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Death by a Thousand Cuts or Hard Bargaining?: How the Court's Indecision in *Wilkie v. Robbins* Improperly Eviscerates the *Bivens* Action

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I. INTRODUCTION

One June day in Wyoming, Frank Robbins received a phone call from agents of the federal government demanding an easement on his land. Robbins knew nothing of this easement because the Bureau of Land Management (BLM) agents neglected to record the easement when they purchased it from Robbins's predecessor.[1] For several years, BLM agents mounted a campaign to harass and intimidate Robbins through increasing their supervision of his land infractions, not allowing him to cross federal land, videotaping guests at his ranch, and breaking into his ranch.[2] The BLM actions were intended to intimidate and coerce Robbins into giving the federal government the public easement. Thirteen years after the initial contact between federal agents and a rancher, the case reached the United States Supreme Court. Robbins lost his final claim against the federal agents as the Court held that no judicial remedy was available for the injury that Robbins suffered at the hands of the BLM agents.[3]

In one of the most influential opinions in American jurisprudence, Chief Justice Marshall declared the infamous statement, "The 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."[4] This line of reasoning inspired the monumental decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[5] where the Supreme Court created a cause of action for a citizen when a federal officer violated his constitutional rights.[6] *Bivens* was a judicially created right of action against federal officers for violations of federal constitutional rights. Because the cause of action against federal officers

1. Wilkie v. Robbins, 127 S. Ct. 2588, 2593 (2007).
2. *Id.* at 2593–95.
3. *Id.* at 2604–05.
4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
5. 403 U.S. 388 (1971).
6. It has also inspired *Bivens*'s counterpart—the statutory formulation creating causes of actions against state actors under 42 U.S.C. § 1983 (2008). Shortly after the Civil War, Congress enacted a reconstruction statute, § 1983, that expressly authorized suits for violation by state officers of federal constitutional rights.

is not related to a specific constitutional provision, *Bivens* remedies have been controversial.[7] *Bivens* was decided in 1971, and in the past thirty years, this area of law has undergone major retrenchment. Robbins's claim fell under *Bivens* jurisprudence as Robbins sought damages for the violation of his constitutional rights by the BLM agents. The Court used this case to further limit the ability of courts to grant a *Bivens* remedy against federal agents.

The ideal maxim expounded in *Marbury v. Madison*—that for every right there is a remedy—is far from true in practical applications of modern litigation. Due to immunity doctrines, many injured individuals are left without a remedy when the government is the defendant in the suit.[8] Moreover, the complex doctrine of justiciability provides another bar to receiving remedies when rights have been violated.[9] The curtailment of the availability of a *Bivens* cause of action is another example in the modern legal system where an individual injured by a federal officer has no remedy. It is unclear, however, why federal officers should be excluded from paying damages if they violate an individual's constitutional rights. State actors, for example, are still required under 42 U.S.C. § 1983 to pay damages if they violate federal constitutional rights. Because *Bivens* causes of actions were created by federal common law instead of a statutorily defined structure akin to § 1983, *Bivens* causes of actions have hardly been embraced.

With the most recent decision in *Wilkie v. Robbins*,[10] not much of the original jurisprudence established in *Bivens* remains. *Wilkie* continues the trend of substantially retreating from the original *Bivens* action. By failing to provide a *Bivens* remedy when the Court conceded that no other adequate remedy existed, and by expanding the policy arguments for "special factors counseling hesitation,"[11] the *Wilkie* decision not only prevents the extension of the *Bivens* remedy, but effectively limits prior cases where the remedy has been granted to their facts.[12] The Court's

7. *See* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 326–28 (1995) (arguing that constitutional rights have come to be vindicated on their own terms). *See also* Jeffrey M. Nye, Holly v. Scott*: Constitutional Liability of Private Correctional Employees and the Future of* Bivens *Jurisprudence*, 75 U. CIN. L. REV. 1245, 1270 (2007) ("The *Bivens* remedy is the sole vehicle through which many constitutional violations may be redressed—no statute, for example, imposes liability on individuals who violate a person's Fourth Amendment rights.").

8. *See generally* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999) (standing for the general proposition of state sovereign immunity).

9. *See generally* Allen v. Wright, 468 U.S. 737 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (standing for the proposition that where plaintiffs lack standing, their case cannot be adjudicated even if a wrong has occurred and has not been remedied).

10. 127 S. Ct. 2588 (2007).

11. *See infra* Part II.

12. *Id.*

retrenchment of the availability of the *Bivens* remedy reinforces the idea that as a practical matter not every right has a remedy. The Court avoids deciding whether the alternative remedies are adequate to preclude the *Bivens* actions. The Court also avoids deciding whether the BLM agents violated Robbins's constitutional rights through the series of threats and intimidation levied against him. The majority weighs the BLM actions as "death by a thousand cuts"[13] at one point and "hard bargaining"[14] at another, and then assumes that the intimidation was not severe enough to warrant a remedy. Finally, the Court pronounces that Congress should decide whether there should be a remedy for intimidation by federal officers.[15] By avoiding the pivotal decision of whether a right was actually violated, the Court changes the analysis to focus on factors that allow the limitation of the *Bivens* remedy in almost any circumstance.

This note begins with a brief discussion of the principal issues discussed in *Bivens* and then traces the development of the two exceptions to the *Bivens* action that have swallowed the rule. Part III discusses the facts, holding, and dissent of *Wilkie v. Robbins*. Part IV argues that the *Wilkie* decision broadly denies the enforcement of a constitutional right and improperly eviscerates the *Bivens* remedy in four ways. First, the Court departs from the most important consideration in determining whether a *Bivens* remedy applies, which is deciding whether an alternative remedy exists. Second, the Court adopts an unnecessarily broad interpretation of special factors counseling hesitation to include concern over opening the floodgates to litigation and the difficulty of deciding whether a right was violated that precludes a *Bivens* remedy. Third, the Court improperly declines to decide whether a constitutional right was in fact violated before deciding how the severity of the violation of the right affects the plaintiff's receipt of damages. Fourth, the Court improperly bases its denial of the *Bivens* remedy on concerns about legislating, but in doing so, reveals the legislative nature of the *Bivens* remedy itself as being a matter of federal common law. This note concludes by discussing the future of the availability of the *Bivens* remedy.

