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Ubi Jus Ibi Remedium - For the Violation of Every Right, There Must Be a Remedy: The Supreme Court's Refusal to Use the Bivens Remedy in *Wilkie v. Robbins*

Heather Jane Hanna

Alan G. Harding

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COMMENT

***Ubi Jus Ibi Remedium—For the Violation of Every Right,
There Must Be a Remedy: The Supreme Court’s Refusal
To Use the Bivens Remedy in Wilkie v. Robbins.***

Heather J. Hanna and Alan G. Harding***

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I. INTRODUCTION

The United States Constitution provides the solid foundation of our country, and defines rights guaranteed to citizens of the United States.¹ But, the Constitution does not explicitly provide a remedy if a violation of those rights is

* Candidate for J.D. Degree, University of Wyoming College of Law, 2008. I would like to thank my mother, Terri Hanna.

** Candidate for J.D. Degree, University of Wyoming College of Law, 2008. Special thanks to my mother and sister.

This work is a product of the authors and any mistakes contained herein are our own.

¹ See generally U.S. CONST.

perpetrated by government actors.² It is well established that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever, he receives an injury.”³ Congress has enacted some regulatory schemes to protect our Constitutional interests.⁴ However, at times, these regulations lack sufficient remedies or no regulations exist which provide a remedy. When these situations arise, the United States Supreme Court must step in to establish a remedy for those individuals caught in the limbo where no remedy exists.⁵ One such example is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, where the Court held federal officials can be sued for Fourth Amendment violations committed when acting under color of federal authority.⁶ *Bivens* was the first time the Court officially recognized a freestanding constitutional claim for damages stemming from violations carried out by government actors acting in their official capacity.⁷

² *Id.*

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁴ The Civil Rights Act of 1871, codified in 42 U.S.C.A. § 1983, which is used as a way to explore the federal courts’ functioning in relation to states and Congress. *See Ex parte Young*, 209 U.S. 123, 155 (1908) (holding that the power of a federal court to prevent the enforcement of railroad rates fixed under state legislative authority, which were considered confiscatory).

The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Ex parte Young, 209 U.S. at 155–56; *see also* *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 281–82, 295–96 (1913) (involved a telephone company in Los Angeles who sued the city and some of its officials to try and prevent them from decreasing usage rates, holding a state’s violation of the Constitution, even if also a violation of the state’s constitution, was nevertheless under the jurisdiction of the federal courts); *Monroe v. Pape*, 365 U.S. 167, 169 (1961) (suit against police officers and city officials, contending the search of a home and subsequent arrest without a warrant constituted a violation of the Fourth Amendment, held Civil Rights Act, 42 U.S.C.S. § 1983, meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by a state official’s abuse of his position). All of these cases deal with § 1983 and remedies available under that statute, but if § 1983 is unavailable the choice comes down to *Bivens* or no remedy at all. *Bivens* is essentially a counterpart to § 1983. *See* Erwin Chemerinsky & Martin A. Schwartz, *Section 1983 Litigation: Supreme Court Review, A Round Table Dialogue*, 19 *TOURO L. REV.* 625, 675-76 (2003).

⁵ *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 402 (1971) (“[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.”); *J.I. Case Co. v. Borak*, 377 U.S. 426, 434-35 (1964) (holding that federal courts could step in and provide all kinds of remedial relief in cases involving violations of the Securities Exchange Act); *Cf. Wyandotte Transp. Co. v. U.S.*, 389 U.S. 191, 201-04 (1967) (allowing other remedies not provided in the Rivers and Harbors Act of 1899, including removal of and costs incurred by the negligently sinking of a vessel).

⁶ *Bivens*, 403 U.S. at 397–98.

⁷ *Id.*

The United States Supreme Court recently ruled on *Wilkie v. Robbins*, a case involving harassment by a governmental administrative agency trying to extract an easement from a private landowner.⁸ In *Wilkie*, the Court refused to broaden the *Bivens* holding so it would apply to respondent Robbins's situation.⁹ Robbins experienced seven years worth of continued harassment and intimidation by Bureau of Land Management (BLM) officials.¹⁰ This harassment took the form of illegal and illegitimate activities like trespass for an unauthorized survey of the hoped-for easement's topography, as well as an illegal entry into the lodge.¹¹ There were also administrative claims against Robbins for trespass, land-use violations, fine for unauthorized repairs to the road, and criminal charges.¹² Robbins sought damages as a remedy to the persecution.¹³

The Court's refusal to apply *Bivens* left Robbins no actionable claim for damages.¹⁴ In fact, the *Wilkie* Court conceded that people who experience ongoing governmental harassment, even under the guise of legitimate bureaucratic activity, are left no adequate remedy in the wake of the holding.¹⁵ Justice Ginsburg, writing the dissent, condemned the shortcomings of the majority's opinion, arguing Robbins should have a claim under *Bivens*.¹⁶

The ruling in *Wilkie* left the question of what governmental activities are sanctioned and permissible in a rather ambiguous state.¹⁷ Equally obscure and unsettling is to what ends governmental actors are allowed to employ their administrative weight in order to meet overall legitimate goals, especially when these activities combine several disparate elements, which in the aggregate become

⁸ *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), *rev'd* *Wilkie v. Robbins*, 433 F.3d 755 (10th Cir. 2006).

⁹ Compare *Wilkie*, 127 S. Ct. at 2600 (the Court did not want to broaden the *Bivens* doctrine to include Robbins's situation because it thought broadening *Bivens* would "invite claims in every sphere of legitimate governmental action affecting property interests") with *Bivens*, 403 U.S. at 389-90 (establishing a cause of action for damages against government actors in a Fourth Amendment case).

¹⁰ *Wilkie*, 127 S. Ct. at 2611 (Ginsburg, J., concurring in part, dissenting in part) (noting the extensive factual record of harassment by federal officials).

¹¹ *Id.* at 2594-95.

¹² *Id.*

¹³ *Id.* at 2596. Robbins sought a *Bivens* remedy for the series of government actions because to engage in piecemeal litigation would have been costly, unrealistic, and would result in "death by a thousand cuts." *Id.* at 2596, 2600.

¹⁴ *Id.* at 2600, 2604-05.

¹⁵ *Id.* at 2601 ("Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.").

¹⁶ *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., concurring in part, dissenting in part) ("Robbins has no alternative remedy for the relentless torment he alleges. True, Robbins may have had discrete remedies for particular instances of harassment, but in these circumstances, piecemeal litigation, the Court acknowledges, cannot forestall 'death by a thousand cuts.'").

¹⁷ See generally *Wilkie*, 127 S. Ct. at 2588.

repeated, harassing, small-scale attacks. *Wilkie* leaves an expansive loophole, allowing government agencies and their employees to use menacing tactics to achieve an objective against a private party.¹⁸ An agency may nickel and dime a private citizen into bankruptcy if it so chooses to get what it wants.¹⁹

The topic of judicially created remedies for constitutional violations is worthy of attention due to the potential repercussions of governmental strong-arming toward private-property owners.²⁰ Allowing government officials to flex administrative muscles in an abusive fashion for the purpose of intimidation and harassment of private citizens implicates a legion of constitutional violations, even if the acts are within the scope of their legitimate powers.²¹ The overall effect of the Court allowing the government to overreach under the umbrella of its legitimate power leaves the private landowner with uncertainty as to what, if any, remedies are available if they find themselves in a similar situation. Potential victims of unreasonable governmental intimidation need to be given means to rectify the situation.²² This is not to impart that government intimidation is an everyday occurrence. In fact, for the most part, it is an aberration, which is why there needs to be a remedy.²³ Private landowners deserve a realistic legal solution to protect themselves from unreasonable governmental harassment when asserting their constitutionally protected rights.²⁴ There needs to be a remedy allowing for compensation when intimidation occurs.²⁵ An appropriate source for a remedy in these circumstances should come from the *Bivens* holding.²⁶

¹⁸ See generally *id.*

¹⁹ See *Wilkie*, 127 S. Ct. at 2611 (Ginsburg, J., concurring in part, dissenting in part) (stating that on just the few claims for which he sought a discrete remedy. “Robbins reported that he spent ‘hundreds of thousands of dollars in costs and attorney’s fees’ seeking to fend off BLM.”).

²⁰ See generally *Wilkie*, 127 S. Ct. at 2588.

²¹ See generally *Wilkie*, 127 S. Ct. at 2615 n. 7 (Ginsburg, J., concurring in part, dissenting in part) (agreeing that government agencies “should not be hampered in pursuing lawful means to drive a hard bargain.” She then states the activities used by the BLM in *Wilkie* “[t]respassing, filing false criminal charges, and videotaping women seeking privacy to relieve themselves . . . are not the tools of ‘hard bargaining.’”).

²² See generally *Wilkie*, 127 S. Ct. at 2618 (Ginsburg, J., concurring in part, dissenting in part) (“Unless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become “merely precatory.”).

²³ *Id.* at 2616 n. 8 (Ginsburg, J., concurring in part, dissenting in part) (“The rarity of such harassment makes it unlikely that Congress will develop an alternative remedy for plaintiffs in Robbins’ shoes, and it strengthens the case for allowing a *Bivens* suit.”)

²⁴ See U.S. CONST. amend. V. “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” *Id.*

²⁵ See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971).

²⁶ *Wilkie*, 127 S. Ct. at 2616 n. 8 (Ginsburg, J., concurring in part, dissenting in part) (“[E]very time the Court declined to recognize a *Bivens* action against a federal officer, it did so in deference to a specially crafted administrative regime.”) *Id.*

Prior to the *Bivens* ruling, a damages remedy for Constitutional violations at the hands of government officials proved to be elusive.²⁷ The *Bivens* holding became conceivable after the Court recognized the Constitution as an individual source of rights.²⁸ This comment first discusses the facts presented in *Wilkie*, the inconsistencies found between *Bivens* and its progeny, and then addresses remedies available under *Bivens* and its progeny for victims of governmental harassment.²⁹ This comment then discusses why the Court refused to broaden *Bivens* to include situations like that in *Wilkie*, where government officials use a series of minor, yet harassing actions, in order to achieve their desired ends, even where the overall result, torment, justifies an equitable remedy.³⁰ Finally, this comment addresses possible solutions by broadening or redefining the *Bivens* rule to provide redress to victims in situations involving harassment by governmental actors.³¹

II. BACKGROUND

Wilkie v. Robbins concerns Bureau of Land Management (BLM) officials' harassment of a private landowner.³² In 1994, Robbins purchased High Island

²⁷ *E.g.* U.S. v. Lee, 106 U.S. 196, 223 (1882) (action under the Fifth Amendment, the plaintiff thrown off of land needed for "Arlington Cemetery," held Lee did not acquire rightful title to the land even though it was lost due to government officials failure to pay taxes on the property after the officials asserted they had in fact paid the taxes before the land was turned over to Lee); Giles v. Harris, 189 U.S. 475, 487–88 (1903) (action under the Fourteenth Amendment, request for an order compelling the county board of registrars to register blacks on the voter rolls, held the complaint failed to state a cause of action for which relief could be granted); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 684, 704–05 (1949) (action for an order to the War Assets Administrator to prevent transfer of coal claimed, held this relief was against the sovereign, reasoning the government should not be impeded in its essential governmental functions); Wheeldin v. Wheeler, 373 U.S. 647, 648–52 (1963) (action under Fourth Amendment challenging unauthorized House of Representatives committee subpoena, avoiding the question whether a cause of action existed by construing the fourth amendment as inapplicable based on the facts); See generally Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

²⁸ See generally Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. Rev. 737 (1991) (exploring why the principle of damage actions against unconstitutional acts by federal officials brought directly under the Constitution was not officially recognized for so long by taking a closer look at *Monroe v. Pape*, 365 U.S. 167 (1961)).

