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Ramirez-Peyro v. Holder: Protecting Mexican Informants from Themselves

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Ramirez-Peyro v. Holder: **Protecting Mexican Informants** **from Themselves**

David Seth Yohay¹

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"When I was your age they would say we can become cops, or criminals. Today, what I'm saying to you is this: when you're facing a loaded gun, what's the difference?"²

In Martin Scorsese's *The Departed*, Jack Nicholson, as charmingly sleazy crime boss Frank Costello, flawlessly delivers this memorable gangland meditation. Although spoken in the context of Boston's criminal underground, nowhere is this proposition truer than in contemporary Mexico.

I. INTRODUCTION

By now, just about everyone is familiar with the incessant violence and high death toll associated with the Mexican government's internal drug war. A March 2010 account claims that President Felipe Calderon's three-year affront on powerful and ruthless drug enterprises has left nearly 18,000 people dead,³ while a source from November 2010 fixes the death count at above 31,000.⁴ The uncontrollable violence has even forced American universities located in south Texas to cancel classes "because of gunfire taking place across the Rio Grande."⁵

Criminal or confidential informants are instrumental to the Mexican government's efforts to emerge victorious from the nation's "bloodiest drug war ever," particularly since so many corrupt police officers moonlight for Mexico's \$25 billion drug-trafficking industry.⁶ For example, informants helped cops in December 2009 "locate a sophisticated, 260-yard narco-tunnel beneath Tijuana that almost reached the U.S. border."⁷

The story of Guillermo "Lalo" Ramirez Peyro emerges from this backdrop. Ramirez Peyro is "a Mexican national who informed on the powerful and violent Juarez cartel for U.S. Immigration and Customs Enforcement."⁸ As part of his duties, he witnessed and tape-recorded homicides in Ciudad Juarez, a Mexican

2. *THE DEPARTED* (Warner Bros. Pictures 2006).

3. Alicia A. Caldwell, *Ex-snitch Can't Be Deported Out of Fear of Torture*, *THE HOUSTON CHRONICLE*, Mar. 24, 2010, <http://www.chron.com/dispatch/story.mpl/metropolitatan/6928299.html>.

4. See Robin Emmott, *Mexicans Fear Turf War After Drug Kingpin's Death*, *YAHOO! NEWS*, Nov. 8, 2010, http://news.yahoo.com/s/nm/us_mexico_drugs.

5. See *Gunmen, Forces Clash After Cartel Leader Killed* [hereinafter *Gunmen, Forces Clash*], *CNN.COM*, Nov. 6, 2010, <http://www.cnn.com/2010/WORLD/americas/11/06/mexico.violence/index.html?hpt=T2> (internal quotation marks omitted).

6. See Tim Padgett, *Mexico's Witness-Protection Program: What Protection?*, *TIME*, Dec. 8, 2009, <http://www.time.com/time/world/article/0,8599,1945983,00.html>.

7. *Id.*

8. Caldwell, *supra* note 2.

city across the Rio Grande from El Paso.”⁹ Ramirez Peyro, a former police officer, served as an informant until the 2004 discovery of a mass grave in a Juarez backyard.¹⁰ The United States Drug Enforcement Administration accused Ramirez Peyro of supervising the murder of a Juarez cartel associate, but he has denied allegations of participating in any murders.¹¹ Ever since his cooperation became an embarrassment to Immigration and Customs Enforcement, federal immigration authorities have been pushing for Ramirez Peyro’s deportation.¹²

Suffice it to say, Ramirez Peyro’s close alliance with American authorities has not been greatly appreciated back home. “It is undisputed that based on his work with the U.S. government there have been two attempts on Ramirez Peyro’s life.”¹³ An Immigration Judge (“IJ”) determined that “people within the Mexican law enforcement community . . . would either harm [him] themselves or acquiesce in placing him into a position where he would be killed by the cartel.”¹⁴

Paying deference to these actual and supposed threats, along with the immense influence and expansive reach of the Juarez cartel he incriminated, Ramirez Peyro’s stint as a federal drug informant necessitates his placement into a witness-protection program if removed to Mexico. One commentator distinguished the state of the art of witness-protection programs in the United States and Mexico as follows:

Thanks to movies like *Goodfellas*, Americans appreciate how witness-protection programs are supposed to work. A mobster may not be able to find decent marinara sauce where the feds have him hiding, but in return for his testimony, he can count on not getting whacked.

But then there’s witness protection in Mexico – which may as well be called witness detection, since it seems the country’s violent drug traffickers are having little problem locating, and assassinating, the informants whom the government is supposed to be shielding.¹⁵

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 895 (8th Cir. 2009). These two attempts occurred on both sides of the border – one in El Paso, Texas, and the other in Juarez, Mexico. *Id.* at 895-96.

14. *Id.* at 898 (internal quotation marks omitted).

15. Padgett, *supra* note 5.

Unlike the comparatively sophisticated American system, Mexican witness-protection programming does not assign witnesses new identities or require them to be escorted by protective marshals outside of secured areas.¹⁶ According to Mexican Attorney General Arturo Chávez, the untrustworthy, turncoat nature of far too many Mexican cops stands as an institutional roadblock to building "a proper protection apparatus."¹⁷

Given this context, the precarious "lose-lose" situation Ramirez Peyro finds himself contemplating becomes evident. If he does not become a protected witness in Mexico, drug cartel assassins will likely track him down using their normal means and methods. If he does become a protected witness, chances are that a corrupt official will turn over information regarding his whereabouts to would-be attackers. Either way, it is more than mere speculation to propose that Ramirez Peyro has slim chances for survival in Mexico.

Lest the former drug informant's fate be sealed, Ramirez Peyro may have the United States' federal courts as an ally. In the noted case, *Ramirez-Peyro v. Holder*, the Eighth Circuit Court of Appeals broadened its understanding of when torture is committed "in an official capacity" so as to prevent Ramirez Peyro's removal from the United States to Mexico under legislation implementing Article 3 of the United Nations Convention Against Torture.¹⁸ This Note suggests that given the ineffectiveness of Mexico's witness-protection program and other internal relocation measures designed to protect government informants, the expansive and liberal color-of-law analysis applied by the Eighth Circuit Court of Appeals in this and prior cases serves as a much needed judicial palliative for Mexico's inability to adequately protect and ensure the safety of government informants and other witnesses needing same.

Part II of this Note depicts how the fusion of grossly inadequate Mexican witness-protection programs with a rapidly disintegrating line of demarcation between cops and criminals has resulted in a "lose-lose" situation for Ramirez Peyro and others similarly situated. Part III provides a statutory background of both the United Nations Convention Against Torture and its respective implementing legislation in the United States. Parts IV and V chronicle the common law development of the decisional

16. *See id.*

17. *See id.*

18. *See Ramirez-Peyro*, 574 F.3d at 900.

doctrines at work in *Ramirez-Peyro*. After the preceding sections lay the expository foundation, Part VI summarizes the factual posture, issue in controversy, opposing arguments, and final disposition of *Ramirez-Peyro*. Part VII praises the *Ramirez-Peyro* Court's decisional criteria as the judicial formulation most consistent with both the philosophical underpinnings of the United Nations Convention Against Torture and the practical realities of contemporary Mexican law enforcement.

