

# ***Wilkie v. Robbins* and the Aggregate Approach to Takings under the Fifth Amendment**

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## **Introduction**

One of the least noticed, but potentially most important, cases decided this term presented the Supreme Court with an attempt to create a novel constitutional tort. The plaintiff sought money damages from federal agents whose otherwise legitimate regulatory actions in a seven-year campaign of harassment allegedly amounted, in the aggregate, to a violation of the Takings Clause of the Fifth Amendment. Justices Ginsburg and Stevens found themselves spiritedly defending private property rights, while the conservative wing of the Court denied recovery to a plaintiff whose property rights were violated by a series of small harms that amounted to, “death by a thousand cuts.”<sup>1</sup> *Wilkie* may foreshadow the end of judicially-created remedies for many constitutional violations beyond individual property rights.

## **I. Factual Background**

### **A. Easement Follies**

The plaintiff-respondent, Frank Robbins, owned a commercial guest ranch in Hot Springs, Wyoming. After agreeing to sell the ranch to Robbins, but before closing the sale, the previous owner, George Nelson, signed a non-exclusive deed of easement giving the federal government the right to use and maintain a road along a stretch of the ranch property. The

United States Bureau of Land Management (the “Bureau”)<sup>2</sup> wanted the public to be allowed to use the road, which led to a popular recreation area.<sup>3</sup>

The land parcels making up the ranch were not entirely contiguous and were intermingled with private, state, and federal land across forty miles of territory. In return for the easement, the Bureau agreed to grant Nelson use of a road across federal property that connected noncontiguous parts of Nelson’s land. However, Robbins did not know about the government’s easement, as the Bureau did not record it, so Robbins took title to the ranch free of the easement upon recording his deed in May 1994.<sup>4</sup>

When the Bureau learned of its costly oversight and demanded a replacement easement, Robbins said he would not grant a new easement for free but might do so in return for something. Instead of reaching a settlement, Robbins alleged that a Bureau employee told him that “the Federal Government does not negotiate,” and the defendant-petitioners (current and former Bureau employees, hereinafter “defendants”) set off on nearly a decade-long “campaign of harassment and intimidation” in retaliation for his continuing refusal to replace the easement.<sup>5</sup> Robbins did not allege that any one of the Bureau officials’ actions alone amounted to a constitutional violation, but that the aggregate effect was an unlawful attempt to coerce him to replace the easement.<sup>6</sup>

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1. *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

2. The Bureau of Land Management is part of the United States Department of the Interior, and manages 258 million acres of public land. *See generally* U.S. Dept. of the Interior, Bureau of Land Management, Ann. Rep. (2006).

3. *Wilkie*, 127 S. Ct. at 2593 (2007).

4. *Id.* (citing WYO. STAT. ANN. § 34-1-120 (2005))

5. *Id.* at 2593-94.

6. *Id.* at 2594.

## B. Campaign of Harassment

Beginning in the summer of 1994 and continuing for the next seven years, Bureau employees<sup>7</sup> caused Robbins a variety of difficulties, including taking unfavorable agency action against him, bringing charges against him, inflicting tortious injuries upon him, and engaging in other offensive behavior.<sup>8</sup> One Bureau employee decided to retire in part because he believed his colleagues mistreated Robbins.<sup>9</sup>

The unfavorable agency actions against Robbins began in 1995, when Bureau employees made good on their threat to cancel the right-of-way that Nelson had negotiated.<sup>10</sup> Later that year, the Bureau, citing permit violations, changed the ranch's five-year Special Recreation Use Permit ("SRUP") to one requiring annual renewal, an action which disrupted Robbins's guest ranching business,<sup>11</sup> but for which he did not seek review.<sup>12</sup> Four years later, the Bureau terminated Robbins' SRUP because of accumulated administrative charges, leaving his business susceptible to civil penalties if he or his patrons were to accidentally cross unmarked property boundaries into federal lands.<sup>13</sup> Shortly thereafter, the Bureau revoked the ranch's grazing

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7. All Bureau employees described in this subsection were defendant-petitioners in this case, except where otherwise indicated.

8. *Id.* at 2598; *see id.* at 2594-96 (majority opinion), 2609-11 (Ginsburg, J., concurring in part and dissenting in part).

