa ("Agent Mesa") grabbed one of the boys through the fence.[3] A few of the boys then began throwing rocks at Agent Mesa so he would let go of their friend.[4] Agent Mesa pulled out his gun and fired at the boys from the U.S. side of the border.[5] He alleges it was in self-defense.[6] Sergio, who hid behind a pillar of the

1. Diana Washington Valdez, *Suit in Fatal Shooting of Mexican Teen By Border Patrol Agent Gains Support*, EL PASO TIMES (July 6, 2012, 12:00 AM), http://www.elpasotimes.com/news/ci_21016766/suit-mexican-teens-death-gains-support.

2. *Id.*

3. Emily Schmall, *Border Patrol Faces Ire in Shooting Death of Mexican Teen Sergio Adrian Hernandez*, AOL.COM (June 9, 2010, 7:26 AM), http://www.aolnews.com/2010/06/09/border-patrol-accused-of-excessive-force-in-death-of-mexican-tee/. *See also* Terry Grenee Sterling, *U.S. Border Patrol Fires at Rock Throwers in Mexico, and Three Have Died*, THE DAILY BEAST (Oct. 13, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/10/13/u-s-border-patrol-fires-at-rock-throwers-in-mexico-and-three-have-died.html.

4. Terry Grenee Sterling, *U.S. Border Patrol Fires at Rock Throwers in Mexico, and Three Have Died*, THE DAILY BEAST (Oct. 13, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/10/13/u-s-border-patrol-fires-at-rock-throwers-in-mexico-and-three-have-died.html.

5. Press Release, Amnesty International, Mexican teenager shot dead by US border police (June 9, 2010), *available at* http://www.amnesty.org/en/for-media/press-releases/mexican-teenager-shot-dead-us-border-police-2010-06-09.

6. Alejandro Martínez-Cabrera, *U.S. Officials to Visit Parents of Mexican Teen Shot, Killed by Border Patrol Agent*, EL PASO TIMES (June 3, 2012, 12:00 AM),

bridge, was shot and killed.[7] Eyewitnesses reported Sergio was unarmed, a fact confirmed recently by video footage of the incident. The video also shows Agent Mesa never attempted to render medical assistance to Sergio. Instead, Agent Mesa quickly returned inside the fence to the U.S. side of the border.[8] Sergio died in Mexico. And even though Sergio stood mere feet from where Agent Mesa fired the weapon in U.S. territory, current legal precedent may prevent the Hernandez family from seeking judicial redress in U.S. courts for Sergio's death.

Chief Justice Marshall once said, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[9] But it is Chief Justice Marshall's second question in *Marbury v. Madison* that is brought to the fore with Sergio's story: "[i]f he has a right, and that right has been violated, do the laws of this country afford him a remedy?"[10] As the law stands for Sergio, the answer is no. Despite considerable legal obstacles, the Hernandez family is testing the limits of American constitutional jurisprudence as it applies to noncitizens.[11]

This Comment assesses whether noncitizens can sue in U.S. courts when they have sustained an injury outside of U.S. territory. This Comment assumes the underlying merits of the Hernandez's claim that Agent Mesa used excessive force when shooting at Sergio. It will not address whether Agent Mesa acted in self-defense. Part II will discuss the context of the Hernandez litigation and its claims against the U.S. Government, its agencies, and employees for the use of excessive force against a noncitizen. It will also discuss the legal requirements for bringing an excessive force claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[12] for violations of Sergio's Fourth and

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http://www.elpasotimes.com/news/ci_20770760/us-officials-set-visit-parents-slain-teensotimes.com/news/ci_20770760/us-officials-set-visit-parents-slain-teen.

7. Daniel Borunda & Maggie Ybarra, *U.S. Officials: Youth Shot by Border Patrol Agent Had Record as Smuggler*, EL PASO TIMES (June 10, 2010, 12:00 AM), http://www.elpasotimes.com/ci_15265746?IADID=Search-www.elpasotimes.com-www.Elpasotimes.com.

8. Primer Impacto (Univision television broadcast June 8, 2010), *available at* http://www.youtube.com/watch?v=NRFETM86uAk.

9. Marbury v. Madison, 5 U.S. 137, 163 (1803).

10. *Id.* at 154.

11. *See* Plaintiff's Original Complaint, Hernandez, et al. v. United States, et al., No. 3:11-cv-00027 (W.D. Tex. Jan. 17, 2011).

12. 403 U.S. 388 (1971).

Fifth Amendment rights. *Bivens* provides a cause of action in U.S. courts for damages remedies for constitutional violations committed by federal agents. Part III will discuss the direct and extraterritorial application of the U.S. Constitution to provide standing for an excessive force claim on the border. Part IV will explore the viability and obstacles of pursuing a *Bivens* claim on the border. Part V will discuss the possibility of alternative non-judicial remedies to addressing civil rights violations by Customs and Border Patrol ("CBP") agents. Also discussed is whether existing international agreements may provide the basis for judicial redress.

II. DEATH AND IMPUNITY AT THE BORDER

A. Allegations of Excessive Force on the Rise

There is no question that guarding the border is dangerous work often requiring split-second decisions and expert judgment.[13] Defending the border is critical to protecting U.S. citizens and residents from organized crime, human and drug trafficking, and terrorism.[14] In recent years, the U.S. Government has dramatically increased its border defenses. Expenditures total more than $17 billion each year on increases in personnel, technology, and infrastructure (such as fences and barriers) along the border.[15] Over the past eight years, the U.S. Government expended over $115 billion on border enforcement.[16] According to a recent report by the Migration Policy Institute, a leading think-tank on foreign and domestic immigration policy, the federal government spends more on immigration enforcement than on all other principal federal criminal law enforcement agencies combined, with nearly $18 billion spent in fiscal year 2012 alone.[17] In 2012, the Government employed over 21,370 CBP agents.[18] An additional 1,200 National Guard troops help law enforcement on the ground identify

13. Ambar Carvalho, Comment, *The Sliding Scale Approach to Protecting Nonresident Immigrants Against the Use of Excessive Force In Violation of the Fourth Amendment*, 22 EMORY INT'L L. REV. 247, 264 (2008).

14. *See* Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications For Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 649 (2011).

15. Marshall Fritz, *Safer than Ever: A View from the U.S.-Mexico Border: Assessing the Past, Present, and Future*, CTR. FOR AM. PROGRESS, at 4–7, (Aug. 4, 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/safer_than_ever_report.pdf.

16. *Id*. at 16.

17. DORIS MEISNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

18. DEP'T OF HOMELAND SEC., FISCAL YEAR 2012 BUDGET-IN-BRIEF 71 (2012), *available at* http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

smugglers.[19] The current version of the immigration bill passed by the Senate allocates roughly $40 billion for the implementation of new border security measures including the doubling the number of CBP agents, erecting over 700 miles of fencing, and increasing the use of technology such as drones and motion sensors.[20] Unfortunately, side effects of the Government's massive build up of force along the border are rising numbers of mistreatment and abusive conduct complaints against CBP agents filed by entering immigrants and illegal border crossers.[21] Both individuals and human rights organizations are demanding greater accountability and discipline within the agency in response to these rising complaints.[22]

Illegal immigration into the United States is at the lowest level in four decades.[23] Yet deadly clashes between Mexican citizens and CBP agents increased alarmingly in the past few years.[24] An investigative collaboration among nonprofit journalism organizations named "Deadly Patrols" identified at least fourteen men and boys who have died since October 2009 after confrontations with CBP agents.[25] As a result, complaints against CBP agents for the use of excessive force against Mexican citizens are on the rise.[26] According to the Department of Homeland Security's ("DHS")

19. Fritz, *supra* note 15, at 5.

20. *See e.g.*, Fernanda Santos, *Border Security Rule Costs Support*, N.Y. TIMES, June 26, 2013, *available at* http://www.nytimes.com/2013/06/27/us/politics/border-security-rule-costs-bill-support.html; Albor Ruiz, N.Y. DAILY NEWS, (June 30, 2013, 4:59 PM), http://www.nydailynews.com/new-york/albor-ruiz-new-border-patrol-fencing-plans-disturbing-article-1.1386569.

21. *See* AM. CIV. LIBERTIES UNION (ACLU), *Statement on Human Rights Violations on the United States-Mexico Border Submitted to Office of the United Nations High Commissioner*, Session of the United Nations General Assembly (ACLU, New York, N.Y.), Oct. 25, 2012, at 1, 4–7, *available at* http://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_0.pdf.

22. *See* Press Release, ACLU, ACLU Demands Federal Investigation Into Charges of Abuse by Border Patrol Agents (May 10, 2012).

23. *See* Jeffrey Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less* (Pew Hispanic Ctr., Washington, D.C), Apr. 23, 2012; *see also* Fritz, *supra* note 15, at 8, 11.

24. Roxana Popescu, *Deadly Patrols: Political Climate, Trust, and Evidence Contribute to a Lack of Accountability*, KPBS (July 19, 2012), http://www.kpbs.org/news/2012/jul/19/challenges-prosecution-political-climate-trust-and/ [hereinafter *Deadly Patrols*].

25. *See id.*

26. *See* DEP'T OF HOMELAND SEC., OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2010 ANNUAL AND CONSOLIDATED QUARTERLY REPORTS 32 (2011); DEP'T OF HOMELAND SEC., OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011

Office for Civil Rights and Civil Liberties annual reports, complaints of excessive of force against CBP agents have steadily increased over the last three years. There were ten complaints of excessive force against CBP agents in 2010, fourteen such complaints in 2011, and nineteen in 2012.[27] Fatal shootings by CBP agents of rock throwers across the border are a familiar storyline during the past few years.[28] According to the Southern Border Communities Coalition, a human rights organization, as many as twenty individuals were killed by excessive force of CBP agents since January 2010.[29] The Mexican government claims that CBP agents along the border killed fourteen individuals in 2012 alone.[30] Surprisingly, the U.S. Government has only conducted one federal investigation into these deaths.[31] International and domestic human rights organizations castigate the U.S. Government's hypocrisy, as it is willing to prosecute CBP agents for corruption, bribery, and improper arrests, but refuses to investigate and punish claims of excessive or lethal force.[32]

In recent years, several prominent international organizations, including the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, have argued that the United State's failure to promptly investigate crimes committed along the border permits CBP agents to act with impunity.[33] In March 2012, the Inter-American Commission on Human Rights held a general hearing on human rights violations on the border.[34] The Commission expressed grave concern over the,

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ANNUAL AND 4TH QUARTER REPORT TO CONGRESS 28 (2012); DHS, OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2012 ANNUAL REPORT TO CONGRESS 33 (2013).

27. *Id.*

28. *See Deadly Patrols*, *supra* note 24.

29. *Border Patrol Abuse Since 2010*, S. BORDER CMTY. COAL., http://soboco.org/border-patrol-brutality-since-2010 (last visited Aug. 30, 2013).