13. *Id.* at 2600 (quoting Brief for the Respondent at 40, Wilkie v. Robbins, 127 S. Ct. 2588, No. 06-219 (Feb. 20, 2007).

14. *Id.* at 2600.

15. *Id.* at 2604–05.

II. BACKGROUND

The Supreme Court created a private right of action against federal officers in *Bivens v. Six Unknown Named Agents*.[16] Bivens alleged that his arrest by federal officers without a warrant and without probable cause was a violation of his Fourth Amendment rights. Charges against Bivens were dropped, and Bivens sued the officers who had arrested him.[17] The Supreme Court reversed the lower court's dismissal of the case and held that when a constitutional right has been violated, federal courts will supply all customary remedies for the invasion if there are no special factors counseling hesitation or if Congress has explicitly provided another remedy that is equally effective.[18] At the beginning of this judicially created cause of action, the Court established important exceptions to obtaining a remedy for the violation of a constitutional right. In addition, the Court considered only the Fourth Amendment in this case and left other constitutional violations and implied remedies for another day.[19]

Perhaps Justice Harlan's concurrence in *Bivens* has had a longer-lasting impact on the *Bivens* jurisprudence than the majority opinion. Instead of accepting hard-and-fast rules, Justice Harlan saw the issues presented by remedying constitutional wrongs as more of a legislative matter. He encouraged a sort of balancing test that looks at factors contributing to the vindication of the right and factors determining the proper remedy for this right.[20] He wrote the famous mantra of *Bivens* actions: "For people in Bivens' shoes, it is damages or nothing."[21] The lack of alternate remedies seemed to be one of the most important factors for Justice Harlan in the need for a remedy against these federal officers.

Eight years after the *Bivens* decision, the *Bivens* remedy was applied in two expansive cases. In *Davis v. Passman*,[22] the plaintiff, a congressional staffer, claimed that she had been a victim of sexual discrimination in violation of the Fifth Amendment.[23] Congress had expressly exempted its own staff from the Civil Rights Act of 1964, and she could not obtain relief under the general federal statute.[24] The Court held that a cause of action could be directly implied from the Due

16. 403 U.S. 388 (1971).
17. *Id.* at 389.
18. *Id.* at 396.
19. *Id.*
20. *Id.* at 408–10.
21. *Id.* at 410.
22. 442 U.S. 228 (1979).
23. *Id.* at 230–31.
24. *Id.* at 247 n.26.

Process Clause of the Fifth Amendment. Justice Brennan, who authored the opinion, explained that if the plaintiff had sued under a statute, then her cause of action would depend on congressional intent to create such a cause of action. Because the statute did not apply to her, she sued under the Constitution, and the decision to imply a private right from the Constitution fell to the Supreme Court.[25] Justice Brennan reasoned that because she had no other way to enforce her constitutional right to be free from gender discrimination, she must be able to seek relief under the Fifth Amendment.[26]

A year later, the Supreme Court again extended the *Bivens* action to cover the violation of an Eighth Amendment constitutional right. In *Carlson v. Green*,[27] a mother sued on behalf of her deceased son's estate, alleging that her son had died because the federal officers had not given him adequate care.[28] The Court reasoned that neither of the two factors necessary to refuse a *Bivens* action existed in the case. The Court found that there were no special factors that counseled hesitation in applying the *Bivens* action, but did not expand on what these factors could be.[29] In addition, the Court found that even though the Federal Tort Claims Act (FTCA) provided remedies for certain intentional torts of a federal officer, Congress had not explicitly declared the FTCA to be a substitute for a *Bivens* action.[30] The Court reasoned that the *Bivens* action was more effective than the FTCA remedy and a better deterrent against constitutional violations.[31] Even though the Court did grant a *Bivens* action, the Court specifically provided that a *Bivens* action would be precluded if there were any special factors that counseled hesitation.[32]

The Court began to restrict the availability of the *Bivens* action in 1983 by using the "special factors counseling hesitation" exception established in *Bivens* and reaffirmed in *Carlson*. In *Chappell v. Wallace*, the Court declined to apply a *Bivens* action because of special factors counseling hesitation.[33] In *Chappell*, five enlisted men in the U.S. Navy sued their superiors for violating their constitutional right to be free from racial discrimination.[34] The plaintiffs alleged that because of racial discrimination, they were assigned to unappealing duties, suffered threats

25. *Id.* at 241–42.
26. *Id.*
27. 446 U.S. 14 (1980).
28. *Id.* at 16.
29. *Id.* at 19–20.
30. *Id.* at 18–19.
31. *Id.* at 23.
32. *Id.* at 18.
33. 462 U.S. 296, 298 (1983).
34. *Id.* at 297.

from superior officers, received harsh punishments, and received low performance evaluations.[35] The Court unanimously found that the nature and structure of the military system as a whole was a special factor counseling hesitation that would preclude a *Bivens* remedy. Justice Burger wrote for the Court: "Civilian courts must, at the very least, hesitate long before entering a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment."[36] The Court did not address the adequacy of the remedies the plaintiff could receive in the military structure, but focused more on the plenary authority of Congress to provide for military discipline and review of military matters.[37]

In *Bush v. Lucas*,[38] decided on the same day as *Chappell v. Wallace*, the Court declined to extend a *Bivens* action to a claim under the First Amendment when a federal employee claimed he had been demoted because he exercised his First Amendment rights. The Court reaffirmed its ability to award monetary damages for a violation of a constitutional right, but also found that this power was limited by policy considerations. The Court explained the law regarding *Bivens* actions:

> When Congress provides an alternative remedy, it may . . . indicate its intent, by statutory language, by clear legislative history, or . . . by the statutory remedy itself, that the Court's power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate . . . paying particular heed, however, to any special factors counselling [sic] hesitation before authorizing a new kind of federal litigation.[39]

The Court took a larger step in restricting the *Bivens* remedy by broadening the policies that could be considered as special factors counseling hesitation. The Court found that Congress had expertise in the field of civil service policy and had fashioned appropriate civil service remedies for constitutional violations.[40] Although those remedies were not as effective as *Bivens* remedies, the Court did not desire to intrude upon Congress's prescribed, meaningful review program.[41] The Court

35. *Id.*
36. *Id.* at 300.
37. *Id.* at 302–03.
38. 462 U.S. 367 (1983).
39. *Id.* at 378.
40. *Id.* at 388–89.
41. *See id.* at 378 n.14.

said that Congress could "indicate its intent [to preclude *Bivens* actions] by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself . . . ."[42] Congress's expertise in making policy for hiring and firing constituted a special factor counseling hesitation.

