Bound By Oath | Season 2 | Episode 2: Death by a Thousand Cuts

John: Hello and welcome to Episode 2 of Season 2 of Bound By Oath. If you haven't listened to Episode 1 of Season 2, we strongly recommend you stop, back up, and start with that. If you haven't listened to Season 1, we also strongly recommend that you do that, but not right now. On this episode, we are going to head out to Wyoming, where federal officials conducted a decade-long vendetta against a rancher because he did something that any American should feel free to do. He told the government to buzz off when they demanded something from him that the Constitution -- and common decency -- says they couldn't. In retaliation, officials abused their authority as regulators; they abused the criminal justice system, and they broke the law. In an effort to take his land and drive him out of business, they subjected him to a death by a thousand cuts.

> **Frank Robbins**: Death by a thousand cuts. **Justice Souter**: The death by a thousand cuts. **Steve Vladeck**: Death by 1000 cuts. **Karen Budd-Falen**: The root of the problem was the death by 1000 cuts. **Laurence Tribe**: Death by a thousand cuts.

John: When a federal appeals court heard his story, it said the rancher should get a trial -- his day in court to prove his allegations were true and to get a remedy. But the Supreme Court reversed, holding that the courthouse door should be closed to him, even if he has legitimate constitutional claims. On this episode, we're going talk about how -- with a very few exceptions -- the Constitution is simply not enforceable against federal officials. There may be a right, but -- according to the Supreme Court -- there's no remedy.

John: Before we get to Wyoming, I want to take a few minutes to lay out some of legal background that we're going to come back to over and over again this season.

Erwin Chemerinsky: I think Chief Justice John Marshall got it exactly right when he said in *Marbury vs. Madison*, that the Constitution exists to limit government power. Those limits are meaningless unless there's a way to enforce them.

John: That's Erwin Chemerinsky, dean of the law school at the University of California-Berkeley. What we're going to try to achieve this season is to show how many of the limits the Constitution places on the government have been rendered meaningless because of a variety of immunity doctrines the Supreme Court has invented or repurposed to protect the government and its employees from lawsuits when they are accused of violating the Constitution. The first immunity doctrine we'll talk about is the oldest. It's called sovereign immunity.

Erwin Chemerinsky: The United States government, and state governments, has sovereign immunity. It means they can't be sued without their consent.

John: All government officials at all levels -- federal, state, and local -- are entitled to qualified immunity when they are accused of violating the Constitution. And some are also entitled to absolute immunity. Those are the cases you hear about on the news, and that we'll be talking about very soon on this season. Sovereign immunity by contrast doesn't protect individual officials. It protects the government itself.

Erwin Chemerinsky: Sovereign immunity comes to the United States from England. It is based

on the principle that the King can do no wrong.

John: If the King can do no wrong, then you can't sue the King claiming he did something wrong. Now, there's a lot to like about the legal tradition that we adopted from England. But the Founders made a pretty clean break from many parts of the English system, including the idea of an infallible King.

Erwin Chemerinsky: I believe that sovereign immunity is inconsistent with the most basic principles of the Constitution. The Constitution is supposed to be the supreme law of the land. And yet sovereign immunity means the government can't be held accountable when it violates the Constitution. The core of the rule of law is that no one -- not even the government -- should be above the law. But sovereign immunity lets the government violate the Constitution with impunity.

John: If an employee of a private company harms you while he or she is on the job, you can generally sue the company, which after all hired, and trained, and supervised the employee. But when it's a government employee who harms you, you cannot sue the government unless, as Dean Chemerinsky said, the government waives sovereign immunity and consents to being sued. For example, that's what the Federal Tort Claims Act does. We talked about the FTCA on the last episode. Congress passed the FTCA in 1946 after a U.S. military plane got lost in fog and crashed into the Empire State Building, killing 14 people. Congress said there should be a way to sue the government over that rather than just the pilot. Which, good for Congress. Congress should consent to being sued when government employees cause harm. But the logic is backwards. The government is supposed to be bound by the Constitution, but sovereign

immunity allows Congress to stipulate the terms by which it will comply with the Constitution. Which kind of defeats the purpose. The overarching theme of the season is this: Because of doctrines like sovereign immunity, you usually can't sue the federal government or state governments. So you pivot and you sue the individuals officials who harmed you, but they are protected by other immunity doctrines. You can sue local governments, and we're going do a whole episode on that, but again you run into a different set of roadblocks. When you're suing the government, no matter who you sue, no matter what cause of action you bring, you often run into a quagmire. And with that, there's just one more piece of legal background I want to share before we start our story. And that is that these various immunity doctrines only kick in if you're asking for money damages.

Erwin Chemerinsky: There's three primary remedies that a court can provide. One is damages. That's usually to compensate for injuries. There can be punitive damages, to punish.

John: James King, on the last episode, had significant medical and legal bills. He wants to be compensated for those.

Erwin Chemerinsky: A second remedy is an injunction. It's a court order to stop behavior or court order that requires behavior.

John: In many situations, an injunction is an excellent outcome. At the Institute for Justice, we file claims all the time where the end goal is to get the government to stop doing something that's unconstitutional. Or in other situations, an injunction may require the government to start doing something -- like improve conditions in a prison.

Erwin Chemerinsky: A third possibility is a declaratory judgment. This is where the court issues a declaration of rights -- perhaps it's to declare a law unconstitutional.

John: With declaratory relief, the court will make a declaration. No one is ordered to do anything. No money changes hands. Just a straight up declaration that a law or certain conduct violates the Constitution. And sometimes a bare statement of what the law is is enough to resolve a dispute. However, for many -- if not most -- plaintiffs neither an injunction nor a declaration is a sufficient remedy.

Erwin Chemerinsky: James King isn't seeking an injunction to stop the police from beating him in the future. In fact, in order to seek an injunction, you have to show a likelihood that it's going to happen to you again in the future. And there's no reason to believe -- and hopefully it won't -- that he'd be injured. He's not seeking a declaration of rights. What he wants is damages to compensate him for any costs he suffered and for the pain and suffering he incurred.

John: One interesting point about injunctions: The rule that an individual can't sue to get an injunction unless they can show there's a likelihood that they'll be victimized again in the future comes from a case a lot like James King's. It was a chokehold case.

Erwin Chemerinsky: *City of Los Angeles versus Lyons* ~~Supreme Court case~~ from almost 30 years ago involved a man, Adolph Lyons, who was stopped by police officers.

John: Lyons had a burnt out taillight.

