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The Praetorians: An Analysis of U.S. Border Patrol Checkpoints Following Martinez-Fuerte

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THE PRAETORIANS: AN ANALYSIS OF U.S. BORDER PATROL CHECKPOINTS FOLLOWING *MARTINEZ-FUERTE*

INTRODUCTION

Suppose José needs a gallon of milk from the grocery store. He puts on his shoes and grabs his car keys and his wallet. The grocery store is located outside of town. José is aware of the inevitable: he'll have to cross an immigration checkpoint located halfway between his house and the grocery store. Upon arriving at the checkpoint, José must declare his citizenship to an immigration officer. José tells the officer that he is a US Citizen. The officer, however, is skeptical; he asks José for documentation. José, befuddled, pulls out his driver's license and presents it to the officer. The officer scoffs, informing José that his driver's license does not prove his citizenship. Thereafter, the officer instructs José to pull over to the side for further inspection. José complies, and other officers inform José that they will search his vehicle. José, having nothing to hide, consents to the search. José waits while officers and a canine inspect his vehicle. He's nervous; the canine is sniffing all sorts of things in his car. Perhaps it's the scent of pizza in the rear seat, or perhaps it's his dog's hair spread all over the driver's seat. An immigration officer approaches José, telling him that the canine sniffed marijuana in the vehicle. José can't believe what he's hearing. He can only imagine how much longer he'll be detained at the checkpoint. Will officers tear up his vehicle and find nothing? Will officers delay him further? An officer eventually lets José go. His five-minute trip to the grocery store became a thirty-minute trip. Unfortunately for José, the grocery store closed the minute he left the checkpoint. José returns home, fearful and empty-handed.

The Constitution applies to every person in the United States. It applies to every person regardless of race, citizenry, and immigration status. It certainly applies to individuals like José. Specifically, when a person travels within the United States, he or she can rest assured that in his or her travels, the Constitution will attach itself to each step he or she takes. This includes instances where a person crosses the border from Mexico, Canada, or elsewhere into the United States. But in recent times, it seems as if the Constitution is no longer recognized in some parts of the United States. Concealed by the cloud of an omnipotent and intrusive government, people like José find themselves having to prove their citizenship, defend their ethnicity, and routinely fold on exercising fundamental constitutional rights within the United States. These

procedures occur within 100 miles of the international border. One then must truly ponder when exactly did we begin to shrug off constitutional protections that, presumably, apply within the United States.

The answer leads us to the late seventies, when the Supreme Court held in *United States v. Martinez-Fuerte* that the United States Customs and Border Protection ("Border Patrol," or "CBP") could constitutionally operate checkpoints within the United States for the purpose of conducting brief, routine questioning in order to verify a person's citizenship and immigration status.[1] The case was fueled by efforts to curtail the flow of undocumented immigrants into the United States from Mexico.[2] Some of these undocumented immigrants came to the United States because of economic opportunities unavailable in Mexico.[3] But throughout the thirty-eight-year history since the Court's holding, some argue that CBP routinely ignores, misunderstands, or continuously refuses to acknowledge the fact that the checkpoints were to be solely utilized for immigration inquiries.[4]

In addition to preventing undocumented immigrants from entering the United States, the checkpoints "yield a far richer harvest—a cornucopia of contraband, particularly illegal drugs."[5] Moreover, checkpoints are utilized in other law enforcement functions, such as apprehending human traffickers[6] and intercepting unregistered firearms.[7] One can hypothesize

1. United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

2. *Id*. at 551 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)) (finding that approximately 10–12 million undocumented immigrants were in the United States).

3. *Id.* (citing United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973)).

4. *See* AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION'S (CBP'S) 100-MILE RULE 1 (2014), *available at* https://www.aclu.org/sites/default/files/field_document/14_9_15_cbp_100-mile_ rule_final.pdf.

5. United States v. Soyland, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting). For recurring examples, see Press Release, U.S. Customs & Border Prot., San Clemente Border Patrol Agents at Checkpoint Near $2M Mark in Seizures for the Week (Aug. 25, 2014); Press Release, U.S. Customs & Border Prot., Border Patrol Arrests Two Men on I-5 with $780K of Narcotics (Aug. 21, 2014); Press Release, U.S. Customs & Border Prot., San Diego Border Patrol Agents Nab $600K of Drugs at Checkpoint (Aug. 18, 2014).

6. *See, e.g.*, *Border Patrol Agents Find 15 People at Checkpoint*, THE MONITOR (Nov. 23, 2015, 8:32 PM), http://www.themonitor.com/news/local/border-patrol-agents-find-people-at-checkpoint/article_9a386abe-9253-11e5-ac86-e7d57d676250.html.

7. *See, e.g.*, United States v. Approximately $18,000.00 in U.S. Currency Seized on or About Oct. 29, 2013 at the U.S. Border Patrol Checkpoint in Sierra Blanca, Tex., No. EP-14-CV-00129-FM, 2015 WL 1003872, at *4 (W.D. Tex. Mar. 5, 2015) (firearm); *US Border Patrol Checkpoint in Upstate NY Detains 17*, WASH. TIMES (Sept. 25, 2015), http://www.washingtontimes.com/news/2015/sep/25/us-border-patrol-checkpoint-in-upstate-ny-detains-/ (detaining individuals for weapons violations, among other things). *But see* Bob Ortega, *Incidents at Border Patrol Checkpoints Spur Complaints*, AZCENTRAL.COM (Feb. 1, 2015, 1:20 PM), http://www.azcentral.com/story/news/politics/immigration/2015/01/30/teacher-legal-guns-triggers-cbp-checkpoint-incident/22634247/ (inspecting a woman with a *registered* firearm).

the endless law enforcement functions that checkpoints could serve outside the immigration context: perhaps apprehending inmates who break out of prison, catching notorious drug lords like "El Chapo" Guzman, or perhaps even preventing terrorist organizations like Al Qaeda and ISIS from committing gruesome acts against Americans.[8] Thus, the checkpoints can pursue laudable objectives within the United States.

This broader use of the checkpoints, however, "subverts the rationale of *Martinez–Fuerte* and turns a legitimate administrative search into a massive violation of the Fourth Amendment."[9] The underlying reasons the checkpoints are scrutinized are twofold. First, the "*Martinez–Fuerte* [court] approved immigration checkpoints for a very narrow purpose—detecting, and thereby deterring, illegal immigrants."[10] Second, individuals have become frustrated by the undermining of fundamental constitutional protections that, presumably, apply within the United States.[11] Individuals traveling through the checkpoints consist of US citizens, lawful permanent residents, and foreign travelers. Hispanics[12] primarily take issue with the controversial language from *Martinez-Fuerte*, where the Court allowed CBP to use "Mexican ancestry" to interrogate, and potentially search, certain individuals.[13] Non-Hispanics likewise take issue with the checkpoints because the procedures have opened the floodgates to harassment and abuse.[14]

A "round-the-clock US Border Patrol presence at the checkpoints means that American citizens must endure inspection when they commute

8. For other law enforcement functions, see United States v. Camou, 773 F.3d 932, 936 (9th Cir. 2014) (child pornography); State v. Grijalva, No. 2 CA-CR 2014-0051, 2015 WL 686025, at *1 (Ariz. Ct. App. Feb. 17, 2015) (enforcing state DUI law).

9. *Soyland*, 3 F.3d at 1316 (Kozinski, J., dissenting).

10. *Id.* at 1318.

11. Such constitutional protections include the Fourth Amendment's protection against "unreasonable searches and seizures" and the Fifth Amendment's protection against "self-incrimination," commonly referred to as "the right to remain silent." U.S. CONST. amend. IV, V.

12. I recognize that there are different names for Spanish-speaking groups such as Hispanics, Latinos, Chicanos, etc. For the sake of convenience, I solely use "Hispanics" throughout this Note with the exception of the discussion of *Martinez-Fuerte*, where the Supreme Court uses the label "Mexican," and the discussion of the PHP Study, where the report uses the label "Latino."

13. United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976).

14. *See, e.g.*, Curt Prendergast, *'Are You Detaining Me?' Citizens, Lawyers Question Legality of BP Vehicle Searches*, NOGALES INT'L (Oct. 11, 2013), http://www.nogales international.com/news/are-you-detaining-me-citizens-lawyers-question-legality-of-bp/article_2053f0a8-3295-11e3-ade3-001a4bcf887a.html, *archived at* http://perma.cc/FRH2-87N2; *Border Patrol Checkpoints Foiled by Drivers Asserting Their Rights (VIDEO)*, HUFFINGTON POST (Mar. 1, 2013, 11:16 AM), http://www.huffingtonpost.com/2013/03/01/border-patrol-checkpoints_n_2789592.html.

to work or run errands."[15] Some individuals encounter checkpoints while on their way to the supermarket, a doctor's appointment, or the bank.[16] Others claim that the checkpoints have negatively affected local communities' economies, including the real estate market,[17] tourism, shopping, and recreational activities.[18] In fact, in certain places, there is no way to get out of town without encountering a checkpoint.[19] Complaints range from allegations of "unnecessary delays, harassment and sometimes abuse at the checkpoint[s]"[20] to allegations of "unconstitutional searches and seizures, excessive use of force, racial profiling, and other agent misconduct."[21] While these occurrences are infrequent, they are clear violations of the Constitution and should concern all of us.

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15. Amy Lieberman, *Arizona's Checkpoint Rebellion*, SLATE (July 20, 2014, 7:31 PM), http://www.slate.com/articles/news_and_politics/politics/2014/07/arizona_immigration_checkpoint_criticism_border_patrol_harasses_people_and.html.

16. *See* Massoud Hayoun, *US Nationals 'Under Siege'; Citizen Dies at Border Patrol Checkpoint*, ALJAZEERA AM. (Dec. 29, 2013, 8:45 PM), http://america.aljazeera.com/articles/2013/12/29/us-nationals-undersiegeamidsuspiciousborderpatrolcheckpointdeath.html; Fernanda Santos, *Border Patrol Scrutiny Stirs Anger in Arizona Town*, N.Y. TIMES (June 27, 2014), http://www.nytimes.com/2014/06/28/us/border-patrol-scrutiny-stirs-anger-in-arizona-town.html. Notably, celebrities such as Willie Nelson and Snoop Dogg have been arrested at a checkpoint for possessing marijuana. John Burnett, *At 'Checkpoint of the Stars,' Texas Sheriff Takes a Pass on Pot Cases*, NPR (Nov. 15, 2015, 9:55 PM), http://www.npr.org/2015/10/01/444780811/at-checkpoint-of-the-stars-texas-sheriff-takes-a-pass-on-pot-cases.

17. *See, e.g.*, JUDITH GANS, THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES 2 (2012), *available at* http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf (finding that real estate prices declined in communities near a checkpoint by an average of over $2700 in a three-month period).

18. *See* Joe Sharkey, *Border Patrol Grows as Seizures Drop*, ALJAZEERA AM. (Aug. 22, 2013, 6:00 AM), http://america.aljazeera.com/articles/2013/8/22/border-patrol-growingasapprehensions drop.html.

19. *See id.* In fact, thousands of undocumented immigrants, including those brought to the United States by their parents as minors, are limited from traveling since they will undoubtedly encounter a checkpoint. Manny Fernandez, *Checkpoints Isolate Many Immigrants in Texas' Rio Grande Valley*, N.Y. TIMES (Nov. 22, 2015), http://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html?_r=0.

20. Cindy Carcamo, *Arizona Residents Begin Monitoring Immigration Checkpoint*, L.A. TIMES (Feb. 26, 2014, 6:58 PM), http://www.latimes.com/nation/la-na-ff-border-crossing-20140227-story.html#axzz2uURn4Zzw.

21. Letter from James Lyall, Staff Attorney, Am. Civil Liberties Union of Ariz., to Charles K. Edwards, Deputy Inspector Gen., Dep't of Homeland Sec., Office of Inspector Gen. 1 (Jan. 15, 2014), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2011%2015.pdf. For other instances involving physical altercations, see Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov./Dec. 2014), http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220_full.html#.VGgQoZPF-6w; Tom Graser, *No Charges for Border Patrol Agents for Stun Gun Use at Waddington Checkpoint*, WATERTOWN DAILY TIMES (Dec. 6, 2015, 5:23 PM), http://www.watertowndailytimes.com/news05/no-criminal-charges-for-border-patrol-agents-who-used-stun-gun-at-waddington-checkpoint-video-20151207 (CBP agents allegedly used a stun gun on a woman at a checkpoint); J.J. Hensley, *Tempe*

This Note proposes standards for checkpoint procedures that would strike an equilibrium between implementing effective law enforcement procedures at interior checkpoints and preserving constitutional values within the United States. This Note distinguishes CBP procedures conducted *at the international border*, which address compelling governmental interests in regulating foreign commerce and preserving national security, from CBP procedures *not conducted at the international border* that should be scrutinized much more stringently.[22]

Thus, this discussion is broken down as follows. Part I provides a brief history of the checkpoints, including CBP's organizational structure, its functions at the checkpoints and its authority for carrying out those functions, and the Supreme Court's approval of checkpoints in *Martinez-Fuerte*. Part II discusses the practical implications of *Martinez-Fuerte*, including how to prove US Citizenship at checkpoints, whether individuals may refuse to answer non-immigration related inquiries, and the dilemma over CBP not recording individual checkpoint statistics for law enforcement functions. Part III discusses the procedures and legal standards for specific actions that have potential damages claims for unlawful or improper conduct by CBP agents at checkpoints. Moreover, Part III discusses potential barriers one may face when seeking relief from the federal government and its officers for being subject to allegedly unlawful or improper conduct at checkpoints. Lastly, Part IV proposes several reforms that could determine whether the federal government has gained substantial benefits from checkpoint operations that outweigh the costs of operating the checkpoints. Reform efforts include implementing an ombudsman's office for CBP, implementing an effective, accessible, and external complaint forum, and implementing a "SENTRI-like" program for local communities. Moreover, this Note argues that a

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Pastor Says Border Agents Stopped, Beat Him, ARIZ. REP. (Apr. 17, 2009, 7:00 PM), http://www.azcentral.com/news/articles/2009/04/17/20090417.borderbeating0417-ON.html (CBP agents broke the car window of a gentleman at a secondary inspection and then tased him, which caused him to bleed); Morgan Loew, *Immigration Checkpoints Catching More Drugs than People*, CBS5 AZ (May 28, 2015, 8:52 AM), http://www.kpho.com/story/27331272/us-citizens-complaining-about-immigration-checkpoints (CBP agents smashed the car window of a gentleman who refused to roll down his window at a checkpoint and chose to remain silent throughout the interrogation); Fernanda Santos, *Border Patrol Accused of Profiling and Abuse*, N.Y. TIMES (Oct. 14, 2015), http://www.nytimes.com/2015/10/15/us/aclu-accuses-border-patrol-of-underreporting-civil-rights-complaints.html.

