Dicey's Nightmare: An Essay on The Rule of Law

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The British constitutional lawyer A.V. Dicey argued in the nineteenth century that the common law, as administered by superior courts, better ensured government accountability than did written constitutions. Dicey taught us to focus less on constitutional promises and more on the practical effectiveness of judicial remedies. This Article builds on Dicey by offering a comparative assessment of military encroachments on the rights of the nation's citizens during times of war. Rather than comparing British common-law norms to European constitutionalism, as Dicey did, this Article compares nineteenth-century common law as applied in the courts of the United States to the constitutionally-inflected rules that those courts apply today.

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This Article focuses its comparison on three common-law remedies: habeas to secure release from military detention; trespass to obtain an award of damages for wrongful or abusive military confinement; and tort and contract-based compensation for the military's destruction or taking of property. The modern Supreme Court has recalibrated each of these common-law regimes and now evaluates the legality of the military's actions almost exclusively in constitutional terms. As Dicey might have predicted, the shift away from hard-edged common-law rules to open-ended constitutional balancing corresponds to a marked loss of relative remedial effectiveness. This Article examines some of the factors that have shaped the remedial decline, as reflected in Hamdi v. Rumsfeld *and* Ziglar v. Abbasi*. It then offers suggestions as to how the Court might keep the infrastructure of rights enforcement in better repair.*

INTRODUCTION

In his well-known work on the British constitution, A.V. Dicey both explained and celebrated the British theory of parliamentary sovereignty.[1] Dicey also criticized constitutional law, comparing the sturdy common law of England, with its trespass actions and habeas petitions, to the more theoretical assurances of the French and Belgian constitutions.[2] For Dicey, common-law remedies imposed practical constraints on government action and differed from airy constitutional assurances that had little holding power in the face of a determined bureaucracy.[3] By expressing a preference for the more reliable common law, Dicey helped to frame the terms of modern debates over bills of rights and human-rights legislation.[4] Indeed, Dicey's challenge to constitutionalism and judicial review poses questions at the heart of much twenty-first-century public law.[5]

While Dicey reverberates through the Commonwealth,[6] his work has been less central to the evaluation of government accountability and the rule of law in

1. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–85 (10th ed. 1959). For an account of Dicey's life as a scholar, see Mark D. Walters, *Dicey on Writing the Law of the Constitution*, 32 OXFORD J. LEG. STUD. 21 (2011). In his introduction to the Tenth Edition, the editor updated the reader on many of the issues Dicey raised. *See* E.C.S. Wade, *Introduction to Tenth Edition by the Editor*, DICEY, *supra*, at xvii.

2. *See* DICEY, *supra* note 1, at 206–07 (treating the assurance of liberty in the Belgian constitution as a "proclamation" that gives but "slight security" and emphasizing the importance of studying the "legal methods" by which exercise of the right has been secured); *id.* at 208 (describing the trespass action and the privilege of the writ of habeas corpus as the principal legal means for the enforcement of the right of personal liberty in England); *see also id*. at 238–41 (contrasting the French guarantee of freedom of the press in the *Declaration of the Rights of Man* with the English practice of barring prior restraint and making individuals responsible for their resulting freedom to speak and publish through libel actions). For a more up-to-date comparison, see James E. Pfander, *Government Accountability in Europe: A Comparative Perspective*, 35 GEO. WASH. INT'L L. REV. 611 (2003).

3. Dicey cited Voltaire's experience with arbitrary imprisonment in France as virtually unthinkable in England. *See* DICEY, *supra* note 1, at 209–12; *see also id*. at 135 (describing French constitutional provisions as "not in reality laws," but as "maxims of political morality," which derive their strength from the support of public opinion).

4. *See* Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 549–53 (2014) (treating Dicey's work as a leading statement of parliamentary sovereignty and examining changes in British constitutionalism associated with the creation of the Supreme Court of the United Kingdom (UKSC) and the Human Rights Act of 1998); Fabian Duessel, *Human Rights in the British Constitution: A Prisoner of History?*, 2017 U. ILL. L. REV. 791, 794 (2017) (tracing the rise of European human rights consciousness after World War II and describing the tension between Dicey's conception of parliamentary sovereignty and Great Britain's decision to incorporate human rights protections by way of a statute).

5. *Compare* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (invoking traditions of parliamentary supremacy in questioning judicial review and court-based constitutional enforcement), *with* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (defending the political legitimacy of a judicial role in constitutional rights elaboration).

6. *See, e.g.*, ANTHONY KING, THE BRITISH CONSTITUTION 19–23 (2007) (describing Dicey's place among iconic theorists of the British constitution); Dylan Lino, *The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context*, 81 MOD. L. REV. 739 (2018); Rivka Weill, *Dicey Was Not*

the United States. With its separation of the powers of government and embrace of judicial review, the Constitution of the United States does not subscribe to Dicey's theory of parliamentary supremacy.[7] Over the course of some 230 years of constitutional experience, moreover, the United States has switched from a system of government remediation that relied heavily on the common-law forms to one that features far greater reliance on statutes and constitutional norms.[8] To be sure, our constitutional and statutory schemes occasionally incorporate common-law features.[9] But in evaluating the legality of federal government action, the courts of the United States now focus less on the common law than on a set of rights specified in written law. What relevance can Dicey's hymn to the common law have for lapsed common lawyers? Dicey, after all, strikes the modern reader as more relevant to issues of constitutional design in the United Kingdom and the Commonwealth than to those of constitutional evolution in the United States.[10]

This Article draws on Dicey's account of the rule of law in assessing the effectiveness of remedies for alleged violations of the law by the United States military in the post-September 11 world. Instead of comparing British law to continental constitutionalism (as Dicey did), this Article compares the remedial scheme in antebellum America to its modern, constitution-infused counterpart. Antebellum America relied on the ordinary courts, in Dicey's sense,[11] to

Diceyan, 62 CAMBRIDGE L.J. 474 (2003) (joining issue on how committed Dicey was to the preservation of parliamentary sovereignty).

7. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (invalidating act of Congress said to be inconsistent with the Constitution's allocation of judicial power).

8. *See infra* Part III.

9. Constitutional tort claims often turn on the elements of common-law claims. *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 483–84 (1994) (borrowing elements of common-law tort of malicious prosecution in defining right of individuals to recover for unconstitutional conviction or imprisonment). The Federal Tort Claims Act (FTCA) incorporates the common-law tort rules of the state in which the "act or omission occurred" as the measure of federal government liability. *See* 28 U.S.C. § 1346(b)(1) (2012). Mandamus actions to assure official compliance with law survive as non-statutory review under the Administrative Procedure Act. *See generally* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

10. *See* Delaney, *supra* note 4, at 549–53 (discussing Dicey and parliamentary sovereignty in terms of the distinctive problem of human rights enforcement and federalism in the UK and drawing comparative lessons for possible expansion of the power of the UKSC).

11. Dicey was keen to distinguish the ordinary superior courts of law and equity from specialized tribunals such as the French Conseil d'Etat. *See* DICEY, *supra* note 1, at 345–48 (treating the Conseil's tendency to protect officials from accountability before the ordinary courts as its "most despotic" feature). Modern scholars have come to give the Conseil more credit than did Dicey for ensuring the legality of the administrative state in France. *See* L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 175–212 (1998); *cf.* Edmund M. Parker, *State and Official Liability*, 19 HARV. L. REV. 335 (1906) (criticizing Dicey's conception of French administrative law). Nineteenth-century government accountability litigation in the US went forward before state superior courts and lower federal courts; there were no specialized tribunals for administrative law until much later in the nineteenth century. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 4, 13 (2012) (recognizing the conventional view that the Interstate Commerce Commission served as the nation's first specialized

administer a body of common law that was borrowed from Britain and informed by the writings of publicists on the law of nations.[12] Writs of habeas corpus and trespass loomed large in ensuring remedies for military violations of rights to liberty and property, as did theories of implied promise.[13] Today, the common-law norms that gave life to restrictions on military law in the nineteenth century have been absorbed into constitutional guarantees. Rather than ask if torts were committed or if contracts were breached, courts today typically ask if the Constitution was violated.[14]

One might hypothesize from Dicey that the switch to basing claims on the Constitution would diminish the protection afforded to individual rights. This Article tests that hypothesis along three dimensions of the law of war. Consider first the right of individual citizens to contest wrongful detentions and other invasions of personal rights by the military during times of armed conflict. In the nineteenth century, these claims of wrongful detention and trespass were mounted primarily by citizens of the United States against officers of the military. Civilians wrongfully detained were entitled to release on habeas and to compensation on claims of trespass or false imprisonment after they were released from custody.[15] These claims did not occasion any evaluation of national security concerns. Rather, they proceeded on the assumption that citizens of the United States who had not joined the military were immune from military justice. Military law thus had a quite limited ambit, and common-law courts enforced those limits rather strictly (except where the lawful suspension of the privilege of the writ of habeas corpus set those limits aside and authorized military detention[16]).

Today, while habeas persists and the Court has reaffirmed the principle of non-suspension, the Court now frames many civilian remedies in constitutional

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administrative tribunal and noting the role of common-law courts in adjudicating claims of government wrongdoing in the antebellum era).

12. Thus, James Kent's much-admired *Commentaries* often drew on such civil law jurists as Emer de Vattel and Hugo Grotius in elaborating a law of nations that was given binding force through incorporation into the common law. *See generally* JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW (1826) (devoting his first chapter or "lecture" to the law of nations and only then taking up the constitution and laws of the United States).

13. *See infra* Part II.

14. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (recalibrating inquiry into citizen confinement in terms of the Fifth Amendment guarantee of due process of law); *see generally infra* Part III (discussing the factors that reshaped the judicial approach to civilian-military interactions).

15. For recognition of the relatively strict rules of nineteenth-century habeas and trespass litigation as applied to military detention of civilians, see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 885–92 (2d ed. 1920); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1580–85 (2004).

16. *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 145–55, 159–74 (2017) (detailing the failed efforts of President Thomas Jefferson to secure a suspension of the writ to deal with the Burr conspiracy and describing the decision of President Abraham Lincoln to suspend the writ at the outset of the Civil War on his own authority).

terms.[17] In *Hamdi*, for example, the Supreme Court did not order a citizen's immediate release from military custody but instead conducted a fluid due-process inquiry that balanced individual rights and military necessity.[18] Similarly, in claims alleging the wrongful detention and torture of US citizens, the substitution of a constitutionally-based *Bivens* remedy has resulted in the denial of any effective remediation for the invasion of rights once securely protected at common law.[19]

A similar change has redefined the law of takings. During the nineteenth century, when the federal government (and the military) used eminent domain powers to take private property, the common law recognized an implied contractual duty to compensate the owner.[20] So long as the taking was properly authorized, the implied contract bound the government and Congress, rather than the official who took the property in question.[21] In 1855, when Congress tired of compensating these and other implied contract claims as part of the appropriations process, it created the Court of Claims (with life-tenured judges, interestingly enough).[22] That court's jurisdiction extended to claims on any contract with the government, express or implied, but did not extend by its terms to claims under the Fifth Amendment.[23] Today, of course, takings claims seek compensation under the Fifth Amendment and have been assigned to the US Court of Federal Claims.[24] We can thus compare the efficacy of remedies for breach of the implied (takings) contract with those for the corresponding constitutional violation. Two changes stand out: courts have come to doubt the Fifth Amendment's application to overseas takings of property, and they have more narrowly defined the right of individuals to recover for the losses the military inflicts by way of eminent domain.[25]

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17. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (concluding that legislation curtailing right to habeas violated the habeas non-suspension clause); Rasul v. Bush, 542 U.S. 466 (2004) (upholding right of foreign nationals to petition for habeas contesting confinement at Guantanamo Bay).

18. *See Hamdi*, 542 U.S. at 529 (applying the due process balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976) in evaluating the legality of Hamdi's detention as an enemy combatant).

19. *See* Vance v. Rumsfeld, 701 F.3d 193, 201–03 (7th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390, 394–96 (D.C. Cir. 2012).

20. *See infra* Part II.C.

21. *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852) (drawing this distinction between the government and the officials); *see also* Buron v. Denman (1848) 154 Eng. Rep. 450 (recognizing the distinction as a part of English common law).

22. *See* Act of Feb. 24, 1855, ch. 122 § 1, 10 Stat. 612 (creating a court with three judges who were given tenure during good behavior).

23. *See id.* (declaring that the jurisdiction of the court was to encompass "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States").

24. *See* 28 U.S.C. § 1491(a)(1) (2012) (extending jurisdiction of Court of Federal Claims over claims "founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States"). On the power of the Court of Federal Claims to hear Fifth Amendment takings claims, see GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 327–30 (4th ed. 2006).

25. *See infra* Part II.

This Article conducts its comparison in three parts. Part One briefly recounts Dicey's preference for concrete common-law remedies (the heart of Britain's unwritten constitution) and his more skeptical view of the efficacy of written constitutional assurances.

Part Two shows that the common law Dicey celebrated as the cornerstone of the British constitution also ensured remedies in the United States for military invasions of the rights of citizens. After describing the operation of the common-law writs of trespass and habeas corpus, Part Two evaluates their contours and assesses their efficacy in the practice of the United States. It then contrasts the nineteenth-century system of common-law remediation with constitutional remedies available today.

Part Three examines some of the reasons why the shift from common-law to constitutional rights has corresponded to a shift away from formal remedial rules to a more open-ended balancing of remedial interests. Today, federal courts often weigh issues of military necessity and national security quite heavily and discount the interests of individual claimants. To be sure, some gains have been achieved as part of today's much broader remedial framework.[26] But one comes away from the comparison with the disquieting sense that we may be living Dicey's nightmare: the recognition of nominally broad constitutional rights does not necessarily secure the practical effectiveness of available remedies.[27]

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26. For example, the common law did not recognize a right to sue for tortious misconduct resulting in death. On the origins of the common-law rule and the 1846 statute that made provisions for such suits, see S. M. Waddams, *Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?*, 47 MOD. L. REV. 437, 437–38 (1984) (describing the rule's origins as obscure). On the initially halting but later enthusiastic reception of the common-law rule in America, see Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1062–73 (1965). Statutory provisions, authorizing suit for wrongful death, began to appear in the United States in the mid-nineteenth century. *See* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 734 (2000) (contrasting the quasi-criminal approach to wrongful death that Massachusetts adopted in 1840 with New York's more influential 1847 tort-based approach, modeled on English law).

27. If forced to choose, many would prefer today's broad recognition of constitutional rights, even if unevenly enforced and often symbolic, to the much narrower conception of constitutionalism in the common-law world of the nineteenth century. After all, nineteenth-century legal thinkers could countenance the subjugation of Native American people, the enslavement of African Americans, the mistreatment of people with disabilities, and the disenfranchisement of women. With such substantial gaps in constitutional consciousness, one cannot yearn for a return to the past. Indeed, one might argue that the remedial weakness described in this Article actually contributes to the expansion of constitutional rights; courts can recognize new rights with less cost and disruption if they operate primarily in a world of prospective injunctive and declaratory relief. *See generally* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

But if possible, one might prefer to have both broad and deep constitutionalism. Note that today, when claims fail, the burden often falls on minority groups such as the Muslim men living in New York who were rounded up after the September 11 attacks and subjected to harsh and degrading confinement until cleared (these men were the plaintiffs in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), as more fully discussed in Part IV). One might argue that these men fell through a gap in the constitutional order comparable to that which swallowed up the claims of the citizens of Japanese descent who were interned after Pearl Harbor. *See* TYLER, *supra* note 16, at 239 (quoting sources that described the racism that animated the internment of those of Japanese ancestry and that may have blinded the Court to the

I.
DICEY AND THE RULE OF (COMMON) LAW

Dicey's *Introduction to the Study of the Law of the Constitution*[28] has been remarkably influential for its explication of Parliamentary supremacy and the common law, its discussion of conventions, and its articulation of the idea of British constitutionalism.[29] In giving voice to the unwritten constitution of the United Kingdom, Dicey emphasized the right of individuals to mount common-law claims against government officials, who were held personally accountable for their actions unless able to justify them in accordance with the law of the land. In Great Britain, Dicey explained, "individual rights are the basis, not the result, of the law of the constitution."[30]

In the course of his work, Dicey offered a working definition of the rule of law that he based on distinctively British institutions. The key to the rule of law, Dicey held, was to apply the same body of law to government officials as to private individuals.[31] On that view, only the sovereign herself was immune from suit; everyone else, from cabinet-level ministers on down, was subject to the same laws and was liable to suit for violating the rights of British subjects. These suits were to be brought in the ordinary courts, perhaps as petitions for habeas review or suits sounding in trespass. Dicey drew on these institutions to contrast the British model with that of the Conseil d'Etat, or "council of state," the French high court of administrative law.[32] Dicey viewed the Conseil with suspicion because he saw it as applying a specialized body of administrative law in tribunals that were separate from the regular courts.[33] For Dicey, as for others

need for a hard-edged habeas remedy). Had the Supreme Court deployed a nineteenth-century model of remedies, the claims of both Muslims and Japanese descendants would have fared much better. We might aspire to a constitutionalism that recognizes the humanity of all and provides a suitable remedy when the government, acting on the contrary impulse, invades the individual's liberty, property, or personal integrity. Thanks to the students in the Berkeley Public Law and Policy Workshop for inviting me to attend more carefully to this point.