²⁹ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *U.S. v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *McCarthy v. Madigan* 503 U.S. 140 (1992); *Correctional Servs. Corp v. Makesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

³⁰ *Wilkie*, 127 S. Ct. at 2604 ("The point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true. The point is the reasonable fear that a general *Bivens* cure would be worse than the disease.").

³¹ *Bivens*, 403 U.S. 388; 18 U.S.C. §§ 1961–1968 (2006).

³² *Wilkie*, 127 S. Ct. at 2593–96.

Ranch, located in Hot Springs County, Wyoming.³³ The ranch is checker-boarded with other lands belonging to the State of Wyoming, the Federal Government, and other private owners.³⁴ Unbeknownst to Robbins at the time of his purchase, the BLM had previously bartered with the prior owner of the land for an easement to use and maintain a road running across the ranch which allowed public access to other federal lands.³⁵ In return the BLM agreed to rent a right-of-way on a different part of the road to the ranch, which allowed for access to remote portions of the ranch.³⁶ After Robbins purchased the land he recorded a warranty deed.³⁷ Since the BLM failed to record the easement before Robbins filed the deed, per Wyoming law, Robbins received title to the land free and clear of the easement.³⁸ When the BLM realized its mistake, a BLM official demanded Robbins reinstate the easement.³⁹ Robbins refused.⁴⁰ This initiated a seven-year standoff between the BLM and Robbins, in which the BLM continually made threats, harassed, used intimidation tactics, and generally gave Robbins a hard time in an attempt to reinstate the easement.⁴¹ The BLM trespassed on the ranch, refused to maintain roadways to provide access to isolated sections of the ranch, brought unfounded criminal charges against Robbins, and canceled his Special Recreation Use Permit and grazing permits.⁴² BLM officials also tried to enlist other federal agencies in the harassment spectacle.⁴³ The harassment had a significant impact on Robbins's ability to organize cattle drives, and forced him to spend "hundreds of thousands of dollars in costs and attorney's fees" to stave off the BLM.⁴⁴ In a last ditch effort to fend off the BLM Robbins brought suit seeking damages, declaratory, and injunctive relief under the *Bivens* Rule and the RICO Act.⁴⁵ Robbins claimed the BLM tried to extort an easement from him and that it violated his Fourth and

³³ *Id.* at 2593 (High Island Ranch used to be a guest ranch and mock cattle drive business).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Wilkie*, 127 S. Ct. at 2593.; *see also* WYO. STAT. ANN. § 34-1-120 (2005).

³⁹ *Wilkie*, 127 S. Ct. at 2593.

⁴⁰ *Id.*

⁴¹ *Id.* at 2594-95.

⁴² *Id.*

⁴³ *Id.* at 2611 (Ginsburg, J., concurring in part, dissenting in part) ("BLM was not content with the arrows in its own quiver. Robbins charged that BLM officials sought to enlist other federal agencies in their efforts to harass him. In one troubling incident, a BLM employee . . . pressured a Bureau of Indian Affairs (BIA) manager to impound Robbins' cattle, asserting that he was 'a bad character' and that 'something need[ed] to be done with [him].'"

⁴⁴ *Id.* at 2611 (Ginsburg, J., concurring in part, dissenting in part).

⁴⁵ *Wilkie*, 127 S. Ct. at 2590. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. IV).

Fifth Amendment rights.⁴⁶ The Supreme Court disagreed and held that Robbins did not have a valid claim under *Bivens* for remedies.⁴⁷

A. *Bivens v. Six Unknown Fed. Narcotics Agents*

In *Bivens v. Six Unknown Fed. Narcotics Agents*, the Court had to determine whether there was a cause of action under the United States Constitution which gave *Bivens* a remedy for a Fourth Amendment violation.⁴⁸ The Court held monetary damages were an appropriate remedy for federal agent's unconstitutional conduct against a private citizen.⁴⁹ *Bivens* alleged that Federal Bureau of Narcotics agents, acting under the color of federal authority, made a warrantless entry of his apartment, searched the apartment, and subsequently arrested him on narcotics charges.⁵⁰ All of this was without probable cause.⁵¹ *Bivens* sued the federal government, claiming he should receive damages for his "humiliation, embarrassment, and mental suffering" stemming from "the agents' unlawful conduct."⁵² He sought \$15,000 for each agent involved in the arrest from the United States government.⁵³

Federal courts have the power to award damages for violations of "constitutionally protected interests," therefore the traditional judicial remedy of awarding damages is appropriate in *Bivens* type situations.⁵⁴ The Supreme Court held damages to be an appropriate remedy for this sort of Fourth Amendment violation.⁵⁵ The Court had to address the merits of *Bivens*' claim because this was the first time it had looked at whether there was an implied cause of action under the United States Constitution, and specifically the Fourth Amendment.⁵⁶ Justice Brennan, writing the majority opinion, stated American citizens have an

⁴⁶ *Wilkie*, 127 S. Ct. at 2596.

⁴⁷ *Id.* at 2597, 2608.

⁴⁸ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .")

⁴⁹ *Bivens*, 403 U.S. at 389.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 389-90.

⁵³ *Id.* at 398 (Harlan, J., concurring).

⁵⁴ *Id.* at 399 (Harlan, J., concurring).

⁵⁵ *Bivens*, 403 U.S. at 397.

⁵⁶ *Id.*

“absolute right to be free from unlawful searches and seizures” under the Fourth Amendment.⁵⁷ The judiciary has a fundamental duty to protect this right.⁵⁸

As a result of the constitutional infringement and the violation of Bivens’ personal liberty at the hands of the federal agents, the Court created the *Bivens* rule as a constitutional remedy.⁵⁹ The Court inferred the *Bivens* rule from the Constitution itself, which allowed Bivens to state a cause of action for damages directly under the Fourth Amendment for violations of his constitutional rights.⁶⁰ The Court believed damages were historically “regarded as the ordinary remedy for an invasion of personal interests in liberty.”⁶¹ The Court regarded the federal agents’ capacity and authority to influence the behavior of others to be a determining factor in its decision to grant a remedy.⁶² “[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”⁶³

Bivens’s dissent forcefully objected, declaring the Court had no authority to read a damages remedy into the Constitution.⁶⁴ Justice Black said, “The courts of the United States as well as those of the States are choked with lawsuits. . . . The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the states.”⁶⁵

⁵⁷ *Id.* at 392.

⁵⁸ *Id.* at 392 (“[The Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”) (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

⁵⁹ *Bivens*, 403 U.S. at 395.

⁶⁰ *Id.*

⁶¹ *Bivens*, 403 U.S. at 395; *see also* *Nixon v. Condon*, 286 U.S. 73, 81 (1932) (involving a case where an African American brought an action against Texas election judges in order to recover damages for their refusal to permit him to cast his vote at a primary election due to his race).

⁶² *Bivens*, 403 U.S. at 392.

⁶³ *Id.* at 392. Respondents attempted to argue the petitioners’ suit involved rights of privacy, therefore the only way to obtain money damages was by a tort claim, “under state law, in the state courts.” *Id.* at 390. The Court disagreed with this analysis believing it imposed too great of a restriction on the Fourth Amendment, which “operates as a limitation upon the exercise of federal power . . . [a]nd where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” *Id.* at 391-92.

⁶⁴ *Id.* at 427-28 (Black, J., dissenting).

⁶⁵ *Id.* at 428-29 (Black, J., dissenting).

According to Justice Harlan, in his powerful, well-reasoned concurrence, the disagreement about whether the federal courts are powerless to accord a litigant damages “for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment.”⁶⁶ Justice Harlan countered the dissent’s reasoning stating, “[The] possibility of ‘frivolous’ claims [do not] warrant closing the courthouse doors to people in *Bivens* situations There are other ways of coping with frivolous lawsuits.”⁶⁷

The *Bivens* Court adhered to the principle that a victim of Fourth Amendment violations caused by federal officers should be allowed a monetary claim for relief.⁶⁸ A fair reading of the *Bivens* decision reveals the majority was not mainly concerned with deterrence, but instead with the idea that “the judiciary has a duty to enforce the Constitution . . . [so] the Court must ensure that each individual receives an adequate remedy for the violation of constitutional rights.”⁶⁹ The Court did not define what other types of circumstances would also justify such a remedy.⁷⁰ In fact, the lower federal courts were given very little guidance to determine the extent to which the Constitution should be used to create and take advantage of the damages remedy.⁷¹

B. *Bivens Evolution*

Before contemplating a full analysis of the most recent constitutional damages claim before the Supreme Court, *Wilkie v. Robbins*, it is necessary to examine the evolution of *Bivens* case law since the decision was handed down in 1971. Following its debut, *Bivens* has not been confined to Fourth Amendment violations. The United States Supreme Court has applied the “*Bivens* rule,” “*Bivens* remedy,” or

⁶⁶ *Bivens*, 403 U.S. at 402 (Harlan, J., concurring).

⁶⁷ *Id.* at 410 (Harlan, J., concurring).

⁶⁸ *Id.* at 389.

⁶⁹ See, e.g., Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) (proposing a need to correct the wrong turns taken by the Court in the *Bivens* progeny so damages action against federal officials who violate an individuals’ constitutional rights is preserved because the Constitution is “meant to circumscribe the power of government where it threatens to encroach on individuals.”) *Id.*

⁷⁰ *Bivens*, 403 U.S. at 397 (The Court went on to quote *Marbury v. Madison*, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” but their use of vague language left the effects of the opinion on ice) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

⁷¹ Nathan R. Horne, Casenote, *Removing the “Special” from the “Special Factors” Analysis in Bivens Actions: Vennes v. An Unknown Number of Unidentified Agents of the United States*, 28 CREIGHTON L. REV. 795, 807-09 (1995).

“*Bivens* claims” to other constitutional violations involving other amendments, while further clarifying the rule along the way.⁷²

1. Broadening *Bivens*

Immediately after the *Bivens* ruling, it became apparent the holding was ambiguous as to whether *Bivens* had created a new cause of action that could also apply to violations of other constitutional amendments.⁷³ The Supreme Court allowed a private cause of action for the first time after *Bivens* in *Davis v. Passerman*, based on a violation of the Fifth Amendment’s Equal Protection Clause.⁷⁴ Davis brought a suit against her previous employer, a former congressman, based on sexual discrimination and sought damages in the form of backpay for the time she would have been working.⁷⁵ The congressman felt that although Davis had been an “able, energetic, and very hard worker” as his administrative assistant, he preferred a male and he let her know as much.⁷⁶ The Court determined that a remedy existed under *Bivens* because Davis’s constitutional rights had been violated and there were “no effective means other than the judiciary to vindicate these rights.”⁷⁷ The *Davis* holding developed an expectation that a violation of a constitutional right entitled a plaintiff to a *Bivens* remedy where there were no alternative forms of federal or state relief available.⁷⁸

⁷² The Court has extended *Bivens* to Fifth Amendment equal protection claims, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979); to some, but not all Eighth Amendment claims in *Carlson v. Green*, 446 U.S. 14, 23-24 (1980); *McCarthy v. Madigan* 503 U.S. 140 (1992); but not in *Correctional Servs. Corp v. Makesko*, 534 U.S. 61, 74 (2001), to First Amendment claims in *Bush v. Lucas*, 462 U.S. 367, 389-90 (1983), to Fifth Amendment due process claims in *U.S. v. Stanley*, 483 U.S. 669, 685-86 (1987); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983). An especially stark example of the Court’s unwillingness to see the constitutional source of rights is in *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988), in which the Court completely failed to acknowledge the plaintiffs’ constitutional claim. See generally, Sonya Gidumal, *McCarthy v. Madigan: Exhaustion of Administrative Agency Remedies and Bivens*, Note, 7 ADMIN. L. J. AM. U. 373, 390 (1993) (giving an articulate background on *Bivens* holdings and subsequent interpretations).

