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Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers

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FEDERAL COURTS, PRACTICE & PROCEDURE

LESSONS FOR *BIVENS* AND QUALIFIED IMMUNITY DEBATES FROM NINETEENTH-CENTURY DAMAGES LITIGATION AGAINST FEDERAL OFFICERS

*Andrew Kent**

*This Essay was written for a symposium marking the fiftieth anniversary of the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. As the current Court has turned against *Bivens*—seemingly confining it to three specific contexts created by *Bivens* and two follow-on decisions in 1979 and 1980—scholars and litigants have developed a set of claims to respond to the Court's critique. The Court now views the judicially created *Bivens* cause of action and remedy as a separation-of-powers foul; Congress is said to be the institution which should weigh the costs and benefits of allowing constitutional tort suits against federal officers for damages, especially in areas like national security or foreign affairs in which the political branches might be thought to have constitutional primacy. Scholarly writing and litigation briefs critical of the Court's treatment of *Bivens* now frequently focus on damages suits under common law or general law against American government officers in the early republic, reading them as giving *Bivens* a quasi-originalist pedigree. This historical writing about officer damages suits claims that courts in the early republic: acted independently of Congress to impose significant restraints on federal officers; protected persons from federal overreach no matter their citizenship and territorial location, and even during wartime; and refused to grant anything like qualified immunity that might have softened the blow of strict personal liability and promoted government efficiency. Common-law damages suits against federal officers are said to have remained routinely available until after *Bivens* was decided when, in the 1988 Westfall Act, Congress barred state-law tort suits against federal officers acting within the scope of their employment.*

Through case studies of litigation against federal officers involved in customs enforcement and maritime seizures, this Essay qualifies and revises these claims. In those two contexts, I show that there was substantial political branch endorsement of personal damages liability of federal

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* Professor and John D. Feerick Research Chair, Fordham Law School. Thanks to other participants in this symposium for lively discussion, the *Notre Dame Law Review* editors for their hard work, my colleague Thomas Lee for expert review of an earlier draft, and Patrick Reed for helpful conversations about customs taxation and judicial remedies.

officers in the early republic, but as material and legal conditions changed over the nineteenth century, Congress moved away from officer suits as a means of ensuring accountability of federal officers and compensation of persons harmed by official illegality. Further, in high stakes contexts for the young republic—wartime prize seizures and peacetime antipiracy seizures—the Supreme Court did in fact apply immunity doctrines to protect officers and incentivize vigor. Finally, alien enemy disability to sue in U.S. courts during wartime must be acknowledged as a significant limit the protective reach of the officer damages suit. I conclude with thoughts about the implications of this somewhat revised view of the history of damages litigation against federal officers.

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INTRODUCTION

Fifty years ago, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹ created an “implied cause of action to remedy a constitutional violation,” through a suit for money damages against responsible federal officers.² The *Bivens* case involved federal law enforcement officers who allegedly violated Fourth Amendment rights through an unreasonable search and seizure in the plaintiff’s home.³ In 1979 and 1980, the Court authorized nonstatutory *Bivens* damages suits in two new areas: Eighth Amendment claims against federal prison officials for denial of medical care⁴ and employment discrimination claims against a member of Congress under the Fifth Amendment’s Due Process Clause.⁵

1 403 U.S. 388 (1971).

2 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

3 See *Bivens*, 403 U.S. at 389.

4 See *Carlson v. Green*, 446 U.S. 14, 19–20 (1980).

5 See *Davis v. Passman*, 442 U.S. 228, 230, 248–49 (1979).

Since then, the Court has declined to extend its *Bivens* cause of action and remedy to any new contexts, new constitutional provisions, or new types of defendants.⁶ And more recently, the Court has treated *Bivens* with evident disfavor. The Court now says that judicial implication of a damages remedy is a nearly always unjustified intrusion into an area that Congress should control: assessing the costs and benefits of various remedial regimes for U.S. government misconduct.⁷ And the Court has voiced additional separation-of-powers concerns when the substantive area covered by a putative *Bivens* suit—for example, military discipline, foreign affairs, counterterrorism, or extraterritorial government action—is one in which Congress and/or the Executive have constitutional primacy.⁸ As a result of recent developments, the Supreme Court seems to allow *Bivens* suits only in legal and factual circumstances close to those approved in the three decisions from forty to fifty years ago.⁹