A significant retrenchment in courts' application of the *Bivens* action using special factors counseling hesitation came again in *Schweiker v. Chilicky*.[43] In *Chilicky*, the Social Security Administration erroneously discontinued benefits to thousands of people before Congress stopped the administration's disqualifications of benefits.[44] Several individuals who were wrongfully denied benefits experienced severe financial hardship because of medical costs during this time. They alleged a violation of their Fifth Amendment due process rights and sued the officials seeking a *Bivens* remedy.[45] The Court again denied the *Bivens* remedy in a 6–3 decision and applied the special-factors-counseling-hesitation prong. The Court reasoned that because Congress had enacted an elaborate scheme to review wrongful denial of benefits, it would be improper for the Court to apply a non-statutory remedy that would undercut the administrative scheme. The Court stated, "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."[46] Two of the plaintiffs had pursued the administrative remedy and received a back payment of the benefits that were denied to them. The Court also found that the "*Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed,"[47] but even though the administrative remedies provided for by Congress were not as effective as a *Bivens* remedy, *Bivens* still could not be applied. Thus, under the Court's analysis in *Chilicky*, to preclude a *Bivens* remedy, Congress must have provided some sort of remedy that Congress found adequate. The Court did not discuss, however, how meaningful or adequate the remedy needed to be to preclude a *Bivens* action.

The most recent case before *Wilkie* to discuss the availability of a *Bivens* action came in *Correctional Services Corp. v. Malesko*,[48] where the Supreme Court refused to apply a *Bivens* action against a private corporation operating a halfway house as a governmental contractor with

42. *Id.* at 378.
43. 487 U.S. 412 (1988).
44. *Id.* at 416.
45. *Id.*
46. *Id.* at 423.
47. *Id.* at 425.
48. 534 U.S. 61 (2001).

the Federal Bureau of Prisons. The Court had previously held in *FDIC v. Meyer*[49] that *Bivens* actions could not be extended to suing federal agencies instead of individual officers. Similarly, in *Malesko*, the Court found that a *Bivens* action could not be applied to private corporations acting under a contract with a federal agency.[50] The Court stated that alternative remedies were available, such as the ability to sue the corporation under state tort law.[51] Thus, the progeny of *Bivens* has shown a general retrenchment in the availability of direct damages for a constitutional violation by federal officials. *Wilkie* pronounces an even stronger statement about the difficulty of prevailing on a *Bivens* action.

III. *WILKIE V. ROBBINS*

A. Facts

In 1994, Frank Robbins purchased the High Island Ranch from George Nelson. The High Island Ranch is a guest resort stretching across almost forty miles of land in Hot Springs County, Wyoming.[52] The land involved in this area of Wyoming is split into parcels owned by private individuals, the State of Wyoming, and the federal government. The High Island Ranch is near the Rock Creek area, a remote and scenic area of Wyoming. South Fork Owl Creek Road runs through High Island Ranch and directly up to the upper Rock Creek area.[53] Because of pressure from environmentalists and those who enjoy the outdoors, the Bureau of Land Management (BLM) tried to obtain an easement for the public to use this road to connect them to the Rock Creek area.[54] Unbeknownst to Robbins, two months before Robbins bought the property from Nelson, Nelson had signed a deed of easement giving the United States the right to use and maintain the South Fork Owl Creek Road. In return for this easement, Nelson had received a right-of-way on a different portion of the road to access parts of the ranch.[55]

Unfortunately, the government neglected to record this easement and according to Wyoming law, when Robbins recorded his title to the ranch in May, he took ownership of the ranch free of the easement.[56] In June, a BLM official realized the mistake had been made and immediately

49. 510 U.S. 471, 473 (1994).
50. *Malesko*, 534 U.S. at 71.
51. *Id.* at 72–74.
52. *Wilkie*, 127 S. Ct. at 2592–93.
53. *Id.*
54. *Id*.
55. *Id.*
56. *Id.*; *see* WYO. STAT. ANN. § 34-1-120 (2005).

demanded that Robbins give the United States the easement. Allegedly, the federal officer told Robbins that "'the Federal Government does not negotiate'" when Robbins asked what the government would exchange for the easement.[57] Discussion between the two parties broke down, and as Justice Ginsburg describes in her dissent, "the BLM officials mounted a seven-year campaign of relentless harassment and intimidation to force Robbins to give in."[58]

BLM officials trespassed on Robbins's land to survey the easement, federal officers were told to follow possible permit violations by Robbins more closely, federal officers allegedly made disparaging remarks about Robbins, and officials threatened to cancel the right of way negotiated by Robbins's predecessor, Nelson. The federal officers later claimed that Robbins violated various land use regulations, which Robbins denied.[59] They also refused to maintain the public road that Robbins used and fined Robbins for trespass when he fixed the road himself, canceled his special recreational use permit and grazing privileges, and brought criminal charges against him for impeding and interfering with a federal employee.[60] The jury acquitted Robbins in this criminal charge, and a news article reported the jury's disgust with the government's treatment of Robbins.[61] Even after Robbins filed the 1998 lawsuit that reached the Supreme Court in 2007, the BLM continued to deny permits, interfere with Robbins's business, and even videotape female ranch guests as they tried to find privacy.[62] In sum, the Court sifted the difficulties Robbins endured at the hands of the BLM into four separate categories: tort-like injuries, charges brought against him, unfavorable agency actions, and miscellaneous offensive behavior.[63]

B. Procedural History

Robbins brought the lawsuit in 1998 asking for compensatory and punitive damages as well as declaratory and injunctive relief founded on a Racketeer Influenced and Corrupt Organizations Act (RICO) claim and a *Bivens* claim.[64] Under the *Bivens* claim, Robbins asserted that the BLM had violated his Fourth and Fifth Amendment rights. The district court

57. *Wilkie*, 127 S. Ct. at 2593 (quoting Brief for the Respondent at 5, Wilkie v. Robbins, 127 S. Ct. 2588, No. 06-219 (Feb. 20, 2007)).