Erwin Chemerinsky: An officer ordered Lyons out of the car, slammed Lyons' hands above his head on the roof of the car. Lyons was complaining that the keys that he was holding were cutting into the skin of his palm. The officer then administered a chokehold on Lyons and rendered him unconscious. He woke spitting blood and dirt. He had urinated and defecated.

John: He was given a traffic ticket and allowed to go.

Erwin Chemerinsky: He did some research and discovered that at that point 16 people in Los Angeles, most all like him African American men, had died from police use of the chokehold.

John: He sued the city of Los Angeles for an injunction to stop police from using chokeholds in the future unless absolutely necessary to protect officers' lives and safety.

Erwin Chemerinsky: But the Supreme Court ruled five to four that Lyons lacked standing. The Court said Lyons couldn't sue for an injunction because he couldn't show that it was likely that he personally would be choked again in the future.

John: The Court said a plaintiff who is suing for an injunction has to show a likelihood of future personal injury. Adolph Lyons couldn't show that. James King can't show that.

Erwin Chemerinsky: The Supreme Court was clear that Lyons could sue for damages, but he couldn't sue for an injunction.

John: It is a lot easier to sue the government if you are asking for an injunction or a declaration because, as I said, then a lot of these immunities we're talking about don't apply. But that leaves many plaintiffs, for whom injunctions may not be available or may not be sufficient, out in the cold. Because for many plaintiffs, in the words of Justice John Marshall Harlan, it's damages or nothing. But over the last 50 years, the Supreme Court has all but closed the courthouse doors to plaintiffs, with constitutional claims, who are asking for money damages. And that is true whether you are suing federal, state, or local official. In this episode, we will talk about suing federal officials.

John: In 1994, Frank Robbins, an Alabama native, sold his floor-covering business and moved his family to Wyoming. He bought the High Island Ranch: 75,000 acres stretching across 60 miles that runs from high mountains down into the desert.

Karen Budd-Falen: You really can't just make a living if you only have the private property.

John: That's Frank's lawyer, Karen Budd-Falen.

Karen Budd-Falen: When you're talking about a state like Wyoming, that's 50% owned by the federal government -- you cannot have a viable ranch unit -- you can't make a living without working with the federal government

John: Mostly who Frank has to work with is the Bureau of Land Management. The BLM's property completely surrounds some pieces of the ranch and vice versa. The BLM can't get to its land without crossing Frank's and vice versa. On a map, the ranch looks like a checkerboard

of public & private property.

Karen Budd-Falen: There's no public land in Alabama so the whole system was new to him. So at first, when I met him, we talked a lot about how do you work within the system? What is it like to have public lands in your ranch? How do you deal with the permitting, that kind of thing. And so originally I thought that that's what the case was going to be was I was going to help him maneuver all these new rules that you have to deal with when you have a ranch and a guest business on public land.

John: But it soon became apparent that the BLM had it in for Frank.

Karen Budd-Falen: As we went along, it got to be easier to see that the government was treating him differently than every other permittee on every other public land ranch that I worked on. And I have worked on hundreds of them. So you could just start to tell that this was a different animal when you started digging into it.

John: The trouble started back in Alabama, before Frank even moved.

Frank Robbins: We closed on the property and I was still back in Alabama preparing to move. And I get a call from Joe Vessels.

John: That’s Frank. Joe Vessels was a Bureau of Land Management official and one of the federal employees that Frank eventually sued.

Frank Robbins: And he proceeds to tell me that he has this easement.

John: Part of owning a ranch with public land is that the BLM has lots of easements giving it to permission to cross your property or do various other things on your property and vice versa. Both parties have a mix of rights and responsibilities to the other. Anyway, just before the prior owner of the ranch sold it to Frank he had apparently agreed to give or sell to the BLM a new easement that was not disclosed to Frank and that would allow the public onto a portion of the ranch.

Frank Robbins: And I said, well, I don't know anything about an easement. He said, well, it's not a big deal. I'm just going to send you some papers out and I want you to sign the papers. And I said I'll look at it when I get there, but I'm not going to sign any papers.

John: But it was a big deal. The part of the ranch the BLM wanted access to was a really isolated, beautiful portion of the property near a guest lodge. And it would destroy the experience for Frank’s guests to have random people wandering around what was supposed to be pristine wilderness. And the Fifth Amendment requires the government, if it’s going to take property for public use, to pay just compensation. The BLM wanted Frank’s land for free.

Frank Robbins: Anyway, he got very forward and he basically said, well, you don't have any choice, but to sign these papers. And I said, yeah, yeah, I do too. I'm not signing any papers.

John: Under Wyoming law, the easement that Joe Vessels and the BLM wanted -- assuming that it even existed -- was void. It was the BLM’s responsibility to record it, and they didn’t do it.

It wasn’t part of the deed, and it wasn’t part of the deal Frank signed onto.

Frank Robbins: So I said, when I get into Wyoming, I'll come by and see you. So anyway, I did. And he once again said, well, you don't have any choice, but to give it to us one way or the other.

John: At that meeting Joe Vessels allegedly declared, “The federal government does not negotiate.” And that was the beginning of 12 years of harassment and retaliation.

Frank Robbins: It was 12 years of pure hell. Be honest with you.

John: The BLM wanted the easement, and they didn’t want to pay for it. So they came after Frank every way they could think of. They gave him dozens of citations for letting his cattle graze on BLM land when they weren’t supposed to.

Karen Budd-Falen: BLM just started trespassing him over and over again. One cow would get outside the imaginary boundary, he'd get a trespass.

Frank: When you move out of a pasture, you're attempting to round up all the cattle and move them into the next pasture. Well, in this huge country you can't -- you don't find them all. And then from one day to the next you're in trespass, if they go out there, and they find a cow that you left behind. They make it look like it's a big deal as far as the trespass, but in reality it's ridiculous.

Karen Budd-Falen: Cows are gonna get on this land. Cows just kind of go wherever cow feels like going.

Frank Robbins: They build this record against you through these trespasses that are not legitimate in the first place. You have to defend yourself, otherwise it becomes permanent on your record.

John: The citations were like constantly getting tickets for driving 26 miles per hour in a 25 mile per hour zone. No one gets a ticket for that. And no other ranchers were getting the citations for what Frank was getting them for.

Frank Robbins: To fight those trespasses you end up in court, and I did that.

Karen Budd-Falen: Before you started seeing the pattern, we were appealing every decision, every trespass that was wrongly decided and you appeal them to the office of hearings and appeals. It's a judge trial. So you have to do the whole trial prep for every single one of these decisions.