As the Court's hostility toward *Bivens* has grown, and as more members of the Court have identified as originalists, scholarship and scholarly litigation briefs trying to preserve and expand *Bivens* have taken a historical turn. Writing critical of the Court's narrow view of *Bivens* now frequently focuses on early nineteenth-century damages suits against American government officers, reading them as precedents for a more expansive view of *Bivens* today.¹⁰ The Court in its most recent *Bivens* decision dismissed consideration of such cases, stating simply that they were irrelevant because they

6 See Andrew Kent, *Hernández v. Mesa: Questions Answered and Questions Avoided*, 2019–2020 AM. CONST. SOC'Y SUP. CT. REV. 187, 189 [hereinafter Kent, *Questions*]; Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1141 (2014) [hereinafter Kent, *Damages*].

7 See, e.g., *Ziglar*, 137 S. Ct. at 1856 (“[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. . . . Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered.”); see also *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68–69 (2001); *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994).

8 See *Hernández v. Mesa*, 140 S. Ct. 735, 744–47 (2020); *Ziglar*, 137 S. Ct. at 1860–61; *Christopher v. Harbury*, 536 U.S. 403, 406–08, 417 (2002); *United States v. Stanley*, 483 U.S. 669, 681–83 (1987); *Chappell v. Wallace*, 462 U.S. 296, 300–02 (1983).

9 See Kent, *Questions*, *supra* note 6, at 196–97.

10 See, e.g., Brief for the Petitioners at 10–11, *Hernández*, 140 S. Ct. 735 (No. 17-1678); Brief of Carlos M. Vázquez & Anya Bernstein as Amici Curiae in Support of Petitioners at 11, *Hernández*, 140 S. Ct. 735 (No. 17-1678) [hereinafter Brief of Vázquez & Bernstein]; JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 6–8, 14–16 (2017); Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases*, 68 CASE W. RESV. L. REV. 1153, 1156–58 (2018); James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN ST. L. REV. 1387, 1393–95 (2010); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the*

occurred prior to when *Erie Railroad Co. v. Tompkins*¹¹ “held that ‘[t]here is no federal general common law,’ and therefore federal courts today cannot fashion new claims in the way that they could before 1938.”¹² There is more to say on the topic than this near non sequitur by the Court. This Essay will review and comment on some important aspects of this historical turn in *Bivens* scholarship and advocacy and the relevance of the history of early republican damages litigation against federal officers under the common law or general law.

It is well known and uncontroversial that the Framers and ratifiers of the Constitution in 1787–88 expected that common law or general law¹³ would supply forms of action to contest many kinds of misconduct by federal officers.¹⁴ After all, the Constitution expressly mentions only two remedies—habeas corpus and just compensation for the taking of private property for public use.¹⁵ As Stephen Sachs has usefully described it, the Constitution was part of, and “layered on top of,” a preexisting legal system¹⁶—a system inher-

Nature of the Bivens Question, 161 U. PA. L. REV. 509, 531–42 (2013); Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019–2020 CATO SUP. CT. REV., 263, 267–70.

11 304 U.S. 64 (1938).

12 *Hernández*, 140 S. Ct. at 742 (alteration in original) (quoting *Erie*, 304 U.S. at 78).

13 “General law was ‘an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.’ Such law addressed matters of concern to more than one sovereign, and no single sovereign had the ability to fix its meaning.” Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013) (footnote omitted). “At the Founding, general law was synonymous with *jus gentium*, or the law of nations. Courts and other writers recognized various branches of the law of nations, including the law merchant (or general commercial law), the law maritime, and the law governing relations between sovereign states.” *Id.* at 660 (footnotes omitted).

14 See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1180 (1991) (stating that the Framers contemplated that state law “create[s] the cause of action that would enable ordinary men and women to challenge unconstitutional actions by federal officials” (emphasis in original)); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942–43 (2019) (“When harmed by official misconduct at the dawn of constitutional history, aggrieved parties could normally seek redress by invoking forms of action available at common law and in equity that included suits against governmental officials under ordinary tort law.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) (“To the framers, special provision for constitutional remedies probably appeared unnecessary, because the Constitution presupposed a going legal system, with ample remedial mechanisms . . .”). As Fallon notes, equitable actions could also be used to challenge official action. See Fallon, *supra*, at 942–43. This Essay does not discuss equity because it is concerned with suits or claims for money damages for tortious wrongs.