58. *Id.* at 2608 (Ginsburg, J., concurring in part and dissenting in part).

59. *Id.* at 2494–95 (majority opinion).

60. *Id.* at 2495.

61. *Id*.

62. *Id.* at 2610.

63. *Id*. at 2598.

64. *Id.* at 2596.

dismissed Robbins's claims.[65] The Tenth Circuit Court of Appeals reversed and remanded, specifying that the *Bivens* action was only available against individual federal officials for constitutional violations.[66]

On remand, the district court dismissed the *Bivens* Fourth Amendment claim for malicious prosecution and the Fifth Amendment claim for due process violations, but did not dismiss the Fifth Amendment claim of the government's retaliation against Robbins. The Court of Appeals for the Tenth Circuit affirmed the district court, holding that Robbins had a right under the Fifth Amendment to be free from retaliation for his refusal to give the government an easement.[67] The Court of Appeals allowed Robbins's allegations regarding the individual actions of the officials to proceed under *Bivens*. The Court of Appeals also allowed the RICO claim to go forward. The Supreme Court reversed the Court of Appeals' grant of the *Bivens* action in a 7–2 vote and unanimously reversed the Court of Appeals' decision to allow the RICO claim to go forward.[68] Even viewing the facts in the light most favorable to Robbins, the Court maintained that the lower court should have granted the government its motion for summary judgment by denying the *Bivens* action.[69] Ultimately, Robbins was left without a remedy under either claim.

C. The Court's Analysis

The Court not only affirmed the power of courts to recognize *Bivens* actions but also recognized that a *Bivens* remedy is not an entitlement after a constitutional violation. The Court held that it must follow a "familiar sequence"[70] and used a two-part test to determine whether a *Bivens* action was justified:

> [T]here 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,

65. *Id.*
66. *Id.*
67. *Id.* at 2596–97.
68. *Id.* at 2597 (Ginsburg, J. concurring in part and dissenting in part).
69. *Id*. at 2594 n.2; *see also id*. at 2597 (majority opinion).
70. *Id.* at 2598.

> paying particular heed, however, to any special factors counselling [sic] hesitation before authorizing a new kind of federal litigation.[71]

The Court then analyzed the remedies available to Robbins for each category of wrongs he asserted against BLM. For the trespass, the Court concluded that even though he chose not to pursue the available tort remedies, they were available.[72] The administrative charges against Robbins also had avenues for review.[73] The Court recognized that Robbins did contest various citations and had a jury hear the criminal suit against him. The Court found, "For each charge . . . Robbins had some procedure to defend and make good on his position. He took advantage of some opportunities, and let others pass; although he had mixed success, he had the means to be heard."[74] The Court reasoned that among the government's numerous questionable activities, the videotaping of ranch guests was "while no doubt thoroughly irritating and bad for business, may not have been unlawful . . . ."[75] Because this and other activities may have been legal, no remedy at law needed to exist. The Court concluded that Robbins did have an avenue for review or an alternative remedy for nearly every claim. The Court, however, did not find the existence of an alternative remedy determinative of whether a *Bivens* action was available because the remedy mechanisms were piecemeal and not elaborately established by Congress.[76]

The Court then continued to the second prong of determining whether a *Bivens* action should apply by "weighing reasons for and against the creation of a new cause of action . . . ."[77] The Court seemed to empathize with Robbins's argument that not one incident with the BLM alone justifies the *Bivens* actions, but taken together the incidents need some sort of remedy, or "death by a thousand cuts" would result.[78] The Court, however, also recognized that the BLM officials may just have been working with "legitimate zeal" or "hard bargaining" on behalf of the public to obtain an easement for the use of all to access Rock Creek.[79] The Court regarded Robbins's claims not as alleging that the BLM went too far to obtain an easement, but obtaining an easement is itself a lawful

71. *Id.* at 2598 (citing *Bush*, 462 U.S. 367 at 378).

72. *Id.* at 2598.

73. *Id.* at 2597–99.

74. *Id.* at 2599.

75. *Id.*

76. *Id.* at 2600.

77. *Id.*

78. *Id.* (quoting Brief for the Respondent at 40, Wilkie v. Robbins, 127 S. Ct. 2588, No. 06-219 (Feb. 20, 2007).

79. *Id.*

action. The Court concluded that since this was a retaliation case to establish a denial of due process claim, Robbins would need to show that the officers did not have a valid purpose. The Court saw obtaining an easement as a valid purpose and characterized the BLM's actions as "bargain[ing] hard by capitalizing on their discretionary authority and Robbins's violations of various permit terms, though truculence was apparent on both sides."[80]

As the Court weighed the factors counseling hesitation, two main factors seemed to sway the Court's decision to deny the *Bivens* remedy. First, the Court recognized that opening a *Bivens* claim in a retaliation case would open the possibility for a flood of litigation. The Court stated that opening retaliation cases to *Bivens* actions "would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations."[81] The second factor the Court stated that dissuaded it from applying *Bivens* is the difficulty of the constitutional inquiry. The Court stated,

> The proposal . . . to create a new *Bivens* remedy to redress such injuries collectively on a theory of retaliation for exercising his property right to exclude, or on a general theory of unjustifiably burdening his rights . . . raises a serious difficulty of devising a workable cause of action. A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out . . . .[82]

