

PUBLIC WRONGS AND PRIVATE BILLS: INDEMNIFICATION AND GOVERNMENT ACCOUNTABILITY IN THE EARLY REPUBLIC

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Students of the history of administrative law in the United States regard the antebellum era as one in which strict common law rules of official liability prevailed. Yet conventional accounts of the antebellum period often omit a key institutional feature. Under the system of private legislation in place at the time, federal government officers were free to petition Congress for the passage of a private bill appropriating money to reimburse the officer for personal liability imposed on the basis of actions taken in the line of duty. Captain Little, the officer involved in one oft-cited case, Little v. Barreme, pursued this avenue of indemnification successfully. As a result, the ultimate loss associated with that officer's good faith effort to enforce federal law fell on the government rather than on the officer himself.

This paper fills out the picture of government accountability in the early nineteenth century by clarifying the practice of congressional indemnification. After identifying cases in which officers sought indemnity from Congress through a petition for private relief, we examine the way official liability, as administered by the courts, interacted with private legislation, as administered by Congress, to shape the incentives of government officers to comply with the law. We find that a practice of relatively routine indemnification took the sting out of sovereign immunity, a doctrine that key players—including James Madison and John Marshall—treated as thinly formalistic. We also find that Congress assumed responsibility for deciding when federal officers were entitled to indemnity for acts taken in the scope of employment.

The antebellum system thus contrasts sharply with modern government accountability law. Jurists today tend to regard sovereign immunity as a barrier to relief, rather than a principle of forum allocation that preserves legislative primacy in the adoption of money bills. Moreover, courts today often refrain from deciding the question of formal legality in an effort to strike a proper balance between the victim's interest in accountability and the official's interest in immunity. Whatever the wisdom of the resulting body of qualified immunity law, the doctrine reflects judicial control of matters that the early republic had assigned to the legislative branch.

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INTRODUCTION

Many students of administrative law have examined the relatively strict system of official liability that prevailed during the nineteenth century.¹ No case better illustrates the standards to which federal government officers were held than *Little v. Barreme*.² There, the Supreme Court affirmed a finding that George Little, a Captain in the United States Navy, was subject to personal liability for the wrongful seizure of the *Flying Fish*, a vessel that was suspected of trading with the French in violation of federal law. As a consequence of the Court’s decision, Little was obligated to pay damages, costs, and

¹ See, e.g., RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 841–45 (6th ed. 2009) [hereinafter HART & WECHSLER] (exploring historical and conceptual foundation of sovereign immunity); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 104–19 (2000) (discussing evolution of federal sovereign immunity in Supreme Court); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–15 (1972) (discussing substantial disfavor of governmental immunity during nineteenth century); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 556 (2003) (reviewing availability of suits against government officers); James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 Nw. U. L. REV. 899, 937 n.138, 966–71 (1997) (examining rise of government accountability at common law); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–53 (1986) (discussing emergence of legality and discretionary models of official liability in nineteenth century).

² 6 U.S. (2 Cranch) 170 (1804).

interest totaling the substantial sum of \$8504.³ Writing for the Court, Chief Justice Marshall acknowledged both the harshness of the rule and his own initial inclination to protect Captain Little from liability.⁴ In a revealing aside, Marshall suggested that his colleagues on the Court had persuaded him that lenity was inconsistent with the necessarily strict role the federal courts must play in enforcing official liability.⁵ In a well-known companion case, the Marshall Court likewise upheld the imposition of personal liability on Captain Alexander Murray for the wrongful seizure of the Danish vessel the *Charming Betsy*.⁶

The *Little* and *Murray* decisions offer a striking contrast to modern official accountability rules. Since the latter part of the nineteenth century, the Court has developed rules of official immunity that may have precluded the imposition of personal liability on Captains Little and Murray. Today, officials enjoy immunity from liability as long as they do not violate clearly established legal rules of which a reasonable person would have known.⁷ Scholars debate the justifications for this rule of qualified immunity. Some express concern that the rule undermines the goal of securing compensation for victims of government lawlessness;⁸ others note the Court's suggestion that officials might shy away from the vigorous performance of their official duties if they faced the sort of strict liability that the *Little* and *Murray* Court deemed to be essential to government accountability.⁹

³ *Id.* at 175.

⁴ *Id.* at 179.

⁵ *Id.*

⁶ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117 (1804).

⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (“[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”). Earlier decisions recognized privileges from tort liability based on the common law. See, e.g., *Barr v. Matteo*, 360 U.S. 564, 570 (1959) (applying “absolute privilege” to executive officer in context of libel action (citing *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896))). As explored in greater detail in Part IV, later decisions transformed common law privileges into a federal common law of qualified immunity.

⁸ See, e.g., Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U. L.Q. 221 (1984) (criticizing rule of qualified immunity as reflected in *Harlow*).

⁹ See Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1153–59 (1980) (assessing possibility that official liability may result in overdeterrence of official action); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (noting that threat of overdeterrence is important consideration); Woolhandler, *supra* note 1, at 472–77, 483 (discussing role of legal immunity in structuring officials' actions). The Court has expressed similar concerns about overdeterrence of official action. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (justifying official immunity on ground that liability might “deter [an officer's] willingness to execute his office with

An increasingly sophisticated literature has grown up around this question of official liability and immunity, one that considers alternatives to official immunity and examines the likely impact of liability on the incentives of government principals and agents.¹⁰

For all of its theoretical sophistication, the literature on immunity and accountability reveals little about the way the antebellum legal system ultimately allocated responsibility for the losses associated with government wrongs.¹¹ Although scholars have often assumed that officers were entitled to some form of indemnification, the institutional foundations of indemnity have escaped sustained attention. For example, in an important investigation of the use of civil actions to enforce constitutional rights, Akhil Amar explained that the officers likely viewed indemnity as an essential part of their contract with the government; otherwise, who would accept government employment?¹² Amar, in turn, cited the work of David Engdahl, who also assumed the availability of indemnity without exploring its institutional underpinnings.¹³ Engdahl observed that officers might enjoy a right to indemnity, but he noted that the officer's ability to enforce such a right would ultimately depend on the government's willingness to waive its sovereign immunity so as to allow an indemnity suit to proceed in the federal courts.¹⁴ Others have debated the prevalence of

the decisiveness and the judgment required by the public good"), *abrogated in part by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁰ See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 60–77 (1983) (offering evaluation of power of supervisors to shape incentives of street-level government employees); Cass, *supra* note 9, at 1174–84 (offering model of "enterprise liability" as alternative control of official misconduct); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (exploring potential justification for constitutional compensation remedies other than deterrence of government misconduct).

¹¹ Scholars have occasionally commented on the harsh rules of *Little* and *Murray* without recognizing that the government indemnified both captains for their losses. See Engdahl, *supra* note 1, at 14–15 (discussing *Little*); Woolhandler, *supra* note 1, at 415–16 (discussing *Murray*). But see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1109–10 (2003) (recognizing that Congress indemnified Captain Little); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1328–30 (2006) (relaying story of Jeremiah Olney, government official during early republic, who anticipated that Congress would indemnify him for liabilities incurred in line of duty).

¹² See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 20 (1997) ("[E]veryone understood that the real party in interest was the government itself, which would typically be forced to indemnify officials who were merely carrying out government policy.").

¹³ See *id.* at 198 n.199 (citing Engdahl, *supra* note 1, at 17–18); see also Louis L. Jaffe, *Suits Against Governments and Officials: Damage Actions*, 77 HARV. L. REV. 209, 227 (1963) (assuming availability of indemnity).

¹⁴ Engdahl, *supra* note 1, at 18.

indemnity as a feature of modern government practice.¹⁵ After surveying these works, Robert Brauneis called for a more careful study of actual indemnification practices in order to develop a fuller picture of the growth of qualified immunity doctrine.¹⁶

In this Article, we explore the indemnification practices of the early republic and antebellum periods in greater detail. We find that while the *right* to indemnity was understood in contractual terms, the *practice* of securing a determination of the right to indemnity almost invariably entailed the submission of a petition to Congress for the adoption of private legislation.¹⁷ The practice took shape during and immediately after the Quasi-War with France (1798–1801), when the government of the United States came under diplomatic pressure to provide compensation to the owners of neutral Danish vessels. Although the two best known private bills were those for the relief of Captain Murray in 1805 and Captain Little in 1807,¹⁸ we find that Congress adopted its first private bill of indemnity in April 1802 and adopted a public act of indemnity as early as 1799.¹⁹ We also find evidence that James Madison, the Secretary of State under President Jefferson, played a crucial role in establishing the early institutional practice of indemnification. Madison insisted, as had others before him, that the Danish owners of the erroneously seized vessels first secure a judicial resolution of their legal claims before seeking the payment of compensation from the government. Madison also took the view that Congress was ultimately responsible for deciding whether to pay the judgment through the appropriations process.²⁰

¹⁵ Compare Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 880–81, 881 n.92 (2000) (assuming routine availability of indemnity in defending reliance on officer suits under § 1983), with Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1020–21 (2000) (doubting that indemnity practices extend uniformly and operate seamlessly to ensure fully compensatory awards). See generally John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) (defending combination of presumptive indemnity and qualified immunity as appropriately requiring government to bear cost of official wrongdoing).

¹⁶ Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 55, 108 (1999).

¹⁷ See *infra* Part III (discussing process of congressional indemnification).

¹⁸ See Act for the Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805); Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807). As discussed in greater detail below, the process of private legislation began with a petition for relief, often assigned to the Committee on Claims of the House of Representatives for investigation and a proposed disposition. See H.R. REP. NO. 8-46 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS 138 (Washington, Gales & Seaton 1834) (reporting Committee on Claims's favorable disposition on petition of George Little).

¹⁹ See *infra* notes 61, 97–101, and accompanying text (discussing relief bill for Paolo Paoly).

²⁰ See *infra* note 100 (discussing Madison's role in Paoly incident).

After describing in detail its Madisonian origins in the wake of the Quasi-War, we consider the antebellum practice of congressional indemnification at a somewhat higher level of abstraction. Using a variety of tools, we have attempted to identify and analyze cases in which federal government officers sought indemnity from Congress through a petition for private relief.²¹ While the congressional reports we studied did not always provide detailed information on the rationale of a particular decision, we have located a number of relatively complete records in order to compile this data. We use this information to examine the way official liability, as administered by the courts, interacted with private relief legislation, as administered by Congress, to shape the incentives of government officers to comply with law. Perhaps most strikingly, we find evidence that nineteenth-century legislators viewed reimbursement of a well-founded claim more as a matter of right than as a matter of legislative grace.²² Indeed, our study suggests that government officers succeeded in securing indemnifying private legislation in roughly sixty percent of cases in which they petitioned for such relief.²³ Certainly by 1828, when Congress published Burch's Index, an abridgement of private

²¹ In attempting to identify successful petitions, we first examined the private bills that Congress adopted as collected in the *Statutes at Large*. We also examined the collection of private bills of indemnity in an index of private legislation compiled in 1828 by the clerk of the House of Representatives, Samuel Burch. See GENERAL INDEX TO THE LAWS OF THE UNITED STATES OF AMERICA FROM MARCH 4TH, 1789, TO MARCH 3D, 1827, at 152–53 (Samuel Burch ed., Washington City, William A. Davis 1828) [hereinafter BURCH'S INDEX] (listing “[c]ases in which individuals have been indemnified for losses, or damages sustained by reason of acts done in the discharge of official duty”). To locate unsuccessful petitions (a more challenging undertaking), we relied primarily on congressional compilations and focused on petitions by officers seeking indemnity in respect of court judgments. With our focus on petitions arising out of judicial proceedings, we excluded private petitions for direct compensation, many of which were submitted to Congress by American citizens for wartime losses they had sustained during the War of 1812.

²² See *infra* Part III (discussing development and procedure of indemnification). On the counterintuitive idea of a legal entitlement to a remedy by way of legislative petition, see Christine A. Desan, *Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in Chisholm v. Georgia*, in THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 178, 192–93, 230–31 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) [hereinafter HOUSE & SENATE IN THE 1790S]. On the handling of such claims in Congress, see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 637–48 (1985).

²³ We collect these data in the Appendix to this Article. Obviously, one cannot draw any definite conclusions from the success rate of officers' indemnity petitions. For one thing, our search may not have captured all of the unsuccessful petitions. For another, some officers may have failed to seek indemnity after concluding that they had little chance of persuading Congress that they were acting in the scope of their employment. We have greater confidence that we have identified successful petitioners than that we have captured the universe of potential claimants.

legislation that collected the leading principles of “indemnity,” the practice of government indemnity had become settled and routine.²⁴

Our study of the practice of securing private bills of indemnity also sheds light on a number of debates in the current literature. First, the practice of relatively routine, but not automatic, indemnification clarifies the historical function of the doctrine of sovereign immunity.²⁵ The doctrine generally barred private individuals from suing the United States directly, but it did not bar suits against government officials. Following the imposition of liability on a government officer, Congress would decide whether to make good the officer’s loss in the exercise of its legislative control of the appropriation process. Indemnifying legislation thus preserved the formal doctrine of sovereign immunity while assigning the ultimate loss associated with wrongful conduct to the government. In contrast to its operation today, when the doctrine applies to bar relief altogether,²⁶ sovereign immunity in the early republic served less to authorize lawless conduct on the part of the federal government than to allocate responsibility for appropriations and adjudication as between the legislative and judicial branches of government.²⁷ Courts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not; Congress was to decide whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss. This allocation of responsibilities had a self-reinforcing quality; perhaps as early as 1804, when the Marshall Court decided *Little and Murray*, and certainly by 1836, the Supreme Court simply assumed that indemnity was routinely available to take the sting out

²⁴ See BURCH’S INDEX, *supra* note 21, at 152–53 (listing significant number of indemnity petitions).

²⁵ Today, sovereign immunity protects the federal government from suit in the absence of an extremely clear congressional waiver. *See, e.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (applying strong presumption against waiver of federal immunity). Even a clear congressional statement may fail to override state sovereign immunity from suit, at least for statutes adopted pursuant to the Commerce Clause. *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that state sovereign immunity limits Congress’s power to impose suit on states in state court).

²⁶ *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1106 (2010) (“[T]he doctrine of sovereign immunity . . . typically bars suits against the government without the government’s consent.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1753 (1991) (treating sovereign immunity as bar to enforcement of individual rights in cases to which it applies).

²⁷ For valuable discussions of the role of Congress’s appropriations power and its constitutional relationship to sovereign immunity, see Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1258–64 (2009), and Jackson, *supra* note 1, at 523–52.

of any official liability.²⁸ In other words, the nineteenth century's strict, judge-made rules of liability may have resulted from, as much as they led to, the practice of congressional indemnification.

Second, the history of indemnification practice enriches our understanding of the incentive system that confronted federal officials. Congress used a variety of tools to shape the incentives of federal officers. Some officers—federal judges, for example—were placed on salary.²⁹ Others, like marshals and revenue collectors, were paid through a combination of salary and fees for their services.³⁰ Still others (naval captains and port officials) were given incentives to ferret out and pursue wrongdoing through the initiation of forfeiture proceedings. Thus, customs collectors could initiate a forfeiture proceeding against a vessel that failed to comply with the revenue laws and expect to receive a share of the proceeds.³¹ Similarly, Captain Little stood to gain had the federal courts upheld his interdiction of the *Flying Fish*, as federal law provided naval captains with a fifteen percent share in the proceeds of any vessel forfeited for violation of federal law.³² Captain Little thus had reason to act aggressively for his own account in enforcing federal law; yet he also had reason to act cautiously for fear of personal liability. The prospect of indemnity would have moderated, but not eliminated, the risk associated with an erroneous seizure.

²⁸ Up to now, the literature has assumed that Congress adopted its first private indemnification bill in 1805 for the relief of Alexander Murray. See Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 19 (2001) (characterizing 1805 bill as “first time”). Our study suggests that Congress had adopted such legislation at least by 1802 and perhaps as early as 1799, depending on how one characterizes the legislative action in connection with the Navy's wrongful seizure of the *Niger*. See *infra* note 110 (discussing appropriations). These indemnification practices were well established by the time the Court evaluated the liability of government officers in *Little* and *Murray*. Certainly by the 1830s, the Court assumed the availability of indemnity for actions taken in accordance with official instructions. See Part III.C (discussing routine use of indemnification).

²⁹ See generally James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1 (2008) (describing salary-based compensation system put in place by founding generation for judges on Article III courts).

³⁰ On the payment of marshals and members of Congress, see *id.* at 5 n.17, 13 n.62, which reports that marshals received both salaries and fees for services, while members of Congress received per diem fees for attendance and compensation for travel expenses. For surveys of early compensation practices, see THOMAS K. URDAHL, *THE FEE SYSTEM IN THE UNITED STATES* 122–33 (Madison, Democrat Printing Co. 1898), and Nicholas Parrillo, *The Rise of Non-Profit Government in America* 14–19 (Nov. 15, 2006) (unpublished manuscript, on file with the *New York University Law Review*).

³¹ For an account of early forfeiture practice in relation to the alien tort statute, see Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 446–47 (1995).

³² See Act for the Better Government of the Navy of the United States, ch. 33, §§ 5–6, 2 Stat. 45, 52–53 (1800).

Finally, and most intriguingly, indemnification practice sheds light on the modern, judge-made doctrine of qualified immunity. Today, courts view the qualified immunity doctrine as one that requires them to strike the proper balance between the interests of the victims and the interests of government actors. Too much immunity may leave victims uncompensated and fail to assure proper respect for the law; too little may chill government officials in the zealous discharge of their appointed duties.³³ Antebellum courts did not attempt to strike this delicate balance; instead, they simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials. Congress offered government employees a mix of salary, fees, and forfeitures to ward off bribery and ensure zealous enforcement; Congress provided further incentives by indemnifying from any liability only those government officials who acted in good faith.³⁴ But Congress might also refuse to indemnify, thus leaving the loss on the official who acted without just cause. One can debate whether this complex mix of incentives struck a more satisfying balance between interests in legality, victim compensation, and effective enforcement than the judge-made balance that prevails today. It certainly provided a set of incentives that Congress could tailor to the particular job, rather than the one-size-fits-all immunity standard of *Harlow v. Fitzgerald*.³⁵

This Article has four Parts. Part I provides a general overview of the rules of sovereign immunity and official liability that prevailed during the antebellum period. Part II sketches the litigation that grew out of the Quasi-War with France during the administration of John Adams. In addition to discussing the claims against George Little and Alexander Murray, we describe claims filed against Lieutenant William Maley, also the commander of a government warship. We

³³ The Court's immunity decisions have attempted to strike this balance. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (proposing test of objective reasonableness of officials' conduct as balancing compensation of victims against execution of government duties); *Butz v. Economou*, 438 U.S. 478, 525 (1978) (describing *Bivens*-type action as permitting suit against government while limiting risk of overdeterrence of official execution of duties); *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (invoking "good faith" standard from *Wood v. Strickland*, 420 U.S. 308, 321 (1975), as enabling school officials to go forward with their business); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (explaining dual rationales for official immunity), *abrogated in part by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). See *infra* notes 276–86 and accompanying text for further discussion of modern qualified immunity doctrine.

³⁴ See *infra* Part III.D.

³⁵ See *Harlow*, 457 U.S. at 818 (1982) (declaring federal officers immune from suit unless they violate "clearly established" law of which reasonable person would have known). For a critique of the qualified immunity standard's failure to consider variations in the responsibilities assigned to federal officers, see SCHUCK, *supra* note 10, at 56.

chose these disputes because they led to the first private acts of official indemnity adopted by Congress. Part III explores the private bill process as applied to the indemnity claims of Little, Murray, and Maley, and describes more generally how it worked in other representative cases. We also provide an overview of the indemnification process as it evolved in the antebellum period from an ad hoc process to a relatively formal and legalistic proceeding, complete with proof, precedents, and legal principles. Part IV then summarizes the lessons of the study.

I

SOVEREIGN IMMUNITY, THE POWER OF THE PURSE, AND PRIVATE BILLS

The founding generation inherited a system of administrative law that ensured government accountability through judicial processes and protected the role of the general assembly in the payment of public claims.³⁶ Thus, the common law developed an array of writs that allowed individuals to test the legality of government conduct by filing suit against government officials. The familiar writs of habeas corpus, mandamus, trespass, and assumpsit all served something of the same function in testing the legality of government action.³⁷

³⁶ In England, the petition of right (a mechanism for the adjudication of money claims against the Crown) had fallen into desuetude by the eighteenth century and was reportedly replaced by a practice of parliamentary control. See Figley & Tidmarsh, *supra* note 27, at 1213–14 (describing decline of petition of right). We have not found solid evidence that the English Parliament also took over the task of indemnifying government officials by inviting petitions for private bills. To be sure, the Crown agreed to defend and indemnify the defendants in a series of suits famously brought by John Wilkes to challenge the legality of searches conducted pursuant to general warrants. See *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.) (listing government officers as attorneys for defendants); see also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION* 44–45 (1937) (recounting verdicts against defendants Wood and Lord Halifax in amounts of £1000 and £4000); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994) (reporting that Crown spent some £100,000 in defending suits and paying damage awards). But Wilkes's own account suggests that the indemnity resulted from the action of the Crown, rather than from any action taken as a result of petition to Parliament. See 1 JOHN ALMON, *THE CORRESPONDENCE OF THE LATE JOHN WILKES, WITH HIS FRIENDS* 136–37 (London, Richard Phillips 1805) (reporting that defendant, Lord Halifax, Secretary of State, had procured assurance of indemnity by warrant signed by “lord-privy-seal,” an executive officer).

³⁷ For an overview of the operation of these official writs in the scheme of early republic government accountability and of their English and colonial origins, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 691 (2004), and Pfander, *supra* note 1, at 986. Officer suits failed to provide an effective mechanism for claims sounding in contract; the liability did not run against the officer as such but against the government, thus necessitating some sort of approach to the legislature. See Figley & Tidmarsh, *supra* note 27, at 1261 (noting lack of remedy for those who contracted with state and that legislative discretion was only

Habeas focused on the legality of detention; mandamus issued to compel official action; trespass claimed damages for a government invasion of liberty or property; and assumpsit facilitated a challenge to the legality of taxes and other government exactions.³⁸ In each case, the action went forward against the government officer, thereby preserving the formal truth that the government itself was immune from suit at common law.³⁹

The common law's emphasis on officer suits meant that individuals could not pursue money claims directly against the government, for payment out of the fisc, except in accordance with whatever system the assembly put in place. Throughout the colonial period, many lower houses of the assembly guarded their power over the purse and insisted on relatively complete control over the payment of all public claims.⁴⁰ This lower-house control led to the development of what Christine Desan has aptly described as a process of legislative adjudication in which individuals filed petitions seeking the payment of funds from the treasury.⁴¹ These petitions were often referred to a

remedy); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (describing importation of officer suit but noting failure of American colonies to develop petition-of-right practice that would facilitate litigation against Crown itself for claims sounding in contract). For a summary of historical writing on early administrative institutions, see generally Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835*, 11 STUD. AM. POL. DEV. 347 (1997).

The antebellum practice of indemnity may shed light on the current debate over how broadly or narrowly to interpret legislation that suspends the privilege of the writ of habeas corpus. Compare Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007) (contending that suspension of privilege of writ of habeas corpus would leave detainees free to sue officers in trespass for award of damages for wrongful imprisonment), with Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) (arguing that suspension broadens executive detention authority and ordinarily both prevents release from confinement and provides officers with defense to trespass action).

³⁸ On congressional solicitude for the use of actions in assumpsit to test revenue collection, see Ann Woolhandler, *Judicial Deference to Administrative Action: A Revisionist History*, 43 ADMIN. L. REV. 197, 221–24 (1991). On the use of assumpsit to litigate the constitutionality of taxes, see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 135–37 (1997).

³⁹ See Jaffe, *supra* note 37, at 2 (discussing formal quality of sovereign immunity); Pfander, *supra* note 1, at 963 (noting Blackstone's account of the "fictions and circuities" of government accountability (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *268)).

⁴⁰ See JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776*, at 51–71 (1963) (describing lower house control over taxation and money bills in Southern colonies).

⁴¹ See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1382 (1998) [hereinafter Desan, *Constitutional Commitment*] (demonstrating that state legislatures served as fora for claims against government); Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW &

committee on public claims for a determination on the merits, and such committees would often follow trial-like processes in passing on such claims. If successful, the claims were paid either by inclusion in a general appropriations bill or by passage of a private bill.⁴²

The mixed character of claims for money—implicating both the assembly's power of the purse and the judicial role in the resolution of disputes—gave rise to some institutional uncertainty after the Revolutionary War. Many of the newly independent states simply maintained their existing schemes and continued to rely on the assembly for the determination of public claims. But some assemblies experimented with structural innovations that gave the courts a more significant role in the process. Thus, the states of New York, Pennsylvania, and Virginia all recognized a role for the courts in passing on public claims.⁴³ Some states, moreover, adopted constitutional provisions more or less guaranteeing individuals the right to interplead with the government in the regular courts.⁴⁴ Leading thinkers of the day agreed that, from the perspective of the separation of government powers, the task of adjudicating money claims against the government was one that the courts should perform.⁴⁵

HIST. REV. 257, 258 (1998) (defining “legislative adjudication” as “the provincial assembly’s distinctive power to determine claims made by individuals against the colony”).