30. Bret Stephens, *The Weekend Interview with Felipe Calderón: The Paradoxes of Felipe Calderón*, WALL STREET J., Sept. 29, 2012, at A15, *available at* http://online.wsj.com/article/SB10000872396390443916104578022440624610104.html

31. ACLU, *Suggested List of Issues to Country Report Task Force on the United States*, Session of the Human Rights Committee, Geneva 11–28 March 2013 (ACLU, New York, N.Y.), Dec. 10, 2012, at 11 [hereinafter ACLU List of Issues].

32. *See Deadly Patrols*, *supra* note 24; *see also* Letter from ACLU to Tamara Kessler, Acting Officer for Civil Rights and Civil Liberties, Dep't of Homeland Sec., and Charles K. Edwards, Acting Inspector Gen., Dep't of Homeland Sec. 17 (May 9, 2012) [hereinafter ACLU letter] (on file with author), *available at* https://www.aclu.org/files/assets/aclu_2012)cbp_abuse_complaint_2.pdf.

33. Press Release, Inter-Am. Comm'n on Human Rights, Annex to Press Release 36/12 on the conclusion of the IACHR'S 144th Session (Mar. 19–20, 2012) (on file with author), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2012/036a.asp.

34. *See id.*

> Abuses and human rights violations that are committed against migrants by members of the Border Patrol, as well as about the impunity of such acts and the shortcomings in the policies and practices that serve as the basis for prosecuting and punishing members of the Border Patrol who commit such acts.[35]

As a result, victims have increasingly begun to sue federal officers in U.S. courts for compensation. Consequently, courts must reconcile the legitimate concerns of the federal government in policing the border with providing compensation for victims of excessive force by CBP agents.[36] These deaths at the border are tragedies that raise complex legal questions. This Comment addresses one: when an alien is the victim of excessive force, should surviving family members be able to pursue a wrongful death action in U.S. courts? The Hernandez's case raises the issue of "why a state should be permitted to violate in one location a right that it must respect as fundamental in another location."[37]

Addressing this issue requires the balancing of several sensitive and competing interests; the sovereign's right to defend its borders, the individual's right to be free from excessive force, and our nation's commitment to upholding the rule of law. The Hernandez litigation represents the basic tension between ensuring an effective government and one that adheres to the Constitution and its tenets. National security and immigration lie squarely within the domain of the legislative and executive branches,[38] and courts must avoid "overly broad or expansive remedies [that] may chill government efforts and leave the nation vulnerable."[39] Nevertheless, the judiciary must not abstain from holding the political branches accountable to their constitutional limits.

The Hernandez family's case provides an opportunity to assess two underlying issues. First, to what extent do constitutional limits on excessive force apply when victims are not physically within the U.S? In other words, to what extent does the U.S. Constitution apply extraterritorially? Second, if the constitution does apply, should courts enforce constitutional limits when the Constitution places authority over immigrants and foreign

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35. *See id.*

36. Peter Margulies, *Noncitizens' Remedies Lost?: Accountability For Overreaching In Immigration Enforcement*, 6 FIU L. REV. 319, 325 (2011).

37. Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 260 (2009).

38. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711–14 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 604–08 (1889).

39. Margulies, *supra* note 29, at 319.

policy in the hands of Congress and the President? The Hernandez family's litigation, which is now before the Fifth Circuit, highlights the difficulty of seeking judicial remedies for human rights violations along the border under current U.S. law. The Hernandez family filed suit against the U.S. Government, Department of Justice ("DOJ"), the DHS, and its subparts, the Immigration Customs Enforcement ("ICE") and the CBP for damages under the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), and the Constitution.[40] They also sued several individual CBP agents, including Agent Mesa under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[41] for violating Sergio's Fourth and Fifth Amendment rights.

B. Hernandez Litigation

The District Court dismissed with prejudice all claims against the U.S. Government and its departments on the grounds that the U.S. had not waived its sovereign immunity[42] and severed the case against the individual agents into a separate proceeding.[43] The District Court also dismissed the *Bivens* action against Agent Mesa for lack of jurisdiction. The court reasoned that Sergio was not entitled to protection of the U.S. Constitution because at the time of his death he was outside the territorial jurisdiction of the U.S. and did not prove sufficient connections to the U.S. as a noncitizen to warrant extraterritorial application of the U.S. Constitution.[44]

Many human rights advocacy groups criticized the District Court's decision to dismiss the action as undermining the Government's "commitment to ensuring that fundamental constitutional protections of due process and equal protection are extended to every person, regardless of citizenship or immigration status."[45] Moreover, the same groups claim that denying judicial redress to noncitizens on jurisdictional grounds conflicts with our nation's international treaty obligations.[46] However, it is possible that the Fifth Circuit will decline the Hernandez's request and dismiss the action on the same narrow grounds as the District Court, because this case not only requires recognition of a *Bivens* claim in a

40. Plaintiff's Original Complaint, *supra* note 11, at ¶¶ 3–6.

41. Plaintiff's Third Amended Complaint at 2, Hernandez, et al. v. Cordero et al., No. 3:11-cv-00331-DB (W.D. Tex. Aug. 22, 2011) (citing Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)).

42. Hernandez, et al. v. United States, 802 F. Supp. 2d 834, 846–47 (W.D. Tex. 2011).

43. Memorandum Opinion and Order at 2, Hernandez et al. v. Mesa et al., No. 3:11-cv-331-DB (W.D. Tex. Feb. 17, 2012).

44. *Id.* at 5–6.

45. ACLU letter, *supra* note 32.

46. ACLU List of Issues, *supra* note 31, at 12.

next context, but also the unprecedented application of the U.S. Constitution to the U.S. border. A brief overview of the Hernandez family's statutory and constitutional claims against the U.S Government, its agencies, and several officers will show why a more promising avenue for compensation is a *Bivens* action against the individual offending officer.[47]

1. Claims Against the U.S. Government Under the FTCA, ATS, and U.S. Constitution

Under the doctrine of sovereign immunity, the U.S. Government retains immunity from suit unless it explicitly and unequivocally consents to be sued.[48] Only Congress can—by an express waiver in a congressional statute—abrogate the federal government's sovereign immunity to allow suits for money damages.[49] Moreover, the Westfall Act[50] protects federal employees from suit for common law tort claims or constitutional violations when they are acting within the scope of employment, by transferring all claims against the individual officers to the U.S. Government and its agencies.[51] Accordingly, the District Court dismissed all claims against Agent Mesa under the FTCA, ATS, and the U.S. Constitution and approved the DOJ's substitution of the United States for Agent Mesa pursuant to the Westfall Act.[52] Once the U.S. Government was the only remaining defendant, the District Court dismissed all statutory and constitutional claims.[53] The following summarizes the court's grounds for dismissal and demonstrates the lack of legal remedies available to noncitizen plaintiffs against the U.S. Government.

First, the Hernandez's sought to hold the U.S. liable under the FTCA.[54] The FTCA explicitly waives federal sovereign immunity and permits recovery for constitutional violations committed by federal employees acting within the scope of his office or employment.[55] The purpose of the FTCA is to impose liability on the Government for negligent actions that

47. *See Hernandez*, 802 F. Supp. 2d at 838; *see also* 28 U.S.C. § 1346 (2006).
48. *See* United States v. Sherwood, 312 U.S. 584, 586 (1941).
49. *See* Boyle v. United States, 200 F.3d 1369, 1373 (Fed. Cir. 2000).
50. 28 U.S.C. § 2679(b)(1) (2006).
51. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).
52. Hernandez, et al. v. United States, 802 F. Supp. 2d 834, 840 (W.D. Tex. 2011); 28 U.S.C. § 2679(b)(1).
53. *Hernandez*, 802 F. Supp. 2d at 840.
54. *Id.*
55. 28 U.S.C. § 1346.

would typically incur liability if committed by a private person.[56] The FTCA, however, contains several exceptions. Most relevant here is the the "foreign country" or "foreign soil" exception, which bars actions against U.S. Government employees from "any claim arising in a foreign country."[57] Because Sergio died on foreign soil, the District Court dismissed all of the Hernandez's FTCA claims under the "foreign country" exception.

For years, some courts allowed actions for injuries suffered abroad when a plaintiff could establish that the "act or omission giving rise to a tort occurred in the United States."[58] In fact, most courts had held that the "foreign soil" exception only applies where choice of law principles would otherwise require that foreign law govern the cause of action.[59] One court reasoned, "[b]ecause FTCA actions are governed by the law of the state in which the negligent act or omission occurred, negligence occurring within the United States but causing damage in a foreign country is not barred by the 'foreign soil' exception."[60] However, in 2004 the Supreme Court reversed course and "unequivocally held that the FTCA's "foreign country" exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[61] Thus, the District Court reasoned that the "foreign country" exception precluded liability in tort because Sergio died in Mexican territory, despite standing mere feet from the U.S. border, where Agent Mesa pulled the trigger. Thus, border plaintiffs are unlikely to prevail under the FTCA given current statutory interpretation of the FTCA's "foreign country" exception.

Furthermore, while the District Court did not dismiss the FTCA claim on this ground, the "discretionary function" exception could also prove fatal to an excessive force claim under the FTCA.[62] Under the "discretionary function" exception, the FTCA precludes any claim that arises from,

> [a]n act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[63]

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56. 28 U.S.C. § 1346(b)(1).
57. 28 U.S.C. § 2680(k) (2006).
58. Mulloy v. United States, 884 F. Supp. 622, 632 (D. Mass. 1995).
59. United States v. Spelar, 338 U.S. 217, 218–21 (1949).
60. *Mulloy*, 884 F. Supp. at 632–33.
61. Hernandez, et al. v. United States, 802 F. Supp. 2d 834, 841 (W.D. Tex. 2011) (citing Sosa v. Alvarez Machain, 542 U.S. 692, 712 (2004)).
62. 28 U.S.C. § 2680(a).
63. *Id.*

This exception is interpreted by the Fifth Circuit and others to bar FTCA suits when the constitutional violation "bears even a tangential relationship to discretionary functions and hence to policy."[64] Because the use of force by a CBP agent is unquestionably a discretionary decision, the "discretionary function" exception would most likely prevent an excessive force claim under the FTCA. As will be explained further in Part IV, a middle ground solution must be forged, one that provides for expeditious punishment for the reckless use of lethal force by CBP agents without hampering CBP agents' lawful use of force in self-defense or to protect others.[65]

Second, the Hernandez family sought relief under the ATS.[66] In particular, the family claims that Sergio was killed in violation of several international treaties, conventions, and the Laws of Nations, including but not limited to:

> The United Nations Charter; the Treaty of Amity, Commerce, and Navigation; the Treaty of Guadalupe Hidalgo of 1848; the Gadsden Treaty Relating to the Boundaries of 1853; the Inter-American Convention on the Rights and Duties of States; and the Inter-American Convention on the Status of Aliens.[67]

