LIVING DICEY'S NIGHTMARE: THE RULE OF LAW IN TIMES OF WAR

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ABSTRACT

Writing in the nineteenth century, the British constitutional lawyer A.V. Dicey argued that the common law, as administered by superior courts, better ensured government accountability than did written constitutions. Dicey taught us to focus less on written declarations and more on the practical effectiveness of judicial remedies. This paper builds on Dicey in providing 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 paper compares nineteenth century common law, as applied in the courts of the United States, to the constitutionally-inflected rules that those courts apply today.

The paper 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 remedies 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 in constitutional terms. In keeping with Dicey's thesis, this paper shows that the switch from common law to constitutional rights has corresponded to a shift away from hard-edged rules to forms of open-ended balancing that markedly diminish the relative effectiveness of citizen remedies. The paper identifies the factors that have shaped the remedial decline and offers suggestions as to how the Court might keep the infrastructure of rights enforcement in better repair.

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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] In 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]

[1] See A.V. DICEY, Introduction to the Study of the Law of the Constitution 39-85 (10th ed. 1959) [hereinafter DICEY]. 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 Dicey's Law of the Constitution, DICEY, supra, at xix.

[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 238-241 (contrasting the French guarantee of freedom of the press in the Declaration of the Right of Man (1791) 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 209-212. *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* Fabian Duessel, Human Rights in the British Constitution: A Prisoner of History?, Ill. L. Rev. (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); 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 UK Supreme Court and the Human Rights Act of 1998).

[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*

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 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 two hundred and thirty 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]

In this Article, I draw on Dicey's account of the rule of law in assessing the effectiveness of remedies for alleged violations of the laws of war by members of the United States armed forces. 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 administer a body of common law that was

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.*, Rivka Weill, Dicey Was Not Diceyan, 62 Cambridge L.J. 474 (2003) (joining issue on how committed Dicey was to the preservation of parliamentary sovereignty).

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

[8] *See* 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 (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 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). Mandamus actions to assure official compliance with law survive as non-statutory review under the Administrative Procedure Act. See 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 UK Supreme Court).

[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 . Modern scholars have come to give the Conseil more credit than did Dicey for ensuring the le-

borrowed from Britain and informed by the writings of publicists on the law of nations.[12] Writs of habeas corpus and trespass brooked 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 contracts were breached, courts today often ask if the Constitution was violated.[14]

One might read Dicey to hypothesize that the switch to basing claims on the Constitution would diminish the protection afforded to individual rights. The Article tests that hypothesis along three dimensions of the law of war. Consider first the law of takings. During the nineteenth century, when the federal government (and the military) used eminent domain powers to take private property, the taking gave rise to an implied promise to compensate the owner.[15] So long as the taking was properly authorized the obligation ran against the government, rather than the official who took the property in question.[16] In 1855, when Congress tired of passing on these and other implied contract claims for compensation, it created the Court of Claims (with life-tenured judges, interestingly enough).[17] The 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.[18] Today, of course, takings claims seek compensa-

gality 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 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 (1887) served as the nation's first specialized administrative tribunal and noting the role of common law courts in adjudicating claims of government wrongdoing in the antebellum era).

[12] Thus, Kent's much admired *Commentaries* often drew on such civil law jurists as Vattel and Grotius in elaborating a law of nations that was given binding force through incorporation into the common law. *See* James Kent, I 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* 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 part III.

[15] *See* part II.B.3.

[16] *See* Mitchell v. Harmony, 54 U.S. 115 (1851) (drawing this distinction); *see also* Buron v. Denman, 2 Ex. 167 (1848) (recognizing the distinction as a part of English common law).

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

[18] See 10 Stat. 612, ch. 122 § 1 (1855) (declaring that the jurisdiction of the court was to encompass "all claims founded upon any law of Congress, or upon any regulation of an ex-

tion under the Fifth Amendment and have been assigned to the U.S. Court of Federal Claims.[19] We can thus compare the efficacy of remedies for breach of the implied contract and for violation of the Constitution. Two changes stand out: courts have come to doubt the Fifth Amendment's application to overseas takings of property, and have more narrowly defined the right of individuals to recover for the losses the military inflicts by way of eminent domain.[20]

Consider second the right of non-combatant individuals to contest wrongful detention 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 wrongly detained by military officers were entitled to release on habeas and to compensation on claims of trespass or false imprisonment after they were released from custody.[21] In general, these claims 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 quite a limited ambit and common law courts enforced those limits rather strictly (except where a treason prosecution or the lawful suspension of the privilege of the writ of habeas corpus set those limits aside and authorized military detention).

Today, while habeas persists and the Court has reaffirmed the principle of non-suspension, many civilian remedies have been constitutionalized.[22] In *Hamdi*, for example, the Supreme Court held that citizens detained in the war on terror were entitled not to immediate release from military custody absent treason charges or suspension but to a fluid due process inquiry that balances rights and necessity.[23] Similarly, in claims involving the wrongful detention and torture of U.S. citizens, the substitu-

ecutive department, or upon any contract, express or implied, with the government of the United States").

[19] *See* 28 U.S.C. § 1491 (a) (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 (4th ed. 2006).

[20] *See* part III.

[21] 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 885-892 (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).

[22] *See* Rasul v. Bush, 542 U.S. 466 (2004) (upholding right of aliens to petition for habeas to contest confinement at Guantanamo Bay); Boumediene v. Bush, 553 U.S. 723 (2008) (concluding that legislation curtailing right to habeas violated the habeas non-suspension clause).

[23] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

tion of a constitutionally-based *Bivens* remedy has resulted in the denial of any effective remediation.[24]

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 rights. Part Two shows that the common law Dicey celebrated as the cornerstone of the British constitution also ensured remedies in the United States for violations, among other things, of the law of war. Part Two traces a series of common law remedial doctrines, evaluating their contours and assessing their efficacy in the practice of the United States through the time of the Civil War. Part Three contrasts the nineteenth century system of common law remediation with remedies available today.

This Article finds that, to an unsettling degree, the shift from common law to constitutional rights has corresponded to a shift away from formal rules to a more open-ended balancing of interests. Today, federal courts with freedom to balance often weigh issues of military necessity and national security quite heavily and discount the claims of individuals. To be sure, some gains have been achieved as part of today's much broader remedial framework.[25] But one comes away from the comparison with the disquieting sense that we may be living Dicey's nightmare: where the recognition of broad constitutional rights leads to a notable diminution in the practical effectiveness of available remedies.

I. DICEY AND THE RULE OF (COMMON) LAW

Dicey's *Introduction to the Study of the Law of the Constitution* appeared in 1885, in his third year as the Vinerian Professor of Law at Oxford,[26] the same chair that William Blackstone held.[27] The *Law of the Constitution* has been remarkably influential, for its explication of Parlia-

[24] *See* Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012); Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012).

[25] 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 provision 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 around 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).

[26] *See* Walters, supra note 1, at 25 (observing that Dicey held the Vinerian chair from 1882 to 1909).

mentary supremacy and the common law, for its discussion of conventions, and for its articulation of the idea of British constitutionalism. Dicey observes, somewhat oddly, that Blackstone had managed to write his entire *Commentaries on the Laws of England*, without once acknowledging the existence of something called the British constitution.[28] Dicey gave voice to the unwritten constitution of the United Kingdom, one that consisted primarily of 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."[29]

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 was applied to private individuals.[30] On that view, only the sovereign herself was immune from suit; everyone else, from cabinet-level ministers on down, was subject to 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.[31] 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.[32] For Dicey, as for others writing in the British constitutional tradition, the similarity between the Conseil and Star Chamber was perhaps too close for comfort.[33]

[27] *See* Rupert Cross, *The First Two Vinerian Professors: Blackstone and Chambers*, 20 Wm. & Mary L. Rev. 602, 602 n.1 (1979) (reporting that Sir William Blackstone was the first to hold the chair, named after Charles Viner, author of a best-selling abridgment).

[28] On the absence of references to the British constitution in Blackstone's *Commentaries*, 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." W. Blackstone, 1 Commentaries on the Laws of England 122 (1765). 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.

[29] Id. at 207.

[30] See DICEY, supra note 1, at 23.

[31] On the origins and current operation of the Conseil D'Etat in France, see L. Neville Brown & John S. Bell, French Administrative Law (1998).

[32] 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).

[33] Id. at 315-16 (exploring the similarities between the Star Chamber and the application of the droit administratif by the French conseil)

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."[34] On his 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.[35] He 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.[36]

Dicey summed up his constitutional skepticism as follows:

> 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 also sounds a bit like Holmes, who reminded 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 exist apart from the ordinary courts and they apply a specialized

[34] DICEY, supra note 1, at 221.
[35] DICEY, supra note 1, at 221.
[36] *See* note 3 supra.
[37] DICEY, supra note 1, at 207.
[38] *See* Letter from James Madison to Thomas Jefferson, Oct. 17, 1788 in THE REPUBLIC OF LETTERS 562, 564 (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 *The Common Law*. *See* Walters, supra note 1, at 36-38. *See* O.W. Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 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").

body of law.[40] Dicey devoted a 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*, 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.[46] The decision was notable both for its application of English common law principles to the British imperial bureaucracy and for its willingness to hold the officers legally accountable in circumstances where they appeared to have acted in the best interests of the government as then understood.[47] *Mostyn* has become well-known for all three princi-

[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 21, at 50 ("the 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 or 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 Wiener, supra note , at 3-6 (noting that the Act created a statutory or constitutional framework for the lawful imposition by court martial of military punishment).

[42] Id. at 307 (noting that courts martial mete out more severe punishment).

[43] Id. at 301 (observing that soldiers agree to a system of harsh discipline as a condition of enlistment).

[44] 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] Id.

[46] *See* Mostyn v. Fabrigas, 20 Howell's State Trials 82, 1 Copp 161, 98 Eng. Rep. 1021 (1775). On the importance of *Mostyn* to a full understanding of 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).