⁴² On the role of petitions and their use to secure an appropriation, see RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA* 27–29, 129–30 (1979), which describes the rise in colonial Virginia of a Committee on Public Claims and the process by which petitioners could present their claims for payment.

⁴³ For a summary of statutes adopted in New York, Pennsylvania, and Virginia that authorized judicial determination of claims against the state, see Pfander, *supra* note 1, at 939–43.

⁴⁴ See *id.* at 927 n.101 (describing adoption of constitutional provisions, in both Pennsylvania and Tennessee, that called upon legislative body to create mode for suits against state).

⁴⁵ Such thinkers included Edmund Pendleton, Chief Justice of the Virginia Court of Appeals, who worked with Thomas Jefferson to codify the petition of right in the Commonwealth. See *id.* at 942–43 (discussing Jefferson’s role in codification of petition of right). James Wilson, a prominent member of the Philadelphia Convention and an eventual Justice of the Supreme Court, persuaded the 1790 Pennsylvania state constitutional convention to include a provision for government suability. *Id.* at 928 n.101. Edmund Randolph, governor of Virginia and the nation’s first attorney general, supported government suability both in his report on the federal judiciary and in his arguments to the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793). See EDMUND RANDOLPH, *REPORT OF THE ATTORNEY GENERAL TO THE HOUSE OF REPRESENTATIVES* (Dec. 31, 1790), reprinted in 4 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 127, 130–31 (Maeva Marcus et al. eds., 1992). St. George Tucker also expressed support for government suability in his influential version of *Blackstone’s Commentaries*. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 363–64 (St. George Tucker ed., Philadelphia, William Birch Young & Abraham Small 1803) (arguing that legislative determination of public claims does not conform to theory of separation of powers).

Such was the backdrop to the framing of the Constitution, a document that recognizes legislative control of the fisc and extends federal jurisdiction to claims against the government.⁴⁶ These provisions authorize, but do not necessarily require, Congress to assign the adjudication of money claims to the federal courts. So while one can argue that the doctrine of government (sovereign) immunity has no place in a constitution that recognizes the sovereignty of the people, the institutional practices that arose after the Constitution's ratification presumed the existence of such immunity.⁴⁷ One important feature common to these practices was the refusal of the federal courts to hear disputes that were subject to review either by Congress or by the executive branch.⁴⁸ Their refusal substantially limited Congress's ability to assign public claims to the federal courts without also surrendering its traditional authority to control the eventual payment of those claims. Congress eventually ceded control over the process by creating a judgment fund under which the decisions of the federal courts were payable as a matter of course, but this regime did not arrive until the twentieth century.⁴⁹

Early federal practice thus relied on traditional tools of government accountability—habeas, mandamus, trespass, and assumpsit claims against federal officials, rather than against the government itself.⁵⁰ From the perspective of the federal officer, these tools posed

⁴⁶ See U.S. CONST. art. I, § 7 (“All Bills for raising Revenue shall originate in the House of Representatives”); *id.* art. III, § 2 (“The judicial power shall extend to . . . Controversies to which the United States shall be a Party”). The Court held that Article III does not contemplate suits against the United States in *Williams v. United States*, 289 U.S. 553, 577 (1933), but it has since reached the contrary conclusion. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 566 (1962) (“[C]ongressional understanding that suits against the United States are justiciable in courts created under Article III may not be lightly disregarded.”).

⁴⁷ For an account of the institutional history of the conflict between Congress and the courts over who should adjudicate claims against the government, see generally Shimomura, *supra* note 22.

⁴⁸ See *Hayburn's Case*, 2 U.S. (2 Dall.) 409–10, 410 n.† (1792) (collecting letters from circuit court justices that questioned power of federal courts to hear cases subject to executive and legislative revision). For an account of the *Hayburn* decision and its role in structuring Congress's ability to rely on the federal courts, see Pfander, *supra* note 37, at 699–704.

⁴⁹ See *Glidden Co. v. Zdanok*, 370 U.S. 530, 569–70 (1962) (concluding that likelihood of payment through standing judgment fund created sufficient finality to permit involvement of Article III courts); Pfander, *supra* note 37, at 759–62 (same). Today, the judgment fund provides for the routine payment of any judgment against the United States. See Jackson, *supra* note 1, at 594 & n.266.

⁵⁰ See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (relying on habeas action to test confinement of Burr's alleged co-conspirators); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 331 (1806) (presenting trespass action against officers to test legality of court martial proceeding); *cf.* *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 533 (1838) (upholding writ of mandamus against postmaster to compel payment).

financial threats that varied quite substantially. Successful habeas and mandamus petitions both resulted in specific decrees, directing the official to take certain action on pain of contempt.⁵¹ Successful trover and replevin actions similarly contemplated specific performance. While they might entail fees, such proceedings did not result in a judgment for damages payable by the official. Successful trespass and assumpsit claims were different, however. Both resulted in the entry of a judgment for money damages, payable by the officer.⁵² Assumpsit claims posed little risk for public officers, however. Tax collectors, the most frequent target of assumpsit actions, maintained a running account with the Treasury. If courts subjected tax collectors to liability in assumpsit for wrongful tax collection, the tax collectors could recover the money by claiming an accounting credit against any sums they would otherwise pay into the Treasury.⁵³ Officers subject to trespass liability, by contrast, would not necessarily have had an open account with the government and, even if they did, could not have simply claimed credit for any payment they made to satisfy the judgment.⁵⁴

⁵¹ See Pfander, *supra* note 1, at 912 n.40 (discussing use of contempt and threat of imprisonment to enforce specific decrease of mandamus and habeas corpus).

⁵² See *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836) (granting assumpsit to recover customs tax from collector); *Wise*, 7 U.S. 331 (awarding damages for wrongful seizure of property to enforce illegal fine); *Mitchell v. Merriam*, 13 Me. 439 (1836) (holding federal postal official liable for malicious prosecution); *Imlay v. Sands*, 1 Cai. 566 (N.Y. Sup. Ct. 1804) (holding federal collector liable for wrongful seizure of vessel). Officials would justify their conduct by reference to statutory authority, and such justifications could pose questions about the breadth of their authority and its constitutionality. See *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875) (declaring in response to such justification that “[a]n unconstitutional law will be treated by the courts as null and void”); *Callender v. Marsh*, 18 Mass. (1 Pick.) 418, 430–31 (1823) (explaining Constitution’s role in depriving officer of authority in suit for just compensation); cf. *Miller v. Horton*, 26 N.E. 100, 100–03 (Mass. 1891) (opinion of Holmes, J.) (looking to plaintiff’s due process entitlement to compensation in denying agency’s statutory defense in trespass action). Damage claims against federal officers drew on English common law principles. See, e.g., *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) (holding officials liable for illegal trespass); *Leader v. Moxton*, (1733) 95 Eng. Rep. 1157 (K.B.) 1160 (subjecting commissioners to liability in tort when they exceed their powers). Other litigation sought forms of specific relief. See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (injunction against trespassory taxation); *Meigs v. McClung’s Lessee*, 13 U.S. (9 Cranch) 11 (1815) (ejection).

⁵³ See 1 Op. Att’y Gen. 99, 102 (1825) (“[The government agent] retain[ed] in his own hands the proceeds of the sales of the [cargo], and these actual proceeds, with reasonable deductions for expenses, being the measure of the damages recovered against him, he has in his own hands what must be considered as sufficient to satisfy these damages, and of course is completely indemnified.”).

⁵⁴ With respect to trespass liability, however, routine indemnity was not an option and thus posed a threat to the financial security of the official. See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era*,

Trespass liability thus presented a grave challenge to early federal administrative law.⁵⁵ Because sovereign immunity barred suits directly against the government, the personal liability of the officer was essential to ensure a test of the legality of government action. As a consequence, trespass liability created risks for the victims of government misconduct (who might not get paid in full by the officer), and for the officers named as defendants. The government expected the officer to defend the action personally, subjecting the officer to writs of execution (including seizure and sale of personal assets) to satisfy any resulting judgment. Congress dealt with these imbalances by adopting private bills of indemnification—bills that protected the officer from ruinous liability, assured the victim of compensation, and overcame the doctrine of sovereign immunity by ensuring that, at the end of the day, the government paid for the losses its officials inflicted in the line of duty. The next Part explores the origins of the practice of indemnity in connection with the imposition of substantial liability for maritime torts.

1801–1829, 116 *YALE L.J.* 1636, 1679 (2007) (quoting Treasury Secretary Albert Gallatin who argued that tort liability asks collectors to “risk all they are worth in doubtful cases”).

For an illustration of the principle that indemnification was not granted as a matter of course for trespass actions, consider *Emerson v. Hall*, 38 U.S. (13 Pet.) 409 (1839). The litigation turned on whether money paid to a government tax collector to indemnify him for losses he suffered in a trespass action was part of his account with the government or a separate matter. The Court viewed them as separate. Thus, the Court explained that in pursuing a forfeiture, the collector acted on behalf of his own account, not the government’s. *Id.* at 412. Any payment from Congress by way of indemnity for losses Emerson suffered as a result of a flawed forfeiture proceeding was a free gift or donation, not part of his running account with the federal government (and thus not subject to prior claims of his creditors). *Id.* at 412–13.

⁵⁵ For an excellent illustration of the risks associated with trespass liability, consider the plight of Jeremiah Olney, the federal collector in Providence, Rhode Island, in the 1790s. Olney enforced federal revenue laws in denying Welcome Arnold government credit after Arnold defaulted on a revenue bond. Treasury Secretary Alexander Hamilton encouraged Olney in this course of action, promised that federal lawyers would represent Olney in any suit brought by Arnold, and assured him that the federal government would indemnify him against losses he might incur. *See* 7 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800*, at 565–77 (Maeva Marcus et al. eds., 2003). Although Arnold sued in trespass in Rhode Island state court and won a judgment in his favor, Olney sought review in the Supreme Court on a writ of error, where he was represented by the Attorney General of the United States, Charles Lee. The Court upheld its jurisdiction and reversed the state court judgment, thus siding with Olney and Hamilton. *Id.* at 617 (recording minute entry from Supreme Court in which state court judgment was “reversed with costs”). Curiously, the *United States Reports* mistakenly indicates that the court affirmed the Rhode Island judgment. *See* *Olney v. Arnold*, 3 U.S. (3 Dall.) 308, 318 (1796). This error in the official report has confused scholars. *See, e.g.,* Mashaw, *supra* note 11, at 1328–30 (relying on report in 3 Dallas in concluding that Supreme Court upheld trespass judgment against Olney and regretting absence of any reported explanation for decision).

II MARITIME TORTS DURING THE QUASI-WAR WITH FRANCE

George Little and Alexander Murray committed two of the best-known maritime torts of the early Republic.⁵⁶ Both occurred during the Quasi-War with France. And both cases are best known for legal propositions: *Little* for its strict attitude toward official liability,⁵⁷ and *Murray* for its articulation of what we know today as the *Charming Betsy* canon.⁵⁸ Both cases began with the seizure of Danish vessels which were suspiciously plying the waters of the Caribbean, and both ended before federal admiralty courts, which heard conflicting claims of prize, capture, salvage, and tort. Both came before the Marshall Court during the February Term of 1804, and both resulted in substantial judgments in favor of the Danish owners.⁵⁹ Both captains eventu-

⁵⁶ Accounts of the Quasi-War provide sketches of the lives of Murray and Little. According to Michael Palmer, Alexander Murray served in the Maryland line during the Revolutionary War, sailed with the Continental Navy, and had been a successful merchant in Philadelphia before receiving his commission as a commander in the Quasi-War. MICHAEL A. PALMER, *STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE, 1798-1801*, at 167-68 (William N. Still, Jr. ed., 1987) [hereinafter *STODDERT'S WAR*]. George Little lived in Boston and, like Murray, served with a measure of distinction in naval battles. Like other commanders in the Caribbean theater, Little apparently accepted gifts and gratuities from local politicians. *Id.* at 181. The Navy later subjected Little to a naval inquiry regarding the alleged mistreatment of French prisoners of war, but it ultimately acquitted him of any wrongdoing. *Id.* at 219-20.

Alexander Murray shows up in other reported decisions. In one, he defended a position in prize litigation that might strike the reader as rather aggressive. In *Murray v. McLane*, 1 Del. Cas. 534 (1815), Murray brought suit after he was imprisoned as the defendant in an action brought by Allen McLane, the federal collector for Delaware. The dispute began when Murray seized an English vessel as lawful prize in Delaware Bay, shortly after the 1812 declaration of war with Great Britain. McLane brought suit, arguing that Murray's authority to claim prize was limited to vessels on the high seas, and succeeded in having Murray imprisoned on special bail. The jury's rejection of Murray's subsequent false imprisonment action reflects a finding that McLane had just cause for contesting Murray's authority. In another, Murray successfully defended his enlistment into the Navy of a boy seventeen years of age. *See Commonwealth v. Murray*, 4 Binn. 487 (1812).

⁵⁷ For discussions of *Little's* strict approach to official liability, see Engdahl, *supra* note 1, at 17-18, 18 n.73, and Woolhandler, *supra* note 1, at 415-16.

⁵⁸ The *Charming Betsy* canon takes its name from the vessel Murray seized and libeled. It holds that an act of Congress "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See generally* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L.J.* 479 (1998) (discussing *Charming Betsy* canon as device sometimes employed to support U.S. foreign political obligations, and more recently, as tool to facilitate balance between legislative and judicial branches).

⁵⁹ *See Murray*, 6 U.S. 64 (affirming district court's decree of liability and remanding for damage calculation); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (affirming lower court decision holding official liable for unlawful seizure). The decisions came down five days apart, on February 22 and February 27, respectively.

ally secured private bills to pay the judgments.⁶⁰ Lesser known claims against Lieutenant William Maley grew out of the same conflict and similarly produced indemnifying legislation.⁶¹ This Part sketches the military hostilities and resulting litigation that gave rise to these early, precedent-setting indemnity claims.⁶²

The Quasi-War grew out of long-simmering tensions rooted in the conflict between revolutionary France and Great Britain. The United States attempted to remain neutral, but French officials thought its 1778 treaty with the United States entitled France to American support.⁶³ France further regarded Jay's Treaty in 1794 as aligning the United States with Britain in the conflict. By 1798, France's refusal to respect American neutrality, coupled with France's insulting treatment of American diplomats, led the Adams administration to put the country on a war footing.⁶⁴ Congress adopted a series of laws responding to French provocations, including one that suspended the Treaty of 1778,⁶⁵ one that authorized the seizure of French vessels,⁶⁶

⁶⁰ See Act for the Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805); Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807).

⁶¹ See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806) (discussing Maley's unlawful taking of Shattuck's vessel, *Mercator*); Act for the Relief of Jared Shattuck, ch. 19, 6 Stat. 116 (1813) (compensating Shattuck for \$33,864.55 in damages awarded against Maley in connection with Maley's seizure of Shattuck's vessel, *Mercator*); Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802) (granting \$7040.55 in compensation to Danish subject Paolo Paoly, awarded by Pennsylvania circuit court as result of Maley's wrongful seizure of Paoly's schooner, *Amphitheatre*).

⁶² One might argue that these maritime torts arose in an international setting that deprives them of precedential value for wholly domestic government torts. Yet, as we will see, the pattern of liability and indemnity set in the government's handling of maritime tort claims was quickly adopted for use in wholly domestic cases involving the actions of U.S. marshals. See *infra* notes 187–88 and accompanying text.

⁶³ For an account of the Washington administration's efforts to preserve neutrality amid the division in American politics between the Federalists, generally aligned with England, and the Democrat-Republicans, generally aligned with France, see WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 35–58 (2006).

⁶⁴ On the development of hostilities, the French attacks on American shipping, and the rise of war fever following the disclosure of the diplomatic debacle known as the XYZ affair, see STANLEY M. ELKINS & ERIC L. MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 537–79 (1993). For an account of the Quasi-War from the perspective of an American naval officer, see STODDERT'S WAR, *supra* note 56. For an account of the war from a diplomatic vantage point, see ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801* (1966).

⁶⁵ Act of July 7, 1798, ch. 67, 1 Stat. 578.

⁶⁶ See Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578 (1798) (authorizing Navy to seize armed French vessels and empowering President to issue commissions to privateers to prey on French commercial shipping).

one that subjected aliens to removal,⁶⁷ and one that barred commercial intercourse between American merchant ships and French ports.⁶⁸

While the maritime tort claims arose from efforts to enforce the Nonintercourse Act, an additional difficulty stemmed from the breadth of presidential instructions. As communicated to U.S. Navy officers, early instructions directed the seizure of all vessels “bound to or from” a French port when the vessel or cargo was “*apparently as well as really American*.”⁶⁹ The instructions went on to warn officers of Americans using Danish papers for the purpose of evading the law. Both captains honestly believed that the vessels in question actually were American ships masquerading as Danish to evade the Nonintercourse Act.⁷⁰

In addition, Little and Murray both captured the vessels as the vessels sailed *away from* a French port. In *Little*, this fact raised the question of whether the instructions could authorize a capture not squarely permitted by the terms of applicable law. By the time of *Murray*, however, Congress had amended the law to interdict American vessels sailing to or from a port controlled by the French Republic. The case then focused on whether ownership of the vessel had genuinely passed from American to Danish hands.

Both Little and Murray had reason to suspect that the vessels in question were trading in violation of the prohibition. Captain Little and his crew were cruising in the company of another frigate near the island of Hispaniola (now Haiti), a French possession. On December 2, 1799, they happened upon the *Flying Fish*, a vessel laden with coffee and bound from the French port of Jeremie to the Danish colony of St. Thomas.⁷¹ During the chase that ensued, the master of

⁶⁷ A cluster of statutes dealt with aliens, including a law that subjected alien enemies to removal and a law that lengthened the required period of residency for naturalized citizenship from five to fourteen years. Act of July 6, 1798, ch. 66, 1 Stat. 577 (deportation); Act of June 18, 1798, ch. 54, 1 Stat. 566 (naturalization). The Sedition Act prohibited statements meant to bring the government or the Adams administration into disrepute. See ELKINS & MCKITRICK, *supra* note 64, at 700, 703–06, 710.

⁶⁸ See Act of June 13, 1798 (Nonintercourse Act), ch. 53, 1 Stat. 565 (prohibiting vessels owned by Americans from sailing to ports and places governed by French Republic). Over the next two years, Congress reenacted the law. See Act of Feb. 9, 1799, ch. 2, 1 Stat. 613; Act of Feb. 27, 1800, ch. 10, 2 Stat. 7.

⁶⁹ *Little*, 6 U.S. at 178.

⁷⁰ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 116 (1804) (noting that Murray considered Shattuck “an *American* citizen who was violating the law”); *Little*, 6 U.S. at 178 (expressing no doubt as to whether Little truly suspected *Flying Fish* to be American ship).

⁷¹ *Little*, 6 U.S. at 178. Upon capture, the master of the *Flying Fish* convinced his crew to collude with him in telling their captors that they were bound from Port-au-Prince—a French port that was excepted from the Nonintercourse Act by a presidential proclamation—rather than Jeremie which remained prohibited under the President’s orders. H.R.

the *Flying Fish* threw the logbook and other papers overboard.⁷² Little decided to seize the vessel, conveying it to Boston where it was libeled in the District Court of Massachusetts.⁷³ Despite Little's suspicions, the *Flying Fish* was neither an American vessel, nor was it sailing to a French port; it was not, therefore, subject to forfeiture under the Act.⁷⁴

In July 1800, seven months after Little's encounter with the *Flying Fish*, the U.S. frigate *Constellation*, under the command of Captain Murray, spotted the schooner *Charming Betsy*.⁷⁵ After a two-hour chase, the *Constellation* fired a shot across the bow of the *Charming Betsy*, hailing its master. Murray learned that the vessel had been taken over by a prize crew from France (an indication that the French regarded the vessel as American owned).⁷⁶ Murray recaptured the *Charming Betsy*, reasoning that he was entitled either to salvage—for protecting the vessel against wrongful seizure by the French—or to a forfeiture if the vessel was really American and had violated the Nonintercourse Act.⁷⁷ Murray's crew sailed the schooner to Philadelphia and instituted a libel proceeding in the district court. During that proceeding, the court learned that the vessel had been recently sold to Jared Shattuck, a former citizen of Connecticut who expatriated himself to become a Danish burgher on the island of St. Thomas. As with Little's claim against the *Flying Fish*, then, Murray's view that the vessel was really American was unsupported by the facts. The district court thus rejected the condemnation claim and ordered the vessel restored.⁷⁸

Following restoration of the vessels, the lower courts faced claims for damages by their owners; there, consensus disappeared. The district court in Massachusetts ruled that neutral vessels on the high seas in a theatre of war must act openly and avoid the appearance of fraud or duplicity.⁷⁹ The court found that the *Flying Fish* did not meet these

REP. NO. 8-46 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 138.

⁷² H.R. REP. NO. 8-46, at 138–39. When Little's crew boarded the vessel, they found that the master spoke in a perfect American accent and had the appearance of an American. Furthermore, the mate was a citizen of the United States. *Id.*

⁷³ *Little*, 6 U.S. at 172.

⁷⁴ *Id.* (discussing fact that vessels of neutral nations were not subject to Act).

⁷⁵ For a detailed account of the seizure of the vessel and the early stages of litigation, see Leiner, *supra* note 28, at 1–11.

⁷⁶ *See id.* at 2.

⁷⁷ *Id.* at 4–5.

⁷⁸ *Id.* at 6–9.

⁷⁹ *Little*, 6 U.S. at 174–75. The district court addressed the fact that France and the United States were not engaged in a full-fledged war, but it held that this state of affairs had no impact on a neutral vessel's duties. *Id.* at 174.

duties and was not entitled to damages or costs.⁸⁰ The owners of the *Flying Fish* appealed. Meanwhile, in Philadelphia, the district court directed the clerk to calculate Shattuck's losses, less a reasonable allowance as salvage for the rescue from French privateers. The resulting judgment, over \$14,000, was well more than Murray could afford to pay. Indeed, he could not afford to post a bond in an amount sufficient to perfect his right to appeal.⁸¹

In an effort to get the federal government involved, Murray wrote to the Department of the Navy, pleading for support. After mulling over the question for some time, the Secretary of the Navy eventually agreed to post Murray's appeal bond.⁸² Moreover, the Secretary procured the services of the United States Attorney for the District of Pennsylvania, Alexander Dallas, to serve as appellate counsel.⁸³ Dallas succeeded at the circuit court level, obtaining a reversal of the damages award against Murray.⁸⁴ Meanwhile, up in Massachusetts, the circuit court reversed the district court's decision on damages and awarded some \$8000 against Captain Little for invasion of the rights of a neutral vessel. This division of lower court authority set the stage for Supreme Court review.

The Supreme Court ruled resoundingly in favor of the Danish owners and against Captains Little and Murray.⁸⁵ The Court con-

⁸⁰ *Id.* Marshall later characterizes the district court's holding as being based on grounds of a probable cause excuse. *See id.* at 176.

⁸¹ Leiner, *supra* note 28, at 10.

⁸² *Id.* at 10–11.

⁸³ The Secretary's account reveals some uncertainty about how to proceed. He felt much "hesitation" in reaching his conclusion but ultimately decided that the executive could, under the circumstance of the case and in the "exercise of a reasonable discretionary power," protect the officer in question by providing an appeal bond and appellate counsel in an effort to "prevent an eventual loss to the public." Letter from R. Smith, Secretary of the Navy, to George Harrison, Navy Agent (Sept. 23, 1801), in 7 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 287 (Office of Naval Records & Library ed., 1938). The letter indicated that the decision about executive branch involvement was discretionary and acknowledged that a judgment against Murray might well create a charge or demand for "eventual" payment by the public.

⁸⁴ *See* Leiner, *supra* note 28, at 11 (noting that "[t]he circuit court acted Solomonically" in returning *Charming Betsy* to Shattuck while reversing lower court's finding of liability against Murray).

⁸⁵ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 125–26 (1804); *Little*, 6 U.S. at 179. Early in the Quasi-War, the Court respected the sale of American vessels to Danish purchasers even when the sale enabled the vessel to evade federal trade restrictions imposed on American citizens. Consider the 1800 case of *United States v. Topham*, which arose from the sale of the brig *Harriott* to a naturalized Danish subject, John Imlay, Jr. Imlay bought the vessel from American owners in St. Thomas, sailed it to a French port, and then sailed back to the United States with a new cargo valued at some \$22,000—well more than the sale price of the vessel. Joshua Sands, the intrepid collector of the Port of New York, initiated the process leading to libel proceedings to forfeit the vessel for violation of the Nonintercourse Act. *See* 8 THE DOCUMENTARY HISTORY OF THE SUPREME

cluded that the captors had failed to show that the *Flying Fish* and the *Charming Betsy* were American owned at the time of their capture. Without American ownership, the Court found no basis on which to forfeit the vessels under the Nonintercourse Act.

