

## A DIFFERENT “BORDER CRISIS”: CIVIL REMEDIES FOR UNLAWFUL DETAINMENTS AFTER *EGBERT*

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### *Abstract*

*In 1971, the Supreme Court decided Bivens v. Six Unknown Named Agents where the court created an implied cause of action for a private citizen to sue a federal official for a Fourth Amendment violation. This began to be known as a Bivens claim. Later cases created two more causes of action for Fifth and Eighth Amendment violations in Davis v. Passman and Carlson v. Green. Beyond these three instances, the court has declined to extend the Bivens claim any further. Most recently, the Court’s ruling in Egbert v. Boule essentially closed the door to Bivens, and with it, civil relief for constitutional violations by federal officials. In Egbert, the court held an individual did not have a Bivens claim against a Border Patrol agent for the violation of his First and Fourth amendment rights. In refusing to extend Bivens to the facts in Egbert, the Court pointed towards Congress to create a cause of action to remedy private citizens.*

*In recent years, there has been an extensive influx of immigration, causing an increase in border security efforts. Congress and the Court have recognized several exceptions to constitutional rights at the border in the name of national security. Exceptions such as the 100-mile Border Exception have given Border Patrol increased latitude in policing at the border and nearby cities where an approximated two-thirds of the U.S. population lives. This latitude at times results in the infringement of constitutional rights of U.S. citizens. In 2019, an 18-year-old Dallas teenager, traveling through a Border Patrol checkpoint, was held in Border Patrol custody for nearly a month. This teen was a U.S. Citizen and had documentation to prove it, yet he was detained for weeks unable to make even a phone call.*

*After Egbert, U.S. citizens who are unlawfully detained for extended periods of time, and who suffer from other unconstitutional conduct during their detainment, have little to no relief. Private citizens should have access to an adequate civil remedy that works to both compensate and*

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deter further unlawful detentions. Along with providing relief, officers should be deterred from further conduct that infringes on the fundamental rights of U.S. Citizens. This Article proposes a statute that mimics a §1983 claim and sets out statutory language that is narrowly tailored to consider government interest while protecting individual rights.

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## I. INTRODUCTION

Let us begin with our hardworking southern U.S. border city resident, Jose.<sup>1</sup> Jose is driving near the city of Brackettville, Texas, about 30 miles from the Acuña-Del Rio International Bridge, at the United States-Mexico border.<sup>2</sup> Carlos and Luis, his two new friends from the construction site, are riding as his passengers.<sup>3</sup> They have worked a hard day and are excited about rewarding their efforts with a bacon cheeseburger from a popular local burger joint.<sup>4</sup>

Jose notices lights in his rearview mirror and slows down to stop when he sees it is a Border Patrol officer who is attempting to pull him over.<sup>5</sup> He rolls down his window and is asked the basic questions: *Where are you going? Where do you live? Are you a U.S. Citizen?*<sup>6</sup> Jose and Luis are U.S. Citizens and able to provide identification, but it turns out his friend Carlos did not bring his ID with him to work that day.<sup>7</sup> The officers are suspicious one of them might not be a U.S. citizen and wants to investigate further.<sup>8</sup> They take the three to a Border Patrol holding facility to further investigate their citizenship and documentation.<sup>9</sup> One hour goes by, then another, next thing they know it is nightfall and they are spending the night in what feels like a cage.<sup>10</sup> Jose asks the officer for a phone call so that he can notify his family and new employer. He is denied.<sup>11</sup>

A day goes by and Jose's worry increases.<sup>12</sup> What will his wife think happened to him? What will his job think? Surely, he will be fired.<sup>13</sup> He just got the job, and his family was already behind on bills. How will they pay next month's rent? Another day goes by, but nothing.<sup>14</sup> He is finally released 6 days later and is told he must pay a storage fee to get his car

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1. See generally *Joyner v. Station, No. DR-22-CV-0013-AM*, 2023 U.S. Dist. LEXIS 176741 (W.D. Tex. Oct. 2, 2023) (holding no *Bivens* claim. The hypothetical in this Article is based, in part, on the facts alleged in this case); See also 'US Citizen Wrongfully Detained' by Border Patrol, BBC (July 23, 2019), <https://www.bbc.com/news/world-us-canada-49091524> [<https://perma.cc/MKE4-UVVA>] (providing an example of a U.S. Citizen detained by Border Patrol for over three weeks).

2. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*2.

3. See *id.*

4. See *id.*

5. See *id.*

6. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*3.

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

11. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*4.

12. See *id.* at \*3.

13. See *id.*

14. See *id.*

back.<sup>15</sup> He is confused and feels humiliated.<sup>16</sup> No criminal charges were pressed against him and yet he was detained for days.<sup>17</sup> He has not showered and is desperate to let his family know he is okay.<sup>18</sup> After this incident, Jose feels an injustice was done to him.<sup>19</sup> He would like to seek compensation for the time he was detained and the money he lost while Border Patrol officials were “investigating.”<sup>20</sup> He would also like for no one to experience this again.<sup>21</sup>

Although Jose’s story is a hypothetical, it is loosely based on a real story.<sup>22</sup> After the Court’s ruling in *Egbert v. Boule*, Jose’s options to seek relief are extremely limited and inadequate.<sup>23</sup> In *Egbert*, the Supreme Court refused to extend a *Bivens* remedy to First and Fourth amendment violations by a Border Patrol official.<sup>24</sup> Prior to *Egbert*, a *Bivens* claim was used for many years to find federal officials liable for constitutional violations, like the Fourth Amendment excessive-force claim in that case.<sup>25</sup>

Although the Court did not overrule *Bivens*, the implications of *Egbert* are that unless the facts and claims exactly match the trinity of recognized *Bivens* claims, the Court will likely not extend a *Bivens* remedy to that claim.<sup>26</sup> If someone like Jose has been unlawfully detained for an extended period of time, a *Bivens* claim is not a likely remedy.<sup>27</sup> This leaves Jose without compensation for time and money lost.<sup>28</sup> The implications are also that the officers who violate Jose’s constitutional rights do not have anything deterring them from doing the same thing again.<sup>29</sup>

In *Regulating Federal Law Enforcement: Considerations for Congress*, the Congressional Research Service (CRS) proposed the creation of a Section-1983-type legislation that would allow a claim against federal law enforcement officers.<sup>30</sup> This Article provides the

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15. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*3–4.

16. See *id.*

17. See *id.*

18. See *id.*

19. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*2–4.

20. See *id.*

21. See *id.*

22. See *id.*

23. See generally *Egbert v. Boule*, 596 U.S. 482 (2022).

24. See *id.* at 501–02.

25. See *id.* at 484–85.

26. See *id.* at 525–27 (Sotomayor, J., dissenting).

27. See *Joyner*, 2023 U.S. Dist. LEXIS 176741, at \*15.

28. See *Egbert*, 596 U.S. 482 at 504–05 (Sotomayor, J., dissenting).

29. See *id.* at 511–12 (Sotomayor, J., dissenting).

30. See Whitney K. Novak, CONG. RSCH. SERV., LSB10500, REGULATING FEDERAL LAW ENFORCEMENT: CONSIDERATIONS FOR CONGRESS (2023) found at <https://crsreports.congress.gov/product/pdf/LSB/LSB10500> Congressional Research Service (CRS) is a

necessary detail to implement their proposal with proposed statutory language.<sup>31</sup> Part II highlights the problem through various examples of unlawful detentions near the border and provides a background of the remedies available in the past and those presently available.<sup>32</sup> Part III analyzes the inadequacy of the current remedies and proposes a model legislation that imitates §1983.<sup>33</sup> Part IV provides a brief conclusion that summarizes the problem and encourages an adequate remedy.<sup>34</sup>

## II. UNCONSTITUTIONAL CONDUCT AND THE INSUFFICIENT REMEDIES AVAILABLE

### A. Overview of the Problem

#### 1. Constitutional Protections and their Dilution Near the Border

The U.S. Constitution guarantees every U.S. citizen a set of rights that “promote the general Welfare, and secure the Blessings of Liberty.”<sup>35</sup> Certain rights have been deemed so important “as requiring a high degree of protection from government encroachment.”<sup>36</sup> For example, one such fundamental right is guaranteed through the Fourth Amendment — the right of citizens to be secure in their persons against unreasonable searches and seizures.<sup>37</sup> Other guaranteed protections, such as those found in the Fifth and Sixth Amendments, are a citizen’s right not to be deprived of “life, liberty, or property, without due process of law,” rights guaranteeing a speedy trial, to be informed of the nature and cause of the accusation, and to have the assistance of counsel.<sup>38</sup>

Yet, despite these guarantees many limitations and exceptions have been created by Congress and the Supreme Court to dilute the force of

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nonpartisan group that serves congressional committees and Members of Congress. CRS operates under the direction of and exclusively for Congress. *Congressional Research Service Careers*, LIB. CONG., <https://www.loc.gov/crsinfo/> [<https://perma.cc/RE9P-JDRW>].