[47] 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

ples: 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.[48] Having joined with revolutionary French forces hostile to Great Britain in leading the 1798 Irish uprising, John Theobald Wolfe Tone was brought to book before British military tribunals in Ireland. 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.[49] However treasonous their conduct, they could not be said to have committed unauthorized or unlawful military actions and could not be subjected to military justice under the laws of war.[50] Dicey treated the decision at length.

II. COMMON LAW RULES IN THE UNITED STATES

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.[51] The new nation's revolution-era code of military discipline, drafted by John Adams and Thomas Jefferson, drew liberally on the British model.[52] A later codification of U.S. military

were "laudable"). *See* Mitchell v. Harmony, 54 U.S. 115, 135-36 (1851) (citing *Mostyn*).

[48] See Wolfe Tone's Case, 27 How. St. Tr. 613, 625 (1798) (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).

[49] Id.

[50] Dicey treats Wolfe Tone's case at length, arguing that it 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)

[51] On the reception of English common law into the law of the United States, see Daniel J. Hulsebosch, CONSTITUTING EMPIRE 215 (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. (2017)

[52] For a useful sketch of the introduction of British conceptions of martial law into the law of the United States, see Winthrop, supra note 21, at 46-49. On the drafting the articles of war that governed American forces during the war for independence, see Francis Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 Military L. Rev. 1, 5-9 (1999) (noting the respective roles of Adams and Jefferson).

law, in 1806, similarly owed a good deal to its British precursors.[53] Apart from incorporating features of the British mutiny act (as 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.[54]

This part of the Article describes the nineteenth century's legal response to the exercise of government power in the context of military-civilian interactions. Focusing primarily on the period between the founding and the Civil War – a period marked by wars with Great Britain and Mexico and skirmishes with the Seminoles in Spanish Florida – we find ordinary courts playing a boundary-setting function along three broad categories of litigation.[55] They intervened to protect the rights of those whose property was wrongly taken; they granted release on habeas to those wrongly subject to military detention; and they awarded damages in trespass to individuals who had undergone periods of wrongful detention. While enemies were not entitled to invoke the processes of law to recover their losses during war, remedies in the courts of the United States were extended to both citizens and to friendly foreign nationals.[56] Remedies were available for wrongful conduct on the part of government officials, including that which took place outside the territorial boundaries of the United States.[57]

A. The Common Law of Taken Property

War voraciously consumes property, posing a particular threat to those in the vicinity of a battle. But the common law treated such losses as non-

[53] For an account, see Francis Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 1, 15-22 (1958).

[54] On the importance of the law of nations, see Winthrop, supra note 21, at 773 (describing the law of war as a subset of the law of nations, and distinguishing the law of war from military law proper; 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").

[55] On the use of commissions during the Seminole wars, see Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. Early Rep. 559 (2008) (describing the military trial and execution of two British subjects for providing assistance to warring native American tribes).

[56] On access to courts for alien friends, see McKenna v. Fisk, 42 U.S. 241, 249 (1843) ("It then appears from our books, that the 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"). On the refusal to permit alien enemies access to court, see Note, *The Status of Alien Enemies in Courts of Justices*, 31 Harv. L. Rev. 470 (1918).

[57] *See, e.g.*, The Apollon, 22 U.S. 362 (1824) (upholding claim by owner seeking recompense for wrongful seizure of French vessel in Spanish territory); Mitchell v. Harmony, 54 U.S. 115 (1851) (upholding claim for loss of property taken during military campaign in Mexico).

compensable.[58] Similarly non-compensable were the losses that resulted when an army in retreat or under pressure destroyed certain property to hinder the opposing force or to keep the supplies from falling into enemy hands. When a retreating army destroyed a bridge, for example, the loss to the bridge's owner was considered non-compensable as an inevitable misfortune of war.[59]

Apart from collateral damage, war often leads to the deliberate taking of property – horses, cattle, grain, carts and wagons – to fuel the war machine. Soldiers must eat and armies develop ways and means to feed them. 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. These authorized takings created a contract obligation running against the United States.[60]

Finally, individual officers and soldiers might take private property to line their own pockets with the spoils of war or to punish civilians for supporting the opposing army. Both motives were on display during Sherman's march to the sea. Sherman's concept of total war made the civilian population a logical military objective; soldiers marching with him in the United States army were incidentally keen to strip Southern plantation owners of their silver and jewels.[61] At one time, the taking of booty was regarded as lawful, was counted among the spoils of war, and was thought to encourage the recruitment of soldiers.[62] In the United States, however,

[58] 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 south during 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). Such decisions as *United States v. Padelford*, 76 U.S. 531 (1870), declaring 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. 128 (1871) (invalidating act of Congress aimed at depriving courts of jurisdiction to enforce right of pardoned claimants to compensation under the statute).

[59] *See* United States v. Pacific Railroad, 120 U.S. 227 (1887) (refusing to order United States to compensate the owner of a bridge destroyed by a retreating army to slow the advance of an opposing force).

[60] See United States v. Russell, 80 U.S. 623 (1871); Winthrop, supra note 21, at 775.

[61] See John Fabian Witt, Lincoln's Code 278-83 (2012) (describing Sherman's march and the quest of foraging soldiers for loot).

[62] See Emer de Vatel, Law of Nations, bk. 3 § 164, at 365 (1797) (proclaiming a right to confiscate enemy property as booty).

the laws of war would evolve to proscribe the taking of booty.[63] Soldiers who stole from the civilian population were exposed to military discipline and courts-martial (for violation of military law). Soldiers and officers alike also faced civil liability: The common law viewed the unauthorized taking or destruction of property as a trespass and made the officers personally accountable to pay proper recompense.[64]

The common law presented a challenge to those whose property was taken by government officials. 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.[65] (Hence, the Fifth Amendment guarantee of just compensation for the taking of private property.) But if the government did not authorize the taking, the officer who invaded private property rights was personally liable for the loss.[66] In either case, the ability of the claimant to receive full compensation 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 officer).[67] The House Committee on Claims conducted a lively business before 1855, evaluating applications for compensation and indemnity.[68]

[63] Americans' changing attitude towards booty may have links to southern attempts to reclaim slaves taken by the British during the revolutionary war, see John Fabian Witt, Lincoln's Code 70-72 (2012) (contrasting the European approval of the taking of enemy property with the Americans' growing sense that the taking of private property on land was prohibited).

[64] *See* Mostyn v. Fabrigas, 20 Howell's State Trials 82, 1 Copp 161, 98 Eng. Rep. 1021 (1775); Mitchell v. Harmony, 54 U.S. 115 (1851). *See generally* Winthrop, supra note 21, at 889 (noting that the offending officer or soldier may be held liable in damages for "wanton trespasses on the persons or property of civilians" and other injuries inflicted during hostilities that violate the laws of war).

[65] *See* Buron v. Denman, 2 Ex. 167 (1848) (holding that the government ratified and approved the officer's action in destroying a slave plantation, thereby assuming responsibility for the payment of compensation for lost property). *See generally* Winthrop, supra note 21, at 774 (describing question whether the army may "lawfully take or destroy private property of our own citizens" is 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* J.G. Randall, Constitutional Problems Under Lincoln 205-06 (1921) (explaining that the officer bore personal liability in tort unless the act was adopted as that of the government).

[66] *See, e.g.*, Mitchell v. Harmony, 54 U.S. 115 (1851).

[67] 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.

B. Property Case studies

We can now examine some of the leading nineteenth century cases in which these principles of government accountability were applied. Among the intriguing lessons that emerge from a careful evaluation of particular cases, this section shows that the courts were often called upon to make relatively fine grained assessments of military necessity in the course of deciding how to allocate responsibility for particular property invasions. Modern courts shy away from such evaluations, treating them as unfit for judicial consideration.

1. Mitchell v. Harmony.[69] Rightly viewed as a landmark decision on military accountability for the invasion of property rights, *Mitchell v. Harmony* incorporates the leading principles of English common law in assessing responsibility for the loss of property during the Mexican-American War. 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 U.S. 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 opinion of the Court by Chief Justice Taney establishes three important principles of accountability. First, the common law right of action for a trespassory taking of property applies to the conduct of U.S. military forces in the midst of a military campaign. Harmony and the other traders had a legal

[68] 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 (2010) (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 (or to any commission or department of the government Congress established with authority to approve and pay claims). Similarly, Congress might refuse to pay a public claim for compensation on the ground that the official's action was unauthorized, implying that suit should properly proceed against the official. Claimants lacked a forum with power to hear both sorts of claims in a single proceeding. State and federal courts exercised concurrent power over common law claims against official defendants but had no power to hear a claim against the government. 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.)

[69] Mitchell v. Harmony, 54 U.S. 115 (1851).

right to accompany the troops. While the government would ordinarily owe no obligation to compensate for the losses that an opposing force inflicts on such camp followers, 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 "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior." Such superior orders can "palliate" but they "cannot justify."[70]

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 English solicitude for private property, the Court hastened to explain that rights of property were "not less valued nor less securely guarded" in the United States.[71] 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.[72] Here's what the *McKenna* Court said:

> The 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.[73]

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 a foreign national.[74]

Finally, the Court rejected Mitchell's argument that the taking of Harmony's property was justified by military necessity. The Court explained the law as follows:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.[75]

[70] Mitchell, 54 U.S. at 137.
[71] Id. at 137.
[72] See McKenna v. Fisk, 42 U.S. 241 (1843).
[73] McKenna, 42 U.S. at 249.
[74] Id. Embracing the possibility of suits by foreign nationals was consistent both with the prior decision in *The Apollon* and with the notion that the courts were open to alien friends. See notes supra.
[75] Mitchell, 54 U.S. at 134.