On the question of damages for wrongful capture, the Court adopted a fairly strict approach. On the one hand, the Court recognized that the captors had acted with “correct motives” and “pure intention” in seizing the vessels.⁸⁶ Writing for the Court in both cases, Chief Justice Marshall expressed sympathy for the difficult position of a “public officer entrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received.”⁸⁷ On the other hand, the Court refused to treat the officer’s good faith as a legal justification for the wrongful seizure. Thus, the Court explained in *Murray* that a captain is necessarily “a victim of any mistake he commits.”⁸⁸ But this strict

COURT OF THE UNITED STATES, 1789–1800, at 320–26 (Maeva Marcus et al. eds., 2007). In an unreported opinion, the Supreme Court affirmed the circuit court’s rejection of the forfeiture claim. See *id.* at 325; 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 324 (Maeva Marcus et al. eds., 1985) (reproducing minute entry of Supreme Court decision). Imlay later sued Sands in New York state court and, despite the state court’s recognition that Sands had probable cause for the seizure, succeeded in recovering damages. *Imlay v. Sands*, 1 Cai. 566, 567 (N.Y. Sup. Ct. 1804) (concluding that court was “bound to pronounce the law as we find it” and to “leave cases of hardship, if any exist, to legislative provision”). See generally 2 THE LAW PRACTICE OF ALEXANDER HAMILTON 858–60 (Julius Goebel Jr. ed., 1969) (recounting litigation history and Hamilton’s role in representing Sands). Sands secured indemnity from Congress in 1815. See *infra* Appendix Table 2. As in other similar cases, Richard Söderström, the Swedish consul who also acted on behalf of Danish interests, 6 THE PAPERS OF JOHN MARSHALL 21 n.1 (Charles F. Hobson ed., 1990), asked Timothy Pickering, the Secretary of State, to intervene in the litigation. See Letter from Richard Söderström to Timothy Pickering (July 30, 1799), in 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 329–31 (inviting Pickering to terminate forfeiture so as to avoid “the delay & expence of Judicial proceedings”). Pickering replied that the executive branch should not control the judiciary. *Id.* at 331 n.5.

⁸⁶ *Murray*, 6 U.S. at 124 (acknowledging that Murray had acted from “correct motives, from a sense of duty”); *Little*, 6 U.S. at 179 (acknowledging that Little had acted with “pure intention”).

⁸⁷ *Murray*, 6 U.S. at 124.

⁸⁸ *Id.* Some observers have mistakenly interpreted the *Murray* decision as upholding a defense based upon probable cause. See Leiner, *supra* note 28, at 16 (suggesting that probable cause would have shielded Murray from imposition of damages). To be sure, Marshall spends some time discrediting the evidence that was proffered in support of Murray’s good faith. *Murray*, 6 U.S. at 122–23. But Marshall did not hold that probable cause would justify the seizure; he simply found that there was not “such” probable cause as would justify it. *Id.* at 123; *id.* at 67 (“Whatever probable cause might appear to captain *Murray*, to justify his conduct; or excite suspicion at the time, he runs the risk of, and is amenable for consequences.”). Marshall went on to explain that Murray’s character and good faith were such that he should not have his case made harder “by a decision in any respect oppressive.” *Id.* at 124. In context, Marshall softened the rule of strict liability for mistakes by foreclosing vindictive or punitive damages for those who acted in good faith. *Id.*

liability extended only to actual damages; the Court explained that for a captain acting in good faith “it can never be proper to give speculative or vindictive damages.”⁸⁹ The Court remanded *Murray* to the lower courts for a recalculation of damages and affirmed the award in favor of the *Flying Fish*.⁹⁰

The *Little* case has come into vogue in recent years for the light it sheds on founding era perceptions of the President’s obligation to comply with statutes regulating the exercise of war powers.⁹¹ From the perspective of early federal administrative law, Marshall’s discussion of the Court’s rejection of a qualified immunity defense based on “pure intentions” and compliance with superior orders is an equally

The misunderstanding of the role of probable cause in *Murray* may reflect the influence of the reporter, William Cranch, whose headnotes wrongly characterized Marshall’s holding. Cranch’s notes suggest that liability in the case was based on a finding that there was “no reasonable ground of suspicion” that the vessel was trading in violation of federal law. *Id.* at 65. While the published version of the report clearly distinguishes the opinion of the Court from the reporter’s notes, the electronic version of the case on Westlaw confuses matters by including the reporter’s note under the heading “Marshall” and thus suggesting, incorrectly, that the “reasonable suspicion” language forms part of Marshall’s opinion. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64 (1804), 1804 WL 1103, at *1. Marshall’s opinion does not begin until page 115 of the *U.S. Reports*. *Murray*, 6 U.S. at 115. Mistaken placement of Cranch’s notes on Westlaw has apparently misled others. See Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 OHIO ST. L.J. 1339, 1348 & n.38 (2006) (attributing to Marshall statement in *Little* that officer “acts at his peril”). The statement in question appears in Cranch’s notes to the *Little* decision, see *Little*, 6 U.S. at 170, not in Marshall’s opinion, which begins later. See *id.* at 176.

⁸⁹ *Murray*, 6 U.S. at 112. Here we find an echo of the view, rooted both in Blackstone and in the leading treatises of the early republic period in the United States, that the amount of damages should take account not only of the loss that the victim had sustained but also of the nature of the wrong. See John C.P. Goldberg, *Two Conceptions of Tort Damages*, 55 DEPAUL L. REV. 435, 443–45 (2006) (collecting evidence from works by Blackstone, Nathan Dane, and Zephaniah Swift that ordinary (nonpunitive) tort damages could include award to take account of actor’s malicious intent).

⁹⁰ The Court’s decree in *Murray* specifically affirmed the restoration of the vessel but remanded for a calculation of damages by a commission appointed by the circuit court. See *Murray*, 6 U.S. at 125. In directing the appointment of a commission on damages, the Court may have been subtly suggesting that the district court had erred in assigning the calculation of damages to the clerk of the district court, a point Dallas made in his argument. See *id.* at 75 (pointing out error of relying on clerk while acknowledging that point had not been preserved for review on appeal).

⁹¹ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 967–70 (2008) (discussing *Little*’s holding as recognizing implied restrictions on President’s warmaking powers due to contrary congressional authorizations); Robert J. Pushaw, Jr., *The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1025–26 (2007) (arguing that *Little* concludes that “the President did not have Article II power to exceed Congress’s explicit directive”); J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465 (2005) (arguing that Quasi-War cases provide lens to understand private versus public warmaking powers).

intriguing feature of the opinion, which came down within a week of the *Murray* decision in February 1804. Marshall made clear the issues at stake in this decision:

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 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. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction or legalize an act which without those instructions, would have been a plain trespass.⁹²

Marshall here made a number of interesting points.⁹³ He suggests that a defense based on compliance with a superior officer's orders would transform the claim from one against the officer to one against the government. Marshall apparently envisioned that such a claim would be resolved through diplomatic channels by way of "negotiation."⁹⁴ In the end, though, Marshall rejected the superior-orders

⁹² *Little*, 6 U.S. at 179.

⁹³ Among other key points, Marshall suggests that the rule of official liability should be harsher for civil than for military officers. One might view such an insight as captured in the *Bivens* line of cases, which admits the possibility of constitutional tort liability for civilian but not for military officers. See *United States v. Stanley*, 483 U.S. 669, 680 (1987) (holding that service members may not sue officials responsible for conducting involuntary drug experiments on them); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (holding that service members may not sue superior officers for racial discrimination).

⁹⁴ Although he did not say so, Marshall may have envisioned negotiation through a treaty-like process following espousal of the claims by the Danish government. On espousal of private claims in the international context, see generally Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1675 (2004). Jay's Treaty with Great Britain sought to settle a variety of private claims of English subjects whose property and contract rights had been invaded during the Revolutionary War. See Henry Paul Monaghan, *Article III and Supra-*

defense, as applied to military conduct and affirmed the damages award against Little. Perhaps Justice Chase persuaded him that the superior-orders defense had no place in military or civilian law.⁹⁵

Both the prospect of indemnity and doubts as to the propriety of qualified immunity may have informed Marshall's change of heart.⁹⁶ Indeed, two years before the *Little* and *Murray* cases came before the Court, Congress agreed to underwrite the settlement of another case involving the Navy's mistaken seizure of a Danish vessel. In that case, William Maley, the Lieutenant commanding the *Experiment*, seized the schooner *Amphitheatre*, owned and operated by Danish citizen Paolo Paoly.⁹⁷ Maley eventually sailed the vessel to Philadelphia and libeled it in the federal admiralty court there.⁹⁸ Although Maley won at trial, the circuit court reversed that decision and awarded \$7000

national Judicial Review, 107 COLUM. L. REV. 833, 852–57 (2007) (describing origins and elements of Jay's Treaty).

⁹⁵ During oral argument in *Murray*, Justice Chase repeatedly dismissed all discussions of the good faith of the captors and the terms of their instructions on the ground that neither consideration would entitle the officer to a defense if he had exceeded the limited authority conferred by the statute. See *Murray*, 6 U.S. at 78 n.†. Justice Chase's view prevailed; the Court later held that superior orders do not provide a justification for illegal actions by either civil or military officers. See *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851).

⁹⁶ One must also recognize the possibility that Marshall did not agree with the disposition and was, in effect, dissenting from his own opinion by articulating the "first bias of [his] mind." *Little*, 6 U.S. at 179.

⁹⁷ Maley had a brief and inglorious career in the Navy. See STODDERT'S WAR, *supra* note 56, at 167–68. Although he was apparently a competent sailor, Maley's subordinates accused him of drunkenness, cowardice, and fighting. He was brought before a court of inquiry on these charges. Stoddert, the naval secretary, eventually dismissed Maley from the service for failure to respect the rights of neutral vessels, describing Maley as a "very ignorant illiterate man." *Id.* at 168. Of the fourteen prizes he claimed during his tour of duty, only a fraction were upheld in subsequent litigation. *Id.*

⁹⁸ After Maley seized the *Amphitheatre*, it was pressed into service as a tender to support a frigate under the command of Commodore Talbot. Only much later, when the squadron returned to port, did Maley pursue the vessel's adjudication as prize. See STODDERT'S WAR, *supra* note 56, at 174, 181.

Although we have been unable to locate a copy of the decision of the Circuit Court for the District of Pennsylvania in *Maley v. Amphitheatre*, the report of the House committee in favor of Paoly's petition for compensation includes a brief description of that opinion. The report indicates that the district court ruled in favor of Maley and condemned the vessel as lawful prize. See REPORT OF THE COMMITTEE ON THE PETITION OF PAOLO PAOLY, Cong. 7th, Sess. 2d (1802), *microformed on AMERICAN IMPRINTS*, Ser. No. 2, No. S3417 (NewsBank, Inc.) [hereinafter PAOLY REPORT]. On appeal to the circuit court, Paoly obtained a "reversal of that sentence." *Id.* The Committee reported that the United States is "bound by the principles of justice and equity to make restitution and refund to the petitioner" an amount in excess of \$7000. *Id.* Other sources indicate that the circuit court opinion came down in May 1801. See 3 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 47 n.2 (D.B. Mattern et al. eds., 1995) [hereinafter 3 MADISON PAPERS] (reporting that Pennsylvania circuit court reversed district court and awarded damages against Maley in May 1801).

damages to Paoly for wrongful capture and detention. At this point, Maley apparently disappeared; in any case, he never appealed to the Supreme Court.⁹⁹ Instead, the Danish consul to the United States, Richard Söderström, acting as Paoly's attorney-in-fact and seeking the adoption of a private bill to pay the judgment, submitted a petition to Congress.¹⁰⁰ Söderström's efforts quickly bore fruit: Following a favorable committee report in March 1802, Congress enacted a bill in April 1802 appropriating the sum in question. But the bill did not indemnify Maley; the appropriated funds were payable directly to Paoly.¹⁰¹ In addition, the bill required that Paoly acknowledge on record that he received the funds in "full satisfaction of the judgment against the said Maley in the premises." In short, Congress appears to have settled the litigation by paying Paoly directly.

One final, notable case, also involving the unfortunate Lieutenant Maley, arose after Maley detained a Danish vessel during the Quasi-War with France. Maley detained the *Mercator*, a vessel owned by the same Jared Shattuck involved in litigation with Alexander Murray.¹⁰²

⁹⁹ See Letter from James Madison to Alexander J. Dallas (June 15, 1802) in 3 MADISON PAPERS, *supra* note 98, at 308 (reporting that Maley was, as of June 1802, "both absent from the United States and in a state of insolvency").

¹⁰⁰ See PAOLY REPORT, *supra* note 98 (reciting facts surrounding capture of *Amphitheatre*). Söderström corresponded with Madison about the Paoly case and provided him with a copy of his petition on Paoly's behalf. See Letter from Richard Söderström to James Madison (Mar. 15, 1802), in 3 MADISON PAPERS, *supra* note 98, at 36 (inviting Madison's advice as to whether "the owner should and ought to petition Congress for the payment"); Letter from Richard Söderström to James Madison (Mar. 18, 1802), in 3 MADISON PAPERS, *supra* note 98, at 46 (describing himself as Paoly's agent under power of attorney and recounting conversation in which Madison advised him to petition Congress for payment following entry of judicial decree in favor of owner). In the March 18 letter, Söderström noted that he was enclosing a copy of his petition on Paoly's behalf and intended to present the petition to Congress "today," *id.*, thus enabling us to date the submission of the petition.

Treasury records report that Söderström was paid \$7040.50 as Paoly's representative. See Letter from the Treasurer of the United States Accompanying the General Account of his Office, at *6 (Dec. 27, 1802), *microformed on* EARLY AMERICAN IMPRINTS, Ser. No. 2, No. 3330 (NewsBank, Inc.).

¹⁰¹ See Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802). Although the record does not make this clear, it seems likely that Congress chose to make its payment directly to Paoly after concluding that Maley was insolvent. As we shall see, Maley was also named as the defendant in a case involving the seizure of the *Mercator* owned by Jared Shattuck. Shattuck successfully petitioned for a private bill as well, securing a payment of some \$33,864.55. As in the Paoly proceeding, the private bill in Shattuck's case called for the payment to Shattuck himself, rather than to Maley. The report of the Supreme Court's decision in that case notes Maley's insolvency and absence, as does Madison's correspondence with Dallas. See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 470 (1806) (noting that Maley died insolvent); Letter from James Madison to Alexander Dallas, *supra* note 99, at 308 (reporting that Maley was both absent and insolvent).

¹⁰² See Compensation for Seizure, 1 Op. Att'y Gen. 106, 106 (1802) (recounting events surrounding Maley's seizure of *Mercator*). Other cases grew out of the enforcement of the

While under American control, a British warship claimed Shattuck's ship and sailed it to a prize court in Jamaica. Eventually, the British prize court ruled against Shattuck and ordered the vessel forfeited, apparently on the ground that it was French.¹⁰³ Shattuck initiated proceedings in the federal admiralty court in Pennsylvania, bringing a libel action against Maley for wrongful detention. Maley apparently never appeared in the litigation; rather, Madison directed the attorney for the district of Pennsylvania, Alexander Dallas, to represent Maley's interests. Madison, the Danish minister, and Dallas treated the matter as an amicable proceeding to determine whether Shattuck suffered a cognizable wrong.¹⁰⁴

When the case reached the Supreme Court, Marshall viewed it as essentially governed by prior decisions; the vessel was Danish and thus was not subject to detention.¹⁰⁵ The wrongful detention subjected Maley to liability, regardless of what happened later at the hands of the British. The court that found Shattuck's failure to perfect an appeal from his loss in Jamaica was irrelevant; Shattuck could abandon his claim.¹⁰⁶ Nor did the Jamaica disposition require an American court to accept the conclusion that the vessel was French. Damages for loss of the vessel were assessed in the amount of \$33,244.67 (a figure well beyond the means of most naval officers and certainly beyond those of the insolvent Lieutenant Maley).¹⁰⁷ As it had in the Paoly case, Congress paid this amount directly to Shattuck by way of private bill.¹⁰⁸ The next Part explores the private bill process and the factors that led Congress to pay for all four wrongful seizures.

Nonintercourse Act during the Quasi-War but did not produce any notable contribution to the law. *See* *Sands v. Knox*, 7 U.S. (3 Cranch) 499, 503 (1806) (upholding award against government official and treating case as controlled by prior decision in *Murray*).

¹⁰³ For an account of the background of the litigation, see *Shattuck*, 7 U.S. 458. *See also* REPORT OF THE SECRETARY OF STATE, H.R. DOC. NO. 9-175 (1st Sess. 1806), reprinted in 1 AMERICAN STATE PAPERS: CLAIMS 332-33 (Washington, Gales & Seaton 1834) (reporting to Congress in favor of payment of Shattuck's petition for payment of amount awarded in judgment of Supreme Court).

¹⁰⁴ We discuss the connection between the Paoly legislation and the Shattuck litigation in Part III.B *infra*.

¹⁰⁵ *Shattuck*, 7 U.S. at 489-91.

¹⁰⁶ *Id.* at 485.

¹⁰⁷ *Id.* at 477.

¹⁰⁸ *See* Act for the Relief of Jared Shattuck, ch. 14, 6 Stat. 116 (1813) (appropriating \$33,864.55 plus interest since date of Supreme Court decree in Shattuck's favor).

III

PRIVATE BILLS AND OFFICIAL INDEMNIFICATION

The federal practice of adopting private bills¹⁰⁹ began when the first Congress convened in 1789, but the first bills to indemnify federal officers did not appear for another decade.¹¹⁰ Much of the early private legislation addressed individual claims that dated from the Articles of Confederation. Later, because of the commission of maritime torts during the Quasi-War, Congress faced the issue of how to handle petitions for indemnity. Part III.A will offer a brief overview of private bill practice as it developed in the early republic. Part III.B will then examine in greater detail the circumstances surrounding the

¹⁰⁹ Some have suggested a distinction between public and private laws on the basis that public laws were published. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 55 (2005) (reporting that British Parliament published public acts but did not publish private bills). In general, as Hulsebosch also notes, private bills in the parliamentary tradition began with the submission of petitions and often involved such matters as debtor relief, reimbursements, licenses, land questions, and naturalization. *Id.* Yet, as noted below, Congress took early steps to ensure the publication of all acts, broad and narrow alike. See *infra* note 128 and accompanying text. As a result, it may make more sense to draw the line between public and private bills on the basis of their relative breadth (generality) or narrowness. Something like that distinction appears in Burch's Index, the congressionally sponsored collection of legislation published in 1828. As the Index explains, it set out to provide a "General Index to the Laws of the United States of America . . . in which the principles involved in acts for the relief of individuals, or of a private or local nature, are arranged." BURCH'S INDEX, *supra* note 21, at i. This Article will follow Burch's Index in defining private legislation in terms of its functional character as legislation for the relief of an individual petitioner or to address private or local matters.

One can see something like this distinction in the way the practice of petitioning gave way to the adoption of general laws. The petitions of Revolutionary War veterans were first handled on an individual basis, see *infra* note 112, but this body of claims was transferred to the federal courts and the War Department. See Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (providing for federal courts to make initial determinations of disability subject to review by War Department); Pfander, *supra* note 29, at 35–40 (describing evolution of pension system). Something very similar occurred in connection with petitions from the widows of veterans. As Kristin Collins reports, the steady stream of widows' petitions eventually led to the adoption of the watershed act of July 4, 1836, ch. 362, 5 Stat. 127, which established a general framework for widows' pensions. See Kristin A. Collins, "Petitions Without Number": Women's Petitions and the Nineteenth Century Origins of Marriage-Based Entitlements 30–34 (unpublished manuscript) (on file with author).

¹¹⁰ The first *private* bill of indemnity that we have located was adopted in April 1802. See *supra* note 101. The first such *public* bill was enacted even earlier. In 1799, Congress appropriated \$11,000 to cover the losses awarded by the circuit court in Virginia for the wrongful capture of the English vessel the *Niger*. Act of Mar. 2, 1799, ch. 28, 1 Stat. 723; see also *infra* note 174. We have been unable to locate a copy of the circuit court opinion and cannot say with any certainty if the amount appropriated corresponded to the amount fixed by the judgment of the circuit court or was agreed upon through negotiations between the United States and Great Britain. The legislation itself speaks of the circuit court's award of damages as having run "against the United States," not against Captain Nicholson. § 3, 1 Stat. at 724.

early adoption of federal indemnifying legislation for maritime torts.¹¹¹ Part III.C examines the way the maritime precedents were institutionalized for use in domestic cases. Part III.D explores the way the prospect of indemnity interacted with other features of the officer's employment relationship to shape the incentives of government agents.

A. *An Introduction to the Practice of Private Legislation*

In a practice narrower than that of many state assemblies, Congress's enactment of private bills in the early years consisted primarily of the payment of money, often to Revolutionary War veterans or their survivors.¹¹² Congress avoided other common forms of private legislation, perhaps due in part to constitutional limits on the scope of congressional power.¹¹³ For example, despite the fact that the Constitution gave Congress authority over naturalization, Congress

¹¹¹ For an introduction to private bill practice in the American colonies, see BAILEY, *supra* note 42, and S.M. Pargellis, *The Procedure of the Virginia House of Burgesses*, 7 WM. & MARY Q. 143 (1927). For an overview of private bill practice in Congress, see generally 1 CONG. QUARTERLY, GUIDE TO CONGRESS 614–15 (6th ed. 2008), Charles E. Schamel, *Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress*, 27 PROLOGUE 1 (1995), available at <http://www.archives.gov/publications/prologue/1995/spring/private-claims-1.html>, and Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

¹¹² Thus, Congress's first private bill provided compensation to a war veteran for services rendered. See Act To Allow the Baron de Glaubeck the Pay of a Captain in the Army of the United States, ch. 26, 6 Stat. 1 (1789). At least some veterans' petitions sought only to hold the Continental Congress to its promise; legislation adopted during the war guaranteed soldiers disability and pension payments. See Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1785 n.78 (2005) (laying out disability and pension laws adopted by Continental Congress). Private bills also provided relief from the payment of import duties. See, e.g., Act for the Relief of Thomas Jenkins and Company, ch. 20, 6 Stat. 2 (1790). For a useful overview of Congress's procedures for handling private bills, see 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 748–87 (Kenneth R. Bowling et al. eds., 1998) [hereinafter FIRST FEDERAL CONGRESS]. See also William C. diGiancomantonio, *Petitioners and Their Grievances: A View from the First Congress*, in HOUSE & SENATE IN THE 1790s, *supra* note 22, at 29, 47 (“The overwhelming majority of the petitions submitted to the First Congress were direct by-products of the War for Independence . . .”).

¹¹³ The scope of private legislation at the federal level was far narrower than that in some state assemblies, where private bills might provide equitable relief from a common law disposition or confer naturalized citizenship on the petitioner. Elsewhere, private legislation was enacted to create a new corporation, to provide a divorce, to dock the entail of certain real property, or to provide a land grant. Perhaps most commonly, private legislation would provide for the payment of a sum of money to the petitioner. The assembly's control of the appropriations power naturally attracted money claims or what came to be known as public claims. See generally BAILEY, *supra* note 42, at 114–31 (describing variety of claims presented to Virginia legislature); Desan, *Constitutional Commitment*, *supra* note 41 (describing tradition of legislative resolution of claims against government in New York).

initially declined to adopt private naturalization bills.¹¹⁴ Similarly, Congress did not appear to view itself as authorized to grant a divorce, dock an entail, or overturn the decisions of the federal judiciary.¹¹⁵ Limitations on federal legislative authority and the separation of government powers thus restricted the scope of Congress's private bill authority.¹¹⁶ No one appears to have doubted, however, that Congress could adopt legislation that paid public money to private individuals.¹¹⁷ Perhaps any debt that Congress chose to recognize and pay was seen as a debt of the United States within the meaning of Article I.

Private bills invariably began with the submission of a petition to Congress. Petitions came in many forms. Some contained the signatures of a broad range of individuals and advocated the adoption of public laws; such group petitions operated somewhat like public opinion polls do today by communicating community sentiment about

¹¹⁴ See BERNADETTE MAGUIRE, IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS 3 (1997) ("Immigration bills were very few in the early days of Congress."). Maguire notes John Campbell White's private naturalization bill in 1839 as the first private immigration bill enacted by Congress. *Id.* Elsewhere, Pfander and Wardon contend that Congress had studiously avoided private naturalization bills up to that time on the ground that the Constitution obligated it to adopt public laws of general applicability. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 393–403 (2010).

¹¹⁵ Of the private bills adopted in the 1790s, none dealt with these subjects.