9. *Id.* at 2594 (majority opinion). That employee, Edward Parodi, was not a party in this case. *Id.* He testified that, as part of the campaign against Robbins, his superiors told him to investigate aggressively for infractions beyond what he was authorized to do, and eventually to warn Robbins that continued defiance would result in a "long war [in which the Bureau] would outlast him and outspend him." *Id.* at 2610 (Ginsburg, J., concurring in part and dissenting in part).

10. *Id.* at 2594 (majority opinion). Robbins could have appealed the cancellation to the Interior Board of Land Appeals ("IBLA") or sought judicial review under the Administrative Procedure Act, but chose to do neither. *Id.*; 5 U.S.C. § 702 (2000).

11. Robbins's business was taking guests on cattle drives for recreation. *Wilkie*, 127 S. Ct. at 2594-95.

12. *Id.* at 2594. The SRUP change created uncertainty as to whether he would be permitted to take guests on cattle drives in the future. Robbins declined to seek administrative review because Bureau employees warned him that his permit would be suspended during the lengthy review process and failed to inform him of his right to seek a stay preventing such a suspension. *Id.* at 2594-95, 2595 n.3.

13. *Id.* at 2595. Robbins appealed unsuccessfully to the IBLA, and did not thereafter seek judicial review. *Id.* Lacking a SRUP, Robbins could not direct his cattle drives over federal land, and was forced to use a mountain pass with unmarked property lines. Bureau employees tried to catch Robbins in an unauthorized trespass onto federal

permit, though that action was stayed pending resolution of Robbins's appeal.<sup>14</sup>

Bureau employees brought a variety of charges against Robbins beginning in 1996. The administrative charges claimed various trespasses and other land-use violations, and Robbins contested some administratively but not judicially.<sup>15</sup> In 1997, the Bureau refused to repair the public road previously subject to the right-of-way and providing the only access to a portion of Robbins's land. Furthermore, it denied him permission to repair the road himself. The Bureau fined him when he attempted to do so anyway.<sup>16</sup> Finally, later that same year, Bureau employees filed questionable criminal charges against Robbins.<sup>17</sup> The jury acquitted him in less than thirty minutes, with one juror later stating "Robbins could not have been railroaded any worse . . . if he worked for the Union Pacific."<sup>18</sup>

Bureau employees inflicted tortious harm on Robbins on two occasions. A Bureau employee intentionally trespassed on Robbins's property to conduct a survey shortly after he bought the ranch,<sup>19</sup> and in 2000, two employees vandalized a guest house on Robbins's property.<sup>20</sup> Civil remedies were available to Robbins in each case, but he chose not to pursue them, presumably because of the prohibitive cost of bringing multiple small claims.<sup>21</sup>

On two occasions, Bureau employees encouraged other government officials to create

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land by videotaping ranch guests, even as they relieved themselves. *Id.* at 2596.

14. *Id.* at 2595-96.

15. *Id.* at 2595. Robbins claimed some charges were outright false, others were unfair selective enforcement, and all in the aggregate were retaliation for his refusal to grant the easement. *Id.*

16. *Id.* The IBLA denied Robbins's appeal, and he did not seek judicial review. *Id.*

17. *Id.* Robbins was charged with forcibly interfering with a federal employee in violation of 18 U.S.C. § 111 (2000 & Supp. IV 2004) after ordering two Bureau employees off his property and tearing up the fence easement they claimed authorized their entry. *Wilkie*, 127 S. Ct. at 2595.

18. *Id.*

19. *Id.* at 2594. During the summer of 1994, Robbins denied the Bureau permission to survey the road because he believed it unnecessary before an agreement was reached, but an employee surveyed the property anyway and later bragged about it to Robbins. *Id.* That employee was named as a defendant, but died before the case reached the Court. *Id.* at 2594 n.1.

20. *Id.* at 2596. The employees broke in, left garbage inside, and left the lodge gates open when they left. *Id.*

21. *Id.*

difficulties for Robbins. In 1995 an employee unsuccessfully encouraged the local sheriff to charge Robbins with criminal trespass following an incident with a neighbor.<sup>22</sup> In 2001, an employee unsuccessfully pressured an official in the Bureau of Indian Affairs, which managed land on the southern border of the ranch, to impound Robbins's cattle.<sup>23</sup> After four years of harassment, Robbins finally sought refuge in the federal courts.<sup>24</sup>

