
MUCH ADO ABOUT NOTHING:
IS *BIVENS* DEAD, AND DOES IT REALLY MATTER?

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I. INTRODUCTION

On June 21, 1971, the United States Supreme Court recognized a new cause of action as a natural corollary of the protections provided by the Fourth Amendment to the United States Constitution. Espousing as its core premise the notion that every wrong should have a remedy and recognizing that damages have historically served as that remedy, the Court held that the plaintiff was entitled to a damage remedy for injuries that he had suffered as a result of federal agents' violation of the Fourth Amendment. The Court found no reason which prevented it from recognizing such a cause of action as there were no "special factors counseling hesitation in the absence of affirmative action by Congress" or any "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."¹

The right recognized by the Court that day would soon evolve as the federal analog to the civil rights statute codified as 42 U.S.C. § 1983 (2003), rendering state actors liable for constitutional violations effectuated under color of state law. But as the Court's ideological pendulum began to oscillate in the opposite direction, the Court would severely limit its *Bivens* jurisprudence. In effect, it would supplant the majority's ruling in *Bivens* with decisions espousing the arguments advanced by the original dissenting Justices in *Bivens*, namely that the judicial recognition of such a cause of actions transgressed the constitutional mandate requiring separation of powers. The

¹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 397 (1971).

Court's betrayal of its own *Bivens* doctrine would ultimately result in what one commentator has best described as the "*Bivens* nondoctrine."²

What follows is a discussion of the origins of the *Bivens* doctrine, its subsequent developments, its availability today as a remedial device for constitutional wrongs, and the irrelevance of *Bivens*' quiet demise in light of its historical record as an ineffective remedy.

II. *BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS: A WRONG WITH A REMEDY*

On Friday, November 26, 1965, at approximately 6:30 a.m., six Federal Bureau of Narcotics agents, with neither search nor arrest warrant, forced their way into the home of Mr. Webster Bivens.³ With guns drawn and in the presence of Mr. Bivens' wife and children, the agents manacled Mr. Bivens, threatened to arrest the entire family, searched the apartment throughout, and then transported Mr. Bivens to a federal courthouse where he was interrogated, booked for alleged narcotics violations, and subjected to a visual strip search.⁴ The complaint filed against Mr. Bivens was ultimately dismissed by a United States Commissioner.⁵

Acting in *propria persona*, Mr. Bivens brought a Section §1983 action in federal district court, alleging that the defendants searched his apartment without a warrant and employed unreasonable force to effectuate his arrest, which lacked the requisite probable

² Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 Va. L. Rev. 1117, 1128 (1989). See also Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins*, 2007 Cato Sup. Ct. Rev. 23, 63 (2007) ("[T]he Court's decision[s] represent[] a nearly pathological insistence on retaining the appearance of the judicial responsibility that *Bivens* recognized while simultaneously seeking any excuse not to exercise that responsibility . . .").

³ Brief of Petitioner at 2, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁴ *Bivens*, 403 U.S. at 389.

⁵ Brief of Petitioner at 3, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

cause.⁶ Mr. Bivens sought compensatory damages in the amount of \$15,000 from each of the six federal agents to compensate him for mental pain and suffering.⁷ On October 9, 1967, the district court dismissed the action for want of jurisdiction and for failure to state a claim upon which relief can be granted.⁸ Mr. Bivens then moved the trial court for leave to appeal in *forma pauperis* from the court's order of dismissal. Upon denying the motion, the Court noted that it had further researched and considered the cases bearing upon the issue and then proceeded to supplement its October 9 order of dismissal.⁹

Specifically, the court held that 28 U.S.C. § 1343 (2006) vested district courts with jurisdiction only over certain civil actions that were "authorized by law." Looking for a source which authorized by law a right to vindicate violations of one's constitutional rights by federal agents, the court held that 42 U.S.C. § 1983 (2003) could not authorize the action by law because it applied only to deprivations effectuated under color of state law, and the agents had acted under color of *federal law*.¹⁰ The court likewise found that it lacked jurisdiction under 28 U.S.C. § 1331(a) (2006) insofar as no constitutional or statutory provision created a federal right or cause of action to recover damages from individual federal officers for a violation of the Fourth Amendment, and therefore, no federal question was present.¹¹ And to the extent that such a right or cause of action did exist, the court found that the federal agents in any event would be immune from liability

⁶ *Bivens v. 6 Unknown Named Agents of Federal Bureau of Narcotics*, 276 F. Supp. 12, 13 (E.D. N.Y. 1967).

⁷ *Bivens*, 276 F. Supp. At 13.

⁸ *Id.* See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F.2d 718, 719-20 (2nd Cir. 1969).

⁹ Inexplicably, Mr. Bivens did not appear at the court hearing on his motion for leave to appeal *in forma pauperis* from the trial court's order of dismissal.

¹⁰ *Bivens*, 276 F. Supp. at 13-14.

¹¹ *Id.* at 15-16.

by virtue of their official position.¹² Accordingly, the court adhered to its prior ruling, dismissed Mr. Bivens' complaint on the merits, and denied Mr. Bivens' motion for leave to appeal *in forma pauperis*.¹³

The Second Circuit Court of Appeals appointed counsel to represent Mr. Bivens and affirmed the district court's ruling, albeit on different grounds.¹⁴ The appellate court did not pass upon the question of jurisdiction but confined its review only to whether Mr. Bivens had stated a claim upon which relief could be granted.¹⁵ In answering this question in the negative, the court framed the dispositive question of first impression as "whether a federal cause of action for damages arising out of an unconstitutional search and seizure can rest upon the Fourth Amendment in the absence of statutory authorization for the suit more specific than the general grant of federal question jurisdiction by 28 U.S.C. § 1331."¹⁶

The court agreed with Mr. Bivens that a remedy may be implied from a condemnation in the Constitution itself, but it found that "with rare exception . . . the choice of ways and means to enforce a constitutional right should be left with Congress."¹⁷ Because Congress had enacted various statutes criminalizing certain law enforcement activities pertaining to searches and seizures and providing civil remedies for some of these activities, the court reasoned that Congress' failure to provide a similar remedy to cover the facts of Mr. Bivens' case was not "the result of inattention to the problem of Fourth Amendment violations by federal agents, or to the issue of the liability

¹² *Id.* See also *Bivens*, 403 U.S. at 397.

¹³ *Id.* at 16.

¹⁴ *Bivens*, 409 F.2d at 720-726.

¹⁵ *Id.* at 720.

¹⁶ *Id.* at 721.

¹⁷ *Id.* at 722.

of the government and government officials for tortious conduct.”¹⁸ The court held that it was up to Congress to determine whether there is a similar need for a federal damage action to remedy violations of the Fourth Amendment such as those presented in Mr. Bivens’ case and concluded that it was inappropriate for the judiciary to fill the lacuna that had been left by congressional inaction in this area.¹⁹ Rather, the court found that the existing remedies for an unconstitutional search or seizure – injunctive relief, state tort actions for trespass and false imprisonment, and the exclusionary rule – substantially vindicated the interests protected by the Fourth Amendment even if they did not provide “a totally effective enforcement scheme” for the enforcement of Fourth Amendment rights²⁰

The United States Supreme Court disagreed and reversed. Justice Brennan, writing for the majority,²¹ rejected the government’s argument that the privacy rights protected by the Fourth Amendment were essentially creations of state tort law, not federal law. The Court further rejected the paradigm proposed by the government whereby privacy rights secured by the Fourth Amendment would be vindicated under state tort law with the Fourth Amendment serving as a delimitation upon federal defendants’ ability to defend their conduct as a valid exercise of federal power.²²

The Court characterized the government’s state-tort-remedy argument as an “unduly restrictive view” of the Fourth Amendment because it placed citizens vis-à-vis federal agents cloaked with the powers of federal authority on no different grounds than

¹⁸ *Id.* at 724.

¹⁹ *Id.* at 725.

²⁰ *Id.*

²¹ The *Bivens* majority was comprised of Justice William Brennan, Justice William Douglas, Justice Thurgood Marshall, Justice Potter Stewart, Justice Byron White, and Justice John Marshall Harlan II (concurring in judgment).

²² *Bivens*, 403 U.S. at 390-91.

citizens vis-à-vis other citizens, who lacked such awesome powers.²³ The Court rejected the government's state-tort-remedy argument because (1) the Court's precedent had already rejected the idea that the Fourth Amendment proscribes only conduct by federal officials that would also be proscribed by state law if engaged in by private persons,²⁴ (2) the interests protected by state laws regulating trespass and the invasion of privacy may be "inconsistent or even hostile" to the interests protected by the Fourth Amendment,²⁵ and (3) damages have historically been regarded as the ordinary remedy for harm to personal interests.²⁶ Significantly, however, the Court noted that the case "involve[d] no special factors counseling hesitation in the absence of affirmative action by Congress,"²⁷ and that there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."²⁸

In his concurrence, Justice Harlan emphasized that alternative remedies, such as injunctive relief and the exclusionary rule, were practically useless for someone like Mr. Bivens, who was presumably innocent of the alleged crime and had no prior knowledge

²³ *Id.* at 391-92.

²⁴ *Id.* at 392.

²⁵ *Id.* at 394. The Court's concern was that state trespass remedies might require a plaintiff to resist a federal official in order to state a valid trespass claim, but because of the official's authority, such resistance might effectively result in a plaintiff having to subject himself to arrest solely for the purpose of preserving the civil trespass claim.

²⁶ *Id.* at 395, 396.

²⁷ *Id.* at 396.

²⁸ *Id.* at 397. This was, in effect, an inversion of the analytical framework that had been employed by the lower courts insofar as those courts had emphasized that Congress had not affirmatively sanctioned Mr. Bivens' claim in federal court while the Supreme Court emphasized that Congress had not affirmatively barred the claim. The reasoning employed by the lower courts would eventually find favor among the Justices and play no small part in the Court's subsequent dismantling of the *Bivens* remedy.

of the impending invasion of his privacy interests.²⁹ Rather, “[f]or people in *Bivens*’ shoes, it is damages or nothing.” For this reason, Justice Harlan joined in the Court’s decision to infer a damage remedy directly from the Fourth Amendment for violations of rights secured by that amendment.³⁰

Not all of the Justices agreed, however. Justice Warren Burger dissented, deeming the majority’s decision an act of judicial legislation properly left to Congress.³¹ Justice Hugo Black agreed with Justice Burger, but articulated further concerns regarding the judiciary’s swelling docket.³² Justice Blackmun shared the concerns of both Justice Burger and Justice Black.³³

In short, *Bivens* recognized the judiciary’s authority to fashion a damage remedy as an integral part of the Court’s responsibility to hear cases and controversies under Article III as implemented by 28 U.S.C. § 1331 (2006). This authority was to be presumably exercised unless (1) special factors counseled hesitation absent affirmative action by Congress or (2) Congress explicitly declared that persons in the plaintiff’s position could not recover money damages from federal officials but, instead, were required to resort to another remedy that was equally effective in Congress’ view.

III. DAVIS V. PASSMAN: THE BIVENS EXPANSION

The Court subsequently noted that its *Bivens* decision “concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were

²⁹ *Id.* at 409-10 (Harlan, J., concurring in judgment).

³⁰ *Id.* at 397.

³¹ *Id.* at 411-12 (Burger, J., dissenting).

³² *Id.* at 427-28 (Black, J., dissenting). Justice Harlan’s concurring opinion expressly rejected this notion, holding that “current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.” *Id.* at 411 (Harlan, J., concurring).

³³ *Id.* at 430 (Blackmun, J., dissenting).

similarly protected by provisions of the Constitution.”³⁴ However, in *Davis v. Passman*,³⁵ the Court would include Fifth Amendment due process rights to its list of personal interests so protected.

The defendant in *Davis*, a United States Congressman, hired the plaintiff as a deputy administrative assistant but terminated her employment six months later on account of her sex.³⁶ The plaintiff brought suit in federal court seeking damages in the form of back pay on the grounds that the defendant’s conduct had discriminated against her contrary to the Fifth Amendment to the United States Constitution.³⁷ The defendant moved to dismiss the action for failure to state a claim upon which relief can be granted, and the trial court granted the motion on the grounds that the plaintiff had no cause of action.³⁸ Sitting *en banc*, the Fifth Circuit Court of Appeals applied the criteria of *Cort v. Ash*,³⁹ which established a four-prong test to be applied when determining whether a private cause of action should be implied from a federal statute,⁴⁰ and held that “no right of action may be implied from the Due Process Clause of the fifth amendment.”⁴¹ Because Congress had failed to create a damage remedy for people such as the plaintiff, the court concluded that the plaintiff’s proposed damage remedy was not

³⁴ *Butz v. Economou*, 438 U.S. 478, 486 fn. 8 (1978)

³⁵ 442 U.S. 228 (1979) (Brennan, J.).

