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## LEADING CASES

### I. CONSTITUTIONAL LAW

#### A. *Constitutional Remedies*

*Bivens Damages — Takings Clause Retaliation.* — In a 1971 decision, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>1</sup> the Supreme Court first recognized the availability of a damage remedy for violation of a constitutional right by a federal official in the absence of any congressional action obligating or permitting such a remedy.<sup>2</sup> In the decades following this landmark decision, the Court retreated from the initially expansive reach of *Bivens* while purporting not to disturb its continued validity.<sup>3</sup> Last Term, in *Wilkie v. Robbins*,<sup>4</sup> the Court continued this trend by withdrawing another set of claims from *Bivens*'s substantive reach. Previous cases in this line had carefully folded separation of powers concerns into the doctrine and reoriented *Bivens* around a new core purpose of ensuring baseline protection of constitutional rights, rather than remedying violations of the Constitution as a matter of individual right. The *Wilkie* Court, however, eschewed both of these virtues by conducting an untextured analysis that failed to reference any core legitimizing purpose, let alone the one that the doctrine had sensibly come to embrace.

The Bureau of Land Management (BLM), an agency of the United States, contracted with a private landowner for an easement permitting public use of a road traversing his property, which it then failed to

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<sup>1</sup> 403 U.S. 388 (1971).

<sup>2</sup> *Id.* at 396–97. In *Bivens*, federal officials had violated the plaintiff's Fourth Amendment right not to be subjected to unreasonable search and seizure, and there was no alternative, adequate remedy available. *Id.* The Court reasoned that although “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation,” it was “well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>3</sup> Since *Bivens*, the Court has recognized claims in two additional circumstances — employment discrimination that violates due process, see *Davis v. Passman*, 442 U.S. 228 (1979), and conduct of prison officials that violates the Eighth Amendment, see *Carlson v. Green*, 446 U.S. 14 (1980) — but has rejected such claims in numerous other contexts, see *Corr. Servs. Corp. v. Maleško*, 534 U.S. 61 (2001) (rejecting *Bivens* claim against private prisons); *FDIC v. Meyer*, 510 U.S. 471 (1994) (rejecting *Bivens* claim against federal agencies); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting *Bivens* claim for Social Security benefits); *United States v. Stanley*, 483 U.S. 669 (1987) (rejecting *Bivens* claim for injury resulting from military service); *Bush v. Lucas*, 462 U.S. 367 (1983) (rejecting *Bivens* claim for violation of First Amendment by federal employers).

<sup>4</sup> 127 S. Ct. 2588 (2007).

record.<sup>5</sup> As a result, when Frank Robbins purchased the land from the original owner, the title was conveyed free of the easement pursuant to Wyoming law.<sup>6</sup> Robbins declined the government's demand that he gift the easement, and ensuing negotiations stalled.<sup>7</sup> Thereafter, the government undertook a series of "offensive and sometimes illegal actions"<sup>8</sup> — later characterized alternatively as "hard bargaining"<sup>9</sup> or as a "campaign of relentless harassment and intimidation"<sup>10</sup> — including "torts or tort-like injuries inflicted on [Robbins], charges brought against him, unfavorable agency actions, and [other] offensive behavior."<sup>11</sup> After the limited administrative avenues of relief he pursued failed to prevent government harassment or provide redress, Robbins brought the present suit against BLM officials.<sup>12</sup> Framing his injury as "death by a thousand cuts,"<sup>13</sup> Robbins asked the court to recognize a *Bivens* remedy for violation of his Fourth and Fifth Amendment rights and also advanced a claim under the Racketeer Influenced and Corrupt Organizations Act<sup>14</sup> (RICO).<sup>15</sup>

<sup>5</sup> *Id.* at 2593.

<sup>6</sup> *Id.* (citing WYO. STAT. ANN. § 34-1-120 (2005)).

<sup>7</sup> *Id.* A BLM employee initially demanded unilateral conveyance, asserting that "the Federal Government does not negotiate." *Id.*

<sup>8</sup> *Id.* at 2594; *see also id.* at 2595–96.