28. *See* DICEY, *supra* note 1. Dicey held the Vinerian chair at the University of Oxford from 1882 to 1909, the same chair Sir William Blackstone occupied. *See* Rupert Cross, *The First Two Vinerian Professors: Blackstone and Chambers*, 20 WM. & MARY L. REV. 602, 602 n.1 (1979) (reporting that Blackstone was the first to hold the chair, named after Charles Viner, author of a best-selling abridgment); Walters, *supra* note 1, at 25.

29. Dicey observes, somewhat oddly, that Blackstone managed to write his entire *Commentaries on the Laws of England* without once acknowledging the existence of something called the British constitution. *See* DICEY, *supra* note 1, at 7. One wonders precisely what Dicey had in mind; the first chapter of Blackstone includes a host of references to the "constitution" as a "frame of government" or "system of laws." 1 WILLIAM BLACKSTONE, COMMENTARIES *122; *see also id*. at *123 (describing the spirit of liberty as "deeply implanted in our constitution"). Perhaps Dicey was commenting on Blackstone's failure to invoke the "British" constitution.

30. DICEY, *supra* note 1, at 207.

31. *See id*. at 23.

32. On the origins and current operation of the Conseil D'Etat in France, see generally BROWN & BELL, *supra* note 11.

33. See DICEY, *supra* note 1, at 114, 314 (noting the power of the Conseil and its lower courts and likening the Stuarts' failed attempt to institute arbitrary royal control over the common law to the Bourbons' power to withdraw matters from the Conseil for determination as matters of state).

writing in the British constitutional tradition, the similarity between the Conseil and Star Chamber was perhaps too close for comfort.[34]

Dicey's approval of the common-law rights of action informed his conceptions of the rule-of-law and of constitutionalism. For Dicey, it was far more important to rule of law values to have a sturdy writ of habeas corpus than to have declarations of, say, the rights of man. He thus explained that "[t]here is no difficulty, and there is often very little to gain, in declaring the existence of a right to personal freedom"; the "true difficulty," as he understood things, was "to secure its enforcement."[35] On Dicey's view, the English habeas tradition contributed a good deal more to the citizen's or subject's practical ability to protect personal liberty than all the declarations combined, including such famous British versions as the Petition of Right and Magna Carta.[36]

In summing up his (written) constitutional skepticism, Dicey gave voice to realist themes familiar to American jurists and statesmen:

> The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.[37]

Here, Dicey sounds a bit like James Madison, who worried that bills or declarations of rights in written state constitutions had often operated as little more than "parchment barriers" and were incapable of restraining a determined majority.[38] Dicey likewise calls to mind Oliver Wendell Holmes, who encouraged us to attend less to what the law says than to what the courts do in fact.[39]

One might fairly ask how Dicey squared the exercise of military law by courts martial with his conception of the rule of law. After all, courts martial

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34. *Id.* at 315–16 (exploring the similarities between the Star Chamber and the application of the droit administratif by the French conseil). For an account of the Star Chamber's controversial work-ways and eventual demise in 1640, see Daniel L. Vande Zande, Note, *Coercive Power and the Demise of Star Chamber*, 50 AM. J. LEGAL HIST. 326 (2010).

35. DICEY, *supra* note 1, at 221.

36. *See id.* at 221. Dicey thus contrasted British experience under the Habeas Corpus Act with that of Voltaire in France, who was subjected to beatings and arbitrary imprisonment as a critic of the French state. *See supra*, note 3 and accompanying text.

37. *Id.* at 207.

38. *See* James Madison, Letter from Madison to Jefferson (Oct. 17, 1788), *in* 1 THE REPUBLIC OF LETTERS 562–64 (James Morton Smith ed., 1995) (commenting on the inefficacy of a bill of rights in light of that fact that "overbearing majorities" in every state have committed violations of these "parchment barriers").

39. Dicey corresponded with Holmes and wrote a review of Holmes' 1881 book *The Common Law*. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) (explaining that the "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"); Walters, *supra* note 1, at 36–38.

exist apart from the ordinary courts and apply a specialized body of law.[40] Dicey devoted a short chapter to the problem, explaining that the Mutiny Act of 1689 and its successors placed the military on a separate footing that actually enhanced rather than threatened the rule of law.[41] True, a separate and relatively harsh system of punishments applied to members of the armed forces.[42] But this system extended only to those who had agreed to submit to the rigors of military discipline; it did not apply to individuals in civilian life.[43] In addition, the ordinary courts served as guardians of the boundaries between military and civil jurisdiction, providing proper remedies when the boundary lines were crossed.[44] They did so primarily by making habeas and trespass remedies available to individuals whose liberty or property rights were invaded by the military.[45]

A survey of decisions from the eighteenth and nineteenth centuries confirms Dicey's view of the relatively formal boundary lines drawn by common-law courts. In *Mostyn v. Fabrigas*,[46] for example, Lord Mansfield held that officers of the British armed forces were legally responsible in trespass for the imposition of military discipline on civilians. In illustrating the applicable rule, Lord Mansfield mentioned the liability of the admiral for the navy's destruction of the huts of some sutlers on the coast of Canada.[47] The decision was notable both for its application of English common-law principles to the British imperial bureaucracy and for its having held officers legally accountable in circumstances where they appeared to have acted in the best interests of the government as then understood.[48] *Mostyn* has thus become well-known for three

40. It was a commonplace of founding era legal discourse to treat the rules of military discipline administered by courts martial as categorically different from the law that governed civilian life. *See* WINTHROP, *supra* note 15, at 50 ("[T]he court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by any federal court, either by *certiorari*, writ of error, or otherwise . . . .").

41. *See* DICEY, *supra* note 1, at 295–311. On the importance of the Mutiny Act in the development of military law in the United States, see Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 3–6 (1989) (noting that the Act created a statutory or constitutional framework for the lawful imposition by court martial of military punishment).

42. DICEY, *supra* note 1, at 307 (noting that courts martial mete out more severe punishment).

43. *See id*. at 301 (observing that soldiers agree to a system of harsh discipline as a condition of enlistment).

44. *See id*. at 306–08 (noting that civil courts determine whether an individual has become subject to military law and otherwise ensure that courts martial remain within the limits of their jurisdiction).

45. *See id.*

46. *See* Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1025–26.

47. *See id.* On the importance of *Mostyn* to the extraterritorial application of law to govern a nation's military officialdom overseas, see James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006).

48. The sutlers in Canada were apparently selling liquor to sailors and thus undermining the effectiveness of the British naval service. In describing this aspect of the judgment, Chief Justice Taney described the *Mostyn* decision as having imposed liability for an "invasion of the rights of private property" notwithstanding the court's recognition that the navy's goals were "laudable." Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135–36 (1852) (citing *Mostyn*, 98 Eng. Rep. at 1032).

principles: its application of English law as a constraint on official action abroad; its use of the common law to test the legality of military conduct as applied to civilians; and its contribution to the transitory tort doctrine, which holds that plaintiffs can pursue their transitory tort claims wherever they find and serve the defendant.

Equally celebrated habeas decisions, such as that in the case of Wolfe Tone, drew similarly sharp lines between military and civilian life.[49] John Theobald Wolfe Tone was brought to book before British military tribunals in Ireland for joining with revolutionary French forces in leading the 1798 Irish uprising against British rule. A petition on his behalf for habeas was granted; the Irish analog to King's Bench confirmed that rebels and insurrectionists were triable if at all before civilian courts.[50] However treasonous their conduct, they could not be said to have committed unauthorized or unlawful military actions and therefore could not be subjected to military justice under the laws of war.[51] Dicey treated the decision as a correct, and indeed courageous, reaffirmation of the rule of law.

II.
CONSTITUTIONALIZING LIMITS ON MILITARY ACTIVITY

Common-law norms traveled easily across the Atlantic. While the Americans would eventually declare their independence from Great Britain and adopt their own (written) constitutions, they maintained close ties to English common and statute law.[52] The new nation's revolution-era code of military discipline, drafted by John Adams and Thomas Jefferson, drew liberally on the British model.[53] A later codification of US military law in 1806 similarly owed

49. *See* Wolfe Tone's Case (1798) 27 How. St. Tr. 613, 625 (Kilwarden, C.J.) (issuing habeas to compel military officials to produce prisoner, on the theory that his action in taking up arms on behalf of the Irish rebellion was an act of treason punishable only through civil courts).

50. *See id.*

51. Dicey argues that Wolfe Tone's case establishes an important precedent for the role of civilian courts in preventing the introduction of military rule or martial law into civilian life during times of rebellion. *See* DICEY, *supra* note 1, at 293–94 (noting that Wolfe Tone's guilt was substantially admitted but the Irish courts nonetheless decreed on habeas that he was not subject to punishment through courts martial).

52. On the reception of English common law into the law of the United States, see DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 215 (Thomas A. Green et al. eds., 2005) (recognizing the importance of English law and highlighting the selective quality of its incorporation into American law). On the importance of English statutes, see Amanda L. Tyler, *A "Second* Magna Carta*": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949 (2016) (highlighting the influence of the English Habeas Corpus Act of 1679 in shaping the privilege of the writ in the United States); *see also* Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377 (2017) (offering an extensive history of the development of constitutional and statutory measures aimed at extending due process in any federal civil or criminal cases, regardless of physical location).

53. For a useful sketch of the introduction of British conceptions of martial law into the law of the United States, see WINTHROP, *supra* note 15, at 46–49. On the drafting of the articles of war that

a good deal to its British precursors.[54] Apart from incorporating features of the British mutiny act (as later extolled by Dicey), Americans relied on common-law forms to uphold limits on military jurisdiction. When the nation went to war, Americans turned both to English common law and to the law of nations in defining legality.[55]

Litigation over the past fifteen years largely concerning the Bush administration's War on Terror illustrates the degree to which the law of government accountability has shifted from common-law to constitutional foundations. Suits by citizens for release from military custody, though nominally framed as habeas petitions, have lost their sharp edge and now call for the application of an open-textured balancing of interests under the Due Process Clause. Similarly, suits for damages by US citizens for wrongful detention and torture now proceed as constitutional tort claims under the *Bivens* doctrine.[56] Finally, suits to recover money for the improper taking of property now proceed under the Fifth Amendment as suits for the just compensation by the constitution. This Section catalogs the changing state of the law across these three dimensions (habeas, trespass, and takings) as the formal boundary lines associated with common-law remedies have given way to the more flexible approach of constitutional remediation that we see today.

A. Habeas Remedies for Military Detention of Citizens

1. The Nineteenth Century

Habeas in nineteenth-century United States bore the same formal, rule-like features that characterized the remedy in Great Britain.[57] Government detention of citizens of the United States was permissible only when proper cause was shown. Jailers could show cause for detention by establishing that the prisoner

governed American forces during the American War for Independence, see Wiener, *supra* note 41, at 5–9 (noting the respective roles of Adams and Jefferson).

54. For an account of the passage of the 1806 law, see Francis Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 15–22 (1958).

55. On the importance of the law of nations, see WINTHROP, *supra* note 15, at 773 (describing the law of war as a subset of the law of nations, distinguishing the law of war from military law proper, and explaining that the law of war is "not a formal written code, but consists mainly of general rules derived from International Law, supplemented by acts and orders of the military power and a few legislative provisions").

56. On the factors that influenced the Supreme Court's recognition in *Bivens* of a right to sue federal government officials for violations of the Fourth Amendment, see James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau, *in* FEDERAL COURTS STORIES 275–99 (Vicki C. Jackson & Judith Resnik eds., 2010)) [hereinafter Pfander, *The Story of* Bivens]. For a summary of *Bivens* litigation growing out of the War on Terror, see JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 42–56 (2017) [hereinafter PFANDER, CONSTITUTIONAL TORTS]. As discussed in Part IV, the Supreme Court's decision in *Ziglar* casts doubt on the continuing viability of the *Bivens* action, especially in connection with overseas war-on-terror cases.

57. *See* TYLER, *supra* note 16, at 21–33.

had been convicted after due process of law, or was held on properly supported charges of a serious crime. Even in the face of charges, however, the prisoner might pursue habeas to gain admission to bail or to challenge the lack of a speedy trial.[58] In this way, habeas provided the remedial mechanism for securing rights at common law that were later enshrined in the Bill of Rights. Holding those suspected of treasonous activity in military confinement was forbidden. Only individuals who had been mustered into service by enlisting or accepting a commission in the armed forces could be held in military custody. Suspected traitors were entitled to be charged with crimes and tried under the rules of evidence specified in the Constitution. To hold them without charge required an act of Congress that suspended the privilege of the writ of habeas corpus.[59]

On that view, *Ex parte Bollman* was an easy case.[60] Thomas Jefferson's military officers had captured the so-called Burr conspirators in Louisiana and shipped them back to the District of Columbia to face charges.[61] But the administration lacked the factual evidence needed to sustain a charge of treason. President Jefferson approached Congress seeking legislation that would suspend the habeas privilege. Congress demurred.[62] After failing to obtain release from the District of Columbia circuit court, co-conspirators Erick Bollman and Samuel Swartwout petitioned for habeas in the Supreme Court. The Court concluded that the petition sought relief of a permissibly appellate character and that the evidence was indeed inadequate to show a treasonous combination to levy war. Ultimately, the petitioners were released.[63]

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58. On the traditional use of habeas to ensure regularity in criminal procedure, to test the facts on arraignment, to contest bail, to challenge a lack of speedy trial, and to challenge the crime charged as legally insufficient, see *id.* at 21–33. These pre-trial uses of habeas to contest the factual and legal sufficiency of the offense charged would have lessened the need for post-conviction review and may help to explain the absence of the appeal from common-law criminal process. Or to put things differently, perhaps the absence of an appeal pushed the common-law courts to widen the ambit of pre-trial habeas review.

59. *See* DICEY, *supra* note 1, at 287 (explaining British rejection of martial law in terms of the right of individuals to contest their detention if they have been arrested without a lawful warrant); *id.* at 228–32 (discussing circumstances in which parliament suspended the writ of habeas corpus in cases involving charges of high treason but arguing that other factors limit the impact of the suspension on the rights of individuals). On the introduction of habeas suspension to America, see Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CALIF. L. REV. 635 (2015) (recounting and evaluating suspensions adopted by the British Parliament during the course of the American Revolutionary War).

60. 8 U.S. (4 Cranch) 75 (1807). For lively accounts of the Burr conspiracy and its players, see Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 683–85 (2008).

61. Apart from Aaron Burr and Captain James Wilkinson, the conspirators included Samuel Swartwout and Erick Bollman. The apparent idea was to foment rebellion out West in the hope of splitting off parts of Louisiana to confederate with a foreign power. *See* TYLER, *supra* note 16, at 145–55 (recounting the Burr conspiracy and the congressional debate it spawned over suspension).

62. On the attempt to secure a suspension, see Halliday & White, *supra* note 60, at 685. The Senate passed the bill, but the House defeated it on a lopsided vote. *Id.*; *see also* TYLER, *supra* note 16, at 146–52.

63. *See Bollman*, 8 U.S. (4 Cranch) at 99–101.

Similarly easy were cases from the War of 1812, when courts ordered the release of individuals whom the military had imprisoned on suspicion of trading and improperly consorting with the enemy.[64] Like Wolfe Tone, these individuals did not necessarily get away scot-free, but they were entitled to civil rather than military forms of trial and punishment.