³⁶ *Id.* at 230.

³⁷ *Id.* at 231.

³⁸ *Id.* at 232.

³⁹ 422 U.S. 66 (1975).

⁴⁰ *Cort*, decided four years after *Bivens*, relied upon the following factors: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) whether there is any explicit or implicit indication of legislative intent to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy, and (4) whether the cause of action was one traditionally relegated to state law thereby rendering a cause of action based solely on federal law inappropriate. *Id.* at 78.

⁴¹ 442 U.S. at 232.

“constitutionally compelled” and that it was not necessary for the Judiciary to “countermand the clearly discernible will of Congress” and create such a remedy.⁴²

The Supreme Court reversed. Justice Brennan, again writing for a 5-4 majority,⁴³ held that the appellate court had erred by applying the *Court v Ash* standard because the question of who may enforce a statutory right was analytically distinct from the question of who may enforce a right protected by the Constitution.⁴⁴ Unlike statutorily-derived causes of action, the Court could presume that justiciable constitutional rights were enforceable through the Judiciary, at least in the absence of “a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.”⁴⁵ Because the plaintiff rested her claim directly on the Due Process Clause of the Fifth Amendment and further averred that she had no effective means other than the judiciary to vindicate this right, the Court held that she had properly invoked federal-question jurisdiction to assert her cause of action under the Fifth Amendment.⁴⁶

The Court inferred a damage remedy in *Davis* for three reasons. First, damages have been historically regarded as the ordinary remedy for an invasion of personal

⁴² *Id.* at 232-33.

⁴³ The *Davis* majority was comprised of Justice William Brennan, Justice Harry Blackmun, Justice Thurgood Marshall, Justice John Paul Stevens, Justice Potter Stewart, and Justice Byron White. In the interim between the *Bivens* and *Davis* decisions, Justice Hugo Black was succeeded by Justice Louis Powell, Jr., Justice John Marshall Harlan II was succeeded by Justice William Rehnquist, and Justice William Douglas was succeeded by Justice John Paul Stevens. The only obvious impact that these changes had on the *Bivens* doctrine was that Justice Harlan’s concurrence in *Bivens* was now manifest as Justice Rehnquist’s dissent in *Davis*. The remaining succeeding justices, Justice Powell and Justice Stevens, would adhere to the same doctrinal disposition that had been displayed by their respective predecessors in *Bivens*.

⁴⁴ *Id.* at 241 (emphasis in original).

⁴⁵ *Id.* at 242 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962) and *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). See footnote 226, *post*, with regards to the political question presented by the application of the *Bivens* doctrine.

⁴⁶ *Id.* at 243-44 (footnote omitted).

interests,⁴⁷ and equitable relief in the form of reinstatement was not available as a practical matter because the defendant was no longer a Congressman.⁴⁸ As in *Bivens*, it was “damages or nothing.” Second, although special concerns did counsel hesitation before imposing liability upon a Congressman for actions occurring in the course of his official conduct, those concerns were “coextensive with the protections afforded by the Speech or Debate Clause” so that actions outside the purview of the Clause would render the actor liable and thereby neutralize this concern.⁴⁹ Lastly, as in *Bivens*, there was no explicit congressional declaration that those injured by unconstitutional federal employment discrimination could not recover money damages from the responsible party.⁵⁰

The Court again dismissed the notion that expanding the *Bivens* damage remedy to encompass violations of the Fifth Amendment Due Process Clause would open the floodgates of litigation⁵¹ because “not . . . every tort by a federal official may be redressed in damages,” and in any event, the need for a damage remedy could be obviated if Congress created equally effective alternative remedies.⁵² In reaching this conclusion, the majority adopted Justice Harlan’s concurring opinion in *Bivens*, which had held that “current limitations upon the effective functioning of the courts arising

⁴⁷ The Court found that formulating a damage award for back pay was judicially manageable and presented no difficult questions of valuation or causation because Title VII litigation had given federal courts experience with evaluating such claims. *Id.* at 245.

⁴⁸ *Id.* at 245.

⁴⁹ *Id.* at 246.

⁵⁰ *Id.* at 246-47 (citing *Bivens*, 403 U.S. at 397). The Court rejected the notion that Section 717 of Title VII of the Civil Rights Act of 1964, which protects federal employees from discrimination on the basis of “race, color, religion, sex, or national origin,” 42 U.S.C. § 2000e-16(a) (2003), foreclosed a *Bivens* damage remedy because that section did not apply to congressional employees such as the plaintiff who were not part of the competitive service, and there was no evidence that Congress had intended Section 717 to foreclose alternative remedies available to those not covered by the statute.

⁵¹ *Id.* at 248.

⁵² *Id.* at 248 (citing *Bivens*, 403 U.S., at 397). Implicit in the Court’s ruling was the notion that a non-damage remedy could be as equally effective as a damage remedy.

from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.”⁵³

As in *Bivens*, Chief Justice Burger dissented, joined by Justice Powell and Justice Rehnquist, arguing that the case presented “very grave questions of separation of powers”⁵⁴ and describing judicial power in this area as “circumscribed” until Congress legislated otherwise.⁵⁵ Justice Stewart also dissented, with Justice Rehnquist joining, on the grounds that “principles of comity and separation of powers should require a federal court to stay its hand.”⁵⁶ Justice Stewart further held that the immunity afforded by the Speech and Debate Clause was dispositive, and therefore, the case should be remanded back to the appellate court to pass upon that issue.⁵⁷ Notwithstanding the dissent’s rehash of their separation-of-powers concerns, the majority’s budding *Bivens* doctrine took root in *Davis* and would continue to grow in the Court’s next *Bivens*-related decision.

IV. CARLSON V. GREEN: THE BIVENS PINNACLE

The Court’s decision in *Carlson v. Green*⁵⁸ signified the beginning of a short-lived accord in the Justice’s views regarding the *Bivens* remedy. Even Chief Justice Burger, *Bivens*’ most staunch opponent at the time, indicated in *Carlson* that, but for the majority’s “unwarranted expansion” of *Bivens*, he “would be prepared to join in an opinion giving effect to *Bivens*,” notwithstanding the fact that it was “wrongly

⁵³ *Id.* at 248 (citing *Bivens*, 403 U.S., at 411) (Harlan, J., concurring).

⁵⁴ *Id.* at 249 (Burger, C.J., dissenting).

⁵⁵ *Id.* at 250 (Burger, C.J., dissenting).

⁵⁶ *Id.* at 252 (Stewart, J., dissenting).

⁵⁷ *Id.* at 251 (Stewart, J., dissenting).

⁵⁸ 446 U.S. 14 (1980) (Brennan, J.).

decided.”⁵⁹ This relative accord amongst the Justices with respect to *Bivens* would continue until *Bivens* reached the end of its short leash three years later.⁶⁰

Only one year after Justice Brennan authored *Davis*, he would pen the third and last chapter in his trilogy of implied constitutional damage remedy opinions. In *Carlson*, the mother of a deceased prisoner brought suit against federal prison officials, alleging that the defendants kept her son at a Federal Correction Center against the advice of doctors, failed to give her son competent medical attention for eight hours after he had suffered an asthma attack, administered contra-indicated drugs that made her son’s attack more severe, attempted to use a respirator known to be inoperative which further impeded her son’s breathing, and unduly delayed transferring her son to an outside hospital.⁶¹ The complaint further alleged that the defendants’ indifference was in part attributable to their racial prejudice.⁶² The plaintiff sought compensatory and punitive damages for violations of her son’s rights secured by the Due Process Clause, Equal Protection Clause, and Cruel and Unusual Punishment Clause.⁶³

The trial court held that the allegations sufficiently pleaded a violation of the Eighth Amendment proscription against cruel and unusual punishment, which in turn gave rise to a cause of action for damages under *Bivens*, and the Seventh Circuit Court of Appeals agreed that the plaintiff had stated a valid Eighth Amendment *Bivens* claim.⁶⁴

The question presented to the Supreme Court was whether a damage remedy was available directly under the Constitution in light of the fact that the plaintiff’s allegations

⁵⁹ *Id.* at 30 (Burger, C.J., dissenting).

⁶⁰ *See Chappell v. Wallace*, 462 U.S. 296 (1983) (unanimous decision); *Bush v Lucas*, 462 U.S. 367 (1983) (7-2 decision); *Carlson*, *supra*, (6-3 decision).

⁶¹ *Carlson*, 446 U.S. at 16 fn. 1.

⁶² *Id.*

⁶³ *Id.* at 16-17.

⁶⁴ *Id.* at 17.

could also support a suit directly against the United States under the limited waiver of sovereign immunity provided by the Federal Tort Claims Act (“FTCA”).⁶⁵ Justice Brennan, again writing for the Court,⁶⁶ characterized *Bivens* in broad sweeping and generalized terms as “establish[ing] that the 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.”⁶⁷ The Court further reiterated that *Bivens* relief was generally available unless the defendants demonstrated ““special factors counselling hesitation in the absence of affirmative action by Congress”” or otherwise established that Congress had provided “an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.”⁶⁸

The Court found neither special factors counseling hesitation nor a sufficiently adequate alternative remedy that would foreclose the availability of a judicially-created *Bivens* remedy. More specifically, the Court found no special factors counseling hesitation in the absence of affirmative action by Congress because (1) prison officials do not enjoy “such independent status in our constitutional scheme as to suggest that

⁶⁵ *Id.* (citing 28 U.S.C. § 2671-2680 (2006)). Although this issue was addressed in the Petition for Certiorari, it was neither presented to nor addressed by the lower courts. The Court, however, concluded that the interest of judicial administration would be served by addressing the issue on its merits where it was squarely presented, fully briefed, and presented an important recurring issue that had been properly presented in a petition being held in abeyance in another case. *Id.* at 17 fn. 2.

⁶⁶ The *Carlson* majority was comprised of Justice William Brennan, Justice Harry Blackmun, Justice Thurgood Marshall, Justice William Rehnquist, Justice John Paul Stevens, and Justice Byron White. There had been no change in the Court’s composition during the interim between its *Davis* and *Carlson* decisions.

⁶⁷ *Carlson*, 446 U.S. at 18. The majority’s expansive interpretation of *Bivens* seems contrary to its pronouncement just two years prior that *Bivens* “concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution.” *Butz*, 438 U.S. at 486 fn. 8.

⁶⁸ *Id.* at 18, 19 (citing *Bivens*, 403 U.S. at 396, 397; *Davis*, 442 U.S. at 245-247) (emphasis in original).

judicially created remedies against them might be inappropriate,”⁶⁹ (2) even if prison officials’ efforts to perform their duties might be inhibited by *Bivens* suits, qualified immunity was sufficient to provide adequate protection,⁷⁰ and (3) there existed “no explicit congressional declaration that persons injured by federal officers’ violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress.”⁷¹ The Court further rejected the defendants’ argument that the FTCA or its legislative history revealed a congressional intent to preempt the *Bivens* remedy or created an equally effective remedy for constitutional violations. The FTCA was enacted long before *Bivens* was decided, and when Congress amended the FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, the legislative record was “crystal clear” that Congress viewed the FTCA and *Bivens* as “parallel, complementary causes of action.”⁷²

The Court articulated four additional factors that rendered the *Bivens* remedy a more effective remedy than the FTCA, which also supported its conclusion that Congress did not intend to limit the plaintiff to an FTCA action.⁷³ Namely, the Court emphasized

⁶⁹ *Id.* at 19 (citing *Davis*, 442 U.S. at 246).

⁷⁰ *Id.* (citing *Davis*, 442 U.S. at 246).

⁷¹ *Id.*

⁷² *Id.* at 19-20 (citations omitted). The Court noted that its “inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy.” *Id.* at 20 fn. 5.

⁷³ The Court noted that:

The issue is not whether a *Bivens* cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an equally effective remedial scheme. Otherwise the two can exist side by side. Moreover, no one difference need independently render FTCA inadequate. It can fail to be equally effective on the cumulative basis of more than one difference.

Carlson, 446 U.S. at 23.

that (1) unlike the FTCA remedy against the United States, the *Bivens* remedy recoverable against individual federal agents served a deterrent purpose in addition to compensating victims,⁷⁴ (2) the Court's prior decisions implied that punitive damages may be awarded in a *Bivens* suit, which are statutorily prohibited in an FTCA suit,⁷⁵ (3) *Bivens* provided for a jury trial, and the FTCA did not,⁷⁶ and (4) an FTCA action existed only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward, which effectively relegated violations of the federal constitutional by federal officials to the vagaries of state laws and created a lack of uniformity regarding the liability of federal officials for such violations.⁷⁷

Justice Powell, joined by Justice Stewart, concurred in the Court's decision, although they did not agree with much of the language in the Court's opinion.⁷⁸ Specifically, these Justices were troubled by the Court's characterization of *Bivens* in broad, generalized terms, deeming it *dicta* that went well beyond the Court's prior holdings by requiring federal courts to entertain *Bivens* claims unless the action was defeated by one of the two specified exceptions.⁷⁹ They were further troubled by the lack of guidance provided by the majority opinion as to what "special factors" would counsel hesitation.⁸⁰ The concurrence also took exception to the Court's imposition of unduly rigid conditions, which required *Bivens* defendants seeking to prevail to establish, not

⁷⁴ *Id.* at 20-21 (footnote omitted; citing *Butz*, 438 U.S. at 505).

