

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHARLES WILKIE, ET AL., :

4 Petitioners :

5 v. : No. 06-219

6 HARVEY FRANK ROBBINS :

7 - - - - - x

8 Washington, D.C.

9 Monday, March 19, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:05 a.m.

14 APPEARANCES:

15 GREGORY G. GARRE, ESQ., Deputy Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of

17 Petitioners.

18 LAURENCE H. TRIBE, ESQ., Cambridge, Mass.; on

19 behalf of Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-219, Wilkie versus Robinson.

General Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Respondent asks this Court to recognize a new constitutional tort under Bivens and the Just Compensation Clause --

JUSTICE SCALIA: Mr. Garre, could you crank up the thing? The sound isn't working, I don't think, Mr. Garre.

CHIEF JUSTICE ROBERTS: I think it needs a little upcranking.

Good.

MR. GARRE: Hopefully that's better.

-- recognize a new constitutional tort under Bivens and the Just Compensation Clause that would subject public officials to personal liability for conduct that he concedes does not amount to a taking. Recognizing that constitutional tort would require this Court to extend Bivens to an entirely new context, it

1 would disregard limits that have existed for centuries
2 on Just Compensation Clause claims, and it would skew
3 the enforcement of important public land use objectives
4 and thereby threaten public resources and public lands.

5 JUSTICE GINSBURG: General Garre, there's a
6 record here that the district court said there was
7 substantial evidence, enough to go to trial, of a
8 pattern of harassing conduct that included trespasses on
9 this man's lodge and leaving the place in disarray,
10 videotaping the guests, selective enforcement of the
11 grazing laws, a whole pattern of things, even asking the
12 Bureau of Indian Affairs to impound his cattle? This
13 man says, this has been done to me by officers of my
14 government. Is there a remedy?

15 MR. GARRE: Justice Ginsburg, there are a
16 number of avenues that he could have sought to prevent
17 this alleged conduct and that he did invoke. We don't
18 think that there is a remedy under Bivens or an inferred
19 action under the Just Compensation Clause.

20 JUSTICE GINSBURG: Well, what is, what is
21 there that will really be effective, because if you tell
22 me challenging each citation for violating the grazing
23 permit --

24 MR. GARRE: He can challenge the citations
25 for challenging the -- canceling the grazing permits --

1 JUSTICE GINSBURG: And then the behavior
2 will continue and he'll get one more and one more and
3 one more.

4 MR. GARRE: Well, I don't think that that's
5 a reasonable inference, Justice Ginsburg. In fact, the
6 IBLA considered and rejected each of the alleged
7 administrative actions on which his claim is now based.

8 JUSTICE KENNEDY: May I ask a quick
9 question. I had the same list of alleged acts, and I
10 think many of them are uncontested, that Justice
11 Ginsburg mentioned. Just as a matter of policy, can you
12 inform me, when the Solicitor General's Office takes
13 this case do you look into whether any of these things
14 happen and the Justice Department issues a warning,
15 don't do this any more? If these things are as Justice
16 Ginsburg explained you don't defend all of those
17 actions?

18 MR. GARRE: Well, our position is that he
19 hasn't established a constitutional tort or an
20 actionable claim under RICO.

21 JUSTICE KENNEDY: I know that. I know that.

22 MR. GARRE: To answer your question, the
23 Government takes these types of allegations seriously.
24 It's taken seriously at the line level at the Bureau of
25 Land Management. It's taken seriously within the

1 Department of Interior and it's taken seriously at the
2 Department of Justice.

3 JUSTICE KENNEDY: Because if this, if this
4 continues, your argument -- and I understand your
5 argument that there's no essential free-standing cause
6 of action for damages -- basically means he has a right
7 to go broke with attorneys' fees challenging each
8 individual incursion, each individual wrong.

9 Well, again that assumes that he wouldn't
10 get any relief out of the IBLA. That assumes that if he
11 had gone to the IBLA and said, you canceled my grazing
12 permits for grounds that weren't valid, that the BLM
13 would have proceeded to engage in the same conduct. In
14 fact, the IBLA --

15 JUSTICE GINSBURG: Well that's exactly what
16 he alleged and he said, and it happened for over a
17 five-year period.

18 MR. GARRE: But we know from the decisions
19 of the IBLA that he did challenge that they rejected the
20 grounds that he --

21 JUSTICE SCALIA: They may be wrong, too.
22 They may have been as much a part of the conspiracy as
23 the officers who conducted it. And there are indeed
24 those in the West who think that the BLM does, does act
25 quite arbitrarily and high-handedly and is, is upheld

1 by, by the, the administrative courts. Now, if that's a
2 problem, what's the solution to that problem?

3 MR. GARRE: Well, Justice Scalia, to bring
4 an APA action to Federal court challenging the final
5 decisions of the IBLA.

6 JUSTICE SCALIA: That's one by one. Every
7 time there is another trespass he has to go all the way
8 through the administrative procedure and then when the,
9 when the administrative court says, well, it was okay,
10 then he has to go through the regular Federal courts.
11 That doesn't seem to me like a realistic remedy, not for
12 somebody who claims he's being systematically harassed
13 for five years as, as is the claim here.

14 MR. GARRE: Again, I think you have to
15 assume that his claims would not succeed either at the
16 administrative level or at the APA level, and if he
17 got --

18 JUSTICE SCALIA: I don't assume that at all.
19 Even if they, even if they succeed, they say, yes,
20 you're right, they trespassed, good for you. I mean,
21 what is the remedy if they did trespass? What
22 administrative remedy does he obtain.

23 MR. GARRE: Well, if there's a trespass he
24 can go, he can obtain an action under the Federal Tort
25 Claims Act. A trespass is an unauthorized taking.

1 That's the way that this Court has treated it 1952 in
2 the Hasselly case.

3 JUSTICE SCALIA: What -- the photographing
4 of his guests who he brings onto his ranch to hunt and
5 they pay him for that. And then he claims that the BLM
6 follows them just to harass them, just taking
7 photographs. What relief could he get for that?

8 MR. GARRE: Well, he claimed that they were
9 trespassing on his lands.

10 JUSTICE SCALIA: Let's assume they wasn't
11 trespassing.

12 MR. GARRE: Well, he'd raised that objection
13 before the IBLA and the IBLA concluded, and we think
14 reasonably, that, given the history of the disputes with
15 this individual, given his litigious nature, that it was
16 reasonable for the BLM officials who were out there to
17 be documenting his trespasses on public lands, and
18 that's an important dimension of this case.

19 JUSTICE GINSBURG: I thought there was one
20 aspect of the videotaping his guests, that the
21 Government was doing it on its own land, on public land.
22 They had cameras and the cameras were stationed so they
23 weren't trespassing, they were just making the guests
24 feel uncomfortable.

25 MR. GARRE: To document, to document his

1 trespasses on other lands, and that's -- the citation to
2 the IBLA decision is at footnote 2 of our reply brief
3 and it discusses that allegation in depth.

4 In any event --

5 JUSTICE GINSBURG: I would really like to
6 have your answer to my opening question, and I said: If
7 your only answer is each time something, he is charged
8 by the BLM people, he goes one at a time, engaging a
9 lawyer, spending a lot of time, but it was, one of the
10 briefs called it, dying a thousand deaths. He doesn't
11 want that. He wants to say: Stop, stop this whole
12 pattern; not one citation; stop this whole pattern. How
13 does he get that remedy?

14 MR. GARRE: He does not have a remedy under
15 the Just Compensation Clause or Bivens, Justice
16 Ginsburg.

17 JUSTICE GINSBURG: What does, what does he
18 have?

19 MR. GARRE: He can challenge, he can
20 challenge these actions under the administrative process
21 available to him under the --

22 JUSTICE KENNEDY: Piecemeal.

23 MR. GARRE: -- APA --

24 JUSTICE KENNEDY: Piecemeal.

25 MR. GARRE: -- like any number of other

1 contexts.