22. This Note will not discuss the application of certain constitutional provisions at the international border. For a discussion delineating a person's rights at the international border, see Jon Adams, *Rights at United States Borders*, 19 BYU J. PUB. L. 353 (2005).

Supreme Court fix may clarify whether checkpoints can continue to be utilized the way they have been for almost four decades.

I. HISTORY

Following September 11, 2001, there was a "radical restructuring" of some federal agencies whose missions related to national security.[23] The Homeland Security Act of 2002 ("HSA")[24] consolidated several federal agencies into a single entity, the Department of Homeland Security ("DHS").[25] Approximately twenty-two federal agencies, 185,000 federal government employees, and "countless specific functions were transferred" over to DHS.[26] When Congress passed the HSA, it also divided the immigration functions of the DHS into two different entities: one responsible for the immigration enforcement function and the other responsible for the service function.[27] Furthermore, the HSA authorized the president to modify the departmental structure; the president subsequently did so, further dividing the immigration functions of the DHS into three immigration agencies: two enforcement bureaus and one service bureau.[28] The enforcement bureaus are the US Immigration and Customs Enforcement ("ICE") and CBP.[29] These entities are responsible for interior enforcement and border enforcement, respectively.[30] ICE is responsible for "investigations, intelligence-gathering, detention, certain elements of the deportation process, the registration of noncitizens, and other interior enforcement operations."[31] CBP, on the other hand, conducts border inspections at various locations, including land borders, airports, seaports, and interior checkpoints.[32] This Note focuses solely on CBP operations at interior checkpoints.

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23. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 2 (6th ed. 2015).

24. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 6 U.S.C.).

25. LEGOMSKY & RODRÍGUEZ, *supra* note 23, at 2.

26. *Id.*

27. *Id.*

28. *Id.* at 3.

29. *Id.* For a discussion delineating the evolution of the CBP, see Graff, *supra* note 21; U.S. CUSTOMS AND BORDER PROTECTION, SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES 1 (2015), *available at* https://www.hsdl.org/?view&did=763674.

30. LEGOMSKY & RODRÍGUEZ, *supra* note 23, at 3.

31. *Id.*

32. *Id.*

A. Checkpoint Procedures 101

CBP plays a crucial role in curtailing illegal activity within the United States by operating interior checkpoints in areas reasonably located away from the international border.[33] In 2009, CBP operated approximately seventy-one "permanent and tactical checkpoints on the southwest border."[34] Presently, CBP operates approximately 170 checkpoints on roads and highways within the United States.[35] Since the United States shares a border with Mexico that is almost 2000 miles long, and much of the border area is "uninhabited desert or thinly populated arid land,"[36] the checkpoints provide support in monitoring secondary roads CBP determines are likely to be used by undocumented immigrants or narcotics smugglers.[37] Although CBP maintains personnel, electronic equipment, and fences along portions of the border, some individuals still find a way to enter the United States undetected.[38] "It also is possible for an

33. CBP checkpoint operations are authorized under 8 U.S.C. § 1357, which provides in relevant part:

> Any officer . . . shall have power without warrant— within a reasonable distance from any external boundary of the United States, to board and search for aliens any . . . vehicle . . . for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

8 U.S.C. § 1357(a)(3) (2014). "Reasonable distance" is "100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the chief patrol agent for CBP." 8 C.F.R. § 287.1(a)(2) (2016); *see also* Matt Apuzzo & Michael S. Schmidt, *U.S. to Continue Racial, Ethnic Profiling in Border Policy*, N.Y. TIMES (Dec. 5, 2014), http://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html ("Federal agents have jurisdiction to enforce immigration laws within 100 miles of the borders, including the coastlines, an area that includes roughly a third of the United States, and nearly two-thirds of its population."). For a visual depiction of this 100-mile zone in the United States, see *Know Your Rights: The Government's 100-Mile "Border" Zone-Map*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/know-your-rights-governments-100-mile-border-zone-map (last visited Oct. 8, 2015). The U.S. Department of Justice ("DOJ") established these regulations without any public comment or debate. *See The Constitution in the 100-Mile Border* Zone, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/constitution-100-mile-border-zone (last visited Oct. 8, 2015).

34. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-824, CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 34 n.44 (2009) [hereinafter GAO REPORT].

35. *See* Bob Ortega, *Some in Town to Monitor Border Patrol Checkpoint*, ARIZ. REP. (Feb. 26, 2014, 11:49 AM), http://www.azcentral.com/news/arizona/articles/20140225arizona-town-monitor-border-patrol-checkpoint.html.

36. United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976).

37. Cindy Casares, *Border Patrol Takes 'No' for an Answer at Internal Checkpoints*, TEX. OBSERVER (Mar. 7, 2013, 2:49 PM), http://www.texasobserver.org/border-patrol-takes-no-for-an-answer-at-internal-checkpoints/.

38. *Martinez-Fuerte*, 428 U.S. at 552. *But see* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 669–76 (2001) (indicating that the substantial increase of CBP agents and surveillance along the Southwestern border resulted in a large increase in the death rate for persons crossing the border).

[undocumented immigrant] to enter unlawfully at a port of entry by the use of falsified papers."[39] "Once within the [United States], [undocumented immigrants] seek to travel inland to areas where employment is believed to be available, frequently meeting by prearrangement with friends or professional smugglers who transport them in private vehicles."[40] Thus, a CBP checkpoint is "akin to a Port of Entry."[41]

Given this context, CBP checkpoints "play a significant, strategic, and tactical role in the support of the National Border Patrol Strategy."[42] CBP currently operates a combination of permanent and tactical traffic checkpoints nationwide as part of a "three-tiered, defense-in-depth strategy" to secure the US Border between ports of entry.[43] "This strategy involves the use of line-watch operations [at the international] border, roving patrol operations near the border,[[44]] and traffic checkpoints on highways leading away from the border."[45] CBP also conducts operations at "functional equivalents" to the international border; in other words, locations away from the international border.[46] Functional equivalents operate similarly to an international border.

In fact, since 1998, more than 6,000 migrants have died trying to cross the United States-Mexico border. INT'L ORG. FOR MIGRATION, FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION 12 (Tara Brian & Frank Laczko eds., 2014), *available at* http://publications.iom.int/bookstore/free /FatalJourneys_ CountingtheUncounted.pdf.

39. *Martinez Fuerte*, 428 U.S. at 552. The checkpoints are also capable of apprehending individuals who overstay their visas.

40. *Id.* (citation omitted).

41. United States v. March., No. CR-13-02249-001-TUC-JGZ (BPV), 2014 WL 2584458, at *3 (D. Ariz. June 10, 2014).

42. U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2012 17 (2013), *available* at http://www.cbp.gov/sites/default/files/documents/perform_ account_ rpt_2013_3.pdf [hereinafter "CBP REPORT"].

43. *Id.* This may also include the use of "random" checkpoints. *See, e.g.*, *Moveable Border Patrol Checkpoints Showing Up in Laredo Area*, KGNS.TV (Aug. 18, 2015, 10:52 PM), http://www.kgns.tv/home/headlines/Border-Patrol-322237502.html.

44. This Note will not discuss the constitutional basis for roving CBP stops. For a discussion involving roving patrol stops, see United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

45. CBP REPORT, *supra* note 42, at 17. Congress authorizes CBP operations. For example, "[a]ny officer . . . shall have power without warrant—to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1) (2014).

46. CBP agents may "stop, search, and examine . . . any vehicle . . . he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law." 19 U.S.C. § 482(a) (2014). CBP agents may also examine "documents and papers and examine, inspect, and search the . . . vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." 19 U.S.C. § 1581(a) (2014).

Border Patrol's strategy must be explored further. Suppose Border Patrol apprehends 99% of unlawful activity at the international border. With that figure, however, 1% of unlawful activity is getting past the international border (presumably, because of human error or some other conceivable

To visualize the checkpoint procedures, each step can be broken down as follows. In most cases, once a motorist arrives at a checkpoint, he or she will very likely be allowed to travel freely "without any oral inquiry or close visual examination."[47] Only in a relatively small number of instances will a CBP agent conduct further inquiry into a motorist's immigration status.[48] Usually based on "suspicious circumstances," a CBP agent will direct a motorist to a secondary inspection area.[49] Once at secondary, a CBP agent may search a vehicle so long as there is probable cause or the motorist consents[50] to the search.[51] In construing what can meet the probable cause standard, an agent may use his or her discretion in conducting a search of the vehicle, but this discretion is usually corroborated by a canine on site alerting the agent to the possible presence of narcotics in a vehicle.[52] Moreover, "probable cause," in the immigration

factor, such as the sheer difficulty of policing such a long border). Thereafter, we must determine whether checkpoints, roving patrols, or other mechanisms are preventing that 1% from continuing to travel within the United States. Suppose, 0.5% of unlawful activity is being prevented (for the same reasons mentioned previously). That still leaves Border Patrol with 0.5% of unlawful activity mobilizing outside the 100-mile border zone. Given that "perfect" figures amounting to 100% may be unrealistic, questions remain whether Border Patrol is in fact as effective in only allowing 0.5% of unlawful activity into the United States, whether we are comfortable with that figure, and whether that result is because of primary inspections at the international border or secondary inspections at checkpoints (through deterrence and other tactics). This empirical research will be addressed in a later paper.

47. United States v. Martinez-Fuerte, 428 U.S. 543, 546 (1976).

48. *Id.*

49. *Id.* The plain view doctrine states that a point officer is limited to a visual inspection of a vehicle (i.e. what can be seen without a search). *Id.* at 558. However, certain characteristics of a vehicle may justify suspicion. For example, whether the vehicle is a certain make or model, whether the vehicle appears to be heavily loaded, whether the vehicle contains an extraordinary number of persons, or whether the vehicle contains persons trying to hide are all relevant factors. *Id.* at 575 (Brennan, J., dissenting). For further articulations of "suspicious circumstances," see United States v. Sanders, 937 F.2d 1495, 1500 (10th Cir. 1991) ("In construing what 'suspicious circumstances' means, courts should recognize there is no single or narrow definition available to answer all scenarios. Accordingly, some deference is properly given to border patrol agents who, as law enforcement officers, are specifically trained to look for indicia of crime, with an emphasis on immigration and customs laws. So long as their interrogation bears a reasonable relationship to their unique duties, the judiciary is properly reluctant to interfere, and a reviewing court should only determine whether the suspicious circumstances as perceived by the border patrol agent are supported by the facts.").

50. Consent must be "knowingly and voluntarily given, and must not be the product of coercion." United States v. Ruiz-Perez, No. CR-11-0561-TUC-DCB-DTF, 2011 WL 7639543, at *5 (D. Ariz. Oct. 6, 2011) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)), *report and recommendation adopted as modified*, No. CR-11-561-TUC-JGZ, 2012 WL 1078887 (D. Ariz. Mar. 30, 2012). Furthermore, even after consenting to a search, one is free to "delimit or withdraw his or her consent at anytime." *Id.* at *6 (citing Illinois v. Rodriguez, 497 U.S. 177, 252 (1990)). An unlawful detention may revoke consent. United States v. Jaime, 473 F.3d 178, 182 (5th Cir. 2006).

51. *Martinez-Fuerte*, 428 U.S. at 567 (citing United States v. Ortiz, 422 U.S. 891, 897 (1975)).