15 See Fallon, *supra* note 14, at 941–42.

16 Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1821–22 (2012) (“The Constitution is not a comprehensive code. As legal revolutions go, its adoption was relatively minor: the Founders didn’t declare a legal Year Zero, nor did they repeal and replace all prior law. . . . Our founding document is firmly rooted in the common law tradition, in which each new enactment is layered on top of an existing and enormously complex body of written and unwritten law.”).

ited from Britain and developed in the colonies and post-independence U.S. states. In this system, crown officials and U.S. state officers were sued frequently for damages for torts and similar common-law wrongs, many of which protected interests that overlapped with those protected by the U.S. Constitution—“life, liberty, [and] property.”¹⁷

Suits against officers for damages were “a fixture in American law”¹⁸ in the early republic. Sovereign immunity barred suits against the United States, so suits against officers personally were a crucial work-around.¹⁹ “To maintain the suit the plaintiff [had to] allege conduct by the officer which, if not justified by his official authority, [was] a private wrong to the plaintiff, entitling the latter to recover damages.”²⁰ Justification for an officer’s actions could come from legal authority supplied by a valid statute, the Constitution, the common law, or the law of nations (including its subparts such as the laws of war and maritime and admiralty law).

Since a *Bivens* suit is one for constitutional torts seeking damages, the historically minded arguments for a more expansive *Bivens* doctrine focus on common-law or general-law suits for damages against federal officers in the early republic. A core premise of these arguments is that such damages suits against federal officers were both contemplated by the Founders and ubiquitous at and soon after the Founding, giving them a quasi-originalist kind of foundation.

Scholars and advocates supporting a more robust role for *Bivens* today also assert that nonconstitutional tort liability²¹ for federal officers was “routinely” available until 1988,²² when Congress in the Westfall Act barred state-law tort suits against federal officers acting within the scope of their employment,²³ leaving the only state tort remedy to be a limited one against the

17 U.S. CONST. amend. V.

18 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 880 (7th ed. 2015).

19 See *id.* at 877, 880.

20 *Id.* at 881 (quoting ATT’Y GEN.’S COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. 77-8, at 81 (1st Sess. 1941)); see Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RESRV. L. REV. 396, 410 (1987) (describing the structure of early republic trespass suits).

21 By “nonconstitutional tort liability” I refer to tort liability under common law, general law, or state statutory law. The ability of federal courts to elaborate their own version of nonfederal general law was removed by the decision in *Erie*. See *supra* notes 11 & 12 and accompanying text.

22 Brief of Vázquez & Bernstein, *supra* note 10, at 21 (“When this Court decided *Bivens* in 1971, it did so against the backdrop of this unbroken line of cases, in state and federal court, recognizing that federal officers were routinely subject to personal damages liability for unconstitutional conduct.”); Pfander, *supra* note 10, at 1406–07 (“Congress [in the Westfall Act] has essentially eliminated the common law remedies that were routinely available to litigants in the pre-*Bivens* world as a way to contest the legality of federal government conduct.”); Vladeck, *supra* note 10, at 264, 279.

23 See Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2679).

sovereign (the United States) under the Federal Tort Claims Act.²⁴ *Bivens*, though different because the claims allege constitutional rather than state-law or general-law violations, is the only possible federal officer tort suit remaining today under judge-made law, for within-scope-of-employment wrongs. Therefore, suggest scholars and advocates pressing the historical turn, *Bivens* should be seen to share some of the quasi-originalist pedigree of the old officer suits, as well as legitimacy derived from the officer suits' existence for about 200 years—until cut off by the Westfall Act.²⁵

The historical turn in *Bivens* scholarship and advocacy emphasizes the “judge-made” nature of the officer suits for damages in the early republic,²⁶ as a response to the Supreme Court’s criticism of *Bivens* as an illegitimate judicial intrusion into the legislature’s functions. Moreover, as noted above, recent *Bivens* decisions highlight the supposed impropriety on separation-of-powers grounds of courts crafting damages remedies against federal officers, especially but not only in sensitive contexts like military activity, cross-border operations, and the like. In response, the scholars and litigators participating in the historical turn I identify often emphasize that the early American caselaw shows empowered judges overseeing the application of judge-made tort law against U.S. military officers, based on activity that happened extraterritorially.