<sup>9</sup> *Id.* at 2600.

<sup>10</sup> *Id.* at 2608 (Ginsburg, J., concurring in part and dissenting in part).

<sup>11</sup> *Id.* at 2598 (majority opinion). Robbins and the BLM clashed frequently after Robbins's purchase of the property in 1994. The allegations against BLM officials included several instances of trespass on Robbins's property, including breaking into one of Robbins's lodges; the provocation of an incident between Robbins and his neighbor that resulted in Robbins's being struck by the neighbor's car while on horseback; the bringing of frivolous and selective BLM enforcement actions against Robbins; the improper revocation of permits that Robbins needed to operate his ranch; and harassment of guests at Robbins's ranch, including following their cattle drives in a truck and trespassing on Robbins's property to film the guests, at times while they sought privacy to relieve themselves. *See id.* at 2593–96. Robbins further alleged that BLM officials improperly brought federal criminal charges against Robbins based on his demanding that a BLM official leave his property, charges for which the jury acquitted Robbins after less than half of hour of deliberation and which led one juror to claim that "Robbins could not have been railroaded any worse . . . if he worked for the Union Pacific." *Id.* at 2595 (omission in original) (quoting Plaintiff-Appellee's Supplemental Appendix at 852, *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006) (No. 04–8016)) (internal quotation marks omitted). Justice Ginsburg stressed that the majority's "restrained account" of the facts failed to convey "[t]he full force of Robbins' complaint." *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part).

<sup>12</sup> *Id.* at 2595 (majority opinion). Robbins initially named the United States as well, but voluntarily dismissed those claims. *Id.* at 2596.

<sup>13</sup> *Id.* at 2600.

<sup>14</sup> 18 U.S.C.A. §§ 1961–1968 (West 2000 & Supp. 2007).

<sup>15</sup> *Wilkie*, 127 S. Ct. at 2596. Robbins based his RICO claim on the Hobbs Act, 18 U.S.C. § 1951 (2000), which outlaws extortion that interferes with interstate commerce and serves as a predicate for a RICO claim of "racketeering activity" as defined by 18 U.S.C. § 1961(1). *See Wilkie*, 127 S. Ct. at 2605. Robbins alleged that the defendants "wrongfully [tr]ied] to get the easement under color of official right" in violation of the Hobbs Act and therefore also of RICO. *Id.*

On remand from the Court of Appeals for the Tenth Circuit,<sup>16</sup> the District Court for the District of Wyoming denied defendants' motion to dismiss with respect to the RICO claim and the *Bivens* claim premised on the Fifth Amendment's Takings Clause.<sup>17</sup> The district court dismissed Robbins's alternative *Bivens* predicates: malicious prosecution, styled as a Fourth Amendment violation, and various due process theories.<sup>18</sup> Defendants moved for summary judgment on the ground of qualified immunity, but the district court denied the motion.<sup>19</sup>

Defendants filed an interlocutory appeal,<sup>20</sup> and the Tenth Circuit affirmed. The court rejected defendants' argument that Robbins's constitutional claim failed because there was no taking and thus no failure to provide just compensation,<sup>21</sup> reasoning that the Fifth Amendment embodies a "right to exclude," which, "[i]f [it] means anything, . . . must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause."<sup>22</sup> Retaliation for exercise of this right must be prohibited by the Fifth Amendment, the court reasoned, or else "government officials will be more inclined to obtain private property by means outside the Takings Clause," and "[t]he constitutional right to just compensation, in turn, would become meaningless."<sup>23</sup> Finally, the Tenth Circuit relied on circuit precedent holding that only "the right retaliated against," not "the right to be free from retaliation," needed to be clearly established to assert a *Bivens* claim.<sup>24</sup>

The Supreme Court reversed and remanded. Writing for the Court, Justice Souter<sup>25</sup> began by emphasizing that "any freestanding