II. THE MEXICAN "LOSE-LOSE" SITUATION

A. *The United States Government Will Protect Me, Right? Absolutely!*

In the United States, the federal witness-protection program is formally known as the Witness Security Program and is administered by the U.S. Marshals Service, which operates as a branch of the U.S. Department of Justice.¹⁹ Since the Witness Security Program's authorization by the Organized Crime Control Act of 1970 and functional inception a year later, the U.S. Marshals "have protected, relocated and given new identities to more than 8,200 witnesses and 9,800 of their family members."²⁰

The package of benefits and services afforded protected witnesses is so expansive that concern has existed from the outset that the Witness Security Program is overly generous to its participants, many of whom are former criminals themselves.²¹ Once a witness is admitted into the program, the Marshals Service will:

- Obtain one reasonable job opportunity for the witness
- Provide assistance in finding housing
- Provide subsistence payments on average of \$60,000 per year
- Provide identity documents for witnesses and family members whose names are changed for security purposes
- Arrange for counseling and advice by psychologists, psychiatrists or social workers when the need has been substantiated²²

19. See *Witness Security Program*, U.S. MARSHALS SERVICE, <http://www.justice.gov/marshals/witsec/index.html> (last visited Jan. 12, 2011).

20. *Id.*

21. Kevin Bonsor, *Living the New Life*, Subpage of *How Witness Protection Works*, HOWSTUFFWORKS, <http://people.howstuffworks.com/witness-protection5.htm> (last visited Jan. 12, 2011).

22. Kevin Bonsor, *Falling Off the Face of the Earth*, Subpage of *How Witness Protection Works*, HOWSTUFFWORKS, <http://people.howstuffworks.com/witness-protection3.htm> (last visited Jan. 12, 2011).

Furthermore, the U.S. Marshals guarantee twenty-four hour, round-the-clock protection to all witnesses situated in high-threat environments, which typically include pretrial conferences, trial testimonials and appearances at other court proceedings.²³

Most importantly, the Witness Security Program has been incredibly successful at protecting witnesses who follow protocol. According to the U.S. Marshals Service, not a single Witness Security Program participant who adhered to security guidelines has been harmed while under the Marshals Service's active protection.²⁴ In addition to its pristine record, the program has tended to have a rehabilitative effect on protected witnesses. A recent Department of Justice study found that the recidivism rate for Witness Security Program participants is around seventeen percent, which is a significant improvement over the forty percent mark for criminals paroled from prison.²⁵

B. The Mexican Government Will Protect Me, Right? WRONG!

The first federal witness-protection program in Mexico arose out of the passage of the Organized Crime Law in November of 1996.²⁶ In addition to providing for the establishment of a nationwide witness-protection program, the landmark Organized Crime Law of 1996 "expanded Mexican police powers to allow for plea bargaining, the use of informants . . . and court-authorized electronic surveillance."²⁷

Unlike the federal Witness Security Program administered in the United States, Mexico's witness-protection program and other internal relocation measures are woefully inadequate to protect government informants from the expansive reach of the criminal enterprises they helped to prosecute. Interestingly enough, Mexico's first federal witness-protection program was in many respects the brainchild of Marisela Morales Ibáñez, whose nomination by President Calderón for federal attorney general was

23. *Witness Security Program*, *supra* note 18.

24. *Id.*

25. See Kevin Bonsor, *Breaking the Law in The Program*, Subpage of *How Witness Protection Works*, HOWSTUFFWORKS, <http://people.howstuffworks.com/witness-protection6.htm> (last visited Jan. 12, 2011).

26. See Mathieu Deflem, *The Boundaries of International Cooperation: Problems and Prospects of U.S.-Mexican Police Relations*, in *POLICE CORRUPTION: CHALLENGES FOR DEVELOPED COUNTRIES – COMPARATIVE ISSUES AND COMMISSIONS OF INQUIRY* 93, 108 (Menachem Amir & Stanley Einstein eds., 2004).

27. *Id.*

recently approved by the Mexican senate on April 8, 2011.²⁸ Despite Ms. Morales' admirable efforts to restore the rule of law through witness protection, Mexico still has no credible witness-protection program in place.²⁹ One commentator described the level of protection that does exist as "meager."³⁰

Although Mexico certainly does not have a dearth of witness-protection programming, assassins working for drug cartels have encountered little, if any, difficulty tracking down and murdering protected informants,³¹ even when sequestered in fortified federal "safe houses."³² If anything, the "cartels have a reputation for murdering those who aid prosecutors."³³

The recent assassinations of two prominent Mexican drug informants placed in witness protection are illustrative. Edgar Enrique Bayardo, a former high-ranking federal police official, and Jesús Zambada Reyes, the nephew of an influential drug-cartel boss, were slain by hit men within two weeks of each other in late 2009.³⁴ Bayardo, whom federal officials confirmed as a "collaborating witness," reportedly provided Mexican authorities with information on drug traffickers from the powerful Sinaloa cartel.³⁵ According to the daily *Reforma* newspaper, Bayardo "moved among a trio of government-owned safe houses" prior to his death.³⁶ Reyes, "the 22-year-old nephew of the reputed Sinaloa drug lord Ismael 'El Mayo' Zambada, was found dead in a government safe house in Mexico City. Authorities said he hanged himself, but questions swirled over whether he was coerced or killed by cartel hit men."³⁷ Given this state of affairs, "witness *detection*" is a more accurate description of the current system of witness

28. Alizano, *Marisela Morales Becomes Mexico's New Attorney General*, JUSTICE IN MEXICO PROJECT, Apr. 14, 2011, <http://justiceinmexico.org/2011/04/14/marisela-morales-becomes-mexicos-new-attorney-general/>.

29. See Brett Wolf, *Mexico Sets Money-laundering Whistleblower Program*, REUTERS, Apr. 6, 2011, <http://www.reuters.com/article/2011/04/06/mexico-whistleblower-idUSN0620658120110406>.

30. *Id.*

31. Justin Shapiro, *What Are They Smoking?! Mexico's decriminalization of small-scale drug possession in the wake of a law enforcement failure*, U. MIAMI INTER-AM. L. REV. (2010).

32. *Id.*

33. Wolf, *supra* note 28.

34. Padgett, *supra* note 5.

35. Ken Ellingwood, *Witness in Mexico protection program killed*, LOS ANGELES TIMES, Dec. 3, 2009, <http://articles.latimes.com/2009/dec/03/world/la-fg-mexico-shooting3-2009dec03>.

36. *Id.*

37. *Id.*

protection in Mexico.³⁸

It would be improper to compare the state of witness-protection programming in Mexico and the United States without first accounting for programmatic discrepancies in age and experience. As the American Witness Security Program prepares to celebrate its fortieth anniversary in 2011, its Mexican counterpart still awaits its fifteenth birthday in November of the same year. However, the twenty-five year age gap only partially explains the comparative shortcomings of the Mexican regime. In other words, witness protection, as administered in Mexico, suffers from crippling institutional deficiencies.