Under current precedent, such claims are likewise a dead end. While the ATS provides federal courts with jurisdiction over tort actions "in violation of the laws of nations or a treaty of the United States,"[68] federal courts have uniformly held that a valid exercise of jurisdiction is not equivalent to a waiver of sovereign immunity.[69] The Ninth Circuit explained that "any party asserting jurisdiction under the [ATS] must establish, independent of that statute that the United States has consented to suit."[70] Because the United States does not explicitly waive sovereign immunity in any of the statutes or treaties under which the Hernandez family brought suit, the District Court held it lacked subject matter jurisdiction over all claims under the ATS.[71] As Part V will discuss in greater depth, a bilateral treaty between the United States and Mexico could provide the substantive

64. Margulies, *supra* note 29, at 331.
65. George D. Brown, *"Counter-Counter-Terrorism Via Lawsuit"—The Bivens Impasse*, 82 S. CAL. L. REV. 841, 842, 900–04 (2009).
66. 28 U.S.C.A. § 1350 *et seq* (2006).
67. Plaintiff's Original Complaint, *supra* note 11, at ¶ 6.
68. 28 U.S.C.A. § 1350 *et seq* (2006).
69. Tobar v. United States, 639 F.3d 1191, 1196 (9th Cir. 2011).
70. *Id.*
71. Hernandez, et al. v. United States, 802 F. Supp. 2d 834, 845 (W.D. Tex. 2011).

legal mechanism for a claim against the United States, if the U.S. Government agreed to waive its immunity for gross rights violations along its border.[72]

Third, the Hernandez family brought constitutional claims against the U.S. Government and its agencies for its negligent supervision and selection of the CBP agents that led to violations of Sergio's Fourth and Fifth Amendment rights.[73] The District Court spent little time on its discussion of the constitutional claims and dismissed all claims against the U.S. Government in a single paragraph, on the grounds that the U.S. had not waived sovereign immunity with respect to constitutional violations.[74]

Aside from civil claims brought by the victim's families, the DOJ has the authority to prosecute federal employees under federal homicide statutes and federal criminal civil rights statutes.[75] However, the Hernandez family most likely chose not to press these claims once the DOJ notified them that the agency was not going to prosecute Agent Mesa. After over a year of investigation, the DOJ ultimately concluded that there was insufficient evidence to pursue a wrongful death action under either federal statute due to the high burden of proof concerning Agent's Mesa's state of mind.[76] Even if the DOJ was willing to prosecute, these cases are exceedingly difficult to prove.[77] As one former U.S. Attorney in San Diego lamented, there are no cameras, eyewitnesses, or other means to verify

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72. *See generally* Jorge Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 72–83 (2001) (a bilateral treaty with Mexico could impose upon the United States an obligation to protect Mexican nationals within U.S. territory and ensure greater compliance with international human rights norms); Rocio Garza, Note, *Addressing Human Trafficking Along the United States-Mexico Border: The Need for a Bilateral Partnership*, 19 CARDOZO J. INT'L & COMP. L 413, 419 (2011).

73. Plaintiff's Original Complaint, *supra* note 11, at ¶ 5.

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

75. Press Release, Dep't of Justice, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), *available at* www.justice.gov/opa/pr/2012/April/12-crt-553.html.

76. *Id.* (The federal criminal civil rights statutes require the prosecution to "establish, beyond a reasonable doubt, that a law enforcement officer willfully deprived an individual of a constitutional right, meaning with the deliberate and specific intent to do something the law forbids. This is the highest standard of intent imposed by law. Accident, mistake, misperception, negligence and bad judgment are not sufficient to establish a federal criminal civil rights violation. After a careful and thorough review, a team of experienced federal prosecutors and FBI agents determined that the evidence was insufficient to prove, beyond a reasonable doubt, that the CBP agent acted willfully and with the deliberate and specific intent to do something the law forbids, as required by the applicable federal criminal civil rights laws.")

77. *Deadly Patrols*, *supra* note 24, at 1.

anybody's story and to prevail on prosecution so "you probably need more evidence than you would in a normal case."[78]

2. A Bivens *Action Against Border Patrol Agents*

With little hope of piercing the federal government's armor of sovereign immunity, the Hernandez family pursued a *Bivens* claim for money damages against Agent Mesa in his individual capacity for his use of excessive force resulting in Sergio's death.[79] In *Bivens v. Six Unknown Federal Narcotics Agents*, the Supreme Court created an implied private action for damages against federal officers who allegedly violate a person's constitutional rights.[80] Similar to a personal injury action, a *Bivens* claim attaches civil liability to individual federal officials for constitutional violations committed during the scope of their official duties.[81] Many scholars refer to *Bivens* actions as the federal equivalent to a Section 1983 action, which provides a cause of action for money damages against any person who commits a constitutional violation while "acting under the color of state law."[82] The rationale behind providing *Bivens* actions, like that of 1983 actions, is to deter individual federal officers from committing constitutional violations with the threat of litigation and liability of damages.[83] Under a *Bivens* theory, the Hernandez family contends that Agent Mesa is liable in money damages for his use of excessive, deadly force against Sergio in violation of Sergio's Fourth and Fifth Amendment rights.[84] A review of excessive force claims under the Fourth and Fifth Amendments should help demonstrate the legal basis for Sergio's claims.

In its landmark decision *Graham v. Connor*, the Supreme Court held that "an excessive force claim arising in the context of an arrest is most

78. *Id*. In fact, the federal government recently announced that it has opened its first ever grand jury investigation into the killing of Anastasio Hernandez Rojas, who was tasered to death by CBP agents in 2010. Elisabeth Ponsot, *Web Exclusive: Grand Jury to Investigate Death At the Border*, NEED TO KNOW KPBS (July 20, 2012), http://www.pbs.org/wnet/need-to-know/video/video-web-exclusive-grand-jury-to-investigate-death-at-the-border/14290/.

79. Plaintiff's Original Complaint, *supra* note 11, ¶¶ 1, 12, 71–75.

80. *E.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971); Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

81. Steve Hefland, *Desensitization to Border Violence & The Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 108 (2001).

82. 42 U.S.C. § 1983 (1994); *see also* Iqbal, 556 U.S. at 675–76 (2009).

83. Corr. Services Corps. v. Malesko, 534 U.S. 61, 70 (2001).

84. Plaintiff's Third Amended Complaint, *supra* note 41, ¶ 1.

properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures.'"[85] Therefore, "all claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[86] When a person brings an excessive force claim, the court considers several factors to determine the "reasonableness" of the force used to effectuate an arrest or seizure,[87] including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[88] Ultimately, this analysis boils down to "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[89] This inquiry "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[90]

The Supreme Court further held that, under the U.S. Constitution, an officer may not use deadly force "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[91] Furthermore, any rule that would permit "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[92] Thus, where a federal official's use of excessive, deadly force amounts to a Fourth Amendment violation, the victim may typically file a *Bivens* action for money damages against the federal officer.[93] Most courts have recognized a *Bivens* action

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85. Graham v. Connor, 490 U.S. 386, 394 (1989); *see also* Ting v. United States, 927 F.2d 1505, 1509 (9th Cir. 1991).
86. *Graham*, 490 U.S. at 395.
87. *Ting*, 927 F.2d at 1509 (citing *Graham*, 490 U.S. at 396).
88. *Id.* at 1510.
89. *Id.*
90. *Id.* at 1509.
91. *See* Tennessee v. Garner, 471 U.S. 1, 3 (1985).
92. *Id.* at 11.
93. Schweiker v. Chilicky, 487 U.S. 412, 421 (1998); *see also* Tekle v. United States, 511 F.3d 839, 846–47 (9th Cir. 2007) (use of excessive force by officer violated plaintiff's constitutional rights); *Ting*, 927 F.2d at 1514 ("A police officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested[.]").

against federal law enforcement for use of "excessive force," regardless of whether the victim is a citizen or not.[94]

While the Supreme Court clearly stated that an excessive force claim "is most properly characterized as one invoking the protections of the Fourth Amendment,"[95] it is not as clear that the Supreme Court meant to foreclose a claim of excessive force under the Fifth Amendment when the Fourth Amendment does not apply. Amici to the Hernandez litigation contend that an alternative, and equally justifiable, interpretation of *Graham* would permit an excessive force claim against the Agent Mesa under the Due Process Clause of the Fifth Amendment.[96] The language of the Fifth Amendment also differs from the Fourth Amendment in one key respect: it is less geographically limited. Rather than referring to concrete things on U.S. soil like "persons, houses, papers, and effects,"[97] the due process clause of the Fifth Amendment protects all persons against the arbitrary deprivation of life.

III. "STANDING" ON THE BORDER: EXTRATERRITORIAL APPLICATION OF THE U.S. CONSTITUTION TO THE BORDER ZONE

The Supreme Court has long recognized that U.S. Constitution protects the individual, including noncitizens, from physically abusive governmental conduct, either under the Fourth Amendment's prohibition against unreasonable seizures of the person,[98] or the Eighth Amendment's ban on cruel and unusual punishments.[99] It has likewise recognized that "certain constitutional protections . . . are unavailable to aliens outside our geographic borders."[100] Consequently, before a noncitizen can bring a *Bivens* action, the plaintiff must first establish that he has standing to bring a constitutional tort claim. In other words, the court must first find

94. *See* Castaneda v. United States, 546 F.3d 682, 685–87 (9th Cir. 2008); *see also* Martinez-Aguero v. Gonzalez, 459 F.3d 618, 622 (5th Cir. 2006).

95. Graham v. Connor, 490 U.S. 386, 394 (1989).

96. *See* Brief for the American Civil Liberties Union Foundation et al. as Amici Curiae Supporting Appellants at 25–28, Hernandez, et al. v. United States, et al., Nos. 11-50792, 12-50217, 12-50301 (5th Cir. July 2, 2012), 2012 WL 3066824 [hereinafter ACLU Amicus Brief]; Plaintiff's Original Complaint, *supra* note 11, at 25.

97. U.S. CONST. amend. IV.

98. *See* Almeida Sanchez v. United States, 413 U.S. 266 (1973).

99. *Graham*, 490 U.S. at 394.

100. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

that plaintiff was entitled to the protection of the U.S. Constitution at the time the alleged violation occurred.[101]

The Hernandez family advanced two legal arguments to prove it has standing to pursue a *Bivens* claim against Agent Mesa. First, it argued that the U.S. Constitution governs all conduct occurring with the U.S. territory even when those actions are the direct and proximate cause of an injury suffered outside of U.S. territory.[102] Under this theory the extraterritorial application of the U.S. Constitution is unnecessary. Second, the Hernandez's alternatively argued that, even if the extraterritorial application of the Constitution is necessary, the facts of the case meet the "practical and functional test" requirements of *Boumediene v. Bush* to extend constitutional protection to the border zone.[103]

Because a *Bivens* action is a territorial law that "prohibits . . . a human act or conduct that occurs within the nation-state's border,"[104] once an individual steps outside of the borders of the U.S., the court must agree to apply that law extraterritorially for the action to proceed.[105] For years, most courts and some scholars accepted the Supreme Court's plurality decision in *Verdugo-Urquidez* as the prevailing rule on the extraterritorial application of the Constitution.[106] But in recent years, and mostly in the context of the War on Terror, the Supreme Court revisited the issue of exterritorial constitutional rights and discarded the formalist territorial approach in favor of a "functional approach" in the application of the Constitution abroad.[107] The question remains whether either theory can provide the legal basis for permitting a *Bivens* action by a noncitizen against CBP agents for trans-border constitutional violations.

A. Drawing a Hard Line: Verdugo-Urquidez *and Strict Territorial Jurisdiction*

In *Verdugo-Urquidez*, the Drug and Enforcement Agency ("DEA") collaborated with Mexican officials to conduct a warrantless search of

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101. *Martinez-Aguero*, 459 F.3d at 622.
102. *See supra* Part II.A.
103. *See supra* Part II.B.
104. Jeffery A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 123 (2010).
105. *See id.*
106. Lamont v. Woods, 948 F.2d 825, 834–35 (2d Cir. 1991); *Martinez-Aguero*, 459 F.3d at 622; Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. REV. 999, 1002–07 (1992).
107. Neuman, *supra* note 37, at 259–66; *see also* Boumediene v. Bush, 553 U.S. 723 (2008).

the defendant's Mexican residences.[108] Mr. Verdugo-Urquidez claimed the court should exclude certain evidence in his trial because the Government illegally seized the evidence from his Mexican residences in violation of the Fourth Amendment. The Ninth Circuit agreed with Mr. Verdugo-Urquidez and reasoned that "[i]t would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, . . . and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment."[109] The Supreme Court reversed, and held that "if there were a constitutional violation, it occurred solely within Mexico."[110] The Supreme Court reasoned that the words "the people" in the Fourth Amendment only applied to the "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[111] As a result, Mr. Verdugo-Urquidez could not invoke the constitutional protections against warrantless searches when the search took place in Mexico unless he proved substantial connections to the U.S.

Moreover, the Supreme Court did not hide the concerns that prompted its strict territorial reading of the Constitution. The Supreme Court cautioned that extending the Constitution to noncitizens outside of the U.S. could "have significant and deleterious consequences for the United States in conducting activities beyond its boundaries" and "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."[112] Thus, the Supreme Court made it very clear that the Constitution was "never. . . intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[113] It is against this backdrop that we must assess the viability of claims for excessive force at the border.

108. United States v. Verdugo-Urquidez, 494 U.S. 259, 262–63 (1990).
109. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1224 (9th Cir. 1988).
110. *Verdugo-Urquidez*, 494 U.S. at 264.
111. *Id.* at 265.
112. *Id*. at 273–74.
113. *Id*. at 266; *see also* Johnson v. Eisentrager, 339 U.S. 763 (1950).

B. Operative Conduct and Tort Law as the Limit to the Constitution

Border litigants could argue that extraterritorial application of the Constitution is unnecessary. In *Verdugo-Urquidez* all of the operative conduct occurred solely within Mexico."[114] Conversely, the federal agent stood squarely within the U.S. territory when he shot Sergio.[115] Therefore, the Hernandez family and supporting amici contend that because the Constitution governs all alleged government misconduct that occurs inside the United States, the Constitution should apply to Agent Mesa's actions while he was standing in U.S. territory.[116] Under this line of reasoning, the critical issue is not where the injury occurred, but rather where all of the operative (wrongful) conduct occurred.[117] If the focus were on where a person is located when he sustains an injury, "Border Patrol agents essentially would be immunized from civil liability even for truly egregious abuses of power, based on the fortuity of where, within the space of a few feet, their victims might happen to have been standing at the time."[118]

The Ninth Circuit followed this reasoning in *Wang v. Reno*. It held that when the government conduct that violated a noncitizen's due process rights occurred on American soil, the Constitution applied to their actions even when the noncitizen would likely suffer harm outside of the U.S. in the future.[119] The situation in *Wang v. Reno* is distinguishable from the facts underlying Sergio's death because the deprivation of Wang's due process rights occurred on American soil.[120] However, the Ninth Circuit rejected the Government's argument that the court could only review actions taken after Wang was brought to the U.S.[121] Instead, the Ninth Circuit found that Wang's due process violation was the cumulative result of the Government's actions taken prior to Wang's arrival because they "led directly to, and [were] inextricably intertwined with, the ultimate violation of [Wang's] due process rights."[122] All of Agent Mesa's

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114. *Verdugo-Urquidez*, 494 U.S. at 264.

115. ACLU Amicus Brief, *supra* note 96, at 2, 4, 7; Brief of Amici Curae Border Network for Human Rights, Paso Del Norte Civil Rights Project, and Souther Border Communities Coalition in Support of Appellants and Urging Reversal at 4–5, Hernandez, et al. v. United States, et al., Nos. 11-50792, 12-50217, 12-50301 (5th Cir. July 2, 2012), 2012 WL 3066825 [hereinafter Border Network for Human Rights Amicus Brief].

116. ACLU Amicus Brief, *supra* note 96, at 4–5.

117. *See* ACLU Amicus Brief, *supra* note 96; Border Network for Human Rights Amicus Brief, *supra* note 115.

118. Border Network for Human Rights Amicus Brief, *supra* note 115, at *4.

119. Wang v. Reno, 81 F.3d 808, 817 (9th Cir. 1996).

120. *Id.* at 818.

121. *Id.* at 817 n.16.

122. *Id.* at 816–17 n.16.

conduct[123] leading up to Sergio's death—grabbing hold of Sergio's friend through the fence, chasing the boys into the ditch, and pulling out his gun—weighs in favor of applying U.S. law to his actions. Accordingly, because the shot that killed Sergio was fired from American soil, a fact that the government does not dispute, plaintiffs claim the federal agent is still subject to judicial review and the constraints of the Constitution for his actions taking place within its borders.

In a similar case, the Supreme Court rejected a FTCA claim by a noncitizen under the "foreign country" exception even when actions by U.S. officials in the U.S. led to the plaintiff's false arrest.[124] In *Sosa v. Alvarez-Machain*, a Mexican national sued the U.S. Government and individual DEA agents for damages because they coordinated with Mexican nationals to abduct Alvarez from his home in Mexico and transport him to the U.S. to stand trial.[125] The Supreme Court rejected Alvarez's false arrest claims. Concerned that "it will virtually always be possible to assert that the negligent activity that injured the plaintiff abroad" was the direct result of wrongful conduct in the U.S., the Supreme Court refused to adopt an interpretation of the FTCA that "threatens to swallow the foreign country exception whole."[126] Instead, the Supreme Court reasoned that the prevailing choice-of-law principle at the time of the FTCA's enactment required courts to apply the tort law of the place where the injury occurred.[127] Thus, even though DEA agents orchestrated Alvarez's false arrest from their offices in California, the Supreme Court found the harm from the false arrest occurred in Mexico. Furthermore, under this interpretation of the FTCA, the "foreign country" exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[128]

Notwithstanding the Supreme Court's decision in *Sosa*, the facts of the Hernandez litigation are distinguishable for two reasons. First, for-hire Mexican nationals under the direction of DEA agents carried out the false arrest at issue in *Sosa*, while Agent Mesa acted alone and directly

123. The Restatement on the Conflict of Laws has long instructed courts to consider "the place where the conduct causing the injury occurred" as a principle factor in choice of law determinations in tort suits. Restatement (Second) Conflict of Laws § 145(2)(b) (1971).

124. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

125. *Sosa*, 542 U.S. at 702–03 (internal quotation marks omitted).

126. *Id*.

127. *Id.* at 705.

128. *Id*. at 712.

used excessive lethal force against Sergio. Second, the location of where the injury occurred also weighs in favor of applying U.S. law to Sergio's case. Unlike the Mexican nationals who seized Alvarez deep within the interior of Mexico, Agent Mesa targeted Sergio with small arms fire within yards of the U.S. border, in the space between the U.S. and Mexican fences.

In *Sosa*, Justice Ginsburg agreed that the claim was barred, but she wrote separately to explain why the majority's reliance on outdated choice-of-law principles was misguided.[129] In her view, *Sosa* involves a multistate tort action. Consequently, courts should look to "the law of the place where the acts of negligence or the intentional tort took place."[130] Under the "last significant act or omission" rule, Justice Ginsburg agreed that Alvarez's tort claim was barred because the last significant act, his false arrest, occurred in Mexico.[131]

Justice Ginsburg's interpretation of the FTCA and multistate tort analysis might lead to a different conclusion in cases of border torts. In Sergio's case, the "last significant act or omission" was Agent Mesa's decision to pull the trigger and fire on children who posed no real threat. This interpretation may also provide an attractive legal middle ground to the current all-or-nothing practice for torts claims along the border[132] since courts hesitate to intrude upon the political branches by second-guessing government decisions. A "last significant act" rule, however, could help courts provide a remedy that strikes a balance between preventing the vindication of a person's rights on "the vagary of where the resulting harm occurred"[133] and opening the U.S. Government and its employees to a flood of litigation for discretionary conduct.

The Supreme Court has never addressed whether its reasons for barring tort suits under the FTCA would similarly bar trans-border torts; however, there are few a indications that it may not. The year the Supreme Court decided *Sosa*, it also decided *Hamdi v. Rumsfeld* and *Rasul v. Bush*. Those cases assessed the legitimacy of the U.S. Government's indefinite detention policy and the due process rights afforded to citizen and alien enemy combatants.[134] In *Rasul*, the Government argued that the Supreme

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129. *See id.* at 751.

130. *Id.* at 758 (internal quotation marks omitted).

131. *Id.* at 760.

132. James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009).

133. Border Network for Human Rights Amicus Brief, *supra* note 115, at *6; *see also* Pfander & Baltmanis, *supra* note 132, at 117.

134. *See* Rasul v. Bush, 542 U.S. 466, 481 (2004); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 518, 524 (2004) ("[T]he Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American

Court did not have jurisdiction to hear the claims of enemy combatants detained at Guantanamo Naval Base, which is formally part of Cuba but leased by the U.S. The Supreme Court rejected the Government's argument and held that it could exercise jurisdiction over the detainee's habeas claims because the U.S. exercised "complete jurisdiction" and *de facto* plenary control over Guantanamo pursuant to its lease agreement. The Supreme Court emphasized that it was not the individual's citizenship that determined whether jurisdiction existed, but rather the person and place that held him in unlawful custody.[135] Therefore, because the U.S. Government detained the prisoners on a U.S. naval base, the Supreme Court held that presence within the territorial jurisdiction of the U.S. was not "an invariable prerequisite" to the exercise of jurisdiction.[136]

C. Applying Functionalism to the Border

In *Boumediene v. Bush*, Justice Kennedy both confirmed and elaborated on the Supreme Court's "functional approach" to the extraterritorial application of the U.S. Constitution.[137] Under the functional approach, "the selective application of constitutional limitations to U.S. government action outside U.S. sovereign territory"[138] depends on the "'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it,' and, in particular, whether judicial enforcement

citizen. It is not at all clear why that should make a determinative constitutional difference.")