¹¹⁶ Article I of the Constitution did not give Congress specific power over family and property law matters; contemporaries would have thought this omission ruled out a congressional role in granting divorces and docking entails. Article III was thought to vest all the judicial power in the federal courts and to foreclose both executive and legislative revision of judicial decrees. On the early exposition of the doctrine of judicial finality and the related ban on legislative and executive revision of judicial decrees, see HART & WECHSLER, *supra* note 1, at 86–93.

¹¹⁷ Some observers link the power to adopt private bills to the right to petition the government for a redress of grievances. See U.S. CONST. amend. I. Yet the individual right to petition does not necessarily imply a power in Congress to provide the redress requested; petitions may address themselves to matters outside Congress's authority. Close observers of the records of the Philadelphia Convention have found support for a power to authorize payments to private individuals. See Figley & Tidmarsh, *supra* note 27, at 1254–55, 1259. One might nonetheless imagine a limit on private bill authority derived from the requirement that Congress spend money "to pay the debts and provide for the . . . general welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The provision of a wholly private benefit, if conferred through a private bill, might fail a general welfare test. Today, of course, the broad definition of the spending power would seemingly foreclose such an argument. See *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."). Even during the antebellum period, the Court found little reason to question Congress's power to appropriate money to private parties. See *Emerson v. Hall*, 38 U.S. (13 Pet.) 409 (1839) (characterizing private appropriation as gift or donation but raising no question about its constitutional legitimacy).

an important piece of proposed legislation. Some petitions, by contrast, contained but a single signature and requested relief on behalf of a single individual. The first Congress received petitions of both kinds. The tradesmen and merchants of Baltimore, Maryland, petitioned for the adoption of a public law imposing import duties on foreign goods.¹¹⁸ Meanwhile, inventors and authors petitioned for the adoption of private bills conferring patent and copyright protection.¹¹⁹ War veterans petitioned for compensation and pensions, seeking a private appropriation of money.

The procedure for handling petitions continued to evolve throughout the early republic. Petitions were read upon their arrival in the House or Senate and allowed to lie upon the table.¹²⁰ Both the House and Senate also called for brief summaries of the contents of petitions.¹²¹ Upon receiving petitions, the House felt some obligation to deal with each one on the merits, either by committing it to a three-person committee or by assigning it to the Committee of the Whole House.¹²² Often the referral to a committee led to some investigation of the petition's merits. Committees might ask an executive department, often the Department of the Treasury or the Department of War, for advice about the disposition of the claim. On occasion, the

¹¹⁸ According to the House Journal, tradesmen and merchants from Baltimore, Maryland, submitted a petition on April 11, 1789, asking Congress to impose taxes on foreign goods. H. R. JOURNAL, 1st Cong., 1st Sess. 12 (1789). On April 13, a second petition arrived, this time from shipwrights in Charleston, South Carolina. *Id.* at 13. On April 15, petitions seeking individual copyright and patent protection were brought before the House. *Id.* at 14. Petitions from two widows of veterans of the Revolutionary War were received on May 4, 1789. *Id.* at 26–27. See generally diGiacomantonio, *supra* note 112, at 31–35 (describing trade-related commercial petitions).

¹¹⁹ See diGiacomantonio, *supra* note 112, at 39–41 (describing petitions for copyright and patent protection).

¹²⁰ The House rules provided as follows:

Petitions, memorials, and other papers addressed to the House, shall be presented through the Speaker, or by a member in his place, and shall not be debated or decided on the day of their being first read, unless where the House shall direct otherwise; but shall lie on the table to be taken up in the order they were read.

REPORT OF THE HOUSE COMMITTEE ON STANDING RULES AND ORDERS OF PROCEEDING (Apr. 7, 1789), reprinted in 8 FIRST FEDERAL CONGRESS, *supra* note 112, at 766.

¹²¹ On the Senate side, the summary was offered just before the petition was read. See STANDING RULES OF THE SENATE, R. 20 (Apr. 18, 1789), reprinted in 8 FIRST FEDERAL CONGRESS, *supra* note 112, at 752. On the House side, it became the practice to read the petitions in full but to publish a summary in the House journal. See 8 FIRST FEDERAL CONGRESS, *supra* note 112, at xvi (reporting that proposal to summarize petitions became practice in House).

¹²² The Quaker petition campaign for the abolition of slavery in 1790 sorely tested this tradition of considered disposition. See generally William C. diGiacomantonio, “For the Gratification of a Volunteering Society”: Antislavery and Pressure Group Politics in the First Federal Congress, 15 J. EARLY REPUBLIC 169 (1995).

committee would investigate the petition itself, perhaps through inquiry directed to the principals. Eventually, the committee would report to the House, recommending a disposition of the petition. If the House agreed with a favorable committee report, it would direct the committee to draft appropriate legislation. If such legislation was debated and approved by the House and Senate, and signed by the President, it became law and provided a warrant for the payment of public money from the treasury.

Compared with that of some other assemblies, the practice of Congress was remarkably inexpensive, open, and transparent. To petition for a private bill in England was to enter a shadowy world where it was necessary to hire special counsel, pay a series of exorbitant fees to the officers of Parliament, and provide whatever additional gratuities were necessary to grease the wheels of private justice.¹²³ Fees placed the private bill process beyond the reach of most individuals of modest means and earned the Speakers of the Houses of Commons and Lords a great deal of money.¹²⁴ By way of contrast, Congress did not require petitioners to pay an official fee at any stage in the private bill process. Members of Congress and their staff were paid out of public funds and did not earn any additional income on the basis of the number of petitions they received or bills they enacted.¹²⁵ As a consequence, petitions flowed into Congress for the payment of amounts that seem almost trifling by today's standards.¹²⁶ While Congress received a substantial number of petitions prepared by experts, many were written by the petitioners themselves and bear some resemblance to the *in forma pauperis* petitions that now flow into state and federal courts.¹²⁷

¹²³ On the high cost of securing a private bill of naturalization from Parliament, see II FREDERICK CLIFFORD, *A HISTORY OF PRIVATE BILL LEGISLATION* 725 (London, Butterworths 1887).

¹²⁴ On the amount of income from parliamentary fees, see *id.* at 716–17, which notes that petitioners were “continually abused by excessive charges” by both clerks and high officials.

¹²⁵ Legislation provided for the payment of a per diem to members of Congress along with a stipend to cover travel expenses. See Act of Sept. 22, 1789, ch. 17, 1 Stat. 70 (specifying \$6 per day, and per twenty miles of travel, for attendance in House and \$7 per day, and per twenty miles of travel, for attendance in Senate). There was no provision for the payment of additional compensation to the leadership of the two chambers. In one exception to the rule against user fees, the House provided for the sergeant-at-arms to collect a fee of \$2 from every person arrested for contempt and additional fees to defray the cost of custody. See H.R. JOURNAL, 1st Cong., 1st Sess. 14 (1789).

¹²⁶ See, e.g., S. REP. NO. 17-566 (1st Sess. 1822), reprinted in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 103, at 802 (listing claim for \$6.46).

¹²⁷ See Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in HOUSE & SENATE IN THE 1790s, *supra* note 22, at 57, 62–63. Pasley reports that petitions often substituted for what we would today view as lobbying and notes

Two final features of the transparency of early practice in handling private bills deserve mention. First, in contrast with the modern legislative world of hidden perks and pork, the bills themselves were worded in ways that provided the reader with a fairly good idea of why the legislation was adopted. The laws did not simply appropriate a sum to an identified individual but explained in brief the circumstances that gave rise to the legislation. Second, Congress took pains to ensure that all laws, public and private, became a part of the public record. Thus, legislation adopted by the first Congress provided that whenever any bill, vote, or resolution took effect, either by presidential concurrence or legislative override of a presidential veto, the Secretary of State was obliged to record the original, publish a true copy in three public newspapers, and deliver printed copies to every member of the House and Senate and to the governor of every state.¹²⁸ Early practice under this law resulted in the consistent publication of private laws. For example, the *National Intelligencer*, a Washington, D.C.–based newspaper, published “By Authority,” a complete version of each of the private laws adopted to indemnify naval officers for maritime torts against Danish vessels.¹²⁹ Such transparency allowed the people to evaluate the work of their representatives and moderated any tendency among members of Congress to adopt private bills that lacked any obvious public justification.¹³⁰

B. *Private Indemnification for Maritime Torts*

By the time the Danish owners of vessels (and the Danish government) began to seek compensation for their losses in the Quasi-War, American diplomatic policy had changed rather sharply. For one thing, President Adams had sent a diplomatic mission to France to

the success of an early lawyer, Miers Fisher, who secured adoption of private legislation on behalf of two clients. *Id.* at 62. Other petitioners, facing straitened circumstances and unable to hire a lawyer, submitted petitions that they drafted themselves.

¹²⁸ Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68, 68.

¹²⁹ *Washington Advertiser*, NATIONAL INTELLIGENCER, Apr. 21, 1802.

¹³⁰ As the number of petitions proliferated, Congress adopted measures to streamline the process. One response was to assign responsibility for initial determinations to other institutions of government, such as the federal courts or an executive body, subject to review by Congress. A second response was to establish a standing Committee on Claims to which all petitions for private money bills and public land were assigned. Over time, the single Committee on Claims gave way to more specialized committees on veteran pensions, public lands, and so forth. A third response was to adopt a public law setting forth rules for determining the issues at hand and assigning the resolution of the claims to other institutions of government. For a summary of these developments, see Shimomura, *supra* note 22, at 637–39, 643–48. By the 1830s, the system of private claims was in a state of crisis. The House presented two reports detailing the problems and arguing for the creation of an alternative institutional structure. Eventually, these calls for reform led to the creation of the Court of Claims. *Id.* at 648–52.

negotiate a cessation of hostilities.¹³¹ For another, the elections of 1800 put Adams out of office and (after several ballots in the House of Representatives) led to the installation of Thomas Jefferson as President.¹³² Although he disappointed the French, who had hoped for a full-scale American realignment, Jefferson pursued a foreign policy based on neutrality and respect for the rights of neutral vessels.¹³³ In addition, the United States continued to pursue indemnity from France for the losses U.S. vessels had suffered as neutral parties in the mid-1790s.¹³⁴ All of these considerations lent force to Danish claims for compensation.

Because they enjoyed considerable diplomatic support, the Danish claims eventually landed on the desks of two well-known U.S. foreign officers.¹³⁵ The first belonged to John Marshall, the Secretary of State under John Adams, and the soon-to-be Chief Justice who would write for the Court in *Little, Murray, and Maley v. Shattuck*. Richard Söderström, the Danish consul, approached Marshall in November 1800 seeking compensation on behalf of Paolo Paoly and Jared Shattuck for the losses they suffered at the hands of William Maley.¹³⁶ As perhaps befits a man who was only months away from a new job, Marshall temporized.¹³⁷ Several months later, after

¹³¹ See DECONDE, *supra* note 64, at 223–37 (describing mission of Oliver Ellsworth, William R. Davie, and William Vans Murray as ministers to France). The mission produced a treaty of peace in October 1800, which the United States and France ultimately ratified in July 1801. *Id.* at 316–20.

¹³² For an account of the balloting to break the electoral college tie between Jefferson and Aaron Burr, see GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 284–85 (2009), which recounts that the House of Representatives, in February 1801, required several days and thirty-six ballots to break the electoral impasse.

¹³³ DECONDE, *supra* note 64, at 306–10. Jeffersonian suspicions of Great Britain would eventually lead to the War of 1812.

¹³⁴ See DECONDE, *supra* note 64, at 229, 253–54 (identifying compensation for American shipping losses as major goal of negotiation and noting that indemnity was deferred and then omitted from eventual accord).

¹³⁵ Timothy Pickering, the less well-known Secretary of State who preceded Marshall in that office, also dealt with claims arising from the Quasi-War. See *supra* note 85.

¹³⁶ Richard Söderström represented the interests of several Danish vessel owners in letters to the Secretary of State from November 1800 until March 1802. See, e.g., Letter from John Marshall to Richard Söderström (Nov. 26, 1800), in 6 *THE PAPERS OF JOHN MARSHALL*, *supra* note 85, at 21 (acknowledging receipt of Söderström's letters); Letter from Richard Söderström to James Madison (Mar. 18, 1802), *supra* note 100, at 46 (describing Söderström as Paoly's agent).

¹³⁷ Thus, Marshall noted that Maley had been relieved from naval duty due to his failure to respect the rights of neutral vessels. Letter from John Marshall to Richard Söderström (Nov. 26, 1800), *supra* note 136, at 21. Marshall recommended an appeal from the British prize disposition and concluded by disclaiming sufficient knowledge at present to accept responsibility should the appeal fail. *Id.* When Shattuck's claim against Maley came before the Court several years later, Shattuck attempted to secure compensation for the cost of

Jefferson's inauguration, Söderström approached the new Secretary of State, James Madison. The correspondence began in June 1801 and continued through October, when Madison asked that further discussions take place at the ministerial level.¹³⁸ At that point, the Danish resident minister, Peder Blicherolsen, took up the cases.¹³⁹

In his correspondence with Danish representatives, Madison appears to have played a decisive role in shaping the institutional response to the reparation claims. He was quite clear throughout the exchange of letters that any solution must respect the role of the federal courts in adjudicating claims of liability and the role of Congress in making any appropriation of funds to pay the claims. Thus, in a letter to Söderström, Madison explained that whatever the executive branch concluded about the justice of the Danish claims, "it must be sanctioned by an appropriation of the Legislature."¹⁴⁰ Moreover, Madison noted that "the general usage requires that redress should be

pursuing the British appeal, something that Marshall was to reject in his opinion for the Court. *See* *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 491–92 (1806) (concluding Maley was not liable for cost of pursuing appeal in British case).

¹³⁸ *See* Letter from Richard Söderström to James Madison (June 10, 1801), in 1 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 290 (Robert J. Brugger et al. eds., 1986) [hereinafter 1 MADISON PAPERS]; Letter from Richard Söderström to James Madison (July 21, 1801), in 1 MADISON PAPERS, *supra*, at 452; Letter from Richard Söderström to James Madison (Aug. 10, 1801), in 2 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 29 (Mary A. Hackett et al. eds., 1993) [hereinafter 2 MADISON PAPERS]. The last of the letters asked specifically for a response. *Id.* at 30. It drew a fairly petulant letter from Madison. *See* Letter from James Madison to Richard Söderström (Oct. 27, 1801), in 2 MADISON PAPERS, *supra*, at 206 (noting importance of following "useful and established forms" of diplomacy, by which Madison meant that he would no longer deal with mere consul but would insist that residential minister represent Danish subjects in "making their reclamations"). Nonetheless, Söderström continued to send letters directly to Madison, including one in March 1802 that enclosed a copy of the petition he would introduce on behalf of Paolo Paoly.

¹³⁹ *See* Letter from Peder Blicherolsen to James Madison (Jan. 16, 1802), in 2 MADISON PAPERS, *supra* note 138, at 400, 401 (asking that Madison "[p]ermit me therefore Sir, to urge Mr. Söderströms [sic] request, that some mode" of adjudicating issue be agreed upon); Letter from Peder Blicherolsen to James Madison (June 6, 1802), in 3 MADISON PAPERS, *supra* note 98, at 280. Blicherolsen's letter refers to another letter dated April 22, 1802, in which Madison proposed a resolution of the dispute between Maley and Shattuck's vessel, the *Mercator*, through an amicable proceeding in court between the claimant and Maley, with the United States appearing on Maley's behalf. Blicherolsen accepted the proposal and suggested that the litigation proceed in the district court in Philadelphia. *Id.* Madison then wrote to Alexander Dallas, the United States Attorney for the District of Pennsylvania, describing the dispute in brief and noting that Maley was "both absent from the United States and in a state of insolvency." Letter from James Madison to Alexander J. Dallas (June 15, 1802), *supra* note 99, at 308. For Blicherolsen's identification as the Danish resident minister, see 34 THE PAPERS OF THOMAS JEFFERSON 451 (Barbara B. Oberg ed., 2007).

¹⁴⁰ Letter from James Madison to Richard Söderström (July 23, 1801), in 1 MADISON PAPERS, *supra* note 138, at 461.

first prosecuted judicially.”¹⁴¹ Only if relief were not obtained through the judicial process and only if “the obligations of the United States should be found nevertheless to demand that compensation should be made,” would the government consider making a payment.¹⁴² Each branch must play its assigned role in the process.¹⁴³

Advice in March 1802 from the Attorney General, Levi Lincoln, confirmed Madison’s view about the need for adjudication. Lincoln raised questions both about the extent of Maley’s liability for the seizure of Shattuck’s vessel (the *Mercator*) and about the degree of any government responsibility for the losses Shattuck suffered.¹⁴⁴ Lincoln explained that one could doubt Maley’s responsibility for the loss of the *Mercator*, given the intervening British prize claim by which the vessel was condemned.¹⁴⁵ Even if Maley were responsible, Lincoln could find “no principle of the law of nations” that would require the government to “answer in the first instance” for the unlawful captures committed by its citizens or to become liable as a result of their insolvency or avoidance.¹⁴⁶ Lincoln admitted that governments might provide a reparation as a matter of policy “under . . . special circumstances,” but this was not viewed as a “great and obvious principle[] . . . of national right.”¹⁴⁷ Lincoln thus recommended that the government of the United States “ought not to interfere” but should leave Shattuck to any relief he might secure from Maley or from a reversal of the British condemnation of his vessel in Jamaica.¹⁴⁸

Following his receipt of Lincoln’s opinion, Madison made arrangements to secure a judicial determination of Shattuck’s claim against Maley. In a letter to the Danish minister dated April 23, 1802,

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Söderström, for his part, claimed to understand the necessity of interbranch coordination. See Letter from Richard Söderström to James Madison (Aug. 10, 1801), *supra* note 138, at 29 (describing himself as “well aware” of need for legislative appropriation). But he nonetheless sought to secure some kind of arbitral assessment of the loss so as to avoid having recourse to “tedious & expensive judicial proceedings.” *Id.*

¹⁴⁴ See Opinion of Levi Lincoln to Secretary of State (Mar. 11, 1802), in 1 Op. Att’y Gen. 106 (1852).

¹⁴⁵ *Id.* at 107.

¹⁴⁶ *Id.* at 108.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Söderström pointed out to Madison that the outbreak of hostilities between Britain and Denmark left Shattuck with “no hope whatever of obtaining any satisfaction from that quarter.” Letter from Richard Söderström to James Madison (June 10, 1801), *supra* note 138, at 292 (emphasis omitted). Söderström was referring to Britain’s attack on Denmark to force it to withdraw from the French-inspired League of Armed Neutrality. See DECONDE, *supra* note 64, at 310–11 (describing Britain’s demand that Denmark withdraw from League and its subsequent attack on Danish navy).

Madison explained that Shattuck's claim could not be adjusted without a prior judicial investigation: "According to the usual course, injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunals to which the aggressors are responsible . . ." ¹⁴⁹ Such an adjudication would enable the government to determine the circumstances surrounding the seizure and could shed light on the question Lincoln raised, namely whether the intervening seizure of the vessel by a British privateer was the true cause of the loss. Madison closed by explaining that Blicherolsen should prepare to show why, under the law and usage of nations, the government of the United States should be responsible for making redress, rather than the "positive authors" of the injury. ¹⁵⁰ In other words, Madison was not promising that ultimate compensation would be forthcoming even if Shattuck were successful in the judicial proceeding. ¹⁵¹

Madison also played a central role in getting the litigation against Maley underway. This was complicated, needless to say, by the fact that Maley was both absent from the country and presumed insolvent. ¹⁵² Madison invited the Danish minister to choose a forum for the litigation; ¹⁵³ Blicherolsen chose the Pennsylvania district court as the venue closest to his own residence in the United States and as the place where Maley resided at the time of the capture and "may in his absence perhaps be most legally sued." ¹⁵⁴ Madison next arranged with Alexander Dallas, the United States Attorney for the District of Pennsylvania, to assent to the institution of a proceeding against Maley, directing that Dallas appear "in behalf of Captn. Maley; in whose defence the United States are interested." ¹⁵⁵ Madison enclosed copies of the only documents relating to the *Mercator* he could locate: a statement from a member of the crew supporting Maley's action in

¹⁴⁹ Letter from James Madison to Peder Blicherolsen (Apr. 23, 1802), in 3 MADISON PAPERS, *supra* note 98, at 152.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* (recognizing as "question, distinct from the conduct of Captain Maley, how far the capture of the *Mercator* [by a British prize ship] . . . ought to make the United States rather than Great Britain, liable to the Danish claimants").

¹⁵² *See id.* (noting "absence of Captain Maley").

¹⁵³ *Id.* (indicating that adjudication could be had through "proper instructions to an Attorney of the United States" as soon as minister "shall be pleased to signify the district" in which he would prefer to proceed).

¹⁵⁴ Letter from Peder Blicherolsen to James Madison (June 6, 1802), *supra* note 139.

¹⁵⁵ Letter from James Madison to Alexander J. Dallas (June 15, 1802), *supra* note 99, at 308.

detaining the *Mercator* and a copy of the British vice admiralty court's decision condemning the vessel as lawful prize.¹⁵⁶

Madison's efforts to facilitate an amicable proceeding defended by the United States Attorney might appear to have tied the government's hands. It would be difficult, after all, for the government to take the position that it had no obligation to pay any resulting judgment in favor of Shattuck after Madison had taken steps to involve the government in defending its own interests in the litigation. (Shattuck could presumably have obtained a default judgment against Maley,¹⁵⁷ but the government doubtless would have declined to pay such a judgment without a judicial investigation of Maley's defenses.) Madison's agreement with the Danish minister thus appears somewhat inconsistent with his stated view that the executive branch must respect the role of Congress as paymaster. Shattuck's success in litigation would make it much more difficult for members of Congress to argue that the United States bore no legal responsibility for the loss of the Danish vessel.¹⁵⁸

Madison's desire to involve Congress in deciding the question of indemnity for Danish vessel owners may help to explain the speed with which the relief bill on behalf of Paolo Paoly became law.¹⁵⁹ With

¹⁵⁶ *Id.* These documents were apparently destroyed when the British set fire to the nation's Capitol building during the War of 1812. See note accompanying H.R. REP. 9-175 (1806), reprinted in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 103, at 333.

¹⁵⁷ Although Maley was absent from Pennsylvania, it may have been possible to reach him through the process of outlawry. For a description of the process and its use against absentees, see 3 WILLIAM BLACKSTONE, COMMENTARIES, *282-84, and 1 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS 122-43 (Philadelphia, William P. Farrand, 2d ed. 1807).

¹⁵⁸ Indeed, when Congress received a petition for payment of Shattuck's claim in 1806, the House asked Madison for his opinion as to the validity of Shattuck's claim. Madison recommended payment, recounting the steps that led to the litigation. In doing so, Madison pointed out that he had reserved the rights of the United States in his correspondence with the Danish minister and had explained that a judicial decree against Maley would not necessarily obligate the United States. See H.R. REP. 9-175 (1806), reprinted in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 103, at 333 ("[A] final decree in the suit against William Maley should not, in any degree, involve a decision upon the question, whether the United States are responsible" (internal quotation marks omitted)).

¹⁵⁹ Madison may have taken the view he did in light of his own posture in the debate over Jay's Treaty. Madison argued not against the constitutionality of the treaty, but against its wisdom. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1178-85 (2000). He also contended that, in order to implement any treaty that dealt with subjects within the scope of the legislative power, the House would have to adopt implementing legislation, and the House could deliberate as to whether to enact such legislation. 5 ANNALS OF CONG. 772-74 (1796). One provision of the Treaty in particular, Article VI's provision for the federal compensation of frustrated British creditors, obviously implicated the role of the House in the enactment of money bills. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay's Treaty].

a judgment already issued against Maley, the bill moved very quickly through the House. Söderström's petition on behalf of Paoly, submitted on March 18, 1802, was referred to committee on March 22, 1802 and favorably reported out four days later on March 26.¹⁶⁰ The Committee of the Whole House agreed with the committee report and voted in favor of compensation on April 2, 1802.¹⁶¹ The next day, a bill for Paoly's relief was read twice and committed to the Committee of the Whole House.¹⁶² The Committee met on April 5 and reported the bill without amendment.¹⁶³ On April 6, the House read the bill a third time, voted in its favor, and sent it to the Senate for consideration.¹⁶⁴ Senate records reveal that the Senate began work on the bill that same day, April 6, and completed its work on April 12.¹⁶⁵ Jefferson signed the bill on April 14, 1802,¹⁶⁶ some three weeks after the favorable House report on the petition. Few private indemnity bills have moved so quickly through Congress. That it did so at a time when Congress was engaged with other weighty matters suggests that the legislation had strong backers.¹⁶⁷

Although we have uncovered no direct evidence of their involvement in promoting the Paoly legislation,¹⁶⁸ Madison and Jefferson had good reason to support the legislation and to encourage its speedy

¹⁶⁰ See 11 ANNALS OF CONG. 1129 (1802) (reporting that House resolved itself into Committee of the Whole to consider Söderström's petition on behalf of Paoly and noting dates of referral and favorable report).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1131.

