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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

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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. But, the Constitution does not explicitly provide a remedy if a violation of those rights is

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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. 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.” Congress has enacted some regulatory schemes to protect our Constitutional interests. 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. 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. 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.

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).


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. In *Wilkie*, the Court refused to broaden the *Bivens* holding so it would apply to respondent Robbins’s situation. Robbins experienced seven years worth of continued harassment and intimidation by Bureau of Land Management (BLM) officials. 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. There were also administrative claims against Robbins for trespass, land-use violations, fine for unauthorized repairs to the road, and criminal charges. Robbins sought damages as a remedy to the persecution.

The Court’s refusal to apply *Bivens* left Robbins no actionable claim for damages. 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. Justice Ginsburg, writing the dissent, condemned the shortcomings of the majority’s opinion, arguing Robbins should have a claim under *Bivens*.

The ruling in *Wilkie* left the question of what governmental activities are sanctioned and permissible in a rather ambiguous state. 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

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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. An agency may nickel and dime a private citizen into bankruptcy if it so chooses to get what it wants.

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. 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. 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. 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. Private landowners deserve a realistic legal solution to protect themselves from unreasonable governmental harassment when asserting their constitutionally protected rights. There needs to be a remedy allowing for compensation when intimidation occurs. An appropriate source for a remedy in these circumstances should come from the Bivens holding.

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.
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

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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); *Wheelin 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).


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.”).


32 *Wilkie*, 127 S. Ct. at 2593–96.
Ranch, located in Hot Springs County, Wyoming. The ranch is checker-boarded with other lands belonging to the State of Wyoming, the Federal Government, and other private owners. 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. 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. After Robbins purchased the land he recorded a warranty deed. 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. When the BLM realized its mistake, a BLM official demanded Robbins reinstate the easement. Robbins refused. 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. 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. BLM officials also tried to enlist other federal agencies in the harassment spectacle. The harassment had a significant impact on Robbins’s ability to organize cattle drives, and forced him to spend “hundreds of thousands of dollar in costs and attorney’s fees” to stave off the BLM. In a last ditch effort to fend off the BLM Robbins brought suit seeking damages, declaratory, and injunctive relief under the

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

Wilkie, 127 S. Ct. at 2593.

Id.

Id. at 2594-95.

Id.

Id. at 2594-95.

Id.

Id.

Id.

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

Id.

Id.

Id.

Id.

Id.

Id.

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].’”).

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

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

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. The Court held monetary damages were an appropriate remedy for federal agent’s unconstitutional conduct against a private citizen. 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. All of this was without probable cause. Bivens sued the federal government, claiming he should receive damages for his “humiliation, embarrassment, and mental suffering” stemming from “the agents’ unlawful conduct.” He sought $15,000 for each agent involved in the arrest from the United States government.

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. The Supreme Court held damages to be an appropriate remedy for this sort of Fourth Amendment violation. 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. Justice Brennan, writing the majority opinion, stated American citizens have an

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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) (invoking 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.” 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.”

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. 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.” The Court did not define what other types of circumstances would also justify such a remedy. 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.

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

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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)).
“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


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)).


\(^86\) 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


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.


\(^89\) 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. A review board found while Bush’s statements were “somewhat exaggerated, [they] were not wholly without truth.” The board proposed Bush “be restored to his former position” and receive backpay. Bush, not satisfied with the board’s solution, insisted the “civil service remedies were not effective” in remediying the First Amendment violation, “therefore it did not fully compensate him for the harm he suffered.”

The Court began its analysis by assuming Bush’s First Amendment rights had in fact been violated. It then turned its attention to the remedy provided by Congress. 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.” The Court indicated its belief that the extensive nature of current civil service remedies was adequate. Therefore, a judicial remedy was not mandatory, and it would be “inappropriate” to sanction a Bivens remedy.

The same day as the Bush decision, the Court decided Chappell v. Wallace, yet another case wherein a plaintiff sought a Bivens remedy. 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. 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. 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]”).
105 Id.
106 Id. at 297.
present." 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. This “special status” of military personnel precludes enlisted men from bringing suits against superior officers for damages.

The “special factors counseling hesitation” take into consideration the need for strict discipline and regulation within the military rank and file. “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.” Therefore, the Court reasoned, it would be “inappropriate” to allow enlisted personnel a Bivens remedy.

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. The Army secretly administered LSD to Stanley as part of one of its drug testing programs. 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. 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

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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.
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.” Five 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. This was the first time Stanley
heard about the drug-testing program or knew of his involvement in it.