Accordingly, the court deemed these factors ample reason to deny Robbins the *Bivens* remedy while shifting the burden of deciding *Bivens* availability onto Congress.[83] The Court next addressed the RICO claim and denied Robbins a remedy under the federal statutory claim as well.[84]

Justice Ginsburg was joined by Justice Stevens in her dissenting opinion that Robbins should have been afforded a *Bivens* remedy. The dissent argued that that the truest intent of *Bivens* would be to grant such a remedy because Robbins has no alternative remedy for "the relentless torment he alleges" at the hands of the federal BLM officers.[85] Justice Ginsburg saw the harassment as more severe than the majority saw it,

80. *Id.* at 2604.
81. *Id.*
82. *Id.*
83. *Id*. at 2604–05.
84. *Id*. at 2608.
85. *Id.* at 2613 (Ginsburg, J., concurring in part and dissenting in part).

and she did not believe that the campaign against Robbins could just be dismissed as hard bargaining. Justice Ginsburg also asserted that the majority's analysis that retaliation claims would open difficult constitutional questions and the floodgate to federal court legislation does not provide strong enough reasons to refuse to enforce a constitutional right.[86] Justice Ginsburg concluded that "where 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. Robbins would have no trouble meeting that standard."[87]

IV. ANALYSIS OF THE STATE OF *BIVENS* TODAY

The Supreme Court has reaffirmed the existence and availability of the *Bivens* remedy when federal officers have violated an individual's constitutional rights.[88] In all but two of the Court's cases since *Bivens*, however, the Court has refused to apply a *Bivens* action.[89] Although it is possible for an individual to assert a *Bivens* claim and receive damages for a violation of one of his or her constitutional rights by a federal officer, in practice the Court has narrowed the availability of the remedy to few circumstances. In *Wilkie*, Justices Thomas and Scalia in a concurring opinion asserted what they asserted in the 2001 *Malesko* case: that *Bivens* should be limited to its facts, and that it is a "relic of the heady days in which this Court assumed common-law powers to create causes of action."[90] Although the Supreme Court had not affirmed a *Bivens* action since *Carlson v. Green* in 1980, the lower courts continued to apply *Bivens*.[91] For example, the Tenth Circuit in *Wilkie v. Robbins* found that Robbins's *Bivens* claim could go forward.[92] But in each case asserting a *Bivens* action, the Supreme Court has narrowed its

86. *Id.*

87. *Id.* at 2616–17.

88. *See Malesko*, 534 U.S. at 66 ("Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'") (quoting 28 U.S.C. §1331); *Wilkie*, 127 S. Ct. at 2597 ("[W]e have recognized two more nonstautory damages remedies . . . but we have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee . . . .").

89. *See* Davis v. Passman, 441 U.S. 228 (1979); *see also* Carlson v. Green, 446 U.S. 14 (1980).

90. *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring)).

91. Shepardizing *Bivens* reveals that lower courts have followed the *Bivens* analysis in 576 cases and distinguished the analysis in 325 cases.

92. 433 F.3d 755, 764–65 (10th Cir. 2006).

availability.[93] Under the auspices of using the *Bivens* exceptions of an alternative remedy or special factors counseling hesitation, the Court has allowed the exceptions to swallow the rule. A grant of *Bivens* damages is more or less the exception to the rule today, especially after *Wilkie*. *Bivens* has effectively been limited to its facts and after *Wilkie* is very close to a complete demise. Lower courts will no longer be able to apply a *Bivens* remedy for constitutional wrongs.

Wilkie improperly limits the *Bivens* remedy in four ways. First, *Wilkie* strengthens a lower court's ability to refuse *Bivens* actions by lessening the requirements for an alternative remedy because the Court admits that Robbins does not have an adequate means to receive a remedy for the various incidents of harassment that he has endured.[94] Even without a meaningful remedy, the Court still denies Robbins the *Bivens* cause of action, which effectively eliminates the original purpose of *Bivens*. Second, the court applies a liberal construction of what qualifies as a special factor counseling hesitation. By basing these factors on a floodgate analysis and the difficulty of constitutional review, instead of the traditional avoidance with military affairs or congressional legislation, the factors counseling hesitation can be much broader to deny a *Bivens* cause of action.[95] It leaves one to wonder what might be a factor that does not counsel hesitation in applying a private right of action against a federal officer. Third, the Court improperly declines to decide whether a constitutional right was in fact violated before deciding how the severity of the violation of the right affects the plaintiff's receipt of damages. Lastly, the Court improperly places its focus in denying the *Bivens* remedy on concerns about legislating; but in doing so the Court shows the legislative nature of the *Bivens* remedy as a matter of federal common law. In essence, the Court is doing lip service to Justice Brennan's initial approach in the *Bivens* majority, but applying more of a Harlan approach in actually deciding the *Bivens* applicability by balancing policy considerations with the severity of the right involved.

A. Alternative Remedies No Longer Need to be Adequate or Exist

The Court in *Wilkie* makes a somewhat surprising turn in that it recognizes that an adequate alternative does not exist for Robbins, but that his availability to receive the *Bivens* remedy is still precluded. In

93. *See* Gene R. Nichol, Jr., Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV 1117 (1989); *see also* Joan Steinman, *Backing off* Bivens *and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984).

94. *Wilkie*, 127 S. Ct. at 2600.

95. *Id.* at 2604.

Justice Harlan's concurrence creating the original *Bivens* action, it seemed clear that the fact that Bivens had no other alternative remedies necessitated some kind of remedy for a violation of his Fourth Amendment rights.[96] In *Wilkie*, however, the Court does not seemed overly concerned with the fact that no other adequate remedy exists for the onslaught of harassment Robbins has received at the hands of overzealous BLM officers. The existence of an alternative remedy had always been part of the Court's decision to deny a *Bivens* remedy in the past.[97] In fact, in the Court's language allowing the *Bivens* remedy was the assumption unless an alternative remedy existed.[98] *Wilkie* allows federal courts to deny a *Bivens* remedy even if no other remedy exists, and in doing so eliminates the original purpose of the *Bivens* remedy—to provide a remedy for a violation of a constitutional right by federal officers.