Mexican officials openly acknowledge that their current witness-protection regime is utterly inadequate to get the job done.³⁹ They attribute this massive shortcoming to the untrustworthy cops assigned to protect informants, the programmatic failure to provide participants with new identities, and the relatively unrestricted mobility afforded protected informants.⁴⁰ For example, Bayardo's placement in witness protection did not prevent him from roaming freely and openly until he met his demise at a Starbucks café in a middle-class Mexico City neighborhood.⁴¹ To the Mexican program's credit, Bayardo's conspicuous movements may have been a breach of protocol as at the time he had recently begun "preparing to resume normal life, perhaps by teaching about police issues."⁴²

Individuals receiving witness protection cannot only move easily within Mexico, but can do so alone.⁴³ According to Federal Attorney General's Office spokesman Ricardo Najera, "protected witnesses are not [currently] obliged to have bodyguards when they leave government safe houses."⁴⁴ This lack of protection for "protected" witnesses stands in stark contrast to the U.S. Marshals' twenty-four hour guardianship of Witness Security Program participants, albeit only in high-threat environments.⁴⁵

38. Padgett, *supra* note 5 (emphasis added).

39. *Id.*

40. *See id.*

41. *Id.* The fact that Bayardo was concurrently acting as an informant for the U.S. Drug Enforcement Administration at the time of his death makes his conspicuous freedom considerably more surprising. *Id.*

42. Ellingwood, *supra* note 34.

43. *See Mexico to Review Witness Protection Program* [hereinafter *Mexico to Review*], PUERTO RICO DAILY SUN, Dec. 3, 2009, <http://www.prdailysun.com/index.php?page=news.article&id=1259821993>.

44. *Id.*

45. *See Witness Security Program*, *supra* note 18.

Although Bayardo was not in fact sitting alone at the Starbucks when his attackers entered, the personal assistant that accompanied him did not serve in a protective capacity.⁴⁶

As a result of the Bayardo and Zambada murders, Najera said prosecutors would consider “whether protected witnesses should be forced to be accompanied by bodyguards, among other things.”⁴⁷ This proposal, even if acted upon, is likely to produce dubious results at best given the largely fraudulent and corrupt nature of state employees.⁴⁸ Along with preexisting criticisms about the trustworthiness of sworn accounts from confidential witnesses,⁴⁹ the Mexican witness-protection program must now fend off renewed skepticism about the ability of “Mexico’s corruption-ridden law enforcement system” to safeguard informants at all.⁵⁰ For example, the Bayardo assassination “stoked speculation about possible leaks by the organized-crime unit of the federal attorney general’s office, which Bayardo reportedly had been supplying with evidence on links between the Sinaloa cartel and ranking federal police.”⁵¹

The factual findings of the Immigration Judge (“IJ”) in *Ramirez-Peyro v. Holder* are completely consistent with the foregoing description of the current state of Mexican witness-protection programming.⁵² He first “found that internal relocation within Mexico was not an option [for Ramirez Peyro] because of the nationwide reach of the Cartel and its affiliates, the publicity surrounding Ramirez Peyro’s case, and the fact that his return to Mexico would be known to Mexican officials based on normal deportation procedures.”⁵³ Not only was the Mexican witness-protection program wholly inadequate to protect Ramirez Peyro, but “people within the Mexican law enforcement community . . . would either harm [him] themselves or acquiesce in placing him into a position where he would be killed by the cartel.”⁵⁴

46. See *Mexico to Review*, *supra* note 42. Another source describes this companion as a family friend. Padgett, *supra* note 5.

47. *Mexico to Review*, *supra* note 42.

48. See *infra* Part II.C.

49. Ellingwood, *supra* note 34.

50. *Id.*

51. *Id.*

52. See *Ramirez-Peyro v. Holder*, 574 F.3d 893, 897-98 (8th Cir. 2009).

53. *Id.*

54. *Id.* at 898 (internal quotation marks omitted).

C. Cops and Criminals: One and the Same

After analyzing the 2007 U.S. State Department Country Report on Mexico, the Immigration Judge discovered a “deeply entrenched culture of impunity and corruption in [Mexico’s government], particularly at the state and local level.”⁵⁵ He highlighted that “Mexican ‘police and security forces’ had been involved in ‘unlawful killings’ and that ‘there were numerous reports of executions carried out by rival drug cartels, whose members allegedly included both active and former federal, state, and municipal security forces.’”⁵⁶

In Mexico, it is not at all uncommon to observe a uniformed police officer aiding and abetting criminality in some capacity. This unsettling anomaly is explained by rampant, systemic corruption in the Mexican government and flagrant acts of lawlessness by police officers and other public officials.⁵⁷ A frighteningly high level of police corruption pervades the entire hierarchy of public administration in each of Mexico’s 31 states.⁵⁸ This pandemic corruption has resulted in widespread public distrust of law enforcement to the point where 80 percent of Mexicans firmly believe that their law enforcement officers are corrupt.⁵⁹ Even President Calderon has not denied this reality. Since assuming the Mexican presidency in 2006, the plague of police corruption has forced his hand in mobilizing a significant number of military troops nationwide to assume what would otherwise be the duties of state police officers.⁶⁰ In a move harkening back to the Zedillo presidency,⁶¹ President Calderon enlisted the assistance of Mexican naval troops on November 5, 2010 to assassinate a top leader of the Gulf drug cartel, Antonio Ezequiel Cardenas Guillen.⁶² As Cardenas’ guards were armed with grenades and assault weapons,⁶³ Calderon’s decision to summon his nation’s marines to carry

55. *Id.* at 897 (internal quotation marks omitted).

56. *Id.*

57. *See generally* Shapiro, *supra* note 30, at 14-18.

58. *Id.* at 14.

59. *Id.*

60. *Id.* at 17.

61. Aimed at increasing the level of professionalism in Mexican law enforcement, President Ernesto Zedillo deployed some 3,000 soldiers to direct traffic and walk the beat in Mexico City in March 1997. *See* Deflem, *supra* note 25.

62. *See Gunmen, Forces Clash After Cartel Leader Killed* [hereinafter *Gunmen, Forces Clash*], CNN.COM, Nov. 6, 2010, <http://www.cnn.com/2010/WORLD/americas/11/06/mexico.violence/index.html?hpt=T2>.

63. *See id.*

out this deadly operation can hardly be characterized as an excessive use of force.

As one might expect, the use of federal police to cleanse allegedly corrupt local forces has been met with considerable resistance by the latter.⁶⁴ In the span of nine days in June 2009, 78 police officers stationed in northern Nuevo León state, including a local police chief, were detained by Army troops and federal police on suspicion of being on the payrolls of powerful Mexican drug-trafficking organizations.⁶⁵ In response to this strong federal intervention, colleagues of the arrested local police officers staged a protest by blockading busy city avenues with their patrol cars.⁶⁶ Lest these protesters give off the impression of righteousness, “[s]tate officials said there were indications that drug gangs had ordered at least some of the local police to stage the protests.”⁶⁷ The logical conclusion to be drawn from this familiar vignette is that even local police officers cannot put on a dignified demonstration of solidarity; inevitably corrupt influences are the motivating force.