135. *Rasul*, 542 U.S. at 478–79.

136. *Id*. at 478 (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)).

137. The functional approach to the extraterritorial application of the Constitution has its genesis in Justice Kennedy's concurring opinion in *Verdugo-Urquidez*. *Verdugo-Urquidez*, 494 U.S. at 277–78. In his concurring opinion, Justice Kennedy rejected the plurality's narrow reading of the Fourth Amendment's "the people," and instead relied on Justice Harlan's concurring opinion in *Reid v. Covert* to justify a functional approach to extending the Constitution abroad. *Id.* According to Justice Kennedy, precedential cases like the *Insular Cases*, *In re Ross*, and *Reid v. Covert*, stood for the proposition that the "Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277. But only when "the conditions and considerations are that would make adherence to a specific [constitutional] guarantee [not] altogether impracticable and anomalous." *Id.* at 277–78 (citing Reid v. Covert, 354 U.S. 1, 74 (1957) (J. Harlan concurring)).

138. Neuman, *supra* note 37, at 259.

of the provision would be 'impracticable and anomalous.'"[139] Furthermore, in determining the extraterritorial reach of the Constitution, the Court considered three factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[140] Accordingly, the Hernandez family contends it has standing to pursue a *Bivens* remedy because the facts of the case justify the extraterritorial application of the U.S. Constitution under the "practical and functional test" as defined in *Boumediene v. Bush*.[141]

First, the Hernandez family argued that though Sergio was a noncitizen, like the petitioners in *Boumediene*, he is not an enemy combatant and therefore is entitled to greater Constitutional protection.[142] Moreover, "the substantive right at issue here is more fundamental than that at stake in *Boumediene* . . . The right to life is the most fundamental of human rights, the deprivation of which appropriately receives vigilant judicial review."[143] Secondly, the Hernandez family claims that "the second *Boumediene* factor—the nature of the site where relevant events occurred—also weighs strongly in favor" of extending the Constitutional protections because the challenged conduct, Agent Mesa shooting, occurred inside the U.S.[144] Unlike *Boumediene*, where the prisoner's unlawful detention occurred outside the United States, "all of the challenged conduct occurred solely in the United States" and "the injury occurred outside the United States."[145] Thirdly, the Hernandez family contends that it would not be "impracticable or anomalous"[146] to resolve plaintiff's claims because "courts routinely review the Executive's border-related policies and conduct, including claims of excessive force, unlawful search and seizure, and other alleged wrongs"[147] and it is the U.S. Government's refusal to

139. Boumediene v. Bush, 553 U.S. 723, 759 (2008) (citing Reid v. Covert, 354 U.S. 1, 75 (1957)); *see also* Neuman, *supra* note 37, at 265.

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

141. Brief for the Appellant at 22–23, Hernandez, et al. v. United States, et al., Nos. 11-50792, 12-50217, 12-50301 (5th Cir. June 25, 2012), 2012 WL 2513647.

142. *Id.* at 28.

143. *Id.* at 28–29 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) and United States v. Cruikshank, 92 U.S. 542, 553 (1875)).

144. *Id.* at 30.

145. *Id.* at 32.

146. *Verdugo-Urquidez*, 494 U.S. at 277–78.

147. Brief for the Appellant, *supra* note 141, at 34 (citing United States v. Flores-Montano, 541 U.S. 149, 152 (2004); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); United States v. Kelly, 302 F.3d 291, 294 (5th Cir. 2002)).

prosecute Agent Mesa that is "caus[ing] friction" with Mexico.[148] In fact, the Government of Mexico filed an amicus brief in support of the Hernandez family and expressly stated that its interest in protecting the well-being of its citizens supports "[e]xtending the requirements of the Fourth and Fifth Amendment to cover the actions of a U.S. officer in a situation like this [and] would not interfere in any way with Mexico's 'control over its territory . . . and authority to apply the law there.'"[149]

The Hernandez family maintained that "the U.S. courts' refusal to review U.S. agents' conduct would create a lawless border area where the Executive's police powers—including extrajudicial killings—would be unreviewable by Mexico or the U.S. judiciary."[150] If the U.S. continues to refuse to extradite Agent Mesa to Mexico to stand trial, then any effective and enforceable remedy against him can only come from U.S. courts.[151] It is inconsistent with the Supreme Court's holding in *Boumediene* and the doctrine of separation of powers to give "the political branches['] . . . power to switch the Constitution on or off at will."[152]

D. Stretching the Constitution Over the Border

The Hernandez family argued both legal theories—the direct and the extraterritorial application of the Constitution—to justify standing in U.S. courts. But no court has ever applied these theories to the border and for a court to do so would be an unprecedented application of the Constitution to another sovereign's territory and recognition of a *Bivens* claim in a new context. Courts hesitant to break such legal ground could be further dissuaded from adopting a *Bivens* remedy on the border by the following criticisms and separation of powers concerns.

148. *Id.* at 35–36.

149. Brief for the Government of the United Mexican States as Amicus Curiae Supporting Appellants at 15–16, Hernandez, et al. v. United States, et al., Nos. 11-50792, 12-50217, 12-50301 (5th Cir. July 2, 2012), 2012 WL 3066823 (citing *Boumediene*, 553 U.S. at 754) [hereinafter Brief for the Government of Mexico].

150. Brief for the Appellant, *supra* note 141, at 36.

151. *Id.*; *see also* Press Release, Mexico's Ministry of Foreign Affairs (Apr. 27, 2012), *available at* http://saladeprensa.sre.gob.mx/index.php/es/comunicados/1449-129 [last visited Jan. 27, 2013].

152. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

1. Operative Conduct and Modern Military Operations

Creating a *Bivens* remedy in the border context is appealing on moral and remedial grounds; however, the Court must avoid extending the Constitution in a way that would interfere with military operations abroad and inadvertently open U.S. courts to a flood of litigation on behalf of the world's aggrieved.[153] One context in which the first theory, the direct application of the Constitution to all conduct within the U.S. regardless of where the harm occurs, may have unintended consequences is the War on Terror.

Since 2006, the U.S. military has increasingly used "predator drones" to carry out the targeted killing of suspected terrorists and insurgents abroad.[154] In fact, some organizations estimate that U.S. drones have killed 2,555 suspected terrorists since the program's inception.[155] Targeted killing is the "premeditated killing by a state of a specifically identified person not in its custody."[156] These killings are often carried out by predator drones, unmanned military aircrafts with extraordinary combat capabilities.[157] These pilotless weapons are controlled and operated by military command centers in the U.S.[158] Under the first legal theory, the collateral victim of an erroneous drone strike would be able to bring an excessive force or wrongful death action against the federal official who deployed the drone so long as all of the wrongful conduct—launching the drone—occurred within the U.S.[159]

While this analogy oversimplifies Hernandez's legal argument, it illustrates that courts must carefully limit the application of the Constitution to avoid unintentional legal ripples elsewhere. Without careful circumscription of the remedy to the border context, extending the Constitution under this theory could allow tort litigation to undermine the "Government's overriding interest in protecting the Nation" abroad despite the border plaintiff's claims that judicial review would not open the

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153. Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 441–42 (2009).

154. Carla Crandall, *Ready. . .Fire. . .Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L. L. 55, 56 (2012); *see also* Murphy & Radsan, *supra* note 153, at 412–13.

155. Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004-2013*, LONG WAR J. (last visited Oct. 5, 2013), http://www.longwarjournal.org/pakistan-strikes.php.

156. Crandall, *supra* note 154, at 58.

157. *Id.* at 59.

158. Murphy & Radsan, *supra* note 153, at 406.

159. Richard D. Rosen, *Drones and the U.S. Courts*, 37 WM. MITCHELL L. REV. 5280, 5288 (2011).

floodgates of litigation for alleged victims in other circumstances.[160] Additionally, most courts would not try to redefine a *Bivens* remedy, but would either recognize the claim in the new context or not.

However, most courts, including the Supreme Court, are concerned about judicial resources and whether their decisions would burden the court system with new claims and claimants. In *Rasul* and *Boumediene*, the Supreme Court's decision to extend jurisdiction to alien enemy combatants detained at Guantanamo somewhat hinged on whether it could limit jurisdiction to the prisoners at Guantanamo while preventing a flood of litigation from combatants (or even non-combatants) in foreign countries during a war. The Court focused on the "critical differences" between the German prison in *Eisentrager* and the Guantanamo Naval Base in *Boumediene* to distinguish foreign battlefields, clearly outside of the Court's jurisdiction from U.S. military bases, over which the U.S. Government exercises plenary control. In making such stark distinctions, the Supreme Court demonstrated its aversion to extending the Constitution too far without additional statutory authority from Congress.

Moreover, there are indications that resistance to opening courts to War on Terror victims is fading as popular outrage over the U.S.'s prolific use of drones for targeted killing operations pushes the courts and Congress toward more actively policing exercises of Executive war powers. Many scholars, country leaders, and inter-governmental human rights organizations[161] demand that the U.S. Government either stop the "extra-judicial" killings or provide some form of due process to its intended targets.[162] In his *Hamdi* dissent, Justice Thomas argued the plurality's due process standards would require the U.S. give a drone strike target advance notice, as well as an opportunity to be heard, before being killed.[163] While Justice Thomas's admonition was "an attempt 'to mount a *reductio ad absurdum* attack on his colleagues' efforts . . . to impose due process' on government actions,"[164] it may actually foreshadow what is to come as increasingly more citizens disapprove of the military's targeted killing

160. Hamdi v. Rumsfeld, 542 U.S. 507, 598 (2004); *see also* Murphy & Radsan, *supra* note 153, at 441–45; Editorial, *A Court for Targeted Killing*, N.Y. TIMES, Feb. 13, 2013, at A26.

161. *See UN Expert Investigates US Drone Attacks, Targeted Killings Involving Civilian*, FOX NEWS (Jan. 24, 2013), http://www.foxnews/us/2013/01/24/un-expert-investigates-us-drone-attacks-targeted-killings-that-involve-civilian/.

162. *See* Murphy & Radsan, *supra* note 153; *see also* Crandall, *supra* note 154.

163. *Hamdi*, 542 U.S. at 597.