¹⁶³ *Id.* at 1133.

¹⁶⁴ *Id.* at 1141.

¹⁶⁵ See *id.* at 253, 257, 259 (reading bill first and second time, ordering third reading, reading it third time, and passing it).

¹⁶⁶ See Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802).

¹⁶⁷ During the first session of the Seventh Congress, the Jeffersonians reworked a number of Federalist institutions, including the judicial branch of government and the rules of naturalization. See Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (amending judicial system of United States); Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (rejecting fourteen-year waiting period for naturalization adopted in 1798 and returning to five-year residency rule); Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealing Judiciary Act of 1801).

¹⁶⁸ Highly suggestive indirect evidence appears in correspondence a year later. See Letter from James Madison to Thomas Jefferson (Feb. 21, 1803), in 2 THE REPUBLIC OF LETTERS 1260, 1260 (James Morton Smith ed., 1995) (noting Congress's indemnification of Paoly). Madison's letter encloses his report on a Danish claim that American officers wrongly seized a Danish vessel and condemned it (irregularly) before a British prize court. Madison's cover letter reports that he sought the review and acquiescence of "Mr. L.," doubtless a reference to Levi Lincoln. The letter further refers to the precedent of "Paoli" in which Congress had "already interposed" and explains that "[t]he judgm[ent] of the Court ag[ainst] Capt. Maley was p[aid] by Congs."—a fact Madison cited to support his view that compensation was owed in the instant case as well. *Id.*

passage.¹⁶⁹ In addition to indemnifying Paoly for his loss, the bill established a precedent that Congress would compensate the owners of neutral Danish vessels for losses inflicted by officers of the United States. It also established that the United States would provide indemnity directly to the affected owner when the officer in question had become insolvent or was otherwise unavailable. Madison found both conclusions extremely useful. For one, Congress's action nicely rebuffed the Attorney General's opinion that the government should leave Shattuck to his remedies against Maley and the British prize crew. Madison could not easily reject advice from the chief legal officer of the executive branch, but Congress could. In addition, Congress's action in the Paoly incident cleared the way for Madison to suggest a judicial proceeding between Maley and Shattuck as the answer to the repeated inquiries of the Danish ministry. Congressional action suggested that the government would honor the results of the Shattuck litigation, just as it had honored the judgment in the Paoly litigation. The Paoly legislation thus added substantial weight to Madison's proposed diplomatic solution and removed any hint of interbranch impropriety. Rather than taking action on his own that would oblige the government to pay any resulting judgment, Madison may have encouraged Congress, as the government's paymaster, to establish a formal system for acceptance of responsibility on which he and others could rely in continuing to process such cases. Notably, Madison's letter suggesting a judicial resolution of the Shattuck and Maley dispute came shortly *after* the Paoly legislation had become law.

Whatever its diplomatic underpinnings and implications, the Paoly legislation established a precedent that lent decisive shape to the indemnity process. The next two private bills for the indemnification of federal officials were adopted on behalf of Alexander Murray and George Little. Both bills appear to have been viewed as routine matters. Murray's litigation at the Supreme Court had resulted in a remand to the circuit court for the recalculation of damages. Following completion of that process, Murray filed a petition for indemnification with Congress in 1804, which was dutifully referred to the

¹⁶⁹ The timing of the events of March and April 1802 also suggest a connection between the Lincoln opinion, the action of Congress on the Paoly bill, and Madison's proposal to the Danish minister. The period of intense legislative action on the Paoly petition came immediately *after* Lincoln delivered his opinion on March 11, 1802. Madison's April 23 letter to the minister was sent shortly after Jefferson signed the Paoly legislation on April 14.

House Committee on Claims.¹⁷⁰ The Committee report, submitted to the House on January 8, 1805, noted that Murray was liable to execution of the judgment. It also observed that Murray had acted in accordance with the perception of his “duty” as an officer and in compliance with his “public instructions” in intercepting the *Charming Betsy*.¹⁷¹ The Committee thus recommended that Murray’s prayer for indemnity was “reasonable” and “ought to be granted.”¹⁷² The Committee report appended the Supreme Court’s decision, a letter from the Secretary of the Navy recommending payment, and copies of the instructions under which Murray was acting at the time of the seizure.¹⁷³ The Navy Secretary acknowledged that, in September 1801, he had authorized the government to post Murray’s appeal bond and had requested the United States Attorney in Philadelphia to handle Murray’s appeal.¹⁷⁴ He did so, he acknowledged, in the belief that the government would “ultimately have to

¹⁷⁰ See H.R. REP. NO. 8-44 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 128 (indicating that Murray’s memorial was referred to Committee on Claims).

¹⁷¹ *Id.* at 129.

¹⁷² *Id.*

¹⁷³ See *id.* at 129–32 (reproducing opinion from *Murray*, letter from R. Smith, Secretary of the Navy, to Samuel W. Dana, Chairman of the Committee of Claims, and instructions from Ben Stoddert).

¹⁷⁴ *Id.* at 131–32. In defending himself against having presumed too much in deciding to support Murray’s appeal, Smith observed that the policy of indemnifying federal officers had been established by the case of the *Niger* and the adoption of indemnifying legislation in March 1799. The *Niger* was a British ship mistakenly seized as a prize by Captain Samuel Nicholson aboard the U.S. frigate *Constitution* and escorted to Hampton Roads, Virginia, for adjudication. See STODDERT’S WAR, *supra* note 56, at 47. The capture resulted in a protest by the British minister, the release of the vessel by the Circuit Court for the District of Virginia, and the award of \$11,000 in damages to the ship’s owners. Nicholson, apparently in debt and prize hungry, had no assets with which to pay this bill. *Id.* at 49. Congress accordingly included a provision in its supplemental appropriation authorizing the President to pay \$11,000 to the owners of the *Niger*. See Act of Mar. 2, 1799, ch. 28, § 3, 1 Stat. 723, 724.

Nicholson’s conduct was severely criticized, both because he mistakenly seized a British vessel and because he left his assigned duties to escort his prize to harbor, thus effectively taking his boat out of commission for a month in pursuit of personal gain. Secretary of State Timothy Pickering understood that Nicholson’s personal poverty may have explained his behavior; claiming prizes was apparently “his only living” and his “eagerness . . . to procure a condemnation savored of rapacity.” STODDERT’S WAR, *supra* note 56, at 49 (internal quotation marks omitted).

One can fairly debate Secretary Smith’s contention that the *Niger* legislation should be regarded as a definitive precedent for the Danish cases. Under the terms of Jay’s Treaty between the United States and Great Britain, the owners of a wrongfully detained vessel were to be “speedily and completely indemnified” either by the “captors,” or “in their default the government under whose authority they act.” Jay’s Treaty, *supra* note 159, art. XVIII. The Treaty thus contemplated government responsibility in cases where the captors could not afford to pay compensation. The decision to pay the British owners of the *Niger* may reflect treaty obligations, rather than obligations under the law of nations.

pay whatever damages might be decreed against him.”¹⁷⁵ Murray’s relief bill became law on January 31, 1805.¹⁷⁶

The House Committee on Claims also processed George Little’s petition for indemnity. The Committee report, dated February 20, 1805, recited the circumstances of the *Little* litigation, noted that the judicial process had ended with the entry of the circuit court’s judgment in October 1804, and described Captain Little as subject to the process of execution.¹⁷⁷ The report, authored by Chairman Samuel Dana, included a copy of the Supreme Court’s decision and the instructions under which Captain Little acted.¹⁷⁸ Dana apparently regarded the justice of the petition as too obvious to require detailed explanation. As the report explained, “The committee deem it unnecessary for them at this time to enter into an examination of the principle on which the relief is requested. It has already been clearly recognized.”¹⁷⁹ The report apparently referred to the principle established by the bill enacted on Murray’s behalf three weeks earlier.

Although the principle may have been established, Congress took its time in granting indemnity to Captain Little. No immediate reason for the delay appears in the records we have reviewed. Committee reports for the next few sessions of Congress, like the report in February 1805, recommended in favor of Little’s petition. However, Congress took no action to adopt indemnifying legislation. Eventually, Little’s bill became law in January 1807,¹⁸⁰ some two years after Murray was indemnified. Whether members of Congress expressed concern about the merits of Little’s petition or simply deferred its consideration due to the press of other business, we cannot determine.¹⁸¹ But Little’s experience anticipates that of many other petitioners who were thought to have valid claims and eventually secured the passage

¹⁷⁵ H.R. REP. NO. 8-44, at 132.

¹⁷⁶ See Act for the Relief of Alexander Murray, ch. 7, 6 Stat. 56 (1805).

¹⁷⁷ H.R. REP. NO. 8-46 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 138.

¹⁷⁸ *Id.* at 138–39.

¹⁷⁹ *Id.* at 138.

¹⁸⁰ See Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807).

¹⁸¹ The ultimate relief granted to Little called for payment of money from the treasury as necessary to “satisfy[] the [judgment]” in the case of the *Flying Fish*. *Id.* By defining the relief in terms of the satisfaction of the judgment, rather than the simple payment of funds to Little, the legislation suggests that treasury officials were to ensure that the money made its way to the Danish claimants in satisfaction of the judgment. Simple payment of money to Little may have subjected those funds to levies from other creditors and put the Danish claimants at risk.

of indemnifying legislation, but who were not indemnified with the speed which they may have wished.¹⁸²

Jared Shattuck, the Danish owner of the *Mercator*, experienced even lengthier delays. Shattuck's amicable proceeding against the absentee William Maley got underway in 1804, two years after Madison made the arrangements with Dallas and the Danish minister but only months after the Court's decisions in *Little* and *Murray* established the legal principles on which Shattuck would rely.¹⁸³ Dallas appealed the matter on behalf of Maley and the government without success, and the Supreme Court affirmed a judgment for Shattuck in 1806.¹⁸⁴ Shattuck, acting with the assistance of Danish agents, sought compensation from Congress a short time later. Although he petitioned consistently for several years thereafter, his private bill did not become law until February 1813, some seven years after the Court's decision and thirteen years after his loss.¹⁸⁵

A variety of factors may account for the delays Shattuck experienced. First, some members of Congress may have shared the view (expressed by Lincoln and Madison but rejected by the Court) that the intervening wrongful act of the British prize crew in carrying off the *Mercator* to Jamaica absolved Maley and the government of any responsibility for the loss. Second, the loss itself was quite substantial; Shattuck sought (and eventually secured) a payment of \$33,000—well more than the figures at issue in the earlier cases. Third, the payment was to go to Shattuck himself, rather than to an officer of the navy who faced the prospect of execution on a judgment. As an absentee insolvent, Maley, the responsible government official, faced little apparent risk of personal loss, unlike Murray and Little. In any event, the leisurely way in which Congress dealt with the Shattuck petition serves to highlight the speed with which it responded to the Paoly petition in 1802.¹⁸⁶

¹⁸² Had the Danish claimants agreed to accept the appropriation of funds and to defer any direct execution on the assets of Captain Little, it would have moderated, to some degree, the urgency with which Little would have pursued the appropriation.

¹⁸³ See *supra* notes 86–95 and accompanying text (discussing legal principles at issue in *Little* and *Murray*).

¹⁸⁴ See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458 (1806).

¹⁸⁵ See Act for the Relief of Jared Shattuck, ch. 19, 6 Stat. 116 (1813) (describing amicable proceeding and noting that it was product of “instructions . . . from the executive of the United States”).

¹⁸⁶ A report of the Attorney General apparently played a decisive role in moving the bill to passage. The House Committee on Claims had posed a specific question about the implications of the intervening capture by the British prize crew. See H.R. REP. NO. 12-234 (1st Sess. 1812), reprinted in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 103, at 418, 419. The Attorney General briefly but firmly confirmed the Supreme Court's decision that Maley, as an initial wrongdoer, bore responsibility for all losses that followed in the wake

C. Institutionalizing the Practice of Indemnification

Although the nation's first private indemnity bills operated for the benefit of Danish claimants and arose from naval actions on the high seas, everyone appears to have understood that the system of litigation and indemnity applied to losses inflicted by government officers acting within the United States as well.¹⁸⁷ Indeed the early practice bears out this assumption. One relatively early indemnity bill was adopted for the relief of Samuel Ellis, a Deputy Marshal serving in the District of Maine.¹⁸⁸ Although we could not locate a copy of the judicial decision, the indemnity bill recites that Ellis seized and sold a quantity of flour to satisfy a judgment that had been obtained by the federal government against one John Barton. Unfortunately for Ellis, the flour in question belonged not to Barton but to someone else. Ellis was accordingly held accountable for the loss of the flour and sought relief from Congress. Congress appropriated up to \$1000 and directed the Secretary of the Treasury to determine what more specific amount should be deemed "adequate" to indemnify Ellis for the damages awarded against him.¹⁸⁹

To better understand antebellum indemnification practices more generally, we conducted a study of congressional records between 1789 and 1860 and found 57 cases of officers petitioning for indemnification and 11 cases of suitors petitioning for the payment of a judgment against an officer.¹⁹⁰ Of these, the great majority of officer petitions (37) were filed on behalf of military officers who had been held legally responsible for some form of trespassory invasion: a wrongful seizure of property or persons. Many of the remaining

of his wrongful detention of the vessel. *See id.* He also confirmed that the British vice-admiralty court's judgment of good prize had no bearing on the proper disposition of Shattuck's claim against Maley. *Id.*

¹⁸⁷ Thus, Madison explicitly equated the domestic and international claims process: His letter to Blicherolsen confirmed that the institutional practice of litigation and indemnity applied to government "injuries on aliens as well as citizens." Letter from James Madison to Peder Blicherolsen (Apr. 23, 1802), *supra* note 149, at 152. Alexander Hamilton had earlier assured the federal collector in Rhode Island, Jeremiah Olney, that the government would indemnify him for any trespass liability he incurred in following instructions. *See supra* note 55 (discussing Hamilton's promise to Olney).

¹⁸⁸ *See* Act for the Relief of Samuel Ellis, ch. 40, 6 Stat. 132 (1814).

¹⁸⁹ *Id.*

¹⁹⁰ For a summary of our findings, see the Appendix to this Article. (We include some petitions from before 1860 on which Congress finally acted after that date.) Notably, we exclude indemnity for the contempt fine paid by Andrew Jackson following his imposition of martial law in New Orleans during the War of 1812. *See* Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 *CARDOZO L. REV.* 233, 239-51 (1981) (describing Jackson's imposition of martial law, his refusal to honor writ of habeas corpus, his decision to jail federal judge who issued order, his subsequent payment of \$1000 contempt fine, and passage of indemnifying legislation in 1844). Jackson did not petition Congress for relief.

officer petitions (14) were filed by or on behalf of federal revenue officers who, like their military counterparts, were seeking indemnity for liability imposed to compensate for some kind of trespass or conversion. In most such cases, the revenue officers in question had seized property and instituted forfeiture proceedings, but the courts ultimately rejected the legal justification for the forfeiture. The officers were then subjected to liability in trespass, either on the basis of a counterclaim brought in the context of the forfeiture proceeding itself (as in both *Little v. Barreme* and *Murray v. Charming Betsy*) or in a separate proceeding instituted in state court.¹⁹¹ Rounding out the officer petitions are a smattering of petitions filed on behalf of federal marshals (2) and federal postal workers (2), and a few that could not be identified.

As for the success rate of officer petitions, we found that petitioners were relatively effective in securing relief from Congress. Roughly 60% (36 of 57) of those petitioning eventually received some form of relief from Congress.¹⁹² The forms of relief varied. Some private bills were structured as direct payments to the petitioning government officers; others were structured as payments to the victims of government misconduct.¹⁹³ The great majority of successful petitions resulted in the adoption of some sort of appropriation (31 of 36), but other forms of relief were occasionally granted. Sometimes, a private

¹⁹¹ See, e.g., *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818) (affirming New York state court judgment against revenue officers who wrongfully seized *American Eagle*); *Imlay v. Sands*, 1 Cai. 566, 573 (N.Y. Sup. Ct. 1804) (imposing liability on federal revenue officer for wrongful seizure of neutral vessel). Congress appropriated \$130,000 to pay the judgment in *Gelston v. Hoyt*. See Act of Apr. 9, 1918, ch. 45, 3 Stat. 418, 423 (appropriating no more than \$130,000 for judgment). After his death, Gelston's executor successfully petitioned for the adjustment of Gelston's account with the government to credit him for certain additional expenses he incurred in defending against the claims brought by Hoyt. See Act for the Relief of M. Gelston, ch. 200, 6 Stat. 728 (1838) (allowing Gelston credit for judgment obtained against him by his attorney, Charles Baldwin, and other incidental costs of defending that and other proceedings). Gelston, as the collector for the Port of New York, was a frequent litigant. See, e.g., *Brewster v. Gelston*, 4 F. Cas. 82 (C.C.D.N.Y. 1825) (No. 1853) (granting new trial following verdict against Gelston for share of forfeiture); *Sands v. Gelston*, 15 Johns. 511 (N.Y. Sup. Ct. 1818) (finding for Gelston in suit brought by former collector of customs to recover commissions on forfeitures).

¹⁹² Some were successful after a single petition; other petitioners filed as many as three or four petitions before securing relief. The success rate for initial petitioners was thus much lower than that for the sample as a whole.

¹⁹³ Recall, for example, that Congress made direct payments both to Paolo Paoly and Jared Shattuck for William Maley's wrongdoing. By contrast, Congress paid the apparently solvent naval officers (Alexander Murray and George Little) directly, compensating them for the amounts of the judgments against them.

bill made no specific appropriation of funds but simply directed a department of the government to adjust or settle the claim.¹⁹⁴

A review of the procedural aspects of the officer indemnity process suggests that the House Committee on Claims played the leading role. For example, the great majority of the officer petitions we studied originated in the House; about 85% (49 of 57) of indemnity petitions began there. The 8 remaining officer petitions originated in the Senate. We also found a surprising degree of deference to the recommendations of the committees to which the petitions were referred. In the House, we found that adverse action by the committee (either in the form of an adverse report or in the failure of the committee to take action) was invariably fatal to the petition's success: We found no example of a case in which the House overrode an adverse report by adopting a private bill of indemnity.¹⁹⁵ Favorable committee action received almost the same degree of deference. We found 29 favorable House committee reports, and in only one case did the House fail to adopt legislative relief of some form.¹⁹⁶ This finding helps to explain the persistence of petitioning behavior in the face of congressional inaction in cases like those of Jared Shattuck and George Little. Having secured a favorable committee report, petitioners had reason to believe that a future Congress would eventually provide the requested relief.

Apart from this pattern of deference, we found that Congress applied established agency theory in determining whether to grant relief. In both the successful Murray and Little petitions, Congress regarded the two naval officers as having been held legally accountable for actions taken in accordance with their instructions and as having acted in good faith and without any malicious motive.¹⁹⁷ In

¹⁹⁴ For example, the private bill on behalf of Samuel Ellis authorized the payment of up to \$1000 and directed the Secretary of the Treasury to determine the precise amount due. *See Act for the Relief of Samuel Ellis*, ch. 40, §§ 1-2, 6 Stat. 132, 132 (1814).

¹⁹⁵ We counted eighteen instances in which the House committee either issued an adverse report or took no definite action on a petition. In no such case did the House adopt indemnifying legislation. We excluded the Senate figures from this evaluation because all of the Senate petitions were successful, an outcome that suggests some lack of representativeness in the sample.

¹⁹⁶ The Senate refrained from taking an active role in reviewing House bills that provided for relief. The Senate proposed amendments in only one case and adopted the House bill in all other cases. Within the House, the Committee on Claims heard 45% of the petitions for officer indemnification. The Committee had the duty to consider all claims and demands against the United States. The remaining petitions were heard in the Commerce and Manufactures, Ways and Means, Military Affairs, Naval Affairs, Judiciary, and Select Committees.

¹⁹⁷ *See H.R. REP. NO. 8-44* (2d Sess. 1805), *reprinted in* 1 *AMERICAN STATE PAPERS: NAVAL AFFAIRS*, *supra* note 18, at 129 (observing that Murray acted according to his perceived "duty" and in compliance with his "public instructions").

such cases, Congress concluded that the government should bear responsibility for the loss; the men were acting as honest agents of the government in taking the action that led to the imposition of liability. When, by way of contrast, the government official acted outside the scope of his agency or beyond the authority conferred by law or his instructions, the officer was left to bear any resulting liability on his own.

One sees the application of the agency principle reflected in Congress's handling of the *unsuccessful* petition of Joel Burt. Burt was the collector for the Port of Oswego, New York, on the southeast coast of Lake Ontario.¹⁹⁸ In the spring of 1808, he refused to permit Charles Bristol to ship ninety-five barrels of potash from Oswego to Sackets Harbor, New York.¹⁹⁹ Burt's rationale was that he feared that the collector at Sackets Harbor would allow the potash to enter a British (Canadian) port in violation of the Embargo Act.²⁰⁰ Eventually, Bristol obtained a judgment of some \$1500 from a New York state court.²⁰¹ Without having paid the judgment, Burt petitioned the House for relief two years later.²⁰² The House referred this petition to the Committee on Commerce and Manufactures, which took no action on the claim (effectively rejecting it).

Nearly twenty-four years later, Burt and Bristol tried again. Burt submitted a petition to the House, which referred it to the Committee on Claims on January 5, 1836.²⁰³ Two weeks later, the Committee made a negative report to the House.²⁰⁴ The Committee denied relief to Burt, explaining that “[i]t should not be the policy of the United States to screen their officers from making a just remuneration for losses sustained by her citizens, when the acts of such officers are illegal, unjust, and without palliating circumstances.”²⁰⁵ This report was ordered to “lie on the table,” and no further action was taken.²⁰⁶

¹⁹⁸ See H.R. REP. NO. 24-255, at 1 (1st Sess.1836) (identifying petitioner Burt as “collector of the port of Oswego”).

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *Bristol v. Burt*, 7 Johns. 254 (N.Y. Sup. Ct. 1810) (denying motion to set aside verdict for plaintiff in amount of \$1472.20); H.R. REP. NO. 24-255, at 1 (noting that claim included \$1472.20 in damages and \$90.83 in costs).

²⁰² See H.R. JOURNAL, 12th Cong., 1st Sess. 196 (1812) (presenting Burt's petition for relief from payment of judgment).

²⁰³ See H.R. JOURNAL, 24th Cong., 1st Sess. 140 (1836) (presenting Burt's second petition for relief from payment of judgment).

²⁰⁴ See *id.* at 249. The Committee admonished Burt's actions, saying that if other collectors acted as Burt had—refusing shipment without any proof that his fellow officer would violate the law—they would “annihilate all intercourse by water between different points on the sea-board as well as in the interior.” H.R. REP. NO. 24-255, at 1.

²⁰⁵ H.R. REP. NO. 24-255, at 1.

²⁰⁶ H.R. JOURNAL, 24th Cong., 1st Sess. 249 (1836).

One month later, Charles Bristol petitioned the House seeking payment of his judgment against Burt.²⁰⁷ The House referred Bristol's petition to the Committee on Claims on February 29, 1836.²⁰⁸ Citing Burt's continued insolvency, Bristol sought relief under the theory that Burt, being the collector of the port, was an agent of the United States, and, as such, the liability he incurred in detaining Bristol's potash must be discharged by the United States.²⁰⁹ The Committee held the matter under consideration for nearly a year before submitting an adverse report to the House.²¹⁰

The Committee report acknowledged that in answering the question of government liability, it should give due regard to the nature of Burt's action as an employee and agent of the government.²¹¹ The Committee then turned to general agency principles and conceded that a principal is liable for the acts of his agent that are necessary "to carry [the intent of the agency] into full and perfect execution."²¹² However, "when an agent departs entirely from the objects of his appointment and disregards the instructions of his principal, the agent becomes personally liable" because "the power delegated did not authorize the act."²¹³ Burt was not assigned to prevent intercourse between two ports of the United States on the basis of his suspicion of fellow collectors.²¹⁴ Accordingly, when Burt took it upon himself to exercise this power, he went beyond the scope of his agency.²¹⁵ Bristol's remedy "was properly sought, and, as far as the law could aid him, was obtained against Burt," and the United States was under no further legal or moral obligation to provide relief.²¹⁶ This negative report was ordered to lie on the table, effectively killing the petition for relief.

Rules of agency also appeared to inform Congress's eventual resolution of Nathaniel Mitchell's petition for relief. As the postmaster of Portland, Maine, Mitchell was instructed to investigate the loss of letters containing money.²¹⁷ Pursuant to these orders, Mitchell placed

²⁰⁷ See *id.* at 405.

²⁰⁸ *Id.*

²⁰⁹ See H.R. REP. NO. 24-233, at 2 (2d Sess. 1837).

²¹⁰ See *id.* at 1.

²¹¹ *Id.* at 2.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 3.

²¹⁵ *Id.*

²¹⁶ *Id.* In parting, the Committee noted that, had this property been sequestered and the proceeds paid into the Treasury, an entirely different question would have been presented. See *id.* For an example of the problems occasioned by payment to the Treasury in the context of the successful petition of Richard and Benjamin Kidd, see *infra* note 233.