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<sup>16</sup> The district court had initially dismissed Robbins's claims on grounds that he had "inadequately pleaded damages under RICO and that the [Administrative Procedure Act (APA)] and the Federal Tort Claims Act (FTCA) were effective alternative remedies that precluded *Bivens* relief." *Wilkie*, 127 S. Ct. at 2596 (citation omitted). The Court of Appeals for the Tenth Circuit reversed, reasoning that "damages under RICO need not be pled with particularity" and that "the APA and FTCA did not preclude Robbins's *Bivens* claims because the APA does not provide a remedy when an official's intentional acts unrelated to agency action violate a party's constitutional rights, and the FTCA is a separate and distinct remedy from *Bivens*." *Robbins v. Wilkie*, 433 F.3d 755, 760 (10th Cir. 2006) (citing *Robbins v. Wilkie*, 300 F.3d 1208, 1211–13 (10th Cir. 2002)).

<sup>17</sup> *Robbins*, 433 F.3d at 760. The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>18</sup> *Wilkie*, 127 S. Ct. at 2596.

<sup>19</sup> *Robbins*, 433 F.3d at 761.

<sup>20</sup> The Court of Appeals, citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), found jurisdiction under the collateral order doctrine. *Robbins*, 433 F.3d at 760–61.

<sup>21</sup> *Robbins*, 433 F.3d at 765.

<sup>22</sup> *Id.* at 766.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 767 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)).

<sup>25</sup> Justice Souter was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito, and by Justices Stevens and Ginsburg as to Part III, which rejected plaintiff's RICO claims.

damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest.”<sup>26</sup> As a result, “in most instances [the Court] ha[s] found a *Bivens* remedy unjustified.”<sup>27</sup> The Court derived from *Bush v. Lucas*<sup>28</sup> two “steps” to *Bivens* claims. The Court deemed the step one inquiry — “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”<sup>29</sup> — inconclusive as to Robbins’s claim.<sup>30</sup> Step two would therefore be decisive, because “even in the absence of an alternative, a *Bivens* remedy is a subject of judgment.”<sup>31</sup>

Adjudicating step two, the Court began by noting that it would “weigh[] reasons for and against the creation of a new cause of action, the way common law judges have always done.”<sup>32</sup> The Court proffered a weighing of two factors: in favor of Robbins’s claim, the “inadequacy of discrete, incident-by-incident remedies,”<sup>33</sup> as a result of which “[t]he whole [of Robbins’s injury was] greater than the sum of its parts,” and against it, the difficulty of defining a judicially manageable standard.<sup>34</sup> Analogizing to First Amendment free speech retaliation doctrine, the Court distinguished the case before it, which was susceptible only of a “too much” analysis of whether the government “went too far” in pursuit of its “valid interest in getting access to neighboring lands,” from standard retaliation cases, which can be decided on “what for” issues concerning the permissibility of the government’s motive.<sup>35</sup> Without clear grounds for distinguishing “legitimate zeal on the public’s behalf in situations where hard bargaining is to be expected”<sup>36</sup> from “illegitimate pressure,” the Court reasoned, there would be no judicially manageable standard, resulting in “an on-

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<sup>26</sup> *Wilkie*, 127 S. Ct. at 2597.

<sup>27</sup> *Id.*

<sup>28</sup> 462 U.S. 367 (1983).

<sup>29</sup> *Wilkie*, 127 S. Ct. at 2598 (citing *Bush*, 462 U.S. at 378).

<sup>30</sup> *Id.* at 2600. The Court found the present case fell somewhere between *Bush*, which featured an “elaborate remedial system,” 462 U.S. at 388, and *Bivens*, in which there was “no explicit congressional declaration” that an alternate remedy was preferred to damages, 403 U.S. 388, 397 (1971). It therefore concluded that “[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim.” *Wilkie*, 127 S. Ct. at 2600.

<sup>31</sup> *Wilkie*, 127 S. Ct. at 2598.

<sup>32</sup> *Id.* at 2600.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2601.