2 JUSTICE KENNEDY: Does he have any action
3 that is other than piecemeal?

4 MR. GARRE: He has to challenge each
5 administrative action --

6 JUSTICE KENNEDY: I take it the answer is
7 no.

8 MR. GARRE: -- that he claims is unlawful.

9 CHIEF JUSTICE ROBERTS: Were any of these
10 administrative actions found to be unfounded? In other
11 words, did he win any of the trespass citations?

12 MR. GARRE: He did not. In fact, the IBLA
13 found that the BLM had a right of administrative access
14 to cross his lands to get to public lands which it was
15 administering. And again, this case would have been
16 quite different if the IBLA had found that the BLM
17 officers were acting without legitimate authority.

18 JUSTICE BREYER: I'm surprised you say
19 piecemeal. I would have thought most agencies in the
20 government have like an inspector general or someone
21 that you can complain.

22 MR. GARRE: And they do.

23 JUSTICE BREYER: You can write them a letter
24 and you say, look at what's been going on, they've been
25 trespassing, they've indicted me on a false charge; I

1 want you to see the whole list here and I'd like you to
2 do something about it. And if they don't do anything
3 about it, you go to your senator. Maybe you can go to
4 the newspapers. I mean, has any of that happened here?

5 MR. GARRE: It has, Justice Breyer. It has.

6 JUSTICE BREYER: And what's been the result
7 of that?

8 MR. GARRE: The result of that is it was
9 determined that these actions by these line officers of
10 the Bureau of Land Management were perfectly
11 appropriate, that they were dealing with someone who has
12 systematically violated the permits and conditions that
13 are found --

14 JUSTICE GINSBURG: Who made that, who made
15 that determination, including the selective citations?

16 MR. STARR: I believe there was an inspector
17 general investigation, investigation within the
18 Department of Interior that --

19 JUSTICE GINSBURG: I thought the Department
20 of Interior reached a settlement agreement in which they
21 told the line people at BLM to stop.

22 MR. GARRE: There was a settlement
23 agreement, Justice Ginsburg. But the Department of
24 Interior stands behind the actions that are issued, at
25 issue in this case, and I think --

1 JUSTICE GINSBURG: Nonetheless, they did
2 enter a settlement which included that this behavior was
3 going to stop.

4 MR. GARRE: Well, I'm not sure that that's a
5 fair characterization. I mean, like any party to
6 litigation, any party to multiple lawsuits and claims,
7 there are many reasons why it might be deemed in the
8 interest of a person to agree to a settlement. And I
9 don't think it's fair to --

10 JUSTICE GINSBURG: Would you agree at least
11 to a minimum that we must accept for purposes of this
12 proceeding that what the complaint alleged, and what the
13 district court said on summary judgment, there was
14 sufficient evidence to go to a trial. That that's true.
15 So we have to accept his allegations that there were
16 selective citations for violations of grazing -- grazing
17 laws, that they broke into his lodge and messed the
18 place up?

19 MR. GARRE: This Court has to accept those
20 factual allegations, to --

21 JUSTICE GINSBURG: Okay. So that's --

22 MR. GARRE: -- to be sure. But the court
23 of --

24 JUSTICE GINSBURG: So that's the case we
25 have. And you're telling me that the only remedy a

1 citizen, assuming the truth of those allegations, is to
2 fight these actions one by one?

3 MR. GARRE: That's a fulsome remedy, Justice
4 Ginsburg, when you think of the claims that could be
5 brought administratively under the Administrative
6 Procedures Act, under the Federal Tort Claims Act, to
7 receive damages, to receive injunctions --

8 JUSTICE SCALIA: What damages would you get
9 for the trespass of a -- one, one BLM agent on your
10 land? A lot of money you're going to get for that?

11 Would it, would it come anywhere close to
12 reimbursing you for the lawyers' fees that it's taken to
13 go, to go all the way through the litigation?

14 MR. GARRE: If the allegation is that these
15 trespasses have in effect deprived me of my property
16 which is my business, then conceivably he could make a
17 request for a large amount of damages.

18 JUSTICE SCALIA: He doesn't say it deprived
19 him of his property which is his business.

20 MR. GARRE: No, I think --

21 JUSTICE SCALIA: He is saying it's a
22 trespass; get off my land.

23 MR. GARRE: He, he has made both claims,
24 Justice Scalia. And I think -- he has, he has
25 complained about BLM officials exercising the right of

1 administrative access, which has been confirmed at the
2 administrative level and which is well settled. And he
3 has made the more general complaint that these
4 trespasses have -- and interfered with his businesses
5 and interfered with his property. He filed a, a bond in
6 this Court seeking, claiming the damages were in several
7 million dollars related to the business. So that --

8 JUSTICE GINSBURG: Can he get injunctive
9 relief? Can he get injunctive relief? You said
10 something about, that, you said they may seek to enjoin
11 conduct that they claim will amount to an uncompensated
12 taking.

13 Can he have this litany of things that have
14 happened and go into a court and say court, enjoin those
15 --

16 MR. GARRE: Certainly he could under the
17 APA. He could challenge the administrative actions he
18 complained about, and if court concludes those are
19 unauthorized or unconstitutional he could obtain an
20 injunction.

21 JUSTICE GINSBURG: He can bring, he can
22 bring this, he could bring this not one action at a
23 time, but he could complain all at once about
24 everything?

25 MR. GARRE: Well, the other thing to keep in

1 mind is that many of these discrete administrative
2 actions -- for example, take the cancellation of the
3 permits. That was based on a course of conduct that
4 included 20 formal trespasses, disregarding trespass
5 notices by the BLM, 20 violations of his grazing
6 permits. All of that would be part of a record before
7 the IBLA and before a Federal court in an APA. It would
8 have an opportunity to review those allegations and
9 determine whether or not the alleged Federal action was
10 unlawful. And if a court believed --

11 JUSTICE GINSBURG: He could -- he could not
12 go into a Federal court with a Federal question? He
13 would have to go to the initial decision maker, then the
14 I --

15 MR. GARRE: He would have to exhaust his
16 administrative remedies, just like any number of other
17 people who believe that they have been wronged by the
18 Federal Government.

19 JUSTICE SCALIA: Part of his claim is -- is
20 selective enforcement. You know, maybe he did trespass,
21 maybe some of his cattle did stray on somebody's land.
22 But they are beating on him because of what they say is
23 his failure to give a reciprocal easement which the
24 Government is entitled to.

25 To what extent was any of the administrative

1 approval of the BLM agents' actions, to what extent was
2 that based on the legitimacy of seeking to extract this
3 reciprocal easement from him? Because I don't see that
4 it's legitimate at all.

5 MR. GARRE: Well, the I -- let me answer
6 that in two ways. First the IBLA found that there was
7 not an effort to extort or blackmail Mr. -- the
8 Respondent for exercising his rights.

9 JUSTICE SCALIA: Was that because the
10 Government was entitled to the reciprocal easement? Is
11 that why they said that?

12 MR. GARRE: Well --

13 JUSTICE SCALIA: It wasn't extortion because
14 he should have given the easement.

15 MR. GARRE: No. I don't think that's what
16 the IBLA found and we cite the part of the IBLA record
17 at footnote 2 of our reply brief.

18 Secondly it's well established that the
19 Government can seek reciprocal arrangements with respect
20 to property. The Court in the Leo Sheep case forced the
21 Government to seek reciprocal arrangements.

22 JUSTICE SCALIA: Not after, not after they
23 have already given away -- I mean, yes; they could come
24 to him anew and say I'll tell you what, if you give us
25 this easement we'll give you yet another one.

1 MR. GARRE: That's true.

2 JUSTICE SCALIA: But he had one in, from the
3 past, which -- which his predecessor had given a
4 reciprocal easement for, and the Government failed to
5 record the easement and therefore was is deprived of it.

6 MR. GARRE: That's true. But I think it's
7 important to keep in mind the scope of the claim before
8 the Court.

9 JUSTICE SCALIA: And they're mad at him for
10 not giving back that easement which they failed to
11 record.

12 MR. GARRE: The BLM doesn't have to stop
13 enforcing its laws and regulations once someone refuses
14 to enter into reciprocal arrangements. There are
15 thousands of reciprocal arrangements.