John: The tickets themselves were like 100 bucks. But if you get enough of them, there are very serious consequences.

Frank Robbins: Early on, I said well, you know, we're not guilty, we'll fight it. Well you fight one of many. They build so many of those, which they did, that they can take your permit away.

John: To run the ranch profitably, Frank relied on several permits from the federal government. He needed grazing permits and he also needed a recreation use permit so he could take paying guests on cattle drives across public land. But once the BLM had wracked up enough trespasses, they could revoke his permits and wreck his business.

Frank Robbins: That's how they always win. They beat you by by taking away your profit center to where you can't afford to fight.

Karen Budd-Falen: It usually takes a year or more to deal with these tickets. You have to go through an administrative appeals process. You appeal it to an administrative law judge. The judges are not very fast.

John: And there is a perception that the administrative appeals agency that hears these cases, the Interior Board of Land Appeals, is not exactly impartial.

Frank Robbins: It truly was a kangaroo court. I mean it was not honest.

John: The IBLA judges are employees of the Department of the Interior, which means essentially that they and the BLM are colleagues. And to Frank, that's how it seemed like they acted.

Frank: He flies in -- flies in with the lawyer for the government. And then go on to dinner at night and fly home together. It's just a joke. So anyway, of course they rule against you. And you lose, and you have to pay $114 or whatever.

John: Another way the BLM retaliated is that they refused to live up to their own obligations. One of the easements that came with the ranch was that the BLM was supposed to maintain a road on public land that Frank used to reach certain parts of his property. The BLM stopped maintaining it. And so Frank repaired it himself and sent the BLM an invoice. For that, he got another trespass.

Karen Budd-Falen: Frank is the caricature of a stubborn Western rancher, fiercely independent. And so by this point, it's just if we can harass him, let's drive him crazy. Let's push him until he finally just says I'm done.

John: It got to the point where BLM employees weren't just harassing Frank. They started harassing his guests.

Frank Robbins: They would travel with us making themselves very obvious, following us, videoing us.

John: Guests would come to the ranch from as far away as Europe to go on cattle drives and get the cowboy experience. They'd drive cattle from one end of the ranch to the other and spend the night at a lodge in the wilderness. The BLM started following them around.

Frank Robbins: For people who are paying a considerable amount of money to come out and do something like this in wild country. They were wanting to know what these people are doing. Why are they up there? And we were explaining all the time, instead of them having fun and

enjoying their cattle drive, we were having to justify what was going on just about every day we were out there.

John: The BLM would drive just ahead of Frank and his guests, and then watch as they passed by and then they'd get back in their trucks and drive ahead to the next hill.

Frank Robbins: They'd have their binoculars and they'd be watching, then go to the next hill. They'd be there up there waiting on us and that kind of harassment.

John: At one point, some female guests tried to relieve themselves, and the BLM agents filmed them. In addition to just being creepy, the BLM also broke the law. On one occasion, BLM employees broke into Frank's guest lodge, and a part-time employee of Frank's caught them as they were leaving.

Frank Robbins: He caught them red handed. And he told them you guys are trespassing. You shouldn't be up here. And they actually tried to hide from him.

Karen Budd-Falen: Those lodges are not on the main road. I mean you got to work to get up there to him. That's totally on private property. I mean, there's no, there's no lawful reason for them to be up there.

John: They broke in. They left trash inside. Frank never did find out exactly what they were up to.

Frank Robbins: We actually thought they were probably going to plant something or put something in there that they could come back say that, you know, dope or something. I don't know. We never did. We just assumed that it had to be something of that nature.

John: And then there was the incident that got Frank criminally charged.

Frank Robbins: We were doing a cattle drive and I meet this BLM truck coming up on the ranch there and I just rode over and said where are y'all going? We're going up on your ranch, up to your lodge. We can come and go in your property anytime we won't to. She reaches in the back seat and pulls out this easement.

Karen Budd-Falen: By this time, we were already looking at every easement on the property to make sure that there wasn't something that maybe the title insurance missed or was wrong. He looked at the easement. He knew it was a fence repair easement. It wasn't an access easement.

Frank Robbins: And I looked at it and I said this is a fence easement. This has got nothing to do with what you guys are up here doing. I said, we're tired of you guys coming up here, harassing us. So I just took her little piece of paper there and I tore it in half and handed it back to her. And I said, you take that back to Joe Vessels and you tell him next time to call and get permission to go on my private property. So they turned around and left. So anyway, I got charged with interfering with a federal officer.

Karen Budd-Falen: A few days later the sheriff calls and says you need to come to Cheyenne.

John: On the other side of the state.

Frank Robbins: And then they took me to the federal prison where the cells are and they fingerprinted me and charged me, booked me right there.

Karen Budd-Falen: To be able to make this stick, they had to say that they were in fear of their lives and fear of their safety.

Frank Robbins: Weeks later we have a trial, three day trial, $60,000 cost to me to prove that I was innocent.

Karen Budd-Falen: It was ridiculous. Frank was on a horse. He didn't have a weapon. He was riding on his horse. These guys were in a vehicle. There was no way that they were in immediate fear of their safety.

Frank Robbins: We got a 12 to nothing verdict in 20 minutes. And we got postcards from a lot of the jurors. I don't know how they found out where we lived and stuff. But anyway, they were apologizing for their government to be honest with you. That's what they basically, most, all of them did for how the government has treated us and so forth.

John: As you might imagine, Frank didn’t really feel all that joyful after winning. Because the ordeal wasn’t over. It was like, well what’s the next thing the BLM is going to try to do?

Frank Robbins: It wasn't like we won and it was over. And so we went right into the next phase.

John: Ultimately, the loss of the permits meant Frank had to shut down the guest ranch business, sell off most his cattle, and start grazing sheep instead, which you can herd and keep off BLM land. He also did everything he could think of to get the harassment to stop. He wrote to senators and to the governor. At one point, the Department of the Interior's Inspector General investigated the situation -- and concluded that nothing was wrong. Frank also protested in front of the local BLM branch office in Wyoming.

Frank Robbins: I rode a mule around the BLM office down there for 21 days

John: In the middle of February.

Frank Robbins: 10 below zero, a lot of those mornings -- just trying to get some attention to what was going on. The governor, the politicians they're worthless. Oh, occasionally they'd write this little letter or this or that, but nothing~~, nothing~~ as far as trying to turn the tide of anything that was going on.

