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## Shoot First, Ask Later: Constitutional Rights at the Border after *Boumediene*

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## Shoot First, Ask Later: Constitutional Rights at the Border after *Boumediene*

### Abstract

Adopting *Boumediene's* functional approach in analyzing extraterritorial application of the United States Constitution at the U.S.-Mexico border will promote uniformity and provide guidance to courts and officials. Currently, courts are applying *Verdugo-Urquidez's* sufficient connections test, and different variations thereof permitting courts to arbitrarily decide who is entitled to constitutional protection in the absence of uniform precedent. Adopting *Boumediene* as the guiding test will not automatically trigger constitutional protection, instead, constitutional protection will only be granted if extending protection to an alien at the U.S.-Mexico border is justified based on the three-prong test.

## NOTE

# SHOOT FIRST, ASK LATER: CONSTITUTIONAL RIGHTS AT THE BORDER AFTER *BOUMEDIENE*

BRITTANY DAVIDSON\*

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## INTRODUCTION

On June 7, 2010, a fifteen-year-old Mexican national, Sergio Adrian Hernandez Guereca, and his friends were playing a game on the Mexican side of a cement culvert that separates Mexico from the United States.<sup>1</sup> The game was "running up the incline of the culvert, touching the barbed-wire fence separating Mexico and the United States, and then running back down the incline."<sup>2</sup> United States Border Patrol Agent, Jesus Mesa, Jr., approached the group of friends during the game, and detained one of them.<sup>3</sup> Hernandez ran behind a bridge's pillar in Mexico to avoid also being seen and detained by Agent Mesa.<sup>4</sup> For no apparent reason, once Agent Mesa detained Hernandez's friend, and while standing in the United States, he turned and fired gunshots at Hernandez, who was still in Mexico.<sup>5</sup> One of Agent Mesa's gunshots hit Hernandez directly in his head, killing him instantaneously.<sup>6</sup>

Hernandez's parents sued the United States, Agent Mesa, and unknown federal employees for their son's death, asserting eleven claims, including violations of Hernandez's Fourth and Fifth

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1. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014), *aff'd on reh'g*, 785 F.3d 117 (5th Cir. 2015) (per curiam).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 255; *see id.* at 278–79 (indicating that Agent Mesa had no reason to believe the use of deadly force was justified or even required).

6. *Id.* at 255.

Amendment rights against the use of excessive, deadly force.<sup>7</sup> The Fifth Circuit denied Hernandez Fourth Amendment protection on two grounds: first, the plain meaning of “the people” in the text of the Fourth Amendment precluded protection of Hernandez because the right extends only to U.S. citizens; and second, even if Hernandez could bring a Fourth Amendment claim, under the sufficient connections test enumerated in *United States v. Verdugo-Urquidez*,<sup>8</sup> he lacked a sufficient connection to the United States to trigger constitutional protection.<sup>9</sup> The court, however, granted Hernandez Fifth Amendment protection under the Due Process Clause because the term “any person” in the Amendment includes both U.S. citizens and aliens.<sup>10</sup> Additionally, the court applied the three-factor test from *Boumediene v. Bush*<sup>11</sup>—which analyzes: the citizenship and status of the alien-detainee; the nature of the site where the incident occurred; and practical obstacles in awarding constitutional protection—to extend constitutional protection to Hernandez.<sup>12</sup>

The U.S. Court of Appeals for the Fifth Circuit reheard the case, en banc, in 2015 to determine whether Agent Mesa was entitled to

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7. *Id.* The parents brought seven claims under the Federal Tort Claims Act; two claims under the Fourth and Fifth Amendments for failing to adopt reasonable procedures regarding the use of deadly force and use of force during arrests; one claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), for violating his Fourth and Fifth Amendment rights against the use of deadly force; and one claim under the Alien Tort Statute. Although his parents successfully petitioned the Fifth Circuit’s ruling, see *Hernandez v. United States*, 771 F.3d 818 (5th Cir. 2014) (per curiam) (granting petition for rehearing en banc), on rehearing, the court affirmed its holding that Hernandez lacked “significant voluntary connection” to the United States, therefore barring him from asserting a Fourth Amendment claim. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015), *petition for cert. filed sub nom. Hernandez v. Mesa* (July 23, 2015) (No. 15-118).

8. 494 U.S. 259 (1990).

9. See generally *Hernandez*, 757 F.3d at 263, 265 (emphasizing that the court was unwilling to ignore a Supreme Court decision, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), unless directed to do so by the Court). While the Fifth Circuit did not entitle Hernandez to Fourth Amendment protection, it noted the Supreme Court’s recognition that the meaning of “the people” was not conclusive in deciding whether the Fourth Amendment applied in *Verdugo-Urquidez*. *Id.* at 266. Instead, the court relied on the totality of circumstances—which included prior precedent, history of the Fourth Amendment, and practical considerations—in light of the *Boumediene* and *Verdugo-Urquidez* rulings to preclude Fourth Amendment protection. *Id.* at 266.

10. *Id.* at 268.

11. 553 U.S. 723, 766 (2008).

12. See generally *Hernandez*, 757 F.3d at 268 (arguing that “persons” in the text of the Fifth Amendment can be applied to any person and, consequently, “*Verdugo-Urquidez*’s sufficient connections test, which provides a gloss for the term ‘the people,’ does not apply in interpreting the extraterritorial application of the Fifth Amendment”).

qualified immunity.<sup>13</sup> The Fifth Circuit affirmed its previous dismissal of Fourth Amendment protection to Hernandez by finding that he failed to allege a constitutional violation.<sup>14</sup> Additionally, the court reversed its prior grant of Fifth Amendment protection to Hernandez by ruling that he did not clearly establish a right to any constitutional protection and that Agent Mesa could not reasonably have known that his conduct would have potentially violated the Constitution.<sup>15</sup> At the close of the opinion, the Fifth Circuit left open the possibility that *Verdugo-Urquidez* is not the sole authority in determining extraterritoriality and, in the future, *Boumediene* may be the correct avenue in pursuing claims of extraterritorial constitutional violations.<sup>16</sup>

Tragically, Hernandez's death is just one example of the vast history of U.S. Border Patrol abuse of discretion at the U.S.-Mexico border.<sup>17</sup> The Supreme Court has yet to clearly establish whether the Constitution protects foreign nationals, located outside U.S. territory, who are injured by U.S. officials.<sup>18</sup> In 1990, the Court in *Verdugo-Urquidez* first confronted the question of to what extent the Constitution applies to an alien in a foreign territory when U.S. agents are involved. The Court applied a "sufficient connections" test to deny constitutional protection to a foreign national, who was seized by Mexican officials in Mexico then transported to the United States for trial.<sup>19</sup> The sufficient connections test requires courts to determine whether a foreign national established sufficient, significant relations to the United States to be entitled to constitutional protection.<sup>20</sup> Almost two decades later, in *Boumediene*, the Court rejected *Verdugo-Urquidez*'s sufficient connections test and

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13. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (per curiam).

14. *Id.*

15. *Id.* at 119–20.

16. *Id.* at 120–21 ("Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as [Hernandez] urge[s].").

17. See 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, 262–63 (2008) (stating that "[m]any Mexican nationals are found dead at or near the U.S.-Mexico border every year[—]approximately 3,000 immigrants died between 1990 and 2002,"—and pointing to Border Patrol's broad enforcement powers, allowing agents to "express their frustration through blows and insults," as the primary danger for Mexican nationals at the border).

18. See Eva L. Bitran, Note, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 231 (2014) (recognizing that the question of whether foreign nationals immediately outside U.S. territory are entitled to constitutional protection has received no scholarly attention).

19. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 274–75 (1990).

20. *Id.* at 271.

instead created a functional approach to determine whether the Constitution applies extraterritorially.<sup>21</sup> The Court applied a three-factor test to grant the petition for a writ of habeas corpus of enemy combatants held in Guantanamo Bay.<sup>22</sup>

The Fifth Circuit, en banc, ruled incorrectly when it denied Hernandez Fourth Amendment protection. The court's ruling is objectionable on two grounds: it did not interpret the Fourth Amendment's text, "the people," in light of the Framers' intent when creating the Constitution; and it incorrectly chose to apply *Verdugo-Urquidez's* sufficient connections test because *Boumediene's* functional approach is a more uniform and instructive test for application at the U.S.-Mexico border.<sup>23</sup> To inhibit U.S. Border Patrol agents' use of excessive force at the U.S.-Mexico border, and consequently, to prevent the loss of innocent lives, the Court should adopt *Boumediene's* functional approach to determine extraterritorial application of the Constitution at the border.<sup>24</sup>

This Note argues that the Constitution provides Fourth Amendment protection to aliens at the U.S.-Mexico border against the use of excessive deadly force by U.S. Border Patrol Agents. Part II of this Note begins by looking at the Framer's interpretation of "the people" in the Fourth Amendment, specifically concerning their intent to create a Constitution that was not self-restricting. This Part also addresses the Court's century-long struggle to address how to extraterritorially apply the Constitution in alignment with the United States' increased involvement in foreign affairs. This Part further emphasizes some key questions about extraterritoriality that the Court has yet to directly answer. Lastly, this Part addresses the Fifth Circuit's dismissal of both Hernandez's Fourth and Fifth Amendment claims and introduces a recent decision from a U.S. District Court

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21. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (determining specifically the reach of the Suspension Clause).

22. *Id.* (emphasizing three factors: (1) citizenship and status of the alien-detainee; (2) nature of the site where the incident (apprehension and detention) occurred; and (3) practical obstacles in awarding constitutional protection).

23. See *infra* notes 73–86 and accompanying text (explaining the Fifth Circuit's application of *Verdugo-Urquidez*, and noting one District Court case that applied both tests to grant Fourth Amendment rights in a case similar to *Hernandez*).

24. See Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 320–21 (2011) (suggesting that even if prisoners were captured in an active war zone, they could be precluded from succeeding in a habeas proceeding); see also discussion *infra* Section II.B. (arguing that a uniform standard will promote clarity for U.S. officials to follow and alert them of possible apprehension if they were to violate the standard at the U.S.-Mexico border).

that applies both *Verdugo-Urquidez's* and *Boumediene's* tests to grant Fourth Amendment protection to an alien at the U.S.-Mexico border.

Part III of this Note argues that *Verdugo-Urquidez's* narrow interpretation of the Fourth Amendment's text, "the people," should be rejected to correspond with the Framers' vision of a Constitution that allows for unanticipated changes as the United States continues to evolve. Additionally, this Part advocates that the Court should adopt *Boumediene's* three-factor test when determining whether to apply the Constitution extraterritorially at the U.S.-Mexico border. In applying *Boumediene's* three criteria, this Part argues that Hernandez's status as an innocent foreign national, the vast amount of control the United States exerts over the U.S.-Mexico border, and the minimal practical obstacles the government would face if constitutional protection were granted, all support a conclusion of extraterritorial application of the Fourth Amendment to Hernandez. Lastly, this Note concludes that adoption of *Boumediene's* three-factor test when determining extraterritorial application of the Constitution at the U.S.-Mexico border will not only promote clarity among courts and U.S. officials, but, more importantly, it will reduce the number of lives lost at the border from unreasonable and excessive force.

#### I. UNCERTAINTY REGARDING THE EXTENT TO WHICH THE CONSTITUTION EXTENDS ABROAD

The Fourth Amendment was initially enacted as a restraint on governmental misconduct.<sup>25</sup> As time elapsed, while the text of the Amendment never changed, the changing dynamics between the Justices of the Supreme Court, in addition to the United States' expansion into foreign territories, resulted in differing interpretations of the Amendment's meaning.<sup>26</sup> For decades, the Court has struggled to determine to what extent the Constitution applies outside of the United States.<sup>27</sup> Because of the Court's inability to apply a governing test, there is still confusion among U.S.

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

26. See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE INVESTIGATING CRIME* 65 (5th ed. 2013) (characterizing the jurisprudential evolution of the Fourth Amendment as a journey of "U-turns" and "zigs and zags").

27. See Bitran, *supra* note 18, at 232 (explaining that while courts have not determined the Constitution's reach, it is becoming more important with the United States' heightened involvement in international affairs).



officials and courts as to the extraterritorial limits of the Constitution.<sup>28</sup>

A. *The Origins of the Fourth Amendment*

The Fourth Amendment asserts that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>29</sup> The use of excessive, deadly force is classified as a seizure, subject to the reasonableness clause of the Fourth Amendment.<sup>30</sup> To determine whether a U.S. official acted reasonably, courts refer to the totality of circumstances test, considering all factors in a specific context to decide whether the officer acted as a reasonable person would in that circumstance.<sup>31</sup> Scrutiny under the Fourth Amendment’s reasonableness clause is the proper analysis in determining whether an unreasonable search or seizure has occurred because it explicitly prohibits any physically intrusive governmental conduct.<sup>32</sup>

Dating back to the late Nineteenth Century, courts and commentators have disagreed about whom the Framers intended to protect under the plain meaning of “the people” in the Fourth Amendment.<sup>33</sup> Two predominant approaches govern the debate as to whether “the people” in the Fourth Amendment includes only U.S.

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28. See *infra* notes 112–16 and accompanying text (noting how some courts have disregarded *Verdugo-Urquidez* and applied their own tests for extraterritorial issues).

29. U.S. CONST. amend. IV; see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557–60 (1999) (noting that: (1) the first clause of the Fourth Amendment, known as the “reasonableness” clause, states a “comprehensive principle” that restricts the government’s power to conduct unreasonable searches and seizures; and (2) the second clause of the Fourth Amendment, the “warrant” clause, serves a “more specific purpose” of inhibiting the government’s ability to issue warrants without sufficient probable cause).

30. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

31. See *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that all claims of the use of excessive force during a seizure must be analyzed under the Fourth Amendment’s “reasonableness standard”). *But see* *Carvalho*, *supra* note 17, at 258 (stating that courts are still unsure of what constitutes acceptable versus excessive force by officials under the Fourth Amendment).

32. See *Graham*, 490 U.S. at 395 (affirming that any governmental physical intrusion during seizures should not be analyzed under the Due Process Clause of the Fifth Amendment).

33. See generally *In re Ross*, 140 U.S. 453 (1891) (establishing one of the first instances where the Supreme Court was faced with the challenge of deciding the extraterritoriality of the Constitution).

citizens or extends to aliens.<sup>34</sup> The Federalists, who believe that the Bill of Rights enumerates preexisting rights, argue that if “the people” was intended to include only U.S. citizens, then the text would have used terms such as “freemen,” “residents,” or “Americans” to limit the breadth of the Amendment.<sup>35</sup> Contrarily, the Anti-Federalists, who believe the Bill of Rights lists new, fundamental rights, argue that “the people” was carefully selected by the Framers to limit the scope of the right’s protection to only U.S. citizens.<sup>36</sup> In one of the primary cases that sparked the division between the Federalists and Anti-Federalists, *McCulloch v. Maryland*,<sup>37</sup> the Court endorsed the Federalist’s position when it held that Maryland’s effort to tax a federal bank violated the Supremacy Clause of the Constitution by emphasizing that the Constitution is unique from other types of legal documents because its brevity and vagueness leave room for interpretation.<sup>38</sup> The Court further emphasized that every word in the Constitution was not meant to be exclusive.<sup>39</sup>

### B. Extraterritorial Application of the Fourth Amendment

Due to a rise in international disturbances, the United States began to reconsider the extent of its involvement in international affairs.<sup>40</sup>

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34. See DRESSLER & THOMAS III, *supra* note 26, at 65 (explaining that the Supreme Court has struggled over the years to clarify the meaning of the Fourth Amendment and has not yet been successful); *infra* notes 104–07 and accompanying text (explaining the disagreement between the plurality and concurrence in *Verdugo-Urquidez* over the meaning of “the people” in the Fourth Amendment).

