Federalist Society Podcast on *Wilkie v. Robbins*

by Timothy Sandefur

The old adage that every right must have a remedy sets the theme for the Supreme Court's decision in *Wilkie v. Robbins,* a case that might ultimately prove more harmful to American property owners even than the Court's notorious decision in *Kelo v. New London* two years ago. Harvey Frank Robbins, a Wyoming rancher, asked the Court to protect him from what he alleged was a systematic attempt over the course of several years, to coerce him into giving up his property without compensation. But in a 7-2 decision, the justices held that a property owner has no realistic opportunity to protect himself against federal officials who engage in what the Court described as simply "hard-nosed bargaining tactics."

Since the case involved a motion to dismiss, the Court was required to accept Robbins's allegations as true, and I will do the same for purposes of this podcast. In 1994, Robbins purchased the land from its previous owner who, not long before the sale, had conveyed an easement across his land to the federal Bureau of Land Management. For some reason, the Bureau had failed to record the easement, and Robbins was not aware of it when he purchased the land. As a consequence, the conveyance vaporized and Robbins was left in full possession of the property. Realizing their mistake, agents from the Bureau soon began to harass Robbins in order to get him to sign over the easement again. "The federal government doesn't negotiate," one official told him. Instead, they promised that Robbins' refusal would "come to war" and that they would give him a "hardball education." Then they began a vendetta against him, cancelling his right-of-way over government-owned land, revoking his grazing permits, initiating a criminal prosecution against him for "interfering with federal officers" (which resulted in an acquittal after less than a half hour of jury deliberations), repeatedly annoying the guests at his ranch, breaking into his lodge, and citing him for minor infractions that others committed with impunity.

Robbins filed a lawsuit alleging that by retaliating against him for exercising his property rights—including his right to refuse the government's demand for an easement—the government was violating his rights under the Fifth Amendment. He brought his case pursuant to the Racketeer Influenced and Corrupt Organizations Act, or RICO, as well as the 1971 case of *Bivens v. Six Unknown Named Agents. Bivens,* of course, allows citizens to sue federal agents for violating their constitutional rights, in the same way that they can currently sue *state* agents under the civil rights laws.

Although the trial court and the Tenth Circuit Court of Appeals held that Robbins' lawsuit could proceed, the Solicitor General of the United States petitioned the Supreme Court, arguing among other things that "no court [had] ever recognized a constitutional right against retaliation...in the context of property rights." The Supreme Court granted cert. and on June 25th, it reversed, in a 7-2 decision, holding that Robbins could not sue the agents under RICO, and that his *Bivens* claim should not proceed because he had other adequate remedies for the violations of his rights.

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Written by Justice Souter, the opinion of the court rejected Robbins's RICO claim on the grounds that the federal agents were trying to obtain property for the government, not for themselves, and that this is not a violation of federal anti-racketeering laws. Extortion or corruption only occurs, the Court explained, when a public official "sells public favors for private gain," or otherwise seeks to enrich himself through his office; it does not occur when government agents engage in what Justice Souter calls "overzealous efforts to obtain property on behalf of the Government." It would be dangerous for officials to be subject to RICO charges because, writes Souter, "the fear of criminal charges or civil claims for treble damages...could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public."

But while there is broad consensus that a RICO claim is inappropriate here—on that the Court was unanimous—it's the issue regarding *Bivens* that will matter more to landowners who face the prospect of abuse at the hands of "overzealous" bureaucrats.

The court begins by noting that *Bivens* was not intended as "an automatic entitlement" to a lawsuit against federal agents; rather it was an attempt to fashion "the best way to implement a constitutional guarantee." Thus in determining whether a *Bivens* remedy is available, the court asks two questions: whether citizens have other opportunities to vindicate their rights, and second whether there are any "special factors" that would move the court to create a new cause of action anyway.

The Court then proceeded piecemeal through Robbins's injuries, pointing out that in each case there was *some* administrative or common-law remedy available to him. When federal agents broke into his lodge, he could have pressed charges for trespass. He could also have sued for trespass when they sneaked onto his land to complete a survey against his will. When the Bureau cancelled his right-of-way, or pursued its various other actions against him, he could have appealed through the Bureau's administrative processes.