Recent efforts by the Mexican federal government and army to eliminate local police corruption have produced transient results at best.⁶⁸ According to Maureen Meyer, an analyst with the Washington Office on Latin America, local police officers fired as a result of federal crackdowns have been rehired in other districts as Mexico does not maintain a national police blacklist, or simply drop the charade altogether and “go to work full-time for the drug traffickers.”⁶⁹ Even newly organized special police forces are not immune to Mexico’s well-heeled drug traffickers.⁷⁰ The formation of the Zetas is representative of this common dilemma. Sometime in the late 1990s, approximately forty soldiers from army special forces began taking their marching orders from a new employer, the Gulf cartel.⁷¹ Apparently dissatisfied with

64. See David Luhnnow, *Mexico Cracks Down on Local Police Corruption*, THE WALL STREET JOURNAL, June 10, 2009, <http://online.wsj.com/article/SB124459457211800501.html>.

65. *Id.*

66. *Id.*

67. *Id.*

68. See Chris Hawley & Sergio Solache, *Mexico Focuses on Police Corruption*, USA TODAY, Feb. 5, 2008, http://www.usatoday.com/news/world/2008-02-05-mexico-police_N.htm.

69. *Id.*

70. *Id.*

71. Robin Emmott, *Mexicans Fear Turf War After Drug Kingpin’s Death*, YAHOO! NEWS, Nov. 8, 2010, http://news.yahoo.com/s/nm/us_mexico_drugs.

their working arrangement, the Zetas thereafter split from the Gulf cartel in early 2010 to form an independent drug-trafficking organization,⁷² and may now boast a membership of 10,000 across Mexico and Central America.⁷³ In short, some forty former soldiers are now responsible for the emergence of a bona fide drug cartel notorious for committing “some of the worst atrocities in the drug war, including the murders of 72 migrants in August [2010].”⁷⁴

Adalberto Santana, an author and historian at the National Autonomous University of Mexico, asserts that officers’ low pay serves as an institutional roadblock to rehabilitating corrupt police forces.⁷⁵ This, he continues, makes local officers “susceptible to kickbacks from drug smugglers moving their cargo through town.”⁷⁶ Furthermore, if mere pecuniary gain does not motivate local and state police officers to accede or acquiesce to the interests of drug traffickers, a very palpable fear for the safety of their wives and children will.⁷⁷ “*Plata o [p]lomo* – [s]ilver or [l]ead - is the choice facing both local and federal officials, and the threat of a bullet is no joke.”⁷⁸

The foregoing state of affairs suggests that bad cops ousted from one jurisdiction can easily resurface in another free of detection. Given this contamination of once cleanly police ranks, and the generalized intermingling of good and bad forces, the judicial need to distinguish cops from criminals is diminishing by the minute. Therefore, good reason exists to err on the side of “official capacity,” and hold the Mexican government, rather than its citizenry, accountable for its disgraceful law enforcement.⁷⁹

III. STATUTORY BACKGROUND: THE UNITED NATIONS CONVENTION AGAINST TORTURE

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Con-

72. See *Gunmen, Forces Clash*, *supra* note 61.

73. Emmott, *supra* note 70.

74. *Id.*

75. Hawley, *supra* note 67.

76. *Id.*

77. See *id.*

78. Gritsforbreakfast, *Better Border Strategies Needed for Journalist, Witness Protection, Unmasking Corruption*, GRITS FOR BREAKFAST (Dec. 22, 2008, 6:10 AM), <http://gritsforbreakfast.blogspot.com/2008/12/better-border-strategies-needed-for.html>.

79. See *infra* Part IV.

vention Against Torture,” “Convention” or “CAT”) is an international agreement that “requires signatory parties to take measures to end torture within their territorial jurisdiction and to criminalize all acts of torture.”⁸⁰ Unlike numerous prior international agreements that merely condemned or prohibited torture, the Convention Against Torture “appears to be the first international agreement to actually attempt to define the term.”⁸¹ It does so as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁸²

Considered “[p]erhaps the most notable international agreement prohibiting torture,” the Convention Against Torture has been signed by the United States and more than 140 other nations.⁸³ Mexico signed the Convention Against Torture on March 18, 1985 and ratified it soon thereafter on January 23, 1986.⁸⁴

A. *Implementing Legislation in the United States*

The United States signed the Convention Against Torture on April 18, 1988 and subsequently ratified it on October 21, 1994, “subject to certain declarations, reservations, and understandings.”⁸⁵ Most notably, the United States Senate’s consent to ratify

80. Michael John Garcia, Cong. Research Serv., RL 32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2004).

81. *Id.*

82. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 113-14, available at <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028003d679> [hereinafter Convention Against Torture].

83. Garcia, *supra* note 79.

84. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 359, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

85. Garcia, *supra* note 79, at 5.

cation of the Convention Against Torture was conditioned on the declaration in its ratifying instruments that Articles 1 through 16 would not be self-executing.⁸⁶ This precondition to ratification implied that "implementing legislation was required to fulfill U.S. international obligations under CAT, and such implementing legislation was necessary for CAT to apply domestically."⁸⁷

The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") implements relevant portions of the Convention Against Torture in the United States.⁸⁸ This legislation evinces "a policy not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture."⁸⁹ Furthermore, "U.S. courts hearing cases concerning the removal of aliens have regularly interpreted CAT provisions prohibiting alien removal to countries where an alien would likely face torture to be non-self executing and judicially unenforceable except to the extent permitted under domestic implementing legislation."⁹⁰ Given that American courts will not enforce the Convention Against Torture beyond the scope of its implementing legislation in the United States, on what statutory language can plaintiffs claiming relief under the Convention rely?

B. Relevant FARRA Regulations

Under Article 3 of the United Nations Convention Against Torture, "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁹¹ Under the legislation implementing Article 3 in the United States, when determining eligibility for withholding of removal under the Convention Against Torture, "[t]he burden of proof is on the applicant . . . to establish that it is *more likely than not* that he or she would be tortured if removed to the proposed country of removal."⁹² When determining the probability that a CAT applicant will encounter torture in the proposed country of removal, immigration judges

86. *Id.*

87. *Id.*

88. *See id.* at n.22.

89. *Id.*

90. *Id.*

91. Convention Against Torture, art. 3, *supra* note 81, at 114.

92. 8 C.F.R. § 1208.16(c)(2) (emphasis added).

[M]ust consider all evidence, including but not limited to: (1) evidence of past torture inflicted upon the applicant, (2) evidence that the applicant could relocate to another part of the country where he is not likely to be tortured, (3) evidence of gross, flagrant or mass violations of human rights within the country of removal, and (4) other relevant country conditions.⁹³

In order to determine the likelihood of torturous conditions in a given nation, a firm statutory definition of who can torture, and how, is required. "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person *acting in an official capacity*."⁹⁴ The following section analyzes how various circuit courts have interpreted "acting in an official capacity" under the Convention Against Torture.