35. See *infra* notes 105–07 (outlining examples indicating that the phrase “we the people” encompasses more than just U.S. citizens); see also Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT’L L. 329, 335 (1994) (stating that the Constitution’s silence on its geographical reach and the meaning of “the people” or “persons” has caused disagreement and contention for centuries).

36. See, e.g., Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 93 (1998) (stating that the Anti-Federalists attempted to have the Constitution “comprehensively enumerate the people’s rights[, raising] the inference ‘that every thing omitted is given to the general government’”).

37. 17 U.S. (4 Wheat.) 316 (1819).

38. *Id.* at 407, 434–36.

39. *Id.* at 406 (“But there is no phrase in the instrument which . . . requires that every thing granted shall be expressly and minutely described.”).

40. See Hon. Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 804–05 (2013) (“Meanwhile, as part of the War on Terror, courts continue to grapple with the rights due to alien detainees held abroad . . . . At the forefront of both immigration and national security . . . sit concerns about whether constitutional guarantees extend beyond the nation’s territorial borders, and the way the Constitution treats these noncitizens has increasing relevance to the operation of

In light of the War on Terror, courts have increasingly applied a higher level of scrutiny when extending constitutional rights extraterritorially.<sup>41</sup> In prosecuting foreign nationals, courts focus on the aliens' status and allegiance by looking to whether the alien was an enemy combatant with strong ties to his or her home country or simply caught in the wrong place at the wrong time.<sup>42</sup>

The Court first faced the question of whether the Constitution extends beyond U.S. soil in *In re Ross*,<sup>43</sup> where it created a blanket rule that constitutional protection only applies to those within the United States.<sup>44</sup> In that case, a U.S. citizen sought a writ of habeas corpus, challenging his detention for the crimes he committed abroad while on a ship in Japan.<sup>45</sup> The Court applied a strict territorial approach by holding that the Constitution has no force outside of the United States.<sup>46</sup>

Towards the end of the Nineteenth Century, the Court eased its strict territorial approach when faced with the challenging question of whether incorporated territories received constitutional protection.<sup>47</sup> The *Insular Cases* constitute a compilation of cases in which the Court determined whether Insular Areas,<sup>48</sup> such as Puerto Rico, Hawaii, and the Philippines, were within U.S. territory for the purpose of receiving

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government at every level—federal, state, and local.”).

41. *See id.* at 866 (asserting that following the War on Terror, courts must more thoroughly define how designation as an enemy combatant may impact the “panoply” of an individual’s constitutional rights).

42. *See Ex parte Quirin*, 317 U.S. 1, 30–31 (1942) (explaining that “[b]y universal agreement and practice[,] the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants,” and giving an example of a belligerent, or enemy, combatant).

43. 140 U.S. 453 (1891).

44. *Id.* at 464.

45. *Id.* at 454.

46. *Id.* at 464 (reasoning that constitutional protection only applied to citizens and other people physically within U.S. territory and did not extend protection to non-citizens or even citizens traveling abroad in foreign territory).

47. *See Balzac v. Porto Rico*, 258 U.S. 298, 306–07 (1922) (denying the Sixth Amendment right to a jury trial in Puerto Rico because the country’s own Bill of Rights excluded this right); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (rejecting Fifth Amendment grand jury protections in the Philippines); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (rejecting the right to a jury trial in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903) (refusing to apply grand jury indictment requirements in Hawaii); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that the Constitution’s Revenue Clauses did not extend to Puerto Rico).

48. Insular areas were considered incorporated territories, areas that are considered part of the United States, as opposed to unincorporated territories, areas not governed by U.S. law.

constitutional protections.<sup>49</sup> The *Insular Cases* were often interpreted as extending the entire Constitution to incorporated territories without the requirement of legislative authorization.<sup>50</sup>

Two decades later, the Court backed away from its relaxed territorial approach in the *Insular Cases* to deny constitutional protection to enemy aliens who were never within U.S. territory.<sup>51</sup> In *Johnson v. Eisentrager*,<sup>52</sup> German prisoners<sup>53</sup> were “taken into custody by the United States Army,” then “tried and convicted by a Military Commission.”<sup>54</sup> The Court denied the petitioners’ writ of habeas corpus because they were never within U.S. territory and consequently were outside the country’s jurisdiction.<sup>55</sup> The Court emphasized that “[m]ere lawful presence in the [United States] creates an implied assurance of safe conduct and gives [an alien] certain rights,” and that the Court has extended constitutional guaranties to resident aliens since 1886.<sup>56</sup> Furthermore, the Court distinguished between the treatment of aliens as an “incident of alienage” and a stricter treatment of aliens as an “incident of war.”<sup>57</sup>

In the mid-twentieth century, the Court took a sharp turn and abandoned its strict territorial approach by extending constitutional protection to U.S. citizens in a foreign territory.<sup>58</sup> In *Reid v. Covert*,<sup>59</sup> two U.S. citizens located at military posts in Japan petitioned for a writ of habeas corpus, alleging their military trial was unconstitutional

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49. See Bitran, *supra* note 18, at 233–34 (emphasizing that the *Insular Cases* concluded that some constitutional rights applied in their own right to incorporated territories and even in unincorporated territories, without authorizing legislation).

50. See *id.* (pointing out, however, that only fundamental constitutional rights extended to unincorporated territories).

51. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

52. 339 U.S. 763 (1950).

53. German nationals employed in the armed forces in China were charged with violating combat laws in China for engaging in continued military activity against the United States. *Id.* at 765–66.

54. See *id.* at 766 (noting that the Commanding General of the United States Forces in the China Theatre delegated his authority, granted by the Joint Chief of Staff of the United States, to the Military Commission to try and convict criminals).

55. *Id.* at 778.

56. See *id.* at 770–71 (noting that protecting civil and property rights of aliens is readily equivalent to protecting those of citizens, in contrast to instances of war and security, which may raise the question of an alien’s allegiance).

57. *Id.* at 772.

58. See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957), *aff’d* 351 U.S. 487 (1956) (expressing that the “United States is entirely a creature of the Constitution” and dismissing the notion that the United States can disregard the Bill of Rights and act against citizens abroad).