John: Ultimately, Frank sued. At first, he filed a malicious prosecution claim over the bogus criminal charge. He also filed Administrative Procedure Act claims, essentially appealing each the trespassing violations one-by-one. He filed an FTCA claim over the trespassing onto his lodge. But each of those legal avenues was piecemeal. He could, and he did, spend hundreds of thousands of dollars pursuing each one of them, without getting to the heart of the matter, which was the pattern of retaliation.

Karen Budd-Falen: The root of the problem was the death by 1000 cuts.

John: A huge reason that we know as much as we do about the BLM’s internal machinations against Frank is because of one BLM employee did the right thing and spoke up about what his supervisors and colleagues were doing.

Frank Robbins: I went to his house and walked up on his porch and knocked on his door and said, “Hey, you know, you know what's going on.” I said, “they tried me in federal court trying to put me in jail…” Anyway he decided to testify.

John: If there was any question that the BLM had gone on a decade-long vendetta against Frank, that employee’s testimony put that it rest.

Karen Budd-Falen: He really felt like, like he was being asked to do something that was against his moral fiber. Because it wasn't just let’s work together to improve the land. It was we're gonna get rid of this guy at all cost. He said first he was proud to wear his uniform to work every day. He said by the end of this he didn't wear his uniform in town.

John: He testified that Joe Vessels had ordered him to do whatever he could to find Frank in violation of one rule or another. About Vessels, he testified that quote “[i]t has been my experience that people given authority and not being held in check and not having solid convictions will run amuck.” And he said quote: “It’s one thing to go after somebody that is willfully busting the regulations and going out of their way to get something from the

government," end quote. But Frank was just quote "a man standing up for his property rights." To the best of my knowledge, the only person at the BLM who ever suffered any consequences for the whole decade-long saga, was the one person who did the right thing.

Karen Budd-Falen: He said it was really hard for him because he had always been so proud working for the BLM. I'm going to protect the resources, protect the wildlife. If I work with these ranchers as partners, and use grazing as a good management tool, which the science says it's can be, this is going to be a win-win for everybody.

John: I spoke with that employee, and he did not want to be on the podcast. He told me that the retaliation he faced from the agency had been so severe that not only had he retired because of it, but he left Wyoming in the middle of the night. In his words, he had to get out of Dodge. We're going to take a break, and when we come back, we'll talk about how at the Founding someone in Frank's shoes could have sued federal officials and well talk about how things have changed since then -- and not in a good way.

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BREAK 1

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John: Welcome back. Frank pursued his lawsuit all the way to the Supreme Court. But before we get to the outcome of Frank's case, I want to talk about some of the ways our system of adjudicating constitutional claims against federal officials has changed since the Founding. For starters, if Frank Robbins had sued the BLM officials in the 1800s, he probably would have sued

in state court.

James Pfander: A lot of the litigation that went forward in the early 19th century -- in trying to keep federal government officials honest and to make sure that they stayed within the bounds of the law -- a lot of that litigation went forward in state courts.

John: That’s James Pfander, a professor of law at Northwestern University. He was in Episode 1.

James Pfander: If there was an instance of false imprisonment or wrongful conviction or something like that, the state courts viewed themselves as empowered to award damages to compensate the people who had been wrongfully imprisoned.

John: At the Founding, the job of federal courts was considerably smaller than it is today. Federal courts stuck to special subjects, like admiralty or cases involving disputes between citizens of different states.

James Pfander: You couldn't sue a federal officer necessarily just because they were a federal officer and bring that action in federal court. So the assumption was instead that you would bring your claim in state court and you would secure your award of damages there.

John: And the U.S. Supreme Court had a right to review those cases.

James Pfander: And the truth of the matter is that Chief Justice John Marshall affirmed a great

many judgments that had been entered by state courts imposing liability on federal officials. So it's surprising when you look at the 19th century cases with modern eyes. They're not cutting officials any slack at all. If they step over the bounds of their authority and take action ~~like this,~~ that's not legally justified, they're going to be subject to liability. There's a case I know well involving a postmaster, who was conducting an investigation of some thefts from the mail and he caused one of his subordinates to be thrown in jail.

John: In the case of *Merriam v. Mitchell*, from 1836, a postmaster in Portland, Maine came to believe that the assistant postmaster was stealing mail. The postmaster conducted a sting and when that mail went missing, he got the assistant thrown in jail. But the missing mail turned up, and the postmaster found himself facing a civil lawsuit.

James Pfander: And he said, I did it for the best reasons. I wasn't malicious. I was trying to do the work of the federal government. But the state court wouldn't pay any attention to that defense. They took the position that this fellow had suffered at the hands of the federal government. And the mistake was one that had to be rectified with a suit for damages in the common law tradition.

John: Here’s how that worked.

Michael Ramsey: Under common law, as a private citizen, you would have rights, that protected you against things like people coming on your land, people seizing you, trespass, wrongful detention, so forth. These were common law rights.

John: That’s Professor Michael Ramsey of the University of San Diego School of Law.

Michael Ramsey: So if a private citizen would commit one of these actions against you, then you would have a claim typically under common law for damages. So if a federal officer did one of these things -- they came on your land to search your house. That would be a trespass if a private citizen did that. So a federal officer does it, and then you would sue him.

John: It made no difference whether the person who violated your individual rights was a private citizen or a federal official. You had a right to come to court and file a complaint against them.

Michael Ramsey: The federal officer would respond. Well, I was acting in my office as a federal officer and therefore I was authorized to come on your land. I'm different from a private citizen, therefore you can't sue me.

John: Here’s where the Constitution comes in.

Michael Ramsey: Then you would respond: well, if the federal officer was acting outside of his office, if he was acting contrary to the Constitution, then you would say: you federal officer cannot raise the defense of acting under your office because you were acting illegally. And then the common law action would proceed against the federal officer, just as it would against an ordinary private citizen who trespassed on your land. It's very clear that that's how it worked. There is really, I think, no doubt that the set of common law rights would exist as a way of enforcing the Constitution.

John: The Constitution lists a bunch of rights that we have, but it never specifies how those rights will be enforced. It does not say, as the Supreme Court now prefers, Congress shall create causes of action. Nor does it say that the judicial branch can create remedies.

Michael Ramsey: The Constitution doesn't itself provide an enforcement mechanism. But the reason for that is that everyone knew at the time everyone understood how the British common law worked and the American common law worked. That it would work to provide a remedy when federal officers were exceeding their authority.

John: Incidentally, many rights that today we think of as constitutional rights, like the right to be free of excessive force or wrongful imprisonment under the Fourth Amendment -- you won’t find them spelled out in the Constitution. Those rights also come from the common law and, in the past, were enforced through common law. Today, when you are trying to enforce those rights, things work very differently than they did historically.