The current Court’s *Bivens* restrictions are seen (accurately, I believe) as just one aspect of a package of Court-crafted doctrines designed to limit the ability of persons aggrieved by government misconduct to seek judicial redress in damages, while preserving some government accountability.²⁷ Another one of these doctrines is qualified immunity, which today shields officials from damages liability “when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁸ In response, critics of the current Court’s

24 See 28 U.S.C. §§ 2679–2680 (2018). For an explanation of how the Westfall Act and Federal Tort Claims Act operate and interact, see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121–23 (2009); Gregory C. Sisk, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 307–09 (2011).

25 See, e.g., Brief for the Petitioners, *supra* note 10, at 7 (“Although *Bivens* was the first case in which this Court recognized a damages remedy directly under the Constitution, it was, in context, a modest variation on an old theme—the long and consistent tradition of state and federal courts recognizing judge-made tort remedies for federal official misconduct, including violations of the Constitution.” (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

26 See, e.g., Vladeck, *supra* note 10, at 267–68, 270, 277.

27 See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

28 *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)). For an argument that the development of current qualified immunity doctrine must be understood in the context of the Supreme Court’s concerns about *Bivens* suits, see Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1410 (2019).

approach to damages litigation also challenge qualified immunity on historical grounds. They assert that in federal officer suits in the early republic

Nineteenth century courts passed solely on the issue of legality and left the task of determining issues of good faith, immunity, and indemnity to the legislative branch. The task of balancing the interest of the victim in vindication of his rights and that of the officer in securing protection against liability for actions in the course of employment fell to Congress.²⁹

As another work put it, “[e]xecutive officials were . . . not entitled to any immunity at all but were instead strictly liable for torts committed in excess of their authority or otherwise contrary to law.”³⁰ Thus the history of early republic damages suits is mined to critique qualified immunity as a recent upstart, lacking foundation in the early republic.³¹

The arguments just summarized contain a good bit that is accurate and valuable. I have learned a great deal from the work of the major authors of these works—including James Pfander, Steve Vladeck, and Carlos Vázquez, participants in this symposium. So this Essay is not an exercise in wholesale criticism and revision. Rather it sympathetically but critically evaluates and qualifies the claims about the ubiquity of damages suits against federal officers, and about an empowered judiciary applying judge-made law to persons, places, and contexts that the Supreme Court today considers too sensitive for judicial oversight on separation-of-powers grounds. This Essay similarly qualifies claims about a “pure legality” model of early American judicial behavior in officer tort suits in which immunity was unavailable and considerations of fairness to officers, incentives for efficient government, national security, foreign policy, and other policies were ignored. The Essay also qualifies the suggestion that common-law tort claims against federal officers were routinely available from the Founding under 1988’s Westfall Act.

I make the following affirmative observations and claims. Part I looks at a few of the common types of federal officer damages suits in the early republic, with particular focus on suits relating to customs or import taxes. I observe that damages suits against customs collectors were initially very common, but that by the mid-nineteenth century Congress had already started shifting away from personal liability as a method of overseeing collectors. Long before the Westfall Act in 1988, Congress had barred almost all federal officer damages litigation in the customs area.³² Why is this relevant? Congressional decisions, extending over a century or more, to rationalize administration in this area complicates the narrative there was an unbroken

29 Pfander, *supra* note 10, at 1395.

30 Vázquez & Vladeck, *supra* note 10, at 534.

31 See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018) (arguing that by the 1870s there was as yet “no well-established, good-faith defense in suits about constitutional violations”); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–19 (1972) (arguing that there was no official immunity for officers against personal damages suits in the early republic).

32 See *infra* Section I.C.

tradition of routine use of damages suits against federal officers unjustifiably ended by the Westfall Act. The modern Court's concerns about the justice and efficiency of damages liability for federal officers, and its doubts about the judiciary displacing Congress to impose new liability via *Bivens*, look more plausible when we understand the very long history of congressional action in this area.