⁷³ Marilyn Sydeski, *Righting Constitutional Wrongs: The Development of a Constitutionally Implied Cause of Action for Damages*, 19 DUQ. L. REV. 107, 114 (1980-81) (arguing that there was uncertainty in the federal courts as to how far *Bivens* extended).

⁷⁴ *Davis*, 442 U.S. at 234 (1979) (the Fifth Amendment states “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V).

⁷⁵ *Id.* at 231.

⁷⁶ *Id.* at 230. “Dear Mrs. Davis . . . You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion.” *Id.*

⁷⁷ *Id.* at 243. The Court, again cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), in support of their desire to give Davis a cause of action. *Davis*, 442 U.S. at 242.

⁷⁸ *Davis*, 442 U.S. at 248 (“[A] plaintiff seeking a damages remedy under the Constitution must first demonstrate that his constitutional rights have been violated.”).

The very next year, *Carlson v. Green* presented the Supreme Court with an Eighth Amendment *Bivens* remedy question.⁷⁹ In *Carlson*, a federal prisoner's estate claimed the decedent's Eighth Amendment constitutional guarantee of "no cruel and unusual punishment" had been violated.⁸⁰ While incarcerated, the decedent was given scant and deficient medical attention.⁸¹ The administratrix of the estate sought compensatory and punitive damages for the alleged constitutional violations under the *Bivens* rule.⁸² The Court held a damages remedy could be implied directly from the Eighth Amendment and allowed the *Bivens* damages claim.⁸³ The *Carlson* Court suggested *Bivens* established a "right to recover damages against [a federal agent] in federal court" for constitutional violations, even if there was not a statute conferring this right.⁸⁴ Using dicta from *Bivens*, the Court also addressed two factors which would preclude a *Bivens* claim:

The first is when defendants demonstrate 'special factors counseling hesitation in the absence of affirmative action by Congress.'⁸⁵ The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.⁸⁶

An examination of *Bivens*, *Davis*, and *Carlson* make it reasonable to believe that the Court wanted to provide flexible guidelines for those desiring a *Bivens* remedy. After *Bivens*, *Davis*, and *Carlson* the necessary elements for a *Bivens* remedy were: first to prove a constitutional right had been violated and second, to prove judicial

⁷⁹ *Carlson v. Green*, 446 U.S. 14, 16 (1980).

⁸⁰ *Id.* at 16-18.

⁸¹ *Id.* at 16 n.1.

⁸² *Id.* (referring in the allegations by the estate that the Federal Correction Centers failed to recognize and treat the decedent's asthmatic condition, which ultimately led to his death).

⁸³ *Id.* at 19 (addressing the factors that would preclude *Carlson's* claim). "First, the case involves no special factors counseling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* (referring and citing *Davis*, 442 U.S. at 246). "Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress [as there is no remedy in the Federal Tort Acts Claim]." *Carlson*, 446 U.S. at 19.

⁸⁴ *Carlson*, 446 U.S. at 18. Justice Rehnquist's dissent stated, "in my view, absent a clear indication from congress, federal courts lack the authority to grant damages relief for constitutional violations." *Id.* at 41 (Rehnquist, J., dissenting)).

⁸⁵ *Id.* (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)); *Davis v. Passman*, 442 U.S. 228, 245 (1979)).

⁸⁶ *Carlson*, 446 U.S. at 41 (citing *Bivens*, 403 U.S. at 397) (emphasis supplied).

relief in the form of damages was appropriate.⁸⁷ Before *Carlson*, the damages remedy for constitutional violations seemed to be limited to circumstances where no other relief was available, but after *Carlson* it looked as though it was possible for a *Bivens* remedy to be appropriate, even if legislative relief was also available.⁸⁸ Under *Carlson*, which read *Bivens* broadly, a *Bivens* remedy was afforded to a greater number of victims of constitutional violations.⁸⁹ The expectation of a continued broad application of the *Bivens* remedy was quickly shot down by the Supreme Court's decisions following *Carlson*, as the Court has systematically and methodically closed off *Bivens* remedies under the Constitution.⁹⁰

2. *Bivens Reined In*

In the early 1980s, the Court began to place stringent limits on *Bivens* remedies.⁹¹ *Bush v. Lucas*, decided just three years after the *Carlson* decision was handed down, held it “inappropriate” to supplement a “regulatory scheme” with a judicial remedy due to Congress’s capability of addressing the issue.⁹² Bush, an aerospace engineer employed by NASA, gave “highly critical” public statements to the media directed at his employer.⁹³ After making the statements, Bush was demoted.⁹⁴ Bush argued the demotion was a retaliatory act and as a result a violation

⁸⁷ See Marilyn Sydeski, *Righting Constitutional Wrongs: The Development of a Constitutionally Implied Cause of Action for Damages*, 19 DUQ. L. REV. 107, 130 (1980). Stating that when making as analysis of *Bivens*, *Davis*, and *Carlson*:

There are certain guidelines that can be ascertained. Initially, the plaintiff must not only demonstrate that his claim involves a constitutional right, but must also prove the violation of that right. Once this has been established, the plaintiff’s complaint will be dismissed, unless it can be determined that judicial relief in the form of damages is appropriate. . . . Additionally . . . the court must be certain that equally effective alternative remedies are not available to the plaintiff.

Id. at 130-31.

⁸⁸ See Charles Saperstein, *The Bivens Doctrine: Ten Years Down the Road*, 47 BROOK. L. REV. 125-26, 134-36 & nn. 49-59 (1980) (discussing *Bivens* cases regarding whether to extend the remedy to other amendments).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding enlisted Navy men could not bring suit under Constitution); *U.S. v. Stanley*, 483 U.S. 669, 685-86 (1987) (holding no *Bivens* remedy was available for former military service man administered LSD while on active duty); *Bush v. Lucas*, 462 U.S. 367, 389-90 (1983) (holding civil service remedies are not as effective as individual damage claims while finding that it would still be “inappropriate to supplement a judicial remedy when Congress was more capable of dealing with the problem”); *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988) (holding improper denial of social security benefits did not give rise to cause of action under Constitution).

⁹² *Bush*, 462 U.S. at 389-90.

⁹³ *Id.* at 369.

⁹⁴ *Id.*

of his First Amendment rights.⁹⁵ A review board found while Bush's statements were "somewhat exaggerated, [they] 'were not wholly without truth.'"⁹⁶ The board proposed Bush "be restored to his former position" and receive backpay.⁹⁷ Bush, not satisfied with the board's solution, insisted the "civil service remedies were not effective" in remedying the First Amendment violation, "therefore it did not fully compensate him for the harm he suffered."⁹⁸

The Court began its analysis by assuming Bush's First Amendment rights had in fact been violated.⁹⁹ It then turned its attention to the remedy provided by Congress.¹⁰⁰ The Court acknowledged that existing remedial schemes did not offer complete relief, but insisted "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."¹⁰¹ The Court indicated its belief that the extensive nature of current civil service remedies was adequate.¹⁰² Therefore, a judicial remedy was not mandatory, and it would be "inappropriate" to sanction a *Bivens* remedy.¹⁰³

The same day as the *Bush* decision, the Court decided *Chappell v. Wallace*, yet another case wherein a plaintiff sought a *Bivens* remedy.¹⁰⁴ *Chappell* dealt with Naval officers who alleged their commanding officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity" due to their race.¹⁰⁵ A unanimous Court held enlisted military personnel would not be allowed to bring a *Bivens* claim to recover damages when a superior officer is implicated for alleged Constitutional violations.¹⁰⁶ It proclaimed, "*Bivens* and its progeny, has expressly cautioned that . . . a remedy will not be available when 'special factors counselling hesitation' are

⁹⁵ *Id.* at 370.

⁹⁶ *Id.* at 371.

⁹⁷ *Id.*

⁹⁸ *Bush*, 462 U.S. at 372.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 380-89.

¹⁰¹ *Bush*, 462 U.S. at 389. The Supreme Court declined to recognize such a claim because a complex mix of legislation, executive orders, and detailed Civil Service Commission regulations comprised an "elaborate, comprehensive scheme" that provided substantive and procedural remedies for improper federal personnel actions. *Id.* at 385; *see also* *Wilson v. Libby*, 498 F.Supp. 2d 74, 84 (D. D.C. 2007).

¹⁰² *Bush*, 462 U.S. at 390.

¹⁰³ *Id.* ("We are convinced Congress is in a better position to decide whether or not the public interest would be served by creating [a remedy]").

¹⁰⁴ *Chappell v. Wallace*, 462 U.S. 296, 297 (1983).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 297.

present.”¹⁰⁷ The Court held a “special status” exists for the military, due to the two systems of justice, one for civilians and one for military personnel.¹⁰⁸ This “special status” of military personnel precludes enlisted men from bringing suits against superior officers for damages.¹⁰⁹

The “special factors counseling hesitation” take into consideration the need for strict discipline and regulation within the military rank and file.¹¹⁰ “It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.”¹¹¹ Therefore, the Court reasoned, it would be “inappropriate” to allow enlisted personnel a *Bivens* remedy.¹¹²

Four years later, in *United States v. Stanley*, the Court held a *Bivens* remedy was not available to a former Army sergeant who had been secretly fed the hallucinogen LSD by government agents.¹¹³ The Army secretly administered LSD to Stanley as part of one of its drug testing programs.¹¹⁴ Army officials in charge of the program told Stanley they wanted to involve him in a program to test clothing and equipment designed for chemical warfare, but never let on their true intentions of testing the effects of hallucinogenic drugs.¹¹⁵ As a result, “Stanley . . . suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion ‘awake from sleep at night and, without reason, violently beat his wife and children, later being

¹⁰⁷ *Id.* at 298 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)); see also *Carlson v. Green*, 446 U.S. 14, 18 (1980).

¹⁰⁸ *Chappell*, 462 U.S. at 303-04.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 300.

¹¹¹ *Chappell*, 462 U.S. at 301.

¹¹² *Id.* at 300.

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 301 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)).

¹¹³ *U.S. v. Stanley*, 483 U.S. 669, 685-86 (1987).

¹¹⁴ *Id.* at 671-72.

¹¹⁵ *Id.* at 671. James Stanley was one of over 1000 army personnel who participated in secret experiments designed to test the effects of hallucinogenic drugs on human beings. See generally Richard W. McKee, Note, *Defending an Indifferent Constitution: The Plight of Soldiers Used as Guinea Pigs*, 31 ARIZ. L. REV. 633, 633 (1989).

unable to recall the entire incident.”¹¹⁶ Years later, Stanley received a letter from the army asking for his cooperation in a study on the long-term effects of LSD on “volunteers who participated” in the 1958 study.¹¹⁷ This was the first time Stanley heard about the drug-testing program or knew of his involvement in it.¹¹⁸

In forming its opinion, the Court again relied on and reaffirmed the “special factors counseling hesitation in the absence of affirmative action by Congress” rationalization used in *Chappell*.¹¹⁹ Again it held an uninvited intrusion into military affairs by the judiciary would be “inappropriate.”¹²⁰ “The ‘special facto[r]’ that ‘counsel[s] hesitation’ is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”¹²¹ The Court reasserted that damages actions brought directly under the Constitution are not appropriate when “special factors counseling hesitation” are present.¹²² The *Stanley* Court repeated the *Chappell* analysis: the military’s unique position in society, its imperative need for discipline, its separate, established system of justice, together with the explicit constitutional grant of power to the Congress to govern the armed forces were all concerns constituting “special factors.”¹²³ According to the Court, Congress had not authorized judicial intervention into this area; therefore Congress retained sole authority over these types of military matters.¹²⁴ The Court reasoned the lack of congressional authority allowing federal courts to provide a *Bivens* remedy in a military situation underscored the soundness for its decision in this case.¹²⁵ The holding in *Stanley* substantially veered away from *Bivens*’ original

¹¹⁶ *Stanley*, 483 U.S. at 671. Stanley was discharged from the army in 1969 and one year later was divorced from his wife. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 672.