52. This procedure, collectively, is sufficient to overcome the "probable cause" standard at checkpoints. *See, e.g.*, United States v. Morales-Zamora, 914 F.2d 200, 205 (10th Cir. 1990) (holding that probable cause is supplied when a dog alerts a CBP agent to a particular vehicle); United States v.

context, is the "reasonable belief, based on the circumstances, that an immigration violation or crime has likely occurred."[53]

There is no formula as to what factors an agent may use to detain someone; detention should, theoretically, be temporary and scrutinized on a case-by-case basis.[54] The detention will likely conclude only after a CBP agent is satisfied with the immigration statuses of the individuals in the vehicle and there are no circumstances that raise suspicion regarding the presence of illegal substances.[55] But these encounters may not always be "brief" or "temporary." As checkpoints have proliferated, the question of whether some encounters run afoul of constitutional protections under the Fourth and Fifth Amendments has quietly arisen.[56] What we know for certain is that "[o]nce a vehicle crosses the border, the fourth amendment applies in full force, regardless of the fact that the Border Patrol is authorized by statute to stop and search any vehicle within a 100 mile border zone."[57] But these fundamental constitutional provisions seem to be, at times, watered down by numerous exceptions intended to carry out compelling law enforcement practices at checkpoints. The following section explores CBP's authority to operate checkpoints within the United States and how the Supreme Court blessed this authority with its holding in *Martinez-Fuerte*.

Williams, 69 F.3d 27, 28 (5th Cir. 1995) (hinging reliability on the canine's training and certification); United States v. Diaz, 25 F.3d 392, 393–94 (6th Cir. 1994) (same); United States v. Klein, 626 F.2d 22, 27 (7th Cir. 1980) (same); *cf.* JAMES LYALL ET AL., AM. CIVIL LIBERTIES UNION OF ARIZ., RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL'S INTERIOR ENFORCEMENT OPERATIONS 2 (2015), *available at* http://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf (noting that canine alerts can be false alarms).

53. *The Constitution in the 100-Mile Border* Zone, *supra* note 33.

54. *See Martinez-Fuerte*, 428 U.S. at 567.

55. In summary, one court has described the entire encounter as follows:

> A "routine checkpoint stop," which must be brief and unintrusive, generally involves questions concerning the motorist's citizenship or immigration status, and a request for documentation. A cursory visual inspection of the vehicle is also routine, and a few brief questions concerning such things as vehicle ownership, cargo, destination, and travel plans may be appropriate if reasonably related to the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband.

United States v. Morales, 489 F. Supp. 2d 1250, 1263 n.4 (D.N.M. 2007) (citing United States v. Rascon-Ortiz, 994 F.2d 749, 752 (10th Cir. 1993)); *see also* Adams, *supra* note 22, at 366 n.89 (citing United States v. Massie, 65 F.3d 843 (10th Cir. 1995) (holding that CBP agents at a checkpoint may *briefly* question motorists about cargo, destination, and travel plans, so long as such questions are *reasonably related* to the agent's duty to prevent either unauthorized entry or smuggling)).

56. Casares, *supra* note 37.

57. Mary H. Rose, Comment, *Illegal Aliens and the Border Patrol—Reasonable Suspicion Not Required When Occupants of Vehicles Stopped for Questioning at Permanent Inland Checkpoints:* United States v. Martinez-Fuerte, 9 N.Y.U. J. INT'L L. & POL. 303, 313 (1976).

B. Jurisprudential Roots: United States v. Martinez-Fuerte

Without discussing the facts of *Martinez-Fuerte* in great length, the Court granted certiorari to the petitioners in order to resolve a circuit split over the constitutionality of the checkpoint procedures.[58] The Court consolidated several cases where the defendants had all been convicted of illegally transporting undocumented immigrants. One circuit found the procedures to be reasonable while another circuit found the procedures to be unreasonable.[59] The Court analyzed the checkpoint operations under the umbrella of the compelling governmental interest in regulating undocumented immigration.[60] In the Court's writings, this interest could only be furthered by upholding the use of interior checkpoints because the ever-increasing size of border traffic could not be controlled effectively at the international border.[61] The Court was comfortable tipping the scales in favor of upholding checkpoints as it believed such operations imposed a *de minimis* intrusion on an individual's privacy.[62]

At the time the case came to the Court on appeal, approximately ten million cars passed some checkpoints annually.[63] The San Clemente Checkpoint in San Clemente, California, was one of these checkpoints, and was also one of the subject checkpoints in *Martinez-Fuerte*. In 1973, approximately 17,000 undocumented immigrants were apprehended at the San Clemente Checkpoint.[64] Given these numbers, it is unlikely that the Court was sympathetic to the respondents' arguments that CBP agents had violated their constitutional rights at the checkpoints. In fact, the named respondent, Amado Martinez-Fuerte, produced identification that proved his immigration status, but his passengers, who were undocumented immigrants, admitted to entering the United States unlawfully.[65] The Court probably brushed aside these arguments when it was abundantly clear that

58. Case Comment, *Constitutional Law—Fourth Amendment—Immigration Checkpoint Stops for Questioning Are Reasonable Without Individualized Suspicion*—United States v. Martinez-Fuerte, *428 U.S. 543 (1976)*, 2 IMMGR. & NAT'LITY L. REV. 125, 125 (1978).

59. *Id.* at 125–26.

60. United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

61. *Id.* at 556.

62. *Id.* at 563.

63. *Id.* at 554.

64. *Id.* In an eight-day period the following year, roughly 146,000 vehicles passed through the same checkpoint and 820 vehicles were referred to secondary inspection, which resulted in the discovery of 725 deportable aliens in 171 vehicles. *Id.*

65. *Id.* at 547.

the respondents had knowingly violated US immigration laws by transporting undocumented immigrants within the United States.[66]

Martinez-Fuerte brought to the forefront the legal framework CBP heavily relies on in conducting its operations at checkpoints on a day-to-day basis.[67] The majority of the Court's discussion revolved around the applicability of the Fourth Amendment at the checkpoints. The Court recognized that the Fourth Amendment's protections from "unreasonable searches and seizures" imposed limits on CBP from what otherwise would be "arbitrary and oppressive interference by enforcement officials" with an individual's privacy interests.[68] In conducting its Fourth Amendment analysis, the Court weighed the public's legitimate interest in having checkpoints to regulate immigration against an individual's Fourth Amendment interests.[69] The Court erred with the former, noting that checkpoint procedures minimally interfered with the Fourth Amendment[70] and did not completely undermine an individual's right to "free passage without interruption."[71]

The Court believed that the checkpoints served significant law enforcement functions in the immigration context. First, the Court distinguished checkpoint operations from roving patrol stops. Unlike motorists that are pulled over during a roving patrol stop, motorists using major highways are not "taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere."[72] Moreover, since CBP agents may stop only the vehicles passing through the checkpoint, the Court reasoned that there is less room for abusive or harassing stops of individuals than a roving patrol stop.[73] The Court recognized that these safeguards ensured that CBP agents were not equipped with arbitrary law enforcement discretion.

Second, the Court doubted that CBP administrators would locate a checkpoint where the procedures bear "arbitrarily or oppressively on motorists as a class."[74] The Court reasoned that the choice of checkpoint

66. *See id.* at 548, 550.
67. *Id.* at 562–68.
68. *Id.* at 554. The Court noted "checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.* at 556.
69. *Id.* at 562.
70. *Id.* at 555, 559.
71. *Id.* at 557–58 (citing Carroll v. United States, 267 U.S. 132, 154 (1925)). "The *Martinez-Fuerte* court recognized the right to freedom of movement but minimized its importance." Rose, *supra* note 57, at 318 n.78.
72. *Martinez-Fuerte*, 428 U.S. at 559.
73. *Id.* at 561–62.
74. *Id.* at 559.

locations was an administrative decision that had to be left largely within CBP's discretion.[75] This implies that the Court was reluctant to interfere with an arm of the executive branch. Third, the Court found no constitutional barrier in CBP selectively referring motorists to the secondary inspection area based on "apparent Mexican ancestry."[76] The Court reiterated that CBP officers must have wide discretion in selecting motorists to inquire briefly about their citizenship or immigration status.[77] Overall, the majority found that governmental interests in providing discretion to law enforcement officials to effectively perform their jobs outweighed an individual's privacy interests.[78]

Justice William Brennan heavily criticized the majority's rationale.[79] First, he warned that "[e]very American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at [his or her own] risk."[80] I highly doubt a non-Mexican individual would be burdened with such a risk during his or her travels. Second, Justice Brennan noted that an individual, "whose conduct has been nothing but innocent . . . surely resents his own detention and inspection."[81] Checkpoints "detain thousands of motorists, a dragnet-like procedure offensive to the sensibilities of free citizens."[82] Justice Brennan believed that the delay occasioned by stopping hundreds of vehicles on a busy highway would be "particularly irritating."[83] Surely, a non-Mexican individual would be delayed far less than a Mexican individual.

Justice Brennan noted that a Mexican-appearing motorist travels a highway with a checkpoint "at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists."[84] The Court's holding opened the door for certain motorists "[t]o be singled out for

75. *Id.* at 562 n.15.
76. *Id.* at 563.
77. *Id.* at 563–64.
78. *Id.* at 561. The Court believed that enhanced CBP discretion was vital for effective law enforcement. *Id*. at 562 n.15.
79. Justice Brennan's dissent was one of five written in the October 1976 term. *See Summary of Actions Taken by the Supreme Court*, N.Y. TIMES, July 7, 1976, at L+39 (on file with author).
80. *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting).
81. *Id.* at 571.
82. *Id.*
83. *Id.*
84. *Id.* at 572.

referral and to be detained and interrogated" in an arbitrary manner.[85] Many of Justice Brennan's fears surfaced following the decision.[86]

II. REPERCUSSIONS POST-*MARTINEZ-FUERTE*

The Court's decision in *Martinez-Fuente* raised fundamental questions. First, how is a US Citizen supposed to prove his or her citizenship? Second, is an individual obligated to cooperate with a CBP agent at a checkpoint when that agent's "brief inquiry" exceeds that of an immigration-related administrative interrogation? In the absence of a solution articulated by Congress or the Supreme Court, scholars, journalists, and others have attempted to provide answers to these unanswered questions. Third, have the checkpoints been effective in achieving broader law enforcement roles, and do those roles fit within the *Martinez-Fuerte* framework?

A. Proving Citizenship and the "Mexican Ancestry" Criterion

All motorists, both Mexican-appearing and non-Mexican appearing, have to answer the same question: "Are you a US citizen?"[87] The Court did not articulate how a US Citizen must prove his or her citizenship when traveling within the United States. This ambiguity raises a secondary question of whether local residents are required to carry documentation to verify their residency when they are only usually obligated to do so when traveling outside of the country and then seeking re-entry. Documentation is technically not required at a CBP checkpoint unless the vehicle contains lawful permanent residents, who are required to carry their alien registration cards ("green cards") "at all times."[88] And for foreign visitors, most, if not all, have their visas or passports readily available. However, most US Citizens do not carry their birth certificates, passports, social security cards, or naturalization certificates on their person. While the majority of US Citizens carry their driver's license on their person, this form of identification may be deemed insufficient to prove citizenship at checkpoints.[89] Thus, proving citizenship is mind-bogglingly difficult.

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85. *Id.*

86. For a list of complaints alleging abuse at checkpoints in Arizona, see generally LYALL ET AL., *supra* note 52, at 6–7, 19–25.

87. *See* Sharkey, *supra* note 18.

88. 8 U.S.C. § 1304(e) (2014).

89. *See, e.g.*, Sepulveda v. United States, No. 12-cv-3008-W BGS, 2014 WL 145233, at *1 (S.D. Cal. Jan. 10, 2014).

This documentation requirement particularly revolves around the Court's "Mexican ancestry" criterion as a basis for CBP to interrogate, and potentially search, some individuals.[90] CBP wields a "license to profile" at the checkpoints.[91] The criterion is difficult to implement without blatantly profiling an individual on the basis of their physical appearance; some US Citizens and documented immigrants easily fall into the broad "Mexican ancestry" criterion. In fact, some cabinet members in the Obama administration could very well fall into this category. Simply put, the fact that it is impossible to prove one's US citizenship without carrying specialized documentation makes the requirement of proving one's citizenship problematic. Basically, asking a US Citizen to prove his or her citizenship, and that US Citizen not being able to, and thereafter allowing the agent to further interrogate and/or search said individual on the mere basis of his or her ethnicity is quite the conundrum. To then add a further layer of difficulty by singling out individuals by ethnicity when no one else would face a similar burden is unconscionable. So while the use of the "Mexican ancestry" criterion serves the underlying goal of apprehending undocumented immigrants, the broad net cast by the Court inadvertently

90. The Court's criterion is not free of criticism. *See, e.g.*, United States v. Galindo-Gonzales, 142 F.3d 1217, 1223 (10th Cir. 1998) ("[A] person's racial characteristics are insufficient to establish the reasonable suspicion necessary to justify detention after a checkpoint stop conducted a substantial distance from the Mexican border."); United States v. Mallides, 473 F.2d 859, 860 (9th Cir. 1973) (demonstrating the impracticality of using "Mexican [ancestry]" as a factor in detaining an individual because "[i]t is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers"); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 677–78 (2000) (footnote omitted) ("Race-based enforcement deserves special scrutiny because it disproportionately burdens persons of Latin American ancestry in the United States, the vast majority of whom are U.S. citizens or lawful immigrants. Generally speaking, whether they are U.S. citizens, lawful immigrants, or undocumented aliens, persons of Latin American ancestry or appearance are more likely than other persons in the United States to be stopped and interrogated about their immigration status.").