The Court has embraced what Gene Nichol argued was the heart of Chief Justice Rehnquist's dissent in *Carlson v. Green*. Nichol argued that the Chief Justice's dissent focused on the assumption that "a damages remedy is somehow a different or inappropriate method of constitutional enforcement compared to other accepted remedies."[99] This idea also stems from the fact that there is a huge debate as to the role of the Constitution in judicial enforceability. The decision in *Wilkie* alludes to the argument that it is improper for the courts to remedy a constitutional violation by a federal officer if there is any other possible remedy available. It does not look to the meaningfulness of that remedy.

Oddly, the Court was very concerned with the kinds of remedies that were available to Robbins.[100] In the end, the fact that no remedy existed for Robbins did not automatically ensure that Robbins would receive the *Bivens* remedy. In oral arguments, the first questions several justices asked the attorney representing the BLM were about what remedies were

96. *Bivens*, 403 U.S. 388, 409–410 (Harlan, J., concurring).

97. *See Chappell*, 462 U.S. 296 (finding that the plaintiff had an alternative remedy in seeking review in the military system); *Bush*, 462 U.S. 367 (finding that the federal employment system had an elaborate, congressionally created review system for remediating wrongful termination); *Chilicky*, 487 U.S. 412 (finding that the plaintiff had an alternative remedy in the elaborate review system established by Congress for those individuals who were wrongfully denied their Social Security benefits); *Malesko*, 534 U.S. 61 (finding that state tort law remedies were an alternative remedy for the private individual who denied a prisoner access to the elevator).

98. *See Bush*, 462 U.S. at 378 ("In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate . . . ."). *But see* Steinman, *supra* note 92, at 339 ("[T]he Court failed in *Chappell* and *Bush* to underscore the need for courts to assess the constitutional adequacy of legislative remedial schemes before relying on those alternative remedies to defeat implication of a *Bivens* action.").

99. Nichol, *supra* note 92, at 1133. Nichol continues to argue that "arising under" jurisdiction gives the Court the power to declare damage remedies and not just equitable relief. *Id.*

100. See *supra* text accompanying notes 72–75.

available to Robbins.[101] In the majority opinion, the Court noted all of the administrative and judicial remedies that were available to Robbins. In *Chilicky*, the Court declined to provide a *Bivens* remedy because of an elaborate remedial scheme provided for by Congress. In *Wilkie*, because of the nature of the repeated offenses and harassment, one elaborate remedial scheme was not available. A *Bivens* cause of action would have provided a federal common law remedial scheme for the violations of Robbins' rights by federal officers. Because the repeated attempts at obtaining a remedy for individual offenses by the BLM officers failed, there was only one remedy for all of the wrongs committed against Robbins—a *Bivens* award of monetary damages. In a very real way, for Robbins it was damages or nothing. He ended up with nothing. Even though the Court was concerned with the remedies available, the majority erred by eliminating the importance of the availability of another remedy in the analysis of whether *Bivens* would apply.

The majority articulates a test which examines whether there are "any alternative, existing process for protecting the interest amounts to a *convincing* reason for the Judicial Branch to refrain from providing a . . . remedy in damages."[102] The Court classifies the actions against Robbins as "irritating," but finds the administrative and alternative judicial process of state tort law to be available even though the Court agrees that there are aggregate claims for relief from a "period of six years, by a series of public officials bent on making life difficult."[103] The Court finds that "It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand [in this situation], but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim."[104] Thus, because the Court was not convinced that the judicial branch should refrain from applying its own remedy in light of the existing process, the Court should

101. Transcript of Oral Argument at 4, Wilkie v. Robbins, 127 S. Ct. 2588 (No. 06-219). Justice Ginsburg asked:

> [T]here's a record here that the district court said there was substantial evidence, enough to go to trial, of a pattern of harassing conduct that included trespasses on this man's lodge and leaving the place in disarray, videotaping the guests, selective enforcement of the grazing laws, a whole pattern of things, even asking the Bureau of Indian Affairs to impound his cattle? This man says, this has been done to me by officers of my government. Is there a remedy?"

Id. at 8 (Justice Scalia asked: "[T]he photographing of his guests who he brings onto his ranch to hunt and they pay him for that. And then he claims that the BLM follows them just to harass them, just taking photographs. What relief could he get for that?"); *id.* at 10 (Justice Kennedy asked: "Does he have any action that is other than piecemeal?").

102. *Wilkie*, 127 St. Ct. at 2598 (emphasis added).

103. *Id.* at 2600–01.

104. *Id.* at 2600.

have applied the *Bivens* remedy. Instead, the Court reasoned that the decision would be too difficult if it looked at the remedy alone. This decision is a departure from previous jurisprudence where the presumption rested in favor of granting a *Bivens* action.

The Court departs even further from established precedent and narrows the availability of *Bivens* when it states, "But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment."[105] Even though in previous cases some sort of an alternative was always available when the Court denied a remedy, in *Wilkie* no alternative remedy even has to exist.[106] The deterioration first from the *Bivens* remedy to a less effective congressionally stated remedy, and then removing the alternative remedy requirement altogether, shows that *Wilkie* is practically limiting *Bivens* to its facts. The Court now decides as a matter of *judgment* whether the *Bivens* cause of action will be available. Alternative remedies no longer play as significant a role in the analysis of whether a *Bivens* remedy should be applied. Because of this, the Court has severely diminished the ability of an individual to receive a remedy for a violation of his or her constitutional rights by a federal officer.

B. Widening the Special Factors Counseling Hesitation to Narrow Bivens

The judgment that the Court appears to adopt is a balancing test between the appropriate remedies provided at common law and whether there are any special factors that would counsel hesitation. The historic interest in providing monetary damages for invasions of personal liberty was established in *Bivens* itself and has been long accepted as part of administering justice.[107] The special factors counseling hesitation to the Court's decision to provide monetary remedies seemed in earlier cases to be narrow and specific to the facts at hand.[108] In *Wilkie*, however, this test becomes more legislative than judicial in nature, because the Court can now make policy decisions as to whether or not to apply the remedy instead of looking solely to the remedies available and assessing whether they are adequate. In the *Bivens* opinion, the dissenters argued that it was

105. *Id.* at 2598.