¹¹⁹ *Id.* at 678 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)). Stanley tried to distinguish himself from *Chappell* by arguing his case did not implicate military chain of command like *Chappell*, because the people administering the drugs were not his superior officers. *Stanley*, 483 U.S. at 679-80.

¹²⁰ *Stanley*, 483 U.S. at 676.

¹²¹ *Id.* at 683.

¹²² *Id.* The Court relied on the “incident to service” doctrine set out in *Feres v. U.S.*, 340 U.S. 135, 146 (1950), reasoning this standard would afford adequate protection, yet not be so extreme as to bar *Bivens* actions entirely. *Id.* at 673-701. *Feres* held that the government was not liable under the Federal Tort Claims Act for injuries to servicemen arising out of or in the course of activity incident to military service. *Feres*, 340 U.S. at 146.

¹²³ *Stanley*, 483 U.S. at 682-83.

¹²⁴ *Id.* at 679-80.

¹²⁵ *Id.* at 682. The Court said just because a matter is within Congress’s power does not mean it is exempt from a *Bivens* remedy: “[w]hat is distinctive here is the specificity of that technically superfluous grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field.”

rationale, which was to provide a remedy for severe constitutional violations at the hands of government officials.¹²⁶

In 1988, the Court decided *Schweiker v. Chilicky*.¹²⁷ In *Schweiker*, three separate individuals brought suit for alleged due process violations after their Social Security disability benefits were terminated.¹²⁸ The plaintiffs received disability benefits under Title II of the Social Security Act, until their benefits were terminated pursuant to the “continued disability review” program initiated by the Department of Health and Human Services.¹²⁹ Termination of benefits was somewhat widespread within the Social Security Administration.¹³⁰ In response, Congress passed the 1984 Reform Act, which provided for a continuation of benefits after a state agency determined a recipient as no longer disabled.¹³¹ This legislation did not apply to persons, such as the plaintiffs, whose benefits had terminated before 1983.¹³² Although the plaintiffs’ benefits were subsequently restored to disability status and they were awarded retroactive benefits in full, the individuals argued that by using impermissible quotas, government officials had deprived them of fair treatment in a distribution of benefits.¹³³ The issue was “whether the improper denial of Social Security disability benefits, allegedly

Id.; See also Kevin J. Mahoney, Comment, U.S. v. Stanley: *Has the Feres Doctrine become a Grant of Absolute Immunity?*, 23 NEW ENG. L. REV. 767, 780-89 (1989) (Discussing that the Court not only refused to expand *Bivens* by allowing servicemen to recover under the Constitution, but reasoned that the *Feres* doctrine had a more justifiable application to service related *Bivens* actions. The “incident to service” test under *Feres* and furthered in *Stanley* has been expanded beyond acceptable justification. The Court has granted absolute immunity to military officials and has paved the way for these officials to freely violate the constitutional rights of their subordinates.).

¹²⁶ See McKee, *supra* note 115, at 652, (arguing “[b]y holding that military personnel cannot seek redress for violation of their most fundamental rights, the Court not only condones the outrageous conduct of the government in subjecting soldiers to chemical and nuclear experiments without their consent or knowledge, but may actually encourage such conduct.”).

¹²⁷ *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

¹²⁸ *Id.* (a due process claim would have been a violation of their Fifth Amendment rights).

¹²⁹ *Id.* at 414-15 (The three people were entitled to benefits under Title II of the Social Security Act of 1980, whereby the federal government provides disability benefits to individuals who have contributed to the Social Security program, but who are unable to engage in substantial gainful employment due to a physical or mental impairment).

¹³⁰ *Id.* at 417 (The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated, and then reinstated, between March 1981 and April 1984.) “[T]he message [to] State agencies, swamped with cases, was to deny, deny, deny . . . we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free [f]all toward economic chaos.” *Id.* at 416.

¹³¹ *Id.* at 415-16.

¹³² *Chilicky*, 487 U.S. at 417-18.

¹³³ *Id.* at 418-19.

resulting from violations of due process by government officials who administered the federal Social Security program, may give rise to a cause of action for money damages against those government officials.”¹³⁴

The opinion began by restating the *Bivens* limitation of “special factors counseling hesitation in the absence of affirmative action by Congress.”¹³⁵ These factors include judicial deference when Congress had not spoken.¹³⁶ The Court then explained that when there is even an inkling that Congress provided adequate remedial measures for constitutional violations within a government program, which occur in the course of the programs’ administration, *Bivens* remedies would not be available.¹³⁷ This holding is based on the premise that “Congress is in a better position to decide whether or not the public interest would be served by creating [a new substantive legal liability.]”¹³⁸

Then the *Chilicky* Court reaffirmed its holding from *Bush*.¹³⁹ In comparing *Bush* and *Chilicky*, the Court conceded “Congress has failed to provide for ‘complete relief’” in both situations.¹⁴⁰ The Court held that when Congress failed to address the issue of remedies for specific individuals, courts are precluded from inferring a constitutional damages remedy if the legislation provided *any* remedial measures.¹⁴¹ The Court acknowledged these “decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.”¹⁴² Consequently, federal courts are able to use the decisions from *Bush* and *Chilicky* “as a tool in other factual situations to restrict the viability of a *Bivens* action, and one can only speculate what factors in the future might be sufficient to prohibit an individual’s cause of action when he or she suffered a constitutional tort at the hands of a federal official.”¹⁴³

¹³⁴ *Id.* at 414.

¹³⁵ *Id.* at 412 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)).

¹³⁶ *Chilicky*, 487 U.S. at 412.

¹³⁷ *Id.* at 423.

¹³⁸ *Id.* at 426–27 (quoting *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

¹³⁹ *Chilicky*, 487 U.S. at 425.

¹⁴⁰ *Id.*

¹⁴¹ Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L.Q. 1087, 1126 (Winter 1992). “*Schweiker v. Chilicky* was the final step in the wrong direction. Making no pretense of searching for congressional intent, the Court deferred to the congressional remedial scheme merely because Congress had already created a remedy to deal with the wrongful termination of disability benefits in an area in which Congress arguably enjoyed special expertise that the Court lacked.” *Id.*

¹⁴² *Chilicky*, 487 U.S. at 421.

¹⁴³ See Gidumal, *supra* note 72, at 400.

In the decade following the *Bivens* decision, the Court extended causes of action under the Constitution to other constitutional amendments when plaintiffs suffered at the hands of government officials.¹⁴⁴ Then in the 1980s, the Court began to rein in the *Bivens* holding and began to give more deference to Congress, citing Congress's ability to create appropriate statutory remedial schemes. In *Bush v. Lucas*, the Court found it "inappropriate" to allow a cause of action if Congress already created a remedial scheme.¹⁴⁵ Then in *Chappell v. Wallace*, the Court prohibited enlisted men from bringing suit under Constitution.¹⁴⁶ The Court further quashed hopes of a *Bivens* comeback in *United States v. Stanley*, when it held a *Bivens* remedy unavailable for a former military serviceman administered LSD while on active duty.¹⁴⁷ *Bivens* was further constrained in *Schweiker v. Chilicky* when the Court deferred to Congress and the Social Security Administration, holding there to be no cause of action available, even if the alternative remedy was inadequate. Then in 1992 there seemed to be a small glimmer of hope for *Bivens* in *McCarthy v. Madigan*.¹⁴⁸

3. *Bivens* Briefly Revitalized?

In *McCarthy v. Madigan*, the Supreme Court held a prisoner who sought only monetary damages need not exhaust administrative remedies before bringing a *Bivens* cause of action.¹⁴⁹ This was the first time in over a decade the Court ruled in favor of *Bivens*, which provided optimism that the Court had changed its tune and would extend *Bivens* in the future. This turned out to be a hope against hopes.

John J. McCarthy, a federal prisoner, filed a *pro se* complaint against federal prison officials, alleging the officials "had violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his needs and medical condition resulting from a back operation and a history of psychiatric problems."¹⁵⁰ McCarthy sought monetary damages.¹⁵¹

In determining whether McCarthy had a *Bivens* claim, the Court had to decide whether he was required to exhaust all administrative remedies first.¹⁵² The

¹⁴⁴ *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *U.S. v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

¹⁴⁵ *Bush*, 462 U.S. at 389–90.

¹⁴⁶ *Chappell*, 462 U.S. at 305.

¹⁴⁷ *Stanley*, 483 U.S. at 685–86.

¹⁴⁸ *McCarthy v. Madigan*, 503 U.S. 140 (1992).

¹⁴⁹ *Id.* at 156.

¹⁵⁰ *Id.* at 142.

¹⁵¹ *Id.*

¹⁵² *Id.* at 144.

Court considered the doctrine of exhaustion and why it is often a prerequisite to asserting a federal claim.¹⁵³ The general rule insists that parties exhaust any administrative remedies before seeking relief in federal court.¹⁵⁴ The *McCarthy* Court veered away from this general rule.¹⁵⁵ When making a determination of whether exhaustion of administrative remedies was necessary in this context, the Court relied on precedent directing it to look at congressional intent.¹⁵⁶ “We conclude that petitioner McCarthy need not have exhausted his constitutional claim for money damages. Congress did not properly address the appropriateness of requiring exhaustion [and] McCarthy’s individual interests outweighed countervailing institutional interests favoring exhaustion.”¹⁵⁷

The Court found inadequacies in the administrative procedures because of the “heavy burdens” placed on inmates.¹⁵⁸ Furthermore, there was not an option for an award of monetary relief in the remedial scheme.¹⁵⁹ A unanimous Court

¹⁵³ *Id.* “The doctrine of exhaustion . . . govern[s] the timing of federal court decision making.” *McCarthy*, 503 U.S. at 144.

¹⁵⁴ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 155-56 (1967) (discussing the doctrine of administrative remedies, the Court held since there was no explicit statutory authority barring pre-enforcement review, then a pre-enforcement judicial determination was allowed); *McKart v. U.S.*, 395 U.S. 185, 195 (1969) (complaining party may have his/her complaint resolved through the administrative process without the court’s interference, thereby reducing the number of cases that are heard by federal courts).

¹⁵⁵ See *McCarthy*, 503 U.S. at 144-45 (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 & n.9 (1938) (discussing cases as far back as 1898)).

¹⁵⁶ *McCarthy*, 503 U.S. at 144; See *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982) “legislative purpose . . . is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme”

¹⁵⁷ *McCarthy*, 503 U.S. at 149.

The general grievance procedure heavily burdens the individual interests of the petitioning inmate in two ways. First, the procedure imposes short, successive filing deadlines that create a high risk of forfeiture of a claim for failure to comply. Second, the administrative ‘remedy’ does not authorize an award of monetary damages—the only relief requested by McCarthy in this action. The combination of these features means that the prisoner seeking only money damages has everything to lose and nothing to gain from being required to exhaust his claim under the internal grievance procedure.

Id. at 152; See also George Wright, *The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 AM. J. TRIAL ADVOC. 83, 93 (Summer 1987) (“[T]he application of the exhaustion doctrine is, in the absence of a statute requiring exhaustion, a matter of the court’s discretion to be reviewed only for abuse of discretion.”).