2. The Twenty-First Century

The Bush administration responded to the attacks on September 11, 2001 by putting the nation on a war footing. One week later, Congress adopted the Authorization for the Use of Military Force (AUMF) which granted the President the authority to use "all necessary and appropriate" military force against responsible organizations and persons.[65] This included al Qaeda, the terrorist group once headed by Osama bin Laden, and the Afghan Taliban, which harbored al Qaeda and bin Laden. The AUMF provided the legal authorization for the invasion of Afghanistan, for the search for bin Laden, and for the broader global war on terror that led to the detention and torture of high value detainees at black sites around the world.[66]

At least three US citizens were detained in the global war on terror. John Walker Lindh was captured during combat in Afghanistan and brought back to the United States where he pled guilty to two criminal charges and received a sentence of twenty years.[67] Yaser Hamdi was also captured in Afghanistan.[68] Unlike Lindh, Hamdi did not face charges in federal criminal court. Instead, he and other enemy combatants were shipped first to the naval station at Guantanamo Bay for detention, interrogation, and possible trial before military commissions. After Hamdi's citizenship was confirmed, he was transferred to a military prison in the United States where his family instituted habeas proceedings on his behalf. Hamdi eventually agreed to a deal in which he would

64. *See infra* notes 99–101.

65. *See* Authorization for the Use of Military Force of 2001, Pub. L. No. 107–40, 115 Stat. 224 (codified 15 U.S.C. § 1451 (2012)). For an account of the statute and guide to its interpretation, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism,* 118 HARV. L. REV. 2047 (2005).

66. *See* PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 31–35 (recounting the progression from the AUMF to the Torture Memos' approval of the CIA's program of rendition, detention, and interrogation).

67. *See* Jane Mayer, *Lost in the Jihad*, NEW YORKER (March 10, 2003), https://www.newyorker.com/magazine/2003/03/10/lost-in-the-jihad [https://perma.cc/M5QR-8J9X] (describing Lindh's guilty plea to a lesser charge and the problems with the government's case against him that led to the plea deal).

68. On Hamdi's capture in Afghanistan in 2001, subsequent detention as an enemy combatant, challenge to the legality of his detention, and eventual release to his home in Saudi Arabia, conditioned upon his renunciation of terrorism and his U.S. citizenship, see Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, (Oct. 12, 2004), https://www.washingtonpost.com/archive/politics/2004/09/23/us-to-free-hamdi-send-him-home/d3cedb14-ebd0-40e1-8e53-aa84bddda6bd [https://perma.cc/FZD7-HHQ6].

be released in Saudi Arabia (subject to some travel restrictions), renounce his US citizenship, and refrain from suing the United States.[69]

A third US citizen Jose Padilla was not captured on the battlefield; he was arrested at O'Hare International Airport in Chicago.[70] He had been implicated (reportedly by Abu Zubaydah) in the so-called dirty bomb plot to detonate a nuclear device in the United States and was arrested with much fanfare and transferred to federal criminal custody in New York. Later, on the eve of a challenge to his federal detention in New York, President Bush transferred Padilla again. This time he was detained in military custody as an unlawful enemy combatant.[71] Padilla was held in military custody for years as litigation to contest his status worked its way up and down the federal court system. Eventually, the government transferred Padilla yet again, this time to face criminal charges in Florida, where he was convicted and sentenced to seventeen years in prison. The dirty bomb allegations did not figure in the charges on which he was convicted.[72]

Both Hamdi and Padilla sought release from military custody by way of habeas. Yet neither one succeeded, at least directly. Hamdi argued that the AUMF did not authorize the detention of US citizens, that another federal statute prohibited his detention, and that the traditional separation of civilian and military justice barred his detention by military authorities.[73] The Supreme Court was sharply divided, but refused to order his release from military custody. The lead opinion by Justice O'Connor spoke for four Justices in concluding that the detention of enemy combatants was a typical incident of war and was authorized by the AUMF.[74] Justice O'Connor also found that this power to detain extended to enemy combatants who happened to be US citizens like Hamdi, but only where the facts supported the conclusion that the individual had taken up arms against the United States. To ensure the proper factual predicate for detention,

69. *See id.*

70. For a capsule summary of Padilla's case, concluding that the dirty bomb plot was based on a fictional internet story, that the government's claims against him were overhyped, and that the torture of Abu Zubaydah had little to do with the disclosure of the plot's details, see Adam Taylor, *The CIA Claimed its Interrogation Policy Foiled a 'Dirty Bomb' Plot. But it Was Too Stupid to Work.*, WASH. POST (Dec. 9, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/the-cia-claimed-its-interrogation-policy-foiled-a-dirty-bomb-plot-but-it-was-too-stupid-to-work/?utm_term=.0fcd51cf8c35 [https://perma.cc/WU7Y-DUY5]; Paul Waldman, *The War on Terror Encapsulated in One Case*, AMERICAN PROSPECT (Dec. 12, 2014), https://prospect.org/article/war-terror-encapsulated-one-case [https://perma.cc/67YA-BQHV].

71. For the procedural background, see *Rumsfeld v. Padilla*, 542 U.S. 426, 430–34 (2004).

72. On Padilla's conviction on conspiracy charges and the imposition of a seventeen-year sentence, see Tom Brown, *Court Says Padilla Sentence Too Lenient,* REUTERS (Sept. 19, 2011), https://www.reuters.com/article/us-usa-security-padilla/court-says-padilla-prison-sentence-too-lenient-idUSTRE78I49120110919 [https://perma.cc/9ALW-59JY.]

73. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

74. *See id*. at 516–23.

US citizens were entitled to due process of law.[75] In this context, the Court invoked a flexible balancing test in holding that due process required notice and an opportunity to be heard on the enemy combatant issue before a neutral tribunal.[76] The Court vacated the Fourth Circuit decision, upheld detention, and remanded for further proceedings at which Hamdi would have the right to counsel in contesting his designation as an enemy combatant.[77]

Padilla's claim to immunity from military custody was seemingly stronger than Hamdi's, inasmuch as his capture occurred far from the battle fields of Afghanistan.[78] The Court declined to reach a decision on the merits, ruling 5-4 that Padilla had not filed suit in the district of confinement as habeas law required.[79] The four dissenters, in an opinion by Justice Stevens, left little doubt that they would reject the military's authority to detain and interrogate Padilla.[80] Coupled with the likely vote of Justice Scalia, who had argued vigorously against military detention in *Hamdi* but joined the district-of-confinement majority in *Padilla*, the two decisions made it relatively clear that the Court would invalidate Padilla's military detention if and when it reached the merits.[81] Recognizing that reality, the government mooted Padilla's re-filed case on appeal by transferring him out of military detention to face criminal charges.[82]

Without a merits-based disposition in *Padilla*, then, *Hamdi* substitutes a flexible balancing test under the Due Process Clause of the Fifth Amendment for the sharp-edged, non-detention principle that courts applied in the nineteenth century. Nineteenth-century courts viewed habeas as implementing an absolute prohibition against the military detention of US citizens. *Hamdi* relaxes that rule, concluding instead that the government has power in a lawfully declared war to hold US citizens captured as enemy combatants for an extended period of time. Hamdi and Padilla had both been detained for nearly two years when their cases were decided in 2004. Padilla would face two more years of military detention

75. *See id*. at 529 (citing Mathews v. Eldridge, 424 U.S. 319 (1976), a decision addressing the right to procedural due process in a non-military setting).

76. *See Hamdi*, 542 U.S. at 533.

77. *See id.* at 539 (invoking the need for a balance of the risk of an erroneous deprivation and the likely gains achieved through a more exacting process).

78. The government's argument to the contrary rested in good measure on the Court's decision in *Ex parte Quirin*, which upheld prosecution by military commission of several German saboteurs, among whom was one, Haupt, who claimed US citizenship. *See* 317 U.S. 1 (1942). Scholars and jurists alike have questioned *Quirin*'s premises and conclusions. *See* TYLER, *supra* note 16, at 257 (quoting Justice Scalia for the proposition that the *Quirin* decision was not the Supreme Court's strongest opinion).

79. *See* Rumsfeld v. Padilla, 542 U.S. 426, 442, 446–47 (2004).

80. *See id*. at 455 (Stevens, J., dissenting).

81. For Justice Scalia's view in *Hamdi* on the detention of US citizens, see *infra* note 223 and accompanying text.

82. *See* Hanft v. Padilla, 547 U.S. 1062 (2006) (concluding, contrary to the lower court, that the Government's transfer of Padilla to face criminal charges in Florida mooted the challenge to his military custody); *see also id.* at 1064 (Ginsburg, J., dissenting from the denial of certiorari to decide legality of Padilla's military custody).

before the government maneuvered to moot his challenge by bringing criminal charges.[83] Although limits apply and the government must now justify the detention by showing that the individual joined forces with the enemy, the power to subject the citizen to military detention on suspicion of conniving with the enemy has clearly been approved.[84]

Hamdi's approval of military detention inverted nineteenth-century common-law notions of due process of law. Due process in the nineteenth century meant criminal process with rights to counsel, a speedy trial, and proof beyond a reasonable doubt before a jury of one's peers.[85] Military justice was, by definition, something less than due process, and habeas was issued to maintain clear lines between the two. Today, habeas implements a due process regime that serves not to maintain a prohibition against military justice but to render military justice tolerably fair to the individual. Individuals taken into military custody must receive fair process and may attempt to establish that there was inadequate cause to detain. To recast the conclusion in nineteenth-century terms, the modern Court has abandoned the jurisdictional boundaries and now reviews the merits of military justice.

The abrogation of a once-crisp boundary eliminates the previously required congressional role in assessing whether national security concerns necessitate the detention of civilians. Under the old regime, military detention of civilians required a suspension of the habeas privilege. Otherwise, as *Ex parte Bollman* confirmed, citizens were triable before civilian courts in accordance with law or were entitled to release.[86] Nowadays, the executive has the power to take initiative in detaining civilians without legislative approval (aside from the implicit approval that flows from the AUMF as construed in *Hamdi*[87]). If one believes that Congress too willingly shies away from tackling hard questions in the war powers context, and too readily confers discretion on the executive,[88] one will regret *Hamdi's* creation of a zone of judge-made discretion that enables the executive to detain without securing explicit legislative authorization. By breaching the formal boundary between civil and military justice, the Court has replaced the habeas-suspending judgment of Congress with a fluid judicial assessment of need.

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83. *See supra* note 70.

84. For a similar criticism, see TYLER, *supra* note 16, at 260–62.

85. *See* Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867 (2019).

86. *See supra* note 60.

87. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

88. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712–19 (2008) (exploring the congressional abdication thesis but concluding that statutes in place before military campaigns begin and those adopted in the wake of military action impose genuine constraints on the executive).

B. Money Remedies for Tort Claims

1. The Nineteenth Century

The principle underlying the nineteenth-century habeas decisions—that civilians cannot be subjected to military justice—also found repeated expression in tort litigation for unlawful confinement. Such claims were frequently brought in the wake of the War of 1812 by US citizens who had been detained or imprisoned on suspicion of providing aid to the British enemy.[89] Many of these claims arose from the conduct of US citizens near the Canadian border, where at least some folks viewed Madison's War with little enthusiasm. The courts responded with relatively strict rulings in favor of the rights of civilians to seek relief against the responsible military officials. Many of the officials, in turn, successfully sought legislation from Congress, indemnifying them for any damages awarded by the jury.

Two cases will nicely illustrate the formal rules barring military officials from taking civilians into custody. The first, *Utley v. Brown*, occurred near the Canadian border with New York.[90] During the winter of 1813-14, Major General Brown was commanding US forces at their quarters in French Mills, New York. Utley and his family were thought to have been "notoriously employed in communicating intelligence" to the British.[91] Brown's men captured Utley en route to the British to inform on the army's winter location. Utley offered bribes to his captors but was imprisoned to await charges as a spy. He later escaped. After the war ended, Utley sued Brown and recovered a judgment against him for assault, battery, and false imprisonment in the amount of some $600. Congress adopted legislation indemnifying Brown for the loss, concluding that he had acted in the line of duty in taking Utley into custody.[92]

A second case imposed substantial liability on Lieutenants Loring Austin and George Wells for their part in obeying a direct order from then Colonel (later General) Zebulon Pike, who was commanding the US forces at Sackett's Harbor, New York. Pike directed Austin and Wells to lead a detachment of men to Massena, where they were to consult with the federal collector of revenue. The officers were to "seize on and make prisoners of any persons whom [the

89. For an account, see Wuerth, *supra* note 15, at 1580–85.

90. One can reconstruct the backstory of this litigation from the congressional reports that accompany the bills of indemnity. Thus, the description of the litigation in *Utley v. Brown* appears in the congressional documents compiled in connection with Major Brown's subsequent petition for the enactment of private indemnifying legislation. *See* Indemnity to Major Gen. Brown Against Certain Judicial Proceedings NO. 387 (FEB. 9, 1818), *in* 1 AMERICAN STATE PAPERS: CLAIMS 551 (Walter Lowrie & Walter S. Franklin eds.,1834) [hereinafter No. 387] (reporting the facts of the case, the eventual entry of judgment for $669, and the recommendation that Congress grant indemnity).

91. *Id.*

92. *See id*. On the payment of indemnity, see James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1935 (2010) (reporting on the nineteenth-century practice of indemnity and confirming the payment to Major Brown).

collector] charges with having been engaged in treasonable practices" and bring them to headquarters.[93] Austin and Wells complied with the order, arresting as many as nine men on the say-so of the collector and imprisoning them in a guard house at Sackett's Harbor, where the captives "suffered much in mind and body."[94] The nine later sued and recovered substantial judgments: $6700 against Austin and $5700 against Wells.[95] Both defendants, unable to pay, were arrested in execution of the judgments and confined in jail for upwards of a year.[96] Both sought indemnity successfully. The House committee collected advice from the Secretary of War, who explained that the junior officers were right to have obeyed Pike's order, and from the Attorney General, who opined that the order was "strictly considered" unlawful.[97] Indeed, the trial judge charged the jury that Austin was legally accountable for the suffering of the captives from the time of their capture to their ultimate discharge, a charge that no doubt explains the verdicts' severity. A host of cases from the same time and place reach similar results.[98]

The relatively strict character of these verdicts reflects the sharp limits on the military's power to punish civilians, as Chief Judge Kent (still laboring on the law side before his switch to New York's court of equity) explained in the case of one Samuel Stacy.[99] Accused of spying for the British in Sackett's Harbor during the spring of 1813 and held in close military confinement as a spy and traitor, Stacy sought habeas from New York state courts. When the military commander explained that Stacy was to be tried by court martial for "carrying provisions and giving information to the enemy," Judge Kent would have none of it.[100] The military lacked "any color of authority" to try a civilian.[101] Like

93. *See* Indemnity for Judicial Proceedings Against an Officer of the Army NO. 379 (JAN. 23, 1818), *in* 1 AMERICAN STATE PAPERS: CLAIMS 545–46 (Walter Lowrie & Walter S. Franklin eds.,1834) [hereinafter No. 379].

94. *Id.*

95. *See id.*

96. *See id*. On the eventual adoption of indemnifying legislation, see Pfander & Hunt, *supra* note 92, at 1935.

97. *See* No. 387, *supra* note 90, at 546 (quoting opinions of Attorney General and Secretary of War). Notably, provisions in the then-current 1806 version of the Articles of War provided for the punishment by court-martial of those who corresponded with the enemy or provided them with relief via money, ammunition, or victuals. But those provisions, contrary to General Pike's interpretation, applied only to members of the armed forces and not to citizens engaged in treasonous activities. For a comprehensive treatment of the subject, undermining historical arguments for the application of military justice to civilian activities, see Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1627–33 (2017).

98. *See, e.g*., Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815) (holding that a military court martial did not have authority to prosecute the plaintiff who was accused of aiding Great Britain during the War of 1812 because he was a citizen of the United States); *see also* Wuerth, *supra* note 15 (discussing the collecting authority).

99. *See* In re Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

100. *Id.* at 330.

101. *Id*. at 333.

Wolfe Tone, Stacy was released after further deliberations confirmed that a civilian could not be held by the military.

2. The Twenty-First Century

a. The Road to Bivens

Alongside the changes in habeas litigation, the Court has overseen a substantial reconfiguration of the traditional right of citizens to secure redress for military detention that violates rights of bodily integrity and personal liberty. To be sure, Congress has lent an important hand by adopting progressively more stringent limits on the ability of individual citizens to pursue state law claims against federal officers in their personal capacity. The first step was to authorize the removal of such claims to federal court, a response to perceived state hostility to federal programs and initiatives.[102] The second step was to adopt the Federal Tort Claims Act (FTCA), thereby accepting government liability for the torts of federal officials within the scope of the employment.[103] But the FTCA, as originally enacted, dealt primarily with actions sounding in negligence; the statute explicitly excluded from its coverage an array of intentional tort claims, including "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[104] Victims of intentional torts were free to sue responsible officers in their individual capacities, rather than the government.[105]

In the landmark case of *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics,*[106] the Supreme Court authorized individuals to pursue constitutional tort claims directly against federal officials in federal court. Webster Bivens alleged that officers had conducted an unlawful search of his home and an unlawful strip search of his person. He sued federal drug

102. Federal officer removal provisions were first adopted during the War of 1812 and the southern nullification crisis of 1833. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 853–56, 854 n.6 (7th ed. 2015) (describing the removal acts of 1815 and 1833 as the result of state resistance to federal measures). Officer removal was greatly extended during Reconstruction and, in 1948, Congress adopted a general provision for the removal of state court proceedings brought against federal officers and agencies. *See id*. at 853–54; *see also* 28 U.S.C. § 1442(a)(1) (2012).