<sup>35</sup> *Id.* at 2601–02.

<sup>36</sup> *Id.* at 2600.

slaught of *Bivens* actions.”<sup>37</sup> Given Congress’s traditionally recognized advantages in crafting causes of action, the Court concluded that “any damages remedy . . . may come better, if at all, through legislation.”<sup>38</sup> The Court went on to reject Robbins’s RICO claim as well.<sup>39</sup>

In addition to joining the majority opinion, Justice Thomas, joined by Justice Scalia, added a short concurrence reiterating the two Justices’ well-established position that “*Bivens* and its progeny should be limited ‘to the precise circumstances that they involved.’”<sup>40</sup> Asserting that the doctrine is an illegitimate judicial exercise of legislative power, Justice Thomas emphasized that he “would not extend *Bivens* even if its reasoning logically applied to this case.”<sup>41</sup>

Justice Ginsburg, joined by Justice Stevens, concurred in part and dissented in part. She began her analysis<sup>42</sup> by noting *Bivens*’s application of the famous invocation of *Marbury v. Madison*<sup>43</sup> that every right demands redress.<sup>44</sup> Justice Ginsburg framed the line of cases limiting *Bivens* as creating exceptions to its “core holding”: “Absent congressional command or special factors counseling hesitation, ‘victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.’”<sup>45</sup> Instead of heeding this central purpose, Justice Ginsburg charged, the Court — despite its awareness that Robbins lacked an adequate remedy — gave the “floodgates” argument heavy weight incommensurate with the Court’s previous rejection of its relevance.<sup>46</sup> Further, the Court could draw on its past experiences in areas such as sexual harassment law to craft a standard that is both sufficiently well defined and of a suitably high threshold.<sup>47</sup> According to Justice Ginsburg, then, the Court’s emphasis on a lack of judicially manageable standards was both inappropriate and incorrect.

<sup>37</sup> *Id.* at 2604.

<sup>38</sup> *Id.* at 2604–05.

<sup>39</sup> The Court held that because the common law concept of extortion that the Hobbs Act incorporates was “focused on the harm of public corruption, by the sale of public favors for private gain,” *id.* at 2606, “the Hobbs Act does not apply when the National Government is the intended beneficiary of the allegedly extortionate acts,” *id.* at 2605.

<sup>40</sup> *Id.* at 2608 (Thomas, J., concurring) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

<sup>41</sup> *Id.* at 2608.

<sup>42</sup> Justice Ginsburg began the opinion with a discussion of the facts, which she accused the Court of whitewashing. *Id.* at 2609–11 (Ginsburg, J., concurring in part and dissenting in part); see also *id.* at 2615 n.7 (“[T]he Court gives a bloodless account of Robbins’ complaint.”).

<sup>43</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>44</sup> *Wilkie*, 127 S. Ct. at 2611–12 (Ginsburg, J., concurring in part and dissenting in part) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971); *Marbury*, 5 U.S. (1 Cranch) at 163).

<sup>45</sup> *Id.* at 2613 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)).

<sup>46</sup> *Id.* (citing *Davis v. Passman*, 442 U.S. 228, 248 (1979)).

<sup>47</sup> *Id.* at 2615–17.

*Bivens* was initially considered by many to have charged the federal judiciary not merely with ensuring a minimal level of protection for, but also with providing sufficient redress for violations of, citizens' constitutional rights.<sup>48</sup> In reaction, a parade of Supreme Court Justices — beginning with the three *Bivens* dissenters,<sup>49</sup> continuing with Chief Justice Rehnquist,<sup>50</sup> and most recently including Justices Scalia and Thomas<sup>51</sup> — have consistently voiced strong separation of powers concerns. As the blunt and formalistic arguments of Chief Justice Burger's dissent<sup>52</sup> gave way to the "more sophisticated" approach of Chief Justice Rehnquist,<sup>53</sup> the Supreme Court, acting in the common law fashion of case-by-case adjudication, foreclosed the broad reach that *Bivens* might otherwise have had. Giving force to the concepts of a limited judicial role and deference to the political branches, the Court's decisions increasingly moved away from a doctrine focused on providing a remedy for every right and coalesced instead around a more restrained core legitimizing purpose: ensuring minimally neces-