¹⁵⁸ *McCarthy*, 503 U.S. at 153. First, inmates were only given a short period of time to file any grievances and/or a formal written complaint to the prison warden. *Id.* Second, even if the filing was done on time, there was no authorization for an award of monetary damages, which was what McCarthy was requesting. *Id.*

¹⁵⁹ *Id.* at 154.

in *McCarthy* held a prisoner seeking money damages does not need to exhaust administrative remedies before filing a *Bivens* claim in federal court.¹⁶⁰ The holding allowed the Court to express that Congress's intentions preclude a *Bivens* claim or that judicial intrusion would be "inappropriate."¹⁶¹ Based on the *McCarthy* holding, a plaintiff probably will not be given the chance to bring a *Bivens* claim if any alternative remedies are available.¹⁶² Although the initial response to *McCarthy* may have suggested a comeback for *Bivens*, the *McCarthy* holding only created a false sense of hope for the future of *Bivens*.¹⁶³ Congress had not dealt with whether a prisoner had a claim in federal court if the only relief sought was money.¹⁶⁴ That was the only reason the Court allowed a *Bivens* cause of action.¹⁶⁵ The Court still perceived constitutional damages an issue for the Congress and its decision in *McCarthy v. Madigan* was no change from this view.¹⁶⁶

4. *Bivens Shackled Again*

In 2001, the Supreme Court handed yet another prison decision in *Correctional Services Corp. v. Malesko*.¹⁶⁷ The case involved an inmate sent to a halfway house run by a private corporation under contract with the federal government.¹⁶⁸ Malesko claimed he suffered injuries from the contractor's negligence in refusing to permit him to use an elevator and instead forcing him to take stairs to his fifth-floor room, even though he had a noted preexisting heart condition and had special permission to use the elevator.¹⁶⁹ Malesko sustained an injury to his left ear when he suffered a heart attack and fell as a result of climbing stairs to his room.¹⁷⁰ The inmate brought a suit for an alleged violation of his Eighth Amendment rights.¹⁷¹ He sought a remedy under the *Bivens* doctrine.¹⁷²

¹⁶⁰ *Id.* at 156. Prior to *Bivens*, the Supreme Court held in *Bell v. Hood*, 327 U.S. 678, 685 (1946) that federal courts had the power to hear cases brought under the Constitution. The Court reserved judgment, however, on whether an action brought against a federal agent for his unconstitutional conduct was a cause of action for which relief could be granted. *McCarthy*, 503 U.S. at 142-43.

¹⁶¹ See Gidumal, *supra* note 72, at 405 (although the precise holding of *McCarthy* was expected, it did not change the fact that the *Bivens* remedy has been virtually eliminated).

¹⁶² *Id.*

¹⁶³ See Gidumal, *supra* note 72, at 379.

¹⁶⁴ *Id.* at 406.

¹⁶⁵ *McCarthy*, 503 U.S. at 148. Also, note that Justice Blackmun wrote the majority opinion in *McCarthy*, but it was he who had cautioned in his *Bivens* dissent that the majority had opened the door to an "avalanche" of federal cases, and it was Congress's job to provide adequate remedies. *Id.*

¹⁶⁶ See Gidumal, *supra* note 72, at 406.

¹⁶⁷ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

¹⁶⁸ *Id.* at 62.

¹⁶⁹ *Id.* at 64.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 64-65.

The Court considered whether to extend *Bivens* “to confer a right of action for damages against private entities acting under the color of federal law.”¹⁷³ The *Malesko* Court declined to “extend” *Bivens* liability to reach independent contractors working for the government since they are not under its direct control.¹⁷⁴

The Court’s decision, although disappointing, did not come as shock.¹⁷⁵ Justice Scalia, concurring in the *Malesko* holding, declared *Bivens* a product of an era bygone where the need for remedies for violations was far more widespread.¹⁷⁶ Justice Scalia believed an “even greater reason to abandon” the earlier approach in the constitutional field, since Congress lacks power to repudiate a *Bivens* action.¹⁷⁷ He said that he would limit previous *Bivens* holdings “to the precise circumstances that they involved.”¹⁷⁸ This is not all that surprising, since the Justice Scalia, as well as the majority, likely knew there would be other cases requesting *Bivens* remedies that it would hear in the future such as *Wilkie*.

III. *WILKIE* ANALYSIS

A. *New Bivens Rule Set Forth in Wilkie*

In *Wilkie v. Robbins*, the Court explained the current *Bivens* rule and how it is to be applied.¹⁷⁹ As of now, when a “constitutionally recognized interest is adversely affected by the actions of federal employees,” the Court asks: (1) is there an alternative judicial process that can “protect . . . the interest” which is “convincing” enough for the Court to refrain from providing a new remedy; or (2) if there is no “convincing” alternative process, are there “special factors” which favor or disfavor authorizing a new kind of remedy?¹⁸⁰ If the answer to question one is yes, then a new remedy will not be created.¹⁸¹ However, if the answer to the

¹⁷³ *Malesko*, 534 U.S. at 66.

¹⁷⁴ *Id.* at 66-67.

¹⁷⁵ Daniel J. Meltzer, *The Supreme Court’s Passivity*, 2002 SUP. CT. REV. 343, 356-57 (2002) (arguing *Malesko*’s case was not a strong to begin with because: the complaint did not seem to state a meritorious claim; and, in *FDIC v. Meyer*, 510 U.S. 471 (1994), the Supreme Court held no *Bivens* action lies against a federal agency (as distinguished from a federal officer) “the purpose of *Bivens* is to deter the officer,” not the agency).

¹⁷⁶ *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action. . . .”); see also Metzler, *supra* note 175.

¹⁷⁷ *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (stating “the Constitution can presumably not even be repudiated by Congress,” meaning the law within the Constitution is superior to all others, including that of Congress).

¹⁷⁸ *Id.*

¹⁷⁹ *Wilkie*, 127 S. Ct. 2588, 2598 (stating the current *Bivens* rule).

¹⁸⁰ *Id.* at 2598 (citing *Bush*, 462 U.S. at 378).

¹⁸¹ *Id.* at 2599.

first question is no, then the Court will address the second question.¹⁸² At step two, if there is no “convincing” alternative process, or an absence of an alternative process, the Court will look at certain factors discussed below to determine whether a new remedy should be created.¹⁸³

The Court considers the following factors in creating a new remedy: adequacy of alternative remedies; difficulty in defining legitimate action by government actors; the importance of protecting the constitutional interest; the demand and cost on the judicial system from creating a mass of new litigation in the area; the difficulty in defining a broader doctrine; and the ability of Congress to legislate a remedy.¹⁸⁴ From this list, the *Wilkie* Court most meticulously scrutinized the difficulty in defining a broader doctrine, deference to Congress’s ability to create a remedy, and the fear of creating a slew of new litigation.¹⁸⁵ Until the *Wilkie* decision however, fear of creating a mass of new litigation was never a sufficient reason to deny a *Bivens* remedy.¹⁸⁶ In fact, the dissent in *Bivens* sounds remarkably similar to the majority’s reasoning in *Wilkie*.¹⁸⁷ In *Bivens* Justice Black said, “The courts of the United States as well as those of the States are choked with lawsuits. . . . The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the states”¹⁸⁸

The *Wilkie* Court addressed whether to expand the *Bivens* remedy in order to allow actions to be brought for administrative officials’ retaliation in response to private citizens asserting their constitutionally protected rights, specifically the unwillingness of Robbins to cooperate with the BLM’s agenda.¹⁸⁹ The Court refused to extend the *Bivens* remedy to include damages for retaliation against the exercise of property ownership rights.¹⁹⁰ In reaching its conclusion, the *Wilkie* court applied the two-step analysis, stating:

¹⁸² *Id.* at 2600.

¹⁸³ *Id.* at 2598–2605.

¹⁸⁴ *Id.* at 2605; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971).

¹⁸⁵ *Wilkie*, 127 S. Ct. at 2604-05.

¹⁸⁶ *Bivens*, 403 U.S. at 411 (Harlan, J., concurring).

Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current 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.

¹⁸⁷ *Id.* at 428 (Black, J., dissenting).

¹⁸⁸ *Id.* at 428-29 (Black, J., dissenting).

¹⁸⁹ *Wilkie*, 127 S. Ct. at 2596.

¹⁹⁰ *Id.*

[O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: ‘the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.’¹⁹¹

The Court began by identifying the cases in which it had previously granted a *Bivens* remedy and then cases in which it had not.¹⁹² It realized that “most instances . . . have found a *Bivens* remedy unjustified.”¹⁹³ The Court then explained that an “assess[ment of] the significance of any alternative remedies at step one has to begin by categorizing the difficulties Robbins experienced in dealing with the [BLM].”¹⁹⁴

1. *Bivens Step One in Wilkie*

Robbins’ difficulties with the BLM broke down into “four main groups: torts or tort-like injuries inflicted on him, charges brought against him, unfavorable agency actions, and offensive behavior by Bureau employees falling outside those three categories.”¹⁹⁵ The Court discussed the remedies available for each of these categories: for the “tort and tort-like” injuries Robbins had civil remedies available; for the “unfavorable agency actions” he could have brought administrative claims; he could defend himself against the criminal charges; finally, it was unclear who the proper defendant would have been or what the best remedy would have been for the behaviors that “elude[d] classification.”¹⁹⁶ In short, the Court found that

¹⁹¹ *Id.* at 2598 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1988)).

¹⁹² *Wilkie*, 127 S. Ct. at 2597.

¹⁹³ *Id.* at 2597-98 (finding a *Bivens* remedy in a “Fourth Amendment violation by federal officers,” and “two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, and the second for an Eight Amendment violation by prison officials,” and holding against finding a *Bivens* remedy in “claims of First Amendment violations by federal employers, harm to military personnel through activity incident to service, wrongful denials of Social Security disability benefits, . . . claims against federal agencies, or against private prisons.” (citations omitted)).

¹⁹⁴ *Id.* at 2598.

¹⁹⁵ *Wilkie*, 127 S. Ct. at 2598.

¹⁹⁶ *Id.* at 2599.

“Robbins ha[d] an administrative, and ultimately a judicial, process for vindicating *virtually* all of his complaints.”¹⁹⁷ The Court recognized the difficulties inherent in requiring Robbins to address all the claims with separate remedies and decided to more closely examine the situation by moving to “*Bivens* step two.”¹⁹⁸ The Court was forced to analyze the factors for step two because:

[T]he forums of defense and redress open to Robbins are a patchwork, an assemblage of state and federal, administrative and judicial benches applying regulations, statutes and common law rules. It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim.¹⁹⁹

2. *Bivens Step Two in Wilkie*

In its analysis of step two, the Court cited competing interests involved in the facts of the case, mainly “the inadequacy of discrete, incident-by-incident remedies” and the difficulty in “defining limits to legitimate [actions]” by the government actors.²⁰⁰ Robbins’ interest was to use the *Bivens* remedy to address all his damages in the aggregate, which conflicted with the Court’s interest in avoiding the difficulty of defining legitimate boundaries of government activity.²⁰¹ The Court fully acknowledged Robbins’ situation to be different from the previous *Bivens* claims it ruled on.²⁰² The Court recognized Robbins did not want “vindication” for just one claim, like previous cases where the Court extended a *Bivens* remedy.²⁰³ Robbins sought a remedy to redress a series of actions by government officials,

¹⁹⁷ *Id.* at 2600 (emphasis added).

He suffered no charges of wrongdoing on his own part without an opportunity to defend himself (and, in the case of the criminal charges, to recoup the consequent expense, though a judge found his claim wanting). And final agency action, as in cancelling permits, for example was open to administrative and judicial review. . . .

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

Here, the competing arguments boil down to one on a side: from Robbins, the inadequacy of discrete, incident-by-incident remedies; and from the Government and its employees, the difficulty of defining limits to legitimate zeal on the public’s behalf in situations where hard bargaining is to be expected in the back-and-forth between public and private interests that the Government’s employees engage in every day. *Id.*

²⁰¹ *Wilkie*, 127 S. Ct. at 2600.