103. § 403, 60 Stat. 816, 843 (1946) (codified as amended at 28 U.S.C. §§ 1346, 2401, 2675–80 (2012)). For an introduction to the FTCA, see SISK, *supra* note 24 , at 102–87.

104. § 421(h), 60 Stat. at 843.

105. In declining to accept liability, Congress did not mean to foreclose such suits but only to require the suits to proceed against the official in her personal capacity, rather than against the federal government. Many suits were brought against federal officials in the early years of the FTCA. For an account, see generally James E. Pfander & Neil Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L. REV. 417 (2011) (describing early litigation against the government and its officers and judicial efforts to coordinate the overlap). Congress has since provided for government responsibility for the intentional torts of law enforcement officers. *See* SISK, *supra* note 24, at 156–62.

106. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). For an account, see James E. Pfander, *The Story of* Bivens, *supra* note 56, at 275–99.

enforcement agents in federal court, claiming a violation of the Fourth Amendment. The government moved to dismiss on jurisdictional grounds, arguing that the claim arose under state trespass law and that Bivens should have filed suit in state court. The Court held that the Fourth Amendment gave rise to an implied federal right of action for damages, thereby solving any jurisdictional problems.[107]

While the *Bivens* action began life as a supplement to common-law remedies, it would soon become the only vehicle by which individuals could seek redress for the intentional torts of federal officials. Here again, Congress took the lead, preserving the *Bivens* action even as it ultimately took steps to curtail the individual's right to sue federal officials at common law. Responding to a series of no-knock drug enforcement raids in 1974, Congress amended the FTCA to accept government liability for the intentional torts of law enforcement officials.[108] But in doing so, Congress preserved the *Bivens* remedy for constitutional tort claims against officers in their individual capacities.[109] Fourteen years later, in the Westfall Act of 1988, Congress immunized federal officers from liability for all tort claims based on state law, notably bringing trespass claims under the ambit of immunity.[110] But again, Congress created an exception for suits alleging violations of the Constitution, thereby preserving the *Bivens* action.[111] Today, one can sue the government under the FTCA for the intentional torts of its law enforcement officers and sue federal officers themselves under *Bivens* for their constitutional torts.[112] But the sturdy common-law tort claim against the officer, a cornerstone of nineteenth-century remediation, has been seemingly laid to rest.[113]

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107. *See Bivens*, 403 U.S. at 397 (stating that the question was merely whether the petition could prove an injury resulting from a violation of their Fourth Amendment right).

108. *See* 28 U.S.C. § 2680(h) (2012).

109. *See* Carlson v. Green, 446 U.S. 14, 19 n.5, 19–20 (1980) (concluding that the expansion of the FTCA in 1974 was meant to supplement, rather than displace, the *Bivens* remedy).

110. For the terms of the Westfall Act immunity, see 28 U.S.C. § 2679(b)(1) (2012) (providing that "[a]ny other civil action or proceeding . . . arising out of or relating to the same subject matter . . . is precluded without regard to when the act or omission occurred").

111. *See id.* For an account, see generally James E. Pfander & David Baltmanis, *W(h)ither* Bivens*?*, 161 U. PA. L. REV. ONLINE 231 (2013) [hereinafter Pfander & Baltmanis, *W(h)ither* Bivens*?*] (exploring the interlocking elements of the Westfall Act's provision for federal official immunity from suit on state common-law theories of liability); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 131–39 (2009) [hereinafter Pfander & Baltmanis, *Rethinking* Bivens] (discussing the Westfall Act as a ratification of *Bivens* and drawing a parallel between *Bivens* and Section 1983 suits).

112. Recent developments clarify that *Bivens* likely furnishes a right of action only for a narrow range of constitutional torts. *See* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (more fully discussed in Part IV).

113. Or has it? To the extent *Ziglar* forecloses the assertion of claims in a setting where the Constitution requires a money remedy, one might file suit in state court on a trespass theory and argue that the Constitution invalidates the officer's Westfall Act immunity. Thanks to Vicki Jackson for bringing this possibility to my attention. *Cf.* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW.

The switch to *Bivens* has dramatically altered the judicial evaluation of the right to sue. In place of the sturdy and routinely available common-law action, litigants pressing suits under the *Bivens* doctrine must now persuade the federal courts that, on balance, a range of discretionary factors weighs in favor of the right to sue. Courts limit the remedy to established contexts and take a very narrow view of their capacity to extend *Bivens* to new settings.[114] When asked to make such an extension, courts view the *Bivens* action as a remedy of last resort rather than a readily available way to vindicate an invasion of rights.[115] Next, courts consider whether "special factors counsel[] hesitation," code words for a context-specific evaluation of the relative strength of the victim's claim for redress and the government's demand for deference.[116] Even in the absence of clear alternative remedies, the special-factors analysis often leads to the denial of a right to sue.[117]

b. Judicial Hesitation in Times of War

Citizens detained in connection with the war on terror have failed to persuade federal courts to strike these discretionary balances in favor of recognizing their right to sue under *Bivens*. After his discharge from military custody, Padilla brought two such suits: one in South Carolina against then-Secretary of Defense Donald Rumsfeld and the military officers responsible for his detention and mistreatment there;[118] and one in California against the architect of the Bush Administration's Torture Memos, John Yoo.[119] Both suits failed at the threshold, notwithstanding detailed allegations of extreme isolation; interrogation under threat of torture, deportation, and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with his religious practice; and incommunicado detention for almost two years without access to family, counsel, or the courts.[120]

While the results were the same in both cases, the rationales differed. The Ninth Circuit found that the allegations directed at Yoo did not assert violations of any clearly established constitutional rights and thus failed to overcome the

U. L. REV. 899 (1997) (arguing that the right to petition may encompass a right to seek relief from the government that would invalidate statutory barriers and revive common-law remedies).

114. *See Ziglar*, 137 S. Ct. at 1857–59.

115. *See id.* at 1858 (treating "any alternative" remedy as a possibly convincing reason to refrain from recognizing a remedy in damages).

116. *Id.* at 1859 (internal quotations omitted).

117. *See, e.g.*, *id.* at 1863 (refusing to allow claims for the discriminatory detention of Muslim men in the wake of the September 11 attacks); *see also* Wilkie v. Robbins, 551 U.S. 537 (2007) (owner of a dude ranch, who plausibly alleged government retaliation for his refusal to grant an uncompensated easement across his land**,** was not permitted to mount a suit for damages under the Takings Clause of the Fifth Amendment).

118. *See* Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012).

119. *See* Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).

120. *See id.* at 752.

doctrine of qualified immunity.[121] Here, the claim was not that Yoo tortured Padilla, but that he crafted definitions of torture so narrow as to facilitate torture by other actors. The Fourth Circuit, on the other hand, denied relief against Padilla's jailers on a considerably broader basis. It concluded that "special factors counsel[ed] hesitation" and thus refused to recognize a right to sue under *Bivens*.[122] Observing that the Constitution assigned the political branches control over the declaration of war, the creation and discipline of the armed forces, and the management of conflict by the commander in chief, the Fourth Circuit found little room for judicial engagement.[123] Departing from a nineteenth-century conception that courts were obliged to prevent the military from intruding into civilian life, the Fourth Circuit viewed the claim as inviting the judiciary to mount improper and "uninvited intrusion" into military affairs.[124] As a result, the court viewed Congress's failure to create a right to sue as fatal; courts had no business creating such a right on their own.[125]

As with Padilla's litigation in the Fourth and Ninth Circuits, the Seventh Circuit in Chicago rejected Donald Vance's claims.[126] Vance and his colleague Nathan Ertel were working as military contractors with a private security firm in Iraq. Under suspicion as black-market arms dealers, they were taken into military custody, where they were held in solitary confinement and denied access to counsel. Their interrogators used "threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, *incommunicado* detention, falsified allegations and other psychologically-disruptive and injurious techniques."[127] Vance was held for three months; Ertel for six weeks. Officials running the proceedings refused to look at files on Vance and Ertel's computers claimed to establish their innocence. Nor did officials contact the FBI, even though Vance and Ertel said that agents would verify their story. Both claimed to have been physically and psychologically devastated by their experience.[128]

The Seventh Circuit, sitting en banc, refused to permit the suit to go forward under *Bivens*.[129] While similar mistreatment would have been actionable had it occurred in a prison run by federal officials in the United States, the court treated

121. *See id*. at 757–58 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011), which found no clear bar to detention on material witness warrants, and Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), which set the clearly-established standard for qualified immunity).

122. *Lebron*, 670 F.3d at 548.

123. *See id*. at 549–50.

124. *See id*. at 549.

125. *Id.* (viewing the recognition of a judge-made remedy as inconsistent with congressional control of military affairs).

126. *See* Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012).

127. *Id.* at 196 (reciting the complaint's allegations).

128. *See id.* at 206 (Wood, C.J., concurring).

129. *See id*. at 203.

the overseas context and military operation as decisive against the recognition of a remedy. The court noted the Supreme Court's refusal to allow service members to mount *Bivens* claims against their superiors and acknowledged some uncertainty about applying constitutional provisions to federal conduct overseas. The Seventh Circuit also showed some reluctance to authorize a *Bivens* action where Congress had specified alternative modes of compensation, such as the Military Claims Act and the Foreign Claims Act.[130] While none of these factors were decisive, the court held that together they counseled hesitation in recognizing a new right to sue. On the view taken in *Vance*, and in contrast to the view taken by common-law courts, citizens have no right to sue military officials who subject them to wrongful overseas detention and torture.

The D.C. Circuit reached the same conclusion in *Doe v. Rumsfeld*.[131] Doe, an Arab-language translator, worked for a military contractor in Iraq in 2005. He came under suspicion as a threat to coalition forces due to contacts he made with Iraqi clerics. The military interviewed him without counsel, placed him in solitary confinement, transferred him to Camp Cropper in Baghdad, and detained him for nine months. He alleged that he was kicked, beaten, choked, deprived of sleep, subjected to extremes of temperature, and targeted for mistreatment by his fellow detainees. Eventually, a status review board ordered Doe's release, and he returned to the United States. No charges were filed against him. In denying Doe's right to sue, the D.C. Circuit cited the now familiar special factors—the claim arose in a military, intelligence, and national security context, making it a poor candidate for recognition. True, the court acknowledged, Doe was a contractor, not actually a member of the armed forces. Therefore, he was not directly foreclosed from suing by the Supreme Court's decisions in such cases as *Stanley* and *Chappell*.[132] But, the court explained in a stunning departure from

130. *See id*. It may be possible for individuals injured by military activities to secure compensation under either the Military Claims Act, 10 U.S.C. § 2733 (2012), or the Foreign Claims Act, 10 U.S.C. § 2734 (2012). But these statutory compensation schemes provide for gratuitous administrative payments in accordance with regulations promulgated by the various branches of the armed services and do not authorize injured individuals to bring suit for damages in a federal (or state) court. *See* Clyde A. Haig, *Discretionary Activities of Federal Agents Vis-à-Vis the Federal Tort Claims Act and the Military Claims Act: Are Discretionary Activities Protected at the Administrative Adjudication Level, and to What Extent Should They Be Protected?*, 183 MIL. L. REV. 110, 116 (2005). The Acts, moreover, apply only to non-combatant activities, a limitation that likely forecloses compensation for claims arising from the detention of US citizens held as enemy combatants. *See* 10 U.S.C. §§ 2733(a)(3), 2734(a)(3) (2012) (authorizing compensation for injury or death incident to "noncombat activities").

131. *See* Doe v. Rumsfeld, 683 F.3d 390, 396 (D.C. Cir. 2012).

132. *See* United States v. Stanley, 483 U.S. 669, 678 (1987) (rejecting *Bivens* claim by service member that he was drugged without his consent); Chappell v. Wallace, 462 U.S. 296, 298 (1983) (refusing to allow service member to sue his superior officer under *Bivens*, and identifying the military chain of command as a special factor).

the crisp boundary-setting of the nineteenth century, "we see no way in which this affects the special factors analysis."[133]

Judicial rejection of tort suits by Padilla, Vance, Ertel, and Doe—citizens all—permits a more clear-eyed evaluation of the consequences of the decision in *Hamdi*. Once the Court abandoned the strict boundaries between civilian and military justice, and substituted a regime of due process balancing, lower courts could no longer treat military detention of civilians as categorically unlawful. Without a firm line, suits for redress of unjustified military detention and cruel, inhuman, and degrading forms of confinement and interrogation run headlong into an array of national security justifications. This was exactly the case in *Doe v. Rumsfeld*, where the D.C. Circuit reasoned that scrutinizing Doe's claims threatened to expose sensitive military information, deplete scarce military resources, "hamper the war effort," and "bring aid and comfort to the enemy."[134] Instinctively deferential to matters within the ken of the military, courts shy away from recognizing the viability of litigation that the government characterizes as a threat to the success of the mission. Accepting *Hamdi's* premise that the military can justifiably detain civilians as part of the war effort, lower courts have found it practically impossible to provide redress for detention in times of war, even when such detention is inhumane, indefinite, and wholly devoid of due process.

C. Property Taken in the Course of Military Operations

Apart from collateral damage inflicted on property located in the vicinity of battle,[135] war in the nineteenth century often led to the deliberate taking of property—horses, cattle, grain, carts, and wagons—to fuel the war machine.

133. *Doe*, 683 F.3d at 394. Notably, these courts did not invoke nineteenth-century cases that expanded the ambit of military justice to include camp followers, paymasters, and other civilians. *See Ex parte* Reed, 100 U.S. 13, 21–23 (1879) (civilian paymaster subject to court martial); WINTHROP, *supra* note 15, at 98 (noting that the articles of war subject "retainers to the camp" and "persons serving with the armies . . . though not enlisted soldiers" to the rules and discipline of war). In none of the cases (*Padilla*, *Vance*, *Ertel* or *Doe*) did the government attempt to justify detention and abuse by claiming that the individuals had been properly tried and sentenced by a court-martial.

134. *Doe*, 683 F.3d at 395.

135. Under the enemy property rule, owners have no right to compensation for the destruction of property that occurs during lawful military operations. Much of the property destroyed during the Civil War fell within the terms of this rule. *See* Dow v. Johnson, 100 U.S. 158 (1879). Northern troops operating in the south during the Civil War were not subject to liability for destruction of property under the controlling terms of the laws of war. Nonetheless, Congress did occasionally provide relief for lost property, such as that extended to those Southerners who remained loyal to the Union throughout the war. *See* Irving A. Hamilton, The United States Court of Claims and the Captured and Abandoned Property Act of 1863 (1956) (unpublished doctoral thesis in history, University of North Carolina) (available through thesis repository). Such decisions as *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), declared loyal those Southerners who received presidential pardons, considerably expanded the list of claimants on government largesse and eventually led to conflict between Congress and the Supreme Court. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (invalidating an act of Congress aimed at depriving courts of jurisdiction to enforce the right of pardoned claimants to compensation under the statute).

Soldiers must eat and armies must develop ways and means to feed them. But while authorized takings created a contract obligation running against the United States,[136] the task of securing compensation on such a contract could prove challenging.

This Section explores a nineteenth-century model that initially relied heavily on officer suits and congressional appropriations, enacted either to indemnify a responsible official held liable for a wrongful taking or to pay an authorized claim for compensation. Following a discussion of landmark decisions on the suability of military officers, this Section then traces the role of the US Court of Claims in the gradual extension of contract-based compensation for the military taking of property. The Section concludes with a discussion of the provision of compensation for property taken in the course of overseas military operations.

1. The Nineteenth Century

For individuals who had their property taken by government officials, the common law presented a challenge. If the government authorized the taking of property, exercising its eminent domain power, the common law held that the government itself was bound to make good the loss.[137] But if the government did not authorize the taking, the common law held the officer who invaded private property rights personally liable.[138] In either case, the ability of the claimant to receive full compensation from the government would depend on the willingness of Congress to pick up the tab. It could do so directly, by appropriating funds to compensate for authorized takings, or indirectly in the case of officer liability, by adopting a private bill or other appropriation to pay the judgment or repay the

136. Typically, the commissary and quartermaster departments bore responsibility for the care and feeding of the army. They would often purchase supplies in the market and transport them to the battlefield. When supplies ran short, however, officers would requisition or "take" private property to feed the soldiers. In a typical taking, they would issue certificates to the owner of the requisitioned property, promising compensation on behalf of the government. *See* United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); WINTHROP, *supra* note 15, at 775.