164. Crandall, *supra* note 154, at 73 (emphasis added).

policy. President Obama announced in his 2013 State of the Union address that Congress must work to ensure that the "targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances."[165] While providing a suspected foreign enemy with unqualified due process rights may be an unworkable solution and an implacable hindrance on the Executive's ability to wage war,[166] providing due process protections to a noncitizen harmed by CBP agents along the border is not.

2. Fatal Flaws to Functionalism in the Border Zone

The Hernandez family also hopes to establish standing under *Boumediene*'s "practical and functional test," which would warrant extraterritorial application of the Constitution.[167] While a straightforward three-factor test is a tempting plaintiff-oriented interpretation of Justice Kennedy's opinion in *Boumediene*, most courts may not construe the opinion so expansively.[168] Indeed, the Supreme Court indicated that satisfying the three factors alone would not guarantee the extraterritorial application of the Constitution in all circumstances.[169] Still, the functional approach adopted by the Supreme Court in *Boumediene* supports the extraterritorial application of the Constitution "on a provision-by-provision basis, to territories over which the United States exercises exclusive jurisdiction and control."[170] Despite the Supreme Court's reluctance to extend the Constitution to foreign territory,[171] a stronger case for the extraterritorial application of the Constitution can be made when concerns over compromising "military missions" and causing "friction with the host government" are absent.[172]

Admittedly, pursuing constitutional tort litigation on the border seeks an unprecedented extraterritorial application of the Constitution to another sovereign's territory. Justice Kennedy specifically noted that the Supreme Court has "never held that noncitizens . . . in territory over which another country maintains *de jure* sovereignty have any rights under our

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165. President Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013).

166. *See* Murphy & Radsan, *supra* note 153, at 441–43.

167. *See* Part II.C.

168. *See* Brief for the Appellant, *supra* note 141, at 27–37.

169. Boumediene v. Bush, 553 U.S. 723, 764–771(2008).

170. Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 183 (2006).

171. United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1936) ("[N]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of [its] own citizens.").

172. *Boumediene*, 553 U.S. at 769–71.

Constitution."[173] At the same time, the Supreme Court stressed that citizenship is not dispositive of the issue, since "the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles."[174] As a result, the Supreme Court in *Boumediene* focused on where the noncitizens were held, rather than what country they were from.

Unlike the "unincorporated territories" in the *Insular Cases*, or the German prison in *Eisentrager*, Justice Kennedy found that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[175] While it is doubtful that the Court would find that the U.S. exercises the same degree of control over the U.S-Mexico border as it does over Guantanamo Bay,[176] the U.S. arguably exercises *de facto* sovereignty over the immediate area between the U.S. and Mexico, where the incident with Hernandez took place. Though it is indisputable that in the area immediately across the border, the U.S. would be "answerable" to the Mexican Government,[177] the Government of Mexico stated in its amicus brief that "applying U.S. law would pose no threat to principles of comity among nations or to Mexico's sovereignty in its own territory."[178] Additionally, the fact that Sergio died as a result of small-arms fire shows the limited geographic area to which plaintiffs seek to apply the Constitution.

Furthermore, courts uncomfortable with applying the Constitution extraterritorially could interpret the *Boumediene* decision narrowly to suggest that the Court only settled the question of whether the Suspension Clause of the Constitution applies to noncitizens held in its custody and within its territorial jurisdiction, and did not discuss other Constitutional provisions.[179] By construing the decision as having left open the question of "whether and when foreign nationals who are not in U.S. custody . . . are also potentially eligible for constitutional protection,"[180] courts could

173. *Id.* at 770.
174. *Id.* at 743.
175. *Id*. at 771 (citing Rasul v. Bush, 542 U.S. 466, 480 (2004)).
176. Brief for the Appellant, *supra* note 141, at 30–32.
177. *See Boumediene*, 553 U.S. at 768, 770.
178. Brief for the Government of Mexico, *supra* note 149, at 15.
179. Neuman, *supra* note 37, at 272.
180. *Id.* at 259.

more readily distinguish the War on Terror context from excessive force claims along the border.

IV. *BIVENS* ON THE BORDER: A BENEFIT OR BUST?

Since the *Bivens* decision over forty-two years ago, the Supreme Court has extended the action to new contexts only twice[181] and otherwise the Court has "found a Bivens remedy unjustified."[182] Recently, the Second Circuit declined to create a *Bivens* action against federal officers and policymakers for their participation in the extraordinary rendition of a noncitizen.[183] The Court reasoned that a "Bivens remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts.'"[184] To date, the Supreme Court has never recognized a *Bivens* suit against a CBP agent by a noncitizen outside the U.S.; therefore, creating a *Bivens* remedy for trans-border constitutional torts would be a novel *Bivens* context.[185] Despite the Supreme Court's proclaimed disfavor of extending *Bivens* liability "to any new context or new category of defendants,"[186] recent decisions by the Supreme Court in the War on Terror context indicate the Court's willingness to assume a "heightened judicial role in protecting individual rights," as well as to engage in judicial review of Executive and Congressional exercises of power.[187] In her plurality opinion in *Hamdi*, Justice O'Connor stated:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[188]

Moreover, the Supreme Court has consistently reviewed violations of the Fourth Amendment in regards to border policy.[189] Although the Supreme Court often affords considerable deference to Congress's authority over immigration policy and the Executive's control over policing the

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181. *See* Davis v. Passman, 442 U.S. 228 (1979) (An employment discrimination claim in violation of the Due Process Clause) and Carlson v. Green, 446 U.S. 14 (1980) (an Eighth Amendment violation by prison officials).
182. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
183. *See* Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009).
184. *Id.* at 571.
185. Carvalho, *supra* note 13, at 279.
186. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).
187. Brown, *supra* note 65, at 842.
188. Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).
189. Almeida Sanchez v. United States, 413 U.S. 266, 273 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

border, when it comes to constitutional claims, the duty "to say what the law is" remains with the judicial branch.[190] While there are considerable policy concerns at play along the border, the Government should not inflate these concerns to preclude U.S. courts from adjudicating meritorious claims of excessive force against CBP agents.

A. Recognizing the Need For A Bivens *Action In the Border Context*

The twin goals of *Bivens* actions are (1) to provide just compensation to victims of unconstitutional conduct and (2) to deter future constitutional violations through the individual liability model.[191] Adhering to this dual purpose, the Supreme Court has extended a *Bivens* action only when it was necessary to "provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct."[192] Both of these rationales are present in the context of excessive force claims against CBP agents on the border. First, noncitizens lack both constitutional and statutory causes of action against individual CBP agents for use of excessive, deadly force on the border. Second, unless the U.S. Government is willing to extradite the CBP officer to Mexico to stand trial—which it has adamantly refused to do—victims of excessive force have only one option for redress: sue in U.S. courts. A *Bivens* action for victims of excessive force by CBP agents is the most effective solution for holding CBP agents accountable and compensating excessive force victims.[193]

Once a court identifies the context as "new," it must undertake a two-part inquiry to "decide whether to recognize a *Bivens* remedy in that environment of fact and law."[194] The first part of the analysis is whether Congress has already established an alternative remedial scheme available to the plaintiff, while the second part considers whether there are "special factors counseling hesitation" in crafting a *Bivens* remedy in the new

190. Marbury v. Madison, 5 U.S. 137, 177 (1803).
191. Alexander A. Reinert, *Measuring the Success of Bivens Litigation And Its Consequences For the Individual Liability Model*, 62 STAN. L. REV. 809, 814 (2010); *see also Malesko*, 534 U.S. at 69–71.
192. *Malesko*, 534 U.S. at 70.
193. Hefland, *supra* note 81, at 107.
194. Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009).

context.[195] The vagueness of what constitutes "special factors," or when alternative remedies are sufficient, has drawn sharp criticism from litigators and scholars alike[196] since no court has ever defined the term and the weight of special factors are evaluated on a case-by-case basis.[197] Courts are more likely to extend *Bivens* to new contexts when the facts or circumstances surrounding a particular case provide an opportunity to apply the twin goals of deterring unconstitutional conduct and providing compensation.[198]

1. Alternative Remedial Scheme

A *Bivens* remedy operates like a fall back device whose availability is determined after the Court evaluates all of one's alternative remedies.[199] As the Supreme Court stated in *Minneci v. Pollard*, "any alternative, existing process for protecting the constitutionally recognized interest" could constitute "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[200] The Court further suggested that a *Bivens* action may exist only when an alternative remedy against the individual was "nonexistent" or where the plaintiff "lacked any alternative remedy" at all.[201] As previously discussed, a noncitizen harmed by a federal agent while outside of U.S. territory has no statutory legal theory on which to pursue a remedy for excessive force.[202] Moreover, Congress has not implicitly precluded a *Bivens* action by alternative legislation.[203] In these limited circumstances, a *Bivens* claim is currently a noncitizen's legal last resort.[204] Thus, the first prong of the inquiry favors extending a *Bivens* action to the border context.

While it is true that noncitizens may have access to U.S. courts if they can prove standing under the "substantial connection" test from *Verdugo-Urquidez*,[205] such a test will be unduly restrictive in the border context.

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195. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

196. *See* Pfander & Baltmanis, *supra* note 132, at 141–49; *see also* Anya Bernstein, *Congressional Will and the Role of The Executive In Bivens Actions: What is Special About Special Factors?*, 45 IND. L. REV. 719, 722 (2012); Margulies, *supra* note 29, at 331–33.

197. Bernstein, *supra* note 196, at 722, 730–36.

198. Pfander & Baltmanis, *supra* note 132, at 141–49; *see also* Brown, *supra* note 65, at 858–61.

199. Pfander & Baltmanis, *supra* note 132, at 120.

200. Minneci v. Pollard, 132 S. Ct. 617, 621 (2012).

201. *Id.* at 624 (citing *Malesko*, 122 S. Ct. at 70).

202. *See* Part I.B.

203. Bernstein, *supra* note 196, at 736–41.

204. *See* Part I.B.

205. Atamirzayeva v. United States, 77 Fed. Cl. 378, 387 (2007), *aff'd*, 524 F.3d 1320 (Fed. Cir. 2008), *reh'g en banc denied*, 314 F.App'x 298 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 1315 (2009).