31. *See infra* Section III.B (proposing statutory language that creates a civil remedy for private individuals who experience Constitutional violations by federal officials).

32. *See infra* Part II (giving a background on available civil remedies).

33. *See infra* Part III (describing the current insufficient remedies and proposes a statutory remedy).

34. *See infra* Part IV (providing a brief summarization of the issue and a call to action).

35. U.S. CONST. pmbl.

36. *Fundamental Right*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/fundamental\\_right](https://www.law.cornell.edu/wex/fundamental_right) [<https://perma.cc/8BM6-7MWK>].

37. U.S. CONST. amend. IV.

38. U.S. CONST. amend. V; U.S. CONST. amend. VI.

these rights, especially near the border.<sup>39</sup> For example, at any international border crossing, at the United States-Mexico or United States-Canada border, federal officials do not need a warrant, probable cause, or reasonable suspicion to search a person or their property.<sup>40</sup> When making these exceptions, courts acknowledge that they judge the permissibility of certain law enforcement practices by balancing their intrusion on private rights against the legitimate governmental interest.<sup>41</sup>

Outside of the border crossing, Congress passed a statute in 1952 giving immigration officers powers to search without a warrant within a “reasonable distance” from the U.S. border.<sup>42</sup> This “reasonable distance” has become anywhere within 100 miles of a U.S. border.<sup>43</sup>

To balance governmental interests with private interests and because “no Act of Congress can authorize a violation of the Constitution,” the Court has held that the 100-mile rule does not mean that Border Patrol can stop anyone for whatever reason they want to: reasonable suspicion is required.<sup>44</sup> “Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.”<sup>45</sup>

Furthermore, Border Patrol operates immigration checkpoints near border cities around the United States.<sup>46</sup> These checkpoints are typically equipped with cameras, drug-sniffing dogs, and every motorist is required to stop.<sup>47</sup> Border Patrol agents typically ask motorist questions regarding their citizenship status or request proof of immigration status.<sup>48</sup> Border Patrol agents do not need reasonable suspicion at these checkpoints and typically conduct a visual inspection of the cars.<sup>49</sup>

Although Congress and the courts have recognized that Border Patrol agents may take this latitude in the name of national security, a danger exists that agents may go too far and infringe on an individual’s

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39. See generally 8 U.S.C. § 1357; *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975).

40. See *United States v. Ramsey*, 431 U.S. 606, 616–17 (1977).

41. See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

42. 8 U.S.C. § 1357.

43. 8 C.F.R. § 287.1(a) (2023).

44. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268–72 (1973).

45. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975).

46. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 553 (1976).

47. *Know Your Rights 100 Mile Border Zone*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/know-your-rights/border-zone> [https://perma.cc/32NR-TYYN] [Hereinafter *Know Your Rights*].

48. *Id.*

49. See *Martinez-Fuerte*, 428 U.S. at 545–58.

constitutional rights.<sup>50</sup> In *United States v. Montoya De Hernandez*, Justice Brennan warned in his dissent that "[a]t some point, however, further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required."<sup>51</sup> Justice Brennan further explained that there may be times, for example, when a detention at the border may turn into a full scale custodial arrest but a detainee would be treated differently than an arrestee because they would not have access to basic rights such as a phone, a bed, or a prompt hearing before a Magistrate Judge.<sup>52</sup> These exceptions seem to create an "authoritarian twilight zone on the border" that would not pass constitutional muster anywhere else.<sup>53</sup>

According to a 2010 census, two-thirds of the U.S. population lives within the 100-mile zone.<sup>54</sup> Despite the lowered bar for searches and seizures at the United States border crossing with Canada and Mexico and the areas around it, authorities must respect private citizens' constitutional rights.<sup>55</sup>

## *2. American Immigration Council: Complaints Against Border Patrol Go Unanswered*

A 2017 Special Report by the American Immigration Council detailed a lack of accountability for Border Patrol misconduct at or near the Border.<sup>56</sup> According to the report, Customs and Border Patrol (CBP) has a long history of violating the rights of not only immigrants but U.S. citizens as well.<sup>57</sup> The report shows that claims alleging abuses by CBP typically result in no serious disciplinary action.<sup>58</sup>

The Council obtained data from CBP through the Freedom of Information Act.<sup>59</sup> The data included "2,178 cases of alleged misconduct by Border Patrol agents and supervisors that were filed between January

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50. See *United States v. Montoya De Hernandez*, 473 U.S. 531, 551 (1985) (Brennan, J., dissenting).

51. *Id.*

52. See *id.*

53. *Id.* at 564.

54. See *Know Your Rights*, *supra* note 47.

55. See *id.*

56. Guillermo Cantor & Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, AM. IMMIGR. COUNCIL (August 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/still\\_no\\_action\\_taken\\_complaints\\_against\\_border\\_patrol\\_agents\\_continue\\_to\\_go\\_unanswered.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf) [<https://perma.cc/FP77-E4BW>].

57. See *id.*

58. *Id.*

59. See Cantor, *supra* note 56.

2012 and October 2015. These cases range from instances of verbal abuse, to theft of property, to physical assault.”<sup>60</sup> Although the Council was not able to distinguish meritorious allegations from non-meritorious allegations, the results showed a wide disparity between claims reported and those that resulted in an accountability action.<sup>61</sup>

Of the 2,178 formal complaints, 55.2 percent resulted in “no action” while the other 42.4 percent were still under investigation.<sup>62</sup> 52 complaints did lead to a resolution, but half of those cases involved “counseling” and the other half led to minor disciplinary actions like suspension and reprimands.<sup>63</sup> Moreover, the data showed that most of these claims were claims of physical abuse.<sup>64</sup>

### *3. Dallas Teen Unjustly Detained for Over Three Weeks*

Headline after headline illustrates the problems that arise with Border Patrol’s extended powers.<sup>65</sup> In June 2019, Francisco Galicia, an 18-year-old Dallas teen, traveled with his 17-year old brother and some friends to a soccer scouting event when they were stopped at an immigration checkpoint.<sup>66</sup> When requested, Francisco showed his Texas ID to the officers, but his brother, being an undocumented citizen, only showed his student ID.<sup>67</sup> They both were arrested.<sup>68</sup>

Francisco was held in border officials’ custody for over three weeks.<sup>69</sup> Officers did not allow him to use the phone or the shower, and he became

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60. *Id.*

61. *Id.*

62. *Id.* at 15.

63. *Id.*

64. *Id.* at 8.

65. See BBC, *supra* note 1. (18-year-old U.S. Citizen detained by Border Patrol for over three weeks); See also *Washington Man Illegally Detained by Border Patrol at Spokane’s Greyhound Bus Station Sues the Agency for Damages*, AM. C.L. UNION (June 25, 2019), <https://www.aclu.org/press-releases/washington-man-illegally-detained-border-patrol-spokanes-greyhound-bus-station-sues> [<https://perma.cc/ZH4D-HZH3>] (man detained by Border Patrol at the northern U.S. border while riding a greyhound bus); Steve Almasy, *A Border Patrol Agent Heard them Speaking Spanish at a Mini-mart and Asked them for ID. Now they’re Suing*, CNN (Feb. 14, 2019), <https://www.cnn.com/2019/02/14/us/montana-border-patrol-spanish-lawsuit/index.html> [<https://perma.cc/A42Q-MMQN>] (two U.S. women were briefly detained and asked for proof of citizenship after heard speaking Spanish in public).