137. *See* Buron v. Denman (1848) 154 Eng. Rep. 450 (holding that the British government ratified and approved the officer's action in destroying a slave plantation, thereby assuming responsibility for the payment of compensation for lost property); WINTHROP, *supra* note 15, at 774 (describing the question of whether the army may "lawfully take or destroy private property of our own citizens" as a question of necessity; explaining that the "circumstances, however, must be urgent; the exigency immediate, not contingent or remote"; concluding that, if unjustified by exigency, then the "commander giving the order and those acting under him are trespassers, and it is they, and not the United States, who are liable in damages to the injured party"); *see also* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 205-06 (1926) (explaining that the officer bore personal liability in tort unless the act was adopted as that of the government).

138. *See, e.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852).

officer.[139] The House Committee on Claims conducted a lively business before 1855, evaluating applications for compensation and indemnity.[140]

Rightly viewed as a landmark decision on military accountability for the invasion of property rights, *Mitchell v. Harmony* arose from the loss of property during the Mexican-American War.[141] The loss occurred when Colonel Mitchell, leading army forces in Chihuahua, deep within Mexican territory, took control of the property of Manuel Harmony, a naturalized citizen of the United States. Harmony had been accompanying the army on its invasion of Mexico with a license from the US government to sell goods to the Mexican people. When Harmony proposed to leave with his property and return to the safety of the United States, Colonel Mitchell interceded. He forced Harmony to stay with the army, thereby assuming responsibility for the protection of his property. The army made use of Harmony's mules and wagons in connection with the battle of Sacramento, but Harmony's property was lost when Mexican forces re-took the town.

In upholding a judgment against Mitchell of some $100,000, the Supreme Court established three important principles of accountability. First, the common-law right of action for a trespassory taking applies to the conduct of US military forces in the midst of a military campaign. While the government would ordinarily owe no obligation to compensate for the losses that an opposing force inflicts on camp followers like Harmony, Mitchell's assumption of control over Harmony's property changed the calculus and made Mitchell legally accountable. To be sure, Mitchell was acting under the direct orders of his commanding officer. But as the Court stated, "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the

139. In this respect, it seems unlikely that civil juries were expected to pass on claims for just compensation under the Fifth Amendment when the government took property for public use. *Cf.* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 435 (2012) (viewing the Fifth Amendment as contemplating civil jury determination of what compensation was just). The assessment of tort-based damages might well include a punitive element that would have no analogy in the determination of just compensation.

140. *See* Pfander & Hunt, *supra* note 92 (cataloging petitions for indemnity and the practice of the House Committee on Claims). The common law's allocation of responsibility posed a challenge to claimants seeking to identify the proper defendant. A suit against an officer might fail if the officer were able to show that the taking was duly authorized. But that did not necessarily foreclose all recovery; it meant that the claimant was obliged to seek compensation by petition to Congress. Similarly, Congress might refuse to pay a public claim for compensation on the ground that the official's action was unauthorized, implying that the suit should properly proceed against the official. This uncertainty for claimants was exacerbated by jurisdictional limits because claimants lacked a forum with power to hear both sorts of claims in a single proceeding. Before the Federal Court of Claims was established, all money claims against the federal government were submitted to Congress. Even after the court's creation in 1855, it lacked power to hear claims sounding in tort against federal officers. Plaintiffs thus lacked a forum in which they could join alternative takings claims against both the government and the officer as defendants. (As noted in Part III, this difficulty persists today.)

141. *Harmony*, 54 U.S. (13 How.) at 115.

order of his superior." Such superior orders can "palliate" but they "cannot justify" a taking.[142]

Second, the *Harmony* Court found that the right to sue came within the scope of the common-law transitory tort doctrine. If *Mostyn v. Fabrigas* revealed British solicitude for individual rights,[143] the *Harmony* Court hastened to explain that rights of property were "not less valued nor less securely guarded" in the United States.[144] Harmony initiated suit in New York, effecting service of process on Mitchell after the end of the Mexican conflict. That gave the circuit court jurisdiction under the Court's earlier decision in *McKenna v. Fisk*, which imported the transitory tort doctrine into American law.[145] The *McKenna* Court wrote:

> [T]he courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions. . . . [Courts of the United States] have a like jurisdiction in trespass upon personal property with the courts in England and in the states of this Union.[146]

This broad conception of jurisdiction was surely adequate to the task in *Harmony*, and was said to apply as well to claims brought against officers of the United States by foreign nationals.[147]

Finally, the *Harmony* Court rejected Mitchell's argument that the taking of Harmony's property was justified by military necessity. To start, the Court identified two circumstances that would justify a taking: (1) where possession or destruction of property is needed to "prevent it from falling in to the hands of the public enemy," and (2) when a military officer "charged with a particular duty" needs it for "public service" or "public use."[148] Acknowledging these two necessity defenses, the Court found that Mitchell had failed to make the requisite showing. Property could be destroyed only where there was "immediate and impending danger from the public enemy," and it could be taken only upon "an urgent necessity for the public service."[149] The Court upheld the jury's conclusion that the requisite showings of necessity had not been made.[150]

Shortly after *Harmony* came down, Congress created the Court of Claims, in which individuals could seek compensation for military and other government

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142. *Id.* at 137.
143. *See* Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1025–26.
144. *Harmony*, 54 U.S. (13 How.) at 136.
145. *See* 42 U.S. (1 How.) 241, 249 (1843).
146. *Id.*
147. *See id.* (embracing the possibility of suits by foreign nationals as consistent both with the prior decision in The Apollon, 22 U.S. (9 Wheat.) 362 (1824) and with the notion that the courts were open to foreign national friends).
148. *Harmony*, 54 U.S. (13 How.) at 134.
149. *Id.*
150. *See id.* at 135.

takings. The Court of Claims' jurisdiction in the 1860s was limited to claims for breach of express or implied contract; it had no jurisdiction to entertain takings claims under the Fifth Amendment. But the absence of takings jurisdiction did not prevent the award of damages; the Court of Claims held that the government still owed a duty to make just compensation to the owner by virtue of an implied contract that arose from the taking. The "legal duty to make compensation raises an implied promise to do so; and here is found the jurisdiction of this court to entertain this proceeding."[151] In evaluating the existence of an implied contract, therefore, the courts did not apply formal contract doctrine in assessing the evidence of offer, acceptance, and consideration. Instead, awards were based on the court's assessment of the duty of just compensation as applied to the destruction of private property in military conflicts.

By setting up the Court of Claims, Congress may have subtly influenced the judicial evaluation of responsibility for takings claims. The government, as the new Court of Claims explained in *Grant v. United States*, was "bound to make just indemnity to the citizen or subject whenever private property [was] taken for the public good, convenience, or safety."[152] That meant, as a practical matter, that claims once framed as suits against the individual military officer might now proceed against the government itself. To be sure, the *Grant* court distinguished *Harmony* on the ground that, because the danger in *Harmony* did not qualify as "immediate and impending," the taking of property constituted a tort on the part of Colonel Mitchell.[153] But one supposes that both the *Harmony* Court and the Court of Claims would tend to resolve doubts in favor of allowing the action for compensation to proceed in an available forum. In that sense, the creation of the Court of Claims may have broadened the government's legal responsibility for takings to some degree by encouraging that court to make relatively convenient compensation available to claimants in doubtful cases through a finding of necessity or government authorization.

Needless to say, an implied contract theory of compensation was flexible enough to support claims for compensation outside the territorial boundaries of the United States. Citizens of the United States have thus secured compensation for government takings in such places as Austria, El Salvador, and Costa Rica.[154] In addition, foreign nationals have sometimes secured compensation for the loss of their property. For instance, a foreign national was permitted to pursue

151. Grant v. United States, 1 Ct. Cl. 41, 50 (1867).

152. *See id.* at 44; *see also* Wiggins v. United States, 3 Ct. Cl. 412 (1867). Grant was a government contractor who supplied the US army in Tucson, Arizona with flour, corn, barley, and beans. When the Civil War began in 1861, the commander of US forces ordered the destruction of property to prevent its falling into the hands of insurrectionary forces. Grant later brought suit for the value of the property destroyed, recovering a judgment of some $41,000. *Id.* at 412–17.

153. *See Grant*, 1 Ct. Cl. at 48 (distinguishing *Harmony*).

154. *See* Seery v. United States, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (property in Austria); Langenegger v. United States, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (property in El Salvador); *Wiggins*, 3 Ct. Cl. at 422 (property in Costa Rica).

compensation for the government taking of military radar equipment in the Philippines.[155] Congress formalized the right of foreign nationals to pursue compensation in the Reciprocity Act, which specifies that foreign nationals may bring takings claims in the Court of Claims if citizens of the United States can pursue similar claims against the government of the foreign country.[156]

2. The Twenty-First Century

Over time, the theory of liability for government takings switched from a claim based on an implied contract to a claim based on the Fifth Amendment. This Section explores the implications of that change for the ability of individuals to secure compensation for the taking of their property at the hands of military officers. As with tort-based remedies against the government for military detention and abuse, the switch to a constitutional predicate for takings claims has complicated the task of securing just compensation.

According to the best available scholarly reconstruction, the basis for seeking compensation for the taking of property gradually evolved in the wake of Congress's decision in 1877 to expand the jurisdiction of the Court of Claims to include claims founded on the Constitution.[157] By 1933, the Supreme Court ruled that suits seeking compensation for taken property were not really based on implied contracts with the government, but instead "founded upon the Constitution."[158] The Court did so to help clarify the proper amount of compensation. The government had argued below that, inasmuch as the plaintiff's theory of recovery was based on an implied contract, it owed no interest on the compensation awarded. The Court squarely rejected this form-over-substance argument, concluding that the right to compensation, as defined in prior eminent domain cases, included the recovery of interest.[159]

The shift to a constitutional predicate, both in the definition of the Court of Claims' jurisdiction and in the Supreme Court's use of that jurisdiction to constitutionalize the implied contract theory of compensation, was apparently

155. *See* Turney v. United States, 115 F. Supp. 457, 464–65 (Ct. Cl. 1953); *see also* Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (compensation duty applied to property owned by nonresident foreign national).

156. *See* 28 U.S.C. § 2502(a) (2012). On the application of the Reciprocity Act, see *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1354–55 (Fed. Cir. 2004) (concluding that a Sudanese corporation had standing under the Act to pursue a takings claim against the United States).

157. The Tucker Act broadened the jurisdiction of the Court of Claims to encompass "[a]ll claims founded upon the Constitution of the United States." Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. §§ 1491, 1346 (2012)). Professor Brauneis reports that the expansion of the court's jurisdiction may have reflected some concern with the efficacy of the implied contract remedy in cases where the government contested the plaintiff's title to the property in question. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 137–38 n.342 (1999).

158. Jacobs v. United States, 290 U.S. 13, 16 (1933).

159. *See id*. at 17–18 (collecting cases).

meant to expand individual access to remedies against the government.[160] But that does not appear to have been the case in the long run, at least in suits for compensation brought in connection with military hostilities. In *United States v. Caltex (Philippines), Inc*., for example, the Supreme Court refused to order compensation to a Philippine corporation whose property was destroyed during World War II to prevent its falling into the hands of the enemy. The Court acknowledged that the US military took control of the Philippine-based oil production facility in somewhat the same way that Colonel Mitchell took control of Harmony's property in Mexico. But the military decision to destroy the oil terminal with the threat of Japanese invasion impending was, to the Court, one of the misfortunes of war that did not give rise to a compensation duty.

In subsequent cases, lower courts have read the *Caltex* case as implicitly rejecting nineteenth-century Court of Claims precedent.[161] For instance, when an Iraqi sheik applied for compensation for the destruction of his property during the battle of Fallujah in *Doe v. United States*, the Court of Claims viewed those earlier decisions as having been abrogated by *Caltex*.[162] Officers of the United States specifically bargained with the sheik to use his property to establish a command post, asking him to leave the premises and issuing him a written document that memorialized the agreement. When the property was later destroyed, the government offered him modest compensation under the Foreign Claims Act, but he chose to sue in the Court of Claims instead.[163] Despite the similarities to *Harmony* in the official exercise of direct control over property owned by another and later destroyed by enemy forces, the court denied recovery.

The decision, best described as multifaceted, was no doubt informed by the court's recognition that Fallujah was a theater of relatively active military conflict. Control over Harmony's property, by contrast, was taken at some distance from hostile forces. But the *Doe* court did not apply the enemy property rule as such in barring recovery.[164] Instead, the court found that the plaintiff had failed to state a cognizable takings claim under the Fifth Amendment and had also failed to allege official contracting authority with the specificity needed to

160. As Professor Brauneis reports, the decision in *Jacobs v. United States*, constitutionalizing the just-compensation remedy, was among the cases the Court relied on in recognizing a constitutional tort claim in *Bivens*. *See* Brauneis, *supra* note 157, at 137–38 n.342. Congress changed the court's name to the US Court of Federal Claims, but this Article will continue to refer to the court by its older name.

161. *See* Grant v. United States, 1 Ct. Cl. 41, 44 (1867) (finding that the military destruction of property to prevent its falling into enemy hands gave rise to takings liability); *see also* Wiggins v. United States, 3 Ct. Cl. 412 (1867) (same).

162. *See* Doe v. United States, 95 Fed. Cl. 546, 564 n.12, 564–65 (2010) (concluding that *Caltex* had implicitly overruled *Harmony*, *Grant*, and *Wiggins*, to the extent that they ordered compensation for takings accompanied by a measure of military necessity).

163. *See id*. at 552, 557.

164. *See id*. at 555; *see also* Perrin's Case, 4 Ct. Cl. 543, 547–48 (1868) (holding that property of a US citizen located in an enemy town was subject to destruction as enemy property, and therefore its loss was not compensable).

state an implied contract claim.[165] As for the takings claim, the court found that the law no longer embraced the broad idea expressed in the nineteenth century—that the government has a duty to compensate those whose property has been taken due to military necessity.[166] Here, it was difficult to argue that the military destroyed the property to prevent its falling into enemy hands as in *Caltex*; the military took control of the property as a command post, thereby pressing it into public service under the terms of a written memorandum. But the court nonetheless concluded that *Caltex* barred recovery, primarily because takings law no longer regarded such property-based claims against the military as compensable.[167]

As evidence that times had changed, the *Doe* court focused not on the level of *military* authority possessed by the officers but on the degree of *contractual* authority possessed by the officers. [168] In the old days, the inquiry focused on the level of the officer's command authority—high ranking officers could bind the government by ordering a taking of property due to military necessary. If lower level officers took property on their own authority, such takings would not bind the government in contract. Instead the suit would proceed in tort against the responsible officials in their personal capacity. The *Doe* court's emphasis on contractual authority fundamentally altered the nature of the inquiry. The change suggested that the government's liability depends less on the officer's authority to take the property in question than on the involvement of an officer with the authority to enter into binding contracts on behalf of the government.

Changes in the underlying law of tort-based liability underscore the importance of the *Doe* court's refusal to evaluate the officers' authority from the perspective of implied-contract and tort theory. In the nineteenth century, as we have seen, lower-level officers acting on their own authority bore personal liability in tort for their takings. Today, no such tort-based liability can be imposed on such officials. The Westfall Act abrogates the assertion of tort-based

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165. In addition, the court found that the plaintiff lacked standing to pursue a Fifth Amendment takings claim and that the so-called *Totten* bar deprived the court of jurisdiction to consider a contract claim that arose from a secretive, espionage-based relationship. *See Doe*, 95 Fed. Cl. at 578–82 (applying Totten v. United States, 92 U.S. 105, 107 (1875) and Tenet v. Doe, 544 U.S. 1, 7–11 (2005) in concluding that the contract was sufficiently connected to espionage to trigger the jurisdictional bar to suit).

166. *See Doe*, 95 Fed. Cl. at 559–63 (describing the early decisions as abrogated).

167. *See id.* at 565. Although neither the *Caltex* Court nor the *Doe* court relied on the point, one might argue that the transitory tort doctrine does not apply to claims for the destruction of real property, as distinguished from personal property. In a famous early application of the "local action rule," Chief Justice Marshall dismissed a trespass claim brought against Jefferson for the invasion of real property located in New Orleans; such real property claims were not transitory and were suable only in the district where the property was located. *See* Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411). While Congress has since abrogated the local action rule as a matter of federal venue law, see 28 U.S.C. § 1391(a)(2) (2012), the idea that property owners must pursue justice in their home courts, if at all, may help to explain and rationalize both *Caltex* and *Doe*.