59. 354 U.S. 1 (1957), *aff’d* 351 U.S. 487 (1956).

because they were not provided with their Fifth and Sixth Amendment rights to a jury and grand jury trial.<sup>60</sup> The Court held that when reprimanding a U.S. citizen abroad, fundamental constitutional provisions are not abandoned just because the citizen is in a foreign territory.<sup>61</sup> Significantly, the Court overruled *In re Ross* because it was not willing to risk American lives and liberties by denying constitutional protection abroad in favor of preserving a strict application of the Constitution.<sup>62</sup>

Recently, the Court refused to apply the Constitution to a foreign national asserting constitutional protection against an unreasonable search and seizure by U.S. law enforcement.<sup>63</sup> The *Verdugo-Urquidez* Court adopted a sufficient connections test to determine whether a foreign national should receive constitutional protection; the test analyzes who qualifies as “the people,” and therefore receives Fourth Amendment protection, by determining whether a foreign national has “developed sufficient connection with [the United States] to be considered part of the [national] community.”<sup>64</sup> In *Verdugo-Urquidez*, Mexican police officers apprehended the respondent, a Mexican citizen, in his apartment in Mexico and then transported him to the U.S. Border Patrol.<sup>65</sup> The Court rejected the respondent’s Fourth Amendment claim, holding that the Fourth Amendment’s plain text, “the people,” precludes constitutional protection of foreign nationals

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60. See *id.* at 3–5 (stating that the Court in the judgment below held the military trial constitutional because Congress could prescribe procedures for overseas trials for offenses committed abroad as long as they were reasonable and consistent with due process); see also Moore, *supra* note 40, at 866 (noting the Supreme Court’s reasoning that “it would be inconsistent to conclude that aliens and citizens who violate the laws of war should be treated differently than military members committing the same offenses”).

61. See *Reid*, 354 U.S. at 6 (characterizing this principle as being “as old as government”).

62. *Id.* at 11–12.

63. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990). Six Justices agreed that an alien is not entitled to Fourth Amendment protection when the search occurs outside the United States. *Id.* at 261, 275, 279. Four Justices opined that aliens must be within the United States and have substantial connections to the United States to qualify for Fourth Amendment protections. *Id.* at 261, 274–75; see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 105 (1996) (“Kennedy’s concurring opinion diverged so greatly from Rehnquist’s analysis and conclusions that Rehnquist seemed really to be speaking for a plurality of four.”).

64. *Verdugo-Urquidez*, 494 U.S. at 260.

65. *Id.* at 262–63 (stating that the respondent asserted a Fourth Amendment violation and moved to suppress the evidence seized during searches of his apartment in Mexico by U.S. officials).

outside U.S. territory because it protects only U.S. citizens from arbitrary actions by the government.<sup>66</sup> According to the Court, even if the Fourth Amendment did not preempt the respondent's claim, the Court still would not have granted him constitutional protection because he lacked sufficient connections to the United States.<sup>67</sup>

In 2008, the Court reassessed when to extend extraterritorial application of the Constitution by applying a functional approach to determine whether a foreign national located in a foreign country is entitled to constitutional protection.<sup>68</sup> The petitioners in *Boumediene* were aliens and designated enemy combatants, detained at the U.S. Naval Station at Guantanamo Bay, Cuba, who sought writs of habeas corpus.<sup>69</sup> The Court granted the petitioners' habeas corpus rights based on a three-factor test: first, the status and the citizenship of the detainee; second, the nature of the site of apprehension and detention; and third, the potential practical obstacles of granting this constitutional protection.<sup>70</sup> The Court first focused on the petitioners' status as enemy combatants, relying less heavily on their foreign citizenship.<sup>71</sup> Second, the Court asserted that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."<sup>72</sup> Third, the Court held that granting courts jurisdiction to hear habeas corpus claims would not compromise the military mission at Guantanamo Bay.<sup>73</sup> This

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66. *Id.* at 266 (describing the Fourth Amendment's purpose as restricting searches and seizures conducted by the government in domestic matters).

67. *Id.* at 271 (emphasizing that while the respondent's presence in the United States was lawful, it was not voluntary, which indicated no substantial connection with the United States).

68. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

69. *Id.* at 732.

70. *Id.* at 732, 766.

71. *See id.* at 766–67 (noting the difference between enemy aliens, who are foreign nationals in a country that is an enemy of the United States, and enemy combatants, who are foreign nationals actively acting against the United States); *Ludecke v. Watkins*, 335 U.S. 160, 162–63 n.3, 173 (1948) (finding that a German citizen and member of the Nazi Party was deportable as an enemy alien whether engaged in direct hostilities or not because the Attorney General is authorized to move forward without judicial review); *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 n.3 (4th Cir. 2003) (defining enemy combatants as those persons engaged in "armed struggle").

72. *Boumediene*, 553 U.S. at 768–69 (emphasizing the United States' constant control at Guantanamo Bay in determining the Constitution's extraterritorial application). The location of apprehension and detention is important because under *Eisentrager* and the *Insular Cases*, full constitutional protections are only extended to territories the United States intends to govern indefinitely. *Id.* at 768.

73. *Id.* at 769 (stressing that "any judicial process requires some incremental expenditure of resources" and that civilian and military courts have worked together

functional approach reflects a practical departure from *Verdugo-Urquidez*'s sufficient connections test for determining extraterritorial application of the Fourth Amendment and illustrates an effective test for reviewing the Fifth Circuit's ruling in *Hernandez*.

C. *The Fifth Circuit's Approach to Extraterritoriality and the Future of Boundedness*

Hernandez's parents asserted that Agent Mesa violated their son's Fourth and Fifth Amendment rights by knowingly adopting inadequate procedures for the use of excessive, deadly force in making arrests.<sup>74</sup> The Fifth Circuit relied on *Verdugo-Urquidez* when it rejected Hernandez's Fourth Amendment claim.<sup>75</sup> In doing so, the Fifth Circuit used *Verdugo-Urquidez*'s restrictive definition of "the people," encompassing only U.S. citizens, to exclude Hernandez from protection.<sup>76</sup> Moreover, the court argued, even if the Fourth Amendment's text did not exclude Hernandez because of his citizenship, Hernandez lacked "sufficient voluntary connections" to the United States to entitle him to protection.<sup>77</sup>

On rehearing, the Fifth Circuit affirmed its ruling on the Fourth Amendment claim, but reversed its prior grant of Fifth Amendment protection to Hernandez.<sup>78</sup> The court held that Hernandez failed to allege, at the time of the complained incident, a clearly established right.<sup>79</sup> Although the court affirmed that "Agent Mesa showed callous disregard for Hernandez's Fifth Amendment rights by using excessive, deadly force when [he] was unarmed and presented no threat," the court denied extraterritorial application of the Fifth Amendment because Hernandez's right under the Amendment was not clearly established.<sup>80</sup> The court stated that Agent Mesa would not have been reasonably forewarned that his conduct might have

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in the past without problems).

74. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014), *aff'd on reh'g*, 785 F.3d 117 (5th Cir. 2015) (per curiam).

75. *Id.* at 265–66 (refusing to ignore a Supreme Court decision without direct instruction from the Court itself). Judge James Dennis, in his concurrence, disagreed with the plurality and stated that questions of extraterritorial application should "turn on objective factors, and practical concerns," not on formalist approaches such as in *Verdugo-Urquidez*. *Id.* at 280 (Dennis, J., concurring).

76. *Id.* at 265.

77. *Id.* at 266 (factoring in Hernandez's Mexican citizenship, his indifference about staying in the United States, and his lack of acceptance of any societal obligations to conclude that he did not have a significant voluntary tie to the United States).

78. *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015) (per curiam).

79. *Id.* at 119.