²¹⁷ See *Merriam v. Mitchell*, 13 Me. 439, 444 (1836).

test packages in the mail and concluded, incorrectly as it turned out, that one had failed to reach its destination. Mitchell initiated a criminal complaint against an assistant postmaster, one William Merriam, but the criminal process was abated when the missing package turned up.²¹⁸ Merriam sued Mitchell successfully for malicious prosecution. On review of the jury's verdict before entry of judgment by the Supreme Court of Maine, Mitchell argued that he had probable cause and had acted without malice.²¹⁹ The court rejected this argument: The prosecution resulted from the defendant's carelessness in failing to track the missing package, not from any suspicious conduct on the part of Merriam.²²⁰ As the court explained, it was proper for the jury to hold Mitchell accountable on these facts for malicious conduct. Otherwise Merriam would have no remedy "for losses and expenses growing out of the charge, to say nothing of personal suffering and lacerated feelings."²²¹

Although the Maine Supreme Court upheld the finding of malice and entered a verdict in favor of Merriam, Congress did not view those conclusions as a bar to eventual indemnity. After Mitchell filed his petition for indemnity with the House, the Committee on Claims reported in favor of granting relief to Mitchell, finding that he performed his duties with "a strict adherence to the letter of his instructions, with a laudable zeal, and with all good faith."²²² The favorable committee report appeared in 1838, and Congress adopted indemnifying legislation in 1839.²²³ Apparently, Congress did not view the state court's characterization of Mitchell as having acted maliciously as a bar to recovery; rather, he was seen as a public servant who had acted in good faith in carrying out his official duties. Unlike Joel Burt, whom Congress regarded as having exceeded the scope of his instructions and agency, Mitchell was seen as a loyal agent acting within the

²¹⁸ *Id.* at 444–46.

²¹⁹ *See id.* at 456.

²²⁰ *See id.* at 457 ("We cannot but regard it as too much to hold this to have been probable cause, to justify a prosecution against an innocent and unoffending man, who had given no color for suspicion against him.").

²²¹ *Id.* at 458.

²²² H.R. REP. NO. 25-780, at 3 (2d Sess. 1838).

²²³ *See* Act for the Relief of Nathaniel Mitchell, ch. 49, 6 Stat. 754 (1839) (appropriating sum of \$2392.21 for relief of Mitchell). The amount presumably covered the verdict of \$1666 as well as Merriam's costs and fees. *See Merriam*, 13 Me. at 443. Three years later, Congress adopted two bills appropriating some \$1206 to cover the amount paid by Mitchell in defending the suit by Merriam. *See* Act for the Relief of Nathaniel Mitchell, ch. 100, 6 Stat. 843 (1842) (appropriating \$931 to reimburse amount "paid by said Mitchell in defending a suit brought against him by William Merriam"). Later legislation added \$275 to this figure, bringing the total to \$1206. *See* Act for the Relief of Nathaniel Mitchell, ch. 197, 6 Stat. 863 (1842). That was the amount recommended in the committee report. *See* H.R. REP. NO. 27-156, at 5 (2d Sess. 1842).

scope of his instructions. With the grant of indemnity, the government accepted the loss associated with the mistaken prosecution of Merriam in much the same way it had accepted responsibility for the losses occasioned by faulty instructions to naval officers during the Quasi-War with France in 1800.

Yet, despite similarities between the handling of the Paoly and Mitchell bills, congressional practice in handling petitions for indemnity had grown a good deal more legalistic in the forty years that separated the 1802 Paoly indemnity bill from the Mitchell bill in 1842. As we have seen, Congress established a practice of deference to the judgment of the House Committee on Claims, and the Committee began to operate somewhat like a court in its handling of indemnity (and other) matters. Thus, in handling the Mitchell petition, the Committee required that the petitioner provide affidavits, original receipts, and testimony to substantiate his claim.²²⁴ These statements set forth both the amount of the judgment, proof of its payment, and proof of the costs and attorney's fees Mitchell had incurred in defending the litigation. In addition, the Committee on Claims explicitly invoked both legal principles and precedents in supporting its recommended disposition. Thus, the House took the position that the obligation to indemnify its agent was grounded in contract and encompassed both the liability imposed against the officer and the costs and attorney's fees "reasonabl[y]" incurred in defending the action.²²⁵ After describing the controlling legal principles, the Committee noted that it had "examined the precedents, and [found] that Congress has repeatedly adopted the same rule in cases where agents of the Government have been sued for acts done by them in the discharge of their official duties."²²⁶

The House had long relied on precedents in passing on private claims for relief and indemnity. But a decisive step to formalize such reliance was taken in May 1824, when the House directed its clerk, Samuel Burch, to compile an index of the laws of the United States. One purpose of Burch's Index, according to the House resolution that led to its creation, was to identify "the principles involved in acts for

²²⁴ See H.R. REP. NO. 27-156, at 5.

²²⁵ H.R. REP. NO. 27-156, at 4 ("It is well-settled law, that where one individual is bound, either by express or implied contract, to indemnify another, the reasonable costs incurred in the suit, as well as the judgment recovered, must be paid.")

²²⁶ *Id.*; see also H.R. REP. NO. 25-780, at 3 (2d Sess. 1838) ("The committee refer to the subject of indemnity in Burch's index to the Laws of the United States for a list of the cases where relief has been granted in analogous cases to the one now under consideration.")

the relief of individuals, or of a private or local nature.”²²⁷ By arranging these principles under “general heads,” the index that Burch published in 1828 enabled House committees quickly to identify precedents that dealt with the issues at hand.²²⁸ One of the headings, “Indemnity,” collected the precedents related to the indemnification of government officers through private bills.²²⁹ By the time of Mitchell’s petition for relief in 1839, the House Committee on Claims routinely referred to Burch’s Index in the course of deciding whether precedents would support an application for relief. Thus, both the House report on Mitchell’s petition for reimbursement of the judgment and the House’s later report on his application for reimbursement of his costs and attorney’s fees make reference to Burch’s Index.²³⁰

Burch’s Index operates, in essence, as something quite similar to an abridgment or treatise of the law of private legislation and indemnity. In a world where precedents provided guidance both to petitioners and to the House committee that passed upon their claims, Burch’s Index performed an important service in lending a degree of predictability to the indemnification process. Government officers could rely, with some confidence, on the availability of indemnity in accordance with the principles identified in Burch’s Index. House committees could make use of the index when passing on petitions for indemnifying legislation. Even federal courts could begin to regard the process of indemnification as one governed by legal principles. Perhaps, then, the appearance of Burch’s Index, and the precedent-focused practice that it reflects, helps to explain the otherwise surprising view of antebellum jurists that government officers had a “right” to indemnity in a proper case.²³¹ Today, we do not ordinarily

²²⁷ BURCH’S INDEX, *supra* note 21, at i. On the increasing importance of expediting the handling of petitions because Congress began to drown in petitions for public land by 1828, see Mashaw, *supra* note 54, at 1736–37 & n.427.

²²⁸ BURCH’S INDEX, *supra* note 21, at i.

²²⁹ *Id.* at 152–53 (collecting two full pages of references to principles of indemnity reflected in private legislation under heading of “Indemnity”).

²³⁰ See H.R. REP. NO. 25-780, at 3 (referring to precedents in “Burch’s index”); H.R. REP. NO. 27-156, at 4 (referring to check of “the precedents”).

²³¹ The perception that one could enforce rights by way of legislative petition tends to confirm that the practice of legislative adjudication persisted in Congress well into the nineteenth century. See Shimomura, *supra* note 22, at 648–53 (detailing “flood of claims” filed with Congress). Congress was expected to decide petitions on the basis of legal principles and applicable precedents, rather than solely on the equities of the case. Such a conception of the early republic’s approach to indemnity as a right enforceable through petition seems broadly consistent with an understanding that governments were thought to owe an affirmative obligation to provide a system of redress for those who suffered legal injuries. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 550 (2006) (discussing

regard individual claims that depend on the passage of a private bill as grounded in legal right; we understand individual petitioners to request such an act as a matter of legislative grace.

One can see the antebellum understanding of indemnity as a legal entitlement reflected in a variety of sources. Congress itself appears to have taken this view of matters. Thus, the Senate granted relief to two petitioners, Richard and Benjamin Kidd, whose claim for reimbursement of wrongly collected duties foundered due to the insolvency of the official in charge, the troubled Robert Swartwout. The Treasury Department refused to provide the Kidds with their requested refund, apparently on the ground that they could not have levied on the assets of the insolvent Swartwout directly.²³² The Senate refused to countenance this way of doing business; the Kidds were entitled to a refund, and it was the government's obligation to make them whole.²³³ In providing relief to the victims, notwithstanding the insolvency of the official, Congress was following the precedent set in the handling of the petitions on behalf of Paoly and Shattuck.

Importantly, federal courts came to echo this conception of indemnity as a legal entitlement. Thus, in *Tracy v. Swartwout*, another proceeding against the unfortunate Mr. Swartwout, the Court was quite clear that indemnity was available as of right.²³⁴ As it explained,

how early jurists were familiar with “the principle that government owes its citizens laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrongs”). This duty encompassed both the victim's right to pursue tort damages from the officer and the officer's right to seek indemnity from the government by petition to Congress.

²³² S. REP. NO. 29-164, at 1 (1st Sess. 1846).

²³³ See Act for the Relief of Richard Kidd and Benjamin Kidd, ch. 185, 9 Stat. 677 (1846); *Kidd v. Swartwout*, 14 F. Cas. 457 (C.C.S.D.N.Y. 1843) (No. 7756); S. REP. NO. 29-164. This collection of materials tells the story of Robert Swartwout—the revenue collector for the Port of New York—and his improper imposition of duties on the Kidds' wheat and flour. Swartwout would not release their goods without payment of duties, and the Kidds complied. The Kidds then applied to the Treasury for duties wrongly exacted, but they were unsuccessful. The Kidds then sued Swartwout in the Circuit Court for the Southern District of New York. They obtained a judgment for duties, interest, and costs. The Kidds again applied to the Treasury, this time seeking payment of this judgment. The Treasury declined to pay the full amount, instead offering to repay the duties still held in exchange for a release from the judgment. Swartwout was insolvent, so they could not seek payment from him directly. In considering their petition and recommending relief, the Senate Finance Committee chided the Comptroller for attempting to “extort” the Kidds and said that, even if Swartwout had been solvent, the payment of the judgment would not have been his responsibility. S. REP. NO. 29-164, at 1–3.

²³⁴ See *Tracy v. Swartwout*, 35 U.S. 80, 98–99 (1836). Today, one finds it jarring to hear the legislative process described as giving rise to an indemnification “right.” Congress acts as a forum for political decisions, rather than as one for the vindication of rights. Ted Ruger and Jack Goldsmith have suggested that we might test the politics of the antebellum era's rights-based conception of indemnity by looking at the impact of the party affiliations of the petitioning officers and members of Congress on the success rates for petitions. We

“[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.”²³⁵

The Court’s emphasis on the officer’s instructions highlights an important feature of Congress’s evaluation of applications for indemnification. At common law, of course, the doctrine of *respondeat superior* resulted in the imposition of liability on the master for the torts of the servant committed in the course and scope of the servant’s duties.²³⁶ In the case of private wrongs, the master was theoretically entitled to indemnity from the servant for any losses thereby sustained, although one supposes that the servant rarely had pockets deep enough to warrant such an action. In the context of public wrongs, the doctrine of *respondeat superior* was administered not by the courts but by Congress; sovereign immunity foreclosed suit against the government. It thus fell to Congress, in passing on the indemnity petition, to evaluate the official’s actions and determine if they had occurred in the course and scope of employment. If so, then principles of agency law obliged the government to bear responsibility for the loss. Although Congress might have, in theory, insisted on indemnification from the officer for certain losses, the fact that the officer acted under the government’s express or implied instructions would negate the government’s claim. Instructions thus served not to free the officer from liability in the first instance but to ensure that the government would accept the full consequences of such liability through the payment of indemnity.²³⁷

share their view that such analysis (in the hands of able empiricists) could produce interesting results. For now, we simply note that the early years of Jefferson’s administration provide a useful historical (if not empirical) window on the role of politics in the indemnification process. Even though the Jeffersonians had steadfastly opposed the Quasi-War and taken steps in the early nineteenth century to roll back Federalist war measures, James Madison worked to ensure that the government would assume responsibility for losses caused by the Federalist officers who conducted that unpopular war. Madison’s rather apolitical willingness to support claims for indemnity thus contrasts with his refusal to dignify the contemporaneous *Marbury* litigation with a response.

²³⁵ *Id.*; see also *Cary v. Curtis*, 44 U.S. 236, 263 (1845) (finding that when official incurs liability while acting under instructions, government is bound to indemnify official).

²³⁶ See 2 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 315–16 (Boston, Cummings, Hilliard & Co. 1823) (“Here it may be observed, that all agree that the master is liable in *case* for the *negligent* acts of his servant, *done in the course of the master’s business*; and for any act of his servant so done by the *master’s command*, expressed or implied.”). Dane also characterized the master as liable for the willful tort of the servant, done in the master’s business, although some courts might treat the willful act as an abandonment of the master’s service. *Id.* at 316.

²³⁷ *Cf. id.* at 316 (“The command of a superior to an inferior to commit a *tort*, excuses the latter in no case but that of a wife. Such inferior, as servant, is bound to perform only

In summarizing this institutional reality, the Taney Court described a system of administrative law quite similar to that which Chief Justice Marshall and Secretary of State James Madison had worked out at the dawn of the nineteenth century.²³⁸ Madison, speaking on behalf of the executive branch, was quite clear that claims against the government on account of the actions taken by government officers should begin with a judicial determination. He thus took extraordinary steps to secure a judicial resolution of Jared Shattuck's claim against William Maley. Madison viewed Congress as responsible for any ultimate payment of government funds on petition by the officer himself or by the injured claimant in cases of official insolvency, although it was clear to Madison that Congress was bound by legal principles to indemnify in proper cases. Marshall agreed with Madison, ruling in *Little v. Barreme* and *Murray v. Charming Betsy* that government officers were liable for the commission of torts, no matter how clear their instructions and how evident their good faith in carrying them out.²³⁹ The whole point of the enterprise was to ensure legal accountability for the benefit of the victim of government wrongdoing and to place Congress in charge of protecting officers from the consequences of potentially ruinous personal liability. By the time of the *Tracy* decision in 1836, one year after Marshall's death, the antebellum system was so well established that the Court itself took for granted the availability of indemnifying legislation and dismissed concerns with official liability as involving no "eventual hardship" to the official defendants.²⁴⁰

D. *Indemnity, Compensation, and Antebellum Administration*

If the prospect of liability and indemnity had become an ingrained feature of the antebellum system of administrative law, it was not alone in shaping the incentives of the officers who administered the affairs of the federal government. The early republic inherited a property-based conception of government office that was in the process of evolving to our more modern notion of government office

the *lawful commands* of his superior; and the inferior person must know too when he does an injury . . .").

²³⁸ *Tracy v. Swartwout*, 35 U.S. 80, 98–99 (1836) ("Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.").

²³⁹ See *supra* notes 86–95 (discussing strict liability holdings in *Little* and *Murray*).

²⁴⁰ *Tracy*, 35 U.S. at 99.

as a contractual arrangement.²⁴¹ In this property-based conception, government officers held title to their office and to all of the privileges and perquisites associated with it. In some cases, the office conveyed a right to fees payable by those who used government services.²⁴² Thus, justices of the peace, marshals, and other ministerial officers in the judicial system were often paid through fees. In other cases, the office entailed the payment of a salary. Early federal judges were paid on this basis.²⁴³ Finally, some officers were put in a position in which they could augment their income by initiating forfeiture proceedings against offenders of the trade and revenue laws of the United States.²⁴⁴ Revenue collectors for the ports of the United States, charged with enforcing complex trade and customs laws, as well as naval captains and privateers during times of war, were entitled to a share of any property that was forfeited for violations of these laws.²⁴⁵

In many cases, therefore, government officers acted for their own account in enforcing the nation's laws. Sometimes these inducements were quite substantial. An estimated \$700,000 in French shipping was captured during the Quasi-War and subjected to forfeiture proceedings before federal admiralty courts. Of this sum, one-half was to go to the United States, and the other half to the officers and men of the American vessels that perfected the capture. In addition to salary, therefore, naval captains engaged in the Quasi-War would have expected to receive substantial commissions in connection with their seizure of vessels. The prospect of these commissions could certainly influence the judgment of the officers on the high seas. George Little reportedly maneuvered to secure favorable prize-taking assignments for his vessel,²⁴⁶ while another officer apparently defied the instruc-

²⁴¹ For explorations of this evolution from office as property to office as public trust, see generally Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 *STUD. AM. POL. DEV.* 60 (1994), and Parrillo, *supra* note 30.

²⁴² For an overview of the fee-based payment system that Americans inherited from England, see Pfander, *supra* note 29.

²⁴³ See *id.* at 19–29 (describing compensation system for federal judges).

²⁴⁴ On the origins and development of informer, or *qui tam*, litigation in the early republic, see Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 *WIS. L. REV.* 381, and Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 *YALE L.J.* 341 (1989).

²⁴⁵ Courts understand these private motivations. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (“[*Q*]ui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.”).

²⁴⁶ See Frederick C. Leiner, *Anatomy of a Prize Case: Dollars, Side-Deals, and Les Deux Anges*, 39 *AM. J. LEGAL HIST.* 214, 217 (1995) (discussing Little's arrangement with Commodore Talbot and resulting dispute over shares of prize).

tions of his superior officer in leaving his assigned theater of operations to accompany a captured prize into port.²⁴⁷

Consider the impact of this package of incentives on the behavior of George Little. As a Captain in the U.S. Navy, Little was obliged to follow the chain of command. He also enjoyed, especially on the high seas, a measure of discretion in deciding how to deploy his vessel in pursuit of the nation's military objectives.²⁴⁸ His incentive package included his pay—naval captains during his day were paid on the order of \$1008 to \$1830 per year²⁴⁹—in addition to the fees to which he was entitled on any vessel that he captured and condemned before a court of admiralty and maritime jurisdiction. Under the rules of commission-based compensation in the Navy during the period in question, naval captains were to receive up to fifteen percent of the proceeds of any forfeiture.²⁵⁰ In a good year for captains (but perhaps a bad year for a country at war), a captain's commission-based compensation might well exceed salary.²⁵¹

The bounties available for the seizure of vessels were doubtless designed to encourage government officers to enforce the law. For naval captains, such incentives could exert a powerful influence in favor of the taking of prizes; indeed, the financial rewards of prize taking were eventually viewed as interfering with the prosecution of the war effort.²⁵² For revenue collectors, forfeitures encouraged zealous enforcement and performed another potentially important function: They created an incentive for officials to reject the bribes of lawbreakers and to prefer the more substantial rewards associated with a successful forfeiture proceeding. An official on simple salary perhaps would be more likely to accept bribes than one who stood to recover a substantial commission for effective law enforcement. In this respect, Congress matched the structure of official incentives with the nature of the office. Thus, Congress might put judges on salary to

²⁴⁷ Captain Nicholson reportedly left his post in the Caribbean to accompany his prize, the *Niger*, into port in Hampton Roads, Virginia. See STODDERT'S WAR, *supra* note 56, at 47. In Nicholson's case, the commission proved elusive; his claim was rejected and the vessel was released to its British owners, who sued for damages and recovered relief in the form of a federal appropriation. See Act of Mar. 2, 1799, ch. 28, 1 Stat. 723.

²⁴⁸ As noted earlier, Little was described as having received gifts from foreign agents during the course of his service in the Quasi-War. See *supra* note 56.

²⁴⁹ Nicholas Parrillo, *The De-privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 26 (2007).

²⁵⁰ See *supra* note 32 and accompanying text.

²⁵¹ See Parrillo, *supra* note 30, at 17–18 (describing opportunity to earn significant prizes during wartime).

²⁵² See *id.* at 32–33 (discussing move to salary-based compensation system in conjunction with move to fleet-based naval strategy).

avoid the jurisdictional expansion that might result from a fee-based system. Where greater zeal was appropriate, as in the case of marshals (and the members of Congress themselves),²⁵³ a fee-based compensation system could make sense.

But zeal, unqualified by the prospect of liability in the event of mistaken enforcement, might encourage irresponsible risk taking on the part of government officers. Here, the threat of personal liability played a moderating role. Personal liability represented a particularly effective counterweight to the incentives created by the prospect of commissions for the seizure of vessels. Officers like Little, Murray, and Maley would presumably think twice before seizing a vessel in a doubtful case for fear that a court would award substantial damages in case of error. The promise of indemnity, in turn, would temper the moderating influence of the risk of personal liability. As long as the officer stuck to his instructions, seizures would line his pockets. It should also be noted that the incentive system might work better with officers who possessed some wealth and property, and thus had something to lose if they irresponsibly seized neutral vessels. Otherwise, as perhaps illustrated by William Maley, officers' thirst for commissions (and the rum they would purchase) and the absence of any personal assets might encourage a reckless nothing-to-lose attitude.

IV

INDEMNITY IN THE ANTEBELLUM SYSTEM OF GOVERNMENT ACCOUNTABILITY

This study of the antebellum system of personal liability and indemnity challenges many of the assumptions that have long underlaid modern debates over sovereign immunity, government accountability, and official liability and immunity. In this Part, we revisit these debates from the vantage point of those who played key roles in creating and administering the nineteenth century system of government accountability.

A. Reflections on Sovereign Immunity

Today, we tend to regard the doctrine of sovereign immunity as a barrier to the recovery of damages against the government. Where the doctrine applies, it requires a court to dismiss the action for want of

²⁵³ Congress chose to pay itself through fees calculated by reference to the days of attendance and the mileage traveled to attend. Pfander, *supra* note 29, at 5 n.17. Assemblies invariably faced attendance problems at the beginning and near the end of a session, and the fee system may have been designed to counter this absentee problem to some extent.

jurisdiction.²⁵⁴ Although Congress has created a variety of exceptions to sovereign immunity, the Supreme Court has been unwilling to put the doctrine permanently to rest.²⁵⁵ As a consequence, sovereign immunity remains a fact of life in the scheme of government accountability law. Both in its constitutional form—as a bar to unconsented-to suits against state governments—and in its conventional form—as a canon of interpretation that requires a clear statement from Congress to authorize suits against the federal government—sovereign immunity can, in theory, require the dismissal of otherwise meritorious claims.²⁵⁶ Based on their analysis of the scope of these forms of sovereign immunity, Richard Fallon and Daniel Meltzer question the accuracy of any descriptive account of government accountability that is premised on the idea that there will be effective remedies for all rights violations.²⁵⁷

Although scholars often depict sovereign immunity as the product of an earlier day when rough justice prevailed, our survey of government accountability law in the early nineteenth century suggests quite a different view. During the period of our study, the role of sovereign immunity was quite limited. To be sure, federal courts would dismiss actions that named the federal government itself as a party.²⁵⁸ But the dismissal of a suit against the *government* was not understood as depriving the individual of a remedy, but as directing the individual's application for redress into the proper procedural channels. As we have seen, one who suffered a loss at the hands of a government actor was entitled to sue the officer for damages in state or federal court and recover an award.²⁵⁹ If the officer acted within the scope of employment, Congress enacted indemnifying legislation to make good the loss. Jurists' belief that victims were entitled to com-

²⁵⁴ For an early application of the doctrine of sovereign immunity, see *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846).

²⁵⁵ For example, the Court has insisted that any waiver of the government's sovereign immunity be expressed in legislative language that meets an exacting clear meaning standard. See, e.g., *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992) ("Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'" (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990))).

²⁵⁶ For well-known and much-remarked instances of the doctrine's application to bar suit against the states, see *Alden v. Maine*, 527 U.S. 706, 712 (1999), and *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).

²⁵⁷ See Fallon & Meltzer, *supra* note 26, at 1779–86.

²⁵⁸ See *United States v. Lee*, 106 U.S. 196, 204 (1882) ("[T]he United States cannot be lawfully sued without its consent [T]his proposition is conceded to be the established law of this country").