168. *See Doe*, 95 Fed. Cl. at 584 (pointing to the fact that plaintiff has pleaded no facts "that could lead the court reasonably to infer that these operatives had authority to bind the United States").

claims against officers of the United States for actions taken within the scope of their official duties. Such claims must be brought instead against the government itself under the FTCA.[169] But the FTCA specifically prohibits imposing tort-based liability for injuries that occur outside the territorial boundaries of the United States, and its discretionary function exception might well bar claims that arise within the United States.[170] As a practical matter, then, the law no longer permits the assertion of either/or claims against the government (in contract) and its officers (in tort), especially when takings occur outside the United States. Thus, the law narrows access to compensation.

The *Doe* court imposed another new restriction on the availability of just compensation by demanding definite contractual terms and conditions. In the course of analyzing the plaintiff's claim for breach of an "expressed or implied contract,"[171] the court noted that at the time the property was occupied, the plaintiff had been promised "compensation" in exchange for his cooperation.[172] However, the court found this promise too indefinite to establish a contract.[173] Here again, the court's approach departed from the contract analysis of the nineteenth century, which treated the implied contract to compensate as arising from the taking of property, rather than from the articulation of definite contract terms and conditions. The assumption underlying the nineteenth century approach was that it fell to the court to assess the extent of the damage and to enter a judgment in an amount that would provide just compensation. The implied contractual obligation arose from the taking itself; no specificity or definiteness was needed to create a legal obligation.

Finally, the court's analysis of the extraterritorial applicability of the Fifth Amendment reveals a potentially important shift in the doctrine that will further limit access to compensation. The *Doe* court couched its analysis in terms of whether the plaintiff, as an Iraqi citizen seeking recovery for property located in Iraq, had "standing to bring a takings claim."[174] That question led the court to evaluate the extraterritorial application of the Fifth Amendment to takings claims in foreign countries. The court canvassed decisions addressing the degree to which the Constitution applies to federal government activity outside the territorial boundaries of the United States. In *United States v. Verdugo-Urquidez*, the Supreme Court refused to apply the Fourth Amendment's warrant requirement to searches conducted in Mexico.[175] By contrast, the Supreme Court

169. For an account of the interplay between official immunity and the government liability under the Westfall Act, see Pfander & Baltmanis, *W(h)ither* Bivens*?*, *supra* note 111.

170. On the FTCA's application only to torts occurring in the United States, see *Smith v. United State*s, 507 U.S. 197 (1993).

171. *Doe*, 95 Fed. Cl. at 582.

172. *Id.* at 584–85.

173. *See id*.

174. *Id.* at 567.

175. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990). Confronted with the question whether federal officials were obliged to secure a US search warrant before conducting a search of the defendant's home in Mexico, Chief Justice Rehnquist's majority opinion interpreted the Fourth

held in *Boumediene v. Bush* that the habeas non-suspension privilege extends to foreign nationals detained as enemy combatants at Guantanamo Bay.[176] Correctly identifying uncertainty about the extraterritorial application of the Fifth Amendment, the *Doe* court found that the plaintiff lacked standing.[177]

Although likely mistaken in framing the law of extraterritoriality in terms of standing, the *Doe* court nonetheless put its finger on a problem of growing concern. The Supreme Court has treated issues of extraterritoriality (especially in recent years) as posing the question whether the plaintiff can state a claim for relief on the merits, rather than as a question of the plaintiff's standing or the court's subject matter jurisdiction.[178] But however one might characterize the issue, extraterritoriality now surely plays an important role in the analysis of whether any particular taking qualifies as compensable under the Fifth Amendment. This represents a departure from the nineteenth century's assumptions about the transitory nature of tort and takings law. Under the terms of the transitory tort doctrine, the location at which the government took private property did not have controlling significance. Harmony successfully pursued Mitchell in New York court on a claim growing out of the loss of property in Mexico. The *Harmony* Court specifically embraced the common-law transitory tort doctrine in permitting the claim to proceed.

Amendment as applicable only to the "people" of the United States, which he defined narrowly so as to exclude Mexican citizens. Justice Kennedy joined the opinion, but wrote separately to articulate a functional approach to the question that emphasized the possibility of conflict between the search-and-seizure laws of the United States and those of Mexico. *See id.* at 275 (Kennedy, J., concurring). Justice Kennedy's approach leaves open the possibility that the US Constitution might govern matters outside the United States when the circumstances present no similar likelihood of conflict. For a discussion, see PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 128–33.

176. *Compare Verdugo-Urquidez*, 494 U.S. at 261, *with* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008). *Cf.* Chapman, *supra* note 52, at 417–23 (identifying examples from the early nineteenth century in which Fifth Amendment due process norms were applied to the arrest of pirates captured outside the territory of the United States).

177. *See Doe*, 95 Fed. Cl. at 567. For a criticism of prudential standing limitations on the power to adjudicate claims seeking just compensation for takings that occur outside the United States, see Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673 (2010).

178. This presumption against extraterritorial application of US law "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). For recent applications, see Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124 (2013) (refusing to apply alien tort statute to conduct in Nigeria); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010) (refusing to apply US securities laws to an issuer in Australia). These days, the Court treats questions about the extraterritorial application of US law as a matter of "prescriptive" jurisdiction going to the merits of the claim, rather than of subject matter jurisdiction. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); Arabian Am. Oil Co., 499 U.S. at 253 (explaining that the extraterritorial jurisdiction under the Lanham Act was allowed because the allegedly unlawful conduct in Mexico had some effects within the United States); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmt. a (1987). For an effective introduction to the various flavors of jurisdiction that come into play in connection with extraterritoriality, see generally Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303 (2014).

Similarly, when the government took property abroad, citizens and others were permitted to mount takings claims. In *Seery v. United States,* US military officers occupied the plaintiff's Austrian property as an officer's club after World War II had ended.[179] Because the end of hostilities was viewed as terminating any military necessity for the occupation and ending any characterization of the property as "enemy property," the Court of Claims ruled that the occupation amounted to a compensable taking.[180] The fact that the property occupied was real property and was located in a foreign land was not seen as a bar to recovery. Similarly, the government's taking of military radar equipment in the Philippines triggered the obligation to pay just compensation, even though the property in question was owned by a Philippine corporation.[181] Thus, growing doubts about the extraterritorial application of the Constitution, reflected in *Doe*, may undercut the government's obligation to provide just compensation for overseas takings, offering further evidence that the constitutionalization of rights may tend to dilute remedial effectiveness.

D. The Inadequacy of Statutes Incorporating Common-Law Remedies

Before evaluating the implications of the gradual shift from hard-edged common-law remediation to the open-ended assessments that attend constitutional balancing, we should pause to take stock of the current viability of common-law claims. Critics of the comparative project in this Essay might argue that the federal government has made adequate provision by statute for the assertion of claims based on common-law tort and contract theories of liability. If the common law has been preserved, then it arguably deserves a place alongside constitutional remedies in the comparative assessment of today's system of individual remediation. Or to put the matter more sharply, the continued viability of common-law remedies may undercut the force of this Essay's comparative conclusion that today's constitutional remedies depart from the common-law ideal or baseline of the nineteenth century.

Such an argument appears to find support in statutory provisions for the imposition of tort and contract liability on the federal government. For instance, the FTCA provides for the government to accept legal and financial responsibility for the torts committed by its officers and employees in the scope of their employment.[182] It defines the government's tort-based liability by applying the law of the state where the negligent or wrongful act occurred, including that state's choice-of-law rules.[183] Therefore, viewing the FTCA as

179. *See* Seery v. United States, 127 F. Supp. 601, 602–03 (Ct. Cl. 1955).

180. *Id.* at 603.

181. *See* Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953).

182. On the origins of the FTCA in the 1940s, *see* Pfander & Aggarwal, *supra* note 105, at 424–27.

183. *See* 28 U.S.C. § 1346(b)(1) (2012); Richards v. United States, 369 U.S. 1, 11 (1962) (applying the whole law, including choice-of-law rules, of the place where the negligence occurred).

having preserved and incorporated common-law norms, one might argue that *Bivens*-based liability supplements the scheme of common-law remedies and operates primarily to provide a distinctive remedy for constitutional violations.[184]

Whatever its other strengths, however, the FTCA does not provide a remedy for common-law tort claims that citizens such as Hamdi, Padilla, Vance, and others might have brought against the government in connection with their military confinement and abuse in the war on terror. For starters, the FTCA forecloses government responsibility for any claim arising out of "the combatant activities of the military or naval forces."[185] It seems quite likely that all military detention pursuant to the AUMF[186] would qualify as combatant activities for purposes of triggering the exclusion.[187] Apart from the combatant activities exemption, the FTCA excludes liability for any claim "arising in a foreign country."[188] Many of the claims canvassed in this Section, including those by Vance, Ertel, and Doe, arose from overseas military action. Even Hamdi's claim began with detention in a foreign country.

Apart from the military and overseas exclusions, the FTCA also excludes the principal theories of tort-based liability for abusive detention—assault, battery, false arrest, and false imprisonment.[189] To be sure, the intentional tort exclusion has its own proviso that restores government liability when the specified torts are committed by "investigative or law enforcement officers."[190] But the proviso defines such officers to include only those who have been empowered by law to execute searches, seize evidence, and make arrests for violation of federal law.[191] It thus rules out government liability for the intentional torts committed by most service members of the military, except perhaps those with law enforcement responsibilities (such as the military police).

184. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 20 (1980) (rejecting the government's argument that the FTCA displaced *Bivens* liability and concluding instead that constitutional tort remedies supplement the regime of FTCA-based tort liability).

185. *See* 28 U.S.C. § 2680(j) (2012). Courts have adopted a relatively broad interpretation of the term "combatant activities." *See, e.g.*, In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 351 (4th Cir. 2014) (concluding that a contractor who provided water treatment and trash disposal at military bases in Iraq and Afghanistan was engaged in combatant activities).

186. *See* Authorization for the Use of Military Force of 2001, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified 15 U.S.C. § 1451 (2012)). Notably, it was the AUMF on which the Court relied in concluding that Congress had authorized the military confinement of citizens captured in the war on terror. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

187. *See* Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009) (concluding that the combatant activities exception applied to abuse and torture at Abu Ghraib prison in Iraq and thus impliedly preempted tort claims against private contractors).

188. 28 U.S.C. § 2680(k) (2012). *See* Smith v. United States, 507 U.S. 197, 199 (1993) (rejecting claim based on injury that occurred in Antarctica).

189. *See* 28 U.S.C. § 2680(h) (2012).

190. *Id.*

191. *See id.*

True, individuals injured by military activities can petition for gratuitous compensation under statutes that provide for the administrative adjustment and settlement of their claims.[192] But these statutory compensation schemes do not authorize injured individuals to bring suits for damages in a federal (or state) court and do not provide for judicial review of the grant or denial of compensation. In short, a closer evaluation of the remedies available to US citizens detained and allegedly mistreated by the military during the war on terror reveals that common-law remedies have been almost entirely displaced.

One might make a similar argument based on the Tucker Act, which provides for the assertion of contract-based theories of liability against the government as well as claims (such as those for the taking of property) founded directly on the Constitution. In theory, at least, the jurisdiction of the Court of Claims embraces both the implied contract claim and the constitutional claim that now lies at the heart of modern takings litigation. But as the decision in *Doe* makes clear, the implied contract theory of liability no longer provides an effective vehicle for the assertion of takings claims, but instead triggers a nuanced assessment of contract doctrine.[193] Likewise, constitutional vindication must come, if at all, through the application of constitutional norms—norms as we have seen that do not necessarily apply to events outside the United States. As with the federal courts' authority to hear tort claims under the FTCA, the power of the Court of Claims to hear common law contract claims under the Tucker Act no longer assures an effective remedy for the victims of military takings of property in times of war.

III.
WHAT WOULD DICEY SAY?

Without access to common-law remedies, individual citizens (and friendly foreign nationals) find that the shift to constitutional analysis has been accompanied by a distinct judicial reluctance to protect them in their interactions with military forces. In habeas litigation, the Court has substituted an open-ended balancing of interests under the Fifth Amendment's Due Process Clause for the common law's absolute (absent lawful suspension) civilian privilege against military detention. The implied constitutional right to sue for damages under *Bivens* has occasioned a similar loss of effective remediation for those seeking redress for wrongful or harsh detention. Finally, the right to assert property claims has suffered notable erosion as the law has switched from an early focus on implied contract to one now based on the vagaries of "just compensation" under the Fifth Amendment.

192. *See supra* note 130.

193. On the availability of implied contract claims under the Tucker Act, see *supra* note 157 and accompanying text.

Those who might read Dicey to have predicted this loss of remedial effectiveness would suppose that he would have also endeavored to understand the root causes of the change. It would be too simplistic, I believe, to suggest that the Court's switch to the constitutionally-inflected analysis was the sole or a primary cause of remedial attrition. Instead, changes in the underlying framework of government accountability have also contributed to the softening of previously hard edges and the blurring of lines of separation.

At least four factors seem to have reshaped the judicial approach to civilian-military interactions: (i) a change in the conception of the proper role of courts when faced with claims that individual military officials violated the rights of citizens; (ii) a switch from rules to functional standards to measure the legality of executive branch activity; (iii) a growing preference for declaratory forms of judicial intervention, accompanied by forward-looking injunctive-style remedies, rather than backward-looking damage awards; and (iv) the rise of symbolic or expressive litigation, as a vehicle for advancing the interests of the members of non-governmental organizations (NGOs). The switch to constitutional analysis did not bring these factors into existence, but it does provide the framework within which they now operate.

A. Changing Perceptions of Judicial Duty

What accounts for the vigor with which the nineteenth-century common-law courts enforced the prohibition against military encroachments on the rights of civilians? In many War-of-1812 trespass cases and in the habeas case involving Samuel Stacy, the courts do not appear to have considered as relevant the possibility that the civilians in question may have been lending aid and comfort to the enemy and undermining the nation's military efforts. Stacy, in particular, was accused of providing information that facilitated the British assault on Sackett's Harbor while American forces were away.[194] Yet Judge Kent shrugged off this evidence of treasonous malfeasance, explaining that the greater the evidence of complicity, the more important the preservation of strict boundary lines and the primacy of civil (rather than military) justice.[195]

The commitment to formal boundaries may have reflected simple agrarian truths—good fences make good neighbors—but it surely also arose from a specific conception of the proper role of the three branches of government. The executive branch was to act with vigor to prosecute the war (and other affairs of state) within lines drawn by the common and statute law. Courts were expected to police these lines and to ignore the claims of emergent necessity with which military officers would inevitably defend civil rights encroachments. If military officers overstepped the line, courts were expected to say so, either in actions for trespass or in applications for habeas. Ultimately, Congress was in control. It

194. *See supra* notes 99–100 and accompanying text.
195. *See supra* note 100.

could indemnify officers for any damages imposed on them while acting in good faith, and it could authorize the suspension of habeas during invasion or rebellion, thereby authorizing detention on suspicion.

Justice Joseph Story explained this theory in *The Apollon*, a remarkable 1824 decision that upheld the imposition of liability on government officials who sought to enforce American revenue laws against suspected smugglers.[196] The plaintiff was the owner of a French vessel that had been seized by US revenue officers as it sought to land its cargo in Spanish Florida, apparently to avoid American import duties. Evaluating the seizure, Story found that it was unlawful under the law of nations for a US official to enter foreign territory for the purpose of enforcing US law. Thus, when officials did so, they violated the rights of the foreign vessel and its owner and were liable for damages. The government argued strenuously that the border river between Georgia and Spanish Florida was a lawless enclave of smugglers and tax evaders. Story dismissed this assertion on the ground that the case must be decided not on the basis of general policy considerations but on its specific facts.[197]

Here, Story was drawing the same hard lines as Kent, and he was doing so on the basis of the same conception of judicial duty. Story made this remarkable statement:

> [T]his Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy, or the authority of the government to defend its own rights against the frauds meditated by foreigners against our revenue system through the instrumentality and protection of a foreign sovereignty. Whatever may be the rights of the government, upon principles of the law of nations, to redress wrongs of this nature, and whatever the powers of Congress to pass suitable laws to cure any defects in the present system, our duty lies in a more narrow compass; and we must administer the laws as they exist, without straining them to reach public mischiefs, which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.[198]

196. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 371 (1824) (Story, J.).
197. *See id.* at 376.
198. *Id.* at 366–67.