²⁰² *Id.* (“Robbins’ situation does not call for creating a constitutional cause of action for want of other means of vindication, so he is unlike the plaintiffs in cases recognizing freestanding claims. . . .”).

²⁰³ *Id.*

resulting in multiple, multifarious injuries.²⁰⁴ The Court then compared the retaliation claims in *Wilkie* with the other damages claims the Court previously ruled on and decided Robbins's claim did not fit the mold because "those cases turn[ed] on an allegation of *impermissible purpose and motivation*. . . ."²⁰⁵ The questions in the earlier cases were "what for" questions which have "definite" answers, according to the Court, and *Wilkie* "could not be resolved merely by answering a 'what for' question or two."²⁰⁶ A "what for" question asks: what is the government's purpose for taking an action, and would the government have taken that action despite an "*impermissible purpose or motivation*."²⁰⁷ Robbins's claim does not fit the "what for" question framework because the government's interest in obtaining an easement was legitimate, so the "what for question has a ready answer in terms of lawful conduct."²⁰⁸

The Court explained the two ways Robbins's retaliation claims could be the basis of liability.²⁰⁹ Either, the government's actions need to "extend beyond the scope of acceptable means for accomplishing the legitimate purpose," or the necessity of a "presence of malice or spite" rendering its actions unconstitutional "even if it would otherwise have been done in the name of hard bargaining."²¹⁰ The Court characterizes the former as an unworkable "too much" standard, and the latter as a "motive-is-all" test which is not the law of the retaliation case precedents.²¹¹ Interestingly, the Court seems to suggest that had Robbins only sought a *Bivens* remedy for the illegitimate activities he would have avoided the "too much" problem and could have possibly earned relief.²¹²

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2601 (emphasis added) (comparing Robbins's claim to First Amendment speech claims, Fifth Amendment privilege against self-incrimination claims, and Sixth Amendment privilege to a trial by jury claims); *See also* Rankin v. McPherson, 483 U.S. 378, 382-83 (1987), Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973), U.S. v. Jackson, 390 U.S. 570, 582-83 (1968).

²⁰⁶ *Wilkie*, 127 S. Ct. at 2602 (stating a person would have to show "that the conduct at issue was constitutionally protected, that it was a substantial or motivating factor" in the government's actions, and that the government's actions were "illicit." (quoting Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 675, 116 S.Ct. 2342 (1996)).

²⁰⁷ *Wilkie*, 127 S. Ct. at 2601 (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2602 n. 10.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Wilkie*, 127 S. Ct. at 2603-04.

Robbins could avoid the 'too much' problem by fairly describing the Government behavior alleged as illegality in attempting to obtain a property interest for nothing, but that is not a fair summary of the body of allegations before us, according to which defendants' improper exercise of the Government's "regulatory powers" is essential to the claim. . . . Rather, the bulk of Robbins's charges go to actions that, on their own, fall within the Government's enforcement power.

Clearly, the fact that some of the actions the BLM undertook were legitimate is a hurdle the Court was hesitant to cross.²¹³ The *Wilkie* Court went to great pains to point out that the goals of the BLM were legitimate, although all the actions in pursuit of that goal were not.²¹⁴ This mixed bag of claims, according to the Court, begged for a “too much” standard which “can never be as reliable a guide to conduct” as a “what for standard, and for that reason counts against recognizing freestanding liability in a case like this.”²¹⁵ Claiming a “too much” standard is unworkable does not account for the illegitimate acts of the BLM officials though; it is a justification, albeit weak, for not recognizing a claim for “too much” *legitimate* action by the government.²¹⁶ Again, the Court’s reasoning does not address situations where illegitimate government activities are mixed with legitimate activities, no matter whether the government’s goal is legitimate or not.²¹⁷

B. The Court Chose Not to Give Relief Even Though It Acknowledged No Other Realistic Alternatives for Relief

The Court’s failure to extend a *Bivens* remedy to Robbins is troubling because it fully recognized and admitted Robbins had no realistic means of addressing the actions in the aggregate.²¹⁸ The underlying reason the Court declined to broaden the *Bivens* rule is for fear of “invit[ing] claims in every sphere of *legitimate* governmental action affecting property interests. . . .”²¹⁹ The Court regretfully claimed a “general *Bivens* cure would be worse than the disease.”²²⁰ In the most

²¹³ *Id.* at 2602.

The impossibility of fitting Robbins’s claim into the simple ‘what for’ framework is demonstrated, repeatedly, by recalling the various actions he complains about. Most of them, such as strictly enforcing rules against trespass or conditions on grazing permits, are legitimate tactics designed to improve the Government’s negotiating position.

²¹⁴ *Id.* at 2602 n.10 (“[t]he official act remains an instance of hard bargaining intended to induce the plaintiff to come to *legitimate* terms.”(emphasis added)). “[W]e are confronting a continuing process in which each side has a *legitimate* purpose in taking action contrary to the other’s interest.” *Id.* (emphasis added), *but see* *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (holding that a the government actors could not compel the coastal resident to contribute to their legitimate goal, and trying to force their legitimate goal without compensation would outright violate the takings clause).

²¹⁵ *Wilkie*, 127 S. Ct. at 2601-02.

²¹⁶ *Id.* at 2602 (explaining how the Government can use their powers to improve their bargaining position when dealing with people, and that they “have discretion to enforce the law to the letter.”).

²¹⁷ *Id.* at 2601.

²¹⁸ *Id.* at 2601 (“Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.”).

²¹⁹ *Id.* at 2604.

²²⁰ *Id.* at 2604.

recent *Bivens* cases, the Court time and again maintained its power is “sharply limited” and that Congress has primary, if not exclusive, responsibility for fleshing out the operation of schemes of federal regulation.²²¹ With this said, it should be mentioned that a passive judiciary cannot keep the federal government within its constitutionally granted boundaries.²²² “[P]rofessions of judicial passivity represent a dramatic departure from an important tradition in the Anglo-American legal system . . . courts have a distinctive responsibility for promoting legal coherence.”²²³

C. *The Dissent in Wilkie*

Justice Ginsburg makes a forceful and persuasive argument in her dissent. One BLM official, Justice Ginsburg noted, was told to give Robbins a warning that if he continued to defy the BLM’s demands, “there would be war, a long war and [the BLM] would outlast him and outspend him.”²²⁴ “Even if we allowed that the BLM employees had a permissible objective throughout their harassment of Robbins, and also that they pursued their goal through ‘legitimate tactics,’ it would not follow that Robbins failed to state a retaliation claim amenable to judicial resolution.”²²⁵ Justice Ginsburg argued the majority’s fear of being overruled by *Bivens* claims is exaggerated.²²⁶ She insisted the “Court need only ask whether Robbins engaged in constitutionally protected conduct (resisting the surrender of his property sans compensation), and if so, whether that was the reason BLM agents harassed him.”²²⁷ Justice Ginsburg stated she understood the “government . . . should not be hampered in pursuing lawful means to drive a hard bargain . . . ,” but their actions in this instance “have a closer relationship to [an] armed thug’s demand. . . .”²²⁸

Justice Ginsburg admonished the majority for trying to defer to the legislature stating, “[u]nless and until Congress acts, however, the Court should not shy away from the effort to ensure that bedrock constitutional rights do not become ‘merely precatory.’”²²⁹ “Shutting the door to all Plaintiffs, even those roughed

²²¹ See Metzler, *supra* note 175, at 408-09 (“[I]t is striking . . . how the Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system in the everyday disputes . . .”).

²²² *Id.*

²²³ *Id.* at 345.

²²⁴ *Wilkie*, 127 S. Ct. at 2610 (Ginsburg, J., dissenting).

²²⁵ *Id.* at 2614 (Ginsburg, J., dissenting).

²²⁶ *Id.* at 2615 (Ginsburg, J., dissenting).

²²⁷ *Id.* (Ginsburg, J., dissenting).

²²⁸ *Id.* at 2615 n.7 (Ginsburg, J., dissenting).

²²⁹ *Id.* at 2618 (Ginsburg, J., dissenting) (citing *Davis v. Passman*, 42 U.S. 228, 242 (1982)).

up as badly as Robbins, is a measure too extreme.”²³⁰ The type of harassment Robbins suffered is extraordinary; therefore similar cases are not likely to come before the courts.²³¹ The dissent astutely suggests developing a standard similar to the one established to remedy sexual harassment.²³² “[W]here a plaintiff could prove a pattern of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a *Bivens* suit would provide a remedy.”²³³

As Justice Ginsburg pointed out, the “Fifth Amendment [should] provide an effective check on federal officers who abuse their regulatory powers by harassing and punishing property owners who refuse to surrender their property . . . without fair compensation.”²³⁴ This would inevitably involve allowing what the Court considers a “too much” standard.²³⁵ However, in the face of no other alternative for a citizen to address a series of wrongs against them, whether some were legitimate or not, the Court should not be shy of extending a current doctrine to provide a remedy.²³⁶ The Court should also ensure every individual can get an *adequate* remedy.²³⁷ The *Wilkie* Court recognized Robbins had no adequate remedy, and should have accepted the challenge of fashioning a *Bivens* remedy for this type of situation.²³⁸ An appropriate remedy would not be as hard to devise within the *Bivens*-framework as the Court suggests.²³⁹

D. Implications of the Wilkie Decision

The *Wilkie* holding left Robbins, and those who find themselves in similar situations, with no realistic alternative other than to deal with and defend against the multitude of individual actions, separately.²⁴⁰ Addressing all of the claims discretely is an inefficient use of time and resources, resulting in extraordinary legal fees, or what Robbins called a “death by a thousand cuts.”²⁴¹ Since a “judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be

²³⁰ *Wilkie*, 127 S. Ct. at 2616 (Ginsburg, J., dissenting).

²³¹ *Id.* at 2615 n.8 (Ginsburg, J., dissenting).

²³² *Id.* at 2616 (Ginsburg, J. dissenting).

²³³ *Id.* (Ginsburg, J., dissenting).

²³⁴ *Id.* at 2609 (Ginsburg, J., dissenting).

²³⁵ *Id.* at 2591.

²³⁶ *Carlson*, 446 U.S. at 14 (“[It is] established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.”).

²³⁷ See, e.g., Bandes, *supra* note 69, at 297.

²³⁸ *Wilkie*, 127 S. Ct at 2604-05.

²³⁹ *Id.* at 2604 (defining the limits on excessive legitimate action would be “endlessly knotty to work out.”).

²⁴⁰ *Id.* (citing Respondent’s brief at 40).

²⁴¹ *Id.* at 2600.

endlessly knotty to work out, and a general provision for tort-like liability when Government employees are unduly zealous in pressing a governmental interest affecting property would invite an onslaught of *Bivens* actions,” the Court said “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”²⁴²

1. *Legislation is Unlikely to Solve the Issue*

It is highly unlikely legislation will be passed to provide a remedy since situations such as these are irregular and infrequent.²⁴³ Furthermore, it seems implausible, if not impossible, for Congress to create a regulatory scheme which would effectively protect individuals in *Wilkie*-type situations.²⁴⁴ This is due to the millions of possible variants which cannot possibly be anticipated in advance.²⁴⁵ While Congress may be able to fashion a remedy in hindsight to encompass a situation like Robbins’, the remedy may not be effective nor encompassing enough for other plaintiffs in similar situations.²⁴⁶ Additionally, several such actions may be required before Congressional actors feel the need to enact a regulatory scheme to address the problem.²⁴⁷

By the same token, it is extremely unrealistic to defer to Congress to formulate a remedy. Congress has had since 1971 to create statutory provisions

²⁴² *Id.* at 2604-05.

²⁴³ *Id.* at 2616 n.8 (Ginsburg, J., dissenting).