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 could be taken only upon "an urgent necessity for the public service."[76] The Court upheld the jury's conclusion that the requisite showings of necessity had not been made.[77]

2. Little v. Barreme.[78] In a well-known decision, growing out the Quasi-War between the United States and France in the late 1790s, Captain Little of the U.S. Navy was held personally accountable for the wrongful interception of a Danish merchant vessel.[79] Little was acting under a directive from the Secretary of the Navy, urging the strict enforcement of the Non-Intercourse Act to prevent U.S. merchants from trading with French ports in the Caribbean.[80] But while there was cause to suspect the behavior of the *Flying Fish*, Captain Little's capture of the vessel and his attempt to forfeit the vessel were rejected. The *Flying Fish* was not subject to forfeiture either as a vessel owned by American merchants trading in violation of the Act or as a French merchant ship subject to capture under the laws of war. What's more, it was not at the time of seizure sailing to a French port as the terms of the Act required. In an opinion by Chief Justice Marshall, the Supreme Court accordingly upheld a substantial award of damages for wrongful seizure against Little in his personal capacity.[81]

The Court's hard-edged response to Little's suggested good faith defense has repeatedly attracted scholarly attention.[82] The Court acknowledged that its rule of strict personal liability put Little in a difficult position: he was obliged by his commission to follow the orders of his superiors, but was nonetheless held personally liable for the wrongful seizure of the vessel. Marshall acknowledged as much:

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers, and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a

[76] Id.
[77] Id. at 135.
[78] Little v. Barreme, 6 U.S. 170 (1804).
[79] For the Quasi-War context of the *Little* case and the circumstances surrounding Captain Little's seizure of the Flying Fish, see Pfander & Hunt, supra note 65, at 1877-83.
[80] See Little v. Barreme, 6 U.S. 170, 184 (1804).
[81] *See* Little, 6 U.S. at 179.
[82] *See, e.g.*, David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 12-21 (1972); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396 (1987).

> prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion.[83]

The imposition of relatively strict personal liability was later moderated by the congressional adoption of a private bill, indemnifying Captain Little for the amount ($7000) he was compelled to pay to the owner of the *Flying Fish*.[84] In the end, then, the government picked up the tab and victim received redress for a wrongful taking. But en route to that resolution, Little was held to bear personal liability for actions taken in violation of the limited authority to seize that Congress had conferred on the navy.

3. United States v. Russell.[85] Both Colonel Mitchell and Captain Little were held personally liable in tort for the unauthorized taking of private property, despite military justifications for their actions. But what happens when military officers take private property to support the war effort? That was the question in *Russell*, a claim brought before the Court of Claims to recover the value of services that the United States had "taken" from the owner of three steamboats plying the waters of the Mississippi during the Civil War. In each instance, an officer in the quartermaster corps issued orders to the boats' owner, indicating that the services of the steamers were required for the movement of goods and men in the prosecution of the war effort.[86] In each instance, the owner complied without quibble in the expectation that the government would later compensate him for the services rendered. After the emergency passed, the government allowed the vessels to return to private work. They were neither destroyed nor permanently taken for government service.

In assessing the legality of the taking of steamboat services, the Court was mindful of its prior decision in *Mitchell*, which it cited, and of the principle that the unjustified taking of property by military officers was a trespass. But the trial court's findings "show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers . . . in ordering the steamboat into the service of the United States."[87] This showing of "imperative military necessity," as the Court explained,

[83] Little, 6 U.S. at 177-79.
[84] *See* Pfander & Hunt, supra note 65, at 1893-1903 (describing the circumstances that led to the adoption of private legislation indemnifying Captain Little).
[85] United States v. Russell, 80 U.S. 623 (1871).
[86] Russell, 80 U.S. at 628-29.
[87] Id. at 629.

meant that the officers who issued the orders were not trespassers, "and the government . . . is bound to make full compensation to the owner for the services rendered."[88] Compensation was due in either event; if unjustified by necessity, then it was owed by the officer as a trespasser. If justified and authorized as in *Russell*, then it "raises an implied promise on the part of the government to reimburse the owner for the use of the steamboats."[89] That obligation was enforceable in an assumpsit action against the government, assuming provision had been made (as indeed it had) for the assertion of implied contract claims in the Court of Claims. When one puts *Mitchell* together with *Russell*, one finds that courts were called upon to decide the issue of emergent necessity in the course of assigning liability in tort to the individual officers or liability in implied contract to the government itself. Either way, the individual was entitled to be made whole.

4. Grant and Wiggins. Individuals were entitled to claim compensation for property taken or lost in the course of the government's military operations, as the cases of *Grant* and *Wiggins* make clear.[90] Grant was a government contractor who supplied the army in Tucson, Arizona with flour, corn, barley and beans. When the Civil War began in 1861, the commander of U.S. 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.[91] A similar result obtained when a naval expeditionary force was sent to chastise the town of Greytown, Nicaragua for depredations against American citizens. The commander of the force shelled the town; he also destroyed gun powder stored in a nearby community in Costa Rica to prevent its falling into the hands of the enemy. Wiggins and others, U.S. citizens, recovered a judgment of $6000 for the destruction of the powder.[92] As the *Grant* court explained, the rightful taking of private property when the public exigency demands it, by a military officer . . ., is an exercise of the right of eminent domain" and triggers a duty of compensation.[93]

The primary issue in both cases was not whether the loss was compensable but which party owed the legal duty. If authorized, the responsibility to compensate for the loss fell on the government as a matter of implied contract (as the Supreme Court would later confirm in *Russell*). If unauthorized, then the official destroying the property was liable in tort (unless the destruction qualified as a misfortune of war).[94] In both in-

[88] Id.
[89] Id. at 630.
[90] *See* Grant v. United States, 1 Ct. Clms. 41 (1863); Wiggins v. United States, 3 Ct. Clms. 412 (1867).
[91] See Grant v. United States, 1 Ct. Clms. 41 (1863).
[92] See Wiggins v. United States, 3 Ct. Clms. 412 (1867).
[93] Grant, 1 Ct. Clms. at 47.
[94] See Grant, 1 Ct. Clms. at 47.

stances, the Court of Claims found that the property's destruction was duly authorized by "imminent public danger" and the government was obliged to make good the loss. The government, as the court explained in *Grant*, was "bound to make just indemnity to the citizen or subject whenever private property is taken for the public good, convenience, or safety."[95] The court distinguished *Mitchell v. Harmony* on the ground that, because the danger in that case did not qualify as "immediate and impending," the taking of property constituted a tort on the part of Colonel Mitchell.[96] One supposes that both the *Mitchell* Court and the court of claims would tend to resolve doubts in favor allowing the action for compensation to proceed; in that sense, one might suppose that the creation of the court of claims (unavailable to the plaintiff at the time of the litigation in *Mitchell*) may have broadened the government's legal responsibility for takings to some degree.

C. Habeas to Contest Unlawful Military Detention

Habeas bore the same formal, rule-like features that characterized the law of tort. 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 had been convicted after due process of law, or was held on properly supported charges of a serious crime.[97] 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. (Habeas thus 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, perhaps 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 prisons. 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, suspending the privilege of the writ of habeas corpus.[98]

[95] Id.

[96] Grant, 1 Ct. Clms. at 48 (distinguishing *Mitchell v. Harmony*, 54 U.S. 115 (1854)).

[97] 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 Amanda L Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay 21-33 (2017). 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.

[98] 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 228-232 (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

On that view, *Ex parte Bollman* was an easy case.[99] 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.[100] But the administration lacked the factual evidence needed to sustain a charge of treason. Jefferson approached Congress, seeking legislation that would suspend the habeas privilege. Congress demurred.[101] Having previously sought release from the District of Columbia circuit court, Bollman and Swartwout petitioned for habeas in the Supreme Court. After concluding 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, the Court turned them loose.[102] 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 otherwise improperly consorting with the enemy.[103] Like Wolfe Tone, these individuals did not necessarily get away scot free, but they were entitled to civil rather than to military forms of trial and punishment.

What then can one make of the use of military commissions to try Southern sympathizers and spies during the Civil War? In his notable history of the laws of war, *Lincoln's Code*, John Fabian Witt records the fact that Lincoln's generals convened over 1000 war-time military commissions to try civilians for violations of the laws of war.[104] Some commission trials sought to justify the detention and punishment of irregulars who were aiding the Southern war effort. In that sense, the use of commissions could claim some support in the trial of John Andre, who was convicted of spying for the British and hanged by General George Washington.[105] Military commissions of various sorts had also flourished during the Mexican-American War, as General Winfield Scott dealt with the challenges of unconventional warfare. So long as these modes of imposing military justice

Revolution, 103 Cal. L. Rev. 638 (2015) (recounting and evaluating suspensions adopted by Parliament during the course of the Revolutionary War).

[99] Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807). For lively accounts of the Burr conspiracy and its players, see Paul Haliday & G. Edward White, The Suspension Clause: English Text, Imperial Context, and American Implications, 94 Va. L. Rev. 575, 683-85 (2008)

[100] 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 hiving off parts of Louisiana to confederate with a foreign power. See Tyler, supra note , at 145-55 (recounting the Burr conspiracy and the congressional debate it spawned over suspension)

[101] On the attempt to secure a suspension, see Haliday & White, supra note 96, at 685. The Senate passed the bill, but the House defeated it on a lopsided vote. Id. See also Tyler, supra note , at 146-52.

[102] See Bollman, 8 U.S. at 99-101.

[103] See notes 123-27 infra.

[104] See Witt, supra note 58, at 311.

[105] Id. For a brief history of the military commission, including its use in the trial of Major Andre as a spy for British forces, see Detlev F. Vagts, Military Commissions: A Concise History, 101 Am. J. Int'l L. 35, 37 (2007).

targeted military operatives, who were acting at or near federal battle lines, they had some basis in law.[106] When they were deployed against political figures who were addressing public meetings, however, the threat of military confinement and punishment posed a more clear-cut threat to the separation of civil and military justice and other constitutional values.