### C. Procedural History

With the Bureau's alleged campaign of harassment still ongoing, Robbins filed suit in 1998 seeking compensatory and punitive damages and declaratory and injunctive relief.<sup>25</sup> After voluntarily dismissing the United States as a defendant, Robbins pressed forward against the remaining individual defendants with (1) a *Bivens*<sup>26</sup> claim that the defendants violated his Fourth and Fifth Amendment rights<sup>27</sup> and (2) a Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>28</sup> claim charging the defendants with attempted extortion in violation of the Hobbs Act.<sup>29</sup>

The District Court dismissed the suit based upon qualified immunity and failure to state a

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22. *Id.* The employee, knowing that Robbins needed a source of water for his cattle, warned the neighbor to watch him. Robbins was unfamiliar with the area and possibly misled by the Bureau as to the property lines, and drove his cattle to a creek on the neighbor's land. He apparently realized his mistake and began to urge his cows back toward his land, but the neighbor drove her truck into the horse he was riding. *Id.* at 2610 (Ginsburg, J., concurring in part and dissenting in part). Parodi said the employee boasted that he "finally [had] a way to get [Robbins'] permits ...." *Id.* at 2594 (majority opinion) (second alteration in original).

23. *Id.* at 2596. The employee told the Bureau of Indian Affairs official that "something need[ed] to be done" about Robbins, because he was "a bad character." *Id.* at 2611 (Ginsburg, J., concurring in part and dissenting in part) (alteration in original).

24. *Id.* at 2595 (majority opinion).

25. *Id.* at 2596.

26. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)

27. *Wilkie*, 127 S. Ct. at 2596; *Bivens*, 403 U.S. 388; U.S. CONST. amend. IV, V.

28. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-62, 1964 (2000 & Supp. IV 2004)

29. *Wilkie*, 127 S. Ct. at 2596; 18 U.S.C. §§ 1961-62, 1964; Hobbs Act, 18 U.S.C. § 1951 (2000).

claim, but Tenth Circuit Court of Appeals reversed and remanded, holding that “*Bivens* relief was available only for those ‘constitutional violations committed by individual federal employees unrelated to final agency action.’”<sup>30</sup> On remand, the District Court denied summary judgment on Robbins’s RICO and *Bivens* claims that the defendants had retaliated against him for exercising his Fifth Amendment rights to exclude the government from his property and to refuse to grant a property interest without compensation. The Court of Appeals affirmed, reiterating its prior holding regarding the availability of *Bivens* relief.<sup>31</sup>

On certiorari, the United States Supreme Court unanimously reversed<sup>32</sup> as to Robbins’s RICO claim, holding that the Hobbs Act did not criminalize extortion for the sole benefit of the government.<sup>33</sup> By a vote of 7-2 the Court also reversed<sup>34</sup> as to Robbins’s *Bivens* claim, holding that he did not have a constitutional remedy against the employees.<sup>35</sup>

## II. Legal Background

“‘[W]here there is a legal right, there is also a legal remedy . . . whenever that right is invaded.’”<sup>36</sup> An individual whose constitutional rights are invaded by a government official may seek recovery of money damages from that official personally in a civil action known as a “constitutional tort.”<sup>37</sup> Individuals have long been authorized by statute to recover money damages against state officials who invade constitutional rights.<sup>38</sup> There is no similar statute, however, authorizing an action for damages against federal officials. In the 1946 case of *Bell v.*

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30. *Wilkie*, 127 S. Ct. at 2596 (quoting *Robbins v. Wilkie*, 300 F.3d 1208, 1212 (10th Cir. 2002)).

31. *Id.* at 2596-97.

32. *Id.* at 2608 (majority opinion), 2618 n.11 (Ginsburg, J., concurring in part and dissenting in part).

33. *Id.* at 2607 (majority opinion); *see* 18 U.S.C. § 1951.

34. *Wilkie*, 127 S. Ct. at 2608 (majority opinion), 2618 (Ginsburg, J., concurring in part and dissenting in part).

35. *Id.* at 2608 (majority opinion).

36. *Marbury v. Madison*, 5 U.S. 137, 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23.)