²⁴⁴ *Wilkie*, 127 S. Ct. at 2615-16 (Ginsburg, J., dissenting).

²⁴⁵ Compare *Wilkie*, 127 S. Ct. at 2605 (“Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government’s employees.”), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 115 S.Ct. 1447, 1453 (1995) (“Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.” (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803))), and *Wilkie*, 127 S. Ct. at 2616 n.8 (Ginsburg, J., dissenting).

²⁴⁶ Compare Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court’s “New Federalism,”* 55 ME. L. REV. 63, 85 (2003) (discussing whether Congress could create new remedies for sex discrimination in the workplace, this article recognized that “Congress may well find it difficult to use the enforcement power to create imaginative new remedies to address old and familiar problems.”), with Bandes, *supra* note 69, at 306 (discussing remedies in *Bivens* cases the author notes that “Rights have gone unremedied in the past, and some go unremedied today. The question, however, is not whether every right does have a remedy, but whether every right should have one.”).

²⁴⁷ Compare George F. Sanderson III, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 315, 340 (1998-1999) (discussing the problems Congress has had in creating adequate remedies to the problems in mass tort litigation); with Joseph L. Franco, *Needed, Private Attorneys General: Empowering Consumers to Reform the Household Goods Moving Industry*, 9 LEWIS & CLARK L. REV. 981, 987-88 (2005) (discussing Congress’ problems in creating remedies that adequately protect consumers).

which would allow *Bivens* remedies, or authorize a similar cause of action.²⁴⁸ At this point, Congress has been operating under the assumption that *Bivens* stood for the proposition that there is a cause of action to remedy constitutional rights violations committed by a federal official; arguably this is evidence of Congress's approval of the Court extending a *Bivens* remedy in certain *sui generis* cases.²⁴⁹ Furthermore, it has been observed that a refusal by the Court to extend *Bivens* to include additional constitutional violations, such as the one in *Wilkie*, interfere with the general framework of the United States system of government.²⁵⁰ Bricks cannot be made without straw, and the Court's refusal to mint new bricks of justice from the straw of *Bivens* weakens the foundation of a good functional government.²⁵¹ Judicial decisions are an important part of a healthy government because they provide precedents for lower courts and lawyers to use in enforcing and upholding the laws of the country, as well as provide the legislative branch with information to use when creating new laws and remedies in the future.²⁵²

2. *The Bivens Remedy Could be Tailored to Address Cases like Wilkie*

The Court has set other workable precedents which sound remarkable similar to a "too much" standard.²⁵³ Allowing a *Bivens* claim to be brought for excessive use of the government's regulatory powers would not, if tailored correctly, result

²⁴⁸ *Biven*, 403 U.S. at 388. The Federal Employers Liability Reform and Tort Compensation Act of 1988, PL 100-694, is an example. 28 U.S.C. § 2679 (1988). This Act made the Federal Tort Claims Act (FTCA) provide an exclusive remedy for plaintiffs seeking money damages, stemming from a tort, against of a federal employee acting with the scope of employment, 28 U.S.C. § 2679(b)(1)(1988), but the exclusivity provision expressly left open the right of plaintiffs to sue federal employees under *Bivens* for constitutional violations, *see* 28 U.S.C. § 2679(b)(2)(A)(1988).

Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort [a constitutional tort] as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who violated their Constitutional rights.

HR Rep 100- 700, 100th Cong, 2d Sess, 1998 USCCAN 5945, 5950.

²⁴⁹ *See* Micheal J. Kaufman, *A Little "Right" Musick: The Unconstitutional Judicial Creation of Private Rights of Action Under Sections 10(b) of the Securities Exchange Act*, 72 WASH. U. L. Q. 287, 334-35 (1994) (discussing how the lack of Congressional response to the Courts creation of private 10b claims under the Securities Exchange Act can be read as approval for creation of those claims. "The promptness and precision with which Congress amended its securities statutes in the wake of these Supreme Court decisions lends credence to the suggestion that the absence of such prompt and precise action indicates congressional approval of other Supreme Court decisions.").

²⁵⁰ *See* Metzler, *supra* note 175, at 357-58 (judicial decisions are an important piece of the United States framework of government because they are used as precedence for later decisions, interpreted by lower courts, used by lawyer in making argument, and employed by Congress for enactments.).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Compare* Rochin v. Cal., 342 U.S. 165, 172 (1952) (establishing a "shocks-the-conscience" test for due process violations), *with* *Wilkie*, 127 S. Ct. at 2616 ("Sexual harassment jurisprudence

in a tide of new *Bivens* claims.²⁵⁴ The solution to avoiding an onslaught of new *Bivens* claims lies in how the Court defines the upper limit of acceptable activity.²⁵⁵ Allowing a *Bivens* remedy for a pattern of *completely* legitimate governmental activity may invite a slew of claims, but Robbins sought a remedy for a pattern of governmental activity, *some* of which was legitimate, but in the aggregate amounted to a “campaign of harassment and intimidation.”²⁵⁶

3. *The Bivens Remedy Should Be Available When Government Employees Engage in Illegitimate Action*

The *Bivens* remedy should be made available when there are at least some illegitimate individual actions, and in the aggregate those actions amount to absurd and unreasonable infringement by government actors on constitutionally recognized rights regardless of whether the overall goal is legitimate.²⁵⁷ The extent of the infringement, especially if it would be financially devastating for an injured party to defend all the claims discretely, should give more than enough reason for finding factors in favor of extending a *Bivens* remedy.²⁵⁸ The rarity of government abuse in this fashion is yet another reason to extend a *Bivens* remedy.²⁵⁹ The infrequency is also why providing a remedy in these situations will not instigate a rash of people bringing new *Bivens* claims. This kind of extreme overreaching by the government simply does not happen often enough.²⁶⁰

is a helpful guide. Title VII, the Court has held, does not provide a remedy for every epithet or offensive remark. ‘For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the condition of the victim’s employment and create an abusive work environment.’”(citations omitted))(Ginsburg, J., dissenting).

²⁵⁴ See *Wilkie v. Robbins*, 127 S. Ct. 2588, 2604 (2007) (the majority’s main fear is a tide of new litigation which would, it believed, result from allowing a *Bivens* remedy for Robbins’s situation).

²⁵⁵ *Id.* at 2614 (Ginsburg, J., dissenting).

²⁵⁶ *Id.* at 2594.

²⁵⁷ *Id.* at 2601-04 (where the majority focuses on the fact that the goal was legitimate, even though some of actions were not).

²⁵⁸ *Id.* at 2609-11 (Justice Ginsburg notes in her dissent that the facts, viewed in the light most favorable to Robbins were much worse than what the majority recognized in the Court opinion).

²⁵⁹ *Id.* at 2616 n.8 (Ginsburg, J., dissenting).

²⁶⁰ *Wilkie*, 127 S. Ct. at 2616 n.8 (noting the rarity of this kind of harassment). As of May 1985, only thirty of the more than 12,000 *Bivens* suits filed since 1971 resulted in judgments on behalf of plaintiffs. Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343 (1989). Although the figures are dated, more recent statistics are unlikely to be much different given the Court’s accelerated efforts to curtail the scope of *Bivens* over the last two decades. *Id.* Despite the absence of systematic empirical data since 1985, it nevertheless appears that recoveries from both settlements and litigated judgments are exceedingly rare. *Id.* For example, as the largest category of *Bivens* suits, prisoner litigation provides an excellent example of continued low success rates for plaintiffs. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 66 (1999). From 1992 to 1994, prisoners filed 1,513 *Bivens* claims against officials of the Bureau of Prisons that resulted in two monetary judgments and sixteen monetary settlements. *Id.* at n.6.

The *Bivens* remedy could easily encompass series of government activities which result in an unreasonable infringement on a constitutionally protected interest. Some of the activities must be illegitimate for the rule to apply, and the amount of actions must be sufficient that pursuing a remedy for each action discretely would be a financial or unrealistic burden.²⁶¹

E. *The Court's Motivation*

Due to its concern with stepping on the toes of Congress and separation of power, the Court seemingly forgot the primary purpose of the *Bivens* cause of action, to redress constitutional violations committed by federal officials when other remedies are unavailable or inadequate.²⁶² *Bivens* was not originally intended as a deterrent.²⁶³ The decisions up to this point have almost entirely eliminated *Bivens* as a constitutional remedy.²⁶⁴ The Court's stance is equivalent to guaranteeing that those who suffer constitutional violations at the hands of the federal government are not given the opportunity to receive fair compensation.²⁶⁵ It is against this "backdrop of apparent judicial animosity towards the *Bivens* action that the question of whether alternate remedies must be exhausted prior to bringing an action in a court must be answered."²⁶⁶ Based on the *Wilkie* holding, it seems the answer is that if there are any alternative remedies, then a *Bivens* cause of action is unavailable.

Over the past twenty-five years, since *Bush v. Lucas* in 1983, the Court has rejected almost every attempt to assert a claim under the *Bivens* remedy and has given one justification or another for doing so.²⁶⁷ Consequently there was no reason to believe *Wilkie* would be any different from this general trend. At this

²⁶¹ *Wilkie*, 127 S. Ct. at 2611 (Ginsburg, J., dissenting).

²⁶² Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. REV. 337, 343-45 (observing that although federal courts have been inundated by *Bivens* lawsuits, there has been no problem finding against plaintiffs). Of the some 12,000 *Bivens* suits filed, only 30 have resulted in judgments for the plaintiff. *Id.* at 343. Of these, a number have been reversed on appeal and only four judgments actually have been paid by the individual federal defendants. *Id.*

²⁶³ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392-06 (1971).

²⁶⁴ See Rosen, *supra* note 262, at 377.

²⁶⁵ *Id.* ("[T]he Supreme Court must awaken to the fact that its recent decisions have essentially eliminated [the *Bivens*] remedy. The Court must act to give the *Bivens* plaintiff, whose 'cherished constitutional rights' were in fact violated, at least a fair opportunity to obtain redress for those violations.").

²⁶⁶ Howard Jay Pollack, *In The Right Place At The Wrong Time: Should Federal Prisoners Be Required To Exhaust Their Administrative Remedies Prior To Bringing a Bivens-Type Claim in Federal Court?*, 42 SYRACUSE L. REV. 241, 242-43 & nn.10-16 (1991).

²⁶⁷ *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *U.S. v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988), *McCarthy v. Madigan*, 503 U.S. 140 (1992), *Fed. Deposit Insurance Corp. (FDIC) v. Meyer*, 510 U.S. 471 (1994), *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

point in time, the members of the Court are a very different mix than in the 1970's and early 1980's.²⁶⁸ When *Bivens* was formulated, the Court stated plaintiffs were entitled to money damages for violations of their Constitutional rights and the Court had the power to create those remedies under the Constitution.²⁶⁹ Now the Court says Congress is in charge of creating a remedy, or if there is *any* other remedy available then *Bivens* is unavailable.²⁷⁰ "We have come from a fairly strong presumption in favor of the *Bivens* doctrine, to a fairly strong presumption against it."²⁷¹

Prior to *Wilkie*, the Court had narrowed *Bivens* to the following doctrine: a *Bivens* claim was considered a free-standing, generally implied, cause of action independent of state law; a *Bivens* claim could only be brought against individual defendants, not agencies of the federal government; a *Bivens* cause of action was not appropriate when Congress provided alternative forms of relief, even if it did not provide complete relief; a *Bivens* claim was precluded without affirmative action by Congress if special factors counseling hesitation were present.²⁷²

The Court's decision in *Wilkie* is not surprising because the *Bivens* holding has been significantly narrowed since its inception over thirty-five years ago.²⁷³ A substantial amount of commentary has developed arguing that the dissenters in *Bivens* have become the majority.²⁷⁴ *Wilkie* is simply demonstrative of the Court's reticence toward *Bivens* causes of action.²⁷⁵

²⁶⁸ *Wilkie*, 127 S. Ct. at 2588.