⁷⁵ *Id.* at 21-22 (citing 28 U.S.C. § 2674 (1988)).

⁷⁶ *Id.* at 22 (footnote omitted; citing 28 U.S.C. § 2402 (1996)).

⁷⁷ *Id.* at 23 (citing 28 U.S.C. § 1346(b) (2006)).

⁷⁸ Justice Stewart was part of the *Bivens* majority but dissented in *Davis* because he believed the case should have been disposed of on alternative grounds, namely the Speech and Debate Clause. Thus, his concurrence in *Carlson* was the first time that he expressed reservations with regards to the *Bivens* doctrinal framework. Conversely, Justice Powell was not appointed to the Court until after the *Bivens* decision, but he had dissented in *Davis* to express separation-of-powers concerns. Thus, his concurrence in *Carlson* was the first time that he expressed agreement with the *Bivens* doctrinal framework.

⁷⁹ *Id.* at 26 (Powell, J., concurring in judgment).

⁸⁰ *Id.* at 27 (Powell, J., concurring in judgment).

merely the existence of an adequate alternative remedy, but that Congress had explicitly declared this alternative remedy to be an equally effective substitute for recovery directly under the Constitution.⁸¹ The Court's relegation of its judicial discretion to merely ascertaining the acceptability of alternative remedies was, in the eyes of the concurrence, "a drastic curtailment of discretion" and was further inconsistent with the Court's prior decisions that Congress was the appropriate body to create federal remedies.⁸² In short, Justice Powell and Justice Stewart concurred in the Court's decision because the FTCA offered an inadequate alternate remedy, but they did not believe that there was a right to a *Bivens* remedy whenever defendants failed to show that Congress had provided an equally effective alternative remedy that it had explicitly declared to be a substitute.⁸³

Chief Justice Burger maintained his relentless dissent to *Bivens*, arguing that the Court's decision was an "unwarranted expansion" of the *Bivens* doctrine, that the FTCA provided an adequate remedy for prisoners' claims of medical mistreatment, and that inferring a private civil damage remedy from the Eighth Amendment, or any other constitutional provision for that matter, was an exercise of power that the Constitution did not give the Court, such tasks being more appropriately within the legislative preview of Congress.⁸⁴

The *Carlson* decision appeared to be a victory for the *Bivens* camp, with its broad rule of general application subject only to two exceptions, namely the cryptic "special factors" counseling counseled hesitation in the absence of affirmative action by Congress or the presence of affirmative legislative action that provided an equally effective

⁸¹ *Id.* at 26-27 (Powell, J., concurring in judgment).

⁸² *Id.* at 28 (Powell, J., concurring in judgment).

⁸³ *Id.* at 28-29 (Powell, J., concurring in judgment).

⁸⁴ *Id.* at 30, 34 (Powell, J., concurring in judgment).

alternative remedy that Congress had explicitly declared to be a substitute for recovery directly under the Constitution.⁸⁵ Although it appeared as though the *Bivens* doctrine had become firmly entrenched in the Court's jurisprudence, future decisions would soon reveal *Carlson* as the last decision in which the Court would find a judicially-created damage remedy for violations of the federal constitution.

V. **BUSH V. LUCAS: THE PARADIGM SHIFT**

The Court's decision in *Bush v Lucas*,⁸⁶ was the first time that the *Bivens* pen was held in the hands of a Justice other than Justice Brennan, and although the *Bivens* doctrinal framework would survive the encounter, Justice Stevens' doctrinal surgery would subject the *Bivens* remedy to a serious paradigm shift, from which it would never fully recover.⁸⁷

The plaintiff in *Bush*, an aerospace engineer employed at a major space flight center operated by NASA, brought an action in state court against the director of the flight center, claiming that his First Amendment rights had been violated when he was demoted in response to highly critical public comments he had made regarding the agency.⁸⁸ The defendant removed the lawsuit to federal court, which subsequently granted summary judgment on the grounds that the defendant was absolutely immune from liability for any damages resulting from the alleged defamation and that the defendant's demotion was not a constitutional deprivation for which a damages action

⁸⁵ *Id.* at 18, 19 (citing *Bivens*, 403 U.S. at 396, 397; *Davis*, 442 U.S. at 245-247) (emphasis in original).

⁸⁶ 462 U.S. 367 (1983).

⁸⁷ Justice Stephens, who was appointed to the Court after the *Bivens* decision, participated in the majority opinions of both *Davis* and *Carlson*. Thus, his reworking of the *Bivens* doctrinal framework appears to have been motivated more from the perceived need to create a workable standard more acceptable to the Court than from mere disagreement with the underlying doctrine itself.

⁸⁸ 462 U.S. at 369-71.

could be maintained.⁸⁹ The Fifth Circuit Court of Appeals affirmed, holding that the relationship between the federal government and its civil service employees was a special factor counseling against the imposition of a judicially-created damage remedy. The court reasoned that the plaintiff had no damage remedy for a First Amendment retaliatory demotion in view of the remedies made available by Civil Service Commission regulations.⁹⁰

The Supreme Court agreed and affirmed.⁹¹ In a distinct break from precedent, the Court held that its power to grant judicially-crafted relief was now to be exercised “in light of the relevant policy determinations made by the Congress.”⁹² The Court found that special factors counseled hesitation, which required that the Court consider other reasons to allow Congress to prescribe the scope of relief available to federal employees whose First Amendment rights were violated by their supervisors.⁹³ After marshalling various legislative enactments, executive orders, and administrative regulations promulgated over the course of the preceding century, the Court held that civil servants were protected “by an elaborate, comprehensive scheme” that encompassed a multitude of personnel decisions, proscribed arbitrary action by supervisors, and provided

⁸⁹ *Id.* at 371.

⁹⁰ *Id.* at 371-72.

⁹¹ The *Bush* majority was comprised of Chief Justice Warren Earl Burger, Justice John Paul Stevens, William Brennan, Justice Sandra Day O’Connor, Justice Louis Powell, Jr., Justice William Rehnquist, and Justice Byron White. This was the largest consensus of Justices in a single *Bivens*-related decision since the inception of *Bivens*, and it appears to have been the result of Justice Potter Stewart, who dissented in both *Davis* and *Carlson*, being succeeded after the *Carlson* decision by Sandra Day O’Connor, who joined in the *Bush* majority.

⁹² *Id.* at 373.

⁹³ *Id.* at 380.

administrative and judicial procedures through which improper action could be redressed.⁹⁴

Proceeding on the assumption that the plaintiff's First Amendment rights had been violated and that the civil service remedies were not as effective as an individual damage remedy,⁹⁵ the Court pointed out that although Congress had not expressly authorized the damage remedy sought by the plaintiff neither had it expressly precluded such a remedy by declaring existing statutes the exclusive mode of redress.⁹⁶ In another clear break from precedent, the Court expanded the bases from which it could infer Congress' intent to preempt a *Bivens* remedy to include statutory language, clear legislative history, or the existence of the statutory remedy itself.⁹⁷ Absent any direction

⁹⁴ *Id.* at 387. Specifically, the regulations applicable at the time of the plaintiff's demotion provided that federal employees in the competitive service could be removed or demoted only for such. *Id.* at 386. Employees were entitled to 30 days' written notice of a proposed discharge, suspension, or demotion, accompanied by the agency's reasons and a copy of the charges. *Id.* Employees had the right to examine all disclosable materials that formed the basis of the proposed action, to answer the charges with a statement and supporting affidavits, and to make an oral non-evidentiary presentation to an agency official. *Id.* at 386-87. The final agency decision was required to be made by an official higher in rank than the official who proposed the adverse action, and the employee was entitled to written notification, stating which of the initial reasons had been sustained. *Id.* at 387. Employees further enjoyed the right to appeal to the Civil Service Commission's Federal Employee Appeals Authority (now Merit Systems Protection Board), which was further required to hold trial-type hearings at which employees could present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials. *Id.* This appellate tribunal was required to render a written decision, and an adverse decision was subject to judicial review. *Id.* Employees further enjoyed the right to petition to reopen an adverse decision. *Id.* at 387-88. If an employee prevailed at either the administrative or judicial level, he was entitled to reinstatement with retroactive seniority, full back pay, and accumulated leave, which Congress intended to put the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id.* at 388.

⁹⁵ *Id.* at 372. The plaintiff argued that the existent civil service remedies were not equally effective as a *Bivens* money damage remedy because they provided for neither a jury trial nor punitive damages. *Id.* at 372 fn. 8.

⁹⁶ *Id.* at 372-73.

⁹⁷ *Id.* at 378. This aspect of the Court's holding is important because it signifies an inflection point in the Court's jurisprudence regarding the level of congressional action required in order for the Court to find that Congress intended to preclude *Bivens* relief. Gone was the *Bivens-Davis-Carlson* methodology that required the Court to find that Congress had "explicitly declared" an equally effective alternative remedy to be a substitute for judicially-created *Bivens* relief. See e.g. *Carlson*, 446 U.S. at 18-19 (citing *Bivens*, 403 U.S., at 397; *Davis*, 442 U.S. at 245-247). *Bivens* defendants could now show that Congress had provided an alternative remedy by way of express statutory language, clear legislative history, or the existence of the statutory remedy. As discussed further, *post*, the same day that *Bush* was decided, the Court decided *Chappell v. Wallace*, 462 U.S. 296 (1983), in which it (cont'd . . .)

from Congress, the Judiciary should “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.”⁹⁸ The Court then employed a common-law cost-benefit analysis regarding the creation of a *Bivens* remedy for violations of employees’ First Amendment rights and, concluding that Congress was in a better position to decide whether or not the public interest would be served by creating such a remedy, declined to expand the *Bivens* remedy without the assistance of legislative aid.⁹⁹

Justice Marshall, joined by Justice Blackmun, concurred to note that “a different case would be presented if Congress had not created a comprehensive scheme that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights . . . and that affords a remedy that is substantially as effective as a damage action.”¹⁰⁰ The concurrence further noted that the Court’s decision to deny *Bivens* relief was limited only to those injuries caused by personnel actions that could be remedied by the federal statutory scheme.¹⁰¹ Finally, Justice Marshall and Justice Blackmun found that the benefits of the administrative scheme (*i.e.*, burden of proof on government, lack of qualified immunity

further undermined, *sub silentio*, the requirement of an affirmative act of Congress by interpreting mere legislative acquiescence in the lack of an existing statutory remedy as proof of congressional intent not to require a remedy as matter of legislative policy.

⁹⁸ *Id.* This aspect of the Court’s holding is also significant as it laid the foundation for future decisions to reduce the analysis regarding the availability of *Bivens* relief to nothing more than a mere common-law balancing test. See *Tribe, supra* note 2, at 49 (noting that Court reached its decision in *Wilkie v. Robbins*, ___ U.S. __; 127 S. Ct. 2588 (2007) “by transforming the *Bivens* presumption in favor of a federal cause of action into a general, all-things-considered, balancing test.”).

⁹⁹ *Id.* at 388-90 (citation omitted).

¹⁰⁰ *Id.* at 390 (citations omitted).

¹⁰¹ *Id.* at 391.

defense, and a less costly speedier recovery) were not outweighed by the system's disadvantages (*i.e.*, lack of a trial by jury and limited judicial review).¹⁰²

The *Bush* decision presented the first significant milestone in the Court's abandonment of the *Bivens* remedy by successfully shifting the paradigm of the *Bivens* doctrinal framework while ideologically accommodating the individual Justices, which was evidenced by the absence of any dissenters and the general accord regarding the Court's disposition of the matter. The Court's decisions in *Davis* and *Carlson* both emphasized that alternative legislative remedies would not preclude *Bivens*-type relief unless those remedies were "equally effective" and Congress "expressly declared" that the alternative remedies had been enacted to supplant the *Bivens* damage remedy.¹⁰³ Abandoning this approach, the Court no longer considered trial by jury or punitive damages to be indispensable elements of an equally effective alternative to the *Bivens* damage remedy. However, because Congress does not typically express or imply its decision to preclude *Bivens*-type relief,¹⁰⁴

"the real thrust of *Bush* was to expand the class of cases in which congressionally created remedies would be held to preclude *Bivens* recovery far beyond the small, if not null, set in which Congress has explicitly declared a *Bivens* remedy to be supplanted and the somewhat larger set in which Congress might plausibly be said to have implied such preclusion."¹⁰⁵

Unfortunately, *Bush's* encroachment upon the Court's *Bivens* jurisprudence would continue to grow, and its doctrinal ramifications would continue to reemerge in the Court's subsequent decisions.