IV. "ACTING IN AN OFFICIAL CAPACITY" AS "UNDER COLOR OF LAW"

In *Ali v. Reno*, the Sixth Circuit held that the Convention Against Torture applies only to torture occurring "in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in United States law, it applies to torture inflicted '*under color of law*.'"⁹⁵ In an unpublished decision seven years later, the Fifth Circuit applied the same color-of-law framework to define the scope of coverage afforded by the Convention Against Torture.⁹⁶ "To prove entitlement to protection under the CAT, the applicant must demonstrate that, if removed to his country of origin, it is more likely than not he would be tortured by, or with the acquiescence of, government officials *acting under color of law*."⁹⁷

Although the equation of "in an official capacity" with "under color of law" is of little import standing alone, this judicial conflation provides the common law foundation for the introduction of

93. *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 639 (8th Cir. 2007) (citing 8 C.F.R. § 1208.16(c)).

94. 8 C.F.R. § 1208.18(a)(1) (emphasis added).

95. *Ali v. Reno*, 237 F.3d 591, 596-97 (6th Cir. 2001).

96. *Ahmed v. Mukasey*, 300 F. App'x 324, 327-28 (5th Cir. 2008) (unpublished).

97. *Id.* (emphasis added).

the operative "sufficient nexus" inquiry.⁹⁸ Armed with this analytic tool frequently employed to determine whether an official acts under color of law,⁹⁹ American courts now have an effective solution for Mexican citizens awaiting deportation who understandably wish to avoid their homeland's incessant lawlessness and frustratingly ineffective law enforcement.¹⁰⁰

V. LIBERALIZATION OF THE "SUFFICIENT NEXUS" INQUIRY

The color-of-law test can be summarized as follows: "to find whether an official acts under color of law, we look to see whether a *sufficient nexus* exists between the official's public position and the official's harmful conduct."¹⁰¹ The genesis of the "sufficient nexus" inquiry is beyond and before the purview of the Convention Against Torture. In *United States v. Price*, a deputy sheriff, two additional police officers, and 15 private individuals participated in the murders of three prisoners who were released from their cells in the middle of the night by the deputy sheriff.¹⁰² The Supreme Court held that every individual involved was acting under color of state law because the actions of each were made possible by the state detention and the deputy sheriff's calculated release of the victims.¹⁰³ Considering that only three of the 18 defendants were identifiable police officers, or "acting under color of law" in the traditional sense, *Price* serves as a fairly liberal starting point for delineating the circumstances that give rise to state action for color-of-law purposes.

Fourteen years later, the Sixth Circuit held in *Layne v. Sample* that the color-of-law determination is a fact-specific inquiry.¹⁰⁴ "Although in certain cases, it is possible to determine the question whether a person acted under color of state law as a matter of law, there may remain in some instances 'unanswered questions of fact regarding the proper characterization of the actions' for the jury to decide."¹⁰⁵ In finding that the defendant acted under color of state law, these "unanswered questions of fact" included that defendant had authority to carry the weapon

98. See *United States v. Colbert*, 172 F.3d 594, 597 (8th Cir. 1999); *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997).

99. See cases cited *supra* note 79.

100. See *supra* Part II.B-C.

101. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009) (emphasis added).

102. *United States v. Price*, 383 U.S. 787, 794-96 (1966).

103. *Id.*

104. See *Layne v. Sample*, 627 F.2d 12, 13 (6th Cir. 1980).

105. *Id.* (citations omitted).

only because he was a police officer, the argument's genesis was unquestionably in the performance of police duties, the threat was received through a police agency, and plaintiff did not know defendant was on vacation when the latter was found with a revolver in the company of police officers.¹⁰⁶ Despite the generously inclusive color-of-law analysis applied in *Price*,¹⁰⁷ the case-by-case approach adopted here more closely aligns with the systemic corruption, and related "official capacity" issues, that pervade contemporary Mexican law enforcement.¹⁰⁸

Bennett v. Pippin is notable for the special weight the Fifth Circuit accords to information generally only privy to individuals in law enforcement positions.¹⁰⁹ The Court held that a sheriff's action was "under color of state law" where he raped a woman and used his position to ascertain when her husband would be home, and threatened to have her thrown in jail if she refused.¹¹⁰ Given how incredibly easy it is for drug cartel hit men to locate protected witnesses in Mexico,¹¹¹ the obvious conclusion is that an information leak clearly exists among those police officers assigned to do the protecting. The *Bennett* Court recognizes in its color-of-law analysis that sheriffs and other public officials perform their duties from a privileged position of power, and this informed judgment seems well suited to protect Mexican informants from plainclothes officers with classified, insider-only knowledge.

In *Roe v. Humke*, the Eighth Circuit announced the operative "sufficient nexus" inquiry: "[Whether] a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties."¹¹² In this case, the Court determined that an officer's actions were not under the color of law where he was not on duty, was not in uniform or wearing his badge, did not specifically invoke his status, was not in a place where only officers had authority to be, and did not threaten to use official authority in the future.¹¹³ Unlike the Fifth Circuit in *Bennett*, the Eighth Circuit here assigns greater weight to tangible circumstantial factors, including appearance and location,

106. *Id.*

107. *See Price*, 383 U.S. at 794-96.

108. *See supra* Part II.C.

109. *See Bennett v. Pippin*, 74 F.3d 578, 589 (5th Cir. 1996).

110. *Id.*

111. *See supra* Part II.B.

112. *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997).

113. *Id.*

tending to evince public recognition of state action. The factors cited for the outcome in this case suggest that the "sufficient nexus" inquiry employs a totality of the circumstances analysis, which harkens back to the fact-specific approach advanced by the Sixth Circuit in *Layne*.¹¹⁴

United States v. Colbert broadens "under color of law" to encompass actions undertaken by public officials for purely personal reasons.¹¹⁵ The Eighth Circuit held that the defendant's actions were well within the "color of law" requirement where his status as a police officer enabled him to be in the restricted area of a jail, to open a prisoner's cell, to remove the prisoner from the cell, and also to threaten him with future arrest.¹¹⁶ Most important for the evolution of the "under color of law" doctrine is the Court's understanding that the fact that defendant was not on duty at the time, and his motivation was personal, not official, in that his anger at the prisoner arose from a personal cause, does "*not alter the essence of the case*" although it is "certainly not irrelevant."¹¹⁷ This formulation of the color-of-law standard, which holds the state liable for the misconduct of employees even when they act beyond the scope of their agency powers, contemplates that public officials will misuse their official capacity to successfully pursue purely personal agendas. Although the Mexican government "opposes corruption and collusion with drug cartels at its highest levels,"¹¹⁸ considering personal gain as a color-of-law factor will undoubtedly impute responsibility to Mexico "for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will."¹¹⁹

The only wrinkle in this line of jurisprudence is *Delcambre v. Delcambre*.¹²⁰ Here, the Fifth Circuit found no action under color of law where a police chief assaulted his sister-in-law over personal arguments about family matters, but did not threaten her with his power to arrest.¹²¹ This decision merely suggests that at some point a public official's actions become so divorced from his official capacity that imputing them to the state unfairly misplaces liability. The location of this point along the liability spec-

114. See *Layne*, 627 F.2d at 13.

115. See *United States v. Colbert*, 172 F.3d 594, 596-97 (8th Cir. 1999).

116. *Id.*

117. *Id.* (emphasis added).

118. *Ramirez-Peyro*, 574 F.3d at 901 (internal quotation marks omitted).