80. *Id.* at 120.

violated the Fifth Amendment by emphasizing the lack of applicable case law in 2010, when the incident took place.<sup>81</sup> Although the Fifth Circuit denied application of *Boumediene* to *Hernandez*, focusing on the notion that the Court in *Boumediene* restricted its ruling to the specific facts of that case, it left open the possibility of extending *Boumediene* to extraterritoriality cases in the future.<sup>82</sup>

On July 9, 2015, a United States District Court for the District of Arizona applied both the *Verdugo-Urquidez* and *Boumediene* tests in *Rodriguez v. Swartz*<sup>83</sup> when analyzing whether the Fourth and Fifth Amendment apply to an alien located at the U.S.-Mexico border.<sup>84</sup> In *Rodriguez*, a minor Mexican national was walking home alone along a street in Mexico, parallel to the border fence separating the United States and Mexico; a U.S. Border Patrol agent shot the minor approximately ten times before he collapsed dead.<sup>85</sup> The court applied both *Boumediene*'s functional approach and *Verdugo-Urquidez*'s sufficient connections test to grant Fourth Amendment protection.<sup>86</sup>

The court looked to the alien minor's status, citizenship, voluntary connections, nature of the site when the incident occurred, and practical obstacles to grant him constitutional protection.<sup>87</sup> The court found that the alien's status was that of a "civilian foreign national engaged in peaceful activity in another country"<sup>88</sup> and that he had at least one substantial connection to the United States by emphasizing that his grandparents were legal citizens of the country.<sup>89</sup> Next, the court held that the United States—through its border patrol agents' use of force—heavily controlled the area in Mexico immediately adjacent to the border patrol fence.<sup>90</sup> And lastly, the court went on to state that there would be no practical obstacle in

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81. *Id.*

82. *Id.* at 120–21 ("Reasonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge.").

83. *Rodriguez v. Swartz*, No. 4:14-CV-02251-RCC (D. Ariz. July 9, 2015).

84. *Rodriguez*, slip op. at \*8.

85. *Id.* at \*2.

86. *Id.* at \*8, \*13–16; *see id.* at \*12 ("The Court considers [the *Boumediene* factors] along with the 'voluntary connections' test outlined in *Verdugo-Urquidez* to find that *Rodriguez* can assert [her son's] rights pursuant to the Fourth Amendment.").

87. *Id.* at \*13–14.

88. *Id.* at \*13 ("At the time [the U.S. border patrol agent] seized him, [the minor] was not suspected of, charged with, or convicted of violating any law.").

89. *Id.* (taking into account that the minor and his family also lived in an area that previously flowed into an area of the United States, but is now separated by the U.S.-Mexico border).

90. *Id.* at \*14 ("This control extended to the street, Calle Internacional, where [the minor] was killed.").



granting the alien Fourth Amendment protection because the Mexican government affirmed there would be no conflict with Mexican laws and customs.<sup>91</sup> The court also noted that granting the alien Fourth Amendment protection would not “plunge [U.S. officials] ‘into a sea of uncertainty’” because the case “addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border.”<sup>92</sup> The court affirmed the lower court’s dismissal of the Fifth Amendment violation claim because a substantive due process claim “is best analyzed pursuant to the Fourth Amendment.”<sup>93</sup>

## II. BROAD INTERPRETATION OF “THE PEOPLE” AND APPLICATION OF *BOUMEDIENE* AT THE U.S.-MEXICO BORDER

When the Framers drafted the Fourth Amendment, they focused on prohibiting unreasonable and excessive governmental intrusion.<sup>94</sup> The Fourth Amendment is intended to limit how far the government’s authority extends instead of enforcing a concrete list of whom the amendment protects.<sup>95</sup> *Boumediene*’s three-factor approach helps achieve the goal of preventing government encroachment by providing a uniform test that analyzes whether the U.S. government has exceeded its authority and, therefore, whether a foreign national is entitled to protection against U.S. officials.<sup>96</sup>

### A. “[T]he people” Extends to Aliens

The Framers of the Constitution did not intend for a literal interpretation of every word so that “every thing omitted is given to the

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91. *Id.* at \*15.

92. *Id.* at \*15–16 (U.S. border patrol agents “would require no additional training to determine when it is appropriate to use deadly force against individuals (whether citizens or noncitizens alike) located on the Mexican side of the United States-Mexico border”).

93. *Id.* at \*16.

94. See Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1016 (1992) (“[T]he Bill of Rights was expressly adopted to ensure that the federal government would not encroach upon the inherent rights of the people and the states.”).

95. See *Reid v. Covert*, 354 U.S. 1, 13 (1957) (stating that the Constitution did not apply to certain recently conquered or acquired territories of the United States under the *Insular Cases*).

96. See Lobel, *supra* note 24, at 320–21 (stating that *Boumediene*’s ruling did not allow any enemy in a war zone to assert a writ of habeas corpus challenge, but rather the court would decide on a case-by-case basis whether an alien would be entitled to protection).

general government” or precluded from protection.<sup>97</sup> Instead, the Constitution requires a broad interpretation to adapt to U.S. social and political values as they continue to evolve.<sup>98</sup> Specifically, if the Fourth Amendment was supposed to be an all-inclusive, unchanging provision, then the Framers would have specified that “the people” included “residents,” “citizens,” or “Americans” as they did for other provisions, such as in the requirements for political office.<sup>99</sup>

The Framers created a Constitution vague enough to adapt to the United States’s continuous expansion and acquisition of new territories.<sup>100</sup> When the United States began expanding and acquiring new territories at a faster pace, Congress utilized the Constitution’s adaptive nature by statutorily granting people in the newly acquired territories constitutional protection.<sup>101</sup> Initially, the Court rejected the blanket rule that the Constitution did not apply at all overseas.<sup>102</sup> Instead, the Court ruled that the Constitution might not apply in its entirety abroad because some provisions may not comport to other foreign countries’ political composition.<sup>103</sup>

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97. See McAfee, *supra* note 36, at 93–94 (according to James Madison, the limitations in the Constitution were necessary exceptions to the government’s power and not to the “nonexistent or general powers” that the Bill of Rights proposed); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) (“The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” (quoting U.S. CONST. amend. IX)).

98. See Moore, *supra* note 40, at 803 (stating that when James Madison wrote the Bill of Rights, he anticipated that aliens had rights under the Constitution; his broad interpretation stresses that the country has long recognized aliens’ rights).

99. See *id.* at 807 (expressing that the Bill of Rights’ omission of citizens “speaks volumes” about the understanding of aliens’ protection); see also *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring) (opining that restricting the group of people protected by the Constitution is wrong because the Constitution itself does not expressly contain such an expression or designation of parties); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 22 (1990) (asserting that the Constitution does not distinguish between citizens and aliens; rather, its primary concern is “persons,” which includes both citizens and aliens).

100. *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (explaining that for most of the country’s history, there was little need for courts to pinpoint how far the Constitution expanded because there were few international issues).

101. *Id.* at 755–56.

102. *Reid v. Covert*, 354 U.S. 1, 74 (1957).

103. *Id.* at 74–75 (concluding from *In re Ross* and the *Insular Cases* that there is no bright-line rule that every provision of the Constitution must apply to Americans in all foreign jurisdictions; rather, factors such as “the particular local setting, the practical necessities, and the possible alternatives” are the relevant considerations in addressing the extraterritorial application of the Constitution).

The Justices in *Verdugo-Urquidez* even contradicted themselves while debating who “the people” in the text of the Fourth Amendment encompassed. While the Court applied a strict interpretation of “the people” in the Fourth Amendment by stressing that the text only encompasses U.S. citizens,<sup>104</sup> the same plurality offered the opposite argument that the word “persons” is a “relatively universal term” in reference to the text of the Fifth Amendment’s Due Process Clause.<sup>105</sup> Justice Kennedy, concurring, stressed that the right of “the people” could conversely be interpreted as emphasizing the importance of the right against arbitrary action by the government, not as restricting the category of people entitled to protection.<sup>106</sup> Justice Kennedy urged that the Fourth Amendment balances the judicial systems by reinforcing that no one is above the law.<sup>107</sup>

### B. *Uniformity and Guidance is Needed at the U.S.-Mexico Border*

The sufficient connections test articulated in *Verdugo-Urquidez* has left courts and U.S. officials exercising drastically different levels of discretion.<sup>108</sup> The standard formulated in *Verdugo-Urquidez* creates various complications because it is too broad and arbitrary, allowing

104. See Bentley, *supra* note 35, at 345–46 (emphasizing that most commentators disagreed with the Chief Justice’s interpretation in *Verdugo-Urquidez* by arguing, similar to Justice Brennan, that “the Constitution generally should follow the United States whenever the government acts beyond national borders”).