16 JUSTICE SCALIA: It wouldn't be reciprocal.
17 What was the Government offering to give him in exchange
18 for his, his reaffirming the prior easement that they
19 had failed to record? What was the Government giving
20 him in exchange?

21 MR. GARRE: A valuable right-of-way, Justice
22 Scalia, that - that was for 30 years, that covered 14
23 miles of public road --

24 JUSTICE GINSBURG: But that's what his
25 predecessor had.

1 JUSTICE SCALIA: He had that already.

2 MR. GARRE: Well, but that did not convey
3 with the property. It had to be reassigned in order for
4 Mr. Robbins to take advantage of that right-of-way.

5 JUSTICE SCALIA: I did not -- I did not
6 understand that.

7 MR. GARRE: Absolutely. And it's in the
8 regulations. The right-of-way has to be reassigned, and
9 it wasn't going to be reassigned because Respondent
10 refused to agree to the reciprocal easement and because
11 he refused to make rental payments.

12 JUSTICE KENNEDY: As originally negotiated,
13 with I think Nelson. Was the right-of-way cancellable
14 at any time? Or how long would the right-of-way last?

15 MR. GARRE: The right-of-way was for 30
16 years which was long than the 20-year easement that the
17 Government got in exchange. And this something that was
18 negotiated at arm's length by parties that didn't have
19 the acrimonious relationship that developed between
20 Respondent and the BLM.

21 CHIEF JUSTICE ROBERTS: Counsel, I -- I
22 think part of what's happening here is there is
23 difference between the regulation on the books and how
24 they are enforced. Just as a hypothetical, let's say
25 they don't -- the Government doesn't get its reciprocal

1 easement that it wants, and so it says look, we normally
2 don't strictly enforce these cattle trespass things, but
3 we are going to go by the book with this guy until he
4 gives us the right-of-way. Every time his cattle cross
5 over the line we are going to hit him with a trespass
6 citation. They don't do it for anybody else but,
7 they're going to do it for him because they want to get
8 the reciprocal right-of-way. Is that appropriate or
9 inappropriate?

10 MR. GARRE: Well, first I don't think it
11 gives him a cause of action under Bivens or the Just
12 Compensation Clause. Second --

13 CHIEF JUSTICE ROBERTS: So that he can't --
14 but you're saying his remedy is to challenge each one.
15 But actually each one, his cattle did trespass, so he
16 doesn't have a good case. It's just that out in the
17 West they don't actually give citations every time a cow
18 crosses the river.

19 MR. GARRE: Then I, then I don't think he is
20 a very sympathetic plaintiff to be complaining that he
21 is entitled to violate BLM rules or regulations. There
22 is a certain amount of give and take that we think is
23 inherent in these reciprocal arrangements and we think
24 that the Just Compensation Clause tolerates.

25 These are, the Just Compensation Clause or

1 property rights here are protected fundamentally by
2 State law. That's why any unauthorized action by the
3 Government is a trespass, which is, which is dealt with
4 under State law. The Just Compensation --

5 JUSTICE BREYER: Well, why is it a State law
6 matter? Why didn't he know about this possibility? Why
7 didn't he know that his predecessor in title had
8 granted? Why wasn't there an actual notice, given the
9 fact that everybody in this area of the country seems as
10 a matter of course to give mutually beneficial
11 rights-of-way? I agree it wasn't recorded.

12 MR. GARRE: I think he was on notice. The
13 BLM made a determination that because it wasn't
14 recorded, it wouldn't seek to enforce that against
15 Respondent. It may be that it was -- it made a legal
16 error on that; I don't know. But it made that
17 determination --

18 JUSTICE GINSBURG: That's a given in the
19 record. The record is that he was not on notice. So
20 whether one says, gee that's unlikely if he wasn't --

21 MR. GARRE: But in any event, the point is
22 that the BLM recognized that it had to negotiate a new
23 reciprocal arrangement with Respondent and it sought to
24 do so.

25 JUSTICE GINSBURG: And it's trying to cover

1 for its own sloppiness or carelessness in not
2 recording --

3 MR. GARRE: Well, it, it's trying to seek,
4 establish a new reciprocal arrangement. Regardless of
5 why it was back in the position of having to do so, it
6 did so in a way that it did in any number of other
7 situations that did arise.

8 JUSTICE KENNEDY: Can I ask you about the
9 Bivens theory here before your time runs out? Doesn't
10 Davis versus Passman help the Respondent here?

11 MR. GARRE: I, I don't think so, Your Honor.
12 I think what is distinct about the Bivens claim here is
13 first Bivens and Just Compensation Clause claims are
14 fundamentally incompatible. And that in Bivens, its
15 damages are nothing. Here the constitutional right
16 actually explicitly provides a remedy, just
17 compensation. Secondly, just compensation claims are
18 claims against the Government.

19 JUSTICE KENNEDY: Well that's because we
20 assume it's focused just on his property and that the
21 property was ultimately the thing that was in issue.
22 But if you have all these other retaliatory actions, and
23 wrongful actions taken by the Government tangential to
24 this dispute, I take it Davis versus Passman, broadly
25 read, says we can use Bivens if there is no other way to

1 get a remedy against the Government.

2 MR. GARRE: Well -- two points. First,
3 Davis versus Passman was decided in a day in which this
4 Court was much more likely to infer new causes of action
5 from the Constitution or from statutes. The Court in
6 its recent cases, most recently Malesko, has said that
7 it's sworn off that habit, and it's refused to recognize
8 any new Bivens action in 25 years since those cases were
9 decided.

10 Secondly, the Respondent here has ample
11 remedies and avenues that he could seek. If he believes
12 that there has been unauthorized trespass he can seek
13 damages under the Federal Tort Claims Act.

14 JUSTICE KENNEDY: Suppose we think --
15 suppose we disagree with you on the latter point. We
16 think he is really in a bind; there's not really
17 anything he can do. Doesn't that invoke the Davis
18 versus Passman rationale?

19 MR. GARRE: I --

20 JUSTICE KENNEDY: To expand -- it would be
21 an expansion of Bivens.

22 MR. GARRE: It would be closer to it but the
23 Court would still have to confront the question of
24 whether it would be appropriate to infer a
25 constitutional tort under the Just Compensation Clause.

1 And we would urge the Court not to do so.

2 There is an overarching question here of
3 qualified immunity. Whatever is true with respect to
4 whether this new constitutional tort should be created
5 towards other claims before the Court, the Petitioners
6 on this case were not on clear notice that their actions
7 in responding to someone who had systematically violated
8 the rules and regulations, which -- on the books for
9 some time -- would subject them to personal damages
10 actions and in fact treble damages under the RICO
11 statute. For that, for that --

12 JUSTICE SCALIA: If a -- including, you
13 know, busting into his lodge and disrupting the
14 furniture and all of that, they thought that that was
15 probably --

16 MR. GARRE: Well, if that's true --

17 JUSTICE SCALIA: -- probably allowed?

18 MR. GARRE: If that's -- they would be on
19 notice, that that conduct if true could subject them to
20 a tort action under the Federal Tort Claims Act. There
21 is no decision that the court of appeals or
22 Respondent has pointed to that would put the Petitioners
23 here on notice in the specific situation they
24 confronted, that their actions could subject them to a
25 constitutional tort which had never been recognized by

1 any court, whether their actions could subject them to
2 treble damages under RICO.

3 JUSTICE SCALIA: Is that a test for -- for
4 -- for qualified immunity? You have to know -- not
5 only --

6 MR. GARRE: You have to have --

7 JUSTICE SCALIA: It's not enough to know
8 that your action was wrongful? You have to know the
9 particular statute or constitutional provision under
10 which a remedy would be sought?

11 MR. GARRE: Yes. The first question is
12 whether he has established a violation of the right.
13 And the rights that are alleged in this case that are
14 before this Court, or a right under the compensation
15 clause of the Fifth Amendment to --

16 CHIEF JUSTICE ROBERTS: So you're suggesting
17 they would not be immune from a State law trespass
18 action?

19 MR. GARRE: No. The -- the -- the Congress
20 has waived the sovereign immunity from those types of
21 claims under the Federal Tort Claims Act.