James Pfander: The relationship between state courts and federal courts in respect of federal official accountability has changed dramatically over the course of the nation's history.

John: That’s James Pfander from Northwestern again.

James Pfander: So we live in a world today where federal officials are almost never the targets of state court litigation. The Supreme Court has progressively deprived the state courts have any authority to adjudicate.

John: And so has Congress.

James Pfander: For example, in 1948, Congress adopted a general removal statute that authorizes any federal officials sued in state court to remove that action from state to federal court and to defend the action in federal court instead.

John: And in 1988 Congress went even further.

James Pfander: And finally in 1988, Congress adopted something called the Westfall Act. And in the Westfall Act, Congress essentially immunized federal officials from any threat of state court liability. So state common law plays a much less important role today. And state courts, more importantly, have virtually no role to play in this process of adjudicating the legality of government action.

John: And as the enforcement of our constitutional rights has shifted from state court to federal court, one thing that has been left behind is the availability of money damages.

James Pfander: The gap that was created by this system of remedies that emerged in the 20th century was the absence of any provision for a suit for money damages against federal officials who might violate the constitutional rights of individuals.

John: We'll talk about this at length in later episodes, but starting as early as 1871, and with substantially more force in the 1960s, you could sue state and local officials in federal court for money damages for constitutional violations. Because Congress had passed a law, now called

Section 1983, authorizing those suits. But Congress has never passed a similar law authorizing the same kinds of suits for federal officials. So in 1971, the Supreme Court said, we don't need to wait for a permission slip from Congress.

James Pfander: The Supreme Court of the United States attempted to fill that gap in the remedial structure of the law of the United States in a 1971 decision called *Bivens.* Bivens against six unknown named agents of the Federal Bureau of Narcotics. And the *Bivens* action was in some sense, a kind of counterpart to the 1983 actions allowing suits against state and local government officials and *Bivens* actions allowing suits against federal government officials.

John: In 1965, six agents from the Federal Bureau of Narcotics, which was the forerunner of the DEA, stormed into the home of Webster Bivens in the Bronx, and they handcuffed and arrested him in front of his wife and children. They didn't have a warrant, and the intrusion violated the Fourth Amendment. And in 1971, the Supreme Court said Webster Bivens could sue for damages, even without Congress saying so. The Court cited Chief Justice Marshall's opinion in *Marbury v. Madison*.

> **Chief Justice Marshall**: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

John: Where there is a right, there must be a remedy. In *Bivens*, the Supreme Court said: Money damages was a remedy at the Founding; it should be available now. Even if the legal route to get there looks different.

James Pfander: So for purposes of recovering damages for constitutional violations, the *Bivens* action has been the most significant vehicle for those who've suffered injuries at the hands of the federal government.

John: But *Bivens* was controversial when it came down, and it's even more controversial today.

James Pfander: One of the tropes that one hears in recent decisions by the Supreme Court, refusing to recognize damages remedies is that we're supposed to defer to Congress and allow Congress to take the first step in authorizing the suit to go forward. So unless Congress passes a statute that allows these individuals to bring this particular lawsuit, the lawsuit is of dubious character or quality.

John: So very soon after *Bivens*, the Supreme Court began to walk it back.

James Pfander: There has been a steady drumbeat of retrenchment since about 1980 or so. For example, in one case, *Bush versus Lucas*, the individual said, hey, I've been mistreated by my employer, the government official that I work for, and my constitutional rights to free expression have been squashed.

John: Before the plaintiff, who was a NASA aerospace engineer, filed his constitutional claims, he first availed himself of the internal review process that is available to federal employees. Both of those actions were pending at the same time in different courts, but by the time his constitutional claims got to the Supreme Court, he had succeeded in his administrative appeal and had been reinstated with back pay.

James Pfander: And the Court said in that case, you know, it's not really necessary to recognize a formal *Bivens* lawsuit here because this fellow had access to other remedies. And we think those are constitutionally sufficient. So much of the focus in the decisions that denied relief on the *Bivens* theory were predicated throughout the 80s and early 90s on the sense that others remedies might be available. In circumstances where there were no other remedies the assumption was that the Court would be in a sense almost obliged to recognize a *Bivens* remedy to fill the gap.

John: But today the Court no longer feels obliged to fill in the gap. For plaintiffs who have no alternative to a *Bivens* suit, the courthouse doors are often still closed. Not always -- the Court hasn’t overruled its earlier cases. So if, like Webster Bivens, federal officials barge into your house without a warrant and handcuff you -- you still may have a claim. There is also precedent that you can sue federal prison officials for violating the Eighth Amendment right to essential medical treatment. But those are the exceptions. The general rule is you can’t sue and also that the Court is not recognizing any new scenarios where you can sue. Which brings us back to Frank Robbins in Wyoming. When his claim arrived at the Supreme Court, the government’s lawyers said: this is a new scenario. He’s alleging he’s being harassed for refusing to turn over property to the government for free. And the Court hasn’t extended *Bivens* to property rights cases. In a minute, we’re going to take a break and then come back to Frank Robbins’ case. But before we do that, I want to talk about why there is so much skepticism on the federal bench toward *Bivens* -- skepticism that is probably best personified by the late Justice Scalia. Here’s Michael Ramsey from the University of San Diego again.

Michael Ramsey: Justice Scalia was concerned about *Bivens* and wanted to limit *Bivens* because he thought it was a separation of powers problem.

John: Separation of powers meaning that it is the role of Congress to create causes of action and allow new kinds of lawsuits to go forward, and not the Supreme Court's.

Michael Ramsey: Scalia felt that it was not the role of courts to create a cause of action.

John: Because otherwise the Court would be taking power from Congress that properly belongs to Congress.

Michael Ramsey: But I think he was just wrong on this point. And with respect -- I am a former Scalia clerk, I hesitate to disagree with Scalia -- but I think that the Justice was wrong on some points. And I think this is an unusual one where he was wrong. Because he was so focused on the separation of powers point, I think that he lost track of the idea of how this would have worked in the 18th century, which should have been, I think, the paramount question. It certainly would have been inconceivable to the Framers of the Constitution that there would be no remedy. Or that a remedy would depend on the good graces of Congress to create one when federal officers violated the Constitution.