66. See BBC, *supra* note 1.

67. *Id.*

68. *Id.*

69. *Id.*



so desperate he almost opted to self-deport just to end the detainment.<sup>70</sup> His mother—who was not allowed to speak to her son until he was moved into ICE custody—likely felt extremely distressed.<sup>71</sup> After finally learning of her son's detention, she retained an attorney for help.<sup>72</sup> The attorney went to Border Patrol with extra documentation, but his detainment continued.<sup>73</sup> After his detainment made national and international news, a mother's plea finally proved fruitful when ICE released Francisco weeks after the initial stop.<sup>74</sup>

Francisco's story is just one instance in a series of many stories where authorities unlawfully detain U.S. citizens for extended periods of time.<sup>75</sup> Like many others who CBP has unlawfully detained, Francisco announced his plan to sue.<sup>76</sup>

### *B. Section 1983: Civil Liability Against State Actors*

People have long used civil suits to both compensate and deter unlawful and harmful behavior.<sup>77</sup> In a civil suit, there are generally two types of damages: compensatory and punitive.<sup>78</sup> “[C]ompensatory damages are awarded to compensate an injured party for his or her injury while punitive damages are awarded to punish a wrongdoer.”<sup>79</sup>

Congress has created a civil remedy for private citizens to sue state actors who violate their constitutional rights.<sup>80</sup> Under §1983:

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70. See Caitlin O’Kane, *18-year-old U.S. Citizen Detained by Border Officials said Conditions were so Bad he Lost 26 pounds, Almost Self-Deported*, CBS (July 26, 2019, 1:26 PM), <https://www.cbsnews.com/news/us-citizen-detained-by-ice-francisco-erwin-galicia-border-officials-conditions-bad-almost-self-deported/> [https://perma.cc/9UET-ATF4].

71. See BBC, *supra* note 1.

72. Matt Howerton, *Dallas-born Teen who was Wrongfully Detained in Border Detention Center Plans to Sue Government*, WFAA, <https://www.wfaa.com/article/news/dallas-born-teen-who-was-wrongfully-detained-in-border-detention-center-plans-to-sue-government/287-035dfb2b-effc-41bd-9faa-f8b49818ed17> (July 25, 2019) [https://perma.cc/AFY2-YCXQ].

73. *Id.*

74. *Id.*

75. See *supra* note 60 and accompanying text (listing various examples).

76. Howerton, *supra* note 72.

77. See 22 AM. JUR. 2D *Damages* § 3 (2023).

78. See *id.* Injunctive relief is an additional damage a plaintiff may request from the court. “An injunction is an equitable remedy ordering a party to do some act or refrain from doing some act to prevent irreparable future harm to the injunction applicant.” 1 FED. LITIG. GUIDE § 7.01 (2023). If the party has discontinued conduct, injunctive relief is inappropriate.

79. 22 AM. JUR. 2D *Damages* § 3 (2023).

80. 42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>81</sup>

Despite the creation of §1983, and its purpose to protect citizen's rights against unconstitutional conduct by state actors, law enforcement has a defense at its disposal – qualified immunity.<sup>82</sup>

In *Harlow v. Fitzgerald*, the Supreme Court considered whether the President's senior aides and advisors had immunity from a civil suit arising from the performance of their duties.<sup>83</sup> There, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>84</sup> The Court cautioned that plaintiff's can defeat qualified immunity if an official, in the course of his official duties, knew or reasonably should have known that their actions violated a constitutional right or if the official acted with malicious intent to cause a deprivation of a constitutional right.<sup>85</sup>

### C. *From Bivens to Now*

Historically, citizens, who claim a violation of their constitutional rights, have sought out a *Bivens* claim.<sup>86</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court recognized a cause of action against federal agents for violating a private citizen's

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81. *Id.*

82. *See Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982).

83. *See id.* at 818.

84. *See id.*

85. *See id.* at 815.

86. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

Fourth Amendment right against an unreasonable search and seizure.<sup>87</sup> There, six Federal Bureau of Narcotics Agents forced their way into Mr. Bivens's home without a warrant and searched it.<sup>88</sup> They went on to arrest him in front of his family and threaten his family with arrest.<sup>89</sup> The humiliation Mr. Bivens experienced moved him to pursue a civil remedy against the agents for violating his Fourth Amendment right against an unreasonable search and seizure.<sup>90</sup> The trial court dismissed his claim for failure to state a claim upon which relief can be granted.<sup>91</sup> The Court of Appeals affirmed.<sup>92</sup>

The Supreme Court held that the violation of his Fourth Amendment right allowed for a claim against the federal officials.<sup>93</sup> The Court's holding created a new implied cause of action against federal agents.<sup>94</sup> The majority recognized that federal agents "possess[] a far greater capacity for harm" than a mere trespasser.<sup>95</sup>

Following *Bivens*, the Supreme Court recognized a new cause of action in only two other cases.<sup>96</sup> First, the Court extended *Bivens* to a Fifth Amendment gender discrimination claim that a former congressional staffer brought against a United States Congressman.<sup>97</sup> In *Davis v. Passman*, a Congressman hired a woman as his deputy administrative assistant.<sup>98</sup> He later fired her because she was a woman, believing that a man was better suited for the role.<sup>99</sup> She filed suit alleging the discrimination was a violation of her constitutional rights.<sup>100</sup>

The Court extended *Bivens* to allow a new implied cause of action for a violation to her Fifth Amendment Due Process rights.<sup>101</sup> Relying on *Bivens*, the Court ruled that the ex-staffer could sue the federal official for a constitutional violation.<sup>102</sup> It reasoned that the ex-staffer had alleged a constitutionally protected right in her complaint and that relief in damages was an appropriate remedy because "[h]istorically, damages have been

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87. *Id.*

88. *Id.*

89. *Id.* at 389.

90. *See id.*

91. *Id.*

92. *Bivens*, 403 U.S. at 389.

93. *Id.*

94. *Id.*

95. *Id.* at 392.

96. *Egbert v. Boule*, 596 U.S. 482 (2022).

97. *See Davis v. Passman*, 442 U.S. 228 (1979).

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.*

102. *See id.*

regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>103</sup> It explained that the relief was judicially manageable and that there was no explicit congressional declaration that denied relief for a plaintiff in the ex-staffer’s position.<sup>104</sup> Moreover, since the Congressman was no longer actively serving, he could not reinstate the ex-staffer.<sup>105</sup> It was either damages, or no relief at all.<sup>106</sup>

Later, the Court recognized an Eighth Amendment claim against federal prison officials for inadequate medical care that led to a prisoner’s death.<sup>107</sup> In *Carlson v. Green*, a prisoner died while in custody and his mother brought a lawsuit against a group of prison officials alleging an Eighth Amendment violation.<sup>108</sup> The prison officials argued that the court should dismiss her claim because she could have brought a claim under the Federal Torts Claim Act (FTCA).<sup>109</sup>

The Court disagreed.<sup>110</sup> It held that a private citizen could choose between bringing a *Bivens* claim or an FTCA claim.<sup>111</sup> The Court explained that Congress made no indication that it wanted the FTCA to function as a substitution for a *Bivens* claim.<sup>112</sup> It recognized that a *Bivens* claim was more effective than an FTCA claim.<sup>113</sup> “First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose.”<sup>114</sup> Unlike the FTCA, a *Bivens* claim serves a deterrent effect because it allows plaintiff’s to bring a claim against an individual instead of the federal government.<sup>115</sup> Furthermore, unlike the FTCA, a *Bivens* claim allows for punitive damages, a jury trial, and courts try it uniformly throughout the country instead of relying on state law.<sup>116</sup> Because she could have brought an FTCA claim or a *Bivens* claim, the Court recognized the mother’s *Bivens* claim, thereby extending *Bivens* once more to a new context.<sup>117</sup>

However, since *Passman* and *Carlson*, the Court has not created any additional implied causes of action under the Constitution and now

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103. *Davis*, 442 U.S. at 245.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See Carlson v. Green*, 446 U.S. 14 (1980).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Carlson*, 446 U.S. at 20.

114. *Id.* at 21.

115. *Id.*

116. *Id.* at 22–23.

117. *See id.*

emphasizes that recognizing a new *Bivens* claim is a “disfavored judicial activity.”<sup>118</sup>

In *Egbert v. Boule*, the Court did not go as far as overruling *Bivens* but it came pretty close.<sup>119</sup> Boule filed a claim against a Border Patrol agent for excessive use of force and retaliation — a Fourth and First Amendment violation.<sup>120</sup> Boule owned a bed and breakfast, the Smugglers Inn, near the United States-Canadian border.<sup>121</sup> According to Mr. Boule’s account of the incident, an encounter with Border Patrol Agent Egbert led to him throwing Mr. Boule against a car and then to the ground.<sup>122</sup>

Mr. Boule filed an FTCA claim, and the agency ultimately denied it.<sup>123</sup> He then sought out a *Bivens* claim.<sup>124</sup> The Court denied it because it refused to expand *Bivens* any further.<sup>125</sup> It explained that “in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts.”<sup>126</sup>

The Court endorsed a two-step analysis to assist lower courts in determining whether to recognize a *Bivens* claim.<sup>127</sup> First, does the claim create a “new *Bivens* context”? Courts should ask whether the claim is “meaningfully different” than the three claims the Supreme Court has recognized in the past.<sup>128</sup> The Court explained that a new context arises when unique factors, not considered by the three *Bivens* cases, are present.<sup>129</sup> For example, a new category of defendants or a different constitutional right at issue could create a new context.<sup>130</sup>

Second, if the case does create a “new *Bivens* context,” are there “special factors” that make the judiciary less equipped than Congress to “weigh the costs and benefits of allowing a damages action to proceed.”<sup>131</sup> “Special factors” include the importance of border security.<sup>132</sup> In *Hernandez v. Mesa*, the Court recognized that “regulating the conduct of

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118. *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (citing *Ziglar v. Abbasi*, 582 U.S. 120 (2017)).