<sup>48</sup> As one commentator has put it, "the right of an aggrieved citizen to obtain damages for a constitutional deprivation" was "the primary purpose of the *Bivens* action." Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 344-45 (1989); see also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 304 (1995) ("Bivens stands for the proposition that the existence of remedies for others is beside the point: The particular plaintiff before the court is entitled to adequate relief."). In Justice Brennan's words, the question was not "whether the availability of money damages is necessary to enforce the Fourth Amendment," but "whether [a plaintiff], if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Bivens*, 403 U.S. at 397. In *Butz v. Economou*, 438 U.S. 478 (1978), the Court's first chance to characterize *Bivens*, the Court stated that "*Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Id.* at 504.

<sup>49</sup> See *Bivens*, 403 U.S. at 411 (Burger, C.J., dissenting) ("I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress."); *id.* at 427-28 (Black, J., dissenting) ("There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. . . . For us to do so is, in my judgment, an exercise of power that the Constitution does not give us."); *id.* at 430 (Blackmun, J., dissenting) (arguing that federal courts have power to recognize damage remedies under general jurisdictional grants but should not do so unless necessary to enforce constitutional rights).

<sup>50</sup> See, e.g., *Carlson v. Green*, 446 U.S. 14, 41 (1980) (Rehnquist, J., dissenting) ("In my view, absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations.").

<sup>51</sup> See, e.g., *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.").

<sup>52</sup> Chief Justice Burger's approach has been described as "simplistic." Bandes, *supra* note 48, at 296. Indeed, in his *Bivens* dissent he seemed content to merely state conclusively that "[l]egislation is the business of the Congress, and it has the facilities and competence for that task — as we do not." *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting).

<sup>53</sup> See Bandes, *supra* note 48, at 297.

sary protection for constitutional rights. In *Wilkie*, although the Court purported to continue this tradition,<sup>54</sup> it in fact adhered blindly to the trend of rejecting *Bivens* claims and failed to consider the grounds upon which those cases were actually decided. The Court employed a superficial analysis marked by a seeming fear of being charged with “legislating from the bench” rather than by respect for the separation of powers. As a result, the Court failed to relate the case before it to *Bivens*’s core purpose and thereby failed to recognize Robbins’s compelling need for a judicially recognized damages remedy.

The Court’s *Bivens* jurisprudence after *Carlson v. Green*<sup>55</sup> has neither adopted the broad remedial purpose the doctrine’s progenitor once suggested nor undertaken a full-fledged retreat from implied constitutional damage remedies.<sup>56</sup> Instead, the Court’s opinions reveal a careful case-by-case shift, in the common law fashion, toward a principle that gives proper consideration to concerns about separation of powers and a limited judiciary. In *Bush*, the Court reasoned that “Congress is in a better position to decide whether or not the public interest would be served by creating [another remedy]” where a comprehensive remedial scheme already meets the minimum necessary protection of a right.<sup>57</sup> In *FDIC v. Meyer*,<sup>58</sup> the Court for the first time clearly employed its restrained functionalist approach: “the purpose of *Bivens* is to deter the officer.”<sup>59</sup> In its latest major *Bivens* decision, *Correctional Services Corp. v. Malesko*,<sup>60</sup> the Court strongly suggested that even state tort remedies, entirely outside the realm of congressional action, could provide a sufficient alternative remedy.<sup>61</sup> Thus, the Court rejected the claim:

[R]espondent is not a plaintiff in search of a remedy as in *Bivens* and *Davis [v. Passman]*.<sup>62</sup> Nor does he seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*. Respondent instead seeks a marked extension of *Bivens*, to contexts that would not advance *Bivens*’

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<sup>54</sup> The Court noted that it would be making a “judgment about the best way to implement a constitutional guarantee,” *Wilkie*, 127 S. Ct. at 2597, directing its inquiry to whether there was “any alternative, existing process for protecting the interest” and whether it was appropriate for a court to recognize such a remedy, *id.* at 2598.