John: There is a Supreme Court case from 1938 called *Erie v. Tompkins* that's to blame -- to a large extent -- for the rough transition from enforcing constitutional rights in state court versus federal court. *Erie* said that there is no such thing as general common law, which up until that point, there basically had been. When a New York court decided a case, it used New York

common law. When a New Jersey court did it, it used New Jersey common law. And when a federal court decided a case, it used general common law that it created without regard to a particular state in which the issue arose. Which made sense. If you're suing a federal official and you are looking at federal interests at stake, it makes sense to have uniformity, rather than have the liability of the federal official be dependent on the state where he is sued.

James Pfander: Back in Justice Marshall's period, Chief Justice Marshall had essentially wide ranging control over the content and contours of the common law. He wasn't bound to apply the law of any particular state, he was able to tailor common law norms to ensure the effective enforcement of federal rights.

John: But *Erie* said "Nope, there's no more general common law. If we've got 48 states, we're gonna have 48 different rules." Which might solve some problems in the law, but when it comes to enforcing common law rights rights against federal officials, it makes a lot less sense. Because if you've only got one FBI, it seems to make sense to have only one set of rules for the FBI.

Michael Ramsey 1: That created a sort of odd situation, though, that your rights against the federal government depended on what the state was going to give you. And that might vary from state to state.

John: That's where *Bivens* comes in.

Michael Ramsey: Then I think that led to the Supreme Court in *Bivens* saying, No, this, this

should be a national remedy. And we the Supreme Court should control the way that it works. In order to get around *Erie* or to make that consistent with *Erie*, they described as being something that is implied by the Constitution, and therefore is federal law.

John: What the Supreme Court said in *Bivens* is, since we can't do general common law claims, and since it doesn't make sense to apply each state's common law, we're just going to say that the Constitution itself gives people a cause of action.

Michael Ramsey: The problem is that that's not really right. That's not the way that the the common law remedy was understood in the 18th and 19th century, and then that's led to the backlash against *Bivens* among people like Justice Scalia, who thinks the Supreme Court was just making it up. And so in a way, I think that's right. They were just making it up.

John: They were! As we said earlier, the Constitution doesn't say how our rights should be enforced. And there is no history of just saying you can enforce them directly under the Constitution.

Michael Ramsey: But on the other hand, they were they were making up in way that was actually faithful to the original design. Because *Erie* had thrown off the original design a little bit. And in some ways *Bivens* just put it back.

John: *Erie v. Tompkins* was a case about a man walking near train tracks who'd been struck by an open rail car door. A jury awarded him damages, and the question was whether general common law or state common law should apply. So there is no reason the outcome of that case,

no matter which side prevailed, should slam the door on cases about the enforcement of constitutional rights.

Michael Ramsey: Certainly, *Erie* didn't intend to shut that down.

John: It was just kind of happenstance. And maybe in *Bivens*, instead of announcing that the Court was creating an implied, freestanding cause of action under the Constitution, the justices should have said “we’re restoring the common law rights and remedies that have always been available since the Founding.”

Michael Ramsey: I would have liked to see *Bivens* written that way. And if it was, I think it might have been more persuasive to Justice Scalia. You can understand *Bivens* as standing in the shoes of that traditional common law remedy, even if the shoes don't exactly fit. It's not a bad approximation at all of the way the Founding era would have understood it.

John: When Frank Robbins arrived at the Supreme Court, there was really only one way for him to vindicate his right to be free from retaliation for insisting on his Fifth Amendment rights. It wasn’t a remedy that Congress created. And it wasn’t a remedy that the Supreme Court particularly likes. But it was his only chance at a remedy. When we come back from the break, the Supreme Court takes on the death by a thousand cuts.

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BREAK 2

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John: In 2007, when the Supreme Court heard oral argument in Frank's case, that was the backdrop. Frank wanted a trial to prove that the BLM had done what he said they'd done and to show to a jury that that violated the Fifth Amendment -- that the pattern of harassment, the death by a thousand cuts was an attempt to seize private property without just compensation. But given how disfavored *Bivens* is, he tried just about everything else he could think of first.

Karen Budd-Falen: It's one of the kind of tricky things about suing the federal government. There's not that not that many ways to waive sovereign immunity against the federal government. You can do it as a federal tort claim under the Federal Tort Claims Act.

John: If Frank had filed an FTCA claim, that might have allowed him to seek damages for the BLM breaking into his lodge, but it wouldn't have reached the many other things they were doing. And as James King found out on Episode 1, FTCA cases can be procedural nightmares.

Karen Budd-Falen: Those cases are almost impossible to maintain. And so we knew we didn't want to go that route, because your your remedy is very constrained.

John: There is also the Administrative Procedures Act.

Karen Budd-Falen: Those are for administrative actions. So the trespass cases, those are administrative actions.

John: With the APA, you spend a ton of time and money fighting each individual ticket for

trespassing. But in the meantime, you could be getting new tickets. And, again, the government is going after you in different ways that the APA doesn’t allow you to sue over.

Karen Budd-Falen: So we could do that. But that wasn't going to get to the root of the problem. The root of the problem was the death by 1000 cuts to be able to get that easement. So that's why we went with the *Bivens* cause of action.

John: And the Supreme Court got Frank’s argument. The Solicitor General’s office, representing the government, did not have an easy argument. Justice Kennedy.

> **Justice Kennedy**: If this continues, your argument and I understand your argument that there's no essential free-standing cause of action for damages basically means he has a right to go broke with attorneys' fees challenging each individual incursion, each individual wrong.

John: Justice Ginsburg.

> **Justice Ginsburg**: The district court said there was substantial evidence, enough to go to trial, of a pattern of harassing conduct. ... Is there a remedy?

John: Justice Scalia.

> **Justice Scalia**: There are indeed those in the West who think that the BLM does, does act quite arbitrarily and high-handedly and is upheld by the administrative courts. Now, if that's a problem, what's the solution to that problem?

Deputy Solicitor: Well, Justice Scalia, to bring an APA action to federal court challenging the final decisions of the IBLA.

Justice Scalia: That's one by one. Every time there is another trespass he has to go all the way through the administrative procedure and then when the, when the administrative court says, well, it was okay, then he has to go through the regular federal courts. That doesn't seem to me like a realistic remedy, not for somebody who claims he's being systematically harassed.

John: The government's attorney tried to explain that following Frank and his guests on cattle drives wasn't harassment.

Deputy Solicitor: The IBLA concluded, and we think reasonably, that, given the history of the disputes with this individual, given his litigious nature, that it was reasonable for the BLM officials who were out there to be documenting his trespasses on public lands.