²⁵⁹ See *supra* notes 50–55 and accompanying text (describing history and process of habeas, mandamus, trespass, and assumpsit claims in early republic).

pensation and that officials were entitled to indemnity comes through quite clearly. Thus, Congress frequently indemnified the *victims* of government wrongdoing after the officer in question became judgment proof.²⁶⁰ These victim-indemnity cases are striking; Congress could have hidden behind the formal doctrine of sovereign immunity and taken the position that its legal obligation was only to indemnify the officer, not to compensate the victim.²⁶¹ But Congress consistently refused to take this legalistic view. In the cases of Paoly and Shattuck, Congress made good their losses even though the insolvent defendant had disappeared. We found similar solicitude for the rights of those injured by insolvent officials in the successful petitions of the Kidds, Charles Hall, and Gould Hoyt.²⁶²

If the treatment of victim-indemnity claims suggests that sovereign immunity was simply a way to maintain the formal rule against unconsented to suits against the government in its own name, the handling of *Maley v. Shattuck* provides important confirmation. The government, through James Madison, arranged an amicable proceeding in which Maley appeared as a nominal defendant to facilitate a judicial test of Shattuck's legal claims. No one appears to have been offended by the thin formality of this model: Madison issued the order that authorized the litigation, Dallas dutifully entered an appearance on behalf of Maley without disguising the fact that the proceeding was an amicable one, and the presiding courts proceeded to enter judgment as if Maley were really before the court. Reading the opinion of the Supreme Court with a full understanding of the background of the case, one can see Marshall accepting the ruse and winking at the formalistic quality of the proceeding.²⁶³ Thus, in reviewing the claims for compensation, Marshall disallowed amounts Shattuck spent in petitioning the federal government for compensation. No wonder, then, that Marshall was later to treat sovereign immunity as a matter of mere form that turned on the party named in the record of the case.²⁶⁴

²⁶⁰ See *supra* notes 101, 107–08, 233 and accompanying text (describing indemnifying legislation that benefited Paoly, Shattuck, and Kidds).

²⁶¹ A similar theory informed the position that Levi Lincoln put forward as Attorney General. See *supra* text accompanying notes 144–48 (discussing Lincoln's position as expressed in correspondence regarding Maley's case).

²⁶² See *infra* Table 4 in the Appendix.

²⁶³ See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 489–90 (1806) (describing evidence presented by Maley as if he were present in lower court). In explaining that Maley need not pay for such expenses, Marshall surely recognized that the ultimate payment would come from the federal government itself. *Id.* at 491.

²⁶⁴ See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (“It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits

All three branches of the government were treating it that way. The formal quality of government immunity also helps place in context Madison's and Marshall's oft-quoted statements about state immunity from suit in federal court made during the debates over the ratification of the Constitution.²⁶⁵

To the extent it fairly reflects founding era attitudes, moreover, *Maley v. Shattuck* confirms that federal courts can hear claims against the United States in appropriate cases, notwithstanding the doctrinal hurdles that have arisen over time. In *Hayburn's Case*, the Justices of the Supreme Court refused to permit the federal circuit courts to hear pension benefit claims where the judicial decision was subject to revision both by the executive and by Congress; the resulting doctrine of judicial finality now bars federal courts from hearing disputes unless their judgments are regarded as decisive.²⁶⁶ Related doctrines define the judicial power to include the ability to hear only disputes between adverse parties, which forecloses the courts from hearing *ex parte* proceedings and from issuing advisory opinions.²⁶⁷ Finally, some have suggested that federal courts can hear cases only when they have the power to issue process of execution to enforce their decrees.²⁶⁸ An

against States, is, of necessity, limited to those suits in which a State is a party on the record.”).

²⁶⁵ In comments to the Virginia ratifying convention, both Madison and Marshall denied that Article III would authorize the assertion of jurisdiction over claims against the states on the diversity side of the federal docket. See *Hans v. Louisiana*, 134 U.S. 1, 14 (1889) (“It is not in the power of individuals to call any state into court.” (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 533 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1836) (statement of James Madison))); *id.* (“It is not rational to suppose that the sovereign power should be dragged before a court.” (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, *supra*, at 555 (statement of John Marshall))). Viewed from the perspective of their role in *Maley v. Shattuck*, the statements of Madison and Marshall suggest that they contemplated a fairly formal notion of immunity that required suit against the officer in the first instance.

²⁶⁶ See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (stating that Court will not issue advisory opinions). *Hayburn's Case* has significantly influenced the development of the modern law of judicial finality. See HART & WECHSLER, *supra* note 1, at 80–89; Pfander, *supra* note 37, at 700 (“*Hayburn's Case* has come to stand for a principle of judicial finality that prohibits political branch review of judicial decisions.”).

²⁶⁷ See HART & WECHSLER, *supra* note 1, at 80–89.

²⁶⁸ See *Gordon v. United States*, 117 U.S. 697, 702 (1885) (opinion of Taney, C.J.) (denying that Congress can authorize or require Article III court to hear case “where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect”). For an assessment of the judicial role in the execution of judgments and decrees, see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 812–14, 857–64 (2001).

early twentieth-century decision, now discredited, thus took the position that suits against the federal government simply lay beyond the judicial power defined in Article III.²⁶⁹

Maley v. Shattuck offers an historical counterpoint to these supposed limits on the scope of the judicial power. The case proceeded through the judicial system without service of process on Maley, the nominal defendant. The case was amicably arranged to allow a judicial test of Shattuck's claims, and Madison was careful to explain that the result would not be understood as binding on the government or Congress.²⁷⁰ Thus, the case presented the whole gamut of judicial power issues: It did not involve proper parties but was brought to determine the interests of the United States; it was subject to a measure of congressional revision (at least to the extent that Congress chose not to pay Shattuck by private bill); and the judgment, unenforceable either against Maley or the United States by writs of execution, could have been regarded as an advisory opinion.²⁷¹ Notwithstanding these difficulties, federal courts heard the case and resolved it on the merits. They did so, moreover, without suggesting that Article III posed a problem.²⁷²

Maley v. Shattuck thus anticipates many of the more flexible expositions of the judicial power that have issued in the last seventy-five years. One can see in *Maley* the suggestive outlines of a declaratory judgment proceeding, in which a federal court resolves a genuine legal dispute between adverse parties despite the federal judiciary's ostensible inability to enforce its judgment against the government. *Maley* also anticipates the answer to the problem of finality that the Court announced in *Glidden Co. v. Zdanok*.²⁷³ There, the Court found that the prospect of payment through the congressional judgment fund was sufficient to overcome any finality concerns with the adjudication of claims against the federal government.²⁷⁴ Perhaps one can rationalize the Court's willingness to hear *Maley* as an early reflection of this more flexible attitude towards finality. Just as in

²⁶⁹ See *Williams v. United States*, 289 U.S. 553, 576–78 (1933) (denying that judicial power extended to suits brought against United States). For the rejection of the *Williams* approach, see *supra* note 46.

²⁷⁰ See *supra* text accompanying notes 149–51 (describing Madison's view of proceedings).

²⁷¹ The Court's approval of declaratory judgment proceedings in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), makes the prospect of immediate execution less essential to the proper exercise of judicial power today than it was in the antebellum era.

²⁷² For other examples of early feigned proceedings, see CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 392–99 (1926).

²⁷³ 370 U.S. 530, 570 (1962).

²⁷⁴ *Id.*

Glidden, where the judgment fund established a prospect for eventual payment, the likelihood of a successful petition to Congress may have been viewed as sufficient to justify judicial involvement in *Maley*. One might harmonize that interpretation with *Hayburn's Case* by noting that the provision for judicial resolution of pension claims at issue in *Hayburn's Case* had provided for both executive revision and congressional discretion over appropriations, making eventual satisfaction of the judgment much less certain. Under *Maley*, by contrast, the executive would play no formal role in evaluating the correctness of the judgment, and legislative oversight would occur through the appropriations process.²⁷⁵

B. Official Liability and Immunity

The early republic's approach to liability and indemnity contrasts dramatically with the current law of official immunity. Under the prevailing standard today, federal officials sued by way of a *Bivens* action enjoy immunity from suit unless their actions violated "clearly established" rules of which a reasonable person would have known.²⁷⁶ Articulated in *Harlow v. Fitzgerald* for the explicit purpose of facilitating summary judgment, this objective standard of reasonableness seeks to avoid any inquiry into the official's subjective good faith.²⁷⁷ Such subjective inquiries were thought to necessitate jury trials and thus impose both the risk of liability and the burden of litigation on government officials whose actions could be plausibly defended as lawful. The Court has justified its expansive approach to official immunity as a way to calibrate official incentives correctly. Thus, even as the Court has acknowledged the importance of compensating victims and deterring governmental wrongdoing,²⁷⁸ it also has sought to

²⁷⁵ See *supra* notes 102–08 and accompanying text (discussing *Maley v. Shattuck*). However, the executive branch could play an informal role. In response to an inquiry from the House, both Madison and the Attorney General expressed their view that the judgment was valid and should be paid. See *supra* note 158 (noting Madison's views).

²⁷⁶ On the liability of federal government officials for constitutional torts, see *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Today, federal officers enjoy qualified immunity from tort-based liability under the Constitution. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (declaring judge-made rule of qualified immunity). In addition, government officials today enjoy absolute immunity from tort-based liability under state law for actions taken within the line of duty. For an account of Westfall Act immunity from state-law tort claims, see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 132–39 (2009). For background on the *Bivens* case, see generally James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents*, in *FEDERAL COURTS STORIES* 275 (Judith Resnik & Vicki C. Jackson eds., 2009).

²⁷⁷ See *Harlow*, 457 U.S. at 818.

²⁷⁸ See *id.* at 819.

minimize what it has called the “social costs” associated with official liability.²⁷⁹ These costs include “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”²⁸⁰ In addition, the Court has expressed concern that the threat of liability “will ‘dampen the ardor of all but the most resolute, or the most irresponsive [public officials], in the unflinching discharge of their duties.’”²⁸¹

The Court’s development of this judge-made body of immunity law represents a remarkable feat of judicial creativity. In the space of only fifteen years, the Court moved from a tailored immunity defense that the Court implausibly attributed to the common law, to one that applied to all federal officials without regard to the nature of their office or the nature of the underlying claim. Thus, in *Pierson v. Ray*, the Court extended an immunity defense to an officer sued for claims comparable to false arrest, reasoning that liability should not attach where the police officer acted in good faith and with probable cause.²⁸² By the time of *Procunier v. Navarette*, the Court had grown impatient with tailored immunity defenses and announced, over Justice Stevens’s dissent, a more uniform standard.²⁸³ The Court completed its transition in *Harlow*, defining immunity entirely by reference to the existence of a clear constitutional right and abstracting away from any inquiry into analogous common law claims or defenses.²⁸⁴ Recent years have witnessed ongoing judicial management of the qualified immunity defense.²⁸⁵ This management role con-

²⁷⁹ *Id.* at 814.

²⁸⁰ *Id.*

²⁸¹ *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); see also *Butz v. Economou*, 438 U.S. 478, 506 (1978) (noting importance of encouraging “the vigorous exercise of official authority”).

²⁸² See 386 U.S. 547, 556–57 (1967) (purporting to draw on common law defenses of good faith and probable cause to define official’s immunity). For a critique of the Court’s attempt to base qualified immunity on common law precepts, see Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark*, 7 OHIO ST. J. CRIM. L. 463, 502–06 (2009) (describing invention of immunity doctrine in *Pierson* and Court’s “feeble effort” to draw support from common law); Woolhandler, *supra* note 1, at 465 (describing *Pierson* as having “eviscerated” common law model of official accountability).

²⁸³ See 434 U.S. 555, 565 (1978) (defining official immunity as depending both on clarity of law and any malicious intent on part of defendant); cf. *id.* at 568–69 (Stevens, J., dissenting) (accusing majority of adopting single standard of immunity that applies without regard to particular nature of claim and office).

²⁸⁴ See *Harlow*, 457 U.S. at 818 (extending immunity to officials so long as they do not violate clearly established federal law).

²⁸⁵ See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985) (allowing government officers to seek interlocutory review of decisions that reject qualified immunity defense).

trasts with the rhetoric of deference to the legislative branch that the Court often deploys in its discussions of official liability.²⁸⁶

Many have criticized the modern Court's use of qualified immunity doctrine to strike a balance between compensating the victims of official wrongdoing and protecting officials from groundless suits.²⁸⁷ While these criticisms often focus on the way in which the Court has struck the balance, the antebellum system of government accountability suggests a more fundamental critique. During the early republic, the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability. These were matters for Congress to adjust through indemnification and other modes of calibrating official zeal. In the maritime tort cases that arose during the Quasi-War, Chief Justice Marshall declined to treat the good faith of the officer as a defense to liability in both the *Little* and *Murray* cases. While the officer's good faith was admitted in both instances, the Court regarded good faith as relevant only to the award of vindictive damages for tortious conduct.²⁸⁸ The obligation to pay compensatory damages, however, did not turn on the officer's good faith. This holding would make little sense for a Court primarily concerned with tailoring the incentives of a government official. But it made a good deal more sense for a Court that viewed the suit against the officer as a mechanism for holding the government ultimately accountable for the losses it had inflicted on victims of government wrongdoing. Downplaying good faith also made sense for a Court that viewed the burden of official liability as a matter to be managed by the political branches of government.²⁸⁹

As we have seen, the political branches had a variety of devices at their disposal to calibrate the incentives of their officers and bureaucrats. For one, Congress would occasionally confer a limited statutory

²⁸⁶ See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (concluding that right of action in question was matter for legislative, not judicial, creation); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (questioning propriety of extending private rights of action to enforce constitutional rights).

²⁸⁷ See *supra* notes 7–10 and accompanying text.

²⁸⁸ A similar distinction between compensatory and vindictive damages appears in the law that developed around the jailer's liability for the escapes of debtors during the colonial period. I am indebted to Morton Horwitz for the reference to the jailer's liability.

²⁸⁹ Recall that in both *Merriam v. Mitchell* and *Imlay v. Sands*, the state courts emphasized the importance of the judicial role in determining legality and viewed the issue of official hardship as a matter for adjustment by the legislature through the private bill process. See *Merriam v. Mitchell*, 13 Me. 439, 457–58 (1836) (highlighting need for remedy for victim's "losses and expenses"); *Imlay v. Sands*, 1 Cai. 566, 572–73 (N.Y. Sup. Ct. 1804) ("[W]e are bound to pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision.").

immunity on federal officers who acted in good faith.²⁹⁰ In addition, Congress could choose some combination of salary- and fee-based compensation to encourage the right degree of official activity.²⁹¹ Forfeiture commissions, as we have seen, would encourage official zeal and ward off any tendency toward accepting bribes, but they might also come to occupy too central a place in the officer's conception of his job. Oversight and control through the executive branch and the chain of command offered yet another tool by which the political branches could control government officials. Students of the period report that, although it was not especially common, the Adams and Jefferson administrations occasionally disciplined officials for misconduct or discharged them from service.²⁹² The Department of the Navy certainly cashiered William Maley for his seizure of neutral vessels. Finally, the spurs of ambition and reputation would doubtless help to ensure official compliance with law.

Legislative indemnity through private bills surely played an important role in striking the right balance between the compensation of victims and the protection of officers who acted in good faith. As we have seen, officers could expect indemnification when they were subjected to liability for actions taken in the line of duty and in compliance with their instructions. This indemnity extended not only to any damages awarded against them, but also to the costs and expenses associated with defending the case. Thus, the nineteenth-century solution to the problem that is now addressed through qualified immunity was to hold the officer accountable in court for violations of the victim's legal rights but then to indemnify the officer for any losses incurred in the line of duty through the legislative process. Indemnity encouraged zealous conduct on the part of government officials, but officers also understood that unwarranted action outside the scope of

²⁹⁰ See Mashaw, *supra* note 11, at 1330 (providing examples of such early statutes); *cf.* Mashaw, *supra* note 54, at 1683–85 (discussing reasons why Congress preserved access to state jury trial against federal officials). These grants of immunity were in fact quite limited. Mashaw reports that Congress gave Treasury Secretary Gallatin and his revenue officers less protection from legal responsibility flowing from the enforcement of President Jefferson's embargo than they had sought. *See id.* at 1679–81. In England, Parliament adopted measures to protect justices of the peace and constables from vexatious proceedings, but the protections were quite modest: The statute required that defendants be given notice of the claims and afforded an opportunity to pay damages and avoid litigation. *See Act for the Rendering Justices of the Peace More Safe in the Execution of Their Office*, 1751, 24 Geo. 2, c. 44, §§ 1–2.

²⁹¹ See Parrillo, *supra* note 30, at 15–19 (recounting range of salaries, fees, and commissions paid to government employees in early republic).

²⁹² We do not mean to suggest that the system worked seamlessly. As with any human institution, the early republic's system of government accountability was subject to the usual human vices of coziness, corruption, laxity, and excessive zeal. *See Mashaw, supra* note 54, at 1680–85 (cataloging system's vices).

their duties could produce liability that the government would not assume through private legislation.

Given the primacy of political-branch actors in creating the institutional framework of government accountability and indemnity, it is unsurprising that the Marshall Court followed the lead of the political branches in taking a strict approach to official liability. Up until now, scholars have operated on the assumption that the relief bill for Alexander Murray in 1805 represented the first instance in which Congress enacted private legislation to indemnify a federal officer successfully sued for conduct in the line of duty.²⁹³ Such legislation, coming *one year after* the decisions in *Little* and *Murray*, could not have influenced the Court's understanding of the legislative response to the imposition of personal liability. But the Paoly (and *Niger*) legislation demonstrates that indemnity (or something quite similar) was paid in 1802 (and 1799)—*two (and five) years before* the Court decided *Little* and *Murray*.²⁹⁴ To the extent that the Court was aware of it, then, the Paoly legislation revealed the likely response of the political branches to a judicial decision imposing personal liability on naval officers for the wrongful seizure of neutral vessels.²⁹⁵

Such information about political branch attitudes would have been especially welcome at the time of the *Little* and *Murray* decisions in February 1804, one year after the Court's decision in *Marbury v. Madison*.²⁹⁶ Although Marshall in *Marbury* ultimately steered clear of any direct confrontation with the Jefferson administration by engineering a jurisdictional dismissal,²⁹⁷ the Court was under tremendous

²⁹³ See Act for the Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805). For scholarly references to the primacy of this private bill, see, for example, Leiner, *supra* note 28, at 19, which notes that the Murray legislation is "the first time that Congress ever indemnified a public officer for a service-related judgment." See also George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1190 n.94 (1977) (noting that indemnification began "as early as 1805" with *Murray*). During the Civil War, a period outside the scope of our study, Congress adopted legislation immunizing federal officers from liability for arrest. See generally Tyler, *supra* note 37, at 639–51.

²⁹⁴ For an account of the Paoly affair, see *supra* notes 96–101. To be sure, the private bill ran in favor of Paoly, not Maley, so it did not, strictly speaking, operate as indemnity to Maley for amounts he had paid to satisfy a judgment. (As noted above, it seems likely that Maley's insolvency explains why Congress chose to pay Paoly directly.) For an account of the *Niger* affair, see *supra* note 174.

²⁹⁵ The legislation indemnifying the owners of the *Niger* became law in 1799, while John Marshall was serving as a member of the House of Representatives. Depending on the circumstances surrounding the *Niger* indemnity bill, it may also help to explain Marshall's perception that the claims of neutral vessel owners were to be adjusted through the executive and legislative branches.

²⁹⁶ 5 U.S. (1 Cranch) 137 (1803).

²⁹⁷ See generally James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001) (detailing Chief Justice Marshall's underlying rationale for *Marbury* decision).

pressure from the political branches in 1803–1804. Congress had reinstated the Justices' circuit-riding duties and suspended the Court's sessions for a full year as part of its "attack on the federal judiciary" in 1802.²⁹⁸ In the months following *Marbury*, members of Congress had initiated proceedings aimed at the eventual impeachment and removal of Federal District Judge John Pickering from office.²⁹⁹ Justice Samuel Chase was next; the House preferred articles of impeachment in late 1804, and the Senate conducted its trial of Chase in January 1805.³⁰⁰ Although Chase's narrow acquittal ended the impeachment threat, other Justices, including Chief Justice Marshall, might have faced impeachment had the Chase verdict gone the other way.³⁰¹

In this period of judicial insecurity, Chief Justice Marshall's initial reluctance to uphold a substantial judgment against Captain Little may have reflected a preference for shifting responsibility to the polit-

²⁹⁸ Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 385 (quoting ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 81 (1989)); see also RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 59–60 (1971) (discussing effective suspension of Supreme Court); Alfange, *supra*, at 359–60 (same).

²⁹⁹ For a detailed account of the impeachment affair and the politics that accompanied it, see GEORGE L. HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT: FOUNDATIONS OF POWER, JOHN MARSHALL, 1801–1815*, at 205–45 (1981). A brief summary of the dates will highlight its potential relevance to the Court's analysis of government liability issues. The House impeached John Pickering, the aged and insane federal district judge for New Hampshire, in 1803. Pickering was convicted and removed from office after a trial in March 1804. The impeachment of Justice Samuel Chase began in the wake of a widely circulated grand jury charge in May 1803 in which Chase denounced Republican party judicial reforms. The proceedings against Chase officially began in January 1804, with the appointment of a House committee of inquiry. Formal impeachment articles were presented in March 1804 and amended thereafter, but Chase's trial and eventual acquittal in the Senate did not occur until 1805. *Id.* at 238–45.

³⁰⁰ For background on Justice Chase's impeachment, see generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992), and Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 92–103 (2008).

³⁰¹ For accounts of the friction between the Jefferson administration and the judiciary, see generally ELLIS, *supra* note 298, at 19–68, which discusses the growing antipathy between the two groups, and Alfange, *supra* note 298, at 349–72, which examines the political environment during the *Marbury* era. Ellis shows that, as a practical matter, the Justices' acceptance of their circuit-riding responsibilities in the fall of 1802 represented a conclusive validation of the Jeffersonian repeal of the Judiciary Act of 1801. ELLIS, *supra* note 298, at 53–68; see also Alfange, *supra* note 298, at 360–62 (exploring political environment compelling Justices to take up circuit riding). On the threat of impeachment hanging over the judiciary, see ELLIS, *supra* note 298, at 69–82. On the failed impeachment of Justice Samuel Chase, see STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 156–58 (1991), and Alfange, *supra* note 298, at 96–107. Given the threat to Justice Chase, his firm refusal to view the instructions to Captain Murray as relevant to the legality of his conduct seems all the more striking.

ical branches.³⁰² Had the Court fashioned a qualified immunity defense for Captain Little, Marshall explained that the process of compensating the Danish victims would become a matter of “negotiation,” perhaps by way of a treaty, an outcome Marshall may have viewed as less risky to the judiciary’s already tenuous position.³⁰³ Along with the encouragement of the unbowed Justice Chase, the Paoly legislation may have helped allay Marshall’s concerns and blunted his instinct toward shifting responsibility to the political branches. Private bills require bicameral adoption, presentment, and presidential concurrence. The political branches, both in the control of the Jeffersonians, had signed off on the payment of damages in respect of William Maley’s capture of the *Amphitheatre*. Such an acceptance of responsibility may have lent strength in turn to the view that the Court’s role was simply to assess legality and award an appropriate amount of compensatory damages. Thus, the willingness of Congress to provide indemnity may have shaped judicial attitudes toward the imposition of officer liability (as well as the other way around). In any case, as we have seen, congressional indemnity contributed to a regime in which the Court imposed relatively strict official liability and Congress provided relatively routine indemnification for officers acting in good faith.

Apart from raising questions about the role of the federal courts in fashioning immunity law, scholars (and the Court itself) have criticized the jurisprudential stagnation that has followed from the Court’s modern qualified immunity jurisprudence.³⁰⁴ The Court attempted to deal with the problem of stagnation by requiring lower courts first to decide the constitutional issue and only later to determine if the right at issue was clearly enough established to trigger immunity from suit.³⁰⁵ Yet this two-step rule, or order of battle, drew criticisms of its own for producing unnecessary constitutional decisions and complicating the process of appellate review.³⁰⁶ Thus, the Court changed

³⁰² Marshall was elected to the Sixth Congress, where he represented Virginia from 1799–1800, before serving as Secretary of State and then as Chief Justice of the Supreme Court. He was serving in Congress when the *Niger* indemnity bill became law in 1799. See *supra* note 295.

³⁰³ See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

³⁰⁴ See Alschuler, *supra* note 282, at 465 (arguing that qualified immunity and exclusionary rule jurisprudence have led to stagnation in constitutional doctrine and left victims of government misconduct without remedy); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (“Going directly to qualified immunity will not only inhibit the development of constitutional doctrine, but will also degrade existing rights to a least-common-denominator understanding of their meaning.”).

³⁰⁵ See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

³⁰⁶ See *Pearson v. Callahan*, 129 S. Ct. 808, 817–18 (2009) (cataloging these difficulties). But see Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights*

course, putting in place a regime of discretion that allowed the lower courts to refrain from reaching the constitutional issue if they determined that the right was not clearly established.³⁰⁷ Whatever the wisdom of this switch and the risk that problems of stagnation may recur, the Court's current approach certainly differs from that of the nineteenth century. Under the order of battle established in *Little v. Barreme* and other early decisions, the judiciary decided legal questions and left matters of indemnity to Congress. No one had occasion to ask if the rights were clearly established, and no stagnation could occur.