105. United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (recognizing that “any person” included aliens as well as citizens); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1306 (5th ed. 2014) (stating that “people” is “[o]ften treated as a plural of *person*”); see also *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (expanding *Yick Wo* and applying strict scrutiny to aliens because they are “a prime example of a ‘discrete and insular’ minority”). *But cf.* *Plyer v. Doe*, 457 U.S. 202, 223 (1982) (rejecting undocumented aliens as members of “a suspect class”).

106. *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring). See generally Romero, *supra* note 94, at 1011 (mentioning that the American Civil Liberties Union argued that the Framers’ use of the term “the people” was not meant to imply some great interpretation, but instead was simply used to “avoid awkward phrasing”).

107. Romero, *supra* note 94, at 1016 (emphasizing that the Fourth Amendment was created to limit the executive branch from engaging in “overzealous behavior . . . by requiring law enforcement agents to seek the approval of the judiciary”); see *Verdugo-Urquidez*, 494 U.S. at 276 (“The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’”).

108. See Carvalho, *supra* note 17, at 275 (stating that the Court in *Verdugo-Urquidez* did not even clearly define what was required under the sufficient connections test to entitle aliens to constitutional protection).

each judge to decide what constitutes “substantial connections” to the United States.<sup>109</sup> Courts consider a host of differing factors when determining how significant an alien’s connection with the United States is: their “immigration status, physical proximity to the United States (or to its borders), lawfulness of presence, and allegiance to the country.”<sup>110</sup> Lower courts have discretionally applied the sufficient connections test because the variety of factors that can be applied when determining constitutionality has led to situations where the determinative factor may be arbitrarily chosen.

After *Verdugo-Urquidez*’s ruling, courts have varied in their interpretation of the standard; courts either apply a weak standard of review, or strictly apply the rule.<sup>111</sup> Prior to the sufficient connections test, there was a presumption that aliens in the United States, authorized or unauthorized, enjoyed constitutional protection simply because they were within U.S. territory.<sup>112</sup> *Verdugo-Urquidez* added a new element of deciding whether aliens, even in U.S. territory, were entitled to constitutional protection; therefore, the long-standing territorial approach to determining constitutional protections of aliens was significantly diminished.<sup>113</sup> Despite the Court’s ruling in

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109. *Verdugo-Urquidez*, 494 U.S. at 271; see Moore, *supra* note 40, at 803–04 (explaining that many “unauthorized aliens” are in the United States illegally, which prevents them from developing a significant connection to the United States, but they still have extensive ties to the local communities, have lived in the United States for years, and are parents of U.S. citizens).

110. Moore, *supra* note 40, at 804; see *Verdugo-Urquidez*, 494 U.S. at 287 (Brennan, J., dissenting) (noting that the plurality acknowledged that the sufficient connections test is not conclusive, and that a Justice in the plurality went even further to state that he could not use the reference to “the people” as a means of restricting the Fourth Amendment’s protections).

111. Compare *United States v. Guitterez*, 983 F. Supp. 905, 915 (N.D. Cal. 1998) (indicating that the Court was not required to find that the alien established sufficient connections with the United States to allow Fourth Amendment protections), *rev’d on other grounds*, 203 F.3d 833 (9th Cir. 1999), and *United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992) (declining to apply the sufficient connections test for an application of constitutional protection against the Fourth Amendment’s unreasonable searches and seizures), *rev’d in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993), with *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) (holding that an alien felon who had previously been in the United States, but was then deported, did not have sufficient connections to receive Fourth Amendment protection unless he could prove that he was in the country lawfully).

112. See *Carvalho*, *supra* note 17, at 275 (stating that because of this presumption, at least one circuit court has “looked to pre-*Verdugo-Urquidez* decisions to determine that nonresident immigrants have a clearly established right to Fourth Amendment protection”).

113. See *Verdugo-Urquidez*, 494 U.S. at 265 (articulating that the new standard for

*Verdugo-Urquidez*, courts have continued to find that aliens located within U.S. territory are beneficiaries of constitutional rights.<sup>114</sup> Specifically, many courts regarded the sufficient connections test as “mere dictum in a divided opinion” or “assum[ed] that an alien voluntarily within the United States automatically had [sufficient] connections” with the United States.<sup>115</sup> In effect, *Verdugo-Urquidez*’s sufficient connections test is a “wild card of sorts” because courts apply a different discretionary standard when determining who qualifies for constitutional protection.<sup>116</sup>

*Boumediene*’s functional approach, even though it derived the idea of fundamental fairness from *Reid* and the *Insular Cases*, was the first time the Court drastically departed from prior case law on extraterritorial application of the Constitution.<sup>117</sup> “It was the first time the Court held a statute unconstitutional under the Suspension Clause.”<sup>118</sup> It was also the first time the Court granted “a noncitizen with no prior connections to the United States” protection under the Constitution when the incident happened in a foreign territory.<sup>119</sup> Finally, it was the first time that a judicial majority on the Court accepted a functional approach to analyze how far the Constitution applied extraterritorially.<sup>120</sup>

The test’s first factor emphasizes an individual’s status—for example, whether the foreign national is an enemy of the United States—not his or her citizenship.<sup>121</sup> U.S. law recognizes the inherent distinctions

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determining whether the Constitution applies to aliens will be whether the aliens have developed a sufficient connection to the United States).

114. See D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 90 (2011) (describing how many courts dismissed the substantial connections test and continued to assume, for a decade after the *Verdugo-Urquidez* decision, that the Constitution protects aliens in the United States).

115. *Id.* (noting that it took courts almost a decade to even consider implementing *Verdugo-Urquidez*’s substantial connections test).

116. *Id.* at 91. “In the hands of some courts and commentators, *Verdugo* stands for the proposition that territory is the ultimate determinant of constitutional rights. For others, it represents a move away from a territory-based model and toward an approach that values human connections and ties.” *Id.*

117. See Bitran, *supra* note 18, at 238 (noting how the Court in *Boumediene* emphasized the *Insular Cases*’ primary focus on fundamental rights in creating the three-factor test); see also Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 274 (2010) (“*Boumediene*’s rejection of formal territorial restrictions and citizenship requirements, and its focus on practical control for determining when constitutional rights limit governmental conduct abroad, largely comport with modern international law’s focus on effective control.”).

118. Bitran, *supra* note 18, at 238.

119. *Id.*

120. *Id.*

121. *Boumediene v. Bush*, 553 U.S. 723, 727 (2008) (explaining that the Court primarily

between aliens of ally and enemy nations, and between resident aliens who adhere to U.S. law and nonresident aliens who abide by their country's laws.<sup>122</sup> For example, the Alien Enemy Act differentiated between aliens by classifying enemy aliens under their own limited jurisprudence by holding that "apprehension, restraint, and removal of alien enemies" is allowed at the executive order of the President.<sup>123</sup>

The second factor in *Boumediene's* three-factor test is the nature of the site where the incident occurred.<sup>124</sup> The Court held it reasonable to inquire into the "objective degree of control the [United States] asserts over foreign territory."<sup>125</sup> Courts should not simply look to a territory's sovereignty in the broad sense of dominion; rather, courts should also refer to the territory's sovereignty in a narrow, legal sense as a claim of right.<sup>126</sup> A broad approach to territorial sovereignty allows "a territory to be under the *de jure* sovereignty of one nation, while under the plenary control . . . of another."<sup>127</sup>

The last factor enunciated in *Boumediene* is a balancing test to determine whether the practical obstacles of applying constitutional protection outweigh the consequences that might follow if application is granted.<sup>128</sup> The Court warned that holding the Bill of Rights and other constitutional provisions inapplicable when they are inconvenient to apply, or when an emergency might require flexibility with the provisions' requirements, could set a significant precedent.<sup>129</sup> Abandoning constitutional provisions destroys the benefit of having a written Constitution and undermines the government's credibility.<sup>130</sup>

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focused on the petitioners' status as enemy combatants, not their foreign citizenships).

122. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) (distinguishing between enemy aliens loyal to their countries and innocent resident aliens who have submitted to United States laws).

123. *See Moore*, *supra* note 40, at 809 (clarifying that "the term 'enemy' does not cleanly divide citizens from aliens [because] citizens can be enemies too").

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

125. *Id.* at 754 (requiring courts to have a broad interpretation of sovereignty when analyzing this factor).

126. *See id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 206 cmt. b (1986)) ("noting that sovereignty 'implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there'").

127. *See id.* at 768–69 (explaining how Guantanamo Bay is significantly different than the territories in the *Insular Cases* and *Eisentrager* because the government only temporarily governed the insular areas and the prison in Germany).

128. *Id.* at 766, 769.

129. *Reid v. Covert*, 354 U.S. 1, 14 (1957).

130. *Id.* (emphasizing that if the United States' commitment to foreign countries conflicts with compliance with the Constitution, then the Constitution should be

*Verdugo-Urquidez's* sufficient connections test and *Boumediene's* functional approach are incompatible approaches to determine the Constitution's extraterritorial application.<sup>131</sup> *Verdugo-Urquidez's* sufficient connections test focuses on arbitrary factors that *Boumediene's* approach does not weigh heavily on, such as whether the alien made an effort to integrate himself or herself within U.S. communities.<sup>132</sup> Instead, *Boumediene's* functional approach provides courts a clear, uniform three-factor test to apply when determining whether aliens are entitled to constitutional protection.<sup>133</sup>

### C. *Boumediene Applied to Hernandez*

The Fifth Circuit incorrectly applied *Verdugo-Urquidez's* test to *Hernandez*; it should have instead applied *Boumediene's* approach to analyze the Fourth Amendment claim. On appeal, the Fifth Circuit reversed *Hernandez's* right to Fifth Amendment protection that precluded him from receiving any constitutional protection at all. The Court should adopt *Boumediene's* approach as the standard for determining whether an alien is granted constitutional protection at the U.S.-Mexico border to provide aliens who have been unjustifiably harmed by U.S. officials an opportunity for protection.

#### 1. *Hernandez's citizenship and status*

Although *Hernandez* is not a U.S. citizen, his status as an innocent alien demands greater attention in determining whether he should be granted constitutional protection.<sup>134</sup> Unlike the enemy aliens detained in *Eisentrager*, the Mexican national accused of murder and drug crimes in *Verdugo-Urquidez*, or the enemy combatants detained under AUMF in *Boumediene*, *Hernandez* was an innocent civilian.<sup>135</sup>

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amended to adhere to U.S. international policy).

131. *Hernandez v. United States*, 757 F.3d 249, 280 (5th Cir. 2014) (Dennis, J., concurring) (disagreeing with the majority's belief that *Verdugo-Urquidez's* test could be reconciled with *Boumediene's* three-factor approach). See, e.g., *supra* notes 87–91 and accompanying text (applying both *Verdugo-Urquidez's* and *Boumediene's* tests in a district of Arizona case that demonstrates the complexity of determining which factors from which test are determinative in determining constitutional protection).

132. See, e.g., *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (granting constitutional protection to alien petitioners because their bank account in the United States demonstrated they had substantial connections to the country).

133. See *supra* notes 121–30 and accompanying text (elaborating on *Boumediene's* three-factor test).

134. *Hernandez*, 757 F.3d at 268–69.

135. See *Bitran*, *supra* note 18, at 249 (emphasizing the Court's willingness to

Hernandez's status as an innocent Mexican national outside a war zone, in addition to the two remaining *Boumediene* factors, weighs more heavily towards granting constitutional protection and reprimanding Agent Mesa for his unreasonable behavior.<sup>136</sup> From a policy standpoint, the Court should consider granting constitutional rights to aliens far from war zones and not held in U.S. custody.<sup>137</sup>

## 2. *Nature of the U.S.-Mexico border*

The Court should reject *Verdugo-Urquidez's* sufficient connections test because Verdugo-Urquidez's residence in Mexico, where the constitutional violation occurred, is inherently different than the U.S.-Mexico border, where Hernandez was killed. In *Verdugo-Urquidez*, the Court centered on the respondent's apartment in Mexico, where the United States exerted no control.<sup>138</sup> In contrast, the nature of the U.S.-Mexico border is more similar to Guantanamo Bay in *Boumediene* because the United States exerts a significant amount of control in both territories.<sup>139</sup>

The United States exercises extensive control over the U.S.-Mexico border.<sup>140</sup> The border between the United States and Mexico is over 2000 miles long and "is the busiest in the world, with over 350 million crossings per year."<sup>141</sup> In the most recent decade, "the number of Border Patrol agents has doubled from approximately 10,000 to more than 21,000 agents" primarily focusing on the Southwest border.<sup>142</sup>

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extend constitutional protection to foreign enemies in *Boumediene* and that it would be unjust to deny an innocent foreign national constitutional protection).

136. *Id.*

137. *Id.*

138. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990) (detailing the DEA's investigation and process to obtain a warrant to search the Respondent's residence in Mexico); see also *Reid v. Covert*, 354 U.S. 1, 14 (1957) (rejecting the application of other cases that did not involve military tribunals because they followed traditional rules developed by Congress and were too dissimilar).

139. See *Hernandez*, 757 F.3d at 269 (differentiating Guantanamo and Landsberg Prison from the U.S.-Mexico border because *Hernandez* does not require application of the Constitution in a far-away location).

140. See *id.* (concluding that U.S. agents "exercise hard power across the border" when they injure individuals with the use of force).

141. *Id.* at 266. The U.S.-Mexico border is known to be extremely violent; due to the large number of illegal immigrants coming from Mexico to the United States, Mexican nationals have been victimized at higher rates than illegal immigrants from any other country. See *Romero*, *supra* note 94, at 1001-02 (suggesting that illegal immigrants from Mexico frequently have their Fourth Amendment rights violated by INS agents—now called ICE agents).

142. *Hernandez*, 757 F.3d at 267.



The U.S. Department of Homeland Security has advanced its technology to increase border surveillance by using “mobile surveillance units, thermal imaging systems, and large- and small-scale non-intrusive inspection equipment, . . . 124 aircraft and six Unmanned Aircraft Systems operating along the Southwest border.”<sup>143</sup> Therefore, the U.S. Border Patrol agents maintain a constant presence in Mexico as opposed to troops who temporarily occupy a foreign country during wartime.<sup>144</sup>

The Chief of the U.S. Border Patrol explained that the U.S. border security policy intentionally extends the nation’s defense outward to ensure that the physical U.S.-Mexico border is one of many lines of defense.<sup>145</sup> For example, U.S. Border Patrol agents at times cross over the border.<sup>146</sup> Even though Agent Mesa was in the United States when he shot Hernandez, he was only steps away from where the constitutional violation, Hernandez’s death, occurred.<sup>147</sup> The Deputy Solicitor General acknowledged that “while the government can summarily exclude such an alien, *it couldn’t just ‘shoot him.’*”<sup>148</sup>

### 3. *Practical obstacles of applying the Fourth Amendment to Hernandez*

Granting Hernandez Fourth Amendment protection would not burden the U.S. Border Patrol agents’ mission of securing the nation’s border. The Court in *Verdugo-Urquidez* reasoned that applying Fourth Amendment protection to foreign nationals who have no ties to the United States would plunge the agents into “a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.”<sup>149</sup> Having a Supreme Court ruling that permits

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143. *Id.*

144. *Id.* at 269 (explaining that even when the U.S. Border Patrol agents remain on U.S. soil, their power extends across the U.S.-Mexico border because their use of force crosses the border and injures people in Mexico).