John: I guess Frank is litigious in the sense that when the government gives him tickets, he appeals them, and when it criminally prosecutes him on bogus charges, he hires a defense attorney. Anyway, even though the government got tough questions, the Supreme Court's real concern was somewhere else. The majority of the Court was worried that, even if everything Frank claimed was true, allowing a *Bivens* action to go forward in Frank's case would open the floodgates to claims that are frivolous. Justice Breyer.

Justice Breyer: What is worrying me throughout is -- put this case to the side.

> If the Court recognizes … an action for private people to bring against the government, *Bivens*, under the Fifth Amendment, all of a sudden vast numbers of regulations … will be suddenly in federal court as people claim that what's going on with this regulation is there are individuals in the government who have gone too far, and they are just trying to get my property and the use of it, without paying a fair price. … The possibility of the legal imagination becomes endless.

John: Justice Scalia.

> **Justice Scalia**: What troubles me about this case. There are overzealous government agents. There always have been.

John: Chief Justice Roberts.

> **Chief Justice Roberts**: If they go up to somebody and say, you know, we'd really like a right-of-way because we have some interest in lands that we need to maintain on the other side, and the person says, no and, you know, get off my property, do they have to shrug their shoulders and say all right? Or can they say, well, you know, we're neighbors, we have a lot of interests in common and we should work together? Is that all of a sudden extortion?

John: That is part of the reasoning the majority settled on. The government may have done a bunch of illegal things like breaking into his lodge and prosecuting him on trumped up charges. But putting those aside, doing things like giving him tickets that other people don't get is within their discretion. They may have told him that quote, "the federal government does not

negotiate." But that's just a negotiating tactic, playing hardball to get land it wanted. The other part of the Court's reasoning was that in other disputes by other plaintiffs it would just be too hard to tell when the government had gone too far. Here's Justice Souter announcing the Court's opinion:

> **Justice Souter**: Although Robbins had administrative and judicial remedies for virtually all of his injuries, pursuing these individually might not amount to an adequate remedy, because it would subject him to as he put it, death by thousand cuts. While Robbins makes a good case that his injuries should be addressed collectively, on the other side of the ledger, we consider the difficulty in defining workable cause of action under *Bivens*. … On the whole, we think it would be best to allow Congress to decide whether to create a damages remedy in a conflict like this.

John: The Court ruled that yeah, Frank had had a bad go of it. But allowing him to go to trial would have meant opening the door to a flood of cases with less merit. Here's Dean Chemerinsky, who we heard from at the beginning of the episode.

Erwin Chemerinsky: I think what Justice Souter wrongly does is put the efficiency of the government -- in avoiding having to defend lawsuits -- above the Constitution and the need to protect people's rights.

John: As Dean Chemerinsky asks in a book he's written: Why should administrative convenience trump people's constitutional rights? It's a position that needs to be explained and defended, and the Supreme Court hasn't done that. And it's a position that might not be right. In

fact, there are very good reasons to believe that allowing Frank’s claim to proceed would not unleash a torrent of litigation.

Karen Budd-Falen: The Court was concerned it would open the floodgates of litigation and everybody who was mad at the federal government for one reason or the other would bring a *Bivens* cause of action in the federal district court. Our response was, that's the whole point of the federal district courts. They have all sorts of tools at their disposal to get rid of unmeritorious cases. You can they can dismiss them out, you can do rule 11 sanctions. There's, I mean, there's lots of ways district court can get rid of causes of action that are bogus or don't meet the standard.

John: Since Frank’s case was decided in 2007, the Court has continued to disfavor *Bivens* and to leave plaintiffs, for whom it is damages or nothing out, in the cold.

James Pfander: The surprising thing about recent decisions is there doesn't seem to be much of an alternative remedy and the Court still refuses to recognize a right to sue under *Bivens*.

John: Just to reiterate, you can absolutely sue federal officials. But it makes all the difference in the world what remedy you are asking for.

James Pfander: The court is quite open to the idea of a suit for injunctive relief because the suit for injunctive relief empowers the Court to pronounce on the constitutional principles at hand without charging any money to the US Treasury and without imposing any liability on the individuals in question.

John: Which is actually yet another big change from the 19th century.

James Pfander: At that point in our history, in the early to mid 19th century, the thought was that damages were the, in some ways, least intrusive form of relief, and directive remedies like injunctions were more intrusive.

John: At the Founding, damages were the most acceptable and common remedy. And the thought was it would be less of burden on the government because damages leave the government more free to act. If you harm somebody, you pay them a judgment that is tailored to the precise situation at hand. With injunctions and declarations, the government may be ordered to stop a certain behavior or policy with respect to everyone, not just the plaintiffs.

James Pfander: That view has almost entirely switched today.

John: So courts are still available if you want to have a fight about how government officials have to behave in the future. But if your problem is that you've already been harmed -- that they've behaved badly in the past -- then the Supreme Court is reluctant to hold officials responsible unless Congress has passed a statute saying they should be held responsible.

James Pfander: Maybe the best example of that reluctance is the *Ziglar and Abbasi* case. That's a post-911 case coming out of New York, where federal government officials established a practice a protocol of rounding up individuals in the New York City area who were out of compliance with their immigration status and were thought to be potentially threats to the

national security the United States because they were Muslims, or they were from particular countries with a large number of Muslim adherents. And so a number of these people were rounded up and placed in conditions of confinement that can only be described as horrific.

John: According to the detainees, even though the government eventually learned that each of them had nothing to do with the 9-11 attacks, it continued to hold them and abuse them. So they sued, and they asked for money damages.

James Pfander: And the Supreme Court refused to allow that claim to go forward in part because the two high government officials who orchestrated that program of detention, John Ashcroft and Robert Mueller, might face a threat of personal liability. And the Supreme Court was worried that that threat of personal liability would prevent officials like them in the future, from taking the steps and the actions necessary to protect all of us in the in the heat of that moment. One of the odd things about that decision is the Court never bothered to explore how much liability the officers in question actually face. And we've done a study of liability in situations like this. And it turns out that just as in the 19th century, the officer almost never pays. The tab is picked up by the government of the United States in all of these cases.

John: In 95 percent of the cases Professor Pfander and his coauthors studied, the government paid the award of damages, not the individual official.

James Pfander: Moreover, we didn't find any awards of damages made against high government officials like Ashcroft and Mueller. The awards of damages that we found in our database all ran against low level jailers and wardens and other officials of the Federal Bureau

of Prisons, not the high government officials that the Supreme Court was worried about. So I think at the end of the day, that the concern that there's some kind of threat of personal liability that's going to keep federal government officials from taking necessary steps is a bit of a myth.