37. BLACK’S LAW DICTIONARY 1526 (8th ed. 2004).

*Hood*,<sup>39</sup> the Supreme Court first held that federal courts had jurisdiction over claims for damages based on alleged violations of constitutional rights, but the Court reserved the question whether such allegations stated a viable cause of action.<sup>40</sup>

### **A. The Presumptive Right to Recover Damages Under the Constitution**

Twenty-five years after *Bell*, the Court had a fresh opportunity to determine whether a cause of action exists for money damages against a federal official who violates a plaintiff's constitutional rights. In *Bivens v. Six Unknown Named Federal Narcotics Agents*,<sup>41</sup> Bivens alleged that federal narcotics agents had entered his apartment and arrested him without a warrant in violation of the Fourth Amendment. Bivens sought money damages from the agents for the violation. The agents contended that Bivens' claim only presented a cause of action under state tort law (primarily the right to privacy), and that the Fourth Amendment, if violated, merely served to defeat the agents' defense that they validly exercised federal power.<sup>42</sup>

Justice Brennan's majority opinion rejected the agents' argument.<sup>43</sup> He noted that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."<sup>44</sup> He found a claim for damages to be the appropriate remedy because: (1) Bivens alleged an

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38. 42 U.S.C. § 1983 (2000).

39. 327 U.S. 678 (1946).

40. *Id.* at 684-85.

41. 403 U.S. 388 (1971).

42. *Id.* at 389-91.

43. *Id.* at 391. Justice Brennan characterized the agents' argument as resting on "an unduly restrictive view of the Fourth Amendment's protection . . ." that ignored the inherently different types of relationship between two citizens and between a citizen and federal agents. *Id.* at 391-92. The Fourth Amendment limits the exercise of federal power whether the particular act in question is addressed by state law or not. *Id.* at 392.

44. *Id.* at 392 (citing *Bell*, 327 U.S. at 684).

independent violation of his constitutional rights;<sup>45</sup> (2) there were no “special factors counseling hesitation in the absence of affirmative” congressional action;<sup>46</sup> and (3) Congress had made no explicit declaration precluding such recovery in favor of another remedy it judged equally effective.<sup>47</sup> The Court held that Bivens had a claim for money damages for injuries caused by the agents’ violation of his Fourth Amendment rights.<sup>48</sup>

Eight years later, in *Davis v. Passman*,<sup>49</sup> the Court found a constitutional claim for damages under the Due Process Clause of the Fifth Amendment.<sup>50</sup> The plaintiff alleged that her employer, a United States congressman, had fired her because of her gender in violation of her constitutional right to equal protection.<sup>51</sup> Justice Brennan, again writing for the Court, characterized his *Bivens* opinion as requiring a three-part inquiry: (1) whether the plaintiff alleged violation of a constitutional right; (2) whether the plaintiff stated a cause of action asserting that right; and (3) whether relief in damages was the appropriate form of remedy.<sup>52</sup>

Justice Brennan emphasized that, in determining whether the plaintiff had a constitutional cause of action, the Court should focus on “the nature of the right [the plaintiff] asserts.”<sup>53</sup> By the generality of its provisions, Justice Brennan reasoned that the Constitution clearly intended the judiciary to be the primary means of enforcement for the rights it confers.<sup>54</sup> In considering

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45. *Id.* at 395.

46. *Id.* at 396.

47. *Id.* at 397. Justice Brennan stressed that the question was not whether money damages were necessary to enforce the Fourth Amendment’s protections, but instead whether Congress had precluded by statute Bivens’s right to “redress his injury through a particular remedial mechanism normally available in the federal courts.” *Id.*

48. *Id.*

49. 442 U.S. 228 (1979).

50. *Id.* at 230.

51. *Id.* at 231; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Fifth Amendment due process incorporates Fourteenth Amendment equal protection against the federal government).

52. *Davis*, 442 U.S. at 234 (discussing *Bivens*, 403 U.S. 388).

53. *Id.* at 239.

54. *Id.* at 241. Brennan emphasized that, if constitutional rights are to be meaningful, “the class of [plaintiffs] who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the

the appropriate remedy to enforce those rights, he cited *Bivens* as creating, in “appropriate circumstances,” a presumption in favor of money damages for a violation of constitutional rights unless there were “special factors counseling hesitation” and in the absence of affirmative congressional action.<sup>55</sup> He found no such factors present in this case, explicitly rejecting as such a factor the fear of flooding the federal courts with similar claims.<sup>56</sup>

The next year, Justice Brennan, again writing for a majority in *Carlson v. Green*,<sup>57</sup> reiterated the presumption in favor of a constitutional action for damages absent special factors or an alternative remedy created by Congress with the express intent of creating an effective substitute.<sup>58</sup> However, Justice Powell, concurring in the judgment, accused Justice Brennan of making an overbroad characterization of the *Davis* holding that threatened to strip the Court of its “principled discretion” in recognizing a constitutional action for damages.<sup>59</sup> He took exception to Justice Brennan’s language implying “that a court must entertain a *Bivens* suit unless the action is ‘defeated’ in one of two specified ways.”<sup>60</sup> Justice Powell need not have feared Brennan’s dicta, however, because the heyday of the constitutional action for damages against federal officials would end just three years later.