²⁶⁹ *Bivens*, 403 U.S. at 397.

²⁷⁰ *Wilkie*, 127 S. Ct. at 2604-05.

²⁷¹ Chemerinsky, *supra* note 4, at 676-77.

²⁷² See generally Erwin Chemerinsky, *Federal Jurisdiction*, 523, 526-31 (2d ed. 1994); Meyer, 510 U.S. at 485 (1994) ("the purpose of *Bivens* is to deter the officer. . .") (emphasis in original); Lumen N. Mulligan, *Why Bivens Won't Die: The Legacy of Peoples v. CCA Detention Centers*, 83 DENV. U. L. REV. 685, 692 (2006); Betsy J. Grey, *Preemption of Bivens Claims: How Clearly Must Congress Speak?*, 70 WASH. U. L. Q. 1087, 1088 (1992) (arguing *Bivens* actions are available except where Congress clearly states its intent to supersede them); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1552-53 (1972) ("[W]here the judiciary independently infers remedies directly from constitutional provisions, Congress may legislate an alternative remedial scheme which it considers equally effective in enforcing the Constitution and which the Court, in the process of judicial review, deems an adequate substitute for the displaced remedy."); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1142-45 (1989).

²⁷³ *Wilkie*, 127 S. Ct. at 2604-05.

²⁷⁴ See George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L. J. 263 (1989) (Commentators assert the *Bivens* dissenters' rise to power has allowed the justices, concerned that the judiciary lacks the authority to imply damages remedies, to betray *Bivens*' core goals).

²⁷⁵ *Wilkie*, 127 S. Ct. at 2604-05.

F. *The Future of Bivens Remedies Following Wilkie*

The positions of the Justices in the *Wilkie* decision, and the recent holdings of the Supreme Court, foreshadow the future of *Bivens* rulings. During the 2006 term, eight opinions were released the same week as the *Wilkie* opinion.²⁷⁶ It is important to evaluate how the Court is divided on the *Bivens* remedy, and in general, because *Wilkie* was the first time that the *Bivens* remedy has been addressed by the Court since the newest Justice Samuel Alito joined the Court on January 31, 2006.²⁷⁷

Looking at all the cases decided during the week the *Wilkie* decision was released provides a snapshot of how the Court is split.²⁷⁸ In this snapshot there is a noticeable pattern on how the Court divides in its opinions.²⁷⁹ In the midst

²⁷⁶ *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Fed. Election Comm'n v. Wisconsin Right to Live, Inc.*, 127 S. Ct. 2652 (2007); *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553 (2007); *Nat'l Ass. of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Leegin Creative Leather Prod. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *Wilkie*, 127 S. Ct. at 2588.

²⁷⁷ *Wilkie*, 127 S. Ct. at 2588.

²⁷⁸ Compare *Morse*, 127 S. Ct. at 2618 (majority opinion by CJ. Roberts, J. Thomas concurring, J. Alito concurring, J. Breyer concurring in part and dissenting in part, J. Stevens dissenting joined by J. Souter and J. Ginsburg), with *Fed. Election Comm'n*, 127 S. Ct. at 2652 (majority opinion by CJ. Roberts for parts I & II and an opinion for parts III & IV that J. Alito joins, J. Alito concurring, J. Scalia concurring joined by J. Kennedy and J. Thomas, J. Souter dissenting joined by J. Stevens, J. Ginsburg and J. Breyer), with *Wilkie*, 127 S. Ct. at 2588 (majority opinion by J. Souter, J. Thomas concurring joined by J. Scalia, J. Ginsburg dissenting joined by J. Stevens), with *Hein*, 127 S. Ct. at 2553 (majority opinion by J. Alito joined by CJ. Roberts and J. Kennedy, J. Kennedy concurring joined by J. Scalia and J. Thomas, J. Souter dissenting joined by J. Stevens, Ginsburg and Breyer), with *Defenders of Wildlife*, 127 S. Ct. at 2518 (majority opinion by J. Alito joined by JJ. Roberts, Scalia, Kennedy, and Thomas, J. Souter dissenting joined by JJ. Ginsburg, Breyer, and Stevens), with *Parents*, 127 S. Ct. at 2738 (majority opinion by CJ. Roberts joined by JJ. Scalia, Thomas, and Alito, J. Thomas concurring joined by Kennedy, J. Stevens dissenting joined by JJ. Breyer, Souter, and Ginsburg), with *Leegin*, 127 S. Ct. at 2705 (majority opinion by J. Kennedy for the Court, J. Breyer dissenting joined by JJ. Stevens, Souter, and Ginsburg), with *Panetti*, 127 S. Ct. at 2842 (majority opinion by J. Kennedy for the Court, J. Thomas dissenting with CJ. Roberts and JJ. Scalia and Alito).

²⁷⁹ In five of these eight cases, JJ. Souter, Stevens, Ginsburg, and Breyer joined in dissenting opinions. See *Fed. Election Comm'n*, 127 S. Ct. at 2652; *Hein*, 127 S. Ct. at 2553; *Defenders of Wildlife*, 127 S. Ct. at 2518; *Parents*, 127 S. Ct. at 2738; *Leegin*, 127 S. Ct. at 2705. In those same five cases, the Majority opinion was either written for the Court, concurred with, or specifically joined by JJ. Kennedy, Scalia, Thomas, Alito, and CJ. Roberts. *Id.* CJ. Roberts, along with JJ. Kennedy, Scalia, Thomas, and Alito often come together in agreement, while JJ. Souter, Breyer, Stevens, and Ginsburg tend to agree. *Id.* This split can also be seen in the remaining three cases from that week. See *Morse*, 127 S. Ct. at 2618; *Wilkie*, 127 S. Ct. at 2588; *Panetti*, 127 S. Ct. at 2842. In *Morse*, JJ. Ginsburg, Stevens, and Souter joined in a dissenting opinion, while J. Breyer concurred and dissented in part. *Morse*, 127 S. Ct. at 2618. In *Panetti*, J. Kennedy wrote an opinion for the Court in which JJ. Thomas, Roberts, Scalia, and Alito joined in a dissenting opinion. *Panetti*, 127 S. Ct. at 2842.

of these decisions is the *Wilkie* opinion, which was written by Justice Souter.²⁸⁰ Had Justice Alito joined in agreement with Justices Ginsburg, Stevens, Breyer and Souter there would have been a different result.²⁸¹ He did not, and only Justices Ginsburg and Stevens dissented.²⁸² The *Wilkie* opinion is the only opinion out of the eight cases decided that week that Justices Souter and Breyer did not join Justices Ginsburg and Stevens.²⁸³ Instead, Justice Souter wrote the majority opinion, concurred with by Justices Thomas and Scalia, while Justices Ginsburg and Stevens dissented.²⁸⁴ This is important to note, because how the court commonly divides, compared to how the Justices aligned in *Wilkie*, gives an idea of how the Court will approach *Bivens* actions in the future.²⁸⁵ Leading up to *Wilkie*, the *Bivens* remedy had already undergone a period of drought when it came to allowing new causes of action.²⁸⁶ The first time the current Court addressed the *Bivens* remedy in *Wilkie*, the number of Justices that aligned with the majority opinion, along with the concurring Justices, makes a strong statement about how the current Court feels about the *Bivens* remedy.²⁸⁷

Justice Ginsburg and Justice Stevens were the only two justices to support allowing a *Bivens* remedy in the *Wilkie* dissent.²⁸⁸ Not only did Justice Souter and Justice Breyer not join with Justice Ginsburg and Justice Stevens, but Justice Souter wrote the majority opinion in *Wilkie*.²⁸⁹ This makes the future of new *Bivens* remedies seem bleak because of the number of Justices opposed to new *Bivens* remedies.²⁹⁰ Further dismay results from looking at the language some of the Justices in the majority have used in recent cases when discussing *Bivens* remedies. Justice Souter stated in *Wilkie* that remedies for damages resulting from the government overreaching should come from legislation.²⁹¹ Justice Scalia,

²⁸⁰ *Wilkie*, 127 S. Ct. at 2588.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ See *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *U.S. v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61 (2001).

²⁸⁷ *Wilkie*, 127 S. Ct. at 2588 (five justices in the majority, with two justices concurring with the majority opinion, and only two Justices dissenting).

²⁸⁸ *Id.* at 2608.

²⁸⁹ *Id.* at 2593.

²⁹⁰ See *id.* at 2588 (in *Wilkie*, seven justices agreed that a *Bivens* remedy was not appropriate either in the majority or concurring opinions).

²⁹¹ *Id.* at 2604-05 (“We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.”).

who concurred in *Wilkie*, said in *Malesko*, “*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.”²⁹² Additionally, Justice Thomas, joined by Justice Scalia in his *Wilkie* concurrence, stated, “[He] would not extend *Bivens* even if its reasoning logically applied to [a] case.”²⁹³

The weight of the current Court against *Bivens* remedies at this point is clear.²⁹⁴ Only Justice Ginsburg and Justice Stevens seem to support allowing new remedies, while not even Justice Souter agrees.²⁹⁵ On top of that, Justice Thomas and Justice Scalia have openly shown disfavor for *Bivens* remedies, and they commonly disagree with Justice Ginsburg and Justice Stevens in Court opinions.²⁹⁶ The likelihood of getting five justices of the Court to allow a new *Bivens* remedy now is miniscule. It will take the right case, reconsideration of the Court’s power to provide a remedy, and a fresh read of the *Bivens* line of cases for the Court to once again broaden *Bivens*. Although not dead yet, the *Bivens* remedy will likely be narrowed to the point of non-existence, or become forgotten altogether.²⁹⁷

IV. CONCLUSION

Bivens was a landmark decision because it officially gave courts the power to fashion remedies for violations of constitutional rights by federal officials. Early in *Bivens* history, the Court allowed a *Bivens* claim for Fourth Amendment, Fifth Amendment, and Eight Amendment violations, before casting *Bivens* into the scrapheap. The availability of redress for private citizens when enduring harassment resulting in Fifth Amendment violations by government officials is necessary in order to preserve the public’s interest in being secure in individual property rights. There are intense feelings on both sides of the issue regarding private citizen’s sovereignty in their property, and the scope of the government’s ability to interfere with their rights. There must be some check on how much is too much when it comes to the government’s use of their legitimate regulatory powers. A *Bivens* remedy under Robbins’s circumstances would not limit the government’s ability to do its legitimate regulatory tasks, nor would it result in a swarm of new litigation, but rather would protect the private landowner.

²⁹² *Malesko*, 534 U.S at 519 n.3 (Scalia, J., concurring).

²⁹³ *Wilkie*, 127 S. Ct. at 2608.

²⁹⁴ *Id.* at 2604.

²⁹⁵ *Id.* at 2608.

²⁹⁶ *Id.*

²⁹⁷ See Chemerinsky, *supra* note 4, at 678 (“[A]lthough the court is continuing to narrow *Bivens*, it is not overruling or signaling an overruling of *Bivens*. The core of *Bivens* is that if a federal officer violates a constitutional right, there is generally a remedy available. That has not been overturned.”).

Despite the current forecast that it is unlikely for the Court to provide new remedies under *Bivens*, litigants must continue to raise such arguments for redress. The Court has ample room and reasons to allow *Bivens* remedies again in the future. The *Bivens* remedy's original purpose can still outshine the reasons against it in extreme cases where it is needed the most.

Bivens was once a shining ray of hope for individuals who had no other alternative for a remedy. It's time to reincarnate *Bivens*. Existing statutory remedies either require an extremely liberal construction to apply, or would not address all the injuries to a party like Robbins. The *Bivens* rule, however, can and should be tailored to allow a remedy in a Robbins-like situation.