145. See Bitran, *supra* note 18, at 245–47 (noting that in the mid-to-late Twentieth Century, the United States sent agents into Mexican territory during drug enforcement operations); see also Marjorie Florestal, *Terror on the High Seas: The Trade and Development Implications of U.S. National Security Measures*, 72 BROOK. L. REV. 385, 390–91 (2007) (explaining that the U.S. government’s strategy for national defense was to “extend the zone of security outward” after 9/11).

146. *Hernandez*, 757 F.3d at 269.

147. See *id.* (stating that “Border Patrol agents exercise hard power across the border at least as far as their U.S.-based use of force injures individuals”).

148. Lobel, *supra* note 24, at 315 (emphasis added).

149. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990); see *id.* at 278 (Kennedy, J., concurring) (explaining that because Fourth Amendment analysis abides by a “reasonableness” standard, Border Patrol agents might be confused as to what is considered reasonable).

aliens at the U.S.-Mexico border to bring Fourth Amendment claims against U.S. Border Patrol agents would not cause confusion as to what is reasonable behavior.<sup>150</sup> Conversely, it would clarify the perplexing standard that *Verdugo-Urquidez* has left courts to apply.<sup>151</sup> Looking at *Hernandez*, it is difficult to refute that Agent Mesa acted unreasonably when, under no threat to national or agent safety, he chose to shoot and kill an innocent Mexican minor hiding behind a cement pillar.<sup>152</sup>

Due to the United States's significant involvement in international affairs, it is especially crucial to maintain good relations with other countries, especially ones bordering the United States.<sup>153</sup> Typically, aliens lack remedial measures for constitutional violations that occurred in the United States because either the alien's home country has "little political leverage or doesn't . . . support the alien's claim."<sup>154</sup> The current U.S. Border Patrol policy leaves individuals at the U.S.-Mexico border at risk of death or serious harm at the hands of U.S. Border Patrol agents.<sup>155</sup> If the government were able to claim that practical obstacles precluded enforcement of Fourth Amendment rights extraterritorially, it would permit the executive branch to operate in a law-free zone at the U.S.-Mexico border.<sup>156</sup>

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150. See *id.* at 292–93 (Brennan, J., dissenting) (explaining that the Executive Branch's ability to conduct foreign affairs will not be impaired because the doctrine of official immunity still protects agents, and that constitutional rights do not always need to be applied abroad).

151. See *supra* notes 108–16 and accompanying text (emphasizing how courts have applied different standards of deference when using *Verdugo-Urquidez*'s sufficient connections test).

152. See Carvalho, *supra* note 17, at 275 (stating that beating "a defenseless immigrant without provocation" has been found to be a use of excessive force).

153. See generally *Reid v. Covert*, 354 U.S. 1, 14 (1957) (stating that if the United States' foreign commitments alter in such a way that makes the Constitution ineffective, the Constitution should be amended).

154. See Lobel, *supra* note 24, at 314 (noting that an alien can still "claim the protection of customary international law and treaties that proscribe certain governmental action"; however, these remedies usually are unenforceable in U.S. courts against the U.S. government).

155. See Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 269 (2003) (stating that "since 1998[,] there have been more than three hundred deaths every year" at the U.S.-Mexico border); see also Bitran, *supra* note 18, at 249–50 (arguing that allowing "noncitizens to bring claims of excessive deadly force under the Fourth Amendment reduces the threat[] to citizens and [noncitizens] that executive agents will 'switch the Constitution on or off at will'").

156. See Bentley, *supra* note 35, at 348 (explaining that another issue with *Verdugo-Urquidez*'s holding is that such a strict interpretation of the Constitution's Fourth Amendment protections as applying to only U.S. citizens would leave

## CONCLUSION

*Boumediene* and *Verdugo-Urquidez*, read together, leave uncertain how courts will determine whether to extend constitutional protection to aliens outside of the United States.<sup>157</sup> The Supreme Court's adoption of *Boumediene's* functional approach would prevent lower courts from applying an unsound standard and allow flexibility in a constantly evolving country.<sup>158</sup> Lower courts have successfully applied *Boumediene's* test even in circumstances where the United States does not exercise the same degree of control that it exerts in Guantanamo Bay.<sup>159</sup>

There are too many lives at stake for a retroactive policy and a judicial system that does not guarantee a remedy for aliens who have suffered from excessive force at the hands of U.S. officials. The Framers did not intend to have a self-restricting Constitution. Instead, they drafted a broad document to allow the text to acquire new meaning over time. Consequently, with the United States's significant involvement in international affairs, it is critical for the United States to continue its commitment to international human rights. Extending Fourth Amendment protection to people at the U.S.-Mexico border will help accomplish this goal. Moreover, *Boumediene's* test does not automatically grant Constitutional rights; rather, the three-prong test will only extend protection if it is reasonably fair to do so in a specific case.

In *Hernandez*, the Fourth Amendment should apply to the incident at the U.S.-Mexico border because this functional approach assures a just result. Hernandez was an innocent foreign national in a territory

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noncitizens without any kind of remedy).

157. See Núñez, *supra* note 114, at 134 (stating that after *Boumediene*, *Verdugo-Urquidez's* test has to be "interpreted to adopt a post-territorial approach to the Fourth Amendment . . . that rejects presence within the United States as sufficient" to entitle an alien to Fourth Amendment protection).

158. See Lobel, *supra* note 24, at 323 (describing how the test in *Boumediene* has to be used case-by-case and that the Court has to sometimes use "pragmatic considerations to avoid addressing or even trumping constitutional principles"); see also Moore, *supra* note 40, at 845–46 (stating that the Ninth Circuit attempted to combine *Verdugo-Urquidez* and *Boumediene* to make a flexible, functional calculation that permitted the alien to invoke constitutional protection because five years of studying in the United States constitutes a substantial connection and that the alien's travels abroad demonstrated her intent to further the connection).

159. See, e.g., *Al Maqaleh v. Gates*, 605 F.3d 84, 93–97 (D.C. Cir. 2010) (applying the three-factor test from *Boumediene* and concluding that Bagram was in a theater of war where the United States lacked de jure or de facto sovereignty, and most importantly, where the practical obstacles of active hostilities precluded the detainees from asserting the protection of the Suspension Clause).

where the United States has extensive control. Additionally, the United States would not face any significant difficulty in extending constitutional protection to Hernandez. The unique circumstances between the United States and Mexico require cooperation between the two countries to ensure that both of the countries' citizens are protected.<sup>160</sup> In determining what rights and principles are fundamental abroad, courts should take into account what rights the international community considers to be fundamental in addition to American values and culture.<sup>161</sup>

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160. See Bitran, *supra* note 18, at 247 (arguing that "a lower threshold than de facto sovereignty" should be enforced in order to protect constitutional rights).

161. See Lobel, *supra* note 24, at 325 (reinforcing that *Boumediene's* ruling is "consistent with . . . the older due process jurisprudence for determining the applicability of constitutional norms to U.S. actions abroad").