Story understood that emergencies called for executive branch action, but did not regard the emergency itself as having legalized the action taken, however praiseworthy.[199]

Chief Justice Taney expressed the same view of the proper role of the government branches in *Harmony*.[200] Chief Justice Taney proclaimed the actions of the US army in Mexico to have been "boldly planned and gallantly executed," but that could not legalize the taking of Harmony's property.[201]

> But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.[202]

Echoing the comments of Justice Story in *The Apollon*, Chief Justice Taney here disclaimed any power to legalize the trespasses, however gallant and commendable.

Nineteenth-century conceptions of the judicial duty contrast sharply with the views of modern jurists, so sharply in fact that justices from different centuries seem to speak different languages. Rather than disclaiming power to legalize official misconduct, modern courts bend over backwards to avoid the recognition of a right to seek redress and thus effectively immunize official misconduct from legal scrutiny. Consider the representative approach of Justice Anthony Kennedy addressing the claims of the Muslim men who were rounded up in the aftermath of the September 11 attacks and subjected to extremely harsh conditions of confinement. (The men were, for the most part, undocumented aliens who could not claim rights as citizens.) In his second opinion on these claims,[203] *Ziglar v. Abbasi*, Justice Kennedy held that the claims were not

199. Professor Stephen Sachs has suggested to me that Justice Story may have seen himself as applying Spanish tort law in evaluating the claims for money in *The Apollon*. Perhaps, but Justice Story made no references to Spanish law and treated the matter as governed by the law of marine tort. *See id*. at 373.

200. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1852).

201. *Id.*

202. *Id.*

203. In his first opinion in what became a long-running challenge to policies overseen by the Attorney General, John Ashcroft, and the FBI director, Robert Mueller, Justice Kennedy reworked the pleading rules to make it more difficult to state a claim against high government officials. *See* Ashcroft v. Iqbal, 556 U.S. 662, 680, 684 (2009) (holding that the claims against high government officials did not reach the requisite level of plausibility and casting doubt on the viability of such claims more generally).

actionable under the *Bivens* doctrine.[204] As a consequence, claims that the men were targeted for harsh treatment on the basis of improper factors, such as their religion or national origin, were dismissed.[205] Dissenting, Justice Breyer invoked the decision in *Korematsu* as a cautionary tale, likening the *Ziglar* decision to the Court's ratification of Franklin D. Roosevelt's decision to intern citizens of Japanese ancestry during World War II.[206]

Instead of confidently proceeding on the basis of longstanding common-law rules, Justice Kennedy paused at the threshold to express doubt about the wisdom of the enterprise of judicial remediation. Justice Kennedy built on the ideas expressed in the Court's post-*Bivens* decisions and portrayed the recognition of a judge-made federal right to sue as a "significant step under separation-powers," one that should be undertaken cautiously.[207] Among the reasons to proceed cautiously were: the burden on government employees sued in their personal capacities; the regulatory contexts that suggest Congress meant for the courts to stay away; and the existence of alternative remedial schemes.[208] On such a view, the suit for damages becomes a remedy of last resort, available only in circumstances where equitable remedies prove insufficient to redress harm and deter future violations. Justice Kennedy candidly admitted that the judicial recognition of suits for damages was "disfavored."[209]

As a result, Justice Kennedy explained that in most cases the Court would not permit a constitutional suit for damages to proceed but rather leave the matter to Congress. The judicial inquiry would necessarily entail a weighing of "the costs and benefits" with due attention to special factors counselling hesitation.[210] In turn, this open-ended special factors analysis would include consideration of the breadth of the government policy under review; the threat of vexatious litigation; the burdens associated with discovery; the possibility that the litigation would occasion an inquiry into "sensitive issues of national security"; and the possible threat that high officers who face personal liability might refrain from taking "urgent" action "in a time of crisis."[211]

In evaluating the viability of constitutional tort claims against federal officials, Justice Kennedy did not consider alternative forms of tort-based redress at common law. Thus, Justice Kennedy did not ask whether the common law would have permitted an action for false imprisonment and battery to proceed

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204. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017). The Court left room for one possible exception. While the claims against Ashcroft and Mueller were dismissed, those against the warden of the federal detention center were remanded for further consideration. *Id.*

205. *See id.* at 1864, 1867.

206. *Id.* at 1872, 1884 (Breyer, J., dissenting).

207. *Id.* at 1856.

208. *Id.* Notably, the alternative remedies identified were suits for habeas and injunctive relief, rather than suits for damages under the FTCA.

209. *Id.* at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

210. *Id.* at 1858.

211. *Id.* at 1861, 1863.

against the responsible federal officials or whether such claims remained viable.[212] Nor did he give any consideration to the possible relevance of the FTCA, which creates government liability for tortious conduct committed by law enforcement officers (perhaps including federal prison guards and wardens).[213] To the extent lower courts apply Kennedy's framework to claims by US citizens who have suffered allegedly abusive military detention in the war on terror, they may give little weight to the adequacy of alternative tort-based remediation. Indeed, the *Ziglar* Court treated the *presence* of possible remedies under the FTCA as irrelevant to its assessment of a right to sue; thus, courts applying the *Ziglar* framework may well deem the *absence* of FTCA remedies similarly inconclusive.[214]

B. Changing Standards for the Assessment of Legality

With common-law remedies placed on the sideline, one sees the impact of the balancing framework that now governs constitutional remediation. The right to sue now depends on an elaborate multi-factored analysis, rather than flowing naturally and routinely from the common law. Rights once readily vindicated now must await legislation that, for a variety of reasons, Congress will be in no hurry to adopt.[215] The Court views the invocation of national security as a reason

212. *Cf.* Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (treating the presumed availability of remedies for common law torts as a factor in rejection of a *Bivens* remedy). *But cf.* Pfander & Baltmanis, *Rethinking* Bivens, *supra* note 111, at 127–28, 136 (criticizing the *Wilkie* Court's failure to recognize the Westfall Act's displacement of common-law remedies). Among the many ironies in the *Ziglar* opinion, Justice Kennedy emphasized the fact that fifteen years of litigation had produced no clear answer to the merits of the government's detention policy. He argued that habeas offered a more efficient remedy. *See Ziglar*, 137 S. Ct. at 1863. But much of the delay resulted from the efforts of litigants and lower courts to follow the Court's own elaborate constitutional doctrine. Not only has the Court demanded a nuanced assessment of the right to sue and adequacy of the allegations in the complaint, it has allowed the government to seek interlocutory review of adverse decisions that implicate qualified immunity, thereby further delaying resolution of the matter. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). One has little doubt that the common-law courts of the nineteenth century would have gotten the claims to a jury in something less than fifteen years.

213. Unlike most military officials, employees of the federal Bureau of Prisons appear to qualify as law enforcement officers within the meaning of the FTCA. *See* Millbrook v. United States, 569 U.S. 50, 55 n.3 (2013) (noting the government's concession, and thus declining to address the question whether prison guards were law enforcement officers within the meaning of the FTCA); Chapa v. U.S. Dep't of Justice, 339 F.3d 388, 390 (5th Cir. 2003) (treating prison guards as law enforcement officers for purposes of the intentional tort proviso). The government thus proceeds on the assumption that the FTCA accepts liability for tortious injuries inflicted on prisoners by federal prison guards.

214. *See, e.g.*, Vanderklok v. United States, 868 F.3d 189 (3d Cir. 2017) (concluding that *Ziglar* forbade recognition of a First Amendment retaliation claim, despite the lack of any alternative remedy under the FTCA).

215. Much recent legislation has sought to accommodate the existence of *Bivens*, but not to expand the government's liability for the unconstitutional actions of government officials. For example, the Westfall Act includes language aimed at preserving the *Bivens* action, and the Prison Litigation Reform Act imposes restrictions on what Congress otherwise assumed was a broad right to sue. *See* PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 105–07. Legislation in response to some judicial decisions in connection with the Bush administration's war on terror went further, proposing to restrict access to the *Bivens* remedy for those detained at Guantanamo Bay. Congress has not, at least since

for caution in the recognition of a right to sue, rather than treating it in nineteenth-century fashion as a factor entirely irrelevant to the judicial task of assessing the legality of the action at hand. The Court sees the protection of well-meaning officers from personal liability as a paramount judicial concern, weighed both in the balance of special factors analysis and again in the decision of whether to recognize a qualified immunity defense.[216] In contrast, nineteenth-century courts viewed the imposition of personal liability as a perhaps regrettable but nonetheless essential way to provide redress and deter officials from overstepping their bounds.

Note that in adopting this approach to the right to sue, the Court has allowed itself to be drawn into questions that were previously the province of the other branches of government. Instead of leaving the assessment of the need for emergency action to the executive branch (as what Justice Story called matters of "state"),[217] the Court now factors national security concerns into its all-things-considered assessment of the right to sue. How much deference does the executive deserve? How much remediation can the victims fairly claim? The assessment of these imponderables calls upon the federal courts to make judgments about the urgency of the situation and the good faith (or "gallant[ry]," in Chief Justice Taney's words)[218] of the official defendants. Viewed from the perspective of the nineteenth century, the modern Court's deference to the executive branch tends to deprive the Court of its ability to test the legality of action taken in an emergency situation. Rather than commending such action and evaluating its legality, the Court now treats matters of executive branch concern (contra Story) as factors that effectively legalize the conduct in question. In contrast to its stated view that courts have little expertise in assessing matters of national security, the Court has allowed its doctrine to incorporate assessments of emergent necessity.[219]

1974, taken any legislative action directly aimed at bolstering the viability of the suit for damages against Guantanamo Bay officials. That legislative inaction may reflect a perception that the task of tailoring constitutional remedies falls to the Court or a concern that successful claims (whether brought against officers or the government) will expend themselves on the Treasury.

216. Among its many further restrictions on the availability of *Bivens* litigation, *Ziglar* treats the threat of personal liability not only as a factor warranting judge-made official immunity, but also as an element of its special factors analysis and stated reluctance to recognize a right to sue. *See Ziglar*, 137 S. Ct. at 1858 (highlighting the burdens on government employees sued personally as a special factor in the assessment of suability under *Bivens*).

217. *See supra* note 196–198 and accompanying text.

218. *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1852).

219. To be sure, nineteenth-century courts evaluated necessity in the course of deciding whether the military's destruction of property was "justified." *See id.* (finding the official liable for destruction of property after concluding that no showing had been made of an immediate and impending danger from the enemy). But the necessity defense, if successful, would shift liability to the government, rather than absolve all defendants. Today, the Court treats the government's submissions as to national security and executive necessity less as a means of determining respective liability and more as a basis for avoiding the merits altogether.

The Court has also, perhaps less unwittingly, assumed the role of the legislature in ensuring a proper indemnity for official defendants. One can see the concern for indemnifying officers reflected both in the Court's assessment of the wisdom of allowing suit to proceed, and in its ever more stringent doctrine of qualified immunity.[220] Here again, the Court has departed from nineteenth-century conceptions of the separation of powers, stepping into the role of the political branches. During the nineteenth century, officers subjected to liability were expected to petition Congress for the adoption of indemnifying legislation.[221] In the course of that evaluation, Congress would consider whether the officer had acted in good faith and within the course and scope of her line of duty. If so, then the officer deserved indemnity. Today, indemnity remains available,[222] but the combination of the Court's narrow *Bivens* jurisprudence and its qualified immunity doctrine offer individual defendants protection from liability to achieve the same policy goal.

In short, one might fairly conclude that the Court has quit doing its job, that of assessing the legality of government action, and has taken up the work of the other branches. Justice Scalia, with characteristically acerbic insight, put his finger on precisely this change in the Court's role, dissenting in *Hamdi v. Rumsfeld* from what he called "a Mr. Fix-it Mentality:"[223]

> The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.[224]

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220. On the problems with qualified immunity, see PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 52–53. On its steady expansion in recent years, see Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016).

221. *See* PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 8–9, 13–14.

222. Congress has apparently delegated the task of evaluating indemnity claims to the agencies. Today, the Department of Justice has a practice of indemnifying its officers when they act within the scope of their employment and where doing so would be in the "interest of the United States." 28 C.F.R. § 50.15(c)(1) (2010). Federal regulations call for the government to provide representation to officers named in their individual capacity, so long as the action arose from conduct that reasonably appears to have occurred "within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States." 28 C.F.R. § 50.15(a) (2010).

223. Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

224. *Id.* at 576–77.

Here, Justice Scalia treats the Court's abandonment of clear lines and assured remediation as a surrender of its role in assessing the narrow legality of the government's action and as an assumption of the duties of the other branches.

Ziglar, of course, does not directly address the many suits brought by citizens to challenge their abusive military detention during the Bush administration's war on terror. It focuses on the treatment of foreign nationals in the greater New York area who were detained by civil officers of the United States exercising power under the immigration laws; the Court had no occasion to consider military detention or the impact of cross-border events. But for some years, the Court had studiously avoided the review of lower court decisions that refused to recognize a citizen's right to challenge the war-on-terror abuse claims.[225] Having granted review in *Ziglar*, the Court seemingly took the opportunity to articulate broad standards to govern the recognition of all *Bivens* actions going forward. Indeed, the Court has already established that its approach governs in non-domestic contexts; a companion case vacated the lower court decision to facilitate that court's application of the *Ziglar* formulation to a cross-border shooting in Texas.[226] In the end, while the Court has declined to consider torture claims by US citizens detained at home or abroad, one cannot escape the impression that *Ziglar* will serve as a kind of requiem for all such litigation.

C. The Choice of Remedial Forms

Along with a blurring of the lines of branch separation, a loss of rule-based specificity, and the Court's emphasis on multi-factored balancing, the decline of sharp-edged trespass-style remedies may also reflect the Court's acknowledged preference for injunctive and declaratory forms of adjudication. One finds this preference openly expressed in recent cases. In *Ziglar v. Abbasi*, Chief Justice Roberts took up the subject during oral argument. In response to counsel's argument that *Bivens*-based suits for damages were an appropriate means with which to test national security policy, Chief Justice Roberts countered that "the normal injunctive action would challenge the constitutionality of the policy, which would seem, at least at first blush, to be a more appropriate way of doing it than . . . individual damages actions against officials responsible."[227]

The Court's growing preference for injunctive-style litigation of challenges to national policy was borne out in the Court's decision in *Ziglar*. After explaining that the recognition of new rights to sue under *Bivens* was a disfavored activity,[228] the Court treated the suit for damages as a remedy of last

225. *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 569 U.S. 1038 (2013).

226. *See* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

227. Transcript of Oral Argument at 47, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (No. 15-1359) (comments of Roberts, C.J.).

228. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

resort, appropriate for use only "if equitable remedies prove insufficient."[229] Somewhat surprisingly, given the facts, the Court proclaimed the possible relevance of injunctive and habeas remedies as a factor counselling hesitation in the recognition of a *Bivens* suit.[230] The Court also distinguished challenges to "high-level" government policy (such as those to the confinement policy at issue in *Ziglar*) from challenges to what one might call street-level interactions between federal officials and individuals.[231] While it foreclosed the policy challenge, the Court tepidly reaffirmed established categories of *Bivens* litigation and remanded claims of prisoner abuse for further consideration.[232]

The Court's preference for injunctive-style litigation reflects a variety of factors. For starters, the Court worries about the plight of the official defendant confronted with a suit for damages that, at least in theory, may be payable from personal resources. (Nineteenth-century courts had come to view indemnity as a matter of right for officers acting within the scope of their official duties, and therefore viewed personal liability as a necessary but ultimately benign element of the remedial system.[233]) In addition, the Court has grown accustomed to declaring the law in injunctive-style settings; much of the law of federal government accountability since the New Deal has emerged in the form of directives to agency heads issued under the Administrative Procedure Act or in *Ex parte Young*-style litigation to contest the constitutionality of agency policy.[234] Understanding the strong culture of law compliance within the executive branch, the Court has some confidence that Justice Department lawyers will incorporate its proclamations into administrative practice without the need for any award of damages.[235]

The Supreme Court's preference for declaratory forms of adjudication finds an intriguing parallel in the reluctance of federal courts to impose contempt sanctions when federal agencies disobey judicial decrees. Courts view contempt sanctions as a remedy of last resort to coerce a party into compliance with their decrees. In a comprehensive review, Professor Nicholas Parrillo found a distinct

229. *Id.* at 1858.

230. *Id.* at 1862–63 (noting the availability of injunctive relief for challenges to high-level prison policy and suggesting that habeas petitions might have been available to contest the conditions of confinement). As the plaintiff's counsel explained, however, the individual detainees were held in conditions that denied them practical access to court and the government mooted habeas challenges with prisoner transfers. *See* Transcript of Oral Argument, *supra* note 227, at 37–38.