Next, Part II is another case study of federal officer damages suits in a particular area—actions arising from seizures of vessels on the high seas or in U.S. ports, as part of either wartime commerce raiding and seizures of enemy warships (prize cases), or enforcement of antipiracy, embargo, and revenue statutes. This case study problematizes several claims made by historically inclined critics of current doctrines about *Bivens* and qualified immunity. The claims, which are shown to need qualification and recalibration, are that courts in the early republic hearing damages suits against federal officers (1) applied “judge-made” law, with the implication that the judiciary independently decided that damages liability for federal officers was appropriate; (2) assessed only legality, granting officers no immunity of any kind, not considering it their job to qualify tort liability with reference to any policy considerations related to government efficiency, fairness to officers, or the like; and (3) adjudicated damages claims against federal officers anywhere, in any context, brought by plaintiffs irrespective of their nationality.

This Part shows, by contrast, that (1) there was pervasive political branch endorsement of damages liability for federal officers who acted illegally; (2) but the Supreme Court tempered the harshness of this personal liability, and encouraged vigorous prosecution of war and enforcement of antipiracy laws, by providing a qualified kind of immunity to U.S. officers sued in damages; and (3) the disability of alien enemies to sue in U.S. courts during wartime was an important limitation of the protective and remedial power to the officer damages suit.

The Essay concludes with an attempt to offer a revised view of the lessons of the federal officer damages suits from the early republic.

I. THE GRADUAL DISAPPEARANCE OF FEDERAL OFFICER DAMAGES LITIGATION: THE EXAMPLE OF CUSTOMS ENFORCEMENT

Many of the previously common types of damages suits against federal officers under state law or general law were barred or fell into desuetude long before the Supreme Court decided *Bivens* in 1971 or Congress enacted the Westfall Act in 1988. There were a range of reasons for this. Take one set of cases—including some cited by critics of today's narrow *Bivens*—that involved collateral attacks on courts martial that, during peacetime, imposed fines for failure to appear or perform militia service. In the early republic, many of these cases were filed against state officials, but some arose in Washington, D.C., or for other reasons were brought against federal defendants.³³

³³ See, e.g., *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 335–37 (1806); *Ryan v. Ringgold*, 21 F. Cas. 114, 114 (C.C.D.C. 1826) (No. 12,187); *Slade v. Minor*, 22 F. Cas. 317, 317–18

With the decline of compulsory militia service and the growth of a professional standing army, professional law enforcement, and volunteer national guard, this type of suit fell into desuetude. Other types of previously common damages suits against federal officers similarly disappeared. To take a closer look at the decline of damages litigation against federal officers, this Part examines suits involving customs collectors.

A. *Types of Damages Litigation Against U.S. Customs Collectors*

A very large number of the reported damages cases against U.S. officers in the early republic—including cases cited by historically inclined critics of current *Bivens* doctrine—were directed at federal customs collectors. As Jerry Mashaw has explained:

Because customs officers acted coercively by techniques such as seizing property, holding goods in shoreside warehouses, refusing to return or release bonds, or holding ships in port, a host of standard common law actions—trespass, tr[ov]er, debt, detainue, assumpsit, or the like—were available to test the legality of the official action.³⁴

Mashaw also observed that “Congress seems to have presumed that officers could and would be sued in state courts in common law actions Common law actions had the capacity to provide substantial relief with respect to the activities of the most numerous federal agents,” such as “tax collectors.”³⁵

One type of case frequently seen in the early republic concerned the legality of import duties or other taxes paid to the collectors. Importers who thought they were being charged too much paid under protest—to permit the importation of their goods—and then sued federal collectors personally for damages, usually in assumpsit and usually in state court, though sometimes diversity jurisdiction or removal jurisdiction³⁶ brought the trial court proceedings into federal court.³⁷ A second type of common case arose from seizures of goods or vessels by federal customs collectors. The property was generally sought to be condemned through in rem litigation filed by the United States, and if a seizure was unjustified, the owners filed claims for money damages; sometimes, though, suit was filed by the owners, generally

(C.C.D.C. 1817) (No. 12,937); *Mills v. Martin*, 19 Johns. 7, 7 (N.Y. Sup. Ct. 1821); *Moore v. Houston*, 3 Serg. & Rawle 169, 169 (Pa. 1817).

34 Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1335 n.276 (2006).

35 *Id.* at 1321.

36 Removal jurisdiction in actions against customs collectors was available “under intermittent legislation beginning in 1815,” and standing legislation as of 1833. See Woolhandler, *supra* note 20, at 415 n.88.