91. For arguments in favor of and against using race as a criterion for effective enforcement of immigration laws, see generally Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine* United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)*, 23 HOUS. J. INT'L L. 233, 252 (2001) (emphasizing that *Brignoni-Ponce*'s precedential effect is "untenable" due to the increased Hispanic presence in the southwestern United States); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need For Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009 (2010) ("[T]o truly root out racial profiling from modern law enforcement, the law must impose limits on the consideration of race in law enforcement, restrict law enforcement discretion in making stops, and afford a meaningful remedy for impermissible stops and arrests."). *But see* Kristin Connor, Note, *Updating* Brignoni-Ponce*: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 619 (2008) (concluding that the consideration of race in law enforcement practices as one of many factors is appropriate given the public interest in enforcing immigration laws).

covers other individuals and leads to unintended consequences of harassment and abuse.

But others defend the "Mexican ancestry" criterion because it is viewed as the only effective way to stop undocumented immigration. Some argue that the "Mexican ancestry" criterion is essential in pursuing law enforcement goals because CBP agents "have [a] very short period of time to make an assessment as to whether further inquiry needs to be given."[92] Given CBP's short time frame, the "Mexican ancestry" criterion is reasonable in light of the fact that some undocumented immigrants coming from the southern border are Mexicans. It is conceivable that CBP agents, like others, have biases, which are most likely activated in situations requiring an agent to make a split-second judgment. In *Martinez-Fuerte*, the Court *explicitly allowed* these implicit biases to be used in determining who is subject to Fourth Amendment violations. Another reason behind not implementing a more lagged procedure at checkpoint interrogations is that such a procedure may be impractical. The flow of traffic varies by region, but those regions with much heavier traffic are likely to implement procedures that are much more expeditious than their counterparts.

In multiple recent law enforcement contexts, questions have been raised about the legality of law enforcement procedures that either explicitly or implicitly rely on racial profiling. Such procedures have been heavily scrutinized. In 2014, the Obama Administration issued new rules curtailing the use of profiling in federal law enforcement procedures.[93] The new rules impose new training requirements that would require federal agents to keep records on complaints they receive about profiling, presumably including CBP agents located at checkpoints.[94] Moreover, the new rules offer more protection against discrimination than that required by the Supreme Court's interpretation of the Constitution.[95] But the new rules did not go as far as advocates hoped; they exempt federal agents from the prohibition on considering race and ethnicity when stopping people at airports, border crossings, and *immigration checkpoints.*[96] Thus,

92. Apuzzo & Schmidt, *supra* note 33 (noting that DHS officials argue that ignoring ethnicity in border enforcement procedures is "impractical"); *see also* Adams, *supra* note 22, at 361 (noting that a CBP agent may "routinely search people he would not have routinely searched solely because of their race or ethnicity"); Connor, *supra* note 91, at 619–20 (concluding that considerations of racial appearance may be appropriate).

93. Apuzzo & Schmidt, *supra* note 33.

94. *Id.*

95. *Id.*

96. *Id.*

even with the new rules, US citizens who appear to be of Mexican ancestry will continue to struggle to comply with checkpoint procedures.

B. Refusing to Answer Non-Immigration Questions

In *Martinez-Fuerte* and its progeny, the Court has failed to address whether a motorist may refuse to answer a CBP agent's questions—primarily those that go beyond the scope of a routine immigration inquiry. This scenario arises in the instance where CBP agents ask questions that go beyond verifying a motorist's residency, which changes the line of questioning from an administrative one to a law enforcement one. One federal circuit has held that checkpoint stops ought to be "limited to the justifying programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint."[97] This means the stop is restricted to "the time necessary to ascertain the number and identity of the occupants of the vehicle, inquire about citizenship status, request identification or other proof of citizenship, and request consent to extend the detention."[98]

One justice did consider whether motorists could refuse to answer non-immigration related questions. At oral argument in the *Martinez-Fuerte* case, Justice Thurgood Marshall asked both sides whether a motorist could leave a checkpoint freely after verifying his or her citizenship or immigration status.[99] Both sides could not answer this question, and the Supreme Court did not address the question in its opinion. Today, however, commentators, government officials, and legal scholars seem to be a lot more certain regarding whether or not individuals may refuse to cooperate with CBP.

For instance, one commentator notes that law-abiding citizens may not be detained for refusing to listen to or cooperate with an immigration officer, presumably including at a CBP checkpoint.[100] In another instance, a CBP spokesman said a motorist can refuse to answer questions, but will not be allowed to proceed until his or her citizenship or immigration status is verified.[101] Furthermore, one court was faced with this question, but

97. United States v. Machuca–Barrera, 261 F.3d 425, 433 (5th Cir. 2001).

98. *Id.*

99. *See* Oral Argument at 8:38, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (No. 74-1560), *available at* http://www.oyez.org/cases/1970-1979/1975/1975_74_1560.

100. *See* Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 540 (1991).

101. *See* Casares, *supra* note 37.

held, for different reasons, that a referral to secondary inspection was valid.[102] Moreover, Ms. Denise Gilman, Co-Director of the Immigration Clinic at the University of Texas School of Law, said that "[CBP] agents at inter[ior] checkpoints are allowed to ask motorists basic questions about citizenship, identity and travel itinerary, but they cannot detain you or search your vehicle without probable cause. Your refusal to answer questions would not provide probable cause to allow for such a detention or search . . . ."[103]

In order to further interrogate a motorist past the initial interrogation phase, CBP agents need (1) probable cause that an immigration law has been violated or (2) the driver's consent to a search of his or her vehicle. With respect to the latter, one court noted that a driver may refrain from consenting to a search, and thereafter is allowed to leave without consequence.[104]

While the Court in *Martinez-Fuerte* ruled solely on the application of the Fourth Amendment at checkpoints, a future case could implicate the protections of the Fifth Amendment—particularly, the protection against self-incrimination. The role of the Fifth Amendment at checkpoints, especially in the context of refusing to cooperate with CBP, brings to the forefront the difference between routine immigration inquiries and broader law enforcement inquiries.[105]

For starters, the Court noted that individuals are theoretically "seized" for purposes of the Fourth Amendment during the initial inquiry.[106] Thus, an individual may not leave until a CBP agent allows it. In fact, driving away from a checkpoint without CBP's consent is a felony.[107] Given this, one can argue that an individual is in custody and thus Fifth Amendment protections apply. This then begs the question of whether CBP agents must administer *Miranda* warnings to detained individuals at

102. United States v. March., No. CR-13-02249-001-TUC-JGZ (BPV), 2014 WL 2584458, at *2 (D. Ariz. June 10, 2014) (noting that the CBP agent in the specific case referred the motorist to secondary inspection for "suspicious circumstances," such as nervousness, that he noticed *before* the motorist refused a search of his vehicle).

103. Casares, *supra* note 37 (quoting Denise Gilman, Co-Director of the Immigration Clinic at the University of Texas School of Law).

104. *See* United States v. Vasquez-Gutierrez, No. 2:14-CR-793-1, 2015 WL 429735, at *1 (S.D. Tex. Feb. 2, 2015).

105. *See* Adams, *supra* note 22, at 367 n.93 (citing United States v. Lueck, 678 F.2d 895, 899 (11th Cir. 1982) (holding that the routine questioning of individuals wishing to enter the United States does not violate the Fifth Amendment's right against self-incrimination)).

106. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

107. *See* 18 U.S.C. § 758 (2014); Patrik Jonsson, *Borderland Protests: Do Border Patrol Checkpoints Go Too Far?*, CHRISTIAN SCIENCE MONITOR (Apr. 21, 2015), http://www.csmonitor.com/USA/Justice/2015/0421/Borderland-protests-Do-Border-Patrol-checkpoints-go-too-far.

checkpoints.[108] With respect to broader law enforcement uses, "[i]f the initial, routine questioning [at a checkpoint] generates reasonable suspicion of other criminal activity, the stop may be lengthened to accommodate its new justification."[109] Certainly, "an investigatory stop is not an arrest"; however, the detainee's right to roam freely "is as restricted as if he were temporarily placed under arrest [because] [t]he seizure of his person is equally against his will and equally complete," and because "an attempt to avoid stopping would lead to pursuit by the Border Patrol, and presumably would amount to probable cause to arrest and to search the vehicle."[110]

Information obtained at a checkpoint stop would usually be used for deportation proceedings. Deportations, however, are not criminal proceedings and thus defendants in such cases are not entitled to the protections against self-incrimination arising out of the Fifth Amendment.[111] The Fifth Amendment could, however, apply in a scenario where CBP's questions went beyond the immigration context. Examples include those where an agent asks whether a motorist is transporting contraband or undocumented immigrants. Answering this question could potentially result in revealing self-incriminating evidence.[112] One may doubt, however, that an agent would be so blunt in his or her interrogation, or similarly that an individual would be so forthright in answering such a question. Nonetheless, such questioning could be considered "verbal searches" that entitle an individual to constitutional protections.[113] While the Court clearly discussed the constitutionality of the checkpoint operations through a Fourth Amendment lens, it remains a mystery what other constitutional protections apply at checkpoints since the Constitution applies with full force within the United States.

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108. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966), *and* Adams, *supra* note 22, at 369 n.108 (citing United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980) (holding that *Miranda* protections are triggered at a border inspection when an individual "reasonably believe[s]" he is not free to leave the inspection)), *with* Adams, *supra* note 22, at 369 n.102 (citing United States v. Tai-Hsing, 738 F. Supp. 389, 393 (D. Or. 1990) (holding that a *Miranda* warning is unnecessary during a routine immigration inspection where the individual is referred to a secondary search)).

109. United States v. Machuca–Barrera, 261 F.3d 425, 434 (5th Cir. 2001).

110. Rose, *supra* note 57, at 318 (footnote omitted).

111. *Id.* at 319.

112. *Id.* at 320.

113. *Id.*

C. Recording Individual Checkpoint Data

Checkpoints "remain a critical piece of infrastructure and a highly effective tool in [the] enforcement efforts to secure [the] nation's borders."[114] In fiscal year 2013, CBP agents at checkpoints were responsible for seizing over 340,000 pounds of marijuana, which was 14% of the 2.4 million pounds of marijuana confiscated by CBP agents along the northern and southern borders.[115] Moreover, in the past four fiscal years combined, CBP checkpoints were responsible for intercepting more than half of the heroin, cocaine, and methamphetamine seized overall in that same period.[116] The checkpoints have also proven invaluable for preventing undocumented immigrants from entering the United States. In fiscal year 2012, CBP enforcement at checkpoint operations nationwide accounted for the apprehension of over 7500 individuals, which represented 2% of CBP's total apprehensions.[117] In the same year, CBP also referred over 1800 cases to the US Attorney's office.[118]

But while CBP's achievements are highly commendable, a crucial point must be made. The Court in *Martinez-Fuerte* was motivated by a desire to curtail the flow of undocumented immigrants into the United States from Mexico.[119] The Court barely made any mention of using the

114. Carcamo, *supra* note 20. *But see* LESLEY SAPP, U.S. DEP'T OF HOMELAND SEC., APPREHENSIONS BY THE U.S. BORDER PATROL: 2005–2010 1 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf (indicating that the apprehension of undocumented immigrants declined by 61% from 2005 to 2010).

115. Santos, *supra* note 16. Additionally, in fiscal year 2012, CBP agents seized narcotics almost 5000 times at the checkpoints, which was 33% of CBP's total narcotics seizures that year. CBP REPORT, *supra* note 42, at 18.

116. Santos, *supra* note 16.

117. CBP REPORT, *supra* note 42, at 18. For a brief look at CBP's total apprehension of undocumented immigrants coming from Mexico spanning from 2000 to 2013, see U.S. BORDER PATROL, ILLEGAL APPREHENSIONS FROM MEXICO BY FISCAL YEAR 2, *available at* http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%20by%20sector%20and%20border%20area.pdf (demonstrating that the total number of apprehensions of undocumented immigrants coming from Mexico has substantially declined); *see also* LYALL ET AL., *supra* note 52, at 3, 14 (noting that in 2013, nine out of twenty-three checkpoints located in the Tucson Sector "produced zero arrests of 'deportable subjects'"); Astrid Galvan, *Border Patrol Makes Few Immigrant Arrests at Checkpoints*, ASSOCIATED PRESS (Oct. 15, 2015, 5:15 PM), http://bigstory.ap.org/article/1353cc04f84d4cca80fa128f7d526935/border-patrol-makes-few-immigrant-arrests-checkpoints ("[O]nly about 800 of the 120,939 immigrant apprehensions made by the Border Patrol in the Tucson Sector in fiscal year 2013 were made at checkpoints. That's 0.67 percent.").

118. CBP REPORT, *supra* note 42, at 18.

119. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 552–53 (1976) (citing United States v. Baca, 368 F. Supp. 398, 405, 407 n.2 (S.D. Cal. 1973)).

checkpoints to primarily seize narcotics,[120] which, according to the statistics, has overwhelmingly been CBP's greatest success.