CONCLUSION

Viewed on its own terms, Marshall's rejection of the good-faith defense in the early cases of *Little v. Barreme* and *Murray v. Charming Betsy* might appear quite adventuresome. The decisions placed liability on officers of the government who could fairly claim to have been acting in reliance on the instructions of their superiors. Viewed in the context of the system of government accountability in place at the dawn of the nineteenth century, however, the decisions appear unremarkable. Under the Federalists and Jeffersonians, both the executive and legislative branches of government had taken the position that federal courts were the proper forum for the initial determination of issues of government liability.³⁰⁸ Both agreed, moreover, that any court-imposed liability for actions taken in the line of duty ultimately would call for the adoption of indemnifying private legislation. Marshall's decisions thus operated less to allocate the risk of loss to the official than to provide a neutral evaluation of the legality of the government's conduct, which set the stage for the payment of compensation that all three branches of government viewed as owing to the owners of wrongly captured Danish vessels. Congress, then, was responsible for adopting private bills of indemnity both to protect officers who acted in good faith and to ensure that the government ultimately bore liability for the actions of its agents acting within the scope of their authority.

Our survey of legislative practice in the early republic largely bears out the confidence that Madison and Marshall placed in the proper functioning of the private bill indemnification process. As we have seen, Congress rather routinely adopted private indemnification

Litigation: The Continued Viability of Saucier v. Katz, 16 GEO. MASON L. REV. 53 (2008) (positing that constitutional question should be reached only if colorable claim exists, such that litigants are actually interested in matter).

³⁰⁷ See *Pearson*, 129 S. Ct. at 818.

³⁰⁸ For the view of Federalist Secretary of State Timothy Pickering, see *supra* note 85.

bills when officers were held liable for actions taken in the line of duty. Congress placed much responsibility for determining issues of indemnification in the hands of a special Committee on Claims, located within the House of Representatives. The Committee conducted quasi-judicial investigations into the background of the indemnity claims and recommended payment of those it found to be deserving. Both the full House and the Senate displayed remarkable deference to the decisions of the Committee. Indeed, a negative report was invariably fatal to the petitioner's application, and a positive report almost invariably led to the adoption of some form of relief. While advocacy, favoritism, and lobbying doubtless played a role in the outcome of these petitions, the Committee's decision to collect and rely on the precedents embodied in Burch's Index suggests a self-conscious attempt to develop principles of indemnity on which the government's officers and the Committee's own members could rely.

Sovereign immunity played only a modest role in the early republic's system of government accountability in tort. To be sure, it prevented litigants from naming the United States as a party in federal court. But cases such as *Maley v. Shattuck* demonstrate that the prohibition against joining the government as a party was the barest of fictions. Lieutenant Maley was nowhere to be seen; rather, the executive branch authorized the litigation so that the judicial branch could evaluate the merits of the claim as a prelude to the ultimate acceptance of responsibility by Congress, which paid damages directly to the claimant by private bill. Sovereign immunity did not block recovery; it ensured that each branch would exercise the powers—legislative, executive, or judicial—that the Constitution had assigned. Nor did official immunity play a role in the determination of these claims—at least not in the form of a judge-made doctrine that barred the courts from evaluating the conduct at issue. Courts evaluated legality; Congress decided questions of agency and scope of employment and adjusted official incentives accordingly.

No one would argue for a return to the world of the early republic and its reliance on an indemnity practice managed through petitions to Congress. However, something may be learned from the way the founding generation allocated responsibility for the evaluation of the legality of government conduct and the ultimate payment of compensation. All agreed that the government should pay when it was determined that its officers acting within the scope of their duties had violated the law, strictly construed. All agreed that the courts were to make this evaluation in the first instance. The rule of strict official liability that Chief Justice Marshall applied in *Little v. Barreme*

was less an act of judicial hubris than one of judicial deference to the institutional arrangements that Madison and the Republicans in Congress had helped to put in place. One finds similar deference in *Maley v. Shattuck*, where the Marshall Court agreed to hear an amicably arranged dispute that effectively ran against the federal government. While these conclusions do not necessarily undermine the Court's modern management of the doctrines of sovereign and official immunity, they certainly invite further study. One can fairly ask whether victims of positive government wrongdoing would fare better in 1810 or 2010.

APPENDIX
TABLE 1
TABLE ABBREVIATIONS

<i>Category</i>	<i>Code</i>	<i>Definition</i>
<i>Committee</i>	C	Claims
	CM	Commerce and Manufactures
	J	Judiciary
	NA	Naval Affairs
	S	Select
	MA	Military Affairs
	WH	Whole House
	WM	Ways and Means
<i>Claim Type</i>	EM	Enlistment of a Minor
	F	Fraud
	MP	Malicious Prosecution
	RE	Refused Entry
	SPE	Seizure of Person
	SPO	Seizure of Property
	TPO	Trespass on Property
<i>Agent Type</i>	C	Citizen
	MO	Military Officer
	MS	Marshal
	PO	Postal Officer
	RC	Revenue Collector
<i>Authority</i>	GO	General Orders
	SO	Specific Orders

<i>Category</i>	<i>Code</i>	<i>Definition</i>
<i>Relief Sought</i>	D	Defense
	DJ	Defense of Judgment
	J	Judgment
<i>Committee Action</i>	A	Adverse Report
	ASB	Agreed to Senate Bill
	F	Reported Favorable Bill
	I	Indefinite
	NA	No Action
<i>Last Action</i>	DLT	Discharged and Laid on Table
	DWLTV	Discharged with Leave To Withdraw
	LT	Laid on Table
	LTW	Leave To Withdraw
	NCA	No Congressional Action
	P	Passed
	PWA	Passed with Amendment
	RCC	Referred to Court of Claims
	RCW	Referred to Committee of the Whole
	X	Postponed
<i>Relief Granted</i>	P	Paid Amount Owed by Officer
	R	Reimbursed Officer
	SA	Vested Superior Officer with Settlement Authority
	U	Unknown

TABLE 2
OFFICERS PETITIONING THE HOUSE

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Beesley, Maurice ³⁰⁹	C	SPO	MO	SO	J	I	X	5	N/A	2	None	Mar. 2, 1799
Hastings, Jonathan ³¹⁰	C	F	PO	GO	D	A	LTW	7	N/A	1	None	Feb. 12, 1803
Stille, James ³¹¹	C	TPO	MO	GO	DJ	A	DWLTW	8	N/A	2	None	Dec. 28, 1803
Murray, Alexander ³¹²	C	SPO	MO	GO	DJ	F	P	8	\$14,930.30 + costs	1	R	Jan. 31, 1805
Adams, Francis ³¹³	C	SPO	RC	GO	J	A	NCA	9	\$56.86	2	None	Jan. 7, 1806
Little, George ³¹⁴	C	SPO	MO	GO	DJ	F	P	9	\$10,245.96 + costs	3	R	Jan. 17, 1807
Gelston, David ³¹⁵	CM	MP	RC	SO	DJ	F	P	9	N/A	1	R	Feb. 5, 1807

³⁰⁹ H.R. JOURNAL, 5th Cong., 1st Sess. 274 (1798); 1 DIGESTED SUMMARY AND ALPHABETICAL LIST OF PRIVATE CLAIMS WHICH HAVE BEEN PRESENTED TO THE HOUSE OF REPRESENTATIVES FROM THE FIRST THROUGH THE THIRTY-FIRST CONGRESS 117 (Washington, Wm. M. Belt 1853) [hereinafter 1 DIGESTED SUMMARY OF PRIVATE CLAIMS].

³¹⁰ H.R. JOURNAL, 7th Cong., 2d Sess. 316 (1803); 2 DIGESTED SUMMARY AND ALPHABETICAL LIST OF PRIVATE CLAIMS WHICH HAVE BEEN PRESENTED TO THE HOUSE OF REPRESENTATIVES FROM THE FIRST THROUGH THE THIRTY-FIRST CONGRESS 50 (Washington, Wm. M. Belt 1853) [hereinafter 2 DIGESTED SUMMARY OF PRIVATE CLAIMS].

³¹¹ H.R. JOURNAL, 8th Cong., 1st Sess. 468 (1803); 3 DIGESTED SUMMARY AND ALPHABETICAL LIST OF PRIVATE CLAIMS WHICH HAVE BEEN PRESENTED TO THE HOUSE OF REPRESENTATIVES FROM THE FIRST THROUGH THE THIRTY-FIRST CONGRESS 410 (Washington, Wm. M. Belt 1853) [hereinafter 3 DIGESTED SUMMARY OF PRIVATE CLAIMS].

³¹² Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); H.R. REP. NO. 8-44 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 128; 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 546.

³¹³ H.R. JOURNAL, 8th Cong., 2d Sess. 49-50 (1804); H.R. JOURNAL, 9th Cong., 1st Sess. 228 (1806); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 5.

³¹⁴ Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); H.R. REP. NO. 8-46 (2d Sess. 1805), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 138; 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 327.

³¹⁵ H.R. JOURNAL, 9th Cong., 2d Sess. 506 (1807); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 704.

TABLE 2 CONTINUED

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Randall, John ³¹⁶	CM	SPO	RC	GO	J	NA	NCA	11	N/A	1	None	June 15, 1809
Brent, John ³¹⁷	CM	SPO	RC	GO	J	NA	NCA	11	N/A	2	None	Mar. 9, 1810
Beale, William ³¹⁸	WM	SPE	C	SO	DJ	NA	NCA	20	N/A	1	None	Feb. 16, 1829
Ellis, Samuel ³¹⁹	CM	SPO	MS	SO	DJ	F	P	13	N/A	3	SA	Mar. 13, 1814
Sands, Joshua ³²⁰	WM	SPO	RC	GO	J	F	P	13	N/A	3	R	Feb. 27, 1815
Rodgers, John ³²¹	S	SPO	MO	GO	J	F	P	14	N/A	1	R	Feb. 15, 1816
Hampton, Wade ³²²	C	SPE	MO	GO	J	NA	DLT	14	\$6000 + costs	1	None	Feb. 14, 1817
Berry, Joseph ³²³	C	SPE	MO	SO	DJ	NA	NCA	15	N/A	1	None	Mar. 16, 1818
Gelston, David II ³²⁴	WM	SPO	RC	SO	J	F	P	15	\$107,369.43 + costs	3	R	Mar. 21, 1818

³¹⁶ 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 142.

³¹⁷ H.R. JOURNAL, 11th Cong., 1st Sess. 59 (1809); H.R. JOURNAL, 11th Cong., 2d Sess. 274 (1810); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 187.

³¹⁸ H.R. JOURNAL, 20th Cong., 2d Sess. 289 (1829); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 106.

³¹⁹ H.R. REP. NO. 13-35 (1st Sess. 1814); H.R. JOURNAL, 12th Cong., 1st Sess. 264 (1812); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 586-87.

³²⁰ Sands v. Knox, 7 U.S. (3 Cranch) 499 (1806); H.R. REP. NO. 13-71 (2d Sess. 1815); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 263.

³²¹ H.R. REP. NO. 14-138 (1st Sess. 1816), *reprinted in* 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 18, at 408; 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 220.

³²² H.R. JOURNAL, 14th Cong., 2d Sess. 389-91 (1817); S. JOURNAL, 14th Cong., 2d Sess. 237-38 (1817); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 23.

³²³ H.R. JOURNAL, 15th Cong., 1st Sess. 344 (1818); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 131.

³²⁴ Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818); H.R. JOURNAL, 15th Cong., 1st Sess. 331 (1818); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 704.

TABLE 2 CONTINUED

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Rodgers, John II ³²⁵	S	SPO	MO	GO	D	F	P	15	\$43,250 + costs	1	R	Apr. 11, 1818
Brown, Jacob ³²⁶	C	SPE	MO	GO	J	F	P	15	\$669.81	1	R	Apr. 18, 1818
Austin, Loring ³²⁷	C	SPE	MO	GO	J	F	P	15	\$6673.90	1	SA	Apr. 20, 1818
Wells, George ³²⁸	C	SPE	MO	SO	J	F	P	15	N/A	1	None	Apr. 20, 1818
Pool(e), Benjamin ³²⁹	WM	SPO	RC	GO	D	F	P	15	N/A	1	R	Feb. 20, 1819
Worsham, Alexander ³³⁰	C	EM	MO	GO	J	A	LT	16	N/A	1	None	Mar. 23, 1820
Steele, John ³³¹	WH	RE	RC	SO	J	F	PWA	16	N/A	1	R	May 1, 1820
Wilkinson, James ³³²	S	SPE	MO	GO	J	F	P	16	\$2,500 + costs	2	P	May 11, 1820
Bates, Alexander ³³³	C	SPO	MO	SO	DJ	NA	NCA	18	N/A	1	None	Jan. 12, 1824
Dixon, Luther ³³⁴	MA	SPE	MO	GO	DJ	NA	DLT	18	\$300 + costs	4	None	Feb. 10, 1824
Clark(e), Archibald ³³⁵	WH	SPO	RC	GO	J	F	P	18	N/A	1	R	May 19, 1824
Johnston, George ³³⁶	C	SPO	RC	SO	J	F	P	19	\$1241.81	1	R	Feb. 5, 1827

³²⁵ 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 220.

³²⁶ H.R. REP. NO. 15-387, at 551 (1st Sess. 1818); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 207.

³²⁷ H.R. REP. NO. 15-379, at 545 (1st Sess. 1818); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 57.

³²⁸ H.R. JOURNAL, 15th Cong., 1st Sess. 417-18 (1818); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 608.

³²⁹ 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 99.

³³⁰ H.R. JOURNAL, 15th Cong., 1st Sess. (1817); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 702.

³³¹ 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 396.

³³² H.R. JOURNAL, 16th Cong., 1st Sess. 216 (1820); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 649.

³³³ H.R. JOURNAL, 18th Cong., 1st Sess. 130 (1824); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 98.

³³⁴ H.R. JOURNAL, 16th Cong., 2d Sess. 265 (1821); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 519-20.

³³⁵ 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 329.

³³⁶ H.R. REP. NO. 19-159, at 1-4 (1st Sess. 1826); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 207.

TABLE 2 CONTINUED

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Wilkinson, Jesse ³³⁷	NA	SPO	MO	GO	J	F	P	20	N/A	2	U	May 24, 1828
Flournoy, Thomas ³³⁸	J	SPE	MO	GO	J	F	P	20	\$2,500 + costs	1	P	Feb. 12, 1829
Conard, John ³³⁹	J	SPO	MS	SO	J	F	P	21	\$240,000	1	P	May 29, 1830
Cutler, Enos ³⁴⁰	MA	SPO	MO	GO	DJ	F	P	21	N/A	1	P	May 29, 1830
Payne, M.M. ³⁴¹	MA	SPO	MO	GO	D	F	P	21	N/A	1	R	May 29, 1830
Dibble, Solomon ³⁴²	C	N/A	MO	SO	DJ	A	LT	22	N/A	1	None	Dec. 31, 1831
Brown, Harvey ³⁴³	J	SPO	MO	GO	DJ	F	P	22	\$1041	1	R	July 14, 1832
Massias, Abraham ³⁴⁴	MA	SPE	MO	GO	J	F	P	22	\$1000	1	P	Mar. 2, 1833
Renshaw, James ³⁴⁵	NA	N/A	MO	N/A	D	NA	DLT	23	N/A	1	None	Apr. 22, 1834
Jouet, William ³⁴⁶	WH	N/A	MO	N/A	N/A	ASB	P	23	N/A	1	U	Nov. 3, 1835
Scott, Samuel ³⁴⁷	C	SPE	MO	GO	J	A	LT	24	\$530.31	1	None	Jan. 13, 1836
Burt, Joel ³⁴⁸	C	SPO	RC	GO	J	A	LT	24	\$1573.03	2	None	Jan. 29, 1836

337 H.R. REP. NO. 20-192 (1st Sess. 1828); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 649.

338 H.R. REP. NO. 19-62, at 1-2 (2d Sess. 1827); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 646.

339 H.R. REP. NO. 21-323 (1st Sess. 1830); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 377.

340 H.R. JOURNAL, 21st Cong., 1st Sess. 144 (1829); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 444.

341 H.R. REP. NO. 21-193, at 1-2 (1st Sess. 1830); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 34.

342 H.R. JOURNAL, 22d Cong., 1st Sess. 26 (1831); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 510.

343 H.R. REP. NO. 22-74, at 1 (1st Sess. 1831); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 206.

344 H.R. REP. NO. 22-176, at 1-18 (1st Sess. 1832); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 397.

345 H.R. JOURNAL, 23d Cong., 1st Sess. 190 (1834); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 167.

346 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 222.

347 H.R. REP. NO. 24-128, at 1-2 (1st Sess. 1836); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 282.

348 H.R. REP. NO. 24-255, at 1-2 (1st Sess. 1836); H.R. REP. NO. 24-233, at 1-2 (2d Sess. 1837).

TABLE 2 CONTINUED

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Adams, James ³⁴⁹	C	SPO	MO	SO	J	A	LT	24	\$605.57	3	None	Mar. 3, 1836
Lewis, Andrew ³⁵⁰	C	SPO	MO	SO	D	A	LT	27	N/A	1	None	Mar. 17, 1842
Delany, John ³⁵¹	C	SPE	MO	GO	DJ	F	PWA	27	\$839.81	1	R	May 25, 1842
Cline, John ³⁵²	C	SPO	MO	SO	DJ	F	P	27	\$573.27	3	R	July 9, 1842
Mitchell, Nathaniel ³⁵³	C	MP	PO	GO	J	F	P	27	N/A	4	R	July 27, 1842
Morrow, James ³⁵⁴	J	SPE	MO	GO	DJ	F	P	27	\$1114.57	2	R	July 27, 1842
Clay, Cassius ³⁵⁵	C	TPO	MO	SO	J	F	RCW	30	N/A	1	None	Feb. 28, 1849
Simonds, Lewis ³⁵⁶	NA	SPO	MO	GO	D	F	P	33	N/A	3	R	July 31, 1854
Mott, Danford ³⁵⁷	C	SPO	RC	GO	D	F	RCC	38	\$2829.92	3	None	Jan. 27, 1865

³⁴⁹ H.R. JOURNAL, 15th Cong., 1st Sess. 433 (1818); H.R. JOURNAL, 24th Cong., 1st Sess. 457 (1836); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 6.

³⁵⁰ S. REP. NO. 27-191, at 1-2 (2d Sess. 1842); 2 DIGESTED SUMMARY AND ALPHABETICAL LIST OF PRIVATE CLAIMS WHICH HAVE BEEN PRESENTED TO THE HOUSE OF REPRESENTATIVES FROM THE THIRTY-SECOND THROUGH THE FORTY-FIRST CONGRESS, INCLUSIVE 424 (Washington, Gov't Printing Office 1873) [hereinafter DIGESTED SUMMARY FROM THE THIRTY-SECOND THROUGH THE FORTY-FIRST CONGRESS].

³⁵¹ H.R. REP. NO. 27-752, at 1-8 (2d Sess. 1842); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 479.

³⁵² H.R. REP. NO. 27-1, at 1-2 (2d Sess. 1841); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 347.

³⁵³ H.R. REP. NO. 25-780, at 1-3 (2d Sess. 1838); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 503.

³⁵⁴ H.R. REP. NO. 27-272, at 1 (2d Sess. 1842); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 531.

³⁵⁵ H.R. REP. NO. 30-131, at 1-4 (2d Sess. 1849); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 341.

³⁵⁶ H.R. REP. NO. 33-228, at 1-2 (1st Sess. 1854); DIGESTED SUMMARY FROM THE THIRTY-SECOND THROUGH THE FORTY-FIRST CONGRESS, *supra* note 350, at 424.

³⁵⁷ DIGESTED SUMMARY FROM THE THIRTY-SECOND THROUGH THE FORTY-FIRST CONGRESS, *supra* note 350, at 327.

TABLE 3
OFFICERS PETITIONING THE SENATE

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Clark, Ashael ³⁵⁸	C	N/A	N/A	N/A	DJ	F	P	15	N/A	1	R	Apr. 11, 1818
Barrow, Matthew ³⁵⁹	MA	SPO	MO	SO	D	ASB	P	16	\$20.37	1	R	Jan. 28, 1820
Swartwout, Robert ³⁶⁰	MA	SPO	RC	GO	J	F	P	16	\$2500	1	P	Mar. 3, 1821
Purdy, Lt. Cl. Robert ³⁶¹	MA	SPE	MO	GO	J	F	P	17	\$816.70	4	R	Mar. 3, 1823
Stockton, Robert ³⁶²	NA	SPO	MO	N/A	N/A	ASB	P	17	N/A	1	R	Mar. 3, 1823
Hook, Josiah ³⁶³	J	SPO	RC	GO	DJ	F	P	18	\$6.46	3	R	May 18, 1824
Paschal, George ³⁶⁴	C	SPO	MO	SO	D	F	P	27	\$291.62	3	R	Aug. 12, 1842
Mitchell, D.D. ³⁶⁵	MA	SPO	MO	SO	DJ	F	P	32	Approx. \$102,000	2	P	Feb. 10, 1863

³⁵⁸ 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 329.

³⁵⁹ *Barrow v. Page*, 6 Tenn. (5 Hayw.) 97 (1818); S. JOURNAL, 15th Cong., 2d Sess. 40 (1818); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 90.

³⁶⁰ H.R. REP. NO. 16-526, at 731-32 (1st Sess. 1820); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 435.

³⁶¹ *Luty v. Purdy*, 2 Tenn. (2 Overt.) 163 (1811); S. REP. NO. 17-610, at 874-75 (2d Sess. 1822).

³⁶² S. JOURNAL, 17th Cong., 2d Sess. 176 (1823); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 413.

³⁶³ S. REP. NO. 17-566, at 802 (1st Sess. 1822), *reprinted in* 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 103, at 802; 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 121.

³⁶⁴ H.R. REP. NO. 26-448, at 1-2 (1st Sess. 1840); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 23.

³⁶⁵ S. REP. NO. 32-53, at 1-2 (1st Sess. 1852); DIGESTED SUMMARY FROM THE THIRTY-SECOND THROUGH THE FORTY-FIRST CONGRESS, *supra* note 350, at 317.

TABLE 4
CLAIMANTS PETITIONING THE HOUSE

Party	Committee	Claim Type	Agent Type	Authority	Relief Sought	Comm. Action	Last Action	Cong. Session	Amount Requested	No. of Attempts	Relief Granted	Date of Last Cong. Action
Paoly, Paolo ³⁶⁶	S	SPO	RC	GO	D	F	P	7	N/A	1	P	Apr. 14, 1802
Shattuck, Jared ³⁶⁷	C	SPO/SPE	MO	GO	J	F	P	12	\$33,244.67	1	P	Feb. 2, 1813
Hoyt, Gould ³⁶⁸	None	SPO	RC	GO	J	None	None	15	\$200,000	1	P	Apr. 9, 1818
Shattuck, Jared II ³⁶⁹	C	SPO/SPE	MO	GO	J	A	LT	18	Unpaid interest	1	None	Jan. 2, 1824
N.Y. Ins. Cos. ³⁷⁰	WM	SPO	MS	SO	J	F	P	22	N/A	1	P	July 14, 1832
Bristol, Charles ³⁷¹	C	SPO	RC	GO	J	A	LT	24	\$1472.20	2	None	Feb. 16, 1837
Adams, George ³⁷²	WM	SPO	RC	GO	D	A	LT	27	\$1585.65	2	None	Mar. 8, 1842
Diedrick, Robert ³⁷³	C	SPO	RC	GO	J	None	LT	26	\$1505.31	1	None	Mar. 8, 1842
Hall, Charles ³⁷⁴	CM/WH	SPO	RC	GO	J	F	RCW/P	27	\$1705.28	3	P	Mar. 3, 1843
Kidd, R. & B. ³⁷⁵	WM	SPO	RC	GO	J	F	P	29	\$2436.29	1	N/A	Aug. 10, 1846
Lee, Oliver ³⁷⁶	C	SPO	RC	GO	J	F	P	31	N/A	1	P	May 17, 1850

³⁶⁶ PAOLY REPORT, *supra* note 98; 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 8.

³⁶⁷ Maley v. Shattuck, 7 U.S. (3 Cranch) 458 (1806); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 309.

³⁶⁸ Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 140.

³⁶⁹ H.R. JOURNAL, 18th Cong., 2d Sess. 42 (1824); 3 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 311, at 301.

³⁷⁰ 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 570.

³⁷¹ Bristol v. Burt, 7 Johns. 254 (N.Y. Sup. Ct. 1810); H.R. REP. NO. 24-255 (1st Sess. 1836); H.R. REP. NO. 24-233, at 1-3 (2d Sess. 1837); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 194.

³⁷² H.R. REP. NO. 27-329, at 1-2 (2d Sess. 1842); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 6.

³⁷³ H.R. REP. NO. 27-345, at 1 (2d Sess. 1842); 1 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 309, at 478.

³⁷⁴ 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 9.

³⁷⁵ Kidd v. Swartwout, 14 F. Cas. 457 (C.C.S.D.N.Y. 1843) (No. 7756); S. REP. NO. 29-164 (1st Sess. 1846); 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 246.

³⁷⁶ 2 DIGESTED SUMMARY OF PRIVATE CLAIMS, *supra* note 310, at 302.