¹⁰² *Id.* at 391-92.

¹⁰³ *See Tribe, supra* note 2, at 64.

¹⁰⁴ *See Tribe, supra* note 2, at 65 (footnote omitted).

¹⁰⁵ *Id.* (footnote omitted).

VI. CHAPPELL V. WALLACE: THE UNANIMOUS CURTAILMENT OF BIVENS

The same day that the Court decided *Bush* it decided *Chappell v. Wallace*.¹⁰⁶ In *Chappell*, five enlisted naval men who served aboard a combat naval vessel brought suit against the Commanding Officer, four lieutenants, and three noncommissioned officers.¹⁰⁷ The plaintiffs sought damages, declaratory judgment, and injunctive relief on the grounds that the defendants had discriminated against them on account of their race, thereby depriving them of their constitutional rights.¹⁰⁸ The trial court dismissed the complaint on the grounds that the defendants' actions constituted nonreviewable military decisions, the defendants' were entitled to immunity, and the plaintiffs had failed to exhaust their administrative remedies.¹⁰⁹ The Ninth Circuit Court of Appeals reversed based on the assumption that *Bivens* permitted a damage remedy for the constitutional violations alleged in the complaint so long as the actions were not nonreviewable military decisions and the defendants were not immune from suit.¹¹⁰

The Supreme Court reversed. Justice Burger, writing for a unanimous court, held that the Court's holding in *Feres v. United States*,¹¹¹ constituted a special factor counseling hesitation in the *Bivens* context.¹¹² Expressly recognizing its ruling as a limitation on the *Bivens* remedy, the Court reasoned that exposing superior officers to such liability would undermine the "special nature of military life," such as "the need for unhesitating and decisive action by military officers and equally disciplined responses by

¹⁰⁶ 462 U.S. 296 (1983).

¹⁰⁷ *Id.* at 297.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 297-98.

¹¹⁰ *Id.* at 298.

¹¹¹ 340 U.S. 135 (1950).

¹¹² The *Feres* decision held that Congress had not intended to create FTCA liability for the military because of the "peculiar and special relationship" between soldiers and their superiors and the effects that such suits might have on military discipline. *Id.* at 298-99 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)).

enlisted personnel.”¹¹³ The Court found it significant that although Congress had created a separate system of military justice pursuant to its plenary control over military matters it had not provided a damage remedy for claims by military personnel against superior officers for violations of their constitutional rights.¹¹⁴ Thus, the Court concluded that the unique disciplinary structure of the military coupled with Congress’ activity in the field constituted special factors, rendering the imposition of *Bivens* relief against military superior officers inappropriate.¹¹⁵

Both *Bush* and *Chappell* represent the inflection point in the Court’s *Bivens* jurisprudence. Although the *Chappell* Court had finally reached unanimity, subsequent decisions would reveal that the Justices’ agreement extended only to the delimitation – not to the extension – of the *Bivens*’ remedy. Swift changes in the Court’s ideological composition and the concomitant doctrinal shifts that the Court would soon experience as the Rehnquist Court was ushered in would drive the *Bivens* doctrine further along its downward spiral from which it would never fully recover. In future decisions, the *Bivens*

¹¹³ *Id.* at 301, 303-04. In this regard, *Chappell* and *Carlson* appearance somewhat inconsistent insofar as *Chappell* refused to recognize a *Bivens*-type remedy in the military context out of concerns of discipline and the need to maintain complete command over subordinate officers yet *Carlson* imposed such liability in the prison context notwithstanding similar concerns. It is hard to reconcile how extending *Bivens* liability to military personnel would create any greater impediment to discipline than it would in the prison context, particularly in light of the Court’s consistent pronouncements regarding the importance and dangers of disciplinary sanctions in the penal setting. See e.g. *Wolff v. McDonnell*, 418 U.S. 539, 562-563 (1974) (recognizing that prison disciplinary proceedings “necessarily involve confrontations between inmates and authority,” that “[r]etaliatio[n] is much more than a theoretical possibility,” and that in certain instances there is a need for discipline to be “swift and sure”). Although this apparent discrepancy could be explained by the Court’s further emphasis on the “special and exclusive system of military justice,” *Chappell*, 462 U.S. at 300, a similar argument could be made with regards to the special and exclusive system of administrative prison disciplinary proceedings, to which the judiciary extends great deference, *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), coupled with the special and exclusive system of litigation applied exclusively to prisoners. Cf. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (2003), *et seq.* Thus, while *Chappell* appears at first blush to be a relatively straight-forward application of the special-factors exception to *Bivens*, upon further inspection it reveals the beginning of a schism in the Court’s ideological edifice that would continue to increase in divergence as time passed.

¹¹⁴ *Id.* at 304.

¹¹⁵ *Id.*

doctrine would find itself beneath the unforgiving pen of the Court's more conservative constituents, which would cause a recrudescence of narrow 5-4 decisions and, ultimately, reduce the *Bivens* remedy "to a mere shadow of its former self."¹¹⁶

VII. UNITED STATES V. STANLEY: THE CHAPPELL CURTAILMENT REVISITED

A few years later, the Court would revisit the propriety of interposing *Bivens* relief in the military context. In *United States v. Stanley*,¹¹⁷ the plaintiff, a former master sergeant in the Army, had volunteered to participate in a program, which purported to test the effectiveness of protective clothing and equipment against chemical warfare.¹¹⁸ Unbeknownst to the plaintiff, the government surreptitiously administered doses of lysergic acid diethylamide ("LSD") to the participants pursuant to a plan to study the effects of the drug on human subjects.¹¹⁹ As a result of the LSD exposure, the plaintiff suffered from hallucinations, incoherence, and memory loss, which impaired his military performance. Additionally, the plaintiff alleged that he occasionally awoke from his sleep at night, violently beat his wife and children, and could not thereafter fully recall the incidents.¹²⁰ The Army denied the plaintiff's administrative claim for compensation, so the plaintiff filed suit under the FTCA, alleging negligence in the administration, supervision, and monitoring of the government's surreptitious drug testing program.¹²¹

After some procedural wrangling, the trial court held that *Bivens* actions by servicemen for torts committed against them during the term of their service were not

¹¹⁶ Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 Tex. L. Rev. 471, 472 (2006).

¹¹⁷ 483 U.S. 669 (1987) (Scalia, J.)

¹¹⁸ *Id.* at 671.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 672.

wholly foreclosed by *Chappell*.¹²² Instead, the court construed *Chappell* as barring only those actions in which servicemen brought suit against their superiors for wrongs involving direct orders in the performance of military duty that implicated military discipline and order, factors not present in this case.¹²³ The Eighth Circuit Court of Appeals affirmed the lower court's ruling on essentially the same grounds.¹²⁴

The Supreme Court disagreed and reversed. Rejecting the lower court's chain-of-command distinction, Justice Scalia, writing for yet another 5-4 majority,¹²⁵ characterized the trial court's ruling as an "unduly narrow view" of the circumstances in which courts should refuse to impose *Bivens* liability in the military context.¹²⁶ Rather, the Court held that the specificity and insistence of Congress' constitutional authority over military matters counseled hesitation in the creation of a damage remedy in this field.¹²⁷ The Court found that the plaintiff was underestimating the degree of disruption that would be caused by imposing a *Bivens* remedy in the military context, which was yet another factor

¹²² *Id.* at 674.

¹²³ *Id.* at 675.

¹²⁴ *Id.*

¹²⁵ The *Stanley* majority was composed of Justice Antonin Scalia, Chief Justice William Rehnquist, Justice Harry Blackmun, Justice Louis Powell, Jr., and Justice Byron White. During the interim between *Chappell* and *Stanley*, Chief Justice Burger was succeeded by Justice Rehnquist as the Chief Justice, and Justice Scalia was appointed to replace Justice Rehnquist's position on the Court. Although these changes heralded the Rehnquist Court, no palpable ideological shift in the Court's *Bivens* doctrine would result. Historically, Chief Justice Burger was the only Justice to consistently oppose the *Bivens* doctrine, and Justice Scalia seamlessly assumed this role beginning with *Stanley*, the Rehnquist Court's first *Bivens* decision. Thus, the legacy of Chief Justice Burger's opposition to *Bivens* would continue in his absence through Justice Scalia.

¹²⁶ *Id.* at 678, 679.

¹²⁷ *Id.* at 682. One contribution that *Stanley* made to the Court's *Bivens* jurisprudence was the clarification of and emphasis on the independent nature of the special-factors inquiry and the alternative-remedy inquiry. In this regard, the Court held that whether an adequate federal remedy existed to relieve a plaintiff's injuries was irrelevant to whether any special-factors existed that counseled hesitation in imposing a *Bivens* remedy. The special-factors analysis, the Court explained, did not concern itself with whether Congress had chosen to afford some manner of relief in a particular case but, rather, was solely concerned with whether the judiciary's uninvited intrusion into a particular field was inappropriate. *Id.*

that counseled hesitation against imposing *Bivens* liability in this context.¹²⁸ In short, the Court limited *Chappell*'s promise, that not all redress in civilian courts for constitutional wrongs suffered in the course of military service was barred, to encompass only equitable relief,¹²⁹ and expanded *Chappell*'s special factors counseling hesitation to encompass all injuries arising out of or in the course of activity incident to military service.¹³⁰

Justice O'Connor dissented with regards to the Court's expansive incident-to-service rule. Reading *Chappell* and *Feres* together, Justice O'Connor candidly admitted that "no amount of negligence, recklessness, or perhaps even deliberate indifference on the part of the military would justify the entertainment of a *Bivens* action involving actions incident to military service."¹³¹ However, she believed that the plaintiff's allegations so far transcended the bounds of human decency that, as a matter of law, they could not be considered part of the military mission.¹³²

Justice Brennan also dissented with Justice Marshall and Justice Stevens joining. Characterizing the majority's decision as wholesale "abdication,"¹³³ These Justices charged the majority with ripping *Bivens* from its "analytical moorings," which directly led to the Court's "unjust and illogical result."¹³⁴ The dissent considered the majority decision tantamount to a grant of absolute immunity so long as the defendant-civilians inflicted only service-related injuries.¹³⁵ They further deemed the majority's application

¹²⁸ *Id.* Again, as noted in footnote 113, *ante*, it is difficult to reconcile the Court's rulings that liability in the military context presents such a potential for disruption as to counsel hesitation against providing *Bivens* relief, yet imposing *Bivens* liability in the penal context presents no similar measure of concern.

¹²⁹ *Id.* at 683 (holding that *Chappell* was confined to relief "designed to halt or prevent the constitutional violation rather than the award of money damages.").

¹³⁰ *Id.* at 683-84 (quoting *Feres*, 340 U.S. at 146).

¹³¹ *Id.* at 709.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 691 (Brennan, J. dissenting).

¹³⁵ *Id.* at 697 (Brennan, J. dissenting).

of *Chappell* to the present case disingenuous because *Chappell* emphasized the peculiar and special relationship between a soldier and his superiors and the need for immediate compliance with military procedures and orders, yet no such considerations were present in this case.¹³⁶ Moreover, the majority's concern regarding disruption of military affairs was questionable at best because the Court was already involved in various forms of military-related litigation.¹³⁷ Thus, in the dissent's view, the Court's analogy to the concerns underlying the *Feres* doctrine dramatically expanded *Chappell*'s carefully limited holding,¹³⁸ particularly where one of the special factors counseling hesitation in *Chappell* (*i.e.*, the availability of review and remedy of soldier grievances) was not present in this case and where injunctive relief would come too late for someone who was already injured.¹³⁹ Lastly, the dissent rejected the notion that the delegation of authority to Congress over military matters somehow counseled against the imposition of a *Bivens* remedy because *any time* Congress acts it does so pursuant to either an express or implied grant of power by virtue of the fact that the federal government is one of enumerated powers under our Constitutional framework.¹⁴⁰

Although *Stanley* revived the 5-4 division that had plagued the Court's previous decisions, it is illustrative of the Court's seemingly disjointed *ad hoc* approach to its *Bivens* analysis. If the unanimity of *Chappell* showed that the proponents of *Bivens* were amenable to stemming the expansion of the *Bivens* remedy, the divergence of *Stanley* showed that the opponents of *Bivens* were not amenable to expanding the remedy to any

¹³⁶ *Id.* at 700, 701 (Brennan, J. dissenting) (quoting *Chappell*, 462 U.S. at 300, 305).

¹³⁷ *Id.* at 703 (referencing litigation between servicemen and the government for nonservice-related injuries, litigation between servicemen and government contractors for service-related injuries, and litigation between civilians and the military or its military contractors).

¹³⁸ *Id.* at 701.