231. *See Ziglar*, 137 S. Ct. at 1861–62 (distinguishing challenges to "standard 'law enforcement operations'" from those seeking to contest national security policy).

232. *Id.* at 1865.

233. *See* Pfander & Hunt, *supra* note 92, at 1912–13 (citing *Tracy v. Swartwout*, 35 U.S. 80, 98–99 (1836) and *Cary v. Curtis*, 44 U.S. 236, 263 (1845) for the proposition that the government was bound to indemnify officers who acted in good faith in the course of their duties); *see also id.* at 1908–14 (describing the congressional application of agency rules in developing a law of indemnification).

234. *See* PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 89.

235. On the culture of compliance in the Department of Justice, see *id.* at 94–98 (acknowledging the tradition of executive compliance with judicial decisions but identifying gaps in the adjudication of torture and related claims that necessitate the recognition of a right to sue for damages).

reluctance on the part of federal courts to fashion (in the first instance) or to uphold (on appeal) any monetary contempt sanctions against government agencies and officials.[236] Professor Parrillo attributes this reluctance to a variety of considerations, including the strong norm of law compliance within the federal bureaucracy and the relative effectiveness of contempt *findings* (as opposed to *sanctions*) in helping to ensure compliance through the public shaming of relevant agency officials. In contempt proceedings, as in *Bivens* litigation, the federal courts increasingly take the view that law-saying can substitute for the award of monetary sanctions.

D. The Problematics of Symbolic or Expressive Litigation

One final problem: the switch to a constitutional framework for the evaluation of government activity raises the stakes both for the parties and the Court.[237] At least some of the litigation challenging human rights abuse during the Bush administration's War on Terror was underwritten by non-profit advocacy groups for whom litigation may represent an opportunity not only to gain compensation for the victims of government wrongdoing but also to expand rights consciousness more generally.[238] When non-profit public interest groups

236. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018) (describing a distinct reluctance on the part of appellate courts to uphold contempt sanctions against the government and its agencies).

237. Much public law litigation today has been structured and theorized by public interest groups seeking to effect social change through the courts. A variety of successful litigation strategies have emerged, including those that challenged racial segregation, gender-based discrimination, and marriage inequality. For a skeptical view of the power of courts, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 422 (2d ed. 2008) (finding that courts can "almost never be effective producers of significant social reform"). But litigation entrepreneurs may succeed without persuading the courts to rule in their favor; symbolic or losing litigation may help them achieve their policy goals. *See* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 841 (2013) (describing one litigation group that selects long-term litigation strategies that will allow the group to "set the terms of public debate regardless of whether we win or lose in court"); *Cf.* Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60 (2017) (exploring competing theories of sanction and expression in seeking an account of law compliance); *see generally* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004) (documenting use of litigation as a form of political protest); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (reviewing efforts of social movements to influence constitutional interpretation).

238. For the Court's recognition that litigation can serve as a form of "political expression," see NAACP v. Button, 371 U.S. 415, 429 (1963). For examples of associational and expressive activity, see Depoorter, *supra* note 237, at 841 (recounting that the Center for Individual Rights, which undertook the challenge to affirmative action in what became *Grutter v. Bollinger*, 539 U.S. 306 (2003), described itself as looking "for cases with strong facts that can move a public agenda through years of litigation"). The Institute for Justice articulated a similar vision in mounting the takings litigation in *Kelo v. City of New London*, 545 U.S. 469 (2005). *See* Depoorter, *supra* note 237, at 840. Public interest groups were widely involved in challenges to Bush administration war-on-terror policies. Thus, the Center for Constitutional Rights argued *Ziglar* in the Supreme Court, the American Civil Liberties Union (ACLU) and the International Human Rights Clinic at Yale Law School were on the papers at the Ninth Circuit in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012), and the ACLU appeared for the respondent in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

file suit to defend human rights in the face of apparently lawless forms of military detention and interrogation, they must as a practical matter couch the claims in constitutional terms.[239] Attorneys for the government will understandably resist claims of unconstitutionality directed at conduct that the Department of Justice has vetted and approved. Political appointees in the Department, in particular, may view the constitutional claims as overblown, driven less by concerns with remediation than by the desire to score political points.[240] Courts, as we have seen, proceed cautiously when asked to declare unconstitutional the conduct of high government officials, taken in the heat of the moment.[241]

In relying on the common law, nineteenth-century disputants pursued claims of government wrongdoing within a decidedly more modest framework. Their claims did not target whole government policies so much as specific instances of official misconduct. Litigation took place on a retail, not a wholesale basis. Although constitutional values doubtless informed the evaluation of claims to challenge unlawful detention and the taking of property, nineteenth-century litigation did not demand as a condition of success that the court pronounce government conduct unconstitutional. It was enough, instead, to call it unlawful, as a tort or breach of an implied contract. The courts could commend, as Chief Justice Taney did, the gallantry of the officers and in the same breath hold them legally accountable.[242] Accountability ensured redress and compensation for victims, and the officers were presumptively entitled to congressional indemnification.

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239. One can support the efforts of human rights groups, as I do, and recognize that their appearance on behalf of victims will tend to fuel perceptions that such claims have both a political and remedial motivation.

240. The rise of NGO-driven litigation may encourage the government and its courts to view challenges to detention policy as more political than legal. Some may argue that the United Kingdom itself, which developed the common-law rules on which much nineteenth-century American law was based, has now responded to NGO litigation pressures by narrowing access to damage remedies for those caught up in cases of wrongful or abusive detention. In *Belhaj v. Straw*, [2017] UKSC 3, [2017] AC 964, the UKSC applied the Crown act of state doctrine to the claims of one litigant (Rahmatullah) who sought to challenge his transfer from British to US custody during the Iraq war. But the court was at pains to clarify that the doctrine applied only to "exceptional" government activities. *Id.* at 5. If the subject alleges that the government action was "wrongful and claims damages or other relief," the Crown act of state doctrine poses no barrier to adjudication. *Id.* Claims of wrongful detention and mistreatment in custody were thus allowed to proceed. *Id.* at 9. For an overview of the treatment of similar litigation in other nations in the Commonwealth, see Kent Roach, *"The Supreme Court at the Bar of Politics": The Afghan Detainee and Omar Khadr Cases*, 28 NAT'L J. CONST. L. 115 (2010) (examining the Canadian experience); Cameron Sim, *Non-Justiciability in Australian Private International Law: A Lack of 'Judicial Restraint'?*, 10 MELB. J. INT'L L. 102 (2009) (offering a comparative view of developments in Australia and Canada).

241. For example, in *Iqbal*, Justice Kennedy labeled implausible the plaintiffs' allegations that the Attorney General and the FBI director had acted in a deliberately discriminatory manner in making the arrests of Muslim men following the September 11 attacks. Ashcroft v. Iqbal, 556 U.S. 662, 683 (2009). "All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*

242. *See* Mitchell v. Harmony, 54 U.S. (13 How.) 115, 135 (1852).

Modern litigation might gain something from the more particularized focus of the retail model of the nineteenth century. To begin with, a focus on the fact of the matter could help courts avoid entanglement with the national security issues that frequently lead them to refrain from addressing the merits. In an action for damages due to torture, for example, courts need not assess the justifications for the practice or the context in which it occurred. The law universally prohibits the use of torture and cruel, inhuman, and degrading treatment and allows no derogations for pressing national security concerns.[243] Nor does the fact that the officer was carrying out official policy or acting under the orders of a superior officer bear on the officer's liability; superior orders cannot excuse acts of torture.[244] Nor finally must courts demand the disclosure of state secrets in adjudicating claims of torture.[245] With this legal structure already in place, by drawing an inference of government responsibility and employing a regime of burden shifting, the courts could leave it up to the government to decide whether to offer a defense of the conduct in question.[246]

One can see a preference for retail litigation in *Ziglar*, where the Court threw out the detention-policy claims against high government officers but allowed the prison-abuse claims to proceed against the jailers. In explaining why *Bivens* was not a proper vehicle for altering an entity's policy, Justice Kennedy observed that the claims sought to challenge "the Government's whole response to the September 11 attacks."[247] So broad an inquiry would necessitate broad and burdensome discovery and "would assume dimensions far greater than those" in its prior cases.[248] Challenges to "standard" law-enforcement operations were one thing; "[j]udicial inquiry into the national-security realm" was quite another.[249]

The shift from a common-law framework to a constitutional framework for the adjudication of detention and other claims that arise during times of war may occasion a certain loss of judicial dispassion. Dissenting in *Lawrence v. Texas*, Justice Scalia defined the adjudication of high-profile constitutional issues as

243. *See* PFANDER, CONSTITUTIONAL TORTS, *supra* note 56, at 85–86.

244. *Id.*

245. Courts frequently dismiss claims arising in the national security context on the ground that the government's defense of those claims would implicate state secrets. *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (dismissing suit for damages on the ground that defense of extraordinary rendition claims by plaintiff who was shipped by the CIA from Macedonia to the Salt Pit could implicate state secrets). On the state-secrets privilege, see United States v. Reynolds, 345 U.S. 1 (1953). For the debunking of the government's state-secrets claim in *Reynolds*, see Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–40 (2007).

246. In assessing torture claims in Europe, for example, the European Court of Human Rights employs a burden-shifting paradigm that allows the Court to attribute responsibility to the state party without necessarily drawing on state secrets. For an assessment, see Vassilis Pergantis, *European Convention on Human Rights—Extraordinary Renditions—State Secrets Privilege—Right to the Truth—Attribution of Conduct and Responsibility:* Nasr v. Italy, 110 AM. J. INT'L L. 761 (2016).

247. Ziglar v. Abbasi, 137 U.S. 1843, 1861 (2017).

248. *Id.*

249. *Id.*

taking sides in a "culture war."[250] In keeping with that perception, Americans of all stripes have come to view the business of constitutional adjudication as politics by other means.[251] In such a world, evaluations of the constitutionality of the nation's response to the September 11 attacks took on an inevitably political valence. Liberals tended to decry the Bush administration's tactics; conservatives tended to defend, if not to applaud, them. Against such a backdrop, it was perhaps unsurprising that Justice Kennedy and his conservative brethren all opposed the claims in *Ziglar*, while the more liberal Justices, Breyer and Ginsburg, would have allowed them to proceed.

Along with the rise of a more political conception of the adjudication of constitutional claims, scholars have noted a growing perception that the very success of a military mission may depend in part on claims about its legality. David Kennedy explained the change in these terms,

> For a century, law—and particularly international law—has been in revolt against formalism, and has sought in every possible way to become a practical vocabulary for politics. The revolt has been successful. Law has become more than the sum of the rules; it has become a vocabulary for judgment, for action, for communication. Most importantly, it has become a mark of legitimacy. . . .[252]

With the change from a model of war as pitched battle to one of war as long-term counter-insurgency, as in the Middle East today, claims about legality have become central to perceived success on the ground.[253] Military officers travel with military lawyers; together, they target objectives with due consideration of the legality of proposed attacks and the risk of collateral damage.[254] Scholars recognize that law and war have become intertwined, making it harder to separate illegality from a broader condemnation of the war effort. On this view,

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250. Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (**S**calia, J., dissenting).

251. *See* 1 CARL VON CLAUSEWITZ, ON WAR 23 (J. J. Graham, trans., 1918) ("War is a mere continuation of policy by other means."). On the embrace of legal realism among academics, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008). On the use of the attitudinal model of political science to predict judicial voting in particular cases, see Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003) (reviewing literature underlying the attitudinal model of judicial decisions). For a reconceptualization of the way their priors may influence the votes of Justices on the Supreme Court, see Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1098–100 (2015) (discussing the way motivated reasoning might lead to results that align with the Justices' priors).

252. DAVID KENNEDY, OF WAR AND LAW 45 (2006).

253. *See id.* at 7–8 (describing the legalization of modern warfare and noting the surprising degree to which the vocabulary of lawful war has been internalized by military officials); Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1757–58 (2009) (noting the obsolescence of the pitched battle, and arguing more generally that modern warfare no longer follows a kill-capture model, but has shifted to a win-the-population strategy that calls for a reconsideration of the laws of war).

254. On the ubiquity of lawyers in the planning of military tactics, see KENNEDY, *supra* note 252, at 156 (military professionals turn increasingly to the law of war to assess the legitimacy of wartime violence).

an adjudication of illegality would, in the words of one court, provide "aid and comfort to the enemy."[255]

Nineteenth-century judges do not appear to have regarded the adjudication of civilian challenges to military conduct as freighted with partisan political baggage or as a threat to undermine the war effort.[256] Justice Story, appointed by (the Jeffersonian Republican) Madison in 1811, aligned with (the Federalist) Chief Justice Marshall on many issues of government accountability.[257] Yet, Justice Story's opinion upholding the imposition of liability in *The Apollon* spoke for a unanimous bench. Chief Justice Taney, author of the Court's opinion in *Harmony*, was appointed to the bench by that most democratic of Democrats, Andrew Jackson. Chancellor James Kent, author of the New York opinions upholding the citizen's right to habeas to contest military detention, owed his appointment to the conservative New York governor (and former Chief Justice of the Supreme Court of the United States), John Jay.[258] Despite their clashing political affiliations, these jurists had come to view the problem as governed by law rather than by politics. In doing so, they pointed to longstanding common-law rules and refrained from considering either issues of national security policy or proffered justifications for emergency action.[259] How and whether to reclaim that commitment to the application of ordinary law by ordinary courts—Dicey's rule of law—pose central challenges to the courts now overseeing modern constitutional remediation.

CONCLUSION

Increasingly, it seems, the modern Supreme Court would rather declare the law than adjudicate the case. Chief Justice Roberts accurately anticipated the majority's response to the money claims in *Ziglar* when he expressed a strong

255. Doe v. Rumsfeld, 683 F.3d 390, 395 (D.C. Cir. 2012).

256. In many but not all of the nineteenth-century cases cataloged in Part II, the hostilities had already ended by the time the court ruled. Whatever its timing, however, an award of damages likely has less potential to reshape the conduct of the war than a coercive injunctive decree. A judgment for damages does not release a prisoner from custody and does not order the government to refrain from continuing to take action deemed appropriate to meet the emergency. The differential impact of these remedies calls into question the Court's stated preference in *Ziglar* to test government action through suits for declaratory and injunctive relief.

257. *See* Craig Joyce, *Review: Statesmen of the Old Republic*, 84 MICH. L. REV. 846, 849 n.19 (1986) (reviewing R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)) (describing Story's appointment by Madison and Story's rather lackluster Jeffersonian Republican credentials).

258. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 561 (1993).

259. In the wake of *Ziglar*, law professors were quick to characterize reactions to the opinion in terms of we-they political views. *See* Orin Kerr, Comments (June 22, 2017 3:45PM), *in* Richard M. Re., *The Nine Lives of Bivens*, PRAWFSBLAWG (June 22, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html [https://perma.cc/8PB5-V23Q] (arguing that the academic criticism of the Court's decision in *Ziglar* was driven by partisan efforts "to shape their side's attitudes for the next time their side has power").

preference for declaratory modes of adjudication. The Court's response to the Bush administration's War on Terror has been largely declaratory, with its assurances of due process in *Hamdi* and its proclamation of the right to petition for habeas review in *Boumediene*. Such declarations have the appearance of weight and substance, much like the constitutional assurances of which Dicey was so critical. But what holding power do they have?

Dicey, like Holmes and Madison, invited us to look beneath the surface of the Constitution and the Court's declarations as to its meaning and ask about the impact of law and courts on the interactions between civilians and the military. Dicey warned against reliance on constitutional proclamations and encouraged a focus on the practical tools citizens can use to enforce the rule of law. Applying Dicey's insights across three lines of doctrine, we find that today's constitutionally-informed rights enforcement has fewer teeth than the common-law model of the nineteenth century. Citizen rights to freedom from military detention, to compensation for abusive and wrongful confinement, and to compensation for takings of property have all lost their bite in the wake of their incorporation into constitutional assurances.

Dicey would regret that, in its haste to declare prospective adherence to the Constitution and the rule of law, the Court has failed to keep the infrastructure of rights enforcement in good repair. Along the way, the Court has taken on the work of the other branches of government in measuring emergent necessity and protecting officials from the legal consequences of their actions. In the course of trying to balance so much, the Court has been doing less of its own work. It has not only failed to provide redress but has, on a range of questions, declined to evaluate the legality of the government's treatment of its own citizens. Dicey thought the assured enforcement of common-law rights was the very essence of the British constitution and applauded the United States for its reliance on common-law forms. In cases such as *Hamdi* and *Ziglar*, which both ignore the common-law remedial baseline in defining the scope of constitutionally-inflected forms of redress, the Court has come to countenance the very loss of individual rights against which Dicey warned.