119. *See id.*

120. *Id.*

121. *Id.* at 505.

122. *Id.*

123. *Id.*

124. *Egbert*, 596 U.S. at 505.

125. *Id.*

126. *Id.*

127. *Id.* at 518.

128. *Id.*

129. *Id.*

130. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *see also Ziglar v. Abbasi*, 582 U.S. 120, 148 (2017).

131. *Egbert*, 596 U.S. at 518.

132. *Id.*

agents at the border unquestionably has national security implications.”<sup>133</sup> Therefore, the Court explained, permitting suit against a Border Patrol agent presents national security concerns that foreclose a *Bivens* remedy.<sup>134</sup>

If there is any reason to hesitate before recognizing a new *Bivens* cause of action, then Congress should create the claim.<sup>135</sup> Additionally, if Congress has already authorized an alternate remedial structure, the courts should not create a *Bivens* cause of action.<sup>136</sup> Overall, the question to ask is “... whether there is any reason to think that Congress might be better equipped to create a damages remedy.”<sup>137</sup>

The Supreme Court decided *Egbert* in 2022 and already its negative impact is evident in lower court decisions.<sup>138</sup> The result of the *Egbert* precedent is evident in *Gilson v. Alvarez*.<sup>139</sup> There, Border Patrol officers handcuffed and allegedly pushed and hit a protestor in the abdomen.<sup>140</sup> The protestor brought a *Bivens* claim against the agents.<sup>141</sup>

The District Court accepted the Magistrate Judge’s Report and Recommendation to dismiss the claims against the officers.<sup>142</sup> The Court agreed with the Magistrate Judge that the CBP customer complaint program was an alternative remedial structure that defeated Gilson’s claim.<sup>143</sup> Gilson argued that he “cannot imagine how a ‘complaint’ system that provides for comment cards can be conceived as an alternative remedy to damages.”<sup>144</sup> Yet, the Court looked back at *Egbert* in deciding that the program’s adequacy was irrelevant.<sup>145</sup>

The District Court held that Gilson’s claims presented “a new *Bivens* context and that special factors counsel against recognizing a *Bivens* cause of action in this case.”<sup>146</sup>

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133. See *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020).

134. *Egbert*, 596 U.S. at 483.

135. *Ziglar*, 582 U.S. at 137.

136. *Egbert*, 596 U.S. at 503 (citing *Ziglar*, 582 U.S. at 137).

137. *Id.* at 503.

138. See *Gilson v. Alvarez*, No. EP-21-CV-00110-DCG, 2022 U.S. Dist. LEXIS 143321 (W.D. Tex. Aug. 11, 2022).

139. *Id.*

140. *Id.* at \*2–3.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Gilson*, 2022 U.S. Dist. LEXIS at \*2–3.

145. *Id.*

146. *Id.* at \*25.

D. "Alternative Remedies"

1. FTCA and the Westfall Act

Congress created the Federal Torts Claims Act as a waiver of immunity for negligence by federal officials.<sup>147</sup> The waiver comes with several limitations.<sup>148</sup> For example, it does not include the ability to sue a federal official for constitutional violations.<sup>149</sup> The FTCA also does not allow for punitive damages.<sup>150</sup>

Another limitation is the Intentional Tort Exception.<sup>151</sup> This exception does not allow a suit against a federal government official for any intentional torts like assault, false imprisonment, and false arrest.<sup>152</sup> However, federal law enforcement officers are under the exception to the Intentional Tort Exception.<sup>153</sup> Plaintiffs can sue federal law enforcement officers, like Border Patrol, under the FTCA for some intentional torts, like false imprisonment.<sup>154</sup>

When a plaintiff sues an officer, the Westfall Act comes into action by giving officers, engaged in the performance of their duties immunity.<sup>155</sup> Congress created the Westfall Act in response to the Supreme Court's decision in *Westfall v. Erwin*.<sup>156</sup> There, the Court restricted protections for federal employees for tort liability by holding "absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature."<sup>157</sup> Prior to the Court's decision in *Westfall*, a federal employee's conduct was absolutely immune from common law tort liability if the employee was acting within the scope of their employment.<sup>158</sup> Congress responded through the Westfall Act.<sup>159</sup>

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147. 28 U.S.C. § 2671.

148. *Id.*

149. *Id.*

150. 28 U.S.C. § 2674.

151. Michael D. Contino & Andreas Kuersten, *The Federal Tort Claims Act (FTCA): A Legal Overview*, CONG. RSCH. SERV. 25, <https://crsreports.congress.gov/product/pdf/R/R45732> (Apr. 17, 2023) [<https://perma.cc/35SP-XH6E>].

152. *Id.* at 25.

153. *Id.* at 26.

154. *Id.* at 27.

155. William T. Cornell, *An Evaluation of the Federal Employees Liability Reform and Tort Compensation Act: Congress' Response to Westfall v. Erwin*, 26 SAN DIEGO L. REV. 137, 148 (1989).

156. *Id.* at 137.

157. *Westfall v. Erwin*, 484 U.S. 292, 300 (1988).

158. Cornell, *supra* note 155, at 139.

159. Cornell, *supra* note 155, at 137.

Under the Act, when plaintiffs sue a federal employee “for a wrongful or negligent act,” the Attorney General will first certify that the employee was acting within the scope of their employment at the occurrence.<sup>160</sup> Once certified, the United States removes the employee and substitutes itself as the defendant “and the case proceeds under the Federal Tort Claims Act.”<sup>161</sup>

Further, under the Discretionary Function Exception, the FTCA bars suits based on the federal government’s performance or failure to perform discretionary functions or duties.<sup>162</sup> The exception “preserves the federal government’s immunity...when an employee’s acts involve the exercise of judgment or choice.”<sup>163</sup> The government does not waive its immunity when the federal employee’s act is both discretionary and policy driven.<sup>164</sup> Being the most litigated exception, it is also the “broadest and most consequential.”<sup>165</sup>

*Rich v. United States* exemplifies the Discretionary Function Exception.<sup>166</sup> There, after prisoners stabbed an inmate, he filed a suit under the FTCA claiming the Board of Prisoners (BOP) should have separated him from certain inmates.<sup>167</sup> The court held that BOP’s decision of whether to separate inmates was discretionary and therefore it did not waive sovereign immunity under the FTCA.<sup>168</sup>

## 2. Customs and Border Patrol Complaint Program

The Department of Homeland Security has created the Office of Civil Rights and Civil Liberties (CRCL) to review complaints regarding “physical or other abuse; discrimination based on race, ethnicity, national origin...violation of right to due process, such as right to timely notice of charges or access to lawyer...and any other civil rights or civil liberties violation related to a Department program or activity.”<sup>169</sup>

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160. Kurtis A. Kemper, Annotation, *When Has Federal Employee Acted Within Scope of Employment for Purposes of Westfall Act*, 28 U.S.C.A. § 2679, *Permitting Substitution of United States as Defendant in Action Asserting Intentional Tort Not Involving Personal Injury or Death*, 14 A.L.R. FED. 2D 251, \*2 (1978).

161. *Id.*

162. *Id.*

163. Contino & Kuersten, *supra* note 151, at 18.

164. *Id.*

165. *Id.*

166. See *Rich v. United States*, 811 F.3d 140, 141 (4th Cir. 2015).

167. *Id.*

168. *Id.* at 142.

169. *Civil Rights and Civil Liberties*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/about/civil-rights-liberties> (July 27, 2023) [<https://perma.cc/W674-67W4>].