¹³⁹ *Id.* at 690, 706.

¹⁴⁰ *Id.* at 707 ("If a *Bivens* action were precluded any time Congress possessed a constitutional grant of authority to act in a given area, there would be no *Bivens*.").

new factual contexts. In light of the Court’s emphasis that Congress’ express authority over the military precluded a *Bivens* damage remedy, both *Stanley* and *Chappell* may be best understood as the consequences of the *Bush* Court’s holding “that Congress’s special sphere of constitutional authority – even if unexercised – with regard to a particular domain itself constitutes a ‘special factor counselling hesitation.’”¹⁴¹ Applying the *Bush* Court’s concept of the special factors exception, the Court would henceforth refrain from intruding into any areas that the Constitution relegated to the responsibility of Congress.¹⁴²

VIII. SCHWEIKER V. CHILICKY: A WRONG WITHOUT A REMEDY

One year later, the Court would revisit its *Bivens* doctrine,¹⁴³ and the resulting decision, only two years into the Rehnquist era, offered prescient insight into the decisions that were to follow. In *Schweiker v. Chilicky*,¹⁴⁴ three plaintiffs’ disability benefits were wrongfully terminated pursuant to a newly-enacted Continuing Disability Review program that ultimately resulted in the wrongful termination of benefits to over 200,000 disabled persons.¹⁴⁵ Two of the three plaintiffs had appealed their respective terminations through an administrative review process, prevailed, and were awarded full

¹⁴¹ *Tribe, supra* note 2, at 65-66.

¹⁴² *Id.* at 66.

¹⁴³ Some commentators consider the Court’s intervening decision of *McCarthy v. Madigan*, 503 U.S. 140 (1992) to be a revitalization of the *Bivens* doctrine. See Heather J. Hanna & Alan G. Harding, *Ubi Jus Ibi Remedium – For The Violation Of Every Right, There Must Be A Remedy: The Supreme Court’s Refusal To Use The Bivens Remedy In Wilkie v. Robbins*, 8 Wyo. L. Rev. 193, 210 (2008) (maintaining that *Madigan* “was the first time in over a decade the Court ruled in favor of *Bivens*.”). The *McCarthy* Court, however, did not “rule in favor” of *Bivens*. Instead, it merely held that federal prisoners asserting *Bivens* claims were not required to first exhaust their administrative remedies prior to pursuing their claims in court. *McCarthy*, 503 U.S. at 156. No question was presented pertaining to the availability of the *Bivens* remedy under the facts of that case or to the parties’ amenability to *Bivens* liability. Indeed, the *McCarthy* Court’s analysis focused entirely upon non-*Bivens* precedent that pertained to the exhaustion of administrative remedies. Accordingly, *McCarthy* is incorrectly characterized as having a significant bearing upon the Court’s substantive *Bivens* jurisprudence.

¹⁴⁴ 487 U.S. 412 (1988) (O’Connor, J.)

¹⁴⁵ *Id.* at 416-17.

retroactive benefits. The remaining plaintiff did not pursue relief through the administrative review process but opted to file a new application for benefits approximately eighteen months later, which resulted in an award of twelve months' retroactive benefits.¹⁴⁶

All three of the plaintiffs brought suit in federal court in which they alleged a violation of their due process rights by the defendants' adoption of illegal policies that had led to the wrongful termination of their disability benefits for which they sought injunctive relief, declaratory relief, and money damages.¹⁴⁷ The district court dismissed the claims on the basis of good-faith qualified immunity, but the Ninth Circuit Court of Appeals reversed, characterizing the plaintiffs' claims as *Bivens* claims and remanding for further proceedings.¹⁴⁸

The Supreme Court disagreed and reversed. The 6-3 majority,¹⁴⁹ speaking through Justice O'Connor, expressly articulated for the first time its reluctance to expand the *Bivens* remedy: "Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."¹⁵⁰ Consistent with this policy, which had been implied in all of the Court's *Bivens*-related decisions since *Carlson*, the Court proceeded to expand the special-factors exception to include "an appropriate

¹⁴⁶ *Id.* at 417.

¹⁴⁷ *Id.* at 418-19.

¹⁴⁸ *Id.* at 419-20.

¹⁴⁹ The *Schweiker* majority was composed of Justice Sandra Day O'Connor, Chief Justice William Rehnquist, Justice Anthony Kennedy, Justice Antonin Scalia, Justice Byron White, and Justice John Paul Stevens. During the interim between *Stanley* and *Schweiker*, Justice Louis Powell was succeeded by Justice Anthony Kennedy. Justice Powell, having joined the Court just months after *Bivens* was decided, had consistently voted with the majority in all of the Court's *Bivens* jurisprudence save the *Davis* decision. Similar to Justice Scalia's null impact after replacing Chief Justice Burger, Justice Kennedy would continue Justice Powell's legacy by voting with the majority in all subsequent *Bivens* cases decided by the Court.

¹⁵⁰ 487 U.S. at 421.

judicial deference to indications that congressional inaction has not been inadvertent.”¹⁵¹

The Court likewise expanded the alternative-remedy exception by holding that the *complete absence* of statutory relief for a constitutional violation did not imply that the judiciary should impose a *Bivens* damage remedy against the officers responsible for the violation.¹⁵²

Although the Court recognized that the procedural protections enacted by Congress to remedy the wrongful termination of disability benefits failed to provide for complete relief,¹⁵³ it analogized the case to *Bush v. Lucas, supra*, because in both instances Congress had failed to provide “meaningful safeguards or remedies” and the plaintiffs were left without a remedy for their non-economic damages.¹⁵⁴ Moreover, due to the frequency and intensity of congressional attention that had been given to the problems of the administrative review proceedings, the Court concluded that Congress had chose “specific forms and levels of protection” against the incorrect termination of disability benefits, and this protection did not include the damage remedy sought by the plaintiffs.¹⁵⁵ Because Congress’ unwillingness to provide consequential damages for unconstitutional deprivations of the statutory rights involved was at least as clear as it

¹⁵¹ *Id.* at 423 (“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.”)

¹⁵² *Id.* at 421-22.

¹⁵³ These procedures included (1) an initial determination of the claimant’s eligibility for benefits, (2) *de novo* reconsideration with the ability to present additional evidence, (3) review by the Secretary of Health and Human Services acting through a federal ALJ with the ability to present new evidence, (4) review before the Appeals Council of the Social Security Administration, and (5) judicial review after exhaustion of the aforementioned remedies, which included review of constitutional claims. *Id.* at 424. However, the process did not provide for money damages against the officials responsible for the unconstitutional conduct that led to the wrongful denial of benefits, and claimants whose benefits were fully restored through the administrative process lacked standing to invoke the Constitution under the statute’s administrative review provision. *Id.* at 424-25.

¹⁵⁴ *Id.* at 425. Although the administrative remedy available in *Schweiker* was “considerably more elaborate than the civil service system considered in *Bush*,” the injuries suffered by the plaintiffs in both cases would go unredressed absent the imposition of *Bivens* relief. *Id.*

¹⁵⁵ *Id.*

was in *Bush*, the judicial deference that the Court extended to the congressionally-crafted remedy in *Bush* was applied *a fortiori* in the case at bar.¹⁵⁶ In short, Congress had discharged its responsibility with respect to the present case, and the Court could see “no legal basis that would allow [it] to revisit its decision.”¹⁵⁷

Justice Brennan, the architect of *Bivens*, dissented, joined by Marshall and Blackmun. Although these Justices agreed that the Court should in “appropriate circumstances” defer to a congressional decision to substitute alternative relief for a judicially created remedy, they could not extend such deference in this case because neither the legislative record nor the structure of the remedy gave any indication that Congress had meant to preclude the recognition of a *Bivens* remedy for persons whose rights were violated by those charged with administering the remedial scheme.¹⁵⁸ The dissent found it inconceivable that Congress had meant to bar all redress for such injuries “by mere silence”¹⁵⁹ and rejected the majority’s notion that the special factors that counseled hesitation included deference to indications that Congress’ inaction had not been inadvertent.¹⁶⁰

The *Schweiker* Court left the plaintiffs remediless, other than reinstatement of their lost benefits, notwithstanding the fact that the unconstitutional termination of benefits had in some instances resulted in serious illness and even death. One

¹⁵⁶ *Id.* at 426-27.

¹⁵⁷ *Id.* at 429.

¹⁵⁸ *Id.* at 431 (Brennan, J. dissenting).

¹⁵⁹ *Id.* at 432, 442 (“The Court’s suggestion, therefore, that congressional authority over a given subject is itself a ‘special factor’ that ‘counsel[s] hesitation [even] in the absence of affirmative action by Congress,’ . . . is clearly mistaken.”) (Brennan, J. dissenting). In short, Justice Brennan was clinging to the original *Bivens* standard that looked to special factors counseling hesitation in the absence of *affirmative action* by Congress, a standard that remains unsatisfied by mere legislative reticence.

¹⁶⁰ *Id.* at 432, 440 (“The mere fact that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a ‘special factor counselling hesitation’ in the judicial recognition of a remedy. Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent”) (citations omitted; Brennan, J. dissenting).

commentator concluded that *Schweiker*'s callously indifferent result was the beginning of the Court's dismantling of the *Bivens* doctrine, which the Court would ultimately substitute with "an essentially unprincipled search for any factor that would allow [the Court] to shirk the judicial responsibility recognized in the earlier cases."¹⁶¹

IX. F.D.I.C. v. MEYER: THE UNANIMOUS CURTAILMENT OF BIVENS REVISITED

The early 1990s brought a rapid shift in the Court's ideological continuum. The most liberal member of the Court would be replaced by a Justice destined to become one of the most conservative members of the Court,¹⁶² and two longtime proponents of the *Bivens* remedy would be replaced by Justices who would establish themselves as the Court's centrists.¹⁶³ In the midst of this transition, the Court decided *F.D.I.C. v. Meyer*,¹⁶⁴ and just as Justice Scalia swiftly wrested the *Bivens* pen to author *United States v. Stanley*, a newly-appointed conservative, Justice Clarence Thomas, wasted precious little time in further impressing limitations upon the *Bivens* doctrine. Not surprisingly, these limitations would again receive the Court's unanimous imprimatur as did those that were imposed by the *Chappell* decision.

In *Meyer*, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as the receiver of a thrift institution that employed the plaintiff in a management-level position.¹⁶⁵ Pursuant to its general policy of terminating failed thrift

¹⁶¹ *Tribe, supra* note 2, at 67 (observing that *Chilicky* inaugurated "an open-ended balancing approach whereby judges attempt to decide whether a damages claim serves the public good.") (citing Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 Va. L. Rev. 1117, 1150 (1989)).

¹⁶² In 1991, Justice Thurgood Marshall was succeeded by Justice Clarence Thomas.

¹⁶³ In 1990, Justice William J. Brennan, the architect behind the *Bivens* doctrine and its most ardent advocate, was succeeded by Justice David Souter. In 1994, Justice Brennan's Brother in dissent, Justice Harry Blackmun, was succeeded by Justice Stephen Breyer.

¹⁶⁴ 510 U.S. 471 (1994).

¹⁶⁵ *Id.* at 473.

institutions' senior management officers, the FSLIC terminated the plaintiff.¹⁶⁶ The plaintiff in response instituted a *Bivens* action against the FSLIC and a number of other defendants on the grounds that his summary discharge had deprived him of a property right under California law contrary to the Due Process Clause of the Fifth Amendment.¹⁶⁷ A jury returned a verdict against the FSLIC in the amount of \$130,000, which was affirmed by the Ninth Circuit Court of Appeals.¹⁶⁸

The Supreme Court once again reversed. Writing for a unanimous Court, Justice Thomas began by emphasizing that the Court's most recent *Bivens* decisions had "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."¹⁶⁹ The Court further pointed out that *Bivens* presumed the absence of a preexisting cause of action,¹⁷⁰ yet the plaintiff had initially brought a contractual claim against the FSLIC and could have also filed a statutory claim for the value of any contractual rights that he believed were violated.¹⁷¹ The Court also indicated that the plaintiff was seeking a "significant extension" of *Bivens* by attempting to expand the category of defendants against whom *Bivens* actions could be brought to include federal agents as well as federal agencies."¹⁷²

The Court expressed concerns that presuming a damage remedy directly against federal agencies would give *Bivens* plaintiffs an incentive to pursue actions only against government agencies because, unlike federal officers, such agencies would not enjoy the

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 473-74.

¹⁶⁸ *Id.* at 474-75.

¹⁶⁹ *Id.* at 484 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)).

¹⁷⁰ *Id.* at 485 (citation omitted; Harlan, J., concurring in judgment) (holding that the Court "implied a cause of action against federal officials in *Bivens* in part because a direct action against the Government was not available.").

¹⁷¹ *Id.* at 485 & fn. 10.