But there are no statistics documenting the success or failures of CBP's use of expanded law enforcement functions at checkpoints. CBP only records statistics for the checkpoints by sector.[121] CBP does not disclose "stop data or other information related to interior enforcement operations"; thus, "what little is publicly known has been revealed through FOIA ["Freedom of Information Act"] requests and litigation."[122] The lack of individual statistics makes it more difficult to determine whether one specific checkpoint provides a net benefit that outweighs the cost of maintaining the specific checkpoint. To this point, the Government Accountability Office ("GAO"), Congress' auditor, has delineated numerous issues with CBP's "internal monitoring of checkpoint operations, including 'information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management's ability to monitor the need for program improvement.'"[123] Some litigants have alleged that failing to disclose certain CBP documents may violate the FOIA and impede "efforts to educate the public on the many questions that remain regarding the full extent and impact of wide-ranging interior enforcement operations conducted by the largest law enforcement agency in the country."[124]

Due to this lack of transparency, outside groups have taken the initiative and begun to record individual checkpoint statistics. In 2014, People Helping People in the Border Zone ("PHP"), a humanitarian group based in Arivaca, Arizona, monitored a checkpoint located in its town. For three months,[125] PHP monitors recorded several pieces of information during their observations, including: (1) vehicle descriptions; (2) motorist descriptions; (3) the duration of each stop; (4) what occurred during the stop, such as whether individuals were asked for identification or referred

120. *See id.* at 556–57 (mentioning briefly that checkpoints force drug smugglers to use secondary roads).

121. *See generally* GAO REPORT, *supra* note 34. Even then, CBP formally records traffic stops *only* when an arrest is made. *See* LYALL ET AL., *supra* note 52, at 2; Howard Fischer Capitol Media Services, *Drivers Abused at Border Patrol Checkpoints, ACLU Says*, TUCSON.COM (Oct. 15, 2015, 7:10 PM), http://tucson.com/news/local/border/drivers-abused-at-border-patrol-checkpoints-aclu-says/article_4b4e32a2-fae2-54b6-8641-d2d40437cd0c.html.

122. *See* Complaint for Injunctive Relief at 5, Ariz. Civil Liberties Union Found. of Ariz. v. U.S. Dep't of Homeland Sec., No. 4:14-cv-02052-CRP (D. Ariz. Apr. 28, 2014), 2014 WL 1673277; *see also* LYALL ET AL., *supra* note 52, at 11 (recognizing inadequate data collection).

123. Complaint for Injunctive Relief, *supra* note 122, at 5 (alteration in original) (quoting GAO REPORT, *supra* note 34, at 28).

124. *Id.* at 6.

125. Checkpoint monitors ended their studying in late April due to climate concerns.

to a secondary inspection; (5) the use of service canines; (6) the CBP agents' identity; and (7) the vehicle occupants' gender, age, and ethnicity.[126] After monitoring over 2000 vehicles, PHP concluded that CBP agents engaged in unlawful practices at the checkpoint by the "systemic racial profiling of Latino motorists."[127]

The PHP Study made several findings to support its conclusion. First, of the vehicles used in the study, 1938 were occupied by "White-only" occupants while 210 were occupied by "Latino-only" occupants.[128] Applying PHP's methodology to this figure, CBP agents were "[twenty-six] times more likely" to ask a Latino-occupied vehicle to demonstrate immigration documents for verification than a "White-occupied vehicle."[129] Second, CBP agents were "[twenty] times more likely" to order a Latino-occupied vehicle to secondary inspection.[130] Lastly, after observing over 2000 vehicles, including those that were referred to secondary inspection, the PHP Study found that CBP had not apprehended a single individual, citizen or non-citizen, and CBP seized no contraband.[131] But what is truly the most fundamental takeaway from the PHP Study is that it provides the public with information CBP has not provided: individual checkpoint statistics.

CBP could emulate the PHP Study by tracking individual checkpoint statistics. Doing so would provide CBP with enough information to conduct a full cost-benefit analysis to determine which locations are the most feasible for future checkpoint operations. A cost-benefit analysis would also allow CBP to carefully scrutinize which current checkpoints fall behind in performance standards. This is the precise recommendation the GAO has made in the past.[132] As the Court noted in *Martinez-Fuerte*,

126. PEOPLE HELPING PEOPLE, COMMUNITY REPORT: CAMPAIGN DOCUMENTS SYSTEMIC RACIAL DISCRIMINATION AT ARIZONA BORDER PATROL CHECKPOINT 2 (2014), *available at* http://phparivaca.org/?p=567 [hereinafter "PHP STUDY"]. One caveat to the PHP Study is that the monitors, faced with the threat of arrest, had to make their observations from a distance well outside the CBP inspection area, thus impairing a full ability to observe or listen to the CBP agents' procedures. *Id* at 1. Nonetheless, the monitors collected their data to the best of their ability. *Id*.

127. *Id.*

128. *Id.* at 2. According to the PHP Study, while other classifications were considered, only these two categories were used in analyses. *Id*. at 3.

129. *Id.*

130. *Id.*

131. *Id.* at 4. This finding can go both ways: either the checkpoints have effectively mitigated narcotics transportation in the Arivaca area for approximately two months, or that in fact the checkpoint is simply a nuisance to the residents in the area.

132. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-435, AVAILABLE DATA ON INTERIOR CHECKPOINTS SUGGEST DIFFERENCES IN SECTOR PERFORMANCE 8 (2005) ("Border Patrol does not routinely maintain data on the costs of operating checkpoints.").

CBP is unlikely to place a checkpoint in an area where it "bears arbitrarily or oppressively on motorists as a class."[133] Using the people of Arivaca as an example, the checkpoint there is certainly oppressive to Hispanics in the study. Unaccounted for checkpoint operations may cause Hispanics to leave the area, and perhaps deter Hispanics from living in or visiting Arivaca. A pilot program intended to individually monitor checkpoints and report the specific checkpoints' successes and failures would be a reasonable compromise that both recognizes checkpoints' utility in some areas and moves toward a more transparent government.[134]

III. REDRESSABILITY POST-*MARTINEZ-FUERTE*

"[A] claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review."[135] This language, uttered by the Supreme Court in *Martinez-Fuerte*, was presumably addressing Justice Brennan's concerns.[136] If an individual is subject to harassment and abuse at the checkpoints, or if CBP violated an individual's constitutional rights,[137] that person can seek legal or injunctive relief through the courts. The person can find further relief through non-judicial avenues, such as filing a complaint with CBP against an individual officer.[138]

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133. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

134. *See* Santos, *supra* note 16; *see also* JEFFREY JENKINS ET AL., NAT'L CTR. FOR BORDER SEC. AND IMMIGR., UNIV. OF ARIZ., CHECKING ON CHECKPOINTS: AN ASSESSMENT OF U.S. BORDER PATROL CHECKPOINT OPERATIONS, PERFORMANCE, AND IMPACTS (2014), *available at* http://borders.arizona.edu/cms/sites/default/files/checking-on-checkpoints_2014-09-09.pdf (addressing the recommendations made by the GAO in its 2009 report); R. Gil Kerlikowske, Comm'r, CBP, Remarks at the Brookings Institution in Washington, D.C.: The Way Forward: Vision and Strategy 2020 (Apr. 8, 2015), *available at*, http://www.cbp.gov/newsroom/speeches-and-statements/2015-04-08-000000/way-forward-vision-and-strategy-2020 ("I am taking steps to make transparency and accountability hallmarks of my tenure at CBP. The public's trust in us depends on it.").

135. *Martinez-Fuerte*, 428 U.S. at 559.

136. *See id.* at 567–78 (Brennan, J., dissenting).

137. For an insightful discussion about available judicial remedies for constitutional violations, see generally Watkins, *supra* note 100 (noting that individuals who are harassed by government officials during an immigration inquiry may have a cause of action against such government officials).

138. While the majority of this section will cover judicial remedies, a few words about non-judicial remedies are necessary. Generally, a driver, his or her occupants, or "any other interested party" can file a complaint against a border patrol agent after misconduct at a checkpoint. *See* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 765–66 (1995). Complaints may be initiated through CBP personally, or, in the case of Mexican nationals traveling on the interstate, through the Mexican consulate. *Id.* Theoretically, complaints should be forwarded to the Office of the Inspector General ("OIG"), a subdivision of the DOJ. *Id.* (citing 8 C.F.R. § 287.10(a) (1993)). Thereafter, "the matter could die at the OIG, end up in the hands of the Civil Rights Division of the [DOJ] for criminal civil rights prosecution, or go to the INS's Office of Internal Audit and the Border Patrol supervisor of the agent for meting out

A. Judicial Relief

There are two types of judicial remedies: equitable relief and damages.[139] With respect to the former, individuals who wish to halt certain CBP actions can do so through an injunction, assuming they have standing in federal court.[140] Some have requested injunctive relief from CBP, alleging that its agents violated their First Amendment rights at a checkpoint.[141] Similarly, one may seek injunctive relief in the form of a request that CBP comply with existing federal law. For instance, plaintiffs sought injunctive relief when CBP allegedly failed to furnish public information requested through FOIA.[142] The Supreme Court has traditionally allowed actions against federal officers who are "allegedly acting in excess of their legal authority or pursuant to an unconstitutional statute."[143] Thus, seeking injunctive relief may halt unconstitutional

administrative punishment." *Id.* (citing Interview with John Chase, Chief, Office of Internal Affairs, Immigration and Naturalization Serv., in Wash., D.C. (Apr. 12, 1995)). In 2015, the ACLU of Arizona found that for fiscal years 2012 through 2013, DHS oversight agencies, including the OIG, reported only three complaints alleging Fourth Amendment violations, nationwide. LYALL ET AL., *supra* note 52, at 2, 9. However, discovery produced in litigation between the ACLU of Arizona and DHS revealed eighty-one complaints from just two CBP sectors located in Arizona. *Id.* Moreover, while an available complaint forum is highly commendable, the forum has its downsides. For instance, the public is unaware of the ability to complain about abuse, a common issue in the border region. Hing, *supra*, at 779. "The problem is exacerbated by the fact that most of the victims and many of the witnesses are aliens who are not literate in English and are unfamiliar with U.S. laws and customs." *Id.* (citing FRONTIER INJUSTICE: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO PERSIST AMONG CLIMATE OF IMPUNITY 31 (1993)). Additionally, there is no system in place for providing status updates regarding a particular complaint. *Id.* at 780–81. But even more problematic is persuading individuals to make complaints in the first place. For instance, many potential complainants are discouraged from reporting abusive practices because they fear retaliation "in the form of deportation, criminal charges, or loss of legal immigration status for themselves or family members." *Id.* at 782 (quoting Murillo v. Musegades, 809 F. Supp. 487, 496 (W.D. Tex. 1992)).

139. Distinguishable from merely filing an administrative complaint, only the driver of a vehicle at a checkpoint is likely to have standing in an action against a CBP agent. A passenger does not have a possessory interest in a car and therefore has no standing to assert that a search of the car is unlawful. Rakas v. Illinois, 439 U.S. 128, 148 (1978).

140. Individuals need not worry about CBP agents raising affirmative defenses such as qualified immunity in equitable actions such as injunctive relief as the defense only applies in suits for damages. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 546 (5th ed. 2007) (citing authorities).

141. *See, e.g.*, Complaint for Declaratory and Injunctive Relief for Violation of Plaintiffs' First Amendment Rights, Jacobson v. U.S. Dep't of Homeland Security, No. 4:14-cv-02485-BGM (D. Ariz. Nov. 20, 2014), 2014 WL 6530042. For another example, see Jamie Warren, *Man Sues Border Patrol, Claims Harassment Over Medical Pot*, KVIA.COM (Dec. 3, 2015, 7:45 PM), http://www.kvia.com/news/deming-man-files-lawsuit-to-prevent-seizure-of-medical-marijuana-at-border-patrol-checkpoints/36779566 (requesting relief enjoining CBP from questioning US citizens about medical marijuana in states where it has been legalized).

142. *See* Complaint for Injunctive Relief, *supra* note 122, at 2.

143. CHEMERINSKY, *supra* note 140, at 633 (listing authorities).

government actions.[144] If, however, the federal officer is acting within the terms of his or her authority, and the complainant has not alleged that the action is unconstitutional, then injunctive relief is unavailable regardless of the allegedly wrongful conduct.[145]

But most federal judges are unlikely to grant injunctive relief, especially when there is an adequate remedy at law. Thus, assuming federal judges err on the side of not granting injunctive relief, individuals are more likely to successfully receive relief by pursuing remedies under *Bivens* and/or the Federal Torts Claims Act ("FTCA"). Federal judges are more likely to grant these remedies.

1. Bivens *Relief*

Bivens[146] relief is a judicially created remedy.[147] *Bivens* dealt with damages actions against federal officials for constitutional violations.[148] *Bivens* relief became available after the Supreme Court refused to rely on state common law causes of action in tort to remedy constitutional violations.[149] In the checkpoint context, a plaintiff could file for *Bivens* relief when he or she is referred to secondary inspection and a CBP agent searches his or her vehicle without probable cause or consent, which would run counter to the Fourth Amendment.[150] But the Supreme Court suggested that *Bivens* relief is unavailable in two situations. First, there is no cause of action if there are "special factors counseling hesitation in the

144. *Id.*

145. *Id.*

146. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see also* Nathaniel Saylor, Note, *The Untouchables: Protections from Liability for Border Searches Conducted by U.S. Customs in Light of the Passage of the Good Faith Defense in 19 U.S.C. § 482(b)*, 37 IND. L. REV. 275, 277 (2003).

147. While 42 U.S.C. § 1983 authorizes actions against state and local officers for civil rights violations, federal officers may be sued under *Bivens* or the FTCA for similar civil rights violations. *See* CHEMERINSKY, *supra* note 140, at 605 n.1 (citing Wheedlin v. Wheeler, 373 U.S. 647, 650 (1963) (holding that federal officers are not liable under § 1983)). Federal officers, however, may be sued under § 1983 when "they act in concert with state or local officers" in violating one's civil rights. *Id.* (citing Dombrowski v. Eastland, 387 U.S. 82, 83 (1967)).

148. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 733 (6th ed. 2009). Prior to *Bivens*, "[n]o federal statute authorize[d] federal courts to hear suits or give relief against federal officers who violate[d] the Constitution of the United States." CHEMERINSKY, *supra* note 140, at 605. There also was no "analogous statute pertaining to violations of federal law by federal officials." *Id.*

149. *See* CHEMERINSKY, *supra* note 140, at 609 ("[I]ndividuals whose rights have been violated should not be relegated to state law remedies, which might be inadequate or hostile to the federal constitutional interest.").

150. In fact, the plaintiff in *Bivens* alleged a Fourth Amendment violation after federal agents, without a warrant, stormed into his house in search of narcotics. *See Bivens*, 403 U.S. at 397–98.

absence of affirmative action by Congress."[151] The Court did not elaborate as to what would constitute "special factors" in future cases. Second, the Court suggested that there is no cause of action against federal officials in their individual capacity if Congress has explicitly provided an "equally effective" mechanism for redress.[152]

Bivens relief is also heavily contested. For instance, while the Court explicitly created *Bivens* relief for damages against federal officers for violations of the Fourth Amendment, it has subsequently recognized existing causes of action for infringements of the Fifth Amendment.[153] It is unclear if *Bivens* applies to checkpoint violations of the Fifth Amendment. Some lower federal courts have recognized *Bivens* relief for violations of the Fifth Amendment.[154] The issue, however, is that these cases dealt more with alleged violations of the Due Process clause within the Fifth Amendment as applied to the federal government, not alleged violations of the Fifth Amendment's so called "right to remain silent" as this Note posits. But *Bivens* relief may not be available depending on one's immigration status. In a recent case of first impression, one federal circuit determined that undocumented immigrants arrested and detained for civil immigration enforcement actions may not bring *Bivens* actions against the arresting CBP agents.[155]

"In more recent years, the rate of success—either through litigated judgments or monetary settlements—has been estimated at below two percent."[156] Furthermore, *Bivens* relief is, arguably, ineffective. Between 1971 and 1985, litigants filed approximately 12,000 *Bivens* actions, but only four litigants obtained judgments that were not reversed on appeal.[157] Other legal scholars, however, have reached a different conclusion regarding the effectiveness of *Bivens* actions.[158] Additionally, it is impractical for many potential plaintiffs to file for *Bivens* relief. For instance, the harm a motorist suffers at a secondary checkpoint varies.

151. *Id.* at 396.

152. *Id.* at 397.

153. *See* Davis v. Passman, 442 U.S. 228, 248 (1979).

154. *See, e.g.*, Kwoun v. Se. Mo. Prof'l Standards Review Org., 622 F. Supp. 520 (E.D. Mo. 1985).

155. *See* De La Paz v. Coy, 786 F.3d 367, 371 (5th Cir. 2015).

156. JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 30 (3d ed. 2007) (citing Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65 (1999)).

157. *Id.*

158. *See, e.g.*, Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010) (noting that "*Bivens* cases are much more successful than has been assumed by the legal community"). Professor Reinert found success rates, including settlements, ranging from 16% to more than 40%. *Id.*

While a CBP agent's unlawful search of a vehicle constitutes an illegal trespass, the plaintiff can only claim nominal damages without actual property damage.[159] Many attorneys would be unwilling to take such a case to court, deeming it not cost effective.[160] An additional problem is that some motorists may be unable to procure an attorney, due to lack of both funds and knowledge of where to even locate an attorney. Litigants that attempt to go to court in a *pro se* capacity are unlikely to stand a chance against the federal government in court. These litigants will have to "navigate statutory schemes that can be complex and confusing and are not always gap-free."[161]

2. FTCA Relief

In addition to *Bivens* relief, litigants can also seek relief from the federal government under the FTCA.[162] The FTCA establishes exclusive federal district court jurisdiction and waives sovereign immunity in actions against the United States:

> [F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[163]

A claim under the FTCA is different from an ordinary tort action. Specifically, an action under the FTCA may not be filed unless the claimant has "first presented the claim to the appropriate Federal agency" and the agency has failed "to make final disposition of a claim within six

159. *But see* Adams, *supra* note 22, at 355 n.11 (citing United States v. Bews, 715 F. Supp. 1206, 1211 (W.D.N.Y. 1989) (finding a Fourth Amendment violation when CBP agents searched a person's travel bag even after the person gave legitimate reasons for his visit)).

160. The Equal Access to Justice Act of 1980 ("EAJA"), however, authorizes a court to award attorney's fees to a party who prevails against the United States in court, unless the government's position was "substantially justified." 28 U.S.C. § 2412(b), (d)(1)(A) (2014). For success stories, see Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984) (allowing attorney's fees to be awarded); *cf.* CHEMERINSKY, *supra* note 140, at 628 n.120 (listing authorities that did not allow attorney's fees to be awarded).

161. FALLON ET AL., *supra* note 148, at 866.

162. Federal Tort Claims Act, ch. 646, 60 Stat. 812 (1946) (codified as amended at 28 U.S.C. § 1346).

163. 28 U.S.C. § 1346(b)(1) (2014); *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 127–28, 134–35 (6th ed. 2002).

months."[164] Tortious actions such as unlawful detention and property damage are included under the FTCA.[165] But of particular significance to potential litigants in the context of the FTCA is an exemption of liability for the United States for most intentional torts. For example, the FTCA states that the federal courts are denied jurisdiction over claims such as assault, battery, false arrest, and false imprisonment.[166] In 1974, however, the FTCA was amended to permit recovery against the United States for these torts when committed by federal law enforcement officers.[167] The modification, among other things, came as a result of instances where federal narcotics agents were engaging in "illegal behavior," and many individuals were unjustly left without relief.[168]

There are some key distinctions between *Bivens* actions and relief under the FTCA.[169] First, *Bivens* actions are designed to address constitutional violations whereas the FTCA is designed to address tort claims and state civil rights claims.[170] Second, *Bivens* actions may be solely brought against federal agents acting in their official capacity under color of federal law.[171] By contrast, the FTCA is a statutory remedy where the United States waives sovereign immunity and a litigant may sue the United States.[172] Third, the statute of limitations for a *Bivens* action is based on the forum state's statute of limitations for a personal injury action.[173] The FTCA, on the other hand, requires litigants to exhaust an administrative remedy within two years of the alleged misconduct.[174] If the administrative claim is denied, litigants have six months to file an action seeking judicial relief.[175]

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164. 28 U.S.C. § 2675(a) (2014). Relief under the FTCA is limited solely to money damages, with the exception of punitive damages, which the FTCA prohibits. FALLON ET AL., *supra* note 148, at 862. However, punitive damages and jury trials are available under *Bivens*. *See* Carlson v. Green, 446 U.S. 14, 22 (1980).

165. *See* Saylor, *supra* note 146, at 277–78.

166. 28 U.S.C. § 2680(h) (2014); *see also* CHEMERINSKY, *supra* note 140, at 638.

167. CHEMERINSKY, *supra* note 140, at 638.

168. *Id.*

169. For an in-depth discussion delineating these distinctions, see Phillip Hwang, *Suing Government Officials for Damages*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 459, 464 (2009).

170. *Id.*

171. *Id.*

172. *Id.* In fact, the most frequent litigant in the courts of the United States *is* the United States. *See* WRIGHT & KANE, *supra* note 163, at 127 n.2 (finding that the United States is a party in more than one-quarter of the civil cases in the district courts). For the rise and decline of civil rights litigation, see *id.* at 134–35.

173. Hwang, *supra* note 169, at 464.

174. *Id.*

175. *Id.*

With respect to damages and attorney's fees, *Bivens* claims do not have a cap on damages so long as FTCA claims are not simultaneously alleged in the complaint.[176] On the other hand, the FTCA places a 20% cap on damages if the case is settled administratively (i.e., litigants cannot recover more than 20% of the total settlement reached), and 25% if resolved after the filing of a court case (i.e., litigants cannot recover more than 25% of the total judgment awarded).[177] Moreover, attorney's fees are unavailable in *Bivens* actions, but are possibly available under a different statutory scheme such as the Equal Access to Justice Act ("EAJA"), so long as the federal government acted in bad faith in ordering certain CBP conduct.[178]

B. Qualified Immunity and Other Barriers to Relief

Both *Bivens* relief and FTCA relief have shortcomings.[179] For one, "[m]any civil rights cases have been dismissed by federal and state courts based on qualified immunity."[180] "Qualified immunity protects public officers from suit if their conduct does not violate any 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[181] Upon raising a qualified immunity defense, litigants suing the individual officers bear the burden of showing that the agents violated a known constitutional right, and such constitutional right was "clearly established" at the time of the incident.[182] A constitutional right is clearly established if it "would [have been] clear to a reasonable officer that his

176. *Id.*

177. *Id.*

178. *Id.* EAJA relief is available in administrative and judicial proceedings. *See generally* 5 U.S.C. § 504 (2014) (administrative); 28 U.S.C. § 2412 (2014) (judicial). Other distinctions include that jury trials are available in *Bivens* actions but not in FTCA actions, and CBP agents may claim qualified immunity in *Bivens* actions and the "discretionary function exception" in FTCA actions. Hwang, *supra* note 169, at 464.

179. For a list of exceptions to the FTCA, see Saylor, *supra* note 146, at 278–81. For our purposes, two exceptions warrant attention. First, there is the "discretionary function exception," which excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." FALLON ET AL., *supra* note 148, at 862 (citing 28 U.S.C. § 2680(a)). Second, there is the "due care in implementing invalid statutes and regulations exception," which excludes claims "based upon the action of a government employee 'exercising due care, in the execution of a statute or regulation, whether or not . . . valid.'" *Id.* at 863.

180. CHEMERINSKY, *supra* note 140, at 554. Officers must raise qualified immunity as an affirmative defense or else risk waiver. *See id.* at 546; Saylor, *supra* note 146, at 284.

181. Prison Legal News v. Livingston, 683 F.3d 201, 224 (5th Cir. 2012) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

182. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

conduct was unlawful in the situation he confronted."[183] Qualified immunity applies unless both prongs are satisfied.[184]

1. Practical Complications

Additionally, both *Bivens* relief and relief under the FTCA are litigation-only remedies. Litigation is expensive, so a litigant will have to factor in a substantial amount of money in attorney's fees and costs in weighing a decision to file or not file suit. Moreover, in the FTCA cases, the United States is the defendant, and the likelihood of success against the government in such cases is low. Truly then, the majority in *Martinez-Fuerte* did not foresee the practical barriers an individual may face when seeking relief after an unlawful checkpoint stop. This undermines a crucial factor in the Court's holding in *Martinez-Fuerte*: that the courts would be accessible to the aggrieved.

There are considerations that make these judicial remedies ineffective. In addition to potentially not being able to afford an attorney, some complainants may face a language barrier, preventing them from filing a complaint, judicial or non-judicial. Others may also be unlikely to have the necessary information available to make a formal complaint against a CBP official who violates his or her constitutional rights.[185] Furthermore, it is debatable as to whether relief under the FTCA precludes relief under *Bivens*, meaning that litigants are not entitled to double recovery against the federal government.[186] Moreover, the FTCA's jurisdiction does not extend to constitutional violations since a private party would not be liable

183. Saucier v. Katz, 533 U.S. 194, 202 (2001); *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

184. *Pearson*, 555 U.S. at 232.

185. *See generally* Hing, *supra* note 138 (raising such issues).

186. *See, e.g.*, 28 U.S.C. § 2676 (2014); Gasho v. United States, 39 F.3d 1420, 1438 (9th Cir. 1994) (holding that a litigant who pursues remedies under *Bivens* and the FTCA can receive both only if the former judgment is entered first); Serra v. Pichardo, 786 F.2d 237, 242 (6th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986) (holding that double recovery is not allowed); Ortiz v. Pearson, 88 F. Supp. 2d 151, 166 (S.D.N.Y. 2000) ("[T]he FTCA expressly bars a plaintiff from recovering damages against an employee of the government after securing final judgment on an FTCA claim arising out of the same facts."); CHEMERINSKY, *supra* note 140, at 616 (citing Carlson v. Green, 446 U.S. 14, 20 (1980)) (concluding that "*Bivens* suits [are] a 'counterpart' to the [FTCA] because the [FTCA] creates liability for the federal government and a *Bivens* cause of action permits recovery from the officers," thus allowing double recovery). Professor Erwin Chemerinsky hypothesizes that the FTCA imposes an election of remedies: suit cannot be brought against both the United States under the FTCA and against the individual employee under a *Bivens* cause of action. CHEMERINSKY, *supra* note 140, at 637.

absent a violation of "conduct under the color of law."[187] In FTCA cases, the FTCA is the exclusive remedy for torts arising out of the act or omission of a federal government officer who acts within the scope of his or her employment,[188] except for *Bivens* actions. If the US Attorney General notes that a federal employee was acting within the scope of employment "at the time of the incident out of which the claim arose," the employee is granted immunity from suit, the United States is substituted for the employee, and the action proceeds as one against the United States.[189] Individuals should consider all of these practical considerations before filing a complaint.