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protection of their justiciable constitutional rights.” *Id.* at 242.

55. *Id.* at 245. Brennan considered a damages remedy appropriate in *Davis* because (1) such relief would be “judicially manageable” because no difficult questions of valuation or causation were presented and (2) “there [were] available no other alternative forms of judicial relief.” *Id.*

56. *Id.* at 248. 42 U.S.C. § 1983 already allowed such claims against state officials in federal court. Speaking for a majority of the Court, Brennan quoted with approval Justice Harlan’s concurrence in *Bivens*: “[C]urrent limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.” *Davis*, 442 U.S. at 248 (quoting *Bivens*, 403 U.S. at 411 (Harlan, J., concurring)).

57. 446 U.S. 14 (1980)

58. *Id.* at 19-20. The plaintiff in *Carlson* claimed violations, *inter alia*, of the Eighth Amendment. *Id.* at 16; U.S. CONST. amend. VIII.

59. *Carlson*, 446 U.S. at 26 (Powell, J., concurring).

## B. The Exceptions Begin to Swallow the Rule

The 1980s saw several cases illustrating that the absence of statutory relief does not require courts to recognize a *Bivens* action.<sup>61</sup> In 1983 the Court first found applicable one of the exceptions to the *Bivens* presumption in *Bush v. Lucas*,<sup>62</sup> in which the plaintiff alleged violation of his First Amendment rights by his supervisor, the director of a federal agency.<sup>63</sup> Justice Stevens approached the constitutional claim with the assumption that the plaintiff's constitutional rights had been violated and Congress had not provided a complete remedy for the violation.<sup>64</sup> Justice Stevens framed the problem, in the absence of an explicit congressional preclusion of a constitutional claim for damages, as “the kind of remedial determination . . . appropriate for a common-law tribunal,” taking into account “any special factors counseling hesitation before authorizing a new kind of federal litigation.”<sup>65</sup>

Because Congress protected the constitutional rights of federal civil servants with “an elaborate, comprehensive scheme,”<sup>66</sup> Justice Stevens found that Congress was in a better position to evaluate the costs and benefits of augmenting the existing protection and declined to recognize a constitutional cause of action for damages.<sup>67</sup> Because Congress had not explicitly denied the

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60. *Id.*

61. *Schweiker v. Chilicky*, 487 U.S. 412, 421-423 (1988).

62. 462 U.S. 367 (1983).

63. *Id.* at 368-69. The plaintiff was an aerospace engineer with the National Aeronautics and Space Administration (“NASA”), and the defendant was his supervisor. When the plaintiff was twice reassigned during an organizational shakeup, he objected and made multiple public statements highly critical of NASA. The demotion that followed was eventually overturned by the Civil Service Commission’s Appeals Review Board as a violation of the plaintiff’s constitutional right to free speech, for which the plaintiff was compensated with reinstatement and back pay. *Id.* at 369-71.

64. *Id.* at 372. Specifically, though the plaintiff recovered back pay, the civil service remedial process against the government did not allow punitive damages against the supervisor, and the plaintiff did not recover his attorney fees from the government. *Id.*

65. *Id.* at 378.

66. *Id.* at 385.

67. *Id.* at 390.

plaintiff a *Bivens* action, Justice Brennan’s alternative remedy exception was inapplicable,<sup>68</sup> and the Court purported to find the civil service remedial system a special factor triggering his other exception.<sup>69</sup>

The same day that *Bush* was decided, the Court unanimously found special factors precluding recovery present in *Chappell v. Wallace*.<sup>70</sup> Enlisted sailors in the United States Navy sought damages under the Constitution for racial discrimination by their superior officers. The sailors had no remedy against the government itself.<sup>71</sup> The Court held that a *Bivens* cause of action was inappropriate because of “the unique disciplinary structure of the military establishment and Congress’ activity in the field.”<sup>72</sup> Four years later, in a closer case, *United States v. Stanley*,<sup>73</sup> Justice Scalia’s majority opinion reaffirmed the *Chappell* holding and denied a *Bivens* remedy to a service member unknowingly injected with lysergic acid diethylamide (“LSD”),<sup>74</sup> and extended the “special factors” exception to include injuries arising out of or incident to military service.<sup>75</sup>

In the 1988 case of *Schweiker v. Chilicky*,<sup>76</sup> Justice O’Connor, writing for a majority of the Court, characterized the special factors exception as contemplating “appropriate judicial deference” to congressional inaction when the “design of a [government] program” indicated that

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68. *See id.* at 378 (“Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks or by providing him with an equally effective substitute.”).