¹⁷² *Id.*

defense of qualified immunity. This shunting of *Bivens* liability away from federal officers and onto federal agencies would in turn undermine the primary purpose of *Bivens*, namely to deter federal officials from violating the constitution for fear of personal liability.¹⁷³ The Court further believed that expanding the *Bivens* damage remedy to federal agencies would create “a potentially enormous financial burden for the Federal Government,”¹⁷⁴ which presented a special factor counseling hesitation that was more appropriately weighed by Congress.¹⁷⁵

As with *Chappell*, the unanimity of the *Meyer* Court is somewhat deceiving as it again reflected little more than a willingness of the Court’s *Bivens* proponents to impose limitations on the *Bivens* remedy without receiving a reciprocal willingness from the Court’s *Bivens* opponents to extend the remedy to new contexts beyond those presented in *Bivens*, *Davis*, and *Carlson*.

**X. *CORRECTIONAL SERVICES CORP. v. MALESKO:*
THE MEYERS CURTAILMENT REVISITED**

The next *Bivens*-related case to receive the Court’s attention, *Correctional Services Corp. v. Malesko*,¹⁷⁶ would also become ensnared in the Court’s inextricable policy of restricting the *Bivens* remedy. This would be Chief Justice Rehnquist’s first and last say regarding the *Bivens* remedy before leaving the Court, and it demonstrated nothing less than the same fervent opposition to the remedy that he had consistently expressed during the 30 years since *Bivens* was first announced in 1971.

In *Malesko*, the plaintiff-prisoner was housed in a community corrections center operated by the defendant-corporation under contract with the federal Bureau of

¹⁷³ *Id.* at 485.

¹⁷⁴ *Id.* at 486.

¹⁷⁵ *Id.*

¹⁷⁶ 534 U.S. 61 (2001) (Rehnquist, J.).

Prisons.¹⁷⁷ During his imprisonment, the plaintiff was diagnosed with a heart condition that limited his ability to engage in physical activity, such as climbing stairs.¹⁷⁸ The plaintiff was assigned to living quarters on the fifth floor despite his medical condition, and the corrections center subsequently implemented a policy that required prisoners who resided below the sixth floor to use the stairs rather than the elevator when traveling from the first-floor lobby to their rooms.¹⁷⁹ Although the plaintiff was exempted from this policy due to his heart condition, on the occasion at issue, one of the defendant's employees demanded that the plaintiff use the stairs, during which the plaintiff suffered a heart attack and injured his ear upon falling to the ground.

The plaintiff, acting in *propria persona*, filed an action against the defendant-corporation and various individual defendants, seeking several million dollars in damages.¹⁸⁰ Treating the plaintiff's claims as a *Bivens* action, the district court dismissed the action on the grounds that a *Bivens* remedy was not available against a corporate entity, and the statute of limitations barred relief against the individual defendants.¹⁸¹ The Second Circuit Court of Appeals affirmed the trial court's dismissal of the claims against the individual defendants on the statute of limitations grounds but reversed and remanded with respect to the dismissal against the defendant-corporation because such entities, reasoned the court, should be held liable under *Bivens* in order to "accomplish the . . . important *Bivens* goal of providing a remedy for constitutional violations."¹⁸²

¹⁷⁷ *Id.* at 63.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 64-65.

¹⁸¹ *Id.* at 65.

¹⁸² *Id.*

The Supreme Court reversed. Justice Rehnquist, writing for yet another 5-4 majority,¹⁸³ expressly refused the plaintiff's invitation to extend *Bivens* liability to private entities acting under color of federal law.¹⁸⁴ The Court dismissed out of hand the plaintiff's argument that a federal remedy should be provided whenever there was an alleged constitutional deprivation, regardless of the existence of alternative remedies or the absence of a deterrent effect upon individual tortfeasors.¹⁸⁵ Moreover, the Court pointed out that *Bivens* relied largely on earlier decisions that had implied a private damages action from federal statutes, which had been undermined by the Court's subsequent retreat from its previous willingness to imply a cause of action where Congress had not provided one.¹⁸⁶

After marshalling the Court's entire corpus of *Bivens* jurisprudence, the Court offered insight into the operative factors that had been decisive in recognizing the *Bivens* remedy in its prior decisions. In *Davis* the Court inferred a right of action "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation,"¹⁸⁷ and in *Carlson*, the Court inferred such a right where "the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals"¹⁸⁸ and where it was "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability."¹⁸⁹

¹⁸³ The *Malesko* majority was composed of Chief Justice William Rehnquist, Justice Sandra Day O'Connor, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice Clarence Thomas.

¹⁸⁴ *Id.* at 66.

¹⁸⁵ *Id.* ("We have heretofore refused to imply new substantive liabilities under such circumstances, and we decline to do so here.").

¹⁸⁶ *Id.* at 67 & fn. 3 ("Just last Term it was noted that we . . . have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'" (citations omitted)).

¹⁸⁷ *Id.* (citing *Davis*, 442 U.S. at 245 ("For *Davis*, as for *Bivens*, it is damages or nothing")).

¹⁸⁸ *Id.* (citing *Carlson*, 446 U.S. at 21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy.")).

¹⁸⁹ *Id.* (citing *Carlson*, 446 U.S. at 19-20).

At the risk of stating the obvious, the Court pointed out that it had “consistently refused to extend *Bivens* liability to any new context or new category of defendants” during the 30 years since it had decided *Carlson*.¹⁹⁰ The Court then offered additional insight into the operative factors that had been decisive in denying *Bivens* liability in its prior decisions. In *Bush* the Court refused to infer a right of action because administrative review mechanisms provided by Congress provided meaningful redress notwithstanding the fact that the plaintiff had no opportunity to fully remedy the violation, and the same result was reached for similar reasons in both *Chappell* and *Stanley*.¹⁹¹ In *Schweiker*, the Court refused to infer a right of action “simply for want of any other means for challenging a constitutional deprivation in federal court” and because separation of powers principles foreclosed the expansion of *Bivens* liability so long as the plaintiff had an avenue for some redress notwithstanding the fact that refusing the *Bivens* remedy resulted in the plaintiff’s injuries remaining unredressed.¹⁹² In *Meyer*, the Court refused to extend *Bivens* liability against federal agencies out of concern that plaintiffs would then sue federal agencies and not the individual tortfeasors, which would undermine the deterrent effects of the *Bivens* remedy and create a potentially enormous financial burden for federal agencies.¹⁹³ The Court then summed up its view regarding the availability of *Bivens* relief as follows:

In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such

¹⁹⁰ *Id.* at 68.

¹⁹¹ *Id.*

¹⁹² *Id.* at 68-69 (quoting *Schweiker*, 487 U.S. at 425).

¹⁹³ *Id.* at 69 (citation omitted).

circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.¹⁹⁴

The Court found the case tantamount to its *Meyer* decision, where it refused to impose *Bivens* liability on federal agencies because deterring an individual's employer "was not the kind of deterrence contemplated by *Bivens*"¹⁹⁵ and because if corporate defendants were rendered amenable to *Bivens* actions claimants would focus their collection efforts on corporations rather than on the individual responsible for the plaintiff's injury."¹⁹⁶ The Court further emphasized that the plaintiff, unlike the plaintiffs in *Bivens* and *Davis*, was not faced with a damages-or-nothing situation because he could pursue his claim through the administrative grievance process available through the Bureau of Prisons' Administrative Remedy Program, pursue a state tort action,¹⁹⁷ or pursue a federal action for injunctive relief.¹⁹⁸ The Court therefore concluded that the caution it had demonstrated consistently and repeatedly for three decades with regards to the expansion of the *Bivens* remedy into new contexts foreclosed an extension of the remedy in this case.¹⁹⁹

Justice Scalia and Justice Thomas' concurrence in the Court's judgment best illustrates the treatment that the Court's *Bivens* jurisprudence would receive at the hands of the Rehnquist Court.²⁰⁰ Referring to *Bivens* as "a relic of the heady days in which this Court assumed common-law powers to create causes of action," Justice Scalia concurred for the *sole* purpose of announcing that his concurrence in the Court's opinion "[d]id not

¹⁹⁴ *Id.* at 70 (footnote omitted).

¹⁹⁵ *Id.* at 70, 71.

¹⁹⁶ *Id.* at 71 (citation omitted).

¹⁹⁷ The Court's emphasis on a parallel state tort action may have been a consequence of the nature of the plaintiff's claim, which "arguably alleged no more than a quintessential claim of negligence." *Id.* at 73.

¹⁹⁸ *Id.* at 73-74.

¹⁹⁹ *Id.* at 74.

²⁰⁰ *Id.* at 75 (Scalia, J., concurring).

mean to imply that, *if* the narrowest rationale of *Bivens* *did* apply to a new context, I *would* extend its holding. I would not.”²⁰¹ Justice Scalia pointed out that after *Bivens* was decided the Court abandoned its power to “invent” implied causes of action in the statutory field and that “[t]here is even greater reason to abandon it in the constitutional field, since an ‘implication’ imagined in the Constitution can presumably not even be repudiated by Congress.”²⁰² Accordingly, Justice Scalia and Justice Thomas “would limit *Bivens* and its two follow-on cases (*Davis v. Passman* . . . and *Carlson v. Green* . . .) to the precise circumstances that they involved.”²⁰³

Justice Stevens, joined by Justice Souter, Justice Ginsberg, and Justice Breyer, dissented. These Justices found *Meyer* distinguishable because it merely drew a distinction between federal agents and federal agencies and was further concerned with the financial burdens that imposing *Bivens* liability directly upon federal agencies would entail.²⁰⁴ The dissenters rejected the majority’s characterization of the plaintiff’s claim as “a new constitutional tort” and deemed it an Eighth Amendment claim “fall[ing] in the heartland of substantive *Bivens* claims.”²⁰⁵ The dissenting Justices rejected the majority’s characterization of *Bivens*, *Davis*, and *Carlson* as cases in which the plaintiffs had no alternative remedy because both state tort remedies and FTCA remedies were available to the plaintiffs in those cases. Moreover, they expressly rejected the notion

²⁰¹ *Id.* (Scalia, J., concurring; emphasis in original) (“I am not inclined (and the Court has not been inclined) to construe *Bivens* broadly.”).

²⁰² *Id.* at 75 (Scalia, J., concurring).

²⁰³ *Id.* (Scalia, J., concurring) (citations omitted).

²⁰⁴ *Id.* at 77 (citing *Meyer*, 510 U.S. at 486) (Stevens, J., dissenting).

²⁰⁵ *Id.* at 78 (Stevens, J., dissenting; footnote omitted). The Court’s divergent views of the plaintiff’s claim appear to be the result of the scope that each Justice gives to the *Bivens*, *Davis*, and *Carlson* trilogy. Those Justices in the majority interpret these cases very narrowly, restricting each of them to the specific category presented by their facts, namely Fourth Amendment search and seizure claims, Fifth Amendment due process employment claims, and Eighth Amendment cruel and unusual punishment claims. Conversely, the dissenting Justices interpret these cases more generally, looking to their broad classification as general Fourth Amendment, Fifth Amendment, and Eighth Amendment claims.

that the Bureau of Prisons' Administrative Remedy Program offered a sufficiently adequate remedy because it was "by no means the sort of comprehensive administrative remedies previously contemplated by the Court in *Bush* and *Schweiker*."²⁰⁶ Citing Justice Harlan's concurring opinion in *Bivens*, the dissent further noted that state tort actions lack the consistency provided by uniform rules of federal law.²⁰⁷ Lastly, the dissent rejected the majority's claim that *Bivens*' deterrent effect on individual federal tortfeasors would not be advanced by expanding the remedy to corporations because, unlike the federal agency in *Meyer*, corporate defendants would respond to the economic realities that would be created by imposing *Bivens* liability.²⁰⁸ In short, the dissent found that "the driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself."²⁰⁹

XI. WILKIE V. ROBBINS: THE COUPE DE GRÂCE

The Court's decision in *Malesko* did not mark *Bivens*' nadir; rather, it portended the euthanasic *coupe de grâce* that the Court would deliver several years later in *Wilkie v. Robbins*.²¹⁰ Chief Justice John Roberts's succession of Chief Justice William Rehnquist would cause no serious shift in the *Bivens* doctrinal framework due to similarity in these Justice's *Bivens* ideology, but Justice Samuel Alito's succession of Justice Sandra Day O'Connor would.

In *Wilkie*, officials from the United States Bureau of Land Management ("BLM") failed to record an easement granted to it by the plaintiff's predecessor in interest,

²⁰⁶ *Id.* at 79 fn. 7 (Stevens, J., dissenting).

²⁰⁷ *Id.* at 79-80 (Stevens, J., dissenting).

²⁰⁸ *Id.* at 80-81 (Stevens, J., dissenting).