22 JUSTICE KENNEDY: The people who had done
23 this --

24 JUSTICE GINSBURG: But the Federal Tort
25 Claims Act is against the United States. It's not

1 against the --

2 MR. GARRE: It's against the United States
3 if they are acting within the scope of their conduct.
4 If it's unauthorized actions outside the scope of the
5 conduct, then they can go directly against the
6 individuals. That's --

7 JUSTICE GINSBURG: But then it wouldn't be a
8 Federal Tort Claims Act.

9 MR. GARRE: Well, then it would be
10 additional suits in State court. They could also --
11 there are also State, Federal and criminal laws that
12 they could seek to invoke or have invoked. But --

13 JUSTICE SOUTER: But respect to the RICO
14 claim, assuming the RICO claim is upheld, what do you
15 say to your brother's argument that there is no history
16 of qualified immunity for RICO claims? That the
17 qualified immunity doctrine addresses the, the kind of
18 development of squishier law under -- under 1983. So
19 that you simply have not qualified immunity.

20 MR. GARRE: Two things, Justice Souter.
21 First the argument was not raised below; we don't think
22 it's properly before the Court.

23 Second, the question under qualified
24 immunity, and this Court made this clear in the Wyatt
25 case and again in the Knight case, it doesn't look to

1 the particular offense. It looks to the nature of the
2 responsibility that the Government officials are
3 performing. And here the nature of the responsibilities
4 are enforcing grazing permits, enforcing access to
5 public lands, activities that BLM officials have
6 discretion and have had discretion for more than a
7 century to enforce. And we think that falls squarely
8 within the rubric of qualified immunity.

9 JUSTICE SOUTER: Well that may be a very --
10 it seems to me that those may be good arguments, or at
11 least relevant arguments against the applicability of
12 RICO in the first place. But if RICO is found to have
13 been violated, I take it it would be an extension of
14 qualified immunity jurisprudence --

15 MR. GARRE: I don't --

16 JUSTICE SOUTER: -- to, to apply it to a
17 RICO defendant.

18 MR. GARRE: With respect, I don't think it
19 would be. First, the large portion of the courts of
20 appeals that have addressed this have concluded that
21 qualified immunity principles do extend to RICO. And
22 second, again, the focus of the inquiry is on the nature
23 of the responsibilities. It's not on the particular
24 offense alleged. It's not on whether there's a
25 violation of that offense. It's the nature of the

1 responsibilities, and here these responsibilities,
2 enforcing permits enforcing access and use of public
3 land, and protecting against abuse of those lands, are
4 things that BLM officials and other government officers
5 have exercised their discretion to do for more than --

6 JUSTICE BREYER: If this case were
7 identical, everything's the same, except that the
8 officials involved are state officials, would there be a
9 1983 action?

10 MR. GARRE: Well, no, because we don't think
11 that there's a violation of the Just Compensation Clause
12 when someone doesn't take property, when someone doesn't
13 act through allegedly --

14 JUSTICE BREYER: That's a different --
15 that's a different reason. That's a merits defense. I
16 just wondered if --

17 MR. GARRE: Oh, are you -- the question with
18 respect to qualified immunity?

19 JUSTICE BREYER: Yeah. You're saying there
20 is no Bivens action, period.

21 MR. GARRE: Well, we think that qualified
22 immunity now --

23 JUSTICE BREYER: No, I'm not even thinking
24 of it. I just wonder if 1983 would apply and it would
25 be clear that there is an action. If you win, there

1 would be no problem.

2 MR. GARRE: No, because there has been no
3 violation of the substantive Fifth Amendment right and
4 there has been no violation of Bivens.

5 It's important to recognize the overarching
6 context of how the Federal Government manages the public
7 lands. There are -- there are numerous reciprocal
8 arrangements that could be affected by this. Any time a
9 landowner refuses to enter into a reciprocal
10 arrangement, he can then turn around in any government
11 action that is taken against that landowner, all he has
12 to do is add on an element of wrongful subjective
13 intent, and he can bring a constitutional tort claim, or
14 even a RICO claim like the respondent here, and subject
15 officers to the threat of personal liability. And we
16 think that this would have a significant skewing effect
17 on legitimate government decision making.

18 If I could reserve the remainder of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Tribe.

21 ORAL ARGUMENT OF LAURENCE H. TRIBE

22 ON BEHALF OF THE RESPONDENT

23 MR. TRIBE: Mr. Chief Justice, and may it
24 please the Court:

25 There is a dramatic contrast between the

1 instantaneous judgments a school principal might have to
2 make in the face of complicated decisions like Tinker,
3 and a deliberate decision over a course of almost a
4 dozen years made by officials of the Bureau of Land
5 Management that the greater retaliate against someone
6 for refusing to relinquish his property to the
7 government without any compensation. You don't have to
8 have taken a special course in constitutional law to
9 know that that is clearly forbidden.

10 JUSTICE SCALIA: Mr. Tribe, can I get
11 something straight? Is it indeed correct that what the
12 government was seeking here was an exchange of
13 easements, that the government was going to give one and
14 your client would give the other?

15 MR. TRIBE: No, Justice Scalia, that's not
16 correct. That was what they did with Nelson, his
17 predecessor.

18 JUSTICE SCALIA: With the predecessor in
19 interest of your client.

20 MR. TRIBE: That's right. And what happened
21 --

22 JUSTICE SCALIA: Did what the government
23 gave to your predecessor of interest, did that easement
24 continue? The government has just said that it expired.

25 MR. TRIBE: The government is wrong. It

1 continued.

2 JUSTICE SCALIA: That's how I understood it.

3 MR. TRIBE: It ran with the land, it was
4 part of what he brought. If it had expired --

5 JUSTICE SOUTER: This is the easement over
6 the roadway.

7 MR. TRIBE: The right-of-way over the
8 government's roads.

9 JUSTICE SOUTER: As opposed to the grazing
10 easement.

11 MR. TRIBE: As -- that's right. The
12 right-of-way over the road of access, which they not
13 only canceled in July of 1985 but refused to maintain
14 themselves, so that he couldn't really access the ranch.

15 CHIEF JUSTICE ROBERTS: If they finally
16 canceled it, how did it -- I mean, if it runs with the
17 land, they don't have the authority to cancel.

18 MR. TRIBE: They didn't have the authority
19 to cancel it simply because of the transfer of the land.
20 They allege that he had made various technical
21 violations on account of which they canceled it. But
22 the key point is, that was supposed to be the quid pro
23 quo, that is, they have maintained all along that this
24 case is about that right-of-way and what an ingrate the
25 respondent is that he wants to continue enjoying it and

1 not give the easement. Well, he didn't enjoy it after
2 July of 1995 when it was canceled. They wouldn't have
3 had to cancel it for alleged violations.

4 JUSTICE SCALIA: I don't care whether it was
5 canceled, but I must say, if they were just seeking a
6 fair exchange of reciprocal easements, which landowners
7 do all the time --

8 MR. TRIBE: Right.

9 JUSTICE SCALIA: And the system of lands out
10 there can't work without it.

11 MR. TRIBE: Uh-huh.

12 JUSTICE SCALIA: I wouldn't see anything
13 terribly wrong about the BLM people say okay, he wants
14 to play hardball, he wants to play by the book, we'll
15 play by the book. What would be wrong with --

16 MR. TRIBE: They didn't --

17 JUSTICE SCALIA: See, I wouldn't feel bad
18 about that if they said --

19 MR. TRIBE: I wouldn't either.

20 JUSTICE SCALIA: -- by God, every time his
21 cows trespass, we're going to get him. Every time his
22 hunting expeditions go on public land, we're going to
23 get him. That would seem reasonable to me. So it
24 really is crucial to my view of the case that the
25 government was not seeking a new exchange, it was

1 seeking --

2 MR. TRIBE: That's right.

3 JUSTICE SCALIA: -- for him to cough up --

4 MR. TRIBE: To cough up that easement. And
5 in fact when he said, he offered to negotiate, and the
6 immediate response from Mr. Vessels, who is since
7 diseased, was, the United States does not negotiate.
8 That wasn't just kind of starting of a bargaining
9 position. They dug in and for a series of years the
10 district court found, fully substantiated on the
11 petition appellate via -- appendix to the petition at
12 page 37a, not only playing hardball and being
13 selectively tough on him, but a number of clearly
14 illegal acts, breaking into his lodge. One of them
15 particularly striking to me at joint appendix 49 to 57,
16 inciting a neighbor to ram a truck into the respondent
17 while he was on horseback. Firemen --

18 JUSTICE BREYER: Who would have thought --
19 wait. When you say that, I mean, there's a lot of these
20 acts, it seems, they are plainly illegal.

