Committee on Natural Resources
Subcommittee on Public Lands and Environmental Regulation
Threat, Intimidation and Bullying by Federal Land Managing Agencies

Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003

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To: Honorable Committee Chairman Hastings, Subcommittee Bishop, and members of the Committee

My name is Karen Budd Falen. I am attorney and a fifth generation rancher from a family owned ranch, west of Big Piney, Wyoming. I grew up in the same house as my father and we still own the ranch, surviving generations of bad winters, drought, tough cattle markets, devastating wildfires and now wolves. My father, like everyone testifying today, is tough, independent, smart and the proud owner of a small business that is fueling the economy in our town and feeding the Nation.

And while my father, as well as the other ranchers and private property owners, can survive droughts, fires, and low market prices, we cannot survive the heavy hand of the federal bureaucracy – particularly those within the bureaucracy who use the power of the federal government to violate our Constitutionally guaranteed rights. While some may claim that we are here to ask Congress to eliminate the federal bureaucracy or the federal agencies, we are not. What we are asking for you to do is open the court house door to individuals who believe that their civil and Constitutional rights are being violated by individual federal employees, using the power of their offices. While I would absolutely agree that most federal employees are hard working individuals dedicated to trying to do their jobs to the best of their abilities, that is not always the case. But unlike the case with state and local governmental employees who can be sued under the Civil Rights Act when they use the power of their governmental offices to deprive an individual of his Constitutionally guaranteed rights, there is not a similar option against federally employed individuals. All we want is the chance to go to court to present our facts; Articles I, II, and III of the U.S. Constitution set forth three branches of government and every American citizen should be allowed to access all three branches to redress their grievances, particularly those grievances alleging an abuse of power.

I. BACKGROUND OF BIVENS AS APPLIED TO THE PROTECTION OF PRIVATE PROPERTY

In 2007, the United States Supreme Court reversed decisions by the Wyoming Federal District Court and Tenth Circuit Court of Appeals by holding that a private

property owner could not avail himself of a Bivens common law cause of action to protect his private property rights from "taking" by intimidation and harassment from federal officials. Neither the Justices voting to affirm nor reverse the lower courts' decisions seemed to question that there had been a degree of harassment and intimidation against private property owner Frank Robbins because Mr. Robbins would not surrender an easement across his private property to the federal government, without due process and just compensation. However, the Justices writing for the Court's majority, as well as the two concurring Justices, did not believe that the Court should expand its 40-plus year old precedent in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), to the Fifth Amendment property protections. However, the Justices for the Supreme Court suggested that the U.S. Congress could create a Bivens "cause of action" to protect private property and property rights from actions outside the mandates of the Fifth Amendment. This testimony urges Congress' consideration for adopting that type of protection for America's property owners, and treating the Fifth Amendment private property protections with the "comparative importance of [other Constitutionally guaranteed] classes of legally protected interests." Wilkie v. Robbins, 551 U.S. 537, 577 (2007).

At its simplest, the Supreme Court in Bivens allowed a type of Civil Rights Act "Section 1983" claim to lie against federal officials. The Civil Rights Act of 1871 prohibits governmental employees, "acting under the color of state law," from proximately causing the depravation of certain Constitutionally guaranteed rights. The Civil Rights Act however only applies to state officials. In Bivens, a private individual (Petitioner) complained that agents of the Federal Bureau of Narcotics, acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled Petitioner in front of his wife and children, threatened to arrest the entire family, and searched the apartment. Petitioner also alleged that the arrest was conducted with unreasonable force and without probable cause. Petitioner sought monetary damages against the federal officials. The issue before the Supreme Court was whether "a federal agent acting under color of his authority" gives rise to a "common law" cause of action for damages based upon his unconstitutional conduct. In Bivens, the Supreme Court agreed that it would recognize this type of common law cause of action for this unreasonable action in violation of the U.S. Constitution's Fourth Amendment protection of an individual from an unreasonable search and seizure. As stated by the Court, it was damages or nothing against the federal officials causing this harassment. After Bivens, the Supreme Court recognized this same cause of action to protect against harassment and intimidation when dealing with Fourteenth Amendment protection of the "due process" of law and the Eighth Amendment's protection against cruel and unusual punishment.

In its opinion, the Supreme Court held that Robbins had to pass a two part test for his case to continue. First, the Justices considered whether they believed that Robbins had any alternative remedies for his harassment. Although the Court seemed to recognize that Robbins was suffering "death by a thousand cuts" because of the six-year span and dozens of administrative charges filed against him, false criminal complaints against which Robbins had to defend, trespass on his private land by federal

officials and other forms of harassment, the Court's majority opinion believed that Robbins should have administratively challenged or otherwise fought these dozens of actions individually. While the majority opinion seemed to recognize that Congress had never created a "step by step" remedial scheme to remedy this array of harm, the majority believe that each alleged form of harassment had to be considered individually, despite the recognition that:

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

551 U.S. at 555.

The next step, which the Court's majority also found against Robbins, was whether there "special circumstances counseling hesitation" against allowing Robbins to enforce a Bivens cause of action. With regard to this element, the majority was concerned that allowing a common law cause of action to protect private property owners from federal officials' harassment and intimidation would "open the floodgates of ligation" against federal officials. The majority also determined that "legitimate zeal of [federal officials] on the public's behalf in situations where hard bargaining is to be expected," was not harassment.