Through the Customs and Border Patrol (CBP) website, individuals can file a civil rights complaint through their online form, by phone, email, or postal mail.<sup>170</sup> The CRCL office then investigates the complaint pursuant to 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1.<sup>171</sup> The website gives more information on the investigation process through flow charts and FAQs.<sup>172</sup> In question-and-answer format, CBP addresses the outcome to these investigations: "What are the Outcomes of CRCL's Investigations? CRCL does not provide individuals with legal rights or remedies. CRCL uses information from complaints to find and address problems in DHS policy and its implementation. If you believe your rights or those of someone you know have been violated, you may wish to consult an attorney."<sup>173</sup>

### *E. Balancing Private Interests with Government Interests*

The current remedies for unlawful detentions are inadequate and this is a problem for not only those harmed but all citizens who enjoy constitutional rights.<sup>174</sup> In *Egbert*, Justice Sotomayor explained in her dissent that the Court's precedents recognize the importance of civil suits for damages.<sup>175</sup> They help not only to compensate those who have violated constitutional rights, but they also deter unconstitutional conduct by federal officials.<sup>176</sup> She further emphasized the importance of *Bivens* actions "particularly in the Fourth Amendment search-and-seizure context" and recognized that the majority decision "close[d] the door to *Bivens* suits by many who will suffer serious constitutional violations at the hands of federal agents."<sup>177</sup>

The effect of *Egbert* is that there is one less remedy in an already limited list of remedies afforded to U.S. citizens.<sup>178</sup>

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170. *Make a Civil Rights Complaint*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/file-civil-rights-complaint> [<https://perma.cc/8B2G-A9C2>] [hereinafter *DHS Complaint*].

171. *Id.*

172. *Civil Rights Complaint Flowchart*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/sites/default/files/publications/crcl-complaints-flowchart.pdf> [<https://perma.cc/67EJ-YZN6>].

173. *DHS Complaint*, *supra* note 170.

174. *See Egbert v. Boule*, 596 U.S. 482, 527 (2022) (Sotomayor, J., dissenting).

175. *Id.*

176. *Id.*

177. *Id.*

178. *See id.*

## III. WHY CONGRESSIONAL ACTION IS NECESSARY

*A. Insufficiency of Current Remedies*

U.S. citizens who suffer constitutional violations near the border should receive an adequate civil remedy because the Constitution guarantees their rights, and exceptions to those protections should not dilute them.<sup>179</sup> Congress should pass a statute that mimics §1983 because the Supreme Court in *Egbert* entrusts that responsibility to it—to protect individual constitutional rights from violations by federal actors.<sup>180</sup> However, passing a statute narrowly tailored to these needs would consider other compelling governmental interests and prevents Congress from overstepping their boundaries concerning the public's interest in national security.<sup>181</sup>

*1. Insufficiency of Bivens per Egbert*

A *Bivens* remedy is an insufficient civil remedy to compensate wrongly detained U.S. citizens because the Court's decision in *Egbert* has denied extending *Bivens* to a new context.<sup>182</sup> After *Egbert*, private citizens have one less option, from the already extremely limited choice of options, for seeking a civil remedy against federal officials.<sup>183</sup> Specifically, the Court's ruling practically closes all options for seeking any remedy at all for constitutional violations by federal officials.<sup>184</sup>

Instead of overruling *Bivens*, it severely limited its application to new contexts outside of the *Bivens* trinity.<sup>185</sup> In its two-step analysis, the Court explained it would not extend a *Bivens* claim if the claim was “meaningfully different” from any of the previous claims recognized in *Bivens*, *Passman*, and *Carlson*.<sup>186</sup> For example, even though Mr. Boule's claim was a Fourth amendment claim, and the Court conceded it was similar to the injury in *Bivens*, it nonetheless decided his claim created a

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179. See generally Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the “100-Mile Zone,”* 124 PENN. ST. L. REV. 391 (2020) (analyzing the “Constitutional Erosion” near the Border).

180. See *Egbert v. Boule*, 596 U.S. 482 (2022).

181. See *id.*

182. See *id.*

183. Novak, *supra* note 30, at 5.

184. Eric Katz, *Supreme Court Makes Federal Officials ‘Absolutely Immunized’ From Personal Lawsuits*, GOV'T EXEC. (June 8, 2022), <https://www.govexec.com/workforce/2022/06/supreme-court-makes-federal-officials-absolutely-immunized-personal-lawsuits/367934/> [https://perma.cc/3J6S-DD3K].

185. See *Egbert*, 596 U.S. at 502.

186. *Id.* at 501.

"new *Bivens* context" because a suit against a Border Patrol agent had national security implications.<sup>187</sup> It follows that a claim for unlawful detentions by Border Patrol agents, like the one posed in the hypothetical at the beginning of this Article, is likely a "new *Bivens* context" as well.<sup>188</sup>

Moreover, the Court explained that if it had to decide *Bivens* today, it would not have come to the same expansive outcome.<sup>189</sup> It likely would not have extended its authority in creating a new implied cause of action.<sup>190</sup> Commentators believe "this judicial restraint in extending *Bivens* leaves some without a civil damages remedy against many federal actors who may have violated their constitutional rights."<sup>191</sup>

Because the Court left it in the legislature's hands to create a new cause of action against federal officials, Congress must act.<sup>192</sup> The Court explained that the adequacy of a remedy is a legislative determination and "must be left to Congress, not the federal courts."<sup>193</sup> It asserts that if Congress or the Executive created a remedial process sufficient to deter the violation of constitutional rights, the courts should not second-guess it by implying a new *Bivens* remedy.<sup>194</sup>

The Court's hesitation in extending a civil remedy to Boule's claims means that U.S. citizens who suffer constitutional violations by Border Patrol agents do not have *Bivens* to turn to.<sup>195</sup> *Egbert* has a left a gap by stopping *Bivens*' further application to constitutional claims.<sup>196</sup> Congress must create legislation that fills this gap and provides a civil remedy for private citizens who suffer from constitutional wrongs.<sup>197</sup>

## 2. *Insufficiency of the FTCA*

The FTCA is insufficient in protecting citizens against not only Fourth Amendment unlawful detention violations but intentional torts as well.<sup>198</sup>

Although it allows claims against the United States for certain intentional torts like false imprisonment and false arrest, distinguishable

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187. *Id.*

188. *See id.*

189. *See id.*

190. *Id.*

191. Novak, *supra* note 30, at 5.

192. *Egbert v. Boule*, 596 U.S. 482 (2022).

193. *Id.*

194. *Id.* at 491.

195. *See id.*

196. Novak, *supra* note 30, at 5.

197. *See id.*

198. *See id.*

from a *Bivens* claim, an FTCA suit is not against an individual officer.<sup>199</sup> The Westfall Act allows officers immunity from intentional torts.<sup>200</sup> In an intentional tort claim, the United States government will substitute itself as a party on behalf of the officers.<sup>201</sup> This substitution creates an insufficiency in providing an adequate civil remedy for private citizens because they can't hold individual officers accountable for their unconstitutional conduct.<sup>202</sup> The Act dilutes the deterrent purpose of a civil remedy because the United States substitutes itself as the defendant.<sup>203</sup>

Furthermore, when compared to a *Bivens* claim, the FTCA's insufficiencies shine through.<sup>204</sup> *Bivens* claims serve a "deterrent purpose" because they seek damages against individual officers and allow courts to award punitive damages while the FTCA prohibits it.<sup>205</sup> A plaintiff filing an FTCA claim cannot seek a jury trial and FTCA claims only exist if there is a state law that prohibits the conduct.<sup>206</sup>

Punitive damages are vital to a civil remedy scheme and the FTCA falls short.<sup>207</sup> While the purpose of compensatory damages is to "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages serve an important role in deterrence and retribution.<sup>208</sup> The FTCA's denial of punitive damages creates a gap in civil relief, allowing officials to go unchecked in their reprehensible conduct.<sup>209</sup>

Additionally, claimants must overcome the discretionary function exception.<sup>210</sup> Under the discretionary function exception, if the government intended to protect the federal official's challenged actions from tort liability, then the exception exists and the claim fails.<sup>211</sup> Courts have held that even if the claim is based on a constitutional violation, the unconstitutional conduct does not defeat the discretionary function exception.<sup>212</sup> Courts may very well decide that the unconstitutional conduct of holding citizens in Border Patrol custody for an extended

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199. *Id.*

200. *See supra* Section II.D.1 (explaining officer immunity).

201. *See supra* Section II.D.1 (explaining officer substitution).

202. *See* Novak, *supra* note 30, at 4.

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

208. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

209. *See* Novak, *supra* note 30, at 4–5.

210. *See supra* Section II.D.1 (describing the Discretionary Function Exception).

211. *See supra* Section II.D.1 (describing the Discretionary Function Exception).