106. *See supra* text accompanying note 89.

107. *Bivens*, 403 U.S. at 396.

108. For instance, in *Chappell*, 462 U.S. 296 (1983), the unique nature of the military regime was a special factor counseling hesitation. In *Bush*, 462 U.S. 367 (1983), the federal government's interest in providing an employment scheme and review of that scheme was a special factor counseling hesitation. In *Chilicky*, 487 U.S. 412 (1988), Congress's elaborate remedial scheme for denied Social Security benefits was a special factor counseling hesitation.

improper for the Court to create a cause of action without express congressional authority.[109] The dissenters in *Bivens* have prevailed. The majority in *Wilkie* argues, like the dissenters in *Bivens*, that the Court should make the legislative policy decisions about whether or not to apply the cause of action in each case, and that congressional authority is just one factor to consider in making this judgment.[110]

In *Wilkie*, the Court stays true to the words of the *Bivens* majority and its progeny as it looks to what special factors may abound that would counsel hesitation. The Court, however, adopts a much broader view of what these *special* factors could be. With such a broad view of what factors could preclude a *Bivens* remedy, the *Bivens* remedy itself becomes almost impossible to apply. The Court adopts two main policy reasons why they should avoid granting Robbins a *Bivens* remedy. The first is a fear of opening the floodgates of litigation for those seeking a *Bivens* remedy. The Court explains that "a *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests . . . ."[111] The floodgates argument is a common concern in federal litigation, but it has not been considered a *special* factor in previous *Bivens* actions. In her dissent, Justice Ginsburg discusses this departure from precedent when she states, "The Court finds . . . a special factor counseling hesitation quite unlike any we have recognized before."[112] If the Court takes this to its logical extension in future cases, then to apply a *Bivens* remedy to any constitutional violation other than one the Court has already declared deserving of the same would open the floodgates to litigation and would be barred under this prong of the test. This is not a persuasive *special* factor that should preclude the Court from using its historic power to grant a remedy for a violation of a right.[113]

The second factor that the Court reasons should preclude the application of a *Bivens* remedy is the difficulty of determining whether Robbins's constitutional rights have been violated by the federal officers. This factor bleeds into the floodgates argument because the vagueness of

109. *Wilkie*, 127 S. Ct. at 2604–05.

110. *See id.* at 2598. ("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.'") (quoting *Bush*, 462 U.S. 367 at 378).

111. *Id.* at 2603.

112. *Id.* at 2613 (Ginsburg, J., dissenting).

113. *See* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?* 64 IND. L. J. 263, 294 (1989) (contending that "[s]pecial factors should be *special*, as opposed to generally present.").

the constitutional right, the Court believes, would encourage many to respond with a *Bivens* action when they feel the federal government has gone too far in negotiations.[114] The Court explains, "A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out . . . ."[115] The Court shies away from making this determination by reasoning that the difficulty of inquiry is a factor in and of itself that counsels hesitation. This is an insufficient policy reason on which to base the denial of a *Bivens* remedy. Most cases that come before the Supreme Court have difficult constitutional questions to resolve. The difficulty in this case of deciding whether the retaliatory acts by the federal officers violated constitutional rights strikes at the very purpose for why we have a Supreme Court. Surely difficult inquiries can be said to appear in any case that reaches a court, especially those cases attempting to assert a *Bivens* cause of action. This circular reasoning for denying a *Bivens* remedy does not amount to a special factor counseling hesitation. The Court could avoid applying the *Bivens* remedy by simply finding the constitutional violation too difficult of an inquiry. Like the floodgates argument, the difficulty of inquiry argument allows the Court to preclude a *Bivens* remedy in almost any situation, if followed to the logical extreme. In essence, the special factors are no longer very special, but the test has turned into more of an *any* factors counseling hesitation balancing test.

C. The Severity of the Right Infringed

The broad policy reasons that the Court adopts in refusing a *Bivens* remedy mask the true reason for the Court's refusal—the lack of severity of a violation of the constitutional right. The Court infers that the infringement, if any, of constitutional rights was not severe enough to warrant the creation of a new cause of action. The Court is sympathetic to Robbins's plight, but not enough to allow a remedy. The Court classifies the violations as irritating—maybe even lawful—forms of "hard bargaining."[116] In a case without a clear violation of a clear constitutional right, the Court is even more reluctant to provide a *Bivens* remedy even though there is no alternative remedy and no traditional special factors like a congressional remedial scheme already mandated or military procedures.

114. *Wilkie*, 127 S. Ct. at 2604.
115. *Id.*
116. *Id.* at 2599–2600.

In the original *Bivens v. Six Unknown Named Agents* case, the plaintiff was a man who was woken up in the middle of the night by armed federal officers, dragged out of bed, forced to stand naked in his living room, and then brought into jail without a probable cause and with excessive force.[117] This was a well-defined violation of the plaintiff's Fourth Amendment protection against unreasonable search and seizure by federal officers. In *Wilkie*, it is much less clear whether the federal officer's harassment of Robbins constituted a violation of a precise constitutional right. The dissent disagrees with the majority on the severity of the right at issue. Justice Ginsburg argues that because there is not a congressional scheme or any of the traditional special factors counseling hesitation, Robbins should have a right to recover damages because he has been a victim of a constitutional violation by a federal agent.[118]

The Court concludes that

> There is a world of difference between a popular *Bivens* remedy for a well-defined violation [and] litigation invited because the elements of a claim are so unclear that no one can tell in advance what claim might qualify or what might not. . . .[119] The point here is not to deny that Government employees sometimes overreach, for of course they do . . . . The point is the reasonable fear that a general *Bivens* cure would be worse than the disease.[120]

The Court obviously fears expanding *Bivens* more than is necessary, which could be a valid concern. With the dearth of actual Supreme Court opinions upholding the *Bivens* remedy, this fear is somewhat unjustified.[121] The Court uses the floodgates arguments discussed above not to limit the *Bivens* action from expanding to include severe infringements of constitutional rights, but rather to limit infringements of rights that the Court determines are inconsequential.