37 See, e.g., *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 138 (1836); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80, 93 (1836); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 265 (1839); *Hardy v. Hoyt*, 38 U.S. (13 Pet.) 292, 293 (1839); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *Maxwell v. Griswold*, 51 U.S. (10 How.) 242 (1850); *Ogden v. Maxwell*, 18 F. Cas. 613 (C.C.S.D.N.Y. 1855) (No. 10,458); *Gamble v. Mason*, 9 F. Cas. 1140 (C.C.D. Md. 1858) (No. 5209).

for trespass.³⁸ Congress was well aware of this litigation and gradually extended federal jurisdiction to allow more of it to occur in federal court.³⁹ These suits or claims for money damages, if successful, resulted in judgments being entered personally against collectors.⁴⁰

B. Reasons Why the U.S. Government Initially Relied on Damages Suits to Police Collectors

Inertia—continuing the legal practices inherited from British rule—was surely the most important reason why officer damages suits were a primary feature of judicial review of customs collection in the early republic. Damages suits against customs collectors in England were an acknowledged feature of the revenue system there.⁴¹ And prior to independence, North American colonists used tort suits to challenge customs collection.⁴² As Roger Kirst relates, Parliament “seems to have . . . recognized and accepted” the jurisdiction of colonial courts of common law to hear such suits against crown collectors.⁴³ But Parliament did legislate to make sure that vice-admiralty courts in the colonies had primary jurisdiction. A statute of 1764 barred any suit against a collector if the vice-admiralty court certified that there had been probable cause for the seizure.⁴⁴

There were surely additional reasons why the U.S. government after 1789 continued to rely on suits for damages against collectors. Customs collectors tended to be substantial men in their communities, often with eco-

38 See, e.g., *Sands v. Knox*, 7 U.S. (3 Cranch) 499, 503 (1806); *United States v. Riddle*, 9 U.S. (5 Cranch) 311, 311 (1809); *Crowell v. M'Fadon*, 12 U.S. (8 Cranch) 94, 98 (1814); *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 353 (1815); *Otis v. Walter*, 15 U.S. (2 Wheat.) 18, 20–21 (1817); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 2–3 (1817); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 305 (1818); *The Friendship*, 9 F. Cas. 825, 825 (C.C.D. Mass. 1812) (No. 5125); *Burke v. Trevitt*, 4 F. Cas. 746, 747–48 (C.C.D. Mass. 1816) (No. 2163); *Imlay v. Sands*, 1 Cai. 566, 573 (N.Y. Sup. Ct. 1804); *Hoit v. Hook*, 14 Mass. 210, 213 (1817); *Rowley v. Gibbs*, 14 Johns. 385, 386–87 (N.Y. Sup. Ct. 1817); *Steel v. Fisk*, *Brayt.* 230, 230 (Vt. 1816).

39 See PATRICK C. REED, *THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW* 51–52 (1997).

40 See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1875 (2010).

41 See, e.g., *Tinkler v. Poole* (1770) 98 Eng. Rep. 396, 396–97; 5 Burr. 2657, 2657–59 (holding that trover lies against customs officer who wrongfully seized goods for violation of a statutory duty on salt); *Barkley v. Walters* (1731) 145 Eng. Rep. 682, 683; *Bunbury* 306, 306 (acknowledging propriety of a trespass action against a revenue collector being tried in the Court of King's Bench).

42 See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 17, 31–32 (1975); CARL UBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 33–35, 165–77 (1960); Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1321–22 (1978).

43 Kirst, *supra* note 42, at 1322.

44 See *An Act for Granting Certain Duties in the British Colonies and Plantations in America 1764*, 4 Geo. 3 c. 15, §§ 46–47 (Gr. Brit.) (Sugar Act).

conomic and social ties to the local merchant families.⁴⁵ These ties meant that collectors could face social pressure to not vigorously enforce the laws.⁴⁶ To provide an incentive to vigorous execution, collectors were paid a bounty or fee (called a moiety) as a percentage of all vessels and goods judicially condemned for being involved in intentional violation of import laws.⁴⁷ Perhaps personal damages liability was thought to balance the incentives out a bit.

Damages liability was likely thought important for other reasons. The legacy of the British civil service in North America—widely viewed as venal, corrupt, and inefficient—still tainted the reputation of the civil servants created under the new government in 1789 and thereafter.⁴⁸ Smuggling had been rife and British customs collectors were particularly disliked in the American colonies after onerous taxes were imposed to fund the Seven Years’ War.⁴⁹ Keeping the British system of common-law damages liability likely seemed a wise and natural check on potential oppression by the new American government.