212. *See* Linder v. United States, 937 F.3d 1087, 1090–91 (7th Cir. 2019).

period is a completely discretionary action, thus leaving a private citizen without compensation or protection under the FTCA.<sup>213</sup>

The Supreme Court did not endorse Agent Egbert's argument that the FTCA is an "alternative remedy" for good reason.<sup>214</sup> The Court's precedent has interpreted the FTCA to run parallel to *Bivens*.<sup>215</sup> Because Congress carved out constitutional violations from the FTCA, the Court has interpreted this as Congress making it clear that it was not attempting to nullify a *Bivens* remedy but instead leaving *Bivens* where it found it.<sup>216</sup> Thus, Congress must fill the gap that *Egbert* left behind when it essentially overruled *Bivens*.<sup>217</sup>

### 3. Insufficiency of the CBP Complaint Program

Furthermore, the CBP complaint program is an insufficient remedy because it lacks judicial review and is completely discretionary.<sup>218</sup> Organizations who file complaints against Border Patrol agents under CRCL have reported its shortcomings.<sup>219</sup> Many times, the program fails to hold anyone accountable.<sup>220</sup>

The non-participatory nature of the complaint program furthers its inadequacy.<sup>221</sup> For example, after complaints of Border Patrol agents running Haitian migrants off on horseback made national news, CBP investigated the agent's conduct.<sup>222</sup> Unfortunately, the investigatory process did not include interviewing the migrants involved.<sup>223</sup>

Additionally, at the end of an investigation, CRCL may pose recommendations to CBP, but an injured party would have no idea whether those recommendations had an impact.<sup>224</sup>

213. See *supra* Section II.D.1 (describing the Discretionary Function Exception).

214. See *Egbert v. Boule*, 596 U.S. 482, 524 n.10 (2022) (Sotomayor, J., dissenting).

215. See *id.*

216. See *id.*

217. See *id.*

218. See U.S. Customs and Border Prot., *supra* note 169.

219. Adam Isacson & Zoe Martens, *Section III – Failure Points – Abuses at the U.S.-Mexico Border: How to Address Failures and Protect Rights*, WASH. OFF. ON LATIN AM. (Aug. 2, 2023) <https://www.wola.org/analysis/section-iii-accountability-for-abuses-at-the-u-s-mexico-border-how-to-address-failures-and-protect-rights/> [<https://perma.cc/4VV9-UWGS>].

220. See *id.*

221. Rebecca Beitsch, *Democrats Want Answers after CBP Failed to Interview Corralled Haitian Migrants*, THE HILL (Nov. 10, 2022, 5:12 PM) <https://thehill.com/policy/national-security/3730108-democrats-want-answers-after-cbp-failed-to-interview-corralled-haitian-migrants/> [<https://perma.cc/SM6B-VT6G>].

222. *Id.*

223. *Id.*

224. See Isacson & Martens, *supra* note 219.

Furthermore, the CRCL complaint program provides no compensatory remedy.<sup>225</sup> Returning to the hypothetical posed at the beginning of this Article, if Border Patrol detained Jose for days, he lost his job, and had to pay fees to get his car out of storage — he loses money and has no chance of recovery.<sup>226</sup> If this is the only avenue of relief for constitutional violations, then it is completely inadequate.<sup>227</sup>

Therefore, if the CBP complaint program provides no compensation, no participation, and no accountability, it is completely inadequate in protecting and deterring future unconstitutional conduct.<sup>228</sup> It compares with writing a complaint card at a restaurant who served you raw food.<sup>229</sup> You write your complaint on a card and put it in a suggestion box and leave without ever knowing if the restaurant held anyone accountable or if it changed its guidelines to prevent another raw food incident.<sup>230</sup> The CBP program is inadequate in dealing with our constitutional rights.<sup>231</sup>

*B. Congress Should Enact Legislation Narrowly Tailored to Protect Individual Rights and Consider Competing Government Interests.*

Now that the door for a *Bivens* remedy is pretty much closed shut, the legislature must come up with an option that adequately makes an individual who has suffered from the constitutional violation of unlawful detainment whole and additionally functions as a deterrent from future unconstitutional conduct.<sup>232</sup> The Congressional Research Service (CRS) proposes that Congress should create a statute that is similar to Section 1983 but instead of against state officials, against federal officials.<sup>233</sup> “In creating a new statutory cause of action, Congress could establish its parameters, including which federal officials would be liable, what federal rights would be protected, and whether officials are entitled to qualified immunity.”<sup>234</sup> CRS explains that Congress can go as far as making all federal officials liable for a violation of any constitutional right, similar to how Section 1983 does for state officials.<sup>235</sup> Alternatively, it asserts that Congress can also limit the remedy created through this new Section 1983-

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225. See *supra* Section II.D.2 (pointing the reader towards FAQ’s that explicitly state no legal remedies).

226. See *supra* Part I (posing a hypothetical detainment).

227. See *Egbert v. Boule*, 596 U.S. 482 (2022).

228. See *generally supra* Section II.D.2 (describing CBP complaint program).

229. See *generally supra* Section II.D.2 (describing CBP complaint program).

230. See *generally supra* Section II.D.2 (describing CBP complaint program).

231. See *supra* Section III.A.1 (analyzing the insufficiency of current *Bivens* claims).

232. See Novak, *supra* note 30, at 4–5.

233. See *id.*

234. *Id.*

235. *Id.*

type statute.<sup>236</sup> For example, Congress can limit the remedy to only provide a cause of action to United States citizens.<sup>237</sup>

To close the gap created by *Egbert*, this Article proposes that Congress adopt legislation that mimics Section 1983 with some modifications.<sup>238</sup> These modifications would narrow the scope to consider compelling governmental interests in national security.<sup>239</sup>

This new statute should limit claimants to United States citizens.<sup>240</sup> Like Section 1983, this statute should protect against the deprivation of constitutional rights, like those secured by the Fourth Amendment of the Constitution.<sup>241</sup> The statute should include a two-year statute of limitations and should permit compensatory damages but limit punitive damages.<sup>242</sup> I propose the following statute:

Every person who, under color of any Act of Congress, statute, treaty, regulation, or usage, of the United States federal government, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. The following limitations apply:

- a. Claims are subject to a two-year statute of limitations
- b. Claimants may seek reasonable compensatory damages. Claimants may seek reasonable punitive damages, not to exceed \$200,000.<sup>243</sup>

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236. *Id.*

237. *Id.*

238. See Novak, *supra* note 30, at 4–5.

239. See *id.*

240. See *id.*

241. See 42 U.S.C. § 1983.

242. See *id.*

243. See 42 U.S.C.S. § 1983.

This cause of action considers the importance of protecting private citizens from any unconstitutional conduct.<sup>244</sup> Instead of limiting to solely provide a cause of action for the violation of only one constitutional protection, this Article's proposed statute considers the many constitutional violations that may occur when Border Patrol unlawfully detains someone for an extended period of time.<sup>245</sup> Additionally, the proposed legislation is broad enough to protect citizens who suffer from unconstitutional conduct by federal officials but whose issues lies outside the scope of unlawful detainments at the border.<sup>246</sup>

The proposed legislation makes modifications to Section 1983 to limit the the class of potential claimants, limit compensatory relief, and limit punitive damages.<sup>247</sup> Distinguishable from Section 1983, the proposed statute permits a cause of action solely for U.S. citizens, and not for any "person within the jurisdiction thereof."<sup>248</sup> By narrowing the scope of the claim, the proposed legislation gives the federal government more flexibility in governing the way it deems necessary to protect our borders without worrying about a mass of federal suits that are a strain on time and resources.<sup>249</sup> On the other hand, our constitutional rights, as U.S. citizens, can not be swept under the rug in the name of border security.<sup>250</sup>

Further limiting the scope, under the proposed statute, a claimant only has two years from the date of the incident to bring a claim.<sup>251</sup> This express limitation mirrors the FTCA in encouraging prompt claims and thus limiting subject matter jurisdiction.<sup>252</sup> Furthermore, if Congress limits claims to a two-year statute of limitations, it distinguishes claimants with only the most urgent needs for compensation from those whose financial

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244. See *supra* Section III.A (analyzing the insufficiencies of current remedies).

245. See *supra* Section II.A.3 (exemplifying an incident where more than one Constitutional violation may have been possible).

246. See *supra* Section II.A.3 (exemplifying an incident where more than one Constitutional violation may have been possible). This Article acknowledges that there is a breadth of instances where U.S. Citizens have experienced constitutional violations by federal officials and have nowhere to turn to for civil relief. Although outside the scope of this Article, this Article's proposed legislation is intentionally broad enough to cover those instances.

247. See 42 U.S.C.S. § 1983.

248. See *id.*

249. See *Ziglar v. Abbasi*, 582 U.S. 120, 141 (2017).

250. See *supra* Section III.A (explaining the insufficiencies of current remedies).

251. Kent Sinclair & Charles A. Szypszak, *Limitations of Action under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1 (1991).