John: Myth or not, the Court's resistance to individual liability persists. Earlier this year in 2020, the Supreme Court decided a case called *Hernandez versus Mesa*. There, a Customs and Border Protection agent shot and killed a Mexican teenager.

Steve Vladeck: Sergio, who was a 15 year old Mexican national, was playing in a culvert, the sort of area between the US and Mexican borders along the, what used to be at least the Rio Grande between El Paso and Juarez.

John: That's Professor Stephen Vladeck of the University of Texas School of Law. He represented Sergio Hernandez's family at the Supreme Court.

Steve Vladeck: And he and his friends were apparently playing a game where they were running up in touch on the fence on the US side, and then running back down -- not trying to enter surreptitiously.

John: Agent Jesus Mesa, who shot Sergio, says that the teenagers were throwing rocks at him. There's cell phone video that suggests otherwise, but the case never got far enough along that there was any fact-finding.

Steve Vladeck: None of this was in the record, because we never got past a motion to dismiss.

But at least as alleged in the complaint, the officer had no basis for using lethal force, and so therefore should have been liable to somebody for something.

John: Prosecutors declined to charge Agent Mesa, so he wasn't going to face any criminal consequences. Nor could Sergio's family sue Agent Mesa's employer, the federal government, because Congress hasn't consented to be sued in this type of situation. The only option was to file a constitutional claim against the agent under *Bivens*.

Steve Vladeck: One of the questions that I often get about this case is, well, why did Sergio even have constitutional rights? If he was a Mexican national standing on Mexican soil, what does the Constitution have to do with this case? And it's a fair question. The problem is that the posture of the case assumed not only that Agent Mesa acted without justification, but that Sergio does have Fourth and Fifth Amendment rights, that is to say, in deciding whether there's a *Bivens* cause of action for his parents to bring basically a wrongful death claim, on his behalf, the courts assume he is protected by the Constitution. And in a way that makes this case even more important, because we can't just say, that's a cross border shooting of someone who didn't have or maybe didn't have rights. The whole case is predicated on the assumption that he did. And the Court still says no remedy for the parents.

John: And what's the majority's reasoning?

Steve Vladeck: Justice Alito writing for a 5-4 majority treats this as the next, in a line of cases where the Supreme Court has narrowed the so-called *Bivens* remedy, where the Court has shown more and more skepticism that it's ever appropriate for federal judges to fashion a

damages remedy to vindicate constitutional rights.

John: For decades, *Bivens* has been dying its own death by a thousand cuts.

Steve Vladeck: And I think what Justice Alito's opinion doesn't remotely begin to grapple with is that this is actually a pretty remarkable precedent for denying a remedy under *Bivens* in a case where there's no other possible mechanism for Sergio's parents to receive any kind of legal remedy under any source. It is perpetuating this idea that fashioning damages remedies is just not within the bailiwick of federal courts. And that's especially frustrating here, because unlike in many of the prior *Bivens* cases, the Court has decided, you know, we briefed extensively. And the Institute for Justice in its amicus brief, briefed extensively, how strong a historical tradition there is predating *Bivens* and going all the way back to the Founding of judge-made, not statutory, damages remedies against federal officers as a necessary mechanism for holding the federal government to account.

John: The Supreme Court has never explained why that history isn't relevant.

Steve Vladeck: It would have been one thing if the Court had seriously grappled with that tradition and explained why it was no longer viable or important or necessary. Justice Alito's opinion really gives it the back of his hand. I mean, there's a throwaway a couple of sentences about how that tradition dates back to a different time when federal courts assumed more common law powers. That doesn't account for what's really happened. It doesn't account for either how sure the Founders were that these remedies would be available, and thus how weak, the current Court's separation of powers objections really resonate. And it doesn't account for

the radical shift in these kinds of claims from state court -- where they lived and persisted, and were often successful from the Founding into the 1960s -- into federal court. I am not remotely convinced that this is going to be a narrow precedent.

John: In other words, if you can get away with shooting a teenager for no good reason -- which is what the Court assumed was true at that stage of the case -- you can get away with an awful lot.

Steve Vladeck: This is not just a further narrowing of *Bivens*. Now we're really eating away at what, you know, then D.C. Circuit Judge Brett Kavanaugh, called the heartland of *Bivens*, right? Excessive force by federal law enforcement officers. And if there's not going to be a *Bivens* remedy for excessive force by federal law enforcement officers, what's left?

John: When I said at the beginning of this episode that there are only a handful of rights still enforceable against federal officials, that's what I meant. The situations where civil rights plaintiffs can rely on *Bivens* are the exceptions, and they are dwindling. Just this fall the U.S. Court of Appeals for the Fifth Circuit denied a *Bivens* claim to a Vietnam War veteran who was on his way to a dentist appointment at the VA. He's a U.S. citizen on U.S. soil, and federal security guards beat him up as he was going through a metal detector. Because instead of showing them his ID he pointed to the plastic bin where he had put it. There is the video of the beating. The veteran did nothing to deserve it. But still, the Fifth Circuit rejected his *Bivens* claim.

Frank Robbins: Death by a thousand cuts. **Justice Souter**: The death by a thousand

cuts. **Steve Vladeck**: Death by 1000 cuts. **Karen Budd-Falen**: The root of the problem was the death by 1000 cuts. **Laurence Tribe**: Death by a thousand cuts.

Frank Robbins: We're still here. They didn't win. Life has got those twists and turns and sometimes you run into a hornet's nest and you got to fight your way through it.

John: It’s been 13 years since the Supreme Court ruled against Frank Robbins. But back in Wyoming, he and his family have weathered the storm.

Frank Robbins: It cost me a fortune of money and time and effort and heartache and ended up with heart disease over it. I believe that. They basically put us out of the cattle business for -- well, really we just now in the last year or two, getting our permits back to where we can really run the cattle.

John: Maybe it was all the attention the Supreme Court case generated. Or maybe the Bureau of Land Management finally realized Frank wasn’t going to give in. But the retaliation and harassment over the easement has stopped.

Frank Robbins: They knew they knew what was going on was wrong. Now, they didn't, they didn't prosecute anybody, they didn't admit to any guilt, or anything of the sort. But through the years after that have told us that what went on down there it was wrong, bad wrong.

John: It was wrong. And there was no remedy. Because the Supreme Court insists that before it will enforce the Constitution, Congress must pass a law authorizing the Court to enforce the

Constitution. Well, for state and local officials Congress did pass that law. Next time on Bound By Oath, we'll find out why that doesn't make as much of a difference as you might think.

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