69. *See id.* Laurence Tribe has suggested that the Court actually applied the alternative remedy exception cloaked as a special factor, expanding the former exception to include cases where Congress had neither explicitly precluded a *Bivens* action nor provided an equally effective alternative. Laurence Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006-07 CATO SUP. CT. REV. 23, 64-65 (2007).

70. 462 U.S. 296 (1983).

71. *Id.* at 297.

72. *Id.* at 304.

73. 483 U.S. 669 (1987) (two Justices dissenting in whole and two dissenting in part).

74. *Id.* at 671, 686.

75. *Id.* at 683-84.

76. 487 U.S. 412 (1988).

Congress considered the remedial processes of the program to be adequate to safeguards against constitutional violations.<sup>77</sup> The plaintiffs alleged that their Social Security disability benefits had been cancelled through an unconstitutional program implemented by individual federal officials. The plaintiffs' benefits were eventually reinstated retroactively, but they sought compensation for the harm they suffered by having been denied benefits to which they were entitled.<sup>78</sup>

Recognizing that Congress had not provided a complete remedy and that a *Bivens* action could compensate the plaintiffs for otherwise irremediable injuries, Justice O'Connor nonetheless held that no such action was appropriate.<sup>79</sup> She emphasized the "meaningful safeguards" provided by congressional statute and Congress's superior competency in "balancing governmental efficiency and [individual] rights . . ."<sup>80</sup> Her approach was later criticized as foreshadowing a policy-based balancing approach to the special factors exception.<sup>81</sup> Unfortunately for Frank Robbins, this criticism would prove prescient in *Wilkie*.

### **III. The Court's Reasoning**

#### **A. The Majority Opinion**

In *Wilkie v. Robbins*,<sup>82</sup> Justice Souter wrote for seven members of the Court.<sup>83</sup> He began by explicitly declaring that the decision whether to recognize a new *Bivens* claim was a policy judgment and by no means automatic,<sup>84</sup> confirming the concerns raised by commentators after

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77. *Id.* at 423.

78. *Id.* at 417-19.

79. *Id.* at 429.

80. *Id.* at 425.

81. Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1150 (1989).

82. 127 S. Ct. 2588 (2007).

83. *Id.* at 2592.

84. *Id.* at 2597.

*Schweiker*.<sup>85</sup> Justice Souter went on to characterize the *Bivens* line of cases as following a “familiar sequence.”<sup>86</sup> Assuming that the defendants’ actions violated the plaintiff’s constitutional rights, the Court first considers whether Congress has provided an alternative remedy that gives the Court a “convincing reason” to refuse a new *Bivens* action.<sup>87</sup> If not, the Court decides whether such a remedy is appropriate as would a common law court, paying special attention to any “special factors counseling hesitation before authorizing a new kind of federal litigation.”<sup>88</sup>

To answer the first question, Justice Souter categorized the various difficulties the Bureau’s employees caused Robbins as tortious injuries, abuses of the judicial system, adverse agency actions, and other offensive behavior.<sup>89</sup> Justice Souter concluded that Congress had made a patchwork of remedies available through the judiciary covering almost all of the employees’ actions.<sup>90</sup> Nevertheless, he found no clear inference regarding Congress’ intent to preclude a *Bivens* action, and proceeded to the second question.<sup>91</sup>

Justice Souter framed the second inquiry as a matter of balancing between Robbins’s concern that the existing remedies for the individual incidents were inadequate for the aggregate harm, and the Bureau employees’ concern that a new remedy for injuries such as Robbins’ would draw an unclear line between unconstitutional conduct and mere hard bargaining on behalf of the public.<sup>92</sup> In evaluating Robbins’s position, Justice Souter distinguished the present case from those in which the Court recognized a *Bivens* cause of action; in each of those cases, the plaintiff

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85. Tribe, *supra* note 69, at 67 (quoting Nichol, *supra* note 81, at 1150).