21 MR. TRIBE: Sure.

22 JUSTICE BREYER: Well, if they are plainly
23 illegal, then there are remedies in the courts.

24 MR. TRIBE: There are remedies one by one
25 for each of these acts.

1 JUSTICE BREYER: All right. But what is
2 actually worrying you, which probably you can address at
3 some point, is this: There are remedies one by one.
4 That's true. And each has one. And maybe you can even
5 get injunctions against harassing.

6 MR. TRIBE: Well, the remedies were
7 acquittal. He was acquitted, for example.

8 JUSTICE BREYER: Well, maybe he didn't do
9 it.

10 MR. TRIBE: He spent hundreds of thousands
11 of dollars.

12 JUSTICE BREYER: And so it may be, they
13 thought he did do it and --

14 MR. TRIBE: No, no. They didn't think he
15 did do it.

16 JUSTICE BREYER: All right.

17 MR. TRIBE: He alleged --

18 JUSTICE BREYER: Did you bring a suit for
19 malicious prosecution?

20 MR. TRIBE: That's part of -- this is a
21 suite like *Hartman v. Moore*. One of the acts that is
22 clearly actionable under *Bivens*, if one has to dissect
23 the various predicate acts, is the fact that without
24 probable cause, at page 71 of the joint appendix, they
25 deliberately fabricated a felony charge.

1 JUSTICE BREYER: All right. Now --

2 MR. TRIBE: And when he was acquitted of
3 that by a jury that took 20 minutes, and said that they
4 were outraged by the BLM, they found other things to do.
5 They found other things --

6 JUSTICE GINSBURG: But he also lost the
7 malicious prosecution suit, didn't he? Didn't he bring
8 a malicious prosecution suit?

9 MR. TRIBE: He tried to do that.

10 JUSTICE GINSBURG: And he lost.

11 MR. TRIBE: He won some, he lost some, but
12 the --

13 JUSTICE BREYER: Maybe he should have won.
14 What's worrying me throughout, if you want to know --

15 MR. TRIBE: I sure do.

16 JUSTICE BREYER: All right.

17 (Laughter.)

18 JUSTICE BREYER: What is worrying me
19 throughout is, put this case to the side. If the Court
20 recognizes what I take it has not happened in the past,
21 that there is an action for private people to bring
22 against the government, Bivens, under the Fifth
23 Amendment, all of a sudden vast numbers of regulations,
24 the coal pillars in Holmes case, everything south of
25 that will be suddenly in Federal court as people claim

1 that what's going on with this regulation is there are
2 individuals in the government who have gone too far, and
3 they are just trying to get my property and the use of
4 it, without paying a fair price. Now by the way,
5 sometimes people in government do go too far, so many of
6 those claims might have some justification. But
7 suddenly I see the possibility of this kind of action
8 becoming a major roadblock, an obstacle sometimes used
9 unjustifiably, and not necessarily, not necessary, this
10 kind of thing, to impose a roadblock to totally
11 legitimate government regulatory action.

12 MR. TRIBE: Justice Breyer, that -- that
13 floodgates concern was addressed by this Court not long
14 enough in *Hartman v. Moore* when the remedy in that case
15 for a prosecution that was brought to retaliate against
16 someone for the exercise of her First Amendment right
17 was a *Bivens* action against the postal inspectors who
18 made this all up. Now the Court there addressed the
19 possibility that this would unleash a flood of lawsuits,
20 and it said that over the past quarter century, there
21 had been only 12 *Bivens* or 1983 actions against this
22 kind of retaliation. I suppose that is because not that
23 many postal inspectors or BLM guys think they can get
24 away with deliberately retaliating against people for
25 exercising their rights.

1 JUSTICE BREYER: You see, part of what's
2 worrying me is that once you get into the Fifth
3 Amendment, which is -- prevents the government from
4 taking property for a public use without just
5 compensation, the possibility of the legal imagination
6 becomes endless. Because every time a person walks
7 across the doorstep, every time a person wants to
8 install a pipe in the basement, read the meter -- I
9 mean, I can see possibilities of actions of this kind
10 arising, and particularly when the government wants to
11 buy it and is pointing out all the reasons why it should
12 be sold. Is there a threat lurking in that
13 conversation? You see what I'm worried about here,
14 which wasn't present in the other case?

15 MR. TRIBE: I see, but it was present in
16 Davis, Davis v. Passman, to which Justice Kennedy
17 referred, already recognized a Bivens action for
18 violating something even more capacious, due process,
19 equal protection. When this Court said in Village of
20 Willowbrook against Oleck that there is a cause of
21 action even for the naked assertion that you're treating
22 me differently, did that open huge floodgates? Have we
23 been flooded? It seems to me that the Court has
24 developed its own filters against the floodgate of
25 retaliation claims. It's been --

1 JUSTICE KENNEDY: I'm not sure, Professor
2 Tribe, that the cases you cite at page 22, 23 of your
3 brief really support your position. The question is
4 whether there should be a freestanding cause of action
5 for damages.

6 MR. TRIBE: That's correct.

7 JUSTICE KENNEDY: And in the brief you say
8 that the government says that this is limited First
9 Amendment, and then you say, "These remarkable claims
10 are unsurprisingly false." I thought that was a rather
11 severe charge against the government, that it's
12 misrepresenting its cases.

13 MR. TRIBE: Uh-huh.

14 JUSTICE KENNEDY: Then in page 22 and 23,
15 you go ahead and you talk about Wisconsin versus Yoder,
16 Lefkowitz versus Turley, Bordenkircher, which I think
17 was vindictive prosecution or adding on charges. All of
18 those are in the -- every one of these cases are in the
19 context of a criminal proceeding. Griffin, a murder
20 case. It's just alleging a constitutional --

21 MR. TRIBE: But many of them are not,
22 Justice Kennedy.

23 JUSTICE KENNEDY: -- alleging a
24 constitutional claim. Well, which one?

25 MR. TRIBE: Well, for example, Shapiro v.

1 Thompson. The Court has said that the right to travel
2 cannot be penalized. The broad point that --

3 JUSTICE KENNEDY: Well, no. That was, there
4 was an existing case or controversy there. That wasn't
5 a freestanding cause of action. None of these cases are
6 freestanding. Davis versus Passman, different.

7 MR. TRIBE: And Hartman v. Moore, different.
8 What we were answering there was not the point about a
9 freestanding cause of action.

10 JUSTICE KENNEDY: Well, it seems to me that
11 those cases do not support your position, and I don't
12 think it's correct to say that this is unsurprising,
13 that the government makes a false representation about
14 cases.

15 MR. TRIBE: Well, Justice Kennedy, that was
16 a response to their claim, that only with respect to the
17 Fifth Amendment is there a right. This was not the
18 Bivens question. Only with respect to the Fifth --
19 First Amendment is there a right not to be retaliated
20 against for the exercise of your rights.

21 JUSTICE KENNEDY: I think it was in the
22 context of a freestanding right, but let's leave that
23 aside.

24 MR. TRIBE: We can look at it.

25 JUSTICE KENNEDY: That's right. It does

1 seem to me that you are asking us to extend *Bivens*, this
2 is an extension. Would you accept that?

3 MR. TRIBE: In the sense that there has
4 never been a case just like it under *Hope v. Pelzer*,
5 there doesn't have to have been one like it. But we do
6 think that there is a compelling case, because there's
7 no other way to enforce the just compensation right
8 against a group of government agents who are determined
9 to pile punishment upon punishment until someone caves
10 in.