Still, as the Court accurately notes, Robbins's complaint was not so much about each specific action as about the whole pattern of harassment which, as a whole, was greater than the sum of its parts. This requires consideration of the second question—whether there is good reason to allow Robbins to sue the agents directly under *Bivens* regardless of alternative remedies. But here, too, the Court ruled against Robbins. It is at this point that the opinion raises serious concerns for the security of property rights.

Robbins claimed a Fifth Amendment right to be free from retaliation for exercising his property rights, and in support of that argument, cited several retaliation claims that involved other kinds of rights, particularly First Amendment rights. Government can't usually punish someone for speaking his or her mind by terminating employment or engaging in other negative actions against the speaker. But, writes the Court, "unlike punishing someone for speaking out against the Government, trying to induce someone to grant an easement for public use is a perfectly legitimate purpose." And although Robbins complained that the Bureau's tactics in pursuing that objective exceeded the Constitution's limits, the Court was unwilling to address the question of whether such tactics had gone too far. A "'too much' kind of liability standard (if standard at all)," wrote Justice Souter, would be "endlessly knotty to work out." Allowing suits like Robbins's to go forward "would invite claims in every sphere of legitimate governmental action affecting property interests," and to allow citizens to sue government agents who are "unduly zealous in pressing a governmental interest affecting property would invite an onslaught of [lawsuits]."

This conclusion is troubling for four reasons. First, while it's certainly true that the availability of a *Bivens* remedy would require courts in some cases to draw difficult lines, that hardly seems like good reason to reject a property owner's lawsuit against unfair government action. Courts draw difficult lines all the time, and particularly in the context of tort law—very similar to the constitutional claims at issue here—courts have become adept at determining when legitimate activity crosses the line into persecution. Any private citizen can abuse his legitimate rights in ways that constitute unfair harassment, and courts have frequently ruled against them. Courts have even held in some contract cases that the threat to exercise an otherwise legitimate legal right can sometimes constitute duress. In a 1971 North Carolina case, for example, a husband who discovered that his wife had committed adultery demanded that she sign over some stock certificates or he would institute divorce proceedings. Of course, he had the right to begin such proceedings against her, but the court found that "the act done or threatened may be wrongful even though not unlawful, per se; and the threat to institute legal proceedings . . . which might be justifiable, per se, becomes wrongful . . . if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." Likewise the Minnesota Supreme Court has declared that a person has no right to threaten the enforcement of "some just legal demand where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use the legal process as to oppress his adversary and to cause him unnecessary hardship." California and other states have made similar rulings.

The Court's concerns that judges would be tied in knots trying to discern when "overzealous" enforcement activities add up to harassment is also darkly amusing when one compares it with the standard that property owners are required to meet when they seek just compensation for expropriations of their property. Justice Souter himself has more than once affirmed his allegiance to the so-called "test" of *Penn Central v. New York,* a test that is really only a vague set of factors for deciding when a land-use regulation "goes too far" and constitutes a taking. It is so vague, in fact, that the Court has never compensated a property owner under the *Penn Central* test in its thirty year history. Thus in the Court's mind, it appears that the vague "goes too far" standard is good enough when it has the effect of infringing on the rights of property owners—but not when it might result in damages claims against government officials.

Third, Justice Souter's claim that courts would be deluged with lawsuits if a *Bivens* action were available in cases like these hardly constitutes a good reason for locking the courthouse doors to those who have been threatened and intimidated by gung-ho regulators. In fact, on the same day that *Robbins* was decided, Justice Souter issued a dissenting opinion in *Hein v. Freedom from Religion Foundation*, in which he would have allowed taxpayers to maintain lawsuits against government expenditures alleged to violate the Establishment Clause. There, he was much less concerned about opening the floodgates. "If these claims are frivolous on the merits," he wrote in footnote one, "I fail to see the harm in dismissing them for failure to state a claim instead of for lack of jurisdiction. To the degree that the claims are meritorious, fear that there will be many of them does not provide a compelling reason...to keep them from being heard."