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. Again it held an uninvited intrusion into
military affairs by the judiciary would be “inappropriate.” The ‘special facto[ ]’
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. The Court
reasserted that damages actions brought directly under the Constitution are not
appropriate when “special factors counseling hesitation” are present. 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.” According to the
Court, Congress had not authorized judicial intervention into this area; therefore
Congress retained sole authority over these types of military matters. 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.

The holding in Stanley substantially veered away from Bivens’ original

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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

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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.”).


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 fall 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.”

The opinion began by restating the *Bivens* limitation of “special factors counseling hesitation in the absence of affirmative action by Congress.” These factors include judicial deference when Congress had not spoken. 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. 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].”

Then the *Chilicky* Court reaffirmed its holding from *Bush*. In comparing *Bush* and *Chilicky*, the Court conceded “Congress has failed to provide for ‘complete relief’” in both situations. 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. The Court acknowledged these “decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.” 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.”

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134 Id. at 414.
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. 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. Then in Chappell v. Wallace, the Court prohibited enlisted men from bringing suit under Constitution. 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. 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.

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. 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.” McCarthy sought monetary damages.

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

146 Chappell, 462 U.S. at 305.
147 Stanley, 483 U.S. at 685–86.
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. The general rule insists that parties exhaust any administrative remedies before seeking relief in federal court. The Court veered away from this general rule. 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. "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."

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

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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. The holding allowed the Court to express that Congress’s intentions preclude a *Bivens* claim or that judicial intrusion would be “inappropriate.” 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. 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*. Congress had not dealt with whether a prisoner had a claim in federal court if the only relief sought was money. That was the only reason the Court allowed a *Bivens* cause of action. The Court still perceived constitutional damages an issue for the Congress and its decision in *McCarthy v. Madigan* was no change from this view.

4. *Bivens* Shackled Again

In 2001, the Supreme Court handed yet another prison decision in *Correctional Services Corp. v. Malesko*. The case involved an inmate sent to a halfway house run by a private corporation under contract with the federal government. 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. 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. The inmate brought a suit for an alleged violation of his Eighth Amendment rights. He sought a remedy under the *Bivens* doctrine.

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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.


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 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. 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.

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. 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. Until the *Wilkie* decision however, fear of creating a mass of new litigation was never a sufficient reason to deny a *Bivens* remedy. In fact, the dissent in *Bivens* sounds remarkably similar to the majority’s reasoning in *Wilkie*. 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”

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. The Court refused to extend the *Bivens* remedy to include damages for retaliation against the exercise of property ownership rights. In reaching its conclusion, the *Wilkie* court applied the two-step analysis, stating:

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182 *Id.* at 2600.
183 *Id.* at 2598–2605.
185 *Wilkie*, 127 S. Ct. at 2604-05.
186 *Bivens*, 403 U.S. at 411 (Harlan, J., concurring).
187 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.
188 *Id.* at 428 (Black, J., dissenting).
189 *Id.* at 428-29 (Black, J., dissenting).
190 *Wilkie*, 127 S. Ct. at 2596.
[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.’

The Court began by identifying the cases in which it had previously granted a Bivens remedy and then cases in which it had not. It realized that “most instances . . . have found a Bivens remedy unjustified.” 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].”

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.” 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.” 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 Eighth 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.”\(^\text{197}\) 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 “\textit{Bivens step two}.”\(^\text{198}\) The Court was forced to analyze the factors for step two because:

\[\text{[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 \textit{Bivens} hand, but equally hard to extract any clear lesson that \textit{Bivens} ought to spawn a new claim.}\(^\text{199}\)

\section*{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.\(^\text{200}\) Robbins’ interest was to use the \textit{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.\(^\text{201}\) The Court fully acknowledged Robbins’ situation to be different from the previous \textit{Bivens} claims it ruled on.\(^\text{202}\) The Court recognized Robbins did not want “vindication” for just one claim, like previous cases where the Court extended a \textit{Bivens remedy}.\(^\text{203}\) Robbins sought a remedy to redress a series of actions by government officials,

\(^\text{197}\) \textit{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. \ldots

\(^\text{198}\) \textit{Id.}

\(^\text{199}\) \textit{Id.}

\(^\text{200}\) \textit{Id.}

\(^\text{201}\) \textit{Id.}

\(^\text{202}\) \textit{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. \ldots”).

\(^\text{203}\) \textit{Id.}
resulting in multiple, multifarious injuries. 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. . . .” 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.” 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.” 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.”