<sup>55</sup> 446 U.S. 14 (1980). *Carlson* was the second and, to date, last Supreme Court case to uphold a *Bivens* remedy.

<sup>56</sup> See, e.g., *Corr. Servs. Corp.*, 534 U.S. at 68 (“Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context.”); *id.* at 75 (Scalia, J., concurring).

<sup>57</sup> 462 U.S. 367, 390 (1983); see also *id.* at 388–89.

<sup>58</sup> 510 U.S. 471 (1994).

<sup>59</sup> *Id.* at 485 (emphasis omitted).

<sup>60</sup> 534 U.S. 61.

<sup>61</sup> See *id.* at 73.

<sup>62</sup> 442 U.S. 228 (1979).

core purpose of deterring individual officers from engaging in unconstitutional wrongdoing.<sup>63</sup>

Under these cases, the doctrine is concerned at base neither with fulfilling some right of the plaintiff to be made whole nor with protecting rights to the greatest extent possible, both of which are issues appropriately left to the legislature. Rather, the doctrine is concerned with ensuring bottom-line enforcement of constitutional rights. Perhaps the best formulation of the *Bivens* doctrine as it has developed was given before the Court itself even considered *Bivens*. Justice Blackmun's dissent adopted by reference the opinion of Chief Judge Lumbard of the Second Circuit, who reasoned that although the federal courts had the power to recognize a remedy,<sup>64</sup> such "closely balanced policy decisions concerning the manner in which to enforce a federal right normally should be left to Congress" as a "sound principle of judicial restraint."<sup>65</sup> For Chief Judge Lumbard, although "existing remedies . . . may not [have] provide[d] a totally effective enforcement scheme for Fourth Amendment rights," it was sufficient that they "substantially vindicate[d] the interests protected by the Amendment."<sup>66</sup> Indeed, such an approach accords with widely held views on the structural mechanisms of the Constitution.<sup>67</sup>

The Court in *Wilkie*, adhering to the superficial trend of rejecting *Bivens* claims, disrupted the measured development of the *Bivens* doctrine. In contrast to the detailed analyses of the previous *Bivens* cases, the Court's analytical approach — which it optimistically described as "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done"<sup>68</sup> — lacked sophistication. In fact, the Court conducted this analysis without attempting to explicate, and indeed failing entirely even to mention, its conception of the purposes of *Bivens*. Lacking any doctrinal theory against which it might consider the facts it encountered, the Court

<sup>63</sup> *Corr. Servs. Corp.*, 534 U.S. at 74 (footnote added).

<sup>64</sup> At least, that is, under a general jurisdiction statute. Commentators and judges disagree as to whether the authority to recognize damage remedies for constitutional violations, if it exists at all, stems from the congressional grant of federal question jurisdiction or the Constitution itself. For a discussion of these issues, see Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

<sup>65</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 409 F.2d 718, 726 (2d Cir. 1969).

<sup>66</sup> *Id.* at 725.

<sup>67</sup> See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1789–90 (1991) ("[T]he aspiration to effective individual remediation for every constitutional violation represents an important remedial principle, but not an unqualified command. . . . Whatever the weight of the individual interest, however, the remedial calculus . . . must include . . . an overall structure of remedies adequate to preserve separation-of-powers values and a regime of government under law.")

<sup>68</sup> *Wilkie*, 127 S. Ct. at 2600.



proffered an inapposite, overly simplified, one-to-one comparison between the inadequacy of the redress Robbins had received<sup>69</sup> and the “difficulty in defining a workable cause of action.”<sup>70</sup> By focusing on Robbins’s interest in being recompensed rather than the necessity of a remedy for protecting constitutional rights, the Court simultaneously blunted the true force of the action and delegitimized any recognition of a damages remedy, thereby permitting it to find that mere “difficulty in defining a workable cause of action” could outweigh a constitutional interest. The Court therefore never even addressed the true merits of the claim.