Issues of freedom of speech in times of war were presented in *Ex parte Vallandigham*, a case Witt and others portray as endorsing the use of military commissions in such situations. Clement Vallandigham gained notoriety in Ohio for fire-eating oratory in opposition to northern military activities. Arrested by a company of soldiers at his home in Dayton on orders of General Ambrose Burnside and convicted by a military commission a week or so later, Vallandigham was sentenced to confinement for the duration of the war. He first sought review by way of habeas in the lower federal courts. When that proved unsuccessful, he sought review of his conviction by way of certiorari but the Supreme Court refused to intervene. Witt describes the Court's decision as letting the conviction stand and as expressing approval for the use of military commissions to prosecute crimes under the common law of war.[107]

Witt's account of *Vallandigham* naturally raises the question why that precedent did not control or at least figure more prominently in the Court's later decision in *Ex parte Milligan*, a ringing denunciation of the use of military commissions to try civilians.[108] Lambdin Milligan had plotted with southern agents in August 1864 to detach Indiana and the Northwest Territory from the Union; when the plot unraveled in October, he was tried and sentenced to death by a military commission.[109] On habeas review, the Court invalidated the use of military tribunals to try ordinary civilians (including traitors), except perhaps within the "locality of actual war."[110] So long as civil courts were open, as they were and always had been in Indiana, military justice was limited to members of the armed forces.[111] Witt asks why the government's lawyers failed to defend Milligan's conviction on the narrow ground that the commission was a proper vehicle for punishing violations of the laws of war. Witt notes in particular that the *Vallandigham* Court had approved such commissions just two years before.[112] Witt believes the government was seeking a broad ruling

[106] Thus, Scott's military commissions in the Mexican-American war sought to punish irregular forms of military combat as violations of the laws of war. See Winthrop, supra note 21, at 822; Witt, supra note 58, at 123-28. Punishment of irregulars and guerillas by military courts during the Civil War could thus draw on the Scott precedents.

[107] See Witt, supra note 58, at 273 (treating the Court's decision, dismissing Vallandigham's petition for review, as implicitly approving the use of military commissions to punish offenses under the "common law of war").

[108] See Ex parte Milligan, 71 U.S. 2 (1866).

[109] For an account, see Witt, supra note 58, at 308-13.

[110] Ex parte Milligan, 71 U.S. at 74.

[111] Id.

[112] See Witt, supra note 58, at 311.

in *Milligan* on which it could predicate the incorporation of military commissions into southern military reconstruction. He shows that the Court's decision took place in the shadow of debates over the terms of southern reentry into the Union.[113]

Although Witt nicely captures the political context, like others he has misread *Vallandigham* as a decision upholding or approving of the use of military commissions.[114] True, the Court failed to intervene. But it did so because it lacked jurisdiction to review the decision of a military commission. Notably, the case came to the Court as an "original" petition for a writ of certiorari under the All-Writs Act and thus implicated the *Marbury*-based restriction on the scope of the Court's power to supervise executive branch officials.[115] *Marbury* held that the Court cannot exercise original jurisdiction by way of mandamus to oversee the work of an executive branch official (unless, of course, the case qualifies for original jurisdiction under Article III as one involving ambassadors, other public ministers, consuls, or states as parties). Only where its intervention would qualify as an exercise of appellate jurisdiction to "revise or correct" the work of a lower court can the Court use mandamus or other original process.[116] Here, there was no decree by a lower court for the Court to revise or correct on certiorari.[117] The petitioner sought direct review of the commission's order rather than review of the lower federal court's denial of his habeas petition. The posture of the case thus differed from *Ex parte Bollman*, where the Court was effectively using "original" habeas to conduct

[113] Id. at 311-13.

[114] Others make the same mistake. Consider this comment in the *Military Law Review*:

> When Vallandigham's case reached the U.S. Supreme on a writ of certiorari, Holt *personally* appeared before the U.S. Supreme Court on behalf of the government and achieved a great constitutional victory. When the Court unanimously ruled in February 1864 that it could not review Vallandigham's conviction because the commission that had tried him was not a court for purposes of jurisdiction, this decision "empowered" Holt and his judge advocates "with almost the final word as to whether a military arrest or trial of a civilian was justified." There was no longer any impediment to using military law to combat civilian dissidents who sought to undermine the Union war effort or otherwise support the Confederacy.

Fred L. Borch III, Book Review: Law in War, War as Law, 210 Mil. L. Rev. 113, 116-17 (2011). Cf. Andrew Kent, The Constitution and the Laws of War During the Civil War, 85 Notre Dame L. Rev. 1839, 1911 (2010) (noting the Court's reliance on the absence of appellate jurisdiction but recognizing nonetheless that the decision had been greeted in some circles as an implicit confirmation of the legality of Vallandigham's trial by commission).

[115] For accounts of these *Marbury*-based limits, see James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515 (2001); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Texas L. Rev. 1433 (2000).

[116] *See* Marbury v. Madison, U.S. (1 Cranch) 107 (1803) (defining the exercise of permissible forms of appellate jurisdiction as those that seek to "revise and correct" the proceedings of a lower court).

[117] The All-Writs Act authorizes the Supreme Court (and other federal courts) to issue all writs necessary in aid of their respective jurisdictions. See 28 U.S.C. § 1651. It confers an authority similar to that contained in section 14 of the Judiciary Act of 1789.

the functional equivalent of appellate review of the habeas denial by the District of Columbia circuit court.[118]

Notably, the government took steps to prevent habeas review, just as it has done in later cases.[119] President Lincoln overrode the sentence of confinement and sent Vallandigham beyond federal lines and into southern territory (from which he reportedly later made his way to Canada[120]). The absence of continuing military custody meant that Vallandigham could no longer seek review by way of habeas. That meant, in turn, that he could not file an original petition for habeas in the Supreme Court, seeking *Bollman*-style review of the Ohio federal court's earlier rejection of his habeas petition. Forced to approach the Supreme Court directly by way of an original petition for certiorari, Vallandigham ran headlong into the limitations of *Marbury*.[121] Rather than playing the boundary-setting role of habeas, certiorari brings the whole record below into the reviewing court for a decision on the merits. To have ruled in the case, therefore, would have made the Supreme Court's appellate jurisdiction available to anyone seeking merits review of commission convictions. Apart from the threat such review posed to the size of its appellate docket, the decision would have drawn the federal courts away from their traditional boundary-setting role in testing the proper scope of military justice (via habeas) to one of meting out military justice through direct review of the merits. Citing both the absence of any direct source of statutory appellate jurisdiction

[118] See Ex parte Bollman, 8 U.S. 75, 99-100 (1807) (upholding Court's power to issue writ of habeas as effectively appellate in light of the petitioner's earlier attempt to gain release by petition for habeas to the circuit court of the District of Columbia). On the original/appellate wrinkle in the administration of the Court's supervisory writs, see James E. Pfander, One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States (2009). Despite the fact that Vallandigham had (like Bollman) first sought habeas in a lower federal court, his habeas challenge ended when he was released from military custody and sent beyond Union lines to the south. While certiorari will sometimes issue as an auxiliary to a valid petition for habeas, the Court had no valid habeas petition to which it could append a writ of certiorari. Nor could the Court have easily maintained an appellate characterization of its original writs of certiorari as a practical mode of reviewing the denial of habeas below, when the end of custody mooted any further habeas litigation.

[119] Although the Supreme Court in *Ex parte Yerger*, 75 U.S. 85 (1868), upheld its authority to review military detention by way of habeas, it did so on the basis that the habeas petition fell on the appellate side of the *Marbury* line. Following the Court's decision, the government transferred Yerger to civilian custody and thus mooted the habeas inquiry. See Witt, supra note 58, at 316. Similarly, while the Fourth Circuit's decision upholding military detention of a U.S. citizen was awaiting review in the Supreme Court, the government transferred the petitioner to civilian custody and thereby mooted his challenge to the legality of his military detention. Padilla v. Hanft, 547 U.S. 1062 (2006) (Kennedy, J., concurring).

[120] For an account of Vallandigham's travels to Canada and later exploits, see Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War* (1998). See also J.G. Randall, supra note 62, at 176-79 & n.16.

[121] See Ex parte Bollman, 8 U.S. at 99-100 (treating the petition as properly appellate in character by virtue of an earlier submission to the circuit court).

and invoking the *Marbury* limits on its exercise of original jurisdiction, the Court refused to entertain Vallandigham's claim.[122]

Denial of certiorari review thus let the result stand as to Vallandigham but it should not read as expressing implicit approval of the military commission that ordered his confinement.[123] Nor does it speak more generally to the viability of military commissions for the trial of civilians, as Witt suggests. In finding that the Court lacked jurisdiction over direct appeals, the *Vallandigham* decision indicates that the supervision of military commissions was to occur in the first instance before the lower federal courts in the exercise of their habeas authority and only then on further review in the Supreme Court. Unlike Vallandigham, Milligan followed this protocol, first filing a petition for habeas in the circuit court for Indiana and then seeking answers to questions that court certified to the Supreme Court.[124] The answers, forcefully rejecting civilian trials before military commissions, were supplied in the Court's first opportunity to address the boundary line between the rightful authority of military commissions and the citizen's right to due process of law.

D. Detention and Trespass Litigation

The principle underlying the habeas decisions – that civilians cannot be subjected to military justice – also finds repeated expression in trespass litigation. Such claims were frequently brought in the wake of the War of 1812 by individuals who had been detained or imprisoned on suspicion of conniving with the British enemy.[125] Many of these claims arose from the conduct of U.S. 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. One can reconstruct the backstory of this

[122] See Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 251-53 (1863) (finding that the Court lacked a statutory source of appellate jurisdiction in relation to military commission trials and concluding that an original writ of habeas or certiorari would have violated the *Marbury* principle as an exercise of original jurisdiction).

[123] Denial of certiorari in 1863 meant something quite different from denial of certiorari today. The Court lacked any general statutory power to issue certiorari to inferior courts; rather, it reviewed most state and federal judgments by writ of error and oversaw equitable and maritime proceedings by way of appeal. Its certiorari power was limited; it could issue such writs only when necessary in aid of its jurisdiction. The absence of a statutory grant of appellate jurisdiction in relationship to military commissions thus ruled out the use of certiorari to assist in that vein and the original character of the review contemplated meant that the writ could not be characterized as an aid to the appellate jurisdiction conferred in Article III. For an account of these particulars, see Pfander, supra note 115, at .