The Court explained the two ways Robbins’s retaliation claims could be the basis of liability. 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.” 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. 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.

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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.\textsuperscript{213} The \textit{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.\textsuperscript{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.”\textsuperscript{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” \textit{legitimate} action by the government.\textsuperscript{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.\textsuperscript{217}

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

\begin{footnotesize}
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\item \textsuperscript{213} Id. at 2602.
\item \textsuperscript{214} Id. at 2602 n.10 (“[t]he official act remains an instance of hard bargaining intended to induce the plaintiff to come to \textit{legitimate} terms.”(emphasis added)). “[W]e are confronting a continuing process in which each side has a \textit{legitimate} purpose in taking action contrary to the other’s interest.” \textit{Id.} (emphasis added), \textit{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 \textit{legitimate} goal, and trying to force their \textit{legitimate} goal without compensation would outright violate the takings clause).
\item \textsuperscript{215} \textit{Wilkie}, 127 S. Ct. at 2601-02.
\item \textsuperscript{216} \textit{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.”).
\item \textsuperscript{217} \textit{Id.} at 2601.
\item \textsuperscript{218} \textit{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.”).
\item \textsuperscript{219} \textit{Id.} at 2604.
\item \textsuperscript{220} \textit{Id.} at 2604.
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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 ‘legal 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 overrun 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.

\(^{224}\) *Id* at 2614 (Ginsburg, J., dissenting).

\(^{225}\) *Id* at 2615 (Ginsburg, J., dissenting).

\(^{226}\) *Id* at 2615 n.7 (Ginsburg, J., dissenting).

\(^{227}\) *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 (“[I]t 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.”

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. Furthermore, it seems implausible, if not impossible, for Congress to create a regulatory scheme which would effectively protect individuals in Wilkie-type situations. This is due to the millions of possible variants which cannot possibly be anticipated in advance. 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. Additionally, several such actions may be required before Congressional actors feel the need to enact a regulatory scheme to address the problem.

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

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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 2604-05.
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.”).
which would allow *Bivens* remedies, or authorize a similar cause of action.\textsuperscript{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.\textsuperscript{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*, interferes with the general framework of the United States system of government.\textsuperscript{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.\textsuperscript{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.\textsuperscript{252}

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

The Court has set other workable precedents which sound remarkably similar to a “too much” standard.\textsuperscript{253} Allowing a *Bivens* claim to be brought for excessive use of the government’s regulatory powers would not, if tailored correctly, result

\textsuperscript{248} *Bivens*, 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 a federal employee acting within 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.

\textsuperscript{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.”).

\textsuperscript{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.).

\textsuperscript{251} Id.

\textsuperscript{252} Id.

\textsuperscript{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. The solution to avoiding an onslaught of new *Bivens* claims lies in how the Court defines the upper limit of acceptable activity. 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.”

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. 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. The rarity of government abuse in this fashion is yet another reason to extend a *Bivens* remedy. 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.

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.*


\(^{264}\) *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.’).


point in time, the members of the Court are a very different mix than in the 1970’s and early 1980’s.\(^{268}\) When \textit{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 \textit{any} other remedy available then \textit{Bivens} is unavailable.\(^{270}\) “We have come from a fairly strong presumption in favor of the \textit{Bivens} doctrine, to a fairly strong presumption against it.”\(^{271}\)

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

The Court’s decision in \textit{Wilkie} is not surprising because the \textit{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 \textit{Bivens} have become the majority.\(^{274}\) \textit{Wilkie} is simply demonstrative of the Court’s reticence toward \textit{Bivens} causes of action.\(^{275}\)

\(\footnotesize{268}\) \textit{Wilkie}, 127 S. Ct. at 2588.

\(\footnotesize{269}\) \textit{Bivens}, 403 U.S. at 397.

\(\footnotesize{270}\) \textit{Wilkie}, 127 S. Ct. at 2604-05.

\(\footnotesize{271}\) Chemerinsky, supra note 4, at 676 -77.


\(\footnotesize{273}\) \textit{Wilkie}, 127 S. Ct. at 2604-05.

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

\(\footnotesize{275}\) \textit{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...
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.
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.”

Additionally, Justice Thomas, joined by Justice Scalia in his Wilkie concurrence, stated, “[H]e would not extend Bivens even if its reasoning logically applied to [a] case.”

The weight of the current Court against Bivens remedies at this point is clear. Only Justice Ginsburg and Justice Stevens seem to support allowing new remedies, while not even Justice Souter agrees. 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. 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.

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.