86. *Wilkie*, 127 S. Ct. at 2598.

87. *Id.* (citing *Bush*, 462 U.S. at 378).

88. *Id.* (quoting *Bush*, 462 U.S. at 378).

89. *Id.*

90. *Id.* at 2600

91. *Id.*

92. *Id.*

had no effective means of vindication.<sup>93</sup> However, Justice Souter acknowledged that Robbins's case presented a different question because the many individual incidents added up to a whole injury "greater than the sum of its parts."<sup>94</sup>

That whole, however, was not enough.<sup>95</sup> Justice Souter recognized that Robbins's claim alleged retaliation for exercising his constitutional rights, a type of claim with a long history of judicial recognition.<sup>96</sup> The prior retaliation cases, however, turned on allegations of "impermissible purpose and motivation," a "what for" question inapplicable to Robbins's allegations because the employees' purpose in obtaining an easement for public use was legitimate.<sup>97</sup> Thus, any *Bivens* claim would turn on whether the employees went "too far" in pursuing their legitimate objective.<sup>98</sup> Justice Souter considered the difficulty of defining such a standard to weight against recognition of a new *Bivens* claim.<sup>99</sup>

Justice Souter characterized the employees' actions as simple hard bargaining in which the government was "stand[ing] firm on its rights and us[ing] its power to protect public property interests."<sup>100</sup> Though recognizing that the federal government was "no ordinary landowner," he equated the employees' actions to Robbins's refusal to re-grant the easement for free.<sup>101</sup> He did not consider whether the allegations of illegal action avoided the line-drawing problem because the employees' legal actions were essential to Robbins's claim.<sup>102</sup>

Finally, Justice Souter considered Robbins's claim in a more general sense, and found

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93. *Id.* (citing *Davis*, 442 U.S. at 245; *Carlson*, 446 U.S. at 23)

94. *Id.* at 2601.

95. *See id.* at 2604.

96. *Id.* at 2601 (citing various retaliation cases).

97. *Id.*

98. *Id.*

99. *Id.* at 2602.

100. *Id.*

101. *Id.*

102. *Id.* at 2603.

another reason to deny him a *Bivens* remedy.<sup>103</sup> His claim was essentially one of retaliation for a citizen's assertion of his constitutional property rights.<sup>104</sup> Justice Souter asserted that recognizing a *Bivens* action for such a claim would "invite claims in every sphere of legitimate government action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations."<sup>105</sup> He concluded that this possibility gave rise to a "reasonable fear that a general *Bivens* cure would be worse than the disease" and weighed heavily against recognizing a new claim,<sup>106</sup> thus offering the same floodgates argument rejected by Justice Brennan in *Davis v. Passman*.<sup>107</sup>

### **B. Justice Ginsburg's Dissent**

Justice Ginsburg (joined by Justice Stevens) dissented from the Court's denial of a *Bivens* remedy.<sup>108</sup> She initially characterized the question before the Court as whether the Fifth Amendment provided a remedy when federal officers retaliate by abusing their regulatory power against a property owner who refuses to waive his right to just compensation.<sup>109</sup>

Justice Ginsburg first emphasized that the Court could not hold Robbins's *Bivens* suit precluded by a "carefully calibrated administrative regime."<sup>110</sup> In fact, every Justice agreed that Robbins had no adequate alternative remedy.<sup>111</sup> Instead, Justice Ginsburg accused the Court of relying on "a special factor counseling hesitation quite unlike any we have recognized before,"

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103. *Id.* at 2604.

104. *Id.*

105. *Id.*

106. *Id.*

<sup>107</sup> *Davis* at 428

108. *Id.* at 2618 (Ginsburg, J., concurring in part and dissenting in part).

109. *Id.* at 2609.

110. *Id.* at 2613 (listing cases finding no *Bivens* cause of action).