[124] See Ex parte Milligan, 71 U.S. 2, 69 (1866) (describing posture of the case).

[125] For an account, see 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).

litigation from the congressional reports that accompany the bills of indemnity.

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.[126] Major General Brown was commanding U.S. forces at their quarters in French Mills, New York, during the winter of 1813-14. Utley and his family were thought to have been "notoriously employed in communicating intelligence" to the British. Brown's men captured Utley en route to the British to inform on the army's winter location. He 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.[127]

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) Pike, commanding U.S. 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 collector] charges with having been engaged in treasonable practices" and bring them to headquarters. 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 they "suffered much in mind and body." The nine later sued, and recovered substantial judgments, $6700 against Austin and $5700 against Wells.[128] Both defendants, unable to pay, were arrested in execution of the judgments and confined in jail for upwards of a year.[129] 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

[126] 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 Am State Papers: Claims at 551 (No. 387) (Feb. 9, 1818) (reporting the facts of the case, the eventual entry of judgment for $669, and the recommendation that Congress grant indemnity).

[127] Id. On the payment of indemnity, see Pfander & Hunt, *supra* note 65, at 1935 (reporting on the nineteenth century practice of indemnity and confirming the payment to Major Brown)

[128] On the events giving rise to the indemnity petitions of Lts. Austin and Wells, as reported in congressional documents, see American State Papers: Claims at 545-46 (claim no. 379) (Jan. 23, 1818)

[129] Id. On the eventual adoption of indemnifying legislation, see Pfander & Hunt, supra note 65, at 1935.

considered" unlawful.[130] 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.[131]

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.[132] Accused of spying for the British in Sackett's Harbor during the spring 1813 and held in close military confinement as a spy and traitor, Stacy sought habeas from the 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," Kent would have none of it. The military lacked "any color of authority" to try a civilian for that offense or for spying.[133] Like Wolfe Tone, Stacy was released after further deliberations confirmed that a citizen could not be held by the military.

III. CONSTITUTIONALIZING LIMITS ON MILITARY ACTIVITY

Litigation over the past fifteen years or so, much of it growing out of 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. Suits for damages by U.S. citizens for wrongful detention and torture now proceed as constitutional tort claims under the *Bivens* doctrine.[134] Suits to recover money for the improper taking of property proceed under the Fifth Amendment, as claims for constitutionally required just compensation. This part catalogs the state of the law, detailing the ways modern courts evaluate claims that the military exceeded its boundaries.

A. Habeas, Due Process, *Hamdi* and *Padilla*

[130] See American State Papers, supra note, at 546 (quoting opinion of attorney general and secretary of war).

[131] See, e.g., Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815); see also Wuerth, supra note , at (collecting authority).

[132] See In re Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

[133] Id. at 340.

[134] 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). As discussed in part IV, the Supreme Court's decision in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), casts doubt on the continuing viability of the *Bivens* action, especially in connection with overseas war-on-terror cases.

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, which clothes the President with the authority to use "all necessary and appropriate" military force against responsible organizations and persons, including al Qaeda, the terrorist group once headed by Osama bin Laden, and the Afghan Taliban, which harbored al Qaeda and bin Laden.[135] The AUMF provided the legal authorization for the invasion of Afghanistan, 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.[136]

At least three U.S. citizens were detained in the global war on terror. John Walker Lind was captured during fighting in Afghanistan and brought back to the United States where he would plead guilty to two criminal charges and receive a sentence of twenty years.[137] Yaser Hamdi, a U.S. citizen, was also captured in Afghanistan.[138] 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 be released in Saudi Arabia (subject to some travel restrictions), would renounce his U.S. citizenship, and would refrain from suing the United States.[139]

Jose Padilla was not captured on the battlefield; he was arrested at O'Hare International Airport in Chicago.[140] He had been implicated (re-

[135] See Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). 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).

[136] See Pfander, supra note 131, at 31-35 (recounting the progression from the AUMF to the torture memos' approval of the CIA's program of rendition, detention and interrogation).

[137] See Jane Mayer, *Lost in the Jihad*, New Yorker (March 10, 2003) (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).

[138] 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, A02 (Oct. 12, 2004). The next friend petition on Hamdi's behalf was signed by his father in Saudi Arabia at the instance of his federal defense attorney.

[139] Id.

[140] 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 Paul Waldman, The War on Terror Encapsulated in One Case, American Prospect (Dec. 12, 2014); Adam Taylor, Dirty Bomb Plot, Wash. Post (Dec. 9, 2014).

portedly by Abu Zubaydah) in the so-called dirty bomb plot to explode 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 to military custody, in effect detaining him as an unlawful enemy combatant.[141] 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 unrelated 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.[142]

Both Hamdi and Padilla sought release from military custody by way of habeas. Neither one succeeded, at least directly. Hamdi argued that the AUMF did not authorize the detention of U.S. citizens, that another federal statute prohibited his detention, and that the traditional separation of civilian and military justice barred his detention by military authorities.[143] The Supreme Court 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.[144] Justice O'Connor also found that this power to detain extended to enemy combatants who happened to be U.S. 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, U.S. citizens were entitled to due process of law.[145] In this context, invoking a flexible balancing test, the Court held that due process required notice and an opportunity to be heard on the enemy combatant issue before a neutral tribunal.[146] The Court vacated the Fourth Circuit decision, upholding detention, and remanded for further proceedings at which Hamdi would have the right to counsel in contesting his designation as an enemy combatant.[147]

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. (The government's argument to the contrary rested in good measure on the Court's decision in *Ex parte Quirin*; among

[141] For the procedural background, see Rumsfeld v. Padilla, 542 U.S. 426, 430-34 (2004).
[142] On Padilla's conviction on conspiracy charges and the imposition of a 17 year sentence, see Reuters, Court says Padilla sentence too lenient (Sep. 19, 2011).
[143] See Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[144] See Hamdi, 542 U.S. at 516-23.
[145] See Hamdi, 542 U.S. 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).
[146] See Hamdi, 542 U.S. at 533 (concluding that Hamdi was entitled to notice and an opportunity to rebut the evidence against him before a neutral tribunal).
[147] 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)

the German saboteurs whose prosecution by military commission the Court upheld was one, Haupt, who claimed U.S. citizenship.[148]) The Court declined to reach the merits, ruling 5-4 that Padilla had not filed suit in the district of confinement as habeas law required.[149] The four dissenters, joining an opinion by Justice Stevens, left little doubt that they would reject the military's authority to detain and interrogate Padilla.[150] 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.[151] Recognizing that reality, the government mooted Padilla's refiled case on appeal by transferring him out of military detention to face criminal charges.[152]

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 habeas principle that courts applied in the nineteenth century. Nineteenth century courts viewed habeas as implementing an absolute prohibition against the military detention of U.S. citizens. *Hamdi* relaxes that rule, concluding instead that the government has power in a lawfully declared war to hold U.S. 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 before the government maneuvered to moot his challenge by bringing criminal charges.[153] While limits apply and the government must 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.[154]

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. Military justice was, by definition, something less than due process, and habeas issued to maintain clear lines between the two. Today, habeas serves not to maintain a prohibition against military justice but to render military justice

[148] See Ex parte Quirin, 317 U.S. 1 (1942)
[149] See Padilla v. Rumsfeld, 542 U.S. 426, 442, 446-47 (2004).
[150] See Padilla, 542 U.S. at 455 (Stevens, J., dissenting).
[151] For Justice Scalia's view in *Hamdi* on the detention of U.S. citizens, see text accompanying note infra.
[152] See Hanft v. Padilla, 546 U.S. 1084 (2006) (concluding, contrary to lower court, that government's transfer of Padilla to face criminal charges in Florida mooted the challenge to his military custody); see also Padilla v. Hanft, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from the denial of certiorari to decide legality of Padilla's military custody).
[153] See note supra.
[154] For a similar criticism, see Tyler, supra note , at 260-62.

tolerably fair to the individual. Individuals taken into military custody must receive fair process and no violation of their rights occurs until such time as a court determines that there was inadequate cause to detain. To recast the conclusion in nineteenth century terms, the modern Court has abandoned the jurisdictional boundaries it confirmed in *Milligan* and has agreed to review the merits of military justice (something it resisted in *Vallandigham*).

The abrogation of a once-crisp boundary eliminates the need for congressional involvement in assessing the gravity of the situation and the need for the detention of citizens. 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.[155] Nowadays, the executive has the power to take initiative in detaining civilians without legislative approval (aside from the implicit approval that flows from the authorization of the use of military force as construed in *Hamdi*). 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, one will regret *Hamdi's* creation of a zone of judge-made discretion that enables the executive to detain without securing explicit legislative authorization.[156] By breaching the formal boundary between civil and military justice, the Court has substituted a fluid judicial assessment of need for the habeas-suspending judgment of Congress.

B. Trespass Litigation: Padilla, Vance, Ertel and Doe

Alongside the changes in habeas litigation, the Court has overseen a substantial reconfiguration of the traditional right of citizens to mount trespass claims to vindicate rights of bodily integrity and personal liberty. To be sure, Congress has lent an important hand, 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 reflection of perceived state hostility to federal programs and initiatives.[157] The sec-

[155] See note supra.

[156] 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. 691, 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).