Moreover, the scant analysis the Court did undertake recalled the conclusory analysis of Chief Justice Burger, not the reasoned respect for the separation of powers that had developed in the case law. The Court stated that “any damages remedy . . . may come better, if at all, through legislation” because “[a] judicial standard . . . would be endlessly knotty to work out.”<sup>71</sup> Yet it is difficult to comprehend how legislative action could provide a more precise standard to govern cases of “death by a thousand cuts” than can the judiciary. To be sure, the legislature possesses some advantages over the judiciary that make it the generally preferred entity to create causes of actions and remedies. But in *Wilkie* the Court cited only generic strengths of Congress, wholly failing to demonstrate their applicability to Robbins’s thousand-cuts claim.

The Court raised two basic reasons for Congress’s superiority, yet neither seems applicable to the case or relevant to the question whether the courts should recognize a remedy in the absence of congressional action where necessary to protect a constitutional right. First, it noted that “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.”<sup>72</sup> Yet with the doctrine centered on the limited core purpose of providing only the most minimal protections, this risk is substantially reduced. Indeed, the Court was unable to point to any evidence of past interference, even during the period in which many thought the *Bivens* doctrine was invested with a broad remedial purpose. Most importantly, Congress retains the power to supplant the Court’s effort if it finds such interference, so long as it maintains the baseline protection of the

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2601.

<sup>71</sup> *Id.* at 2604–05.

<sup>72</sup> *Id.* at 2605. The Court also cited *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), for the proposition that “fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.” *Wilkie*, 127 S. Ct. at 2605 (quoting *Harlow*, 457 U.S. at 814) (internal quotation marks omitted).

right. The Court also found it important that “[Congress] may inform itself through factfinding procedures such as hearings that are not available to the courts.”<sup>73</sup> But for cases as fact dependant as Robbins’s, it is doubtful that meta-level factfinding would provide any useful information.

In fact, a thousand-cuts claim is much better addressed on a case-by-case basis in the common law fashion than by statutory law. Even if a statute were passed, the Constitution’s requirement that property may not be taken without just compensation already provides as clear a statement as is possible, and such a fact-heavy issue would still require judicially driven doctrinal explication. In short, the same concerns with the proper judicial role would arise whether a cause of action was recognized first by the judiciary or the legislature. The only remaining question, then, is whether it is appropriate for the judiciary to take the initiative, and on that point it is enough to note that the constitutional right would otherwise go unprotected. Indeed, that is the core legitimizing purpose that the *Bivens* doctrine has come to embrace.

While the courts are right both to defer to Congress where that body has acted and to exercise care in acting on their own prerogative in this gray area between legislation and adjudication, the situation presented in *Wilkie* counsels strongly in favor of judicial initiative in ensuring enforcement of the Takings Clause. The legislature had yet to act, a damages remedy against officers was the only manner of deterrent sufficient to protect the right, and court-driven law was ultimately necessary given the fact-driven nature of the inquiry. It was effectively irrelevant that for Robbins “it [was] damages or nothing”;<sup>74</sup> crucially, rather, it is damages or nothing for the Takings Clause of the Fifth Amendment. When viewed in reference to *Bivens*’s central purpose of safeguarding otherwise potentially nullified constitutional provisions, *Wilkie* presented a paradigmatic case for judicial recognition of a constitutional damages remedy.

### B. Criminal Law and Procedure

1. *Eighth Amendment — Death Penalty — Consideration of Mitigating Evidence.* — The maxim that “death is different” has long guided the Supreme Court’s death penalty jurisprudence.<sup>1</sup> In the

<sup>73</sup> *Wilkie*, 127 S. Ct. at 2605 (alteration in original) (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 2613 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971)) (internal quotation marks omitted).

<sup>1</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”); see also