²⁰⁹ *Id.* at 82-83 & fn 10 (Stevens, J., dissenting; citations omitted) ("Such hostility to the core of *Bivens* is not new. . . . Nor is there anything new in the Court's disregard for precedent concerning well-established causes of action.").

²¹⁰ ___ U.S. __; 127 S. Ct. 2588 (2007).

resulting in the plaintiff taking title to his newly-purchased ranch free and clear of the BLM easement.²¹¹ Upon discovering this oversight, BLM officials attempted to pressure the plaintiff into regranting the easement that had been granted by the previous landowner, but he refused to do so. During the next six to seven years, employees of the BLM pursued a calculated campaign of harassment and intimidation designed to force the plaintiff to regrant the lost easement.²¹²

This campaign consisted of BLM officials trespassing on the plaintiff's property, canceling a negotiated right-of-way that the BLM had granted to plaintiff's predecessor in interest, alleging violations of the plaintiff's special use permit, initiating administrative charges against the plaintiff for trespass and other land-use violations, fining the plaintiff for repairing a public road which led to his ranch that the BLM had purposely allowed to fall into disrepair, instituting unfounded criminal charges against the plaintiff for impeding and interfering with a federal employee, terminating the plaintiff's special use permit, revoking the plaintiff's grazing permit, videotaping the plaintiff's ranch guests as they attempted to relieve themselves in private while outside on cattle drives, and encouraging an official from another federal agency to impound the plaintiff's cattle.²¹³

The plaintiff brought a *Bivens* claim against the BLM officials, arguing that the collective campaign against him amounted to coercion designed to force him to regrant the easement and that this "death by a thousand cuts" should be redressed in the

²¹¹ *Id.* at 2593.

²¹² *Id.* at 2593-94.

²¹³ *Id.* at 2594-2596. Not surprisingly, the Court referred to *Wilkie* as a "factually plentiful case." *Id.* at 2598.

aggregate by a *Bivens* damage remedy.²¹⁴ The defendants filed a motion to dismiss the *Bivens* claim on the basis of qualified immunity, which the trial court granted as to all of the plaintiff's claims except his Fifth Amendment claim of retaliation for the exercise of his right to exclude the government from his property and to refuse to grant the government a property interest without just compensation.²¹⁵ The Tenth Circuit Court of Appeals affirmed on the grounds that the plaintiff "had a clearly established right to be free from retaliation for exercising his Fifth Amendment right to exclude the Government from his private property"²¹⁶

The Supreme Court reversed. Writing for a seven-Justice majority,²¹⁷ Justice Souter, first characterized the question before the Court as whether the Court should "devise a new *Bivens* damages action for retaliating against the exercise of ownership rights, in addition to the discrete administrative and judicial remedies available to a landowner like Wilkie in dealing with the Government's employees."²¹⁸ The Court fashioned its analysis in the form of a two-pronged inquiry. That is, assuming that a constitutionally recognized interest had been adversely affected by the actions of federal employees, the questions remained (1) whether any alternative, existing process for protecting the interest amounted to a convincing reason for the Judiciary to refrain from providing a new *Bivens* damage remedy, and (2) whether the remedial determination used by common-law tribunals (*i.e.*, "weighing reasons for and against a new cause of action") justified the creation of a *Bivens* remedy, "paying particular heed . . . to any

²¹⁴ *Id.*

²¹⁵ *Id.* at 2596-97.

²¹⁶ *Id.* at 2597.

²¹⁷ The *Wilkie* majority was composed of Justice Souter, Chief Justice John Roberts Jr., Justice Antonin Scalia, Justice Clarence Thomas, Justice Anthony Kennedy, Justice Stephen Breyer, and Justice Samuel Alito. The Court reached unanimity with respect to Part III of its decision, which pertained only to the plaintiff's RICO claim.

²¹⁸ *Id.* (footnote omitted).

special factors counselling hesitation before authorizing a new kind of federal litigation.”²¹⁹

The Court answered the first prong in the negative, finding that no alternative processes existed that sufficiently protected the plaintiff’s interest so as to convince the Court that it should refrain from fashioning a new *Bivens* remedy. Characterizing the plaintiff’s claims as falling within four general categories of complaints,²²⁰ the Court noted that for each category of wrongful conduct the plaintiff had “an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.”²²¹ Addressing the second prong of the test, the Court balanced the reasons for and against imposing *Bivens* liability and concluded that the plaintiff’s *individual* claims did not warrant a *Bivens* remedy in light of other existing methods by which the plaintiff could vindicate his rights.²²² However, when the Court considered the aggregate of plaintiff’s claims in its synergistic totality, it found that the claims presented a whole that was greater than the sum of its individual parts which was not sufficiently protect by existing alternative remedial processes.²²³

However, the Court refused to recognize a *Bivens* remedy because the plaintiff’s retaliation claim rested upon at least one of two underlying assumptions, neither of which the Court found to be true on the facts of the case. To be sure, at the heart of the

²¹⁹ *Id.* at 2598 (quoting *Bush*, 462 U.S. at 378).

²²⁰ These included torts or tort-like injuries, charges brought against the plaintiff, unfavorable agency actions and offensive behavior by BLM employees.

²²¹ *Id.* at 2598, 2600.

²²² *Id.* (“[W]hen the incidents are examined one by one, [the plaintiff’s] situation does not call for creating a constitutional cause of action for want of other means of vindication, so he is unlike the plaintiffs in cases recognizing freestanding claims: *Davis* had no other remedy, *Bivens* himself was not thought to have an effective one, and in *Carlson* the plaintiff had none against Government officials.”).

²²³ *Id.* at 2600-01 (“It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one’s lodge broken into, but something else to be subjected to this in combination over a period of six years, by a series of public officials bent on making life difficult. Agency appeals, lawsuits, and criminal defense take money, and endless battling depletes the spirit along with the purse. The whole here is greater than the sum of its parts.”).

plaintiff's claims was an assumption that either the defendants' antagonistic acts extended beyond the scope of acceptable means for accomplishing their legitimate purpose (*i.e.*, they were "too much"), or the presence of malice or spite in the defendants' hearts rendered their actions unconstitutionally retaliatory even if they would have otherwise taken the action in the name of legitimate hard bargaining.²²⁴ With regards to the first assumption, that the defendants' actions were "too much," the Court refused to extend a *Bivens* remedy because of the difficulties presented in defining a workable cause of action.²²⁵ Drawing an analogy to its First Amendment retaliation and discrimination jurisprudence, the Court noted that the decisive question in such cases is the *purpose* for which the alleged discriminatory conduct was undertaken and whether the action would have been undertaken in any event even absent this purpose.²²⁶ The Court reasoned that *Wilkie* could not be resolved by such a standard because the parties already agreed that the purpose for the defendants' actions was to compel the plaintiff to regrant the easement without just compensation.²²⁷ Rather than challenging the *object* that the

²²⁴ *Id.* at 2602 fn. 10.

²²⁵ *Id.* at 2601. Although the Court has never expressly stated as much, its decisions intimate that the political question doctrine flows as an undercurrent just beneath the surface of the Court's *Bivens* jurisprudence. "A controversy is nonjusticiable – *i.e.*, involves a political question – where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . .'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). In *Davis*, the Court held that, unlike statutorily derived causes of action, it could presume that justiciable constitutional rights were enforceable through the courts, so long as there was no "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.'" *Davis*, 442 U.S. at 242 (citing *Baker*, 369 U.S. at 217 and *Marbury*, 5 U.S. at 163). In other *Bivens* cases, the Court has expressly held that the expansion of the *Bivens* remedy was best left to Congress in light of textually demonstrable constitutional commitments of the issue to coordinate political departments. See *Chappell*, 462 U.S. at 300-301; *Stanley*, 483 U.S. at 681-82. The Court's concern in *Wilkie* with regards to a workable cause of action further involves the political question doctrine because it maintains that there is a lack of a judicially discoverable and manageable standard for resolving the issue before the Court. Thus, the Court may ultimately find that its final solution to the *Bivens* problem, which has eluded the Court for almost 40 years, may be best solved through the direct application of the political question doctrine.

²²⁶ 127 S. Ct. at 2601.

²²⁷ *Id.*

government sought to achieve or otherwise claim that the *means* employed were illegitimate, the gravamen of the plaintiff's claim was that "the defendants simply demanded too much and went too far,"²²⁸ a claim that presented "line-drawing difficulties" that were "immediately apparent."²²⁹

The Court similarly rejected the second assumption underlying the plaintiff's claim, *i.e.*, that the presence of malice or spite in the defendants' hearts rendered their actions unconstitutionally retaliatory even if they would have otherwise taken the action in the name of legitimate hard bargaining. The Court found that such a motive-is-all test was not supported by its retaliation precedent, which permitted defendants to avoid liability so long as their actions were independently justified on one or more proper grounds irrespective of their motive.²³⁰

The Court refused to generalize the plaintiff's claim broadly as one for government retaliation or undue pressure placed on a property owner for standing firm on property rights because such cases would effectively place any governmental authority

²²⁸ *Id.* The Court's ruling in this regard is somewhat disturbing. The plaintiff's claim included allegations that the defendants' had burglarized his cabin, secretly filmed female ranch guests who attempted to relieve themselves in privacy while outside on cattle drives, and falsely instituted criminal charges against him. Notwithstanding the plain nature of these claims, the Court reasoned that the defendants had merely sought to "convince" the plaintiff to regrant the easement and that the plaintiff's argument did not claim "for the most part . . . that the means the government used where necessarily illegitimate . . ." *Id.* at 2601. The Court broadly categorized "the bulk" of the plaintiff's claims as "actions that, on their own, fall within the Government's enforcement power." *Id.* at 2604. The Court's trivialization of the plaintiff's claim and minimization of the government's conduct is surpassed only by the decisiveness that this characterization played in the Court's analysis. *See Tribe, supra* note 2, at 48 ("The source of the Court's myopia on this point appears to have been its evident determination to follow the government's lead in characterizing the BLM's ongoing campaign of coercion as nothing more than a 'continuing process in which each side has a legitimate purpose in taking action contrary to the other's interest.'") (footnote omitted). And insofar as the plaintiff had charged the defendants with illegal action which transcended mere hard bargaining, the Court held that those particular torts "would be so clearly actionable under the general law that it would furnish only the weakest argument for recognizing a generally available constitutional tort." *Id.* at 2603-04.

²²⁹ *Id.* at 2601-02 ("A 'too much' kind of liability standard (if standard at all) can never be as reliable a guide to conduct and to any subsequent liability as a 'what for' standard, and that reason counts against recognizing freestanding liability in a case like this.").

²³⁰ *Id.* (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)).

affecting the value or enjoyment of property interests within the realm of *Bivens* and would result in an “enormous swath” of potential litigation that would in turn present the difficulty of devising an effective “too much” standard capable of guiding an employee’s conduct or a judge’s factfindings.²³¹ The Court found an analogous parallel in retaliation claims, which typically involve questions of whether an official’s actions were taken for a legitimate purpose or for the purpose of punishing the plaintiff,²³² and characterized the defendants’ conduct as nothing more than hard bargaining intended to induce the plaintiff to come to legitimate terms notwithstanding the fact that the defendants’ conduct may have served the dual purpose of also gratifying malice in their heart.²³³ The Court further reasoned that any standard which attempted to distinguish legitimate hard bargaining from illegitimate government pressure would be “endlessly knotty to work out” and that imposing general tort liability when government employees overstep their bounds while pressing governmental interests affecting property would result in an onslaught of *Bivens* claims.²³⁴ Concluding that “a general *Bivens* cure would be worse than the disease,”²³⁵ the Court found that a damage remedy for actions by government employees who push too hard for the Government’s benefit would come better, if at all, through Congress.²³⁶

As in *Malesko*, Justice Thomas and Justice Scalia concurred for the sole purpose of reiterating that *Bivens* is “a relic of the heady days in which this Court assumed common-law powers to create causes of action” and that “*Bivens* and its progeny should be limited ‘to the precise circumstances that they involved.’”²³⁷

²³¹ *Id.* at 2603 (footnote omitted).

²³² *Id.* at 2602 (“[T]he only question is the defendant’s purpose, which may be maliciously motivated.”)

²³³ *Id.* at 2604 fn. 10.

²³⁴ *Id.* at 2604.

²³⁵ *Id.*

²³⁶ *Id.* at 2604-05.

²³⁷ *Id.* at 2608 (citing *Malesko*, 534 U.S. at 75).