The *Robbins* decision seems therefore like nothing so much as another in the many instances of the Supreme Court treating property rights as second-class, and affected property owners as less important than those challenging other kinds of government action. The Court has on occasion acknowledged that property rights are constitutionally protected and deserve respect,

but in practice it continues to adhere to the New Deal-era discrimination against property rights that has fostered the ever-expanding regulatory welfare state. Along with such recent decisions as *San Remo Hotel* and *Chevron*—which relegated property owners to generally futile state-court actions for recovering compensation, and removed an important test for determining when land-use regulations require compensation—the *Robbins* decision stands as another roadblock in front of property owners that would not be tolerated if the right at issue were free speech, or freedom of religion, or freedom of travel. As Justices Scalia and Thomas once put it, the "picking and choosing among various rights" that receive solicitude from the Court "unquestionably involves policymaking rather than neutral legal analysis."

Finally, the *Robbins* decision is troubling because it requires property owners whose rights have been violated to litigate piecemeal each government action that affects them—an unrealistic option for those who lack the time and money necessary to litigate a case first through the administrative process and then through the state and/or federal courts. Already property owners whose land is targeted for eminent domain often give up rather than sue, since their chances of success are so small. Even worse is a case like this one, in which each discrete government action may not be enough of a violation to warrant litigation, but which taken in total constitute what even the majority opinion described as "death by a thousand cuts."

Today's property owner is surrounded by a pervasive regulatory atmosphere that makes it virtually impossible to comply exactly with every rule. This gives bureaucrats enormous power, if they wish, to use their otherwise legitimate enforcement powers to twist the arms of property owners until they comply with government's wishes. And most of these unfair pressure tactics go unreported because landowners don't have the wherewithal to bring lawsuits—especially when they are unlikely to win anyway. But there are some examples of property owners who have challenged these unfair tactics. In 1993, the president of the Village Board of Sussex, Wisconsin used permit requirements and bureaucratic delays to nudge two landowners into giving him a portion of their land for his own personal use. He even persuaded the Army Corps of Engineers to regulate the property as a wetland and pretended to find Indian artifacts on the property to increase pressure on the property owners. And in 1996, code enforcement agents in San Bernardino, California, used inspection laws to harass apartment and motel owners, to get them to give up their property for redevelopment. The *Robbins* decision not only guarantees that property owners will continue to suffer such tactics, and usually in silence; it also very likely emboldens ambitious government officials who see the property of citizens not as rights, but as permissions which can be revoked to serve the bureaucrats' vision of a good society. In fact, if officials can use their regulatory power to bully property owners with impunity, it's very likely that they will exploit this power to take property without resorting to the expensive method of eminent domain. Why condemn land and pay for it when, with a little patience and cynicism, you can get the landowner to walk away for free? That, after all, is precisely what the Bureau allegedly tried in this case.

To put the point simply, all rights are by definition rights against retaliation. To be free to do something means to be free to do it without facing official punishment afterwards. Ronald Reagan used to put this point well in an old joke. What's the difference between the Soviet Constitution and the American Constitution? The Soviet Constitution guarantees freedom of speech; the American constitution guarantees freedom *after* speech. If landowners are deprived of a realistic opportunity to protect themselves from retaliation when they tell the government "no," their property rights may not amount to much in practice.

Ironically it was Justices Ginsburg and Stevens—no friends of private property rights—who at least recognized the unfair consequences of the Court's decision. "The constitutional guarantee of just compensation would be worthless if federal agents were permitted to harass and punish landowners who refuse to give up property without it," they wrote. "The Fifth Amendment, therefore, must be read to forbid government action calculated to acquire private property coercively, and cost free."

The Constitution's guarantees for property rights have been severely weakened in the past several years. Unfortunately, unless serious attention is given to the fundamental importance of these rights to everyday Americans, that degeneration will only continue, and the harm will fall on regular citizens like Frank Robbins, who only want the government to treat them fairly.