119. *Id.*

120. *Delcambre v. Delcambre*, 635 F.2d 407, 407 (5th Cir. 1981).

121. *Id.* at 408.

trum, among other considerations, is discussed in Part VII.¹²²

VI. THE DECISION: *RAMIREZ-PEYRO v. HOLDER*

A. *Factual Summary*

Guillermo Eduardo Ramirez Peyro, a Mexican native and citizen, did not become a confidential informant overnight. After leaving the Mexican highway police in 1995, he embarked on a career in drug trafficking by supervising the warehousing and distribution of large quantities of cocaine in Guadalajara, Mexico.¹²³ Upon becoming a confidential informant for the United States Bureau of Immigration and Customs Enforcement (“ICE”) in 2000,¹²⁴ Ramirez Peyro successfully infiltrated the Juarez Cartel and facilitated the arrest of some 50 Cartel members by the United States government.¹²⁵ One of these individuals, Heriberto Santillan, was a high-ranking lieutenant in the Juarez Cartel who ended up pleading guilty to a drug trafficking charge.¹²⁶ Along with serving as a material witness in the United States’ prosecution of Santillan, Ramirez Peyro “gave a statement to representatives of the Mexican government implicating Santillan in the murders of rival drug traffickers.”¹²⁷

Ramirez Peyro’s proffer of testimony to the Mexican government is likely to be the more dangerous alliance given that government’s corrupt administration of law enforcement.¹²⁸ Ramirez Peyro “testified that he witnessed Mexican police officers murder individuals at the behest of the Cartel, saw Cartel members participate in many other killings in the presence of Mexican police officers, and further witnessed police cover-ups of those crimes.”¹²⁹

Concerned ICE agents warned Ramirez Peyro that his informant work placed his life in danger.¹³⁰ It is undisputed that Ramirez Peyro’s collaboration with the United States government has resulted in the commission of two attempts on his life.¹³¹ Following the second attempted assassination, the United States

122. *See infra* Part VII.

123. *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 638 (8th Cir. 2007) [hereinafter *Gonzales*].

124. *Id.*

125. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 895 (8th Cir. 2009).

126. *Gonzales*, 477 F.3d at 638.

127. *Id.*

128. *See generally supra* Part II.C.

129. *Ramirez-Peyro*, 574 F.3d at 895.

130. *See Gonzales*, 477 F.3d at 639.

131. *Ramirez-Peyro*, 574 F.3d at 895.

placed Ramirez Peyro into protective custody in 2004, provided him with immunity from prosecution by the United States government, and temporarily paroled he and his family into the country “for their safety.”¹³² Despite Ramirez Peyro’s parole into the United States, he was never admitted within the meaning of the Immigration and Nationality Act, and accordingly, he “was placed into expedited removal proceedings when his parole permit expired on January 14, 2005.”¹³³ The Department of Homeland Security initiated the noted action against Ramirez Peyro on May 9, 2005 when it “issued a Notice to Appear charging [him] with being subject to removal under section 212(a)(7)(A)(i)(I) of the Immigration and Naturalization Act (INA) on the ground that he was an applicant for admission not in possession of a valid immigration document.”¹³⁴

B. Controversy and Opposing Arguments

Ramirez Peyro conceded that he was removable,¹³⁵ and before an immigration judge on June 9, 2005, further conceded that he had trafficked drugs in Mexico, which therefore rendered him ineligible for asylum and withholding of removal.¹³⁶ In the alternative, Ramirez Peyro “maintained that he was entitled to deferral of removal under the Convention Against Torture, which contains no so [sic] such bar on the basis of prior criminal activity.”¹³⁷ Ramirez Peyro supported his prayer for CAT relief by claiming fear of torture and death “at the hands of the Juarez Cartel and Mexican law enforcement acting on the cartel’s behalf.”¹³⁸

Succinctly stated, the issue in the instant case is whether Article 3 of the United Nations Convention Against Torture prohibited the removal of Ramirez Peyro from the United States to Mexico upon the expiration of his parole permit.¹³⁹

In reversing the October 11, 2007 findings of the Immigration Judge, the Board of Immigration Appeals (“BIA”) concluded that since Ramirez Peyro had been offered immunity from prosecution by the Mexican government, “there would be no legal basis upon which Mexican law-enforcement officials could detain Ramirez

132. *Id.* at 896.

133. *Id.*

134. *Gonzales*, 477 F.3d at 638 (citing 8 U.S.C. § 1182(a)(7)(A)(i)(I)).

135. *Id.* at 638.

136. *Id.* at 639 (citing 8 U.S.C. § 1231(b)(3)(B)(iii)).

137. *Id.* at 639.

138. *Id.* at 638.

139. *See Ramirez-Peyro*, 574 F.3d at 895.

Peyro under the pretense of law.”¹⁴⁰ Accordingly, the BIA opined that any commission, consent, or acquiescence to torture by Mexican officials would be the result of “a purely personal pursuit, completely unrelated to the law enforcement powers and responsibilities entrusted to them by Mexico.”¹⁴¹

Ramirez Peyro countered that “even assuming the BIA correctly determined the legal standard for ‘acting in an official capacity,’ it too narrowly construed that standard and erred in applying that standard to the facts because the BIA’s non-official-capacity determination was based on improper fact finding and a misstatement of the IJ’s factual findings regarding the likelihood of Ramirez Peyro’s arrest and whether he had immunity from prosecution in Mexico.”¹⁴²

C. Outcome

The Eighth Circuit Court of Appeals ruled in favor of Ramirez Peyro, finding that “[i]n focusing *only on the likelihood of whether Ramirez Peyro would be taken into official custody*, then, the BIA disregarded the other relevant findings to the color-of-law analysis and could not have properly applied the law.”¹⁴³

VII. THE RAMIREZ-PEYRO COURT “GETS” THE CONVENTION AGAINST TORTURE AND CONTEMPORARY MEXICAN REALITY

A. Liberalized Sufficient Nexus Inquiry Comports with both Article 1 and FARRA

Under Article 1, the Convention Against Torture only becomes operative when the challenged “pain or suffering is inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.”¹⁴⁴ The italicized portions suggest that the drafters of the Convention maintained an expansive view of what constituted a

140. *Id.* at 898-99. It is noteworthy that Ramirez Peyro’s alleged immunity from prosecution by the Mexican government is conspicuously contested. *See id.* at 896. Since there was no written documentation of the grant of immunity from Mexican prosecution or any details of that purported offer in the record, the Immigration Judge merely “determined that Ramirez Peyro *believed* there was some agreement.” *Id.* (emphasis added).

141. *Id.* at 898.

142. *Id.* at 901.

143. *Id.* at 903.

144. Convention Against Torture, *supra* note 81 (emphasis added).

sufficient link between the alleged torturous conduct and those responsible for its commission. To wit, the specific words chosen capture active as well as passive conduct on the behalf of "official" actors, and a commitment to the basic principles of agency law. Given that the drafters of the FARRA legislation opted to implement the quoted portion of Article 1 verbatim in the United States,¹⁴⁵ they must have agreed with the United Nations' liberal construction.