252. *Id.*



need is perhaps less urgent.<sup>253</sup> Lastly, by encouraging prompt claims, it prevents the loss of any critical evidence the government may use.<sup>254</sup>

Additionally, by setting a reasonableness standard for compensatory damages, plaintiffs cannot bring excessive damages against a government official.<sup>255</sup> Although it will be up to a judge and jury to define what is excessive and thus unreasonable, some guiding examples may be excessive damages for the emotional distress of the plaintiff and their family.<sup>256</sup>

Furthermore, limiting punitive damages would serve two functions: deterring outrageous behavior and considering the disruption excessive punitive damages may play against federal officials.<sup>257</sup> The proposed statute limits punitive damages to \$250,000.<sup>258</sup> This figure is based on a 50-state survey that shows states typically cap punitive damages between \$250,000 and \$500,000.<sup>259</sup> Unlike the FTCA, this Article's proposed legislation does not do away with punitive damages because these types of damages play an important role in civil litigation.<sup>260</sup> Punitive damages are necessary in this context because they serve as a deterrent against unconstitutional behavior by an individual officers.<sup>261</sup>

Although many constitutional exceptions apply at and near the border, including a lower standard for searches and seizures, Courts should consider applying a balancing test when reviewing this statute.<sup>262</sup> When deciding whether to apply one of the border exceptions, and therefore deem conduct that would have been unconstitutional outside of the border context as constitutional, the court should balance a citizen's interest in compensation, and deterrence with the border exception applied.<sup>263</sup>

For example, returning to our hypothetical, if a court deems that the 100-mile border zone exception permitted a Border Patrol agent to detain

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253. See *infra* Section III.D (urging that individuals with limited resources are financially impacted by detainment).

254. See Sinclair & Szypszak, *supra* note 251, at 7.

255. See Ziglar v. Abbasi, 582 U.S. 120, 141 (2017).

256. See *supra* Section II.A.3 (describing an incident of emotional distress for a teen and his family after a prolonged Border Patrol detention).

257. See Ziglar, 582 U.S. at 141.

258. LINDA L. SCHLUETER, PUNITIVE DAMAGES § 20.1 (8th ed. 2023).

259. See *id.*; after reviewing the 50-state survey of punitive damages caps, the Author of this Article has chosen to cap the damages at the lower end of most states' caps.

260. Jacqueline Perczek, Note: *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825, 837 (1993).

261. *Id.*

262. See *supra* Section II.A.1 (describing constitutional protections and their dilution near the border).

263. See *supra* Section II.A.1 (describing constitutional protections and their dilution near the border).

Jose because the officer suspected an immigration violation, the court should balance the government's interest in furthering that exception with Jose's interest in avoiding prolonged detainment without a phone call or a lawyer.<sup>264</sup>

A citizen's Fourth Amendment right against unlawful detainment is a fundamental right in our Constitution.<sup>265</sup> Our criminal justice system accords us due process under the law.<sup>266</sup> Case law has evolved to allow us protections from unlawful detainment — like probable cause before an arrest and a procedure for a fair trial.<sup>267</sup> It is therefore necessary that when an officer violates our constitutional rights, we are allowed an adequate remedy to make us whole again.<sup>268</sup>

### *C. Examination of Opposing Views on Expanding Remedies*

#### *1. Another Take on the Border Crises: Unconstitutional Conduct*

Current news headlines state that we are in a “border crisis.”<sup>269</sup> In September 2023, Eagle Pass, Texas declared a state of emergency after an estimated 6,000 migrants crossed the border illegally.<sup>270</sup> “In fiscal year 2022, Border Patrol encountered 2.2 million people crossing the border illegally.”<sup>271</sup> A rise in migration towards our southern border means there is a need for additional security.<sup>272</sup>

Although securing our borders is a vital task, it is equally important to protect U.S. citizens caught in the crossfire of these elevated security

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264. *See supra* Section I (posing a hypothetical detainment).

265. U.S. CONST. amend. IV.

266. U.S. CONST. amend. V.

267. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

268. *See supra* Section III.A (analyzing the insufficiencies of current remedies).

269. Rebecca Santana, *What's Behind the Influx of Migrants Crossing the U.S. Southern Border?*, PBS NEWS HOUR (Sep 21, 2023 3:30 PM), <https://www.pbs.org/newshour/politics/whats-behind-the-influx-of-migrants-crossing-the-u-s-southern-border> [https://perma.cc/5XUH-UMA6].

270. *Id.*

271. *Id.*

272. *See id.*

measures.<sup>273</sup> If there is a rise in policing our borders, there is more opportunity for incidents of constitutional violations to take place.<sup>274</sup>

In November 2022, the CBP announced it was increasing recruiting hiring incentives for Border Patrol agents.<sup>275</sup> As Border Patrol increases its staffing and the border continues to receive an influx of migrants, we must create protections that will give U.S. citizens civil relief for violations of rights we hold as fundamental.<sup>276</sup> Although there is increased activity at our border, that does not mean that courts and congress should give an individual no relief.<sup>277</sup>

The need for reform is now.<sup>278</sup> After *Egbert*, the Supreme Court essentially granted an absolute immunity to CBP agents who violate constitutional rights.<sup>279</sup> “The ruling gives border patrol agents near unfettered authority to search, seize and detain Americans, without any consequences if they overstep their authority or even kill someone.”<sup>280</sup>

## 2. Solutions to Prevent Depleting Resources

Broadening remedies against federal officials does not have to carry the financial burden that many will argue.<sup>281</sup> The *Ziglar* Court explained that recognizing a civil remedy against federal officials “requires an assessment of its impact on governmental operations systemwide.”<sup>282</sup>

273. See *FACT SHEET: President Biden’s Budget Strengthens Border Security, Enhances Legal Pathways, and Provides Resources to Enforce Our Immigration Laws*, THE WHITE HOUSE (Mar. 9, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/03/09/fact-sheet-president-bidens-budget-strengthens-border-security-enhances-legal-pathways-and-provides-resources-to-enforce-our-immigration-laws/> [https://perma.cc/9Q9P-H9TC] [hereinafter THE WHITE HOUSE].

274. See *id.* (describing steps the Biden administration has taken to strengthen border security).

275. *CBP Increases Recruitment Incentive for Border Patrol Agents*, U.S. CUSTOMS AND BORDER PROT. (Nov. 18, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-increases-recruitment-incentive-border-patrol-agents> [https://perma.cc/K8V2-KT9K].

276. See *id.*; U.S. CONST. amend. IV.

277. See *supra* Section III.A (analyzing the insufficiencies of current remedies).

278. Maggie Jo Buchanan et al., *Promoting Accountability State and Federal Officials Shouldn’t Be Above the Law*, CTR. FOR AM. PROGRESS (Dec. 17, 2020), <https://www.americanprogress.org/article/promoting-accountability-state-federal-officials-shouldnt-law/> [https://perma.cc/D26M-UCFU].

279. Hassan Kanu, *U.S. Supreme Court Insulates Federal Agents from Accountability*, REUTERS, <https://www.reuters.com/legal/government/us-supreme-court-insulates-federal-agents-accountability-2022-06-10/> [https://perma.cc/PSQ7-44L2] (June 10, 2022, 1:46 PM).

280. *Id.*

281. See *Ziglar v. Abbasi*, 582 U.S. at 141.

282. *Id.* at 136.

Factors to consider are the burdens on federal officials and the costs to the U.S. Government “when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies.”<sup>283</sup> Some commentators argue that broadening remedies against federal officials will create a burden to their personal finances, but this does not have to be the case.<sup>284</sup>

In order to protect citizens against unconstitutional conduct, a civil remedy is necessary.<sup>285</sup> If these protections are in place through a statute like the one this Article proposes, Congress or federal agencies can provide litigation assistance to their employees.<sup>286</sup> In a different context, lawyers and medical workers carry malpractice insurance to protect them from their mistakes. Similarly, federal agencies can lean on a litigation department, a judgement fund, or adverse judgment insurance.<sup>287</sup>

Furthermore, studies show that precautionary arguments such as those the Court asserts may “be far more theoretical than real.”<sup>288</sup> A 2017 study of successful litigation against the Bureau of Prisons found that the “Court’s assumptions about the government’s payment practices do not hold.”<sup>289</sup> The study identified a section of successful *Bivens* claims against federal employees and found that in more than 95% of the claims, the federal employee, the defendant in these claims, did not contribute any personal financial resources towards resolving the claim.<sup>290</sup> Further, the damage awards and other settlement amounts the study relied on led the authors to infer that they probably would likely have minimal financial impact on the government.<sup>291</sup>

### 3. Qualified Immunity

Although the statute this Article proposes would make it possible for a private citizen to sue a federal agent, federal officials still have a

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283. *Id.*

284. Charles R. Wise, *Suits Against Federal Employees for Constitutional Violations: A Search for Reasonableness*, 45 PUB. ADMIN. REV. 845 (1985).