Moreover, oversight by plaintiffs seeking damages and the courts hearing the cases—whether state courts or federal courts hearing common-law or admiralty and maritime cases⁵⁰—was likely thought desirable because there was little bureaucratic control of federal officialdom in the early republic. By 1801, there were about 1100 U.S. Treasury Department employees focused on import/customs matters, almost all deployed in ports dispersed throughout the large new nation.⁵¹ As Leonard White relates, Americans’ “administrative and technical skills” were “relatively rudimentary,” and “[t]he slowness and unreliability of the means of communication were . . . serious handicaps to the conduct of administration.”⁵² For the first several decades of the new republic, White reports that “[a]dministrative inspection of customhouses was unknown” and the local customhouse was “a self-contained establishment . . . untroubled by Washington.”⁵³

45 See GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 87–88, 102 (Edward Gray, Stephen Mihm & Mark Peterson eds., 2016); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 1789–1801, at 303–04 (The Free Press paperback ed. 1965) (1948).

46 See WHITE, *supra* note 45, at 307 (giving an example).

47 See *id.* at 298; NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 221–22 (2013); Pfander & Hunt, *supra* note 40, at 1869.

48 See WHITE, *supra* note 45, at 317; RAO, *supra* note 45, at 15–17, 63.

49 See RAO, *supra* note 45, at 21–22, 34.

50 The Judiciary Act of 1789 treated cases involving customs seizures on the high seas or waters navigable from the high seas by vessels of ten tons or greater as within the admiralty and maritime jurisdiction of the federal courts, while seizures on other waters or on land were considered to arise under federal statutory law or the common law. See *infra* notes 164–65 and accompanying text.

51 See WHITE, *supra* note 45, at 123.

52 *Id.* at 466, 479.

53 LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801–1829, at 139 (1951).

In the absence of any substantial bureaucratic organization, the courts were necessary to perform many functions. For instance, as Ann Woolhandler recounts, “If an officer who collected money on behalf of the government (such as a postal, customs, or internal revenue official) had a deficiency in his accounts, the government had to initiate a lawsuit against the official to collect the deficiency.”⁵⁴ Judicial oversight could have been thought to create appropriate incentives for good behavior in office. Customs collectors and lower officials were in theory removable from office at the pleasure of the person who appointed them, but “almost universally permanence in lower offices was taken for granted.”⁵⁵ Most government employees at that time were more like part-time contractors than the full-time employees we know today. Nicholas Parrillo refers to government employees in the early republic as “quasi-independent” and “freestanding vendors,” who were only lightly regulated by the legislature.⁵⁶ Many held other jobs in addition to their government office in order to supplement income.⁵⁷ In a new government with only nascent bureaucratization beginning to form, oversight via damages suits was likely thought a salutary measure to ensure that officers followed the law.⁵⁸

In addition, the acquiescence of politically and economically powerful merchants to customs collection was understood to be necessary to make the system work;⁵⁹ if merchants decided to resort to widespread smuggling and subterfuge, the lengthy U.S. coastline and lack of state capacity would have made it very difficult to enforce the law. Perhaps it was thought that allowing easy access to damages suits against collectors who acted illegally or oppressively was one way to achieve legitimacy for the legal system in the eyes of merchants.

Despite the reasons favoring use of officer damages suits against customs collectors, Congress eventually decided that a system based significantly on personal damages liability of government employees was not the best way to supervise collectors and protect the public interest.

C. *Congress’s Gradual Sidelining of Suits for Damages Against Customs Collectors*

Customs or import duties were the largest source of federal revenue until the creation of federal income taxes in 1913 after the Sixteenth Amend-

54 Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 207 (1991).

55 See WHITE, *supra* note 45, at 257.

56 PARRILLO, *supra* note 47, at 12, 16.

57 See WHITE, *supra* note 45, at 296–97.

58 For the same reasons—little bureaucratic oversight over a network of part-time independent contractors motivated by the desire for financial gain—extremely onerous fines and criminal penalties were imposed by Congress on federal officers who failed in their duties. For instance, when it reformed the postal service in 1792, Congress made it a death-penalty crime for a postal official to steal moneys, bills of exchange, or securities from the mails. See Act of Feb. 20, 1792, ch. 7, § 16, 1 Stat. 232, 236.