Ramirez-Peyro marks the first time the Eighth Circuit adopts "in an official capacity" to mean "under color of law" in its body of jurisprudence dedicated to the implementation of the Convention Against Torture.¹⁴⁶ This represents a judicial innovation, if not bona fide breakthrough, for this St. Louis, Missouri-based circuit court. More to the point, the Eighth Circuit's formulation of a nexus inquiry is rightfully cognizant of and sympathetic to the "lose-lose" scenario that afflicts individuals removed to Mexico, where the distinction between cops and criminals is tragically blurry.¹⁴⁷

As a corollary, the judiciary should employ a fluid conception of state action that is mindful of the difficult inquiry of who in Mexico is and is not acting "under color of law." In *Ramirez-Peyro*, the Eighth Circuit already demonstrated this need for flexibility by defining its nexus inquiry as "necessarily fact intensive."¹⁴⁸ Furthermore, by intentionally excluding from its nexus inquiry the requirement that the "public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power,"¹⁴⁹ the Court recognizes the practical reality that lip service policies promulgated at the highest levels of Mexican government are demonstrably estranged from the corrupt proclivities of police officers and other low-level officials.

B. *The Sufficient Nexus Inquiry at Work: A Case Study*

Working through the enumerated factors of the sufficient nexus inquiry applied in *Ramirez-Peyro* demonstrates the framework's commitment to Article 1 and its significant potential to

145. See 8 C.F.R. § 1208.18(a)(1).

146. *Ramirez-Peyro*, 574 F.3d at 900.

147. See *supra* Part II.

148. *Ramirez-Peyro*, 574 F.3d at 901.

149. *Id.*

produce positive results for Mexican citizens. In the context of police officers, the sufficient nexus inquiry “includes considerations such as whether the officers are on duty and in uniform, the motivation behind the officers’ actions, and whether the officers had access to the victim because of their positions, among others.”¹⁵⁰

As a result of the Eighth Circuit’s conflation of “in an official capacity” with “under color of law,” the sufficient nexus inquiry played an instrumental role in withholding Ramirez Peyro’s pending removal to Mexico. Both the immigration judge and BIA agreed that “people within the Mexican law enforcement community” would harm Ramirez Peyro.¹⁵¹ They arrived at this conclusion based on substantial evidence in the record tending to suggest that Mexican officials would either directly harm Ramirez Peyro themselves or place him in the hands of vengeful Cartel members.¹⁵² Without the lens of the sufficient nexus inquiry, the fact that the Cartel’s ranks perhaps included the same police officers who would initially harm him would be of no import for CAT purposes.¹⁵³ Furthermore, the sufficient nexus inquiry illuminates one compelling finding of the immigration judge in favor of withholding removal. Since Ramirez Peyro “‘would be submitted to the normal deportation process’ from the United States, Mexican officials would have information about his return – information only obtainable by virtue of their government positions – and, using that information, ‘would make his presence known to the cartel.’”¹⁵⁴

The beneficial use of the sufficient nexus inquiry can be observed in other contexts. Recall the December 2009 assassination of Edgar Bayardo, the “former high-ranking federal police official whose information led to [the 2008] indictment of Mexico’s federal police chief and other top cops for alleged narco-corruption.”¹⁵⁵ Would a court applying *Ramirez-Peyro*’s sufficient nexus inquiry determine that Bayardo would be tortured under Article 1 of the Convention Against Torture, and therefore entitled to the protections of Article 3?¹⁵⁶

The first factor, “whether the officers are on duty and in uni-

150. *Id.*

151. *Id.* at 902 (internal quotation marks omitted).

152. *See id.*

153. *See id.*

154. *Id.*

155. Padgett, *supra* note 5.

156. This exercise assumes, of course, that the torture was contemplated rather

form,”¹⁵⁷ reflects a judicial determination that it is reasonable for civilians to hold the government liable for the actions of those individuals who hold themselves out as and purport to be identifiable law enforcement officers. This factor is clearly missing here as Bayardo was “fatally riddled with bullets by two hit men dressed in suits.”¹⁵⁸ Assuming those suits were not police uniforms or otherwise indicative of membership in a law enforcement agency, Bayardo would not be able to raise this argument as a factor tending to establish a sufficient nexus between the assassins’ “public position” and their harmful conduct.

Addressing “the motivation behind the officers’ actions” distinguishes employment-related duties from “purely personal pursuit[s].”¹⁵⁹ Most likely, the two hit men were ordered to visit Bayardo in order to prevent him from further providing “crucial testimony not only regarding drug trafficking, but also about links between federal police bosses and Sinaloa capos.”¹⁶⁰ Unlike in *Delcambre v. Delcambre*, where the Fifth Circuit found no action under color of law where a police chief assaulted his sister-in-law in response to personal arguments over family matters,¹⁶¹ the hit men appear to have been motivated by nothing more than business concerns. After all, the two assailants exited the Starbucks just as calmly and nonchalantly as they entered.¹⁶² Ignoring for the moment that Bayardo’s executioners never purported to be anything but paid assassins, Bayardo would still encounter difficulty claiming that the hit men’s actions exceeded the boundaries of their agency relationship.

Since the factors in a totality analysis are necessarily disjunctive, the absence of the above two does not automatically end the inquiry. If anything, the lynchpin of the sufficient nexus analysis is “whether the officers had access to the victim because of their positions.”¹⁶³ “Access by badge” was the dispositive factor in *United States v. Price*, where the Supreme Court determined that 15 private individuals involved in the murders of three prisoners acted under color of state law since their actions were facilitated

than actual, and that at all relevant times Bayardo was held in the United States pending removal to Mexico.

157. *Ramirez-Peyro*, 574 F.3d at 901.

158. Padgett, *supra* note 5 (emphasis added).

159. See *Ramirez-Peyro*, 574 F.3d at 904 (internal quotation marks omitted).

160. Padgett, *supra* note 5.

161. *Delcambre*, 635 F.2d at 408.

162. Padgett, *supra* note 5.

163. See *Ramirez-Peyro*, 574 F.3d at 901.

by the state detention of the victims and a deputy sheriff's premeditated decision to release them.¹⁶⁴

The Mexican government vowed to investigate Bayardo's murder with a presumed keen eye toward uncovering whether the assassination was an inside job.¹⁶⁵ Specifically, investigators allegedly will focus on "whether any officers inside the witness-protection program itself tipped off cartel bosses as to [Bayardo's] movements and whereabouts."¹⁶⁶ Given the generalized failure of Mexican witness-protection programming,¹⁶⁷ it is highly probable that investigators will discover an inside leak. In that event, Bayardo would likely be able to successfully argue that but for the access the witness-protection program vested in these crooked officers, the cartels would not have discovered his location, and he would consequently still be living. Although the sufficient nexus inquiry, as given expression to by the Eighth Circuit,¹⁶⁸ only applies to officials acting under color of law, the foregoing discussion suggests that the framework is even flexible enough to hold corrupt public officials accountable for their actions that directly or indirectly result in harmful conduct.