11 CHIEF JUSTICE ROBERTS: Well, you say -- you
12 call it punishment, but in fact the government's
13 position on each of these particulars has generally been
14 vindicated. When your client has appealed, they've
15 upheld the trespass citations. When you've sued for
16 malicious prosecution, the suit's been rejected. Which
17 of the government actions do you not have an existing
18 remedy for, apart from the Racketeer and Corrupt -- RICO
19 Act or the, this new *Bivens* claim?

20 MR. TRIBE: Mr. Chief Justice, it is the
21 retaliatory pattern that there is no remedy for. When
22 going --

23 CHIEF JUSTICE ROBERTS: Can you point to any
24 one governmental action for which you do not have an
25 existing remedy?

1 MR. TRIBE: Well, the action of falsely
2 prosecuting him in retaliation --

3 CHIEF JUSTICE ROBERTS: You have a malicious
4 prosecution claim for that. You brought that, you lost.

5 MR. TRIBE: No, we did not bring a malicious
6 prosecution claim for that felony charge.

7 CHIEF JUSTICE ROBERTS: You could have
8 brought one.

9 MR. TRIBE: It would have been against
10 Federal officials and that would have been then
11 transformed unless we brought it under Bivens, which is
12 what we are trying to do, transformed into an action
13 against the United States by the Westfall Act. That is
14 all of these attempts --

15 JUSTICE SCALIA: And then if you would have
16 succeeded, you would have been compensated.

17 MR. TRIBE: For that one event from the
18 United States, but the BLM agents would not have been
19 deterred.

20 In any event, Carlson v. Green --

21 JUSTICE SOUTER: No, but the theory of the
22 Tort Claims Act is that if the government is paying out
23 of the treasury, it's going to see to it that its
24 employees don't continue to commit the tort. So I don't
25 think -- I don't think you can make the argument that it

1 would have had no effect on the improper behavior.

2 MR. TRIBE: I think the most important point
3 that I'm trying to make, Justice Souter and Mr. Chief
4 Justice, that when someone says, I do not want to give
5 you my property, you have to take it from me and give me
6 just compensation, the position of the Government here
7 is that there is no constitutional limit on the kind of
8 retaliation they can engage in.

9 CHIEF JUSTICE ROBERTS: Well, if the
10 position of the Government were more fairly represented
11 they would say, we don't want everyone to be able to
12 claim that everything we're doing under color of law is
13 retaliation, because then we'll hear that against IRS
14 agents, we'll hear it against OSHA agents. So long as
15 you -- and their position is you have a remedy for
16 everything you're complaining about, and you invoked
17 some of them and you lost, you didn't invoke others and
18 so you didn't prevail. But don't create a whole new
19 remedy just because you're dissatisfied with having to
20 pursue each one individually.

21 MR. TRIBE: Well, Bivens as a constitutional
22 tort is not a new remedy. The question really is
23 whether there is any conceivable basis when they trash
24 his lodge, when they do all of the other things, for
25 treating this differently from another kind of

1 constitutional violation. I mean, they argue that it's
2 very important, even though we could have lots of people
3 bringing unjustified suits, to have a Bivens remedy for
4 retaliation against free speech. The reason that they
5 give is that free speech is easily chilled. But with
6 property rights the Just Compensation Clause is kind of
7 its own antifreeze.

8 JUSTICE BREYER: No. The reason would be
9 probably that the, if you can make a comparison. The
10 number of Government actions that affect criminal
11 charges and so forth are tiny compared to the number of
12 governmental actions that affect people's property.
13 Virtually, I mean the number of Government actions
14 affecting how people use their property, it's the whole
15 series of law books. It fills the room. And suddenly
16 to open up a new remedy in that kind of thing is what's
17 frightening me, which is what I said already. So you
18 don't have to answer.

19 MR. TRIBE: But Justice Breyer, the Court
20 has established in the area of retaliation against
21 people for the exercise of their rights, Title VII
22 rights in Burlington, First Amendment rights --

23 JUSTICE BREYER: Retaliation, what is
24 retaliation? Isn't retaliation statutory?

25 JUSTICE KENNEDY: It's statutory.

1 MR. TRIBE: Hartman is not statutory. Some
2 of the -- Hartman is the First Amendment, and it's the
3 Bivens case. The point I was trying to make about that
4 is that the Court has a body of law trying to filter out
5 through requiring proof of causation, requiring proof of
6 substantial injury, filter out these trivial cases where
7 someone is simply making a nuisance.

8 JUSTICE ALITO: Mr. Tribe, could I ask a
9 question about the RICO claims?

10 MR. TRIBE: Certainly.

11 JUSTICE ALITO: Until I read this case, I
12 had never come across the concept that a Government
13 employee can be guilty of extortion by demanding money
14 for the Government and your brief didn't cite very much
15 authority for this anywhere in the history of extortion.

16 MR. TRIBE: In the common law history,
17 Justice Alito, we cited two cases from New York, the
18 Whaley case in 1827 and Willett in 1915. And it was
19 that body of New York law from which the Hobbs Act
20 largely drew. Those were cases in which the courts said
21 that the fact that the government agent is extorting
22 property for his own employer the government doesn't
23 make any difference; it is still extortion.

24 JUSTICE ALITO: That's not a lot of, that's
25 not a lot of authority, considering the long history of

1 extortion, just two old New York cases.

2 MR. TRIBE: There are plenty of cases,
3 Justice Alito, that involve extortion for one's employer
4 where the employer might be a union or a corporation or
5 a charitable body. But it's true the Hobbs Act has not
6 been applied, in my research anyway I have not seen it
7 applied, to this kind of extortion. But the language
8 clearly covers it and the language of RICO clearly
9 covers it.

10 JUSTICE ALITO: Suppose you have a librarian
11 in a courthouse and the librarian is charging lawyers 25
12 cents a page for photocopies, but there's some library
13 rule that says the fee is supposed to be 10 cents a
14 page. Now is that, is that a RICO?

15 MR. TRIBE: If the librarian thinks that,
16 the legislature is not giving us enough money, so I'm
17 going to deliberately use my authority to get an extra
18 five cents from everybody, I suppose if you could prove
19 willfulness, which is an important element of Hobbs, and
20 if there were several librarians and there was a pattern
21 and you could establish the other prerequisites of RICO,
22 it could be a RICO violation.

23 JUSTICE BREYER: Well, the two cases you
24 cite, the first one is the person who was charged with
25 extortion is a judge --

1 MR. TRIBE: That's right.

2 JUSTICE BREYER: And he was extorted on the
3 ground that he told the plaintiff to pay the defendant,
4 so the money wasn't given to the government. So I don't
5 see that that's a difference. And then the second case
6 --

7 MR. TRIBE: The second case --

8 JUSTICE BREYER: -- it may have been, but
9 you say "See Also," which is a sign to me there's
10 something wrong with that case.

11 (Laughter.)

12 MR. TRIBE: I don't, I don't think there is,
13 Justice Breyer, and it's very short.

14 JUSTICE BREYER: I'm surprised that you
15 didn't put it first if there wasn't.

16 Page 49.

17 MR. TRIBE: Well, Willett versus Devoy, it
18 involved a clerk demanding more money than the law
19 allowed, and the court said: "No distinction is made on
20 the ground that the official keeps the fee or turns it
21 over to the government. Such a judge-made restriction
22 on the general statute requiring that the money be kept
23 by the individual might itself bring about uncertainty,
24 confuse and possibly great injustice."

25 JUSTICE BREYER: Why did you say "See Also"?

1 MR. TRIBE: I don't remember.

2 CHIEF JUSTICE ROBERTS: You say this clearly
3 establishes. Are the BLM folks supposed to have known
4 about Willett versus Devoy?

5 MR. TRIBE: No.

6 CHIEF JUSTICE ROBERTS: -- as clearly
7 establishing their liability for what you call
8 extortion? I'm sure what they would call trying to save
9 the taxpayers money and getting the type of reciprocal
10 agreement with this landowner that they have got with
11 thousands of others.

