

# The “Newly Constituted Court” Keeps Obliterating Civil Rights, Sotomayor Warns

**An extraordinary dissent calls out Trump’s justices for their “restless” assault on landmark precedents.**

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On Wednesday, the Supreme Court abolished individuals’ ability to sue Customs and Border Protection agents who violate their constitutional rights. In the process, the conservative supermajority came close to smothering lawsuits against *all* federal officers who defy the Constitution, granting them near-impenetrable immunity. The liberal justices, in dissent, took the extraordinary step of identifying the cause of this disturbing development: the addition of new justices appointed by Donald Trump.

Wednesday’s case, [Egbert v. Boule](#), is the latest and most thorough attack on accountability for federal agents who break the law. The decision arises from a loophole in the federal statute that lets individuals sue law enforcement for damages. This statute authorizes suits against *state* law enforcement officers who infringe on civil rights. Sheriffs, local cops, highway patrol—all can be sued in federal court for constitutional violations. But the statute does not authorize such suits against law enforcement officers who work for the *federal* government. If the courts do not provide some measure of accountability, these officers can flout the law with near impunity.

The Supreme Court addressed this problem in 1971’s [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), which involved a claim of excessive force against federal narcotics agents. While “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages,” a majority held, it is “well settled” that “federal courts may use any available remedy to make good the wrong done.” In other words, a right without a remedy is no right at all, so the courts have an obligation to craft one when Congress fails to do so.

Conservative justices have been gunning for *Bivens* for decades, arguing that it runs afoul of the separation of powers between Congress and the judiciary. In recent years, they’ve come close to victory. The court has [insisted](#) that the precedent applies only when the facts of a case are nearly identical to *Bivens*. So, in theory, when federal agents use excessive force, they can still be sued. But if that force takes place in some “new context” with “special factors”—say, [some connection](#) to national security—[the suit will fail](#). And because there is invariably *some* distinction between two cases, courts usually had an excuse to toss out *Bivens* claims.

In *Egbert*, Justice Clarence Thomas replaced this standard with an even more stringent one. Judges hearing *Bivens* claims, he wrote for the court, should now simply ask “whether there is

any reason to think that Congress might be better equipped to create a damages remedy.” He then explained why Congress is *always* better equipped for this task because it implicates a “range of policy considerations.”

By moving the goalposts, Thomas was able to avoid the reality that this case actually does mirror *Bivens* in every relevant way. The plaintiff, Robert Boule, owned a bed-and-breakfast (cheekily named the Smuggler’s Inn) on the U.S.-Canada border. He served as an informant for U.S. Immigration and Customs Enforcement, reporting individuals who illegally crossed the border near his property. The defendant, a CBP agent named Erik Egbert, allegedly walked onto Boule’s property without a warrant to investigate a guest. When Boule refused consent to a search, Egbert allegedly lifted him up, threw him against an SUV, then violently threw him to the ground, inflicting serious injuries.

In other words, a federal agent allegedly used excessive force against an American citizen on American soil—the precise scenario to which *Bivens* ostensibly applies. But no, Thomas wrote: Because the incident occurred so close to Canada, it has “implications” for “national security” and “border security”; as a result, greenlighting Boule’s lawsuit would constitute a “judicial intrusion” into “Congress’ policymaking role.”

It turns out, however, that proximity to the border doesn’t really matter, as Thomas then declared that no one can *ever* bring a *Bivens* claim against any Border Patrol agent, because their work inherently implicates national security.

There are roughly [20,000](#) Border Patrol agents working today. Many of them perform routine law enforcement work, such as traffic stops, and operate far from the actual border. These agents are [notorious for operating above the law](#), committing shocking acts of violence against immigrants and citizens alike. Every one of them just received absolute immunity from civil rights suits. Only Congress can restore liability to these agents, and it [has no interest in doing so](#).

Justice Sonia Sotomayor’s dissent, joined by Justices Stephen Breyer and Elena Kagan, castigated the majority for shredding precedent in its quest to immunize federal officers from civil suits. The justice complained that “a restless and newly constituted court” rewrote the law to ensure that victims of federal police brutality have no redress. She also drew attention to the reason for this shift: the replacement of Anthony Kennedy and Ruth Bader Ginsburg with Brett Kavanaugh and Amy Coney Barrett, whose addition moved the court far to the right.

It is exceedingly rare for a justice to call out their colleagues in this blunt manner. Doing so shatters the myth of the Supreme Court as a unified, apolitical institution with special knowledge of constitutional truths, instead painting the (far more accurate) picture of nine lawyers who exercise raw power to achieve their preferred policy goals. Adherence to precedent, in contrast, promotes not just stability but also an appearance of impartiality rooted in the justices’ willingness to stand by past rulings. When the court abandons this principle, it looks more like a superlegislature whose political composition alone drives its decision-making. There are few good democratic arguments to justify why a handful of life-tenured superlegislators, who have no constituents and face no elections, should have final say over all constitutional law.

Put another way, if the Constitution means whatever a majority says it does—and its meaning is up for grabs after each change in personnel—then it is unclear why the court deserves unlimited authority to impose its will on the entire nation.

This concern runs deeper in a case like *Egbert*, where the majority deploys dubious originalism, shot through with motivated reasoning, to effectively repeal the rights it is meant to protect. The [purpose](#) of constitutional rights is to constrain the legislative and executive branches, placing limits on their ability to restrict individual liberty. But in *Egbert*, the Supreme Court asserted that we cannot enforce our rights against the political branches until the political branches let us. If we must seek permission from Congress to exercise our constitutional liberties—permission that Congress can revoke at any time—can we really say that we have these liberties at all?

It would be one thing if the conservative justices had hard proof that federal courts lack authority to create remedies. But its support for this proposition is [exceedingly weak](#) in light of [strong evidence](#) that federal courts [had this authority in the founding era](#). Thomas' opinion in *Egbert* is not only counterintuitive but contrary to historical practice. It is living constitutionalism at its worst, a reflection of the majority's policy preferences dressed up in the rhetoric of originalism.

The most immediate consequence of *Egbert* is dire: Some 20,000 Border Patrol agents have effectively been freed from the requirements of the Fourth Amendment and can violate the Constitution without fear of a lawsuit. They operate not just *at* the border but also [within 100 miles](#) of it, where two-thirds of Americans live. U.S. citizens will no doubt suffer from Wednesday's decisions, but immigrants will bear the brunt of it; they already face [routine abuse](#) at the hands of these agents. Many of these victims may come into the country seeking the protection of the nation's vaunted Bill of Rights. They will quickly learn that rights are only as good as the judges who enforce them.