2. Good Faith Immunity

Federal officers, such as CBP agents, may also be protected by the statutorily authorized "good faith" immunity.[190] The "good faith" standard will usually be dispositive of whether a certain litigant can recover against a federal officer.[191] The "good faith" standard "must strike a balance between protecting the officer's exercise of discretion, while still compensating and deterring violations of federal law."[192] The key difference between qualified immunity and good faith immunity is the particular standard applied. That is, qualified immunity is an *objective* standard while good faith immunity is a *subjective* standard.[193] It is also safe to say that the standard for both doctrines is significantly different for claims arising out of allegations of racial profiling at CBP checkpoints.[194] In such situations, claimants have to prove that the actions taken by CBP agents "had a discriminatory effect, and were motivated by a discriminatory purpose."[195] Moreover, "[i]n order to prove discriminatory

187. JEFFRIES ET AL., *supra* note 156, at 24 (citing FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) ("[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims.")).

188. 28 U.S.C. § 2679 (2014).

189. *Id.* § 2679(d)(2).

190. 19 U.S.C. § 482(b) (2014). For an enlightening analysis of the good faith immunity doctrine at the time of its enactment, see Saylor, *supra* note 146, at 292–98 (noting that "good faith" could apply based on an official's reliance on operating procedures, departmental procedures, supervisory instructions, and regulations).

191. CHEMERINSKY, *supra* note 140, at 546.

192. *Id.*

193. Saylor, *supra* note 146, at 291–92 (citing Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000)).

194. *See* Adams, *supra* note 22, at 360 (noting that *at the international border*, searches are invalid if "motivated by consideration of race, for the purpose of delay, or a manifestation of ill-will").

195. Saylor, *supra* note 146, at 299 (citing Bradley v. United States, 299 F.3d 197, 204–05 (3d Cir. 2002)).

effect[,] the claimant has the burden of showing that he or she is a member of a protected class and that he or she was treated differently from similarly situated individuals in an unprotected class."[196] Thus, absent direct evidence or compelling circumstantial evidence of discriminatory purpose, such a standard is unlikely to be satisfied, and a CBP agent will not be liable.[197] This immunity would arise in situations where individuals claim they were discriminated against for their Hispanic appearance.

So while the majority in *Martinez-Fuerte* dismissed Justice Brennan's concerns by noting that the "courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry,"[198] individuals do, in fact, face substantial barriers in seeking relief following an improper checkpoint stop.

IV. REFORM POST-*MARTINEZ-FUERTE*

Given the foregoing discussion, several proposals may assist in reaching a balance between implementing effective law enforcement procedures at checkpoints and preserving fundamental constitutional protections. To be clear, this Note only proposes solutions to improve these checkpoints' effectiveness by imposing an oversight factor that has been lacking since their inception. Such proposals arise in the context of previous legislation introduced in 2014 intended to oversee CBP's operations, including those at the checkpoints.[199] This same piece of legislation, House Bill 4303, also promised to make CBP more inclusive with border communities.[200] House Bill 4303 died in committee when the 114th Congress was introduced in 2015. Congress could reintroduce House Bill 4303, but the new legislation must acknowledge proposals the original bill did not.[201]

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196. *Id.* (citing *Bradley*, 299 F.3d at 206). Realistically, however, should a motorist choose not to pursue judicial avenues for relief, the CBP agent who allegedly engaged in misconduct will continue to be employed and may subsequently engage in similar conduct. *See id.* at 299–300; *see also* Hing, *supra* note 138, at 773–74.

197. Nonetheless, some have been successful against CBP outside of litigation. *See* Apuzzo & Schmidt, *supra* note 33 (noting that in 2013, CBP settled "a racial-profiling lawsuit in which Washington State residents accused border agents of racial profiling while making traffic stops near the Canadian border").

198. United States v. Martinez-Fuerte, 428 U.S. 543, 566 n.19 (1976).

199. Border Enforcement Accountability, Oversight, and Community Engagement Act of 2014, H.R. 4303, § 3(a), 113th Cong. (2014), *available at* https://www.congress.gov/113/bills/hr4303/BILLS-113hr4303ih.pdf.

200. *Id.* § 452(d)(3).

201. Two brief solutions that warrant further consideration are (1) "know your rights" booths near checkpoints and (2) "Border Patrol Academies" for the general public. *See* Press Release, Am. Civil

A. CBP Ombudsman Proposal

House Bill 4303 proposed creating an Ombudsman to monitor checkpoint operations. In 2014, Border Patrol conducted operations at 136 stations, 5 substations, and 35 permanent checkpoints, all within 20 sectors.[202] These numbers did not account for temporary or "tactical" checkpoints operated in these same sectors. The Ombudsman's primary duty would be to record statistics on individual checkpoints and compile a report to determine the cost-effectiveness of the checkpoints. "Costs" go beyond those that are merely tangible; they include *intangible* costs such as the loss of inclusivity and community, a loss of respect for the Constitution, and a biased implementation of selective law enforcement procedures on a certain group of individuals. The cost-benefit tool can be broken down into several inquiries. First, the Ombudsman would analyze CBP's budget from DHS. In fiscal year 2014, CBP received an annual budget of $13.9 billion.[203] Thereafter, the Ombudsman could determine how much money each checkpoint sector received and in turn how much money went to funding individual checkpoints in each sector. Clearly then, one solution is for the Ombudsman to request and monitor how much is being spent at each checkpoint by sector to determine costs.[204]

Substantively, the Ombudsman could track law enforcement statistics by focusing on the following key questions, each split by three categories: (1) by sector, (2) at permanent checkpoints, and (3) at temporary checkpoints. First, what is the annually recorded number of undocumented

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Liberties Union of Ariz., ACLU of New Mexico Deploys a "Know Your Rights Checkpoint" (Mar. 18, 2014); Curt Prendergast, *Day 2 at the Academy: I-19 Checkpoint Duty*, NOGALES INT'L (Feb. 4, 2014), http://www.nogalesinternational.com/news/day-at-the-academy-i--checkpoint-duty/article_12088a8a-8db3-11e3-8fd3-001a4bcf887a.html.

202. *See* U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 29, at 1.

203. U.S. CUSTOMS AND BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2014 2 (2015), *available at* http://www.cbp.gov/sites/default/files/documents/CBP_DHS_2014%20PAR_508C.PDF. Take for example operations conducted in the Southwest sectors, including Tucson, San Diego, and the Rio Grande Valley—locations with the highest activity. In fiscal year 2014, the Southwest Sectors staffed a total of 18,156 CBP employees. UNITED STATES BORDER PATROL, SECTOR PROFILE: FISCAL YEAR 2014 1, 4 (2015). The Southwest Sectors also apprehended a total of almost 480,000 undocumented immigrants of Mexican ancestry, both juveniles and adults. *Id.* The Southwest Sectors also intercepted a combined total of over 1.9 million pounds of Marijuana and Cocaine, 9205 ounces of Heroin, and 3771 pounds of Methamphetamine. *Id.* 92,000 of those cases were actually prosecuted by the U.S. Attorney's office. *Id.* Additionally, the Southwest Sectors intercepted 475 firearms, which were, presumably, unregistered, over 63,000 rounds of ammunition, and just under $7.4 million in currency. *Id.* at 4. With these statistics already available to the public, it is simply a matter of keeping tabs on individual checkpoints when reporting statistical data.

204. *See* LYALL ET AL., *supra* note 52, at 17 (recommending a cost-benefit analysis to be conducted on the checkpoints). Even current CBP commissioner R. Gil Kerlikowske said he was interested in analyzing the checkpoints through cost-effective lens. *See* Ortega, *supra* note 7.

immigrants apprehended at a checkpoint? Second, what is the annually recorded number of narcotics apprehended at a checkpoint? Third, what is the annually recorded number of unregistered firearms apprehended at a checkpoint? Fourth, what is the annually recorded number of human traffickers apprehended at a checkpoint? Fifth, what is the annually recorded number of miscellaneous unlawful activities prevented at a checkpoint? Finally, what is the annually recorded number of complaints filed against CBP agents at a checkpoint? The Ombudsman could utilize this cost-benefit tool every year and publish a report reflecting a three-year performance period.

The Ombudsman's role may not be difficult to implement. The Ombudsman could mimic the PHP Study and require that representatives physically monitor the checkpoints. One issue that could arise with this procedure is the distance the monitors are allowed to stand from CBP agents. Monitors should not interfere with a CBP agent's duties; they should only observe what the agent is doing from a reasonable distance. Another way to track this data is to collect press releases CBP already publishes per checkpoint periodically.[205] In addition to its reporting role, the Ombudsman can also serve an advisory role in assuring that CBP complies with the law. This includes the issuance of advisory opinions and legal memoranda on a periodic basis or, alternatively, upon request by CBP. These procedures do not intrude into CBP's operations as much as a physical presence, and are exemplary examples of comity in practice between CBP and the Ombudsman.

Finally, the Ombudsman would present his or her three-year report to CBP officials, DHS officials, and Congress to ultimately determine whether some checkpoints fare better than others.

But the implementation of an Ombudsman may be unrealistic. According to Professor Stephen Legomsky, at the time House Bill 4303 was proposed, it was "very unlikely" to pass congressional muster.[206] During the 113th Congress's tenure, both House and Senate Republicans were "strongly opposed" to a provision that would have created an "Ombudsman for Immigration-Related Concerns."[207] The Ombudsman provision in Senate Bill 744 would have similarly contained various investigative, monitoring, and advisory functions concerning CBP

205. *See generally Media Releases*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/newsroom/media-releases/all (last visited Oct. 8, 2015).

206. E-mail from Stephen H. Legomsky, Law Professor, Washington Univ. Sch. of Law, to author (Feb. 5, 2015, 12:58 CST) (on file with author).

207. *Id.* (citing S. 744, § 1114, 113th Cong. (2013)).

operations.[208] Contextually, a comprehensive immigration bill that includes dramatic increases in enforcement resources is unlikely to be favorable with Republicans.[209] Currently, with a Republican-controlled Congress, and in a climate that has become even more hostile to immigrant-friendly legislation, "the chances of Congress enacting a law designed to monitor the operations of the immigration enforcement agencies have shrunk even further."[210] Republicans are unlikely to cut back on their tough stance on immigration enforcement, thus, House Bill 4303 or a mirror image of the legislation is unlikely to be introduced in the 114th Congress and even the 115th Congress if the Republicans continue to control the House and Senate. Such an anti-reformative view would only continue to make Republicans a less attractive party to Hispanic voters. Nonetheless, an Ombudsman may be part of a solution that would appear reasonable to both sides of the checkpoint debate.

B. CBP Complaint Forum Proposal

House Bill 4303 also provided protection to persons who are reluctant to file a complaint for fear of retaliatory actions by law enforcement officials.[211] A similar concept should be implemented, especially if the Ombudsman's office comes to fruition. A complaint mechanism would not use information the complainant alleges against a CBP agent in any removal or criminal proceeding against the complainant, even if the person violated US immigration laws.[212] This provision could encourage potential complainants to come forward and report harassing and abusive CBP conduct.[213]

Furthermore, as Professor Hing noted, due to the language barrier and inaccessible forum for making complaints,[214] a new complaint mechanism through the Ombudsman should provide a multilingual complaint procedure that is accessible online[215] and would be visible at interior

208. *Id.*
209. *Id.*
210. *Id.*
211. Border Enforcement Accountability, Oversight, and Community Engagement Act of 2014, H.R. 4303, § 452(f)(2), 113th Cong. (2014).
212. *See id.* An analogous provision in future proposals could prove problematic, especially for those already reluctant to place oversight on CBP. Opponents of the provision could argue that, for policy reasons, those who violate the law should not be allowed to go free.
213. *Id.*
214. *See* Hing, *supra* note 138, at 765–78.
215. H.R. 4303 § 452(d)(7)(C). CBP has "not adopted a consistent, uniform process for filing complaints, and do[es] not make complaint forms available in Spanish, such that many individuals do not submit formal abuse complaints." LYALL ET AL., *supra* note 52, at 5, 16. The CBP Integrity

checkpoints.[216] Any implemented complaint procedure should be externalized, not further internalized by CBP's current bureaucracy.

C. Community Sticker Program Proposal

In addition to the previously discussed proposals set forth in House Bill 4303, several supplemental proposals may address issues with the current procedures at checkpoints following *Martinez-Fuerte*. For instance, CBP could consider implementing a Community Sticker Program ("CSP").[217] CSP could emulate CBP's current "SENTRI" program implemented at international borders.[218] "SENTRI provides expedited CBP processing for pre-approved, low-risk travelers. Applicants must voluntarily undergo a thorough biographical background check against criminal, law enforcement, customs, immigration, and terrorist indices; a 10-fingerprint law enforcement check; and a personal interview with a CBP Officer."[219] Upon approval, individuals are issued Radio Frequency Identification ("RFID") cards that identify their residency status on CBP's database once at a port of entry.[220] Through the RFID cards, "the system automatically identifies the vehicle and the identity of the occupants of the vehicle."[221]

Like SENTRI, CSP would require local residents to go through a screening process in order to qualify for admission to the program. Once admitted, residents would receive a blue sticker that must be placed on the windshield.[222] The sticker would reflect the maximum number of people allowed in the vehicle, with each person individually registered in the CSP database. For instance, if the registrant initially registered his or her family of six, only six people could be in the car when arriving at the checkpoint.

Advisory Panel recommended that CBP implement a fully-integrated Spanish language version of its complaints system. HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL 4 (2015), *available at* http://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf.