12 MR. TRIBE: Well, Mr. Chief Justice, first
13 of all, when you keep calling it a reciprocal agreement
14 it does trouble me. They weren't giving him anything
15 for this easement which they had already extracted from
16 his predecessor.

17 CHIEF JUSTICE ROBERTS: You agree if the
18 case were otherwise -- and I gather we have a factual
19 dispute on that -- that it would have been all right? I
20 mean, if he didn't have this other easement already, but
21 they were trying to negotiate it, that this type of
22 playing hardball, I guess is one way to put it, would be
23 all right?

24 MR. TRIBE: It makes all the difference in
25 the world. They were trying to get the easement for

1 nothing. I mean, it's very much --

2 CHIEF JUSTICE ROBERTS: Well, that's what
3 I'm trying to get, to see if you agree with that. In
4 other words, everything about this case would otherwise
5 be, I'm sure not breaking the laws, but otherwise it
6 would be all right if they were trying to get a
7 reciprocal easement?

8 MR. TRIBE: Well, most of what they did
9 would not have been an okay method of getting a
10 reciprocal easement, anyway. But the attempt to get it
11 would be fine. It's not that they are not entitled to a
12 reciprocal easement. That might have been a problem
13 under Nollan and Dolan to figure out whether there was
14 enough connection, but I think there would have been
15 enough.

16 The problem was that they were using the
17 right-of-way, which was long gone, as an excuse to get
18 an invaluable piece of property that they had no right
19 to get. They were then trying to -- they were basically
20 saying, and they made it explicit, give us this easement
21 for nothing or we'll bury you.

22 JUSTICE SCALIA: Mr. Tribe, I'll tell what
23 you troubles me about this case. There are overzealous
24 government agents. There always have been and I am sure
25 that, assuming all of the misbehavior described here is

1 correct, I'm sure it is not the first time this has
2 happened. Government agents sometimes get overzealous.
3 But why should there be this extraordinary remedy when
4 the overzealousness happens to be attached to a desire
5 to get a piece of land, whereas if they had just picked
6 on this guy because they didn't like the way he combed
7 his hair or for any other reason and had done the same
8 things you wouldn't have your Bivens action, right?

9 MR. TRIBE: Nor would Nollan have come out
10 the same way if they weren't trying to get an easement
11 in return for something which wasn't -- which you called
12 extortion.

13 JUSTICE SCALIA: No, no. If they were
14 trying to get some other property for it or, or, or
15 money for it, it didn't turn --

16 MR. TRIBE: I guess the straightforward
17 answer that I would give to your question I think is
18 that the Constitution does guarantee that the Government
19 cannot take your property for public use without just
20 compensation.

21 JUSTICE SCALIA: The whole spectrum of
22 possible Government misbehavior, selective enforcement,
23 the whole spectrum, the only, the only times we're going
24 to allow a cause of action under Bivens or under, under
25 not 1983 -- yes -- the only times we're going to do that

1 is when there is a demand for property?

2 MR. TRIBE: You've certainly done it with
3 respect to the Eighth Amendment. You've done it with
4 respect to speech. You've done it with respect to --

5 JUSTICE KENNEDY: But Professor Tribe, all
6 these cases are cases in which there is -- Nollan, you
7 have a cause of action to challenge the permit and this
8 is just a, this is just a constitutional defense.
9 That's different from a freestanding cause of action.
10 And I share Justice Scalia's concern. It seems to me in
11 thinking about this case there is -- there could be
12 something very wrong here, going after a person because
13 of what he's done. Suppose the Government wants
14 somebody to be a witness in a trial and he won't do it,
15 and they go around hurting his business, they go around
16 invading his property and so forth. That to me is
17 outrageous and you might have an argument that there
18 should be a Bivens cause of action for that.

19 And Justice Scalia's question -- I had the
20 same question -- is why do we think it to the property?
21 The essence here, the essence of what's going on, is
22 that they're being vindictive against this person. Now
23 again, the cases you're citing, include Hartman, which
24 is a free speech case which is different, really don't
25 support you. I think this is an extension of Bivens.

1 MR. TRIBE: Justice Kennedy, if it's an
2 extension, it's I think implicit in Bivens' logic.
3 Bivens deals with the cases --

4 JUSTICE KENNEDY: Fair enough, but it's an
5 extension of Bivens.

6 MR. TRIBE: The Fifth Amendment is different
7 from the First, but is it different in a relevant way?
8 The Just Compensation Clause does give the government an
9 incentive, if they can avoid having to use eminent
10 domain and tax the public, gives them an incentive to
11 try to squeeze property out of somebody. If it has any
12 incentive effect, it's one that points to the need for a
13 Bivens remedy. Why is a Bivens remedy --

14 CHIEF JUSTICE ROBERTS: But are they
15 disabled from negotiating? If they go up to somebody
16 and say, you know, we'd really like a right-of-way
17 because we have some interest in lands that we need to
18 maintain on the other side, and the person says, no and,
19 you know, get off my property, do they have to shrug
20 their shoulders and say all right? Or can they say,
21 well, you know, we're neighbors, we have a lot of
22 interests in common and we should work together? Is
23 that all of a sudden extortion?

24 MR. TRIBE: No, Mr. Chief Justice. Working
25 together is what this guy tried to do at the beginning.

1 He said, I'm happy to negotiate.

2 CHIEF JUSTICE ROBERTS: So how many trespass

3 --

4 MR. TRIBE: They said: We don't negotiate.

5 CHIEF JUSTICE ROBERTS: -- citations for his
6 cattle does it take before it's all of a sudden
7 extortion?

8 MR. TRIBE: The record in the case shows
9 that on those very instances where he was cited with
10 trespass others who were doing the identical thing were
11 not. And the IBLA has said --

12 CHIEF JUSTICE ROBERTS: And he challenged
13 the citations and they were rejected.

14 MR. TRIBE: The IBLA rejected them because
15 it said it has no jurisdiction. This was at -- in its
16 decision at 170 IBLA in 2006. No jurisdiction to
17 consider whether the motive was retaliatory, whether it
18 was unconstitutional, whether it was part of a pattern.
19 And this Court has said that one can't use the APA in
20 that way either. Nor could an injunction be used to get
21 a pattern like this because of Rule 65D and
22 International Longshoremen, try to frame an injunction
23 saying: Don't keep trashing this guy and ruining his
24 business and harassing and surveilling his guests and
25 whatever else you can come up with in order to squeeze

1 his property out of him. No other remedy will work.

2 JUSTICE SOUTER: So are you saying that
3 there was therefore no way short of Bivens even to
4 challenge or even to vindicate his claim of selective
5 prosecution.

6 MR. TRIBE: He could have taken that one
7 item and under a decision like Hartman vindicated it.
8 But as is clear from the way he tried to challenge these
9 individual things and then concluded, as we explained in
10 our brief, that it was taking years and costing hundreds
11 of thousands of dollars more than was involved in each
12 individual one, that was hopeless.

13 JUSTICE SOUTER: I appreciate that, but I
14 thought you made the further claim -- maybe I
15 misunderstood it -- that if he had gone from the
16 administrative tribunal, or attempted to, to get into
17 the district court, he could not have gotten into
18 district court under the act.

19 MR. TRIBE: Well, he wouldn't have had --
20 because he would have had no record. That is, the
21 review under the APA by the district court would have
22 been based on the evidentiary record he made. And the
23 IBLA specifically ruled that it would not entertain
24 evidence about the reasons that the BLM officials had
25 for going after him. There would be no evidence to

1 support his claim.

2 JUSTICE SOUTER: Could he have gone into the
3 district court and said, I tried to make a record but
4 they wouldn't let me; let me make a record now? Could
5 he have done that?

6 MR. TRIBE: I believe the district court's
7 jurisdiction in reviewing a final agency action is
8 limited to the agency record.

9 JUSTICE BREYER: No, no. You can go to an
10 agency and say, agency I want to do such and such, dah
11 dah dah, here are my reasons. Agency says no. I want
12 review.

13 MR. TRIBE: So a challenge to the IBLA's
14 assertion --

15 JUSTICE BREYER: I don't know. You might
16 have written to the Secretary of the Interior:
17 Secretary, I want to you do such and such, please. No.
18 Okay, review.