111. *Id.*

namely the fear of “an onslaught of *Bivens* actions.”<sup>112</sup> In response, she quoted with approval Justice Harlan’s concurrence in *Bivens*, where he found a similar floodgates argument insufficient.<sup>113</sup>

The Court’s fear of a deluge of *Bivens* actions was unfounded, in Justice Ginsburg’s view, because Robbins’s claim was predicated on the vindictive motivation of the employees, which would not be present in common bureaucratic overreaching.<sup>114</sup> She also asserted that the availability of a statutory cause of action to recover for identical violations by state officials provided a “controlled experiment” disproving the Court’s fear.<sup>115</sup> If a decision in favor of Robbins would open the floodgates, “courts should already have encountered endeavors to mount Fifth Amendment Takings suits under § 1983.” Notably, not one federal case has been reported involving this sort of retaliation by state officials.<sup>116</sup>

Justice Ginsburg also disagreed with the Court’s characterization of the retaliation question at issue.<sup>117</sup> She cited cases involving the termination of public employees for exercising First Amendment rights as representing a causation standard applicable to Robbins’s case.<sup>118</sup> In her view, the motive of the Bureau employees was not a dispositive question; if they proved that they would have taken the same actions against Robbins even if he had acquiesced to their demands, they would escape liability despite their improper motive.<sup>119</sup> Thus, Justice Ginsburg concluded that the Court should have recognized a new *Bivens* action.<sup>120</sup>

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112. *Id.* (quoting *id.* at 2604 (majority opinion)).

113. *Id.* (citing *Bivens*, 403 U.S. at 410-11 (Harlan, J., concurring)).

114. *Id.* at 2615.

115. *Id.*

116. *Id.*

117. *Id.* at 2614.

118. *Id.* at 2615 (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

119. *Id.*

#### IV. Implications

The Court's holding in *Wilkie* invites federal officials to circumvent the Constitution's protection of many individual rights without fear of personal liability.<sup>121</sup> This invitation provides less protection to the citizenry from agents of the federal government, against whom the Bill of Rights limitations have always applied directly, than from state agents to whom the Bill of Rights only applies indirectly via the Fourteenth Amendment.<sup>122</sup> State actors are subject to personal liability for violating constitutional rights under the common § 1983 civil rights action,<sup>123</sup> while federal actors no longer face such a threat even in extreme circumstances such as those faced by Frank Robbins.

In the property rights context, two Bureau employees and two employees of an analogous Wyoming agency might simply ignore a landowner's refusal to grant an easement to use his private road. If the four officials traveled the landowner's road regularly and together in a single car, they each would commit identical trespasses. Assuming the trespasses caused no damage to the property, the landowner would be left with no meaningful remedy under state tort law.

However, as the Court recognized in *Wilkie*, the aggregate effect of a series of small harms could be a single constitutional violation. The government's regular use of the landowner's property without permission might constitute a taking without just compensation in violation of the Fifth Amendment. In that situation, § 1983 gives the landowner a means of recovery and deterrence against the state officials, but *Wilkie* leaves him with no similar recourse against the federal officials committing the same constitutional violation.

Because nothing in *Wilkie* explicitly limits the Court's holding to the Fifth Amendment

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120. *Id.* at 2618.

121. Tribe, *supra* note 69, at 60.

122. *Barron v. Baltimore*, 32 U.S. 243 (1833); Tribe, *supra* note 69, at 70-71.

Takings Clause, federal officials may now be free to use the same vindictive regulatory enforcement to retaliate against Robbins for exercising his other constitutional rights. For example, the officials involved in *Wilkie* might want to punish Robbins for exercising his First Amendment right to speak out against their overreaching. If so, the Court has seemingly left them free to begin a new campaign of harassment solely to punish Robbins for making their vindictive conduct the subject of litigation, so long as they maintain a legitimate pretense, such as aggressively enforcing regulations. In effect, *Wilkie* may mean that a politically unpopular landowner, who cannot obtain a political solution, has utterly no recourse against individual federal employees who willfully violate his constitutional rights.

The Court's failure to explicitly overrule *Bivens* leaves open the possibility that, in the future, the Court might create new constitutional torts to protect constitutional rights other than those concerning property interests. This may discourage Congress from accepting the Court's invitation to create a statutory remedy.<sup>124</sup> If, however, Congress reads *Wilkie* as effectively ending the viability of *Bivens* claims other than those already recognized, and creates a statutory remedy analogous to § 1983, federal courts may face exactly the sort of difficult causation and line-drawing problems that Justice Souter feared.<sup>125</sup> A claim similar to Robbins' brought under such a statute would force the federal courts to make just the sort of "endlessly knotty" inquiry that Justice Souter declined to undertake.<sup>126</sup> Until then, the line between hard bargaining and constitutionally prohibited overreaching is left sufficiently unclear that federal agents can cross it with impunity.

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123. 42 U.S.C. § 1983.

124. Tribe, *supra* note 69, at 71-72.

125. *Id.*

126. *Wilkie*, 127 S. Ct. at 2604.