285. See *supra* Section III.A (explaining the insufficiencies of current remedies).

286. See *supra* Section III.B (proposing legislation to fill the gap *Egbert* left behind).

287. See *Federal Employee Professional Liability Insurance*, FEDS PROTECTION, <https://www.fedsprotection.com/feds-PLI> [<https://www.fedsprotection.com/feds-PLI>] (providing litigation insurance for federal employees).

288. James E. Pfander et al., *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 596 (2020).

289. *Id.* at 621.

290. *Id.* at 579–80.

291. *Id.* at 603. (arguing even if the Bureau of Prisons paid settlements directly, these payments would make up an immaterial percentage of the BOP’s annual budget).

qualified immunity defense available.<sup>292</sup> “The doctrine of qualified immunity serves to protect government officials from liability for damages unless a plaintiff ‘pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.’”<sup>293</sup> Although it is possible for the current doctrine to defeat a claim for a constitutional violation, that does not mean we should not have a statute that would serve to protect against unconstitutional conduct.<sup>294</sup>

Those on the left and right of the political spectrum, most notably Justice Thomas, have called for the end or reduction of this judicially created doctrine.<sup>295</sup> For example, after the tragic death of George Floyd, Democrats created a bill to end qualified immunity.<sup>296</sup> Although the bill has not passed, many policymakers are troubled by the lack of accountability for public officials.<sup>297</sup> By denying accountability through qualified immunity, or through the denial of a *Bivens* claim, we “[harm] not only the victims of police misconduct, but the law enforcement community itself, by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively.”<sup>298</sup>

#### *D. Compensating and Deterring*

At the beginning of this Article, the hypothetical posed introduced Jose who suffered violations to his constitutional rights at the hands of Border Patrol agents.<sup>299</sup> Jose suffered huge financial losses.<sup>300</sup> At a time when he had very little, Border Patrol denied his liberty, which resulted in the loss of his employment.<sup>301</sup> The Court emphasized the consequences of prolonged pretrial detention in *Gerstein v. Pugh*. “[Prolonged p]retrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships. Even pretrial release may be

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292. See *supra* Section III.B (proposing legislation to remedy constitutional violations).

293. See *Egbert v. Boule*, 596 U.S. 482, 523 n.8 (2022) (Sotomayor, J., concurring in part).

294. See *id.*

295. See *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) (“I have previously expressed my doubts about our qualified immunity jurisprudence.”).

296. See Jay Schweikert, *Qualified Immunity*, AM. BAR. ASS’N (Dec. 17, 2020), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/).

297. See *id.*

298. See *id.*

299. See *supra* Part I (posing a hypothetical of an unlawful detainment).

300. See *supra* Part I (posing a hypothetical of an unlawful detainment).

301. See *supra* Part I (posing a hypothetical of an unlawful detainment).

accompanied by burdensome conditions that effect a significant restraint of liberty.”<sup>302</sup>

The Court’s decision in *Egbert* leaves those like Jose with very little monetary recourse.<sup>303</sup> If we are a country that puts a high value on constitutional rights, then we need to protect those rights and compensate when the unconstitutional conduct of a law enforcement official has infringed on them.<sup>304</sup>

Changing the facts, even if the wrongfully detained person has no job and his detainment resulted in financial loss, we must still respond by compensating for constitutional wrongs.<sup>305</sup> To do otherwise is to dilute the meaning of these rights.<sup>306</sup>

In addition to permitting compensation for financial losses, courts should permit compensation for emotional distress.<sup>307</sup> It is likely that anyone would experience both humiliation and shame in this situation.<sup>308</sup> For example, after Border Patrol wrongfully detained a woman, she describes her arrest as a “humiliating and frightening experience.”<sup>309</sup> Not only would a wrongful arrest result in emotional grief for the detained, but for their family as well who at times do not know that their loved one is in custody.<sup>310</sup>

Authorities should not subject citizens in the northern and southern border communities to violations of their constitutional rights without any recourse against them.<sup>311</sup> Currently, U.S. border citizens must accept disturbances to their daily lives from citizenship checks.<sup>312</sup> But when unconstitutional conduct arises, there needs to be an adequate remedy.<sup>313</sup>

302. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (explaining the reasoning for a need for a magistrate to make a probable cause determination before extended restraint following arrest).

303. *See supra* Section III.A (describing the insufficiency of current civil remedies).

304. *See supra* Section II.A.1 (pointing to fundamental constitutional rights).

305. *See supra* Part I (posing a hypothetical of an unlawful detainment).

306. *See supra* Section II.A.1 (pointing to the current erosion of constitutional rights near the border).

307. *See supra* Section II.A.3 (recounting emotional distress suffered by a teen and his family).

308. *See supra* Section II.A.3 (recounting emotional distress suffered by a teen and his family).

309. *NYCLU Challenges Border Patrol’s Unlawful Arrest of U.S. Citizen*, NYCLU (Mar. 13, 2013) <https://www.nyclu.org/en/press-releases/nyclu-challenges-border-patrols-unlawful-arrest-us-citizen> [<https://perma.cc/WRH3-VT2A>] [hereinafter *NYCLU*].

310. *See supra* Section II.A.3 (recounting emotional distress suffered by a detained teen and his mother).

311. *NYCLU*, *supra* note 309.

312. *Id.*

313. *See supra* Section III.B (proposing a civil remedy against federal officials).

*Bivens* has long been the answer and a powerful tool for compensation and deterrence not just for those that suffer from unconstitutional conduct, but for society at large.<sup>314</sup> “*Bivens* actions serve a wide array of systemic interests, from exposing individual misconduct and institutional deficiencies in government agencies to incentivizing policymakers to adopt reforms to prevent future abuses.”<sup>315</sup>

## V. CONCLUSION

News headlines everywhere recognize the current “border crisis” caused by the influx of immigration and asylum-seekers to our borders.<sup>316</sup> Because of this influx, Border Patrol surveillance has ramped up in our border cities.<sup>317</sup> Although the government has a strong interest in protecting our borders, it must provide adequate remedies to compensate private citizens who claim constitutional violations near the U.S. border and deter further unconstitutional conduct by Border Patrol officials.<sup>318</sup>

With the recent Supreme Court holding in *Egbert*, private citizens have inadequate civil remedies for the time and money lost during unlawful detentions.<sup>319</sup> Further, the lack of civil liability against an officer means there is lack of a deterrent effect.<sup>320</sup> Before *Egbert*, the two major avenues for seeking a civil remedy from a federal official were filing a *Bivens* claim or the FTCA.<sup>321</sup> Now that the door is essentially closed on *Bivens*, the FTCA (and all its limitations) is the only major avenue.<sup>322</sup> There is a gap here.

Congress should adopt a remedy that balances national security interests with protecting the constitutional interests of U.S. citizens and providing an adequate remedy for their losses.<sup>323</sup> To address this problem, Congress should adopt a narrowly tailored remedy for U.S. citizens whose constitutional rights against unlawful detention have been violated at the

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314. Brief of the DKT Liberty Project et al. as Amici Curiae in Support of Respondent, *Egbert v. Boule*, 596 U.S. 482 (2022) (No. 21-147).

315. *Id.*

316. *Id.*

317. THE WHITE HOUSE, *supra* note 273.

318. See *supra* Section III.B (proposing a civil remedy to both compensate and deter).

319. See *supra* Section III.A.1 (explaining the consequences of *Egbert*).

320. See *supra* Section III.A (pointing out the lack of accountability in current remedies).

321. See *supra* Part II (giving background on remedies before the Court’s holding in *Egbert*).

322. See *supra* Section III.A.2 (describing the FTCA’s insufficiencies).

323. See *supra* Section III.B (proposing a statute to protect constitutional interests).

border.<sup>324</sup> This remedy should echo a §1983 claim but should be narrowly tailored to consider other compelling interests. Limitations can include a smaller time frame and a cap on compensatory and punitive damages.<sup>325</sup>

Although several exceptions to constitutional violations, like the 100-mile border rule, exist near the border to give Border Patrol officers latitude in enforcing and protecting our border communities, it is equally important to continue to protect citizens from constitutional infringements.<sup>326</sup>

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324. *See supra* Section III.B (proposing a statute that would serve to compensate individuals who are unlawfully detained).

325. *See supra* Section III.B (proposing a narrowly tailored statute).

326. *See supra* Section II.A.1 (demonstrating current limitations to constitutional rights near the U.S. border).