All of the victims identified by the Southern Border Communities Coalition and the ACLU are residents and citizens of Mexico with few, if any, "substantial connections" to the U.S. The courts should not allow such an arbitrary and ambiguous limit to bar plaintiffs from pursuing judicial recourse. The Fifth Circuit rightly held that the Fourth and Fifth Amendments protect excludable aliens against excessive force when unjustifiably beaten by CBP agents outside the port of entry, but still technically within the territory of the U.S.[206] Analogously, U.S. airports are the functional equivalents to port of entries at the border, and an international traveler would not doubt that he has a tort claim against a Transportation Security Administration ("TSA") agent for use of excessive force in conducting a search or seizure at the airport or on the airplane prior to disembarking. While an international traveler waits to be formally admitted to the U.S., he should be able to claim protection of the Constitution.[207]

2. Special Factors

In *Bivens*, the Supreme Court warned that the existence of "special factors counseling hesitation" may thwart the application of a *Bivens* action.[208] The Court suggested that "special factors" arise when new damages claims could impose an unreasonable burden on the federal government or when the constitutional violation interferes with Congressional plenary power.[209] In the border context, there are multiple credible "special factors" that could preclude a *Bivens* remedy, but such factors are not insurmountable.[210]

First, the Supreme Court has repeatedly recognized the long-standing principle that the power to defend and regulate the nation's border is an inherent power derived from America's independence as a sovereign nation.[211] The promulgation and regulation of America's national

206. Martinez-Aguero v. Gonzalez, 459 F.3d 618, 626–27 (5th Cir. 2006).
207. *See* Pellegrino v. U.S. Transp. Sec. Admin., 855 F. Supp. 2d 343 (E.D. Penn. 2012).
208. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971).
209. *Id.* at 396–97; Hefland, *supra* note 81, at 113–20.
210. Brown, *supra* note 65, at 842.
211. *See* United States v. Curtiss-Wright Export Co., 299 U.S. 304, 315–18 (1936); *see also* THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 191–96 (Thomas Reuters 7th ed 2012).

immigration laws fall squarely within Congress's constitutional purview and plenary power.[212] Any intrusion into immigration regulation may therefore constitute a "special factor" that would dissuade the court from recognizing a *Bivens* action along the border. Thus, the likelihood that courts will create a *Bivens* action in the border context will depend on whether courts find an action by noncitizens against CBP agents poses a real risk of hindering the Executive's power to direct national security initiatives and Congress's plenary power to regulate immigration.[213] Arguably, it does not.

Excessive force claims have become routine in U.S. courts and the location of the violation should not diminish the individual right that is disregarded. Recently, in the War on Terror context, federal courts have treated the "special factors" analysis as a separation of powers issue that requires courts to give greater deference than usual to the political branches.[214] In those cases, the doctrine of separation of powers requires the Court to tread carefully when exercising judicial review of the Executive's war power and national security stratagem.[215] Some courts have cautioned that judicial review of "matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been hesitant to intrude' absent congressional authorization."[216] Moreover, at least one scholar and one court have expressly stated that a judicially created *Bivens* suit for war on terror plaintiffs is inappropriate in the military context and public policy concerns decidedly weigh in favor of a Congressional remedy.[217] The Second Circuit warned that creating a damages remedy for victims of military operations could incidentally "enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns."[218] Therefore, "[t]he gravity of the separation-of-powers issues raised by [the War on Terror] cases"[219] requires the Court to consider the "practical obstacles" to judicial review, including whether "adjudicating [a claim] would cause friction with the host

212. Hefland, *supra* note 81, at 113–17; *see also* Margulies, *supra* note 29, at 331–32.
213. Hefland, *supra* note 81, at 111–12.
214. Brown, *supra* note 65, at 878.
215. Boumediene v. Bush, 553 U.S. 723, 770 (2008).
216. Arar v. Ashcroft, 585 F.3d 559, 575 (2d Cir. 2009) (citing Lincoln v. Vigil, 508 U.S. 182, 192, (1993)).
217. Brown, *supra* note 65, at 904–11; *Arar*, 585 F.3d at 581.
218. *Arar*, 585 F.3d at 575; *see also* Arar v. Ashcroft, 414 F. Supp. 2d 250, 279–80 (E.D.N.Y. 2006).
219. *Boumediene*, 553 U.S. at 772.

government,"[220] compromise a "military mission," or impose logistical constraints on the "Executive['s] substantial authority to apprehend and detain those who pose a real danger to our security."[221]

However, the border context does not implicate separation of powers concerns in the same way. While it is true that the U.S. remains involved in the "war on drugs"[222] and national security includes border defense and enforcement, it is still possible to meaningfully distinguish the role of CBP agents in policing the borders and the role of military forces in counter-terrorism operations abroad. Where federal courts have rightly shied away from reviewing individual acts stemming from War on Terror policies,[223] federal courts, including the Supreme Court, have always been willing to review constitutional questions of law raised by aliens, even when they have not exhausted their administrative remedies under the Immigration and Nationality Act.[224] Moreover, the "hands-off" approach in the War on Terror cases has drawn criticism from scholars who argue that"a [federal] official should not be able to use the 'factor counseling hesitation' prong of *Bivens* to insulate conduct by slapping a 'national security' label on a challenged decision."[225] Similarly, CBP agents should not be immune from constitutional tort litigation solely because they are stationed at the border. Unlike our nation's military officers, who are routinely confronted with complex situations with a direct effect on our country's foreign affairs, CBP agents are tasked with responsibilities more akin to regular law enforcement. Where a court would refuse to review discretionary conduct on the battlefield, courts routinely review excessive force claims against state police under Section 1983 actions.[226]

Notwithstanding Congress's obvious dominion over immigration, some scholars contend that it may be possible to carve out a *Bivens* action for

220. *Id.* at 770.
221. *Id.* at 797.
222. Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 649 (2011).
223. Brown, *supra* note 65, at 871.
224. 8 U.S.C. § 1252(a)(2)(D) (2006).
225. Margulies, *supra* note 29, at 342.
226. Scott J. Borrowman, Sosa v. Alvarez-Machain *and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Personnel and Civilian* Contractors, 2005 B.Y.U. L. REV. 371, 380–83 (2005).

egregious constitutional violations.[227] In these more exceptional cases, the court would not defer to Congress's plenary power when a federal agent's act is so unconstitutional such that it places it outside the boundaries of Congressional approbation.[228] Already, the Fifth Circuit has held that even "excludable aliens are entitled under the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands . . . of federal officials."[229] Despite recent decisions that limit the substantive rights of resident aliens, it is easy to imagine that the use of excessive, deadly force along the border by federal agents can run so afoul of the Constitution as to warrant judicial intervention. Additionally, it is unlikely that a *Bivens* action against a federal CBP agent acting in their individual capacity would create the financial burden that would counsel against providing a damages remedy since only the agent, not the federal government, would pay for the agent's negligence.[230] As Justice Kennedy pointed out in *Boumediene*, "[c]ompliance with any judicial process requires some incremental expenditure of resources,"[231] but that such cost concerns cannot outweigh adjudication of substantive rights.

3. Qualified Immunity

Finally, it should be noted that even when an individual, citizen or not, can establish the prerequisites for a *Bivens* action, he must still overcome the federal official's defense of qualified immunity, which permits liability only if the official has acted in violation of settled law.[232] Similar to the excessive force analysis, for a plaintiff to pierce qualified immunity, the federal official must have violated a "clearly established" constitutional right[233] that a reasonable person would have recognized. Moreover, recent court decisions have narrowly construed the "clearly established law" element to require "precedents that precisely match the fact pattern in the case at bar."[234] While the Supreme Court has never clearly defined what "clearly established" means, it "has almost always required

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227. *See* Hefland, *supra* note 81, at 114–15; Margulies, *supra* note 29, at 323.

228. *See* Hefland, *supra* note 81, at 114–15; Margulies, *supra* note 29, at 323; *see also* Wong Wing v. United States, 163 U.S. 228 (1896).

229. Hefland, *supra* note 81, at 117 (citing Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)) (internal quotation marks omitted).

230. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 847–50 (2010).

231. Boumediene v. Bush, 553 U.S. 723, 769 (2008).

232. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Pearson v. Callahan, 555 U.S. 223 (2009).

233. *Harlow*, 457 U.S. at 817; *see also* Margulies, *supra* note 29, at 337–39.

234. Margulies, *supra* note 29, at 337; *see also* John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1305–09 (2012).

specificity."[235] Therefore, noncitizen plaintiffs must still prove that a right is "clearly established" by demonstrating either evidence of a "substantial connection" or extraterritorial application of the Constitution.[236]

4. Bivens*: Still the Best Option*

Despite the lament of many scholars, of the uneven and sometimes "ad hoc" fashion in which *Bivens* jurisprudence has developed over the years,[237] has long suggested that damages remedies are the most effective means to deter governmental misconduct and increase overall accountability.[238] While access to the judicial system in no way guarantees relief, the stability and transparency of the judicial process has several advantages over the political process. In fact, the Supreme Court in *Carlson* reasoned that a *Bivens* claim brought against an individual federal officer was more effective than the FTCA in deterring violations of the Constitution.[239] The crux of the issue remains whether it is possible to provide a *Bivens* action in the limited context of the border without unintended consequences in other areas of law.

The Hernandez family, and others similarly injured in border torts, have reason to expect that CBP agents should be held responsible for reckless behavior and use of excessive force, especially when such acts result in the loss of life. But is it possible for courts to fashion a remedy for trans-border torts without imposing liability on the U.S. Government for its conduct abroad, including an erroneous drone strike in a foreign country? The most viable judicial option is to craft a circumscribed *Bivens* action along the border for only the most egregious harms, such as excessive force and the deprivation of life. The possibility of individual civil liability for egregious violations could provide the deterrent needed for CBP agents to think twice before resorting to deadly force. Granted, the exigencies of national security and public safety oppose providing a *Bivens* remedy for noncitizens against CBP agents, but not doing anything is equally unacceptable. The purpose of the *Bivens* remedy is to allow

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235. Williams, *supra* note 234, at 1304–05.
236. *See* Carvalho, *supra* note 13, at 255–58.
237. Bernstein, *supra* note 196, at 720; *see also* Margulies, *supra* note 29, at 320–24.
238. Hefland, *supra* note 81, at 119–22.
239. Lee J. Teran, *Obtaining Remedies for INS Misconduct*, 96-05 IMMIGR. BRIEFINGS 1 (1996).

the courts to step in where Congress has either explicitly or implicitly failed to act. The Hernandez litigation exemplifies this purpose.

V. NON-JUDICIAL REMEDIES: IF NOT *BIVENS*, THEN WHAT?

An assessment of alternative non-judicial remedies is necessary to provide a complete understanding of the choices facing future litigants if courts refuse to act. Such an assessment reveals why a *Bivens* action is still the best option for achieving greater transparency and compliance among CBP agents.