19 MR. TRIBE: Well, he did write to the
20 Secretary of the Interior.

21 JUSTICE BREYER: And what happened?

22 MR. TRIBE: He was not given an answer. So
23 what can one say?

24 The district court decided -- lest you
25 assume that because he wasn't given an answer he doesn't

1 have a case, the district court said, as hard as it is
2 to prove these things, he has substantial evidence that
3 they were picking on him solely to get the property, not
4 because they didn't like him, not for some other reason;
5 they were trying to get property for which they were
6 unwilling to pay.

7 It's doubtful that they could have taken
8 it by eminent domain because the laws limiting the
9 ability of the BLM require proving necessity and there
10 is nothing in the record suggesting that they needed
11 this easement. There is plenty in the record suggesting
12 that he couldn't access his own property as long as the
13 roadway wasn't maintained in a passable condition, and
14 one of the ways they retaliated against him was to
15 refuse to maintain the roadway.

16 The record is also clear that his
17 business suffered greatly. So that if the result is
18 that someone who is trying to insist that if you want my
19 property, you have to take it by eminent domain and give
20 me just compensation, can't get help in those other
21 ways, this is crucial.

22 What would have happened in Kaiser
23 Aetna, if when the Government said we think we have an
24 easement to the Laguna pond, instead of going to court,
25 which they did and they lost, if they had said well we

1 are going to ram our motor boats or invite people to ram
2 their motor boats into your sailboat? We are going to
3 ruin your business in the Kuapa pond until you give the
4 public an easement. Only a Bivens cause of action which
5 the Court has recognized in other areas, in other
6 constitutional claims -- due process, free speech,
7 Eighth Amendment -- only a Bivens cause of action is
8 directly responsive to that.

9 CHIEF JUSTICE ROBERTS: No. A, an action
10 against the Government for ramming your sailboat is
11 directly responsive to that. You get -- you get full
12 recovery.

13 MR. TRIBE: The Westfall Act makes an
14 exception when you are making a constitutional claim.
15 That is, in 1988 when the Court passed the Westfall Act,
16 there were two exceptions 2679B(2) (a) and (b) were
17 constitutional claims and statutory claims.

18 CHIEF JUSTICE ROBERTS: You don't need the
19 Constitution to the sue the Government for ramming your
20 sailboat. Basic state tort law.

21 MR. TRIBE: Mr. Chief Justice --

22 CHIEF JUSTICE ROBERTS: You can answer.

23 (A little laughter.)

24 MR. TRIBE: It seems to me that state tort
25 law does not get at the harm that he has suffered. It

1 gets at each individual piece. But the main harm he
2 suffered is that they are circumventing the Just
3 Compensation Clause as the one way that the Fifth
4 Amendment was designed to permit the Government to get
5 property for public use. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7 MR. TRIBE: Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Mr. Garre, you have
9 four minutes remaining.

10 REBUTTAL ARGUMENT OF GREGORY C. GARRE,

11 FOR PETITIONERS

12 MR. GARRE: Thank you, Mr. Chief Justice.

13 First I want to clarify, the question of the
14 assignment. And our position, it's always been our
15 position that a new right-of-way had to be issued after
16 the property was sold. And I'll point the Court to JA
17 84, which is where the BLM officials made clear at the
18 outset that an assignment was required. Point the Court
19 to JA 100 which is the right-of-way --

20 JUSTICE SCALIA: They might have been lying
21 about that --

22 MR. GARRE: Well --

23 JUSTICE SCALIA: -- just as they lied about
24 a lot of other stuff, according to --

25 MR. GARRE: Pointing to JA 100 which is the

1 right-of-way, which says that in accordance with Federal
2 regulations, and I point the Court to 43 CFR 2803, which
3 discusses assignments and makes clear that assignments
4 have to be approved.

5 JUSTICE GINSBURG: I thought there was
6 something about Nelson having assigned his, the
7 right-of-way that he had to the Government.

8 MR. GARRE: Justice Ginsburg, assignments
9 have to be approved by the BLM. That's --

10 JUSTICE GINSBURG: Yes. But it wasn't that
11 it was a new assignment; it was the former owner
12 assigned it and the BLA -- BLM approved.

13 MR. GARRE: It was never approved. And
14 that's clear, there was never any valid assignment.
15 That's why the reciprocal arrangement had to be
16 negotiated anew and again, I point to 43 --

17 CHIEF JUSTICE ROBERTS: Well, then why did
18 you revoke it later, if it wasn't valid?

19 MR. GARRE: It -- it was revoked as part of
20 the decision not to assign it. And that's clear from
21 the decision canceling the right-of-way. There was no
22 assignment that could be approved, and rents had not
23 been paid on it. So it was combined with the
24 assignment.

25 JUSTICE SCALIA: Why wouldn't there be an

1 assignment? Why, why would the prior owner have any --
2 any interest in not assigning it?

3 MR. GARRE: In order for the right-of-way,
4 because these are rights-of-way to public lands. They
5 have to approved by new -- once new property owners seek
6 to assert them. And again the --

7 JUSTICE GINSBURG: The prior owner did
8 assign it. The stopper was the BLM.

9 MR. GARRE: But, but again it's clear -- and
10 it was not approved, and one of the reasons it wasn't
11 approved was because rents weren't paid and he wasn't
12 agreeing by the terms and conditions of the regulations
13 which are part of the right-of-way. And that's at JA
14 100.

15 The next point I wanted to make, Justice
16 Kennedy, is we agreed this would be a dramatic new
17 extension of Bivens, and we agree with Justice Breyer,
18 the problems or types of litigations that this new
19 constitutional tort would create are really just -- the
20 -- capable of the imagination.

21 JUSTICE KENNEDY: Davis versus Passman is a
22 different context. But in theory is it consistent with
23 what the Respondent asks?

24 MR. GARRE: No, it's not. Because the
25 Respondent here has more statutory and administrative

1 remedies available to him than the plaintiff in Passman
2 did, including claims under the Federal Tort Claims Act
3 for trespasses, for any of the other alleged wrongs that
4 you've heard about here today. These were -- these were
5 wrongs that were addressed by the IBLA and the APA.

6 CHIEF JUSTICE ROBERTS: But their argument
7 is broader. It says you can't look at each little
8 piece. You've got to look at the overall structure, and
9 overall they are doing it to extort a property right
10 they don't want to pay for, and they are not doing --
11 other people's cattle cross over and they don't
12 prosecute them.

13 Now, let's assume that's correct on the
14 facts. Are you saying that they have no remedy for that
15 type of extortionate activity?

16 MR. GARRE: They don't have a Bivens remedy
17 and they don't have a RICO remedy. I'd point the Court
18 to Lujan versus National Wildlife Federation, where the
19 Court said that in that situation what a plaintiff must
20 do is challenge each administrative action individually,
21 and the types of programmatic pattern challenges are for
22 Congress, they're for executive branches; they are for
23 inspector generals.

24 JUSTICE SOUTER: But what do you -- what do
25 you say to the argument that -- that you simply cannot

1 follow that logic ultimately, because when you get to
2 the point of the sort of the, you know, the death by a
3 thousand cuts, which is what they are claiming here, you
4 can stitch up every cut, but by the time you get to a
5 thousand, you're dead. I mean, they're making an
6 argument that this is quantitatively so different that
7 it is qualitatively different.

8 MR. GARRE: I think the law and this Court
9 reasonably assumes that where individuals have remedies
10 available to them through challenging individual --

11 JUSTICE SOUTER: Why is that a reasonable
12 assumption in response to their argument?

13 MR. GARRE: It's reasonable to assume that
14 if there are actions against United States under the
15 Federal Tort Claims Act, or actions finding Government
16 conduct unauthorized under the APA, that the Government
17 will take action to prevent that.

18 Here every action that was challenged was
19 found to be appropriate and lawful under the existing
20 regime. We would urge the Court to reverse.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
22 The case is submitted.

23 (Whereupon, at 12:06 p.m., the case in the
24 above-entitled matter was submitted.)

25

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