[157] Federal officer removal provisions were first adopted during the War of 1812 and the southern nullification crisis of 1833. See Richard J. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 853-56 & n. 6 (7th ed. 2015) (hereinafter, H&W VII) (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. Id. at 853-54. See 28 U.S.C. § 1442(a)(1).

ond step was to adopt the Federal Tort Claims Act, thereby accepting government liability for the torts of federal officials within the scope of the employment.[158] 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 ("assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").[159] Victims of intentional torts were free to sue responsible officers, rather than the government.[160]

Rather than continue to rely solely on the common law as the vehicle for the assertion of such intentional tort claims against federal officials, the Supreme Court federalized the right to sue in *Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*.[161] Webster Bivens claimed to have been the victim of an unlawful search of his home and an unlawful strip search of his person. He sued federal drug 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 responded that the Fourth Amendment gave rise to an implied federal right of action for damages, thereby solving any jurisdictional problem.[162]

While the *Bivens* action began life as a supplement to common law remedies, it soon became the only vehicle by which individuals could seek redress for the intentional torts of federal officials. Here again, Congress took the lead. 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.[163] But in doing so, Congress preserved the *Bivens* remedy for constitutional tort claims.[164] Four-

[158] For an introduction to the Federal Tort Claims Act, 60 Stat. 843 (1946), 28 U.S.C. 1346, 2401, 2675 et seq., see Gregory C. Sisk, Litigation with the Federal Government 102-187 (4th ed. 2006).

[159] 28 U.S.C. 2680(h). 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 such suits were brought in the early years of the FTCA. For an account, see James E. Pfander & Neil Aggrawal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L. Rev. 417 (2012) (describing early litigation against the government and its officers and judicial efforts to coordinate the overlap).

[160] Congress has since provided for government responsibility for the intentional torts of law enforcement officers. See Sisk, supra note , at 156-62.

[161] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). For an account, see James E. Pfander, *The Story of Bivens* in Federal Courts Stories 275-299 (V. Jackson & J. Resnik eds. 2010)

[162] See Bivens, 403 U.S. at 397.

[163] See 28 U.S.C. § 2680(h).

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

teen years later, in the Westfall Act of 1988, Congress immunized federal officers from liability for all claims based on state law.[165] But again, Congress created an exception for suits alleging violations of the Constitution, thereby preserving the *Bivens* action.[166] 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.[167]

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 right to sue, litigants pressing suits under the *Bivens* doctrine must now persuade the federal courts that a range of discretionary factors support the recognition of a right to sue. Courts limit the remedy to established contexts, and take a very narrow view of their capacity to extend *Bivens* to a new setting.[168] When asked to make such an extension, courts view the *Bivens* action as a remedy of last resort rather than a routinely available way to vindicate an invasion of rights.[169] 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.[170] Even in the absence of clear alternative remedies, the special-factors analysis often leads to the denial of a right to sue.[171] Thus, the owner of a dude ranch, who plausibly alleged government retaliation for his refusal to grant an easement across his land**,** was not permitted to mount a suit for damages under the takings clause of the Fifth Amendment.[172]

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 the Secretary of Defense, Donald Rumsfeld, and the military officers responsible for his detention and mistreatment there,[173] and one in California against the architect of the Bush Administration's torture memos, John Yoo.[174] Both suits failed at the threshold, notwithstanding detailed allega-

[165] For the terms of the Westfall Act immunity, see 28 U.S.C.
[166] See 28 U.S.C. § 2679(b). For an account, see James E Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009).
[167] 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).
[168] See Ziglar v. Abassi, 137 S. Ct. at 1857-59.
[169] See Ziglar, 137 S. Ct. at .
[170] Id. at 1860.
[171] Id. at 1863 (refusing to allow claims for the discriminatory detention of Muslim men in the wake of the 9/11 attacks).
[172] See Wilkie v. Robbins, 551 U.S. 537 (2007)
[173] See Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012).
[174] See Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012)

tions 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 ability to practice his religion; and incommunicado detention for almost two years, without access to family, counsel or the courts.[175]

While the results were the same, 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 doctrine of qualified immunity.[176] 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. Dealing with claims against Padilla's jailers, the Fourth Circuit denied relief on a considerably broader basis. It concluded that special factors counseled hesitation and thus refused to recognize a right to sue under *Bivens*.[177] 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.[178] A congressionally "uninvited intrusion" into military affairs by the judiciary was said to be inappropriate. As a result, the court viewed Congress's failure to create a right to sue as fatal; courts were thought to have no business in creating such a right instead.[179]

As with Padilla's litigation in the Fourth and Ninth Circuit, Donald Vance's claims were rejected by the Seventh Circuit in Chicago.[180] 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. While there, 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." Vance was held for three months; Ertel for six weeks. Officials running the proceedings refused to look at files on their computers that Vance and Ertel say would have established their inno-

[175] See Padilla, 678 F.3d at 752.
[176] See id. at 757-58 (citing Ashcroft v. al-Kidd, 563 U.S. 731 (2011) (finding no clear bar to detention on material witness warrants) and Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (setting the clearly-established standard for qualified immunity).)
[177] See Lebron v. Rumsfeld, 670 F.3d 540, 548 (4th Cir. 2012).
[178] Id. at 549-50.
[179] Id. at 550 (viewing the recognition of a judge-made remedy as inconsistent with congressional control of military affairs).
[180] See Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012).

cence of arms-dealing charges. Nor did they 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, which Chief Judge Diane Wood described as "torture."[181]

The Seventh Circuit, sitting en banc, refused to permit the suit to go forward under *Bivens*.[182] While similar mistreatment would be actionable had it occurred in a prison run by federal officials in the United States, the court treated 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. The court also acknowledged some uncertainty as to whether applicable constitutional provisions applied to federal conduct overseas and some reluctance to authorize a *Bivens* action in a context in which Congress had specified alternative modes of compensation, such as the Military Claims Act and the Foreign Claims Act.[183] While none of these factors was decisive, together they counseled hesitation in the recognition of what the court viewed as a new right to sue. On the view taken in *Vance*, 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*.[184] 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 in part to contacts he made with Iraqi clerics. He was interviewed without access to counsel, placed in solitary confinement, transferred to Camp Cropper in Baghdad, and detained for nine months. During his detention 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 his release and he returned to the United States. No charges were ever 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 not actually a member of the armed forces (and not directly foreclosed from suing by the Supreme Court's decisions in such cases as *Chappell* and *Stanley*[185]). But, the court explained in a stunning

[181] See Vance, 701 F.3d at 206 (Wood, CJ, concurring).
[182] See Vance, 701 F.3d at 203.
[183] Id. at .
[184] See Doe v. Rumsfeld, 683 F.3d 390, 396 (D.C. Cir. 2012).
[185] See 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); United States v. Stanley, 483 U.S. 669, 678 (1987) (rejecting *Bivens* claim by service member that he was drugged without his consent).

departure from the crisp boundary-setting of the nineteenth century, "we see no way in which this affects the special factors analysis."[186]

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 abandons the strict boundaries between civilian and military justice, and substitutes a regime of due process balancing, lower courts can no longer treat military detention 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. Scrutiny of Doe's claims was said to threaten exposure of sensitive military information and depletion of scarce military resources, to "hamper the war effort," and "to bring aid and comfort to the enemy."[187] 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, courts have found it practically impossible to provide redress for wholly unjustifiable detention.

C. Property Taken in the Course of Military Operations

In the early years of the court of claims, compensation for military takings of property was based on a theory of implied contract. Recall that the court's jurisdiction in the 1860s was limited to claims for breach of express or implied contract; the court had no jurisdiction to entertain takings claims, as such, under the Fifth Amendment. But the absence of takings jurisdiction did not prevent the award of damages; as the *Grant* court explained: the government owes a duty under the Constitution to make just compensation to the owner. 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."[188] 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, the 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.

[186] 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 21, 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.

[187] Doe, 683 F.3d at 395.

[188] Grant, at 50.

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 of property located in such places as Austria, El Salvador, and Costa Rica.[189] In addition, aliens have sometimes secured compensation for the loss of their property. Thus, an alien was permitted to pursue compensation for the government taking of military radar equipment in the Philippines.[190] Congress formalized the right of aliens to pursue compensation in the Reciprocity Act, which specifies that citizens and subjects of a foreign country may bring takings claims in the Court of Federal Claims if citizens of the United States can pursue similar claims against the government of the foreign country.[191]

Over time, the theory of liability switched from a claim based on an implied contract to pay compensation for taken property to a claim founded directly on the Just Compensation Clause of the Fifth Amendment. As best scholars have been able to reconstruct the change, it appears to have taken place gradually 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.[192] By 1933, the Supreme Court ruled that suits seeking compensation for taken property were not really based on contracts with the government but were "founded upon the Constitution."[193] 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, no interest was due 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.[194]

[189] See Wiggins v. United States, 3 Ct. Clms. 412, 422 (1867) (property in Costa Rica); Seery v. United States, 127 F. Supp. 601, 603 (Ct. Clm. 1955) (Austria); Langenegger v. United States, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (El Salvador).

[190] *See* Turney v. United States, 126 Ct.Cl. 202, 115 F.Supp. 457, 464–65 (1953). See also Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (compensation duty applied to property owned by nonresident alien).

[191] See 28 U.S.C. 2502. 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).

[192] 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, 505 (1887). 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, 57 Vand. L. Rev. 55, 137-38 n.342 (1999).

[193] Jacobs v. United States, 290 U.S. 13, 16 (1933).

[194] Id. at 17-18 (collecting cases).

The shift to a constitutional predicate, both in the definition of the claim court's jurisdiction and in the Supreme Court's use of that jurisdiction to constitutionalize the implied contract theory of compensation, was apparently meant to expand individual access to remedies against the government.[195] But that does not appear to have been the case in the long run, at least in connection with suits for compensation brought in connection with military hostilities. In *United States v. Caltex, Inc*., for example, the Supreme Court refused to order compensation to a Philippine corporation whose property was destroyed in the first month of World War II to prevent its falling into the hands of the (Japanese) enemy. The Court acknowledged that the U.S. military took control of a 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 the earlier decisions in *Grant* and *Wiggins*. Thus, 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 Federal Claims viewed those earlier decisions as having been abrogated by *Caltex*.[196] Officers of the United States specifically bargained with the sheik for the use of his property, asking him to leave the premises so they could establish a command post 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 Federal Claims instead.[197] Despite the similarities to *Mitchell* 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.[198] Instead, the court found that the plaintiff had failed to state a cognizable taking claim under

[195] As Professor Brauneis reports, the decision in *Jacobs v. United States*, constitutionalizing the just-compensation remedy, was among the cases on which the Court relied in recognizing a constitutional tort claim in *Bivens*. Brauneis, supra note , at 138 n.342.