This discrimination between severe and less severe constitutional infringements in deciding whether a *Bivens* remedy should be applied is not sound because it begs the question of what infringements of rights are severe enough to be receive a *Bivens* remedy and because it causes

117. *Bivens*, 403 U.S. at 389.

118. *Wilkie*, 127 S. Ct. at 2613 (Ginsburg, J., dissenting).

119. *Id.* at 2604 n.11 (responding to Justice Ginsburg's criticism of the floodgates factor that the Court uses to deny the *Bivens* remedy).

120. *Id.* at 2604.

121. *See supra* Part II (discussing the general retrenchment of the availability of the *Bivens* action).

the Court to again draw vague lines. If federal officers violate an individual's constitutional right, the Court should apply a *Bivens* remedy. The Court should take into account the severity of the violation in determining damages for the violation, not in determining whether the remedy should be applied at all.

It is troubling that the Court never reaches a consensus as to whether Robbins in actuality suffered a violation of his constitutional rights. Without such a consensus, the Court's reasoning is circular and denies a *Bivens* remedy prematurely. If Robbins did suffer a violation of a constitutional right, the fact that it is a difficult question because it is not a severe violation precludes the ability of *Bivens* to apply for fear of an onslaught of *Bivens* actions. If he did not suffer a constitutional violation, then a *Bivens* remedy does not need to be applied in the first place. The Court puts the proverbial cart before the horse by inferring that the right violated is not severe enough to warrant a *Bivens* remedy before determining whether the right was violated at all. The Court's analysis begs the question of what constitutional infringements by a federal officer are severe enough to warrant a Bivens remedy. If the BLM officers had seized Robbins's land without compensation, would the Court be more willing to grant Robbins a cause of action to seek damages for a direct constitutional violation? What if the BLM officers had only seized an inconsequential portion of Robbins's land? The Court's confusing dichotomy of whether the right was infringed and whether the right was severe enough to warrant a *Bivens* action results in another illogical limit on *Bivens*. The Court should have clearly determined whether the actions by the BLM agents warranted a remedy at all.

D. The Court's Legislative Consideration

The Court in *Wilkie* acts more like a legislature in considering whether a *Bivens* action should apply by weighing and balancing many factors: the existence of an alternative remedy, special factors counseling hesitation, and the severity of the right infringed. After deciding against applying a *Bivens* remedy, the Court states that Congress should be the one to provide a remedy. The Court states: "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."[122] This hope by a strong majority of the Court is far flung. The Court exists to remedy violations of individual rights and, I argue,

122. *Wilkie*, 127 S. Ct. at 2604–05.

has the power to do so directly from the Constitution itself.[123] The power of the *Bivens* cause of action is to provide a remedy for isolated abuses of power by federal officers, abuses that directly violate an individual's constitutional rights. Deferring to Congress to provide for a cause of action against federal officers who push too hard in this case is not a practical solution, nor is it needed. The Court has the power to apply a remedy for a constitutional violation by a federal officer. The Court has chosen to punt this responsibility to Congress and in doing so leaves individuals without protection against abuses by federal officers.

Even as the majority of the Court argues that determining a remedy in this case is a task for the legislative branch, the Court acts much like a legislature in reaching that decision. The Court suggests that future decisions as to availability of *Bivens* remedies can be determined through a case-by-case balancing approach, which mirrors Justice Harlan's original dissent in *Bivens*. Instead of looking to alternative remedies as the main factor, however, the Court's current balancing approach looks to the possibility of opening the floodgates and the difficulty of determining the constitutional right.[124] Because the Court acts more like a legislature in considering these factors, the Court is able to choose which factors it finds more important than the other factors. In doing so, the Court has veered from the original and most important consideration in the *Bivens* analysis—whether an alternative remedy exists. However, the Court, not Congress, created the *Bivens* remedy, and it is in the province of the Court to adapt and change the remedy as it sees fit. In changing the importance of the factors, the Court has veered from the original purpose of a *Bivens* action—to remedy a constitutional violation by a federal officer.

V. CONCLUSION

Wilkie improperly restricts the *Bivens* action. Not every right deserves a remedy, but when a remedy is readily available and the only considerations that preclude the remedy from being granted are concerns that too many cases seeking a similar remedy for a redress of wrongs, and the difficulty of deciding whether a right was really violated, the remedy should be granted. Robbins is left without a remedy for the

123. The validity of the *Bivens* action itself is much debated. Discussing at length the theoretical arguments for whether the Court overstepped its bounds in creating a constitutional common law right against federal officers is beyond the scope of this Note; however, this Note argues that the Court reaffirms its ability to do so but chooses not to use its judicial power to create remedies for constitutional violations.

124. *See* Brown, *supra* note 102, at 298 ("the Court is moving closer and closer to treating the availability of *Bivens* remedies as a legislative question.").

overall harassment he received at the hands of federal officers when one could have been easily applied. The proper role for the Court is to apply such a remedy when it is available. Instead, the Court denies the remedy without deciding whether the right was even violated.

The future of the *Bivens* remedies seems to be quite limited. *Bivens* itself is good law. In a case where federal officers clearly violate the Fourth Amendment, a plaintiff would be able to receive a *Bivens* remedy of damages. The Court in *Wilkie* establishes that to receive a *Bivens* remedy, there must be (1) no other alternative, (2) no fear that granting a *Bivens* remedy will open the floodgates of litigation, and (3) a clear and easily determined violation by the federal officer of a constitutional right. The proper role of Congress and the courts will also be an issue in the future *Bivens* actions, because even though the Court defers to Congress in this case to establish a cause of action, the Court effectively acts like a legislature in deciding that the traditional cause of action is not available. In theory, *Bivens* remedies are still available, but in practical application, a *Bivens* remedy will only be applied in rare, almost extreme circumstances. *Wilkie v. Robbins* shows that when it comes to federal officers violating constitutional rights, there might not be a remedy for every right—no matter how easy and obvious continued recognition of an adequate judicial remedy might seem.

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