Despite these findings, the Court's Justices recognized that Congress could correct this deficiency. In this regard, the majority opinion, written by Justice Souter, with Justice Roberts and Justice Kennedy, stated:

> We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against those who act on the public's behalf. And Congress can tailor the remedy to the problem perceived, thus lessening the risk of a rising tide of suits threatening legitimate initiative on the part of Government's employees.

551 U.S. at 562. Citations omitted.

The concurring opinion of Justices Thomas and Scalia opined that a Bivens common law cause of action should not be extended in any circumstances "by the Court." 551 U.S. at 568.

Finally, the dissenting opinion, written by Justice Ginsberg with Justice Stevens would have extended a Bivens common law cause of action to Robbins. They perceived the question in the Robbins case to be "Does the Fifth Amendment provide an effective

check on federal officers who abuse their regulatory powers by harassing and punishing property owners who refuse to surrender their property to the United States without fair compensation? The answer should be a resounding 'Yes.'" 551 U.S. at 569.

In addition to placing the creation of a cause of action in the hands of Congress, the Court's dissenting opinion also suggested a similar statute containing enough checks to bar every complaint of wrong from reaching the courts. As stated by Justice Ginsberg, "Sexual harassment jurisprudence is a helpful guide. Title VII, the Court has held, does not provide a remedy for every epithet or offensive remark." After citing several cases limiting the situations in which a suit for sexual harassment could be brought, she concluded:

> Adopting a similar standard to Fifth Amendment retaliation claims would "lesse[n] the risk of raising a tide of suits threatening initiative on the part of Government's employees." Discrete episodes of hard bargaining that might be viewed as oppressive would not entitle a litigant to relief. But where a plaintiff could prove a pattern of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a Bivens suits would provide a remedy. Robbins would have no trouble meeting that standard.

551 U.S. at 582. Internal citations omitted.

Based upon this Supreme Court opinion, other private property owners who believe that they are being harassed and intimidated because they refuse to turn over their private property outside the mandates of the Fifth Amendment have no forum in which they can vindicate their claims. The Robbins case now acts as a complete bar to the judicial branch of the government, regardless of the extreme nature of the federal officials' actions. That is not to say that every action or decision by a federal employee should give rise to a judicial cause of action, but there are cases where the harassment and intimidation is so severe that, in the words of the U.S. Supreme Court, "it is damages, or nothing." However, without the intervention of Congress, now it is "nothing."

II. TITLE VII OF THE CIVIL RIGHTS ACT

As stated above, one of the stark inequities in current statutes is that while state and local governmental employees can be held personally liable for the violation of an individual's Constitutional or civil rights, federal employees acting with the same intention and animus cannot. This contrast is based upon Congress' adoption of the Civil Rights Act, which does not extend its protections to individuals dealing with the federal government. At its core, the Civil Rights Act of 1964 "outlawed discrimination based on race, color, religion, sex, or national origin." Although originally the Act focused on protection of the rights of black males, the bill was amended to protect the civil rights of all individuals in the United States from abuses of those state and local governmental employees "acting under color of law."

Title VII of the Civil Rights Act states:

> It is unlawful to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of an individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000(e)-2(a)(1). The regulations implementing this statute provide:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. §1604.11 (a).

"For sexual harassment to be actionable, it must be sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), citation and quotation omitted. "A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice." National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 115-117 (2002); 42 U. S. C. § 2000e–5(e)(1), quotations omitted. "In determining whether an actionable hostile work environment claim exists, we look to all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" 536 U.S. at 115-117 (2002). Citations and quotations omitted.

Using this type of analysis, I believe that a statute could be enacted to protect private property owners from intimidation and harassment from federal employees acting under color of law. Such statutory language could include the following:

> *The attempted taking of private property or private property rights by means of governmental employee harassment or intimidation, under color of law, is hereby declared to be a violation of Civil Rights Act. Harassment or intimidation against the owners of private property or private property rights constitutes such violation when (1) a property owner's relinquishment of his property or property rights is made explicitly or implicitly a term or condition of receipt of a permit or license*

from a governmental agency, (2) submission to or rejection of such conduct by a property owner is used as the basis for the grant of or conditions included in a permit or license, or (3) the conduct of the governmental employee has the purpose or effect of unreasonably interfering with an individual's private property or private property rights. An attempted taking of private property or property rights under this section can be composed of a series of separate acts that collectively constitutes a significant deprivation of the ownership or use of private property or property rights. In determining whether the activities of a governmental employee are actionable under this section, consideration can be given to the frequency of the discriminatory conduct, harassment or intimidation, its severity, and whether such governmental action interferes with the ownership, use or legitimate investment backed expectations of the property owner.

III. THE WITNESSES TODAY ARE NOT THE END OF THE STORY

Today, you are going to hear compelling and heartfelt stories of individual families and businesses who are only asking to be able to walk in the doors of the federal courts to plead their cases. But these are not the only stories in existence. To prepare for this hearing, my office talked to over a dozen other individuals and their representatives who are also willing to tell you their stories and ask your help in getting to the courts for justice. The Constitution created three equal branches of government to provide a system of checks and balances over the actions of each other. Yet today, there is no adequate check over the actions of the federal governmental individuals who abuse their power against the American property owner. We are not asking to win every case, but simply to be able to make our case. We respectfully request that Congress make the same avenue available to us as it does to other Americans.