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

[197] See Doe, 95 Fed. Clm. at 552, 557.

[198] See Doe, 95 Fed. Clm. at 555; see also Perrin v. United States, 4 Ct. Clms. 543, 547-48 (1868) (property of U.S. citizen located in enemy town was subject to destruction as enemy property and its loss was not compensable).

the Fifth Amendment and had failed to allege official contracting authority with the specificity needed to state an implied contract claim.[199] As for the taking 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.[200] 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.[201]

As for the implied contract claim, the court emphasized the failure of the plaintiff to allege that the officers with whom he dealt possessed the authority necessary to contract. In the old days, as we have seen, 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 necessity. 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. 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.[202] Such an inquiry fundamentally alters the nature of the inquiry.

Changes in the underlying law of tort-based liability underscore the importance of the court's refusal to treat the officers as enjoying the requisite authority to bind the government. In the nineteenth century, as we

[199] 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. Clm. at 566, 580-82 (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).

[200] See Doe, 95 Fed. Clm. at 560-65 (describing the early decisions as abrogated).

[201] 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. In a famous early application of the "local action rule," Chief Justice John Marshall dismissed a trespass claim brought against Thomas 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 (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), 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*. The property in *Mitchell v. Harmony*, by contrast, was personal.

[202] Id. at 584 (plaintiff has pleaded no facts "that could lead the court reasonably to infer that these operatives had authority to bind the United States").

have seen, lower-level officers acting on their own authority would bear 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 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 Federal Tort Claims Act. But the FTCA specifically prohibits the imposition for tort-based liability for injuries that occur outside the territorial boundaries of the United States and its discretionary function exception might well bar the claims if they arose within the United States. 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.

A similar change was made with the court's demand for definite terms and conditions. In the course of analyzing plaintiff's claim for breach of an "expressed or implied contract,"[203] the court noted that plaintiff had been promised "compensation" for his property at the time of its occupation in exchange for his cooperation; the court found this promise too indefinite to establish a contract.[204] 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, though likely mischaracterized, reveals a potentially important shift in the doctrine. The *Doe* court couched its analysis in terms of whether the plaintiff, as an Iraqi seeking recovery for property located in Iraq, has "standing to bring a takings claim."[205] 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. Thus, in *United States v. Verdugo-Urquidez*, the Supreme Court refused to apply the Fourth Amendment's warrant requirement to searches conducted in Mexico. By contrast, the Court held in *Boumediene* that the habeas non-suspension clause extends to aliens detained as enemy combatants at

[203] Id. at 582.
[204] Id. at 584-85.
[205] Id. at 567.

Guantanamo Bay.[206] Correctly identifying uncertainty about the extra-territorial application of the Fifth Amendment, the court found that the plaintiff lacked standing.[207]

Although likely mistaken in framing the law of extra-territoriality in terms of standing, the court nonetheless put its finger on a problem of growing concern. The Supreme Court has treated issues of extra-territoriality (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. But however one might characterize the issue, extra-territoriality now surely plays an important role in the analysis of whether any particular taking qualifies as compensable under the Fifth Amendment. That 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 government property did not have controlling significance. Thus, Harmony successfully pursued Mitchell in New York court on a claim growing out of the loss of property in Mexico. The *Mitchell* Court specifically embraced the common law transitory tort doctrine in permitting the claim to proceed.

Similarly, when the government took property abroad, citizens and others have been permitted to mount takings claims. After World War II ended, U.S. military officers occupied the plaintiff's Austrian property as an officer's club.[208] Because the end of hostilities was viewed as terminating any military necessity for the occupation and as ending any characterization of the property as "enemy property," the court of claims ruled that the occupation amounted to a compensable taking. The fact that the property occupied was real property and that it 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.[209] 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 of property, offering further evidence that the constitutionalization of rights may dilute their effectiveness.

IV. WHAT WOULD DICEY SAY?

[206] *Compare* United States v. Verdugo–Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not apply to warrantless search of defendant's home in Mexico) *with* Boumediene v. Bush, 553 U.S. 723 (2008) (habeas non-suspension clause applies to aliens detained at Guantanamo Bay).

[207] Doe, at 567.

[208] See Seery v. United States, 127 F. Supp. 601, 602-03 (Ct. Clms. 1955).

[209] See Turney v. United States, 115 F. Supp. 457, 464 (Ct. Clms. 1953).

Across a range of doctrines, the shift from common law to constitutional analysis has been accompanied by a distinctive reduction in the willingness of courts to protect the rights of citizens (and alien friends) 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 more absolute (absent lawful suspension) civilian privilege against military detention. The substitution of an 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. The right to assert property claims has suffered similar attrition as the law has switched from a focus on implied contract to one based on the vagaries of the Fifth Amendment.

Although Dicey might greet this loss of remedial effectiveness with a certain smugness, he would also endeavor to understand the root causes of the change. It would be too simplistic, I believe, to suggest that the Court's switch to constitutionally-inflected analysis was a sole or primary cause of the loss of rights. Instead, changes in the underlying framework of government accountability have contributed to the softening of previously hard edges and the blurring of lines of separation. Three factors in particular seem to have reshaped the judicial approach to civilian-military interactions: a change in the conception of the proper role of courts when faced with claims that individual government officials violated the rights of citizens; an accompanying switch from rules to functional standards as the measure of the duties of the several departments of government; and a growing preference for declaratory forms of judicial intervention, with forward-looking injunctive-style remedies, rather than backward-looking awards of damages. The rise of symbolic or expressive litigation, as a vehicle for advancing the interests of non-governmental organizations (NGOs) may also play a role. Constitutional analysis did not bring these factors into existence, but it does provide the framework within which they operate.

A. Changing Perceptions of Judicial Duty

What accounts for the vigor with which the 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, no one appears to have doubted 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.[210] Yet Kent shrugged off this evidence of treasonous malfeasance, explaining that the greater the evidence

[210] See text accompanying note supra.

of complicity, the more important was the preservation of strict boundary lines and the primacy of civil justice.[211]

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 do so without regard to the justifications based on claims of emergency and necessity with which military officers would inevitably defend encroachments. If military officers overstepped the line, courts were expected to say so, either in actions for trespass or in applications for habeas. Congress was ultimately in control and could indemnify officials for any damages that were imposed on officers acting in good faith and could authorize the suspension of habeas in the theater of battle, thereby authorizing detention on suspicion.

Justice Joseph Story explained all this in *The Apollon*, a remarkable decision that upheld the imposition of liability on government officials who sought to enforce American revenue laws against suspected smugglers.[212] The plaintiff was the owner of a French vessel that had been seized by U.S. revenue officers after landing its cargo in Spanish Florida, apparently to facilitate the avoidance of American import duties. Evaluating the seizure, Story found that it was unlawful, under the law of nations, for a U.S. official to enter foreign territory for the purpose of enforcing U.S. law. When officials did so, they violated the rights of the foreign vessel and its owner and subjected themselves to damages. The government argued strenuously that the border river between South Carolina 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. The Court thus upheld the award of damages.[213]

Story here was drawing the same hard lines as Kent and 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 gov-

[211] See note supra.
[212] The Apollon, 22 U.S. 362 (1824) (Story, J.)
[213] The Apollon, 22 U.S. at 376.

> ernment, 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, {"pageset": "Scf 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.[214]

Emergencies were certainly for the executive branch to address, but the emergency itself did not legalize the action taken, however praiseworthy.

Chief Justice Taney expressed the same view of the proper role of the branches in *Mitchell v. Harmony*.[215] Taney proclaimed the actions of the U.S. army in Mexico to have been "boldly planned and gallantly executed" but that could not legalize the taking of Harmony's property.[216]

> 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.[217]

Echoing the comments of Justice Story in *The Apollon*, 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 a different language. Two representative samples of the modern argot appear in decisions of Justice Anthony Kennedy, addressing the claims of Muslim men who were rounded up in the aftermath of September 11, 2001, and subjected to extremely harsh

[214] The Apollon, 22 U.S. at 366-67.
[215] See Mitchell v. Harmony, 54 U.S. 115 (1851).
[216] Mitchell, 54 U.S. at 137.
[217] Id.

conditions of confinement. (The men were, for the most part, undocumented aliens who could not claim rights as citizens.) In his first opinion in a long-running challenge to policies that were 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.[218] In his second opinion, *Ziglar v. Abbasi*, Justice Kennedy held that the claims were not actionable under the *Bivens* doctrine, with one modest exception.[219] 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.[220] Justice Breyer, in dissent, invoked the decision in *Korematsu*, which had upheld FDR's decision to target citizens of Japanese ancestry for internment during World War II, as a cautionary tale.[221]

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. Building on the ideas expressed in the Court's post-*Bivens* decisions, Justice Kennedy portrayed the recognition of a judge-made federal right to sue as a "significant step under the separation of powers," one that should be undertaken cautiously.[222] Among the reasons to proceed cautiously: the burden on government employees sued in their personal capacities; regulatory contexts that suggest Congress meant the courts to stay away; and the existence of alternative remedial schemes.[223] 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."[224]

As a result Justice Kennedy explained, in most cases the Court will not permit a constitutional suit for damages to proceed but will leave the matter to Congress. The judicial inquiry will necessarily entail a weighing of "the costs and benefits" with due attention to special factors counselling hesitation.[225] Such an open-ended special factors analysis will 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

[218] See Ashcroft v. Iqbal, 556 U.S. 662 (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).
[219] See Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).
[220] See Ziglar, 137 S. Ct. at 1864, 1867 (dismissing claims against high government officials but remanding the claim against the warden for further proceedings).
[221] Ziglar, 137 S. Ct. at 1872, 1884 (Breyer, J., dissenting).
[222] Ziglar, 137 S. Ct. at 1856.
[223] Id.
[224] Id. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. at 675)).
[225] Id. at 1858.

national security"; and the possible threat that high officers who face personal liability might refrain from taking "urgent" action "in a time of crisis."[226] Notably, Justice Kennedy paid no attention to the question whether the common law would have permitted an action for false imprisonment and battery to proceed against the responsible federal officials.[227]

Right on the face of Justice Kennedy's opinion, one sees the impact of the balancing framework that now governs constitutional remediation. The Court views the existence of a right to sue as dependent on an elaborate multi-factored analysis, rather than as flowing naturally and routinely from the common law. Rights once firmly established now must await legislation that, for a variety of reasons, Congress will be in no hurry to adopt.[228] The Court views the invocation of national security as a reason 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 about whether to recognize a qualified immunity defense.[229] 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.