A. Bilateral International Agreements with Mexico

Stepping away from the merits of the Hernandez litigation, there may be alternative means to increase accountability and reduce human rights violations at the border. Before the judiciary creates a common-law remedy for noncitizens, the United States and Mexico should work harder to fulfill existing international obligations. Prompted by the increase in violent and deadly confrontations between Mexican nationals and CBP agents, the U.S. and Mexico signed the Joint Statement of the Merida Initiative High-Level Consultative Group on Bilateral Cooperation against Transnational Organized Crime in March 2010, as well as the Border Violence Prevention Protocols.[240] These initiatives expound a commitment to shared governance and responsibility along the border. While neither initiative provides for any bilateral judicial mechanism to adjudicate claims that arise along the border, a bilateral agreement that delineates a judicial procedure for trans-border crimes or violations would definitely be afforded greater deference by the judiciary in the U.S. In fact, treaties between nations are considered the supreme law of the land and may confer on Congress the power to pass laws or create procedures to implement the treaty.[241] Because "the Mexican and U.S. governments are equally responsible for the violence at the U.S.-Mexico border," a joint partnership is critical to mounting a united front against external threats while ensuring the safety of their respective citizens.[242] However, the Mexican Government points to the number of violent shootings along the border as proof of the failure of the U.S. Government to

240. Press Release, U.S. Department of State, Joint Statement on U.S.-Mexico Merida High-Level Consultative Group on Bilateral Cooperation Against Transnational Criminal Organizations (Apr. 29, 2011), *available at* http://www.state.gov/r/pa/prs/ps/2011/04/162245.htm [hereinafter United States-Mexico Joint Statement].

241. State of Missouri v. Holland, 252 U.S. 416, 431–33 (1920).

242. *See* Carvalho, *supra* note 13, at 261.

uphold the promises it made in the Joint Declaration. For instance the U.S. Government agreed to,

> [m]inimize the need for United States and Mexican federal law enforcement officers to resort to lethal force, and ensure that such use of force is consistent with the policies and standards of our respective agencies and in compliance with bilateral law and international instruments to which the United States and Mexico are both parties.[243]

But the U.S. Government's repeated refusal to prosecute individual CBP agents has further strained the U.S.-Mexico relationship. When the DOJ announced it would not go forward with the investigation into Sergio's death, the Mexican Government reiterated its request for the U.S. to extradite the federal agent involved in the incident.[244] Despite the U.S.'s most recent denial to extradite Agent Mesa, the Mexican government has made repeated, albeit unsuccessful, requests for extradition of federal agents in the past.[245] President Calderon publicly criticized the U.S.'s approach, saying, "how many Americans have heard of Guillermo Arévalo Pedroza? He was killed earlier this month by a bullet fired from a U.S. Border Patrol boat while picnicking with his wife and two young girls on the south side of the Rio Grande, near Laredo, Texas."[246] He decried the fact that "nothing happened in the legal institutions of [the U.S.]"[247] Calderon's jab at the American judicial system expresses the view held by many Mexicans of the hypocrisy of the U.S. Government's actions—earnestly prosecuting nonviolent undocumented aliens yet refusing to prosecute one of its own employees.

Not surprisingly, many international observers and commentators are enraged that CBP agents involved in deadly clashes are often returned to the field after spending only three to four days on administrative duty.[248]

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243. United States-Mexico Joint Statement, *supra* note 240.

244. Press Release, Ministry of Foreign Affairs of Mex., The Mexican Gov't Disagrees with the U.S. Justice Dep'ts Decision Not to Prosecute the Border Patrol Agent Who Shot a Mexican Teen (Apr. 29, 2012); *see also* Marisela Ortega Lozano & Aaron Bracamontes,*Chihuahua officials seek extradition of border agent in the '10 shooting death of teenager*, EL PASO TIMES (May 4, 2012, 8:32 AM), http://www.elpasotimes.com/news/ci_20544250/extradition-border-agent-sought.

245. *See* Brief for the Government of Mexico, *supra* note 149.

246. Bret Stephens, *Stephens: The Paradoxes of Felipe Calderón*, WALL ST. J., Sept. 29, 2012, at A15.

247. *Id*.

248. Ramon Bracamontes, *Border Patrol Agent Who Shot Boy Is Back on Duty*, EL PASO TIMES (Aug. 25, 2010, 12:00 AM), http://www.elpasotimes.com/news/ci_15883524.

In fact, several members of Congress, the Inter-American Commission on Human Rights, the United Nations High Commissioner for Human Rights, and the Southern Border Communities Coalition have demanded a comprehensive, independent investigation of CBP policies and practices.[249] When it comes to human life, activists claim that "[i]t's not sufficient for there to be enforceable standards . . . it's not enough that border patrol have a complaint process, it's not enough that there be an internal DGS process, because it's clear that none of those mechanisms are sufficient."[250]

In addition to promoting a thorough vetting of the agency's use of force policies, training, and complaint processes, there is widespread support among advocates for a "permanent, arm's-length oversight commission for CBP."[251] The frequency of violent cross-border incidents has tarnished the CBP's reputation internationally.[252] Civil rights organizations recommend CBP engage with the public and take suggestions to implement the best law enforcement practices, including improved training of CBP agents by prioritizing de-escalation techniques, as well as equipping agents with protective gear that reduces their risk of injury and corresponding need to use potentially deadly force.[253] Without proper oversight of the actions of CBP officers and investigations of human rights complaints, "the number of migrant killings and incidents of extreme and unwarranted violence [will] continue to rise."[254]

B. Improved Administrative Complaint Procedure and Internal Discipline

An alternative non-judicial remedy to improving transparency and accountability among the CBP's rank and file employees is an improved administrative complaint procedure coupled with an operative internal discipline system that punishes the "rotten apples" of the CBP. For decades, civil and human rights organizations have criticized the CBP's administrative complaint procedure as being both an ineffective deterrent against border patrol misconduct and partly responsible for continued

249. Press Release, ACLU, Border Patrol Must Stop Hiding the Truth About Its Uses of Force (Oct. 4, 2012); Press Release, ACLU, A Cause for Alarm: ACLU Tells UN Panel of Rampant Abuse by Out-of-Control Border Patrol (Oct. 26, 2012).

250. *Deadly Patrols*, *supra* note 24, at 2.

251. Press Release, ACLU, Border Patrol Must Stop Hiding the Truth About Its Uses of Force (Oct. 4, 2012).

252. *See* NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011).

253. Border Patrol Must Stop Hiding the Truth About Its Uses of Force, *supra* note 251.

254. John Carlos Frey, *What's going on with Border Patrol?*, L.A. TIMES, Apr. 20, 2012, http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420.

abuse and human rights violations.[255] The administrative complaint procedure is the process by which the CBP receives, investigates, and addresses complaints of abuse by its CBP agents.[256] The internal complaint review system in place before 9/11 was often denounced by scholars and human rights organizations as hindered by its bias, cronyism, and bureaucratic apathy.[257] After many prior failed attempts, the most encouraging reform of the administrative complaint review process occurred after 9/11, when Congress established the Office for Civil Rights and Civil Liberties ("CRCL") within the DHS.[258] This new branch has the authority to investigate complaints, provide policy advice to DHS leadership and its subdivisions on civil rights and civil liberties issues, and communicate with the public about CRCL and its activities.[259]

The current procedure still fails to curb official misconduct and illegitimate uses of force despite its broad grant of discretionary authority and structural overhaul of the complaint process.[260] The process fails to achieve its goals for many of the same reasons it has always failed. Undocumented immigrants, who suffer the brunt of human rights abuses, do not file complaints for fear of prosecution or retaliation. Additionally, attempts by advocates to use the Freedom of Information Act to begin an investigation into the use of force policies of the CBP have been unsuccessful. Furthermore, when it comes to allegations of excessive force, as in the Hernandez case, the low rate of prosecution for civil rights abuses only discourages potential complainants because they believe the complaint procedure to be futile. According to the CRCL's third quarterly report to Congress, fifty-three investigations of excessive force were under way by June 30, 2012 with nineteen of those being new

255. HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992).

256. Jesus A. Trevino, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 HOUS. J. INT'L L. 85, 109 (1998).

257. *Id.* at 110–11; *see also* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 779–99 (1995).

258. 6 U.S.C. § 113 (d)(3) (2012).

259. 6 U.S.C. § 345(a)(6) (2012).

260. Letter from Jose E. Serrano, et al., Member of Cong., to Janet Napolitano, Sec'y of the Dep't of Homeland Sec. (May 10, 2012), *available at* http://serrano.house.gov/press-release/16-members-congress-call-justice-hernandez-rojas-case/.

investigations opened in 2012.[261] The higher numbers of complaints indicate that use of excessive force remains a problem for Border Patrol. But the higher numbers also may demonstrate an increased willingness of citizens and noncitizens to file complaints and hold CBP agents accountable.

Most recently, in response to another deadly shooting along the border in October 2012, the Department of Homeland Security Office of Inspector General launched a probe into the agency's lethal force policies.[262] The Mexican Government is encouraged by this recent development and future plaintiffs should be encouraged as well. Hopefully, this investigation will lead to fundamental changes in the agency's firearms policies and agency training programs.

VI. CONCLUSION

Until 2001, no noncitizen had pursued a *Bivens* remedy in U.S. courts.[263] By 2013, over 200 noncitizens had initiated *Bivens* suits against federal officials. However, to date none of these suits have prevailed on the merits of the claims. The only *Bivens* suit the federal court did not dismiss on jurisdictional grounds concluded in a settlement.[264] Without admitting fault, the U.S. Government has repeatedly paid out hundreds of thousands of dollars to settle wrongful death actions along the border, including one settlement in which the family received $850,000.[265] These numbers should provide cautious optimism for future plaintiffs because they indicate the U.S. Government's acknowledgement for the need to compensate noncitizen victims. Moreover, lobbying efforts aimed at the Executive that demand review of DHS internal policies have also been successful.[266]

Sergio's case will be the first *Bivens* action by a noncitizen after the Supreme Court's decision in *Boumediene*. It will also be the first to argue for the implementation of a functional approach when applying the

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261. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., QUARTERLY REPORT TO CONGRESS, THIRD QUARTER FISCAL YEAR 2012, at 11–13 (Oct. 3, 2012), *available at* http://www.dhs.gov/reports-office-civil-rights-and-civil-liberties.

262. *Border Patrol Under Scrutiny for Deadly Force*, USA TODAY (Nov. 24, 2012, 8:59 PM), http://www.usatoday.com/story/news/nation/2012/11/14/border-patrol-probe/1705737/.

263. Hefland, *supra* note 81, at 107.

264. Joint Stipulation of Dismissal, Martinez-Aguero v. Gonzalez, No. EP-03-CV-0411 (W.D. Tex. Oct. 12, 2007).

265. *Border Patrol Under Scrutiny for Deadly Force*, *supra* note 262.

266. Sarah Childress, *Amind Criticism, Border Patrol to Change Use-of-Force Policy*, Frontline (Sept. 25, 2013, 4:05 PM), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/amid-criticism-border-patrol-to-change-use-of-force-policy/.

Constitution to the border zone. While controlling precedent may compel the Fifth Circuit to dismiss the action on jurisdictional grounds, the action must proceed if the courts are to stay true to the tenets of the Constitution and the rationale behind *Bivens*. Something must change along the border to stop the stream of violent and deadly shootings. As U.S. Senator John Cornyn once said, "[u]nless and until Congress addresses the immigration problem across the board, we will continue to experience an unacceptable level of violence along the border."[267]

267. Carvalho, *supra* note 13, at 266.