Justice Ginsberg, joined by Justice Stevens, dissented. Acknowledging that some of the Justices in the majority consider *Bivens* a dated precedent,²³⁸ the dissent noted that the special factor counseling hesitation recognized by the majority (*i.e.*, that recognition of the plaintiff’s claim would result in an onslaught of *Bivens* actions) was quite unlike any that the Court had previously recognized and was expressly rejected by Justice Harlan in his *Bivens* concurrence, which was adopted by the majority in *Davis*.²³⁹ The dissenting Justices rejected the notion that recognizing a *Bivens* claim for the plaintiff’s injuries would present questions more knotty than typical constitutional retaliation claims.²⁴⁰ And because of the unique nature of the plaintiff’s allegations, it was unlikely that Congress would respond by formulating a remedy, which further decreased the likelihood that the plaintiff would receive compensation for his injuries.²⁴¹ Drawing an analogy to the Court’s well-established Title VII sexual harassment jurisprudence,²⁴² the dissent concluded that discrete episodes of oppressive hard bargaining would not entitle a plaintiff to relief. However, a pattern of “severe and pervasive harassment” that exceeded the degree and duration of the “ordinary rough-and-tumble” of strenuous negotiations would give rise to a *Bivens* remedy.²⁴³

Wilkie is replete with irony. First, the Court concedes that “Wilkie does make a few allegations, like the unauthorized survey and the unlawful entry into the lodge, that charge defendants with illegal action plainly going beyond hard bargaining.”²⁴⁴ The opinion then suggests that such actions by themselves would support the imposition of

²³⁸ *Id.* at 2612 (Ginsberg, J., dissenting).

²³⁹ *Id.* at 2613 (Ginsberg, J., dissenting).

²⁴⁰ *Id.* at 2615 (Ginsberg, J., dissenting).

²⁴¹ *Id.* at 2616 fn. 8 (Ginsberg, J., dissenting).

²⁴² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2003), *et seq.*, prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin.

²⁴³ *Id.* at 2616 (Ginsberg, J., dissenting).

²⁴⁴ 127 S. Ct. at 2603.

Bivens liability because, “[i]f those were the only coercive acts charged, Wilkie could avoid the ‘too much’ problem by fairly describing the Government behavior alleged as illegality in attempting to obtain a property interest for nothing.”²⁴⁵ However, as Professor Tribe queries:

Why in the world, if a pattern of independently unlawful actions solves the “too much” problem, is the problem not solved just as well where, as in Wilkie’s case, officials *not only* act in independently unlawful ways but *also* abuse their lawful authority? How could it possibly be the case that the *addition* of actions taken in abuse of regulatory authority can render independently unlawful conduct *less* rather than *more* subject to redress by an action for damages?²⁴⁶

In the same vein of irony, upon rejecting the plaintiff’s synergistic death-by-a-thousand-cuts theory, the majority noted that “there is a world of difference between a popular *Bivens* remedy for a well-defined violation, on the one hand, and (on the other) 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.”²⁴⁷ However, if the Court’s *Bivens* jurisprudence establishes anything, it is this: The elements of a *Bivens* claim are already so unclear that no one can tell in advance what conduct qualifies as a valid *Bivens* claim and what conduct does not. By denying the *Wilkie* plaintiff a *Bivens* remedy, the majority was just as guilty of this sin as the dissenters, who would have extended the remedy.

XII. DOES IT REALLY MATTER?

“After Justice David Souter’s opinion for the Court in *Wilkie* . . . the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of

²⁴⁵ *Id.*

²⁴⁶ *See Tribe, supra* note 2, at 49 (footnote omitted).

²⁴⁷ 127 S. Ct. at 2604 fn. 11.

recovery.”²⁴⁸ This personifying metaphor resonates what other commentators have been saying for some time now. The *Bivens* dissenters have prevailed,²⁴⁹ which has caused many commentators to question the viability of the doctrine and has caused one commentator to bluntly ask: “Is *Bivens* dead?”²⁵⁰ However, when one reviews the empirical data regarding the efficacy of the *Bivens* remedy, the overarching question at once presents itself: *Does it really matter?*

Notwithstanding the characterization of *Bivens* as a “breakthrough for the protection of constitutional rights,”²⁵¹ very few *Bivens* cases have settled with any money paid to the plaintiff.²⁵² According to pre-1985 data, recoveries in *Bivens* actions, either from settlements or litigated judgments, were “extraordinarily rare.”²⁵³ Of approximately 12,000 *Bivens* suits filed, only thirty resulted in judgments on behalf of plaintiffs.²⁵⁴ Of these, a number have been reversed on appeal and only four judgments have actually been paid by the individual federal defendants.²⁵⁵ The largest category of *Bivens* litigation – prisoner rights suits – exemplifies the low success rates for *Bivens* plaintiffs.²⁵⁶ “In the three years from 1992 through 1994, 1,513 *Bivens* cases were filed

²⁴⁸ See Tribe, *supra* note 2, at 26.

²⁴⁹ See e.g. George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs – Have the Bivens Dissenters Prevailed?*, 64 Ind. L.J. 263, 264 (1989) (“Today, however, Justice Rehnquist’s 1980 critique has the ring of prophecy.”); Newman, *supra* note 50, at 477 (analyzing “the subtle evolution of the *Bivens* dissent from a minority position based solely on formal separation to a majority, more functionalist position based on judicial deference to Congress.”).

²⁵⁰ See e.g. Matthew G. Mazefsky, *Casenote, Correctional Services Corporation v. Malesko: Unmasking the Implied Damage Remedy*, 37 U. Rich. L. Rev. 639, 654 (2003).

²⁵¹ Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 Geo. L.J. 65, 66 (1999).

²⁵² Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 343-44 (1989) (citations omitted). Mr. Rosen is a former Trial Attorney for the U.S. Department of Justice, Civil Division, who specialized in *Bivens* cases. *Id.* at 337. The Torts Branch within the United States Department of Justice’s Civil Division defends *Bivens* actions that are brought against federal officials.

²⁵³ Pillard, *supra* note 258, at 66.

²⁵⁴ Rosen, *supra* note 259, at 343 (citations omitted)

²⁵⁵ *Id.* at 343-44 (citations omitted).

²⁵⁶ Prisoner litigation continues to be the single largest category of *Bivens* actions filed today, the “vast majority [of which] are frivolous and dismissed at the threshold.” Telephone Interview with Timothy

against officials of the Bureau of Prisons alone, resulting in two monetary judgments and approximately 16 monetary settlements.”²⁵⁷ Thus, some have concluded that, notwithstanding *Bivens* and its tremendous amount of litigation, the abysmal success rate of *Bivens* actions is indicative of the unavoidable conclusion that federal constitutional violations are almost never remedied by damages.²⁵⁸

More troubling, however, is the fact that these statistics are from an era shortly after *Bivens* reached its jurisprudential apex. It is highly unlikely that more recent statistics would fair any better in light of the Court’s invariably expressed enmity towards the *Bivens* remedy during the course of the last 37 years.²⁵⁹ Indeed, Timothy Garren, the current Director of the Torts Branch of the United States Department of Justice’s Civil Division, estimates that since *Bivens* was decided in 1971, “easily” over 100,000 *Bivens* actions have been filed²⁶⁰ And of these 100,000 actions, about thirty judgments against individual federal actors have been sustained on appeal,²⁶¹ resulting in an unimpressive success rate of approximately 0.0003%. “When analyzed by traditional measures of a claim’s ‘success’ – whether damages were obtained through settlement or court order –

Garren, Director, Torts Branch, U.S. Department of Justice (April 21, 2008). Mr. Garren’s estimate is based upon his work with the Justice Department since 1983.

²⁵⁷ Pillard, *supra* note 258, at 66 fn. 6 (citation omitted).

²⁵⁸ *Id.*

²⁵⁹ Rosen, *supra* note 259, at 343.

²⁶⁰ Telephone Interview with Timothy Garren, Director, Torts Branch, U.S. Department of Justice (April 21, 2008).

²⁶¹ *Id.* Mr. Garren indicated that he doubted if the number of *Bivens* judgments was even this high and seemed to imply that this figure was a liberal estimate erring in favor of *Bivens* plaintiffs. *But cf.* Statement of Policy Concerning Indemnification of Department of Justice Employees, 51 Fed. Reg. 27021-01, 27022 (July 29, 1986) (claiming that *as of 1986* “the Department is aware of only 32 adverse judgments against individual federal employees”) *with* Pillard, *supra* note 258, at 66 fn. 6 (claiming that two monetary judgments and approximately 16 monetary settlements were obtain by prisoners alone between 1992 through 1994). According to Mr. Garren, the figures mentioned in various law reviews and on the congressional record are estimations at best because the Department of Justice does not maintain statistics on the number of *Bivens* actions filed or their disposition. Such approximations are the best figures available and may account for the numerical discrepancies amongst the publications.

Bivens litigation is fruitless and wasteful, because it does not provide the remedies contemplated by the decision, and it burdens litigants and the judicial system.”²⁶²

Consequently, *Bivens* defendants are unlikely to agree to a monetary settlement because their success rate is so high,²⁶³ and they have no incentive to settle in an effort to avoid incurring attorneys’ fees because federal employees sued for conduct arising within the scope of their employment typically receive representation from the Department of Justice at taxpayer expense.²⁶⁴ Ultimately, this system works to undermine *Bivens*’ purported deterrent effect because personal liability is rarely imposed, and when it is, its effects are negated by indemnification from government coffers.²⁶⁵

One commentator attributes *Bivens*’ failure to adequately protect against constitutional violations committed by federal officials due to the judiciary’s propensity to give more deference to federal officials’ need to perform their duties without the threat of liability than to the need to protect citizens’ constitutional rights.²⁶⁶ Regardless of its causal origins, however, the query that naturally flows from the empirical evidence is whether the cost of implementing the *Bivens* remedy is outweighed by the miniscule benefits that it purports to offer. Over twenty years ago, millions of taxpayer dollars had

²⁶² Pillard, *supra* note 258, at 66. *See also Newman, supra* note 18, at 472 (“Although the Court has declined to expressly overturn *Bivens*, its steadfast refusal over more than two decades to extend the doctrine into new contexts has reduced the cause of action to a mere shadow of its former self.”) (footnote omitted).

²⁶³ *Id.*

²⁶⁴ *Id.* (citing 28 C.F.R. § 50.15 (1987)). Moreover, if a conflict of interest arises which prevents the government from representing the official, the government will hire private counsel for the employee. *Id.* (citing 28 C.F.R. § 50.15(a)(6) (1987)).

²⁶⁵ Pillard, *supra* note 258, at 76-77 fn. 51 (noting that because “[t]he federal government provides representation in about 98% of the cases for which representation is requested” it has become “the real defendant party in interest in *Bivens* litigation.”) (citing Memorandum for Heads of Department Components from Stephen R. Colgate, Assistant Attorney General for Administration (June 15, 1998)).

²⁶⁶ Rosen, *supra* note 259, at 343-44.

already been expended to defend *Bivens* actions.²⁶⁷ This significant expense, which does not include the resources expended by the judiciary in processing *Bivens* claims or the services lost by federal officials' distracted with *Bivens* litigation,²⁶⁸ has been subsidized by taxpayers so that litigants can pursue elusive and occasional *Bivens* relief. The conspicuously non-remedial effects of the so-called *Bivens* "remedy" has caused one commentator to discard *Bivens* as nothing more than a "surreptitiously progovernment decision" that gives the appearance of a mechanism for remedying constitutional violations but which "has rarely led to damages recoveries."²⁶⁹

XIII. Conclusion

Almost two decades ago, it was observed that the Court had adopted such a pro-government policy that *Bivens* had effectively been nullified,²⁷⁰ and as the next two decades would unfold, they would reveal the prescience of this statement. Since *Carlson* was decided in 1980, the Supreme Court has shunned the expansion of the *Bivens* remedy much less recognized it. No longer are doctrines of immunity the primary impedance to recovery for constitutional injuries inflicted by federal officers. The contemporary threshold issue has become whether *vel non* a right of action even exists in the first instance. Reviewing the empirical evidence, however, the *Bivens* remedy cannot be said to have been truly a remedy at all. And so long as the Court continues in its current trend of eviscerating the *Bivens* doctrine, the core purpose of this remedy – to provide a

²⁶⁷ 133 CONG. REC. S3243-01, 27022 (daily ed. March 17, 1987) (statement of Sen. McClure) ("The real loser in connection with these cases is the American people. Over \$3 1/2 million has been spent for independent counsel to represent government employees").

²⁶⁸ 141 CONG. REC. H14078-02, H14105 (daily ed. December 6, 1995) (statement of Rep. Lobiondo) (noting that *Bivens* actions are "tying up the time of Federal judges and lawyers for the Bureau of Prisons at a time when we already have overcrowded dockets.").

²⁶⁹ Pillard, *supra* note 258, at 66 (footnote omitted). See also Newman, *supra* note 18, at 472 ("Although *Bivens* remains good law, in practice it seems a dead letter.").

²⁷⁰ Rosen, *supra* note 259, at 344-45.

damage remedy for constitutional deprivations – will continue to remain “an empty and unfulfilled promise.”²⁷¹

²⁷¹ Rosen, *supra* note 259, at 344-45 (footnote omitted).