59 See RAO, *supra* note 45, at 11–13, 76–77, 87–96, 108–11.

ment was adopted.⁶⁰ Collectors could be cowed from collecting necessary, legally imposed revenue by the threat of personal liability.⁶¹ It was important to Congress, therefore, to rationalize the system.

Congress provided protection for reasonable mistakes by collectors by legislating that having probable cause for a seizure, even if it was adjudged ultimately illegal, would bar a damages action against the collector.⁶² In the early years, the prospect of large personal damages liability was also managed with the expedient, approved by the Treasury Department and Congress, of collectors retaining control of import taxes collected, rather than forwarding them to the Treasury, in order to satisfy adverse judgments with public funds.⁶³ But after President Andrew Jackson's appointee as the collector of the Port of New York, Samuel Swartwout, was found to have embezzled a fantastic sum of money⁶⁴—his defalcation aided by his ability to retain possession of public moneys to pay damages judgments—Congress acted. As Mashaw relates, "Congress required that Collectors immediately pay over all funds received to the Treasury of the United States, whether or not those funds were paid under protest or a suit was pending for their recovery."⁶⁵ Collectors were now exposed to potentially dire personal liability for damages. Seemingly in sympathy with their plight, the Supreme Court soon held that Congress had impliedly removed common-law remedies for damages against collectors.⁶⁶ But Congress immediately passed a statute denying that it had intended to bar common-law damages suits.⁶⁷

With collectors now in a precarious position, Congress soon began to move the system decisively away from personal damages liability. Since the turn of the nineteenth century, as James Pfander and Jonathan Hunt document, Congress had indemnified by private bill U.S. officials who were subject to money damages judgments arising out of good faith official conduct;

60 See REED, *supra* note 39, at 9. In the first two decades of the nineteenth century, customs receipts constituted over ninety percent of all federal revenue. See Peter M. Gerhart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y INT'L BUS. 1101, 1105 n.12 (1977).

61 See, e.g., WHITE, *supra* note 53, at 153–56 (reviewing the case of Collector of the Port of New York David Gelston, undisputedly "diligent and honest," who nevertheless suffered enormous personal liabilities from his job).

62 See Act of Mar. 2, 1799, ch. 22, §§ 50, 70–71, 1 Stat. 627, 665, 678; see also *Sixty Pipes of Brandy*, 23 U.S. (10 Wheat.) 421, 426–27 (1825) (discussing these provisions). For another statute with probable cause protection for collectors, see Act of Feb. 24, 1807, ch. 19, § 1, 2 Stat. 422, 422–23.

63 See WEBSTER ELMES, *A TREATISE ON THE LAW OF THE CUSTOMS* 301 (Boston, Little, Brown & Co. 1887); Pfander & Hunt, *supra* note 40, at 1875.

64 See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275 (1856) (noting that the Treasury found that Swartwout had embezzled \$1,374,119).

65 Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1677 (2008).

66 See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 252 (1845); see also ELMES, *supra* note 63, at 301 (discussing this development).

67 See *Curtis's Adm'x v. Fiedler*, 67 U.S. (2 Black) 461, 478–79 (1862) (discussing Act of Feb. 26, 1845, ch. 22, 5 Stat. 727).

but the process of receiving reimbursement from the legislature was often protracted, and only about sixty percent of claims were ever paid.⁶⁸ So collectors and other federal officers who were frequently sued must have acutely felt the danger to their estates posed by their jobs.

The modern system, which largely substitutes administrative process with limited judicial review for damages suits, began in 1857, when certain decisions of collectors were made final, subject to administrative appeals to the Secretary of Treasury.⁶⁹ Then in 1864, Congress largely repealed the common-law right of action against the collector for disputes about import duties, and substituted review by the Secretary of the Treasury and subsequent judicial review of that administrative determination.⁷⁰ Congress also provided that any damages judgments against collectors personally must be paid by the United States.⁷¹ Then in 1890, a major statutory change channeled all disputes about the amounts of tax payments due and appraisal of merchandise into an administrative process with a new system of appraisers, subject to judicial review in the federal circuit courts; the personal liability of collectors for those types of disputes was confirmed to be abolished.⁷²

Some personal damages liability remained for customs officers. Congress allowed tort suits