[226] Id. at 1863.

[227] Among the many ironies in the 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 stems 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 the adequacy of the allegations in the complaint, it has allowed the government to seek interlocutory review of adverse decisions that implicate qualified immunity, thereby 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 submitted the claims to a jury in something less than fifteen years.

[228] 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. Thus, 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 generally Pfander, supra note 131, 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 1974, taken any legislative action directly aimed at bolstering the viability of the suit for damages against its 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.

[229] 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*).

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"), 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 "gallantry" in Chief Justice Taney's words) of the official defendants. The modern Court, it seems, has unwittingly taken on the role of the executive branch in weighing the need to act 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. Very much 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.[230]

The Court has also, perhaps less unwittingly, assumed the role of the legislature in seeking to ensure a proper indemnity for the official defendants who took unlawful actions. 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.[231] 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.[232] 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 a common practice, although Congress has delegated the task of evaluating indemnity claims to the agencies.[233]

[230] To be sure, nineteenth century courts evaluated necessity in the course of deciding whether the military's destruction of property was "justified". *See* Mitchell v. Harmony, 54 U.S. 115, 134 (1851) (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 than as a basis for avoiding the merits altogether.

[231] On the problems with qualified immunity, see Pfander, supra note 131, at 52-3. 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).

[232] See Pfander, supra note 131, at 8-9, 13-14.

[233] 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

One might fairly conclude, in short, 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." [234]

> 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.[235]

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.

B. The Choice of Remedial Forms

Along with its emphasis on open-textured balancing, a loss of rule-based specificity, and a blurring of the lines of branch separation, 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 expressed with far greater openness in recent cases. Thus, in *Ziglar v. Abbasi*, the Chief Justice 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, the Chief countered that "the normal injunctive action would challenge the constitutionality of the policy, which would

the United States." 28 C.F.R. § 50.15(c)(1). 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).

[234] Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004).

[235] Id. at 576-77.

seem, at least at first blush, to be a more appropriate way of doing it than to – than individual damages actions against officials responsible."[236]

The Chief's 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,[237] the Court treated the suit for damages as a remedy of last resort, appropriate for use only "if equitable remedies prove insufficient."[238] 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.[239] 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.[240] While it foreclosed the policy challenge, the Court tepidly reaffirmed established categories of *Bivens* litigation and remanded claims of prisoner abuse for further consideration.[241]

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.[242]) 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.[243] Understanding the

[236] Ziglar v. Abbasi, No. 15-1359, Transcript of Oral Argument, at 47 (January 18, 2017) (comments of Roberts, C.J.).
[237] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
[238] Id. at 1858.
[239] 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 230, at 37-38.
[240] See Ziglar, 137 S. Ct. at 1861 (distinguishing challenges to "standard law enforcement operations" from those seeking to contest national security policy).
[241] Id. at 1865.
[242] See Pfander & Hunt, supra note 65, at 1912-13 (quoting *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).
[243] See Pfander, supra note 131, at 89.

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.

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 Parillo found a distinct 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.[244] Professor Parillo 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.

C. 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.[245] 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 to gain compensation for the victims of government wrongdoing and

[244] See Nicholas Parillo, The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power, 132 Harv. L. Rev. __ (forthcoming 2018) (describing a distinct reluctance on the part of appellate courts to uphold contempt sanctions against the government and its agencies).

[245] 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 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"). *See generally* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477 (2004) (documenting use of litigation as 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); *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).

to expand rights consciousness more generally.[246] When non-profit public interest groups file suit to defend human rights in the face of apparently lawless forms of military detention and interrogation, they almost invariably couch the claims in constitutional terms.[247] 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 with the desire to score political points.[248] 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.[249]

In relying on the common law, nineteenth century disputants pursued claims of government wrongdoing within a decidedly more modest framework. The claims did not target whole government policies, so much as

[246] For the 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 239, at 841 (recounting that the Center for Individual Rights, which undertook the challenge to affirmative action in what became *Gutter 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). 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 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).

[247] Notably, the displacement of common law rights of action under the Westfall Act means that injured victims must pursue their claims either under a federal statute, such as the Federal Tort Claims Act, or must seek redress for constitutional torts under the authority of *Bivens*. The FTCA does not apply to overseas injuries inflicted in the course of military hostilities, leaving only the constitutional claim as a possible basis for suit.

[248] 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 (17 January 2017), the UK Supreme Court applied the Crown act of state doctrine to bar 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 par. 8. 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.

[249] Thus, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), 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. "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. at 583.

discrete 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, the 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. Accountability ensured redress and compensation for victims and the officers were presumptively entitled to congressional indemnification.

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.[250] 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.[251] Nor finally must courts demand the disclosure of state secrets in adjudicating claims of torture;[252] by drawing an inference of government responsibility and employing a regime of burden shifting, the courts can leave it up to the government to decide whether to offer a defense of the conduct in question.[253]

One can see a preference for retail litigation in *Ziglar*, where the Court threw out the detention policy claims against high government officers and 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 Gov-

[250] See Pfander, supra note 131, at 85-6.

[251] Id.

[252] 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, Essay, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1935-50 (2007).

[253] 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, 110 Am. J. Int'l L. 761 (2016).

ernment's whole response to the September 11 attacks."[254] So broad an inquiry would necessitate broad and burdensome discovery and "would assume dimensions far greater that those" in its prior cases.[255] Challenges to "standard" law enforcement operations were one thing; "[j]udicial inquiry into the national-security realm" was quite another.[256]

The shift from a common law 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 taking sides in the "culture war."[257] In keeping with that perception, Americans of all stripes have come to view the business of constitutional adjudication as politics by other means.[258] 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 would all oppose 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 the 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.[259]

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.[260] Mili-

[254] Ziglar v. Abbasi, 137 U.S. 1843, 1861 (2017).
[255] Id.
[256] Id.
[257] Lawrence v. Texas, 539 U.S. 558, 602-03 (2003) (**S**calia, J., dissenting).
[258] Cf. Carl von Clausewitz, I *On War* _ (London: Kegan Paul, Trench, Trubner & C., 1918) (defining war as a continuation of politics (policy) by other means). On the embrace of legal realism among academics, see. On the use of the attitudinal model of political science to predict judicial voting in particular cases, see . On the broader acceptance of a political conceptualization of the role of Justices on the Supreme Court, see
[259] David Kennedy, Of War and Law 45 (2006).
[260] *See* Ganesh Sitaraman, *Counterinsurgency, the War On Terror, and the Laws of War*, 95 Va. L. Rev. 1745, 1758 (2009) (noting the obsolescence of the pitched battle, and arguing

tary officers travel with military lawyers, together, they target objectives with due consideration of the legality of proposed attacks and the risk of collateral damage.[261] Scholars recognize that law and war have become intertwined, making it harder to prevent a finding of illegality from being interpreted as a broader condemnation of the war effort. On this view, an adjudication of illegality would, in the words of one court, provide aid and comfort to the enemy.[262]

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. Justice Joseph Story, appointed by (the Jeffersonian Republican) James Madison in 1811, aligned with (the Federalist) Chief Justice John Marshall on many issues of government accountability.[263] His opinion upholding the imposition of liability in *The Apollon* spoke for a unanimous bench. Chief Justice Roger Taney, author of the Court's opinion in *Mitchell v. 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, was appointed to the bench by the conservative New York governor (and former Chief Justice of the Supreme Court of the United States), John Jay.[264] By pointing to longstanding common law rules and refraining from taking into account issues of national security policy and the proffered justifications for emergency action, these jurists had come to view the problem as governed by law rather than by politics.[265]

CONCLUSION

Increasingly, we find that 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

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); Kennedy, supra note , at 7-8 (describing the legalization of modern warfare and noting the surprising degree to which vocabulary of lawful war has been internalized by military officials).

[261] On the ubiguity 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).

[262] *See* Doe v. Rumsfeld, 683 F.3d 390, 395 (D.C. Cir. 2012).

[263] *See* Craig Joyce, Book Review, R. Kent Newmyer, Statesman of the Old Republic, 84 846, 849 n.19 (1986) (describing Story's appointment by Madison and Story's rather lackluster republican credentials).

[264] *See* John Langbein, Chancellor Kent and the Revival of Legal Literature, 93 Colum. L. Rev. 547, 561 (1993).

[265] In the wake of *Ziglar*, law professors were quick to characterize reactions to the opinion in terms of we-they political views. See Prawfsblawg, June 22, 2017 (comment of Orin Kerr) (arguing that the 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").

expressed a strong preference for declaratory modes of adjudication. The Court's response to the Bush administration's war on terror has been largely declaratory, what 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 in the French declaration of the rights of man. But what holding power do they have?

Dicey, like Holmes, invites us to look beneath the surface of the Constitution and the Court's declarations as to its meaning and ask hard questions 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.

If not surprise, Dicey would express regret that, in its haste to proclaim 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 essential to the very idea of an effective constitution. In the course of managing the transition to constitutionally-inflected forms of redress in cases such as *Hamdi* and *Ziglar*, the Court has overseen the very loss of individual rights that Dicey feared.