216. H.R. 4303 § 452(d)(7)(C).

217. A similar thought was raised at oral argument in *Martinez-Fuerte*. *See* Oral Argument at 13:37, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (No. 74-1560), *available at* http://www.oyez.org/cases/1970-1979/1975/1975_74_1560.

218. *Secure Electronic Network for Travelers Rapid Inspection*, U.S. CUSTOMS & BORDER PROT., http://www.cbp.gov/travel/trusted-traveler-programs/sentri (last visited Jan. 18, 2015).

219. *Id.* SENTRI is unavailable to certain individuals, including, but not limited to, those who provide false or incomplete information during the screening process, those who have been convicted of a crime, and those who have violated US immigration laws. *Id.*

220. *Id.*

221. *Id.*

222. Perhaps CBP could even consider using RFID cards at checkpoints.

If there were any more than that upon a plain view inspection, the point officer could then question the vehicle's occupants.

Another tier of CSP would be what Chief Justice Warren Burger posited at oral argument in *Martinez-Fuerte*.[223] CBP agents at international border stations would place a bright orange sticker on cars crossing from abroad into the United States. CBP could mandate that the sticker remain on the car windshield for forty-eight hours. If a car arrives at the checkpoint with the bright orange sticker, agents would automatically refer the car to secondary for inspection. A car without a bright orange sticker or one with a blue sticker would not be subject to inspection.

Obviously this program has its setbacks; it potentially opens the door to fraud—for example, removing the sticker and placing it on another person's car or substituting legal residents for undocumented immigrants.[224] Thus, CSP would make it easier for those individuals who are legally present in the country to transport undocumented immigrants since a CBP agent would not be required to question a vehicle in compliance with the blue sticker or a vehicle without a bright orange sticker on the windshield. Moreover, the sticker program could also make it much easier for individuals to smuggle narcotics and other illegal materials within the United States, again because a CBP agent would be unlikely to stop a vehicle in compliance with the blue sticker or one without a bright orange sticker.

Individuals with a sticker on their car (whether blue or bright orange) can easily remove the sticker and bypass the checkpoint unless CBP designs a sticker or device that can only be removed by CBP. Any sign of tampering with the sticker or device (perhaps during an annual renewal of one's CSP membership) would be suspect and cause CBP to launch an investigation into the matter. Thus, while certain defects in CSP could undermine the program altogether, CBP needs to close such gaps and make it clear that anyone who willfully circumvents the screening process or abuses the program shall be sanctioned.

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223. *See* Oral Argument at 13:37, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (No. 74-1560), *available at* http://www.oyez.org/cases/1970-1979/1975/1975_74_1560.

224. Non-fraudulent considerations would be transactional costs on CBP for producing the stickers and for ordering agents on duty at the international border to place the stickers on the large volume of cars coming from Mexico and Canada.

D. A Supreme Court Fix?

The final solution to the checkpoint conundrum hails from the judiciary. A Supreme Court fix may perhaps be what clarifies the underlying role checkpoints play within the United States. In order to avoid the trap the *Martinez-Fuerte* defendants fell into, a future litigant before the Supreme Court should not engage in unlawful activities, such as transporting undocumented immigrants or narcotics. The *Martinez-Fuerte* defendants engaged in such unlawful activities and thus the justices were not persuaded by their arguments.

The Supreme Court recently avoided addressing the complexities of the checkpoint operations. In March 2010, Richard Rynearson, a major in the United States Air Force, was stopped at a checkpoint in Uvalde County, Texas.[225] When Mr. Rynearson arrived at the checkpoint, the point officer asked if he owned the vehicle he was driving.[226] Answering in the affirmative, the point officer referred Mr. Rynearson to secondary.[227] No CBP agent had inquired about Mr. Rynearson's citizenship.[228] At secondary, Mr. Rynearson refused to completely open his car window.[229] CBP agents later requested that Mr. Rynearson provide identification.[230] Mr. Rynearson complied, placing his driver's license and military identification between the window glass and the door's weather stripping, which allowed CBP agents to reasonably read from the outside of the vehicle.[231]

Thereafter, a CBP agent asked Mr. Rynearson to step out of his car.[232] Mr. Rynearson refused and asked why he was being detained.[233] The CBP agent responded that he intended to determine Mr. Rynearson's citizenship and that he would be free to go thereafter.[234] Mr. Rynearson continued to refuse, requesting that the agent explain what his "reasonable suspicion" was, to no avail.[235] The CBP agent stepped away to find a supervisor, while Mr. Rynearson added his passport to the window glass along with

225. Rynearson v. United States, 601 F. App'x 302, 302–04 (5th Cir. 2015) (per curiam), *cert. denied*, 84 U.S.L.W. 3086 (U.S. Mar. 21, 2016) (No. 15-168).
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*

his driver's license and military identification.[236] Later, another CBP agent asked Mr. Rynearson for his passport and the name of his commanding officer; Mr. Rynearson refused to furnish his commanding officer's identification.[237] Thereafter, the CBP agent took Mr. Rynearson's passport, verified his citizenship, and allowed him to leave.[238] Mr. Rynearson's total time at the checkpoint was approximately thirty-four minutes.[239]

Following the incident, Mr. Rynearson filed an administrative claim with the border patrol in accordance with the FTCA, seeking $500,000 in damages arising out of the checkpoint stop.[240] The border patrol denied his claim,[241] and he filed an action in federal district court.[242] Mr. Rynearson's complaint alleged negligence, false arrest, false imprisonment, intentional infliction of emotional distress, and several violations of Mr. Rynearson's constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.[243] Mr. Rynearson's complaint also requested *Bivens* relief from the agents, in their individual capacities, for a violation of his Fourth Amendment rights.[244] Mr. Rynearson's claims were dismissed at the district court level, and no appeal was taken thereafter.[245] The district court ruled, among other things, that the CBP agents were entitled to qualified immunity.[246] The Fifth Circuit only reviewed Mr. Rynearson's *Bivens* actions arising out of the Fourth Amendment.[247]

After reviewing his appeal, the Fifth Circuit affirmed the district court, and held that Mr. Rynearson did not have a "clearly established" right, under the Fourth Amendment, to refuse to cooperate with CBP agents at a checkpoint.[248] The Fifth Circuit noted that a "routine interior immigration checkpoint stop conducted without reasonable suspicion does not violate the Fourth Amendment."[249] Moreover, "[b]order patrol agents at interior checkpoints may stop a vehicle, refer it to a secondary inspection area, request production of documents from the vehicle's occupants, and

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 305–06.
249. *Id.* at 304 (citing United States v. Martinez–Fuerte, 428 U.S. 543, 561–62 (1976)).

question the occupants about their citizenship."[250] The Court noted that the CBP agents did not violate Mr. Rynearson's constitutionals rights, but rather "made reasonable but mistaken judgments when presented with an unusually uncooperative person, unusual at least in the facts described in any of the caselaw."[251] The court did not consider whether Mr. Rynearson could refuse to cooperate with CBP due to his Fourth Amendment protections.[252] Rather, the court ruled that the CBP agents were entitled to qualified immunity against Mr. Rynearson's claims because "no constitutional right of which all reasonable officers would have known was violated."[253]

Judge Jennifer Walker Elrod, however, disagreed with the majority. In her dissenting opinion, she noted that the "clearly established" law the CBP agents violated was the "Fourth Amendment when they . . . detain[ed] [Mr. Rynearson] beyond the time reasonably necessary to investigate his citizenship status."[254] After a denial of rehearing en banc, Mr. Rynearson petitioned the Supreme Court of the United States for a writ of certiorari.[255] On March 21, 2016, the Supreme Court denied his petition.

While *Rynearson* was the closest case to address the *Martinez-Fuerte* conundrum, a future case may go much farther than *Rynearson* would have. Surely, in *Rynearson*, the discussion would have focused on whether the checkpoints are still limited to the *Martinez-Fuerte* framework (i.e., to be used solely for immigration inquiries, as opposed to broader law enforcement practices). *Rynearson*, however, would have not addressed the constitutionality of the "Mexican ancestry" criterion since Mr. Rynearson did not raise the issue on appeal, and even if he did, he would lack standing to do so since he is not of "Mexican ancestry." The Supreme Court has not overruled *Martinez-Fuerte*, and thus the "Mexican ancestry" criterion remains valid. Someone other than Mr. Rynearson may challenge the criterion on equal protection grounds arising out of the Fifth Amendment.[256] Such a challenge would allege that Hispanics are subject

250. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 562–63).
251. *Id.* at 305.
252. *Id.*
253. *Id.*
254. *Id.* at 306 (Elrod, J., dissenting).
255. *See* Petition for Writ of Certiorari, Rynearson v. Lands, No. 13-51114 (U.S. Aug. 3, 2015) (No. 15-168).
256. The equal protection clause of the Fourteenth Amendment governs state action, not federal conduct by a federal agency like CBP. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that equal protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment).

to abuse and harassment at the checkpoints at staggering rates while non-Hispanics are not. An equal protection analysis would not look at the initial stop, because everyone is stopped. Rather, such an analysis would look at the secondary stop, which is much more selective given the "Mexican ancestry" criterion used in *Martinez-Fuerte*.

The Court may be persuaded to grant certiorari in a future challenge to the checkpoint operations given the current circuit split over the scope and length of non-immigration related inquiries at checkpoints.[257] Currently, three federal circuits with, presumably, the largest immigration dockets, all agree that once a checkpoint detention procedure exceeds the permissible immigration inquiry per *Martinez-Fuerte*, further detention is justified only if CBP agents have developed a minimum level of reasonable suspicion of criminal activity.[258] The issue is at what point does detention at a checkpoint become impermissible. The circuits seem divided on whether CBP agents may convert an immigration-related inquiry into a non-immigration related inquiry, especially without a minimum level of reasonable suspicion of criminal activity.[259] Thus, if all else fails, a Supreme Court solution could solve the checkpoint conundrum by granting certiorari in a future challenge to the checkpoint operations in the interest of clarifying *Martinez-Fuerte* and its progeny.

CONCLUSION

Many Americans are unaware of the militaristic procedures that occur every day at CBP checkpoints within the United States. As previously mentioned, such procedures, along with the current status of the law, have left many questions unanswered, such as whether a functional equivalent to an international border operates differently than the international border itself. Administrative reform, congressional reform, and a future ruling by the Supreme Court could all resolve these unanswered questions. Such reforms should take effect in that order. The checkpoint problem is not just

257. *See* S. Ct. R. 10(a) (noting that the Court may grant certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

258. *See, e.g.*, United States v. Machuca-Barrera, 261 F.3d 425, 434 (5th Cir. 2001); United States v. Massie, 65 F.3d 843, 848 (10th Cir. 1995); United States v. Taylor, 934 F.2d 218, 220 (9th Cir. 1991).

259. *See, e.g.*, *Rynearson*, 601 F. App'x at 302–04 (allowing CBP agents to inquire into matters unrelated to immigration enforcement); United States v. Rascon-Ortiz, 994 F.2d 749, 752 (10th Cir. 1993) (holding that brief inquiries into limited matters such as vehicle ownership must be "reasonably related" to immigration enforcement); *Taylor*, 934 F.2d at 220 (allowing brief inquiries into immigration-related matters and allowing for plain view inspections of vehicles).

a southwestern issue, but an American issue, because innocent, law-abiding citizens' constitutional rights are being undermined within US borders.

But completely banning checkpoints from the United States should be off the table. An open border system, like that in the Schengen Area of Europe,[260] carries a tremendous risk to national security. Rather, the federal government must continue to recognize the utility of operating checkpoints while simultaneously recognizing that the checkpoints now advance much broader interests. In 1976, checkpoints were designed to solely curtail the flow of undocumented immigration from Mexico, but now counterterrorism and drug-trafficking prevention are cognizable law enforcement functions. Threats to national security no longer solely come from abroad; they may also come from within the United States. The bottom line is that the federal government needs more information, and it can obtain that information by implementing a cost-benefit analysis of checkpoint procedures on a national scale. While this empirical research is being conducted, judicial grievances should not be ignored, but such grievances are merely a Band-Aid to the more inherent issue of whether *all* checkpoints are being used effectively without substantially infringing on the constitutional rights of many. The courts may be called upon to determine whether checkpoints are still being operated within the scope of the Supreme Court's holding in *Martinez-Fuerte*. If they are not being operated within the scope of *Martinez-Fuerte*, and given the various interests at play, should the *Martinez-Fuerte* scope be broadened to cover those interests, and if so, who should broaden that scope: Congress, CBP, or the courts?

While the Southwest presently serves as the focal point for these procedures, one can only speculate how far the federal government will expand these checkpoint operations while the federal judiciary continuously defers to CBP's discretion. While CBP checkpoints have served, and will probably continue to serve, a compelling government interest by preventing the transportation of drugs, undocumented immigrants, and firearms, the effectiveness of each individual checkpoint

260. *See* Josh Lew, *EU Sets Deadline for Border Patrol Plan*, TRAVEL PULSE (Dec. 18, 2015, 2:51 PM), http://www.travelpulse.com/news/impacting-travel/eu-sets-deadline-for-border-patrol-plan.html; *cf. Migrant Crisis: Sweden Border Checks Come into Force*, BBC (Jan. 4, 2016), http://www.bbc.com/news/world-europe-35218921.

ought to be scrutinized in order to preserve fundamental constitutional rights where they presumably are applied in the highest regard: within the United States.

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