C. *The United States Is Still Drug Informants' Best Bet*

Short of momentous institutional upheaval,¹⁶⁹ the American judiciary may be the safest resort for government-cooperating aliens now facing deportation to Mexico. Simply put, Mexican witness-protection programming is not secure enough to foster any meaningful sense of confidence among participants,¹⁷⁰ and Mexican law enforcement officers empirically cannot be trusted to protect informants from the nationwide reach of the drug cartels.¹⁷¹

164. See *Price*, 383 U.S. at 794-96.

165. See Padgett, *supra* note 5.

166. *Id.*

167. See *supra* Part II.B.

168. See *Ramirez-Peyro*, 574 F.3d at 900.

169. E.g., the complete cessation of the United States-backed War on Drugs. After Mexican naval troops killed Antonio Ezequiel Cardenas Guillen, the high ranking leader of the Gulf drug cartel, in November 2010, United States President Barack Obama called to congratulate his Mexican counterpart and renew his support for the latter's efforts to "end the impunity of organized criminal groups." *Gunmen, Forces Clash*, *supra* note 61 (internal quotation marks omitted). Although friendly enough, gestures like these serve as a constant reminder to Mexican authorities that their responses to the drug war are being closely scrutinized by the United States.

170. See *supra* Part II.B.

171. See *supra* Part II.C.

With that knowledge, American courts can best protect the safety of Mexican witnesses under the United Nations Convention Against Torture by deferring, canceling, or otherwise judicially impeding the pending removal of these individuals to Mexico. In order to effect this humanitarian policy choice that is certainly consistent with American notions of justice, the federal courts must embrace the liberalized color-of-law analysis heralded in *Ramirez-Peyro* to presumptively find state action whenever possible.

The unfortunate reality that violence and corruption levels in Mexico have not demonstrably improved in recent years played an instrumental role in reaching this conclusion. A November 2010 account asserts that “[s]ince December 2006, when Calderon launched his crackdown, more than 31,000 people have been killed across Mexico in drug-related violence.”¹⁷² Faced with choosing between the relative stability and institutional integrity of the United States judiciary and a possible yet improbable turnaround in Mexican affairs, this author’s money is unquestionably on the former.

Recognition of the frailty, and ultimate futility, of Mexican domestic efforts to protect informants is not a novel criticism. Back in December of 2008, one Texas commentator speculated that

[P]erhaps the United States, as Mexico’s partner, could assist by establishing a robust witness protection program whereby police and others who turn in their cartel handlers or citizens who rat out corrupt cops could actually come live in America with their family, not just until they were required to testify but as long as they continue to be in danger.¹⁷³

The foregoing points to the United States as a true place of refuge for those individuals daring enough to cross the Mexican cartels. The factual narrative chronicling Ramirez Peyro’s transformation into confidential informant strongly suggests that the United States is the *only* safe space for him, his family, and others similarly situated.

D. How to Withhold Removal Post-Ramirez-Peyro

The Eighth Circuit’s decision in *Ramirez-Peyro v. Holder* sug-

172. Emmott, *supra* note 70.

173. Gritsforbreakfast, *supra* note 77.

gests the applicant's burden of proof for successfully withholding removal under the Convention Against Torture. The applicant must establish that, if removed to the proposed country of removal,¹⁷⁴ it is more likely than not that he or she would be subjected to any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted,¹⁷⁵ when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of an official whose harmful conduct has a broad sufficient nexus to his or her public position.¹⁷⁶ The nexus inquiry contained in the final clause is fact-specific and demands a liberal construction.¹⁷⁷ This articulation of the brilliant defense crafted by Ramirez Peyro's counsel takes into consideration Article 3 of the Convention Against Torture, relevant FARRA implementing regulations, and the Eighth Circuit's humanitarian policy concerns.

VIII. CONCLUSION

Apparently, the one caveat to *Ramirez-Peyro* is that the decision "is temporary and can be reversed 'should the Mexican government make significant inroads in its battle against drug cartels and corruption.'"¹⁷⁸ As prior sections suggest, however, this contingency is simply unlikely. Unless and until the Mexican government regains true control of its law enforcement, *Ramirez-Peyro* should be read to presumptively find torturous conditions entitling a claimant to withholding of removal to Mexico.

Although the impact of *Ramirez-Peyro* "on other deportation and even asylum cases for Mexican nationals remains unclear,"¹⁷⁹ Daniel Kowalski, an immigration lawyer from Austin, Texas, is convinced that the ruling will likely "encourage immigration lawyers to raise the claim (of torture) more often and with more confidence."¹⁸⁰ If this proves to be the case, cooperating government witnesses will have an effective tool for preventing near-certain deportation, and will no longer have to endure corrupt law enforcement practices in Mexico. After all, in order to avoid deportation under *Ramirez-Peyro*, the applicant must simply prove that "he would be tortured 'either directly by government

174. See 8 C.F.R. § 1208.16(c)(2).

175. See 8 C.F.R. § 1208.18(a)(1).

176. See *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009).

177. See *id.* at 901.

178. Caldwell, *supra* note 2.

179. *Id.*

180. *Id.* (internal quotation marks omitted).

agents or indirectly by government agents turning him over to the cartel,"¹⁸¹ which is a rather light burden to carry given the pervasive corruption in Mexican law enforcement.¹⁸²

Sometime in the fall of 2009, shortly after the Eighth Circuit withheld his removal to Mexico, Ramirez Peyro told NPR that solitary confinement, where he had been for more than five years, was favorable to the fate he faced in Mexico.¹⁸³ During his phone conversations with NPR in Spanish, he clarified that his primary goal was to stay out of "the hands of the people who are going to try and kill me."¹⁸⁴ Ramirez Peyro may have realized his goal on April 8, 2010, when Jodi Goodwin, his attorney of five years who successfully argued against his removal to Mexico in the noted case, confirmed that he had been released from the Buffalo Federal Detention Center.¹⁸⁵

At the time of Ramirez Peyro's release, law enforcement sources "were not aware of any U.S.-government sponsored security assistance being provided to him."¹⁸⁶ Although the freed informant is unquestionably safer in upstate New York than anywhere in Mexico, "[t]he word will already be out to the cartel about his release because of [its] prison snitches."¹⁸⁷ As expected, Goodwin refused to provide any information concerning her former client's latest whereabouts.¹⁸⁸ Even if Ramirez Peyro eventually turns up dead and her efforts were all for naught, they will certainly not go unrecognized in the annals of immigration law.

181. *ICE Informant Linked to Juarez 'House of Death' Freed*, KVIA.COM, Apr. 10, 2010, <http://www.kvia.com/news/23104427/detail.html>.

182. *See supra* Part II.C.

183. Carrie Kahn, *The Case of a Confidential Informant Gone Wrong*, NPR, Feb. 11, 2010, <http://www.npr.org/templates/story/story.php?storyId=123385312>.

184. *Id.* (internal quotation marks omitted).

185. Bill Conroy, *House of Death Informant, a Confessed Killer, Soon to Be Released from Jail*, THE NARCOSPHERE (Apr. 8, 2010, 10:42 PM), <http://narcosphere.narconews.com/notebook/bill-conroy/2010/04/house-death-informant-confessed-killer-soon-be-released-jail>.

186. *Id.*

187. *Id.* (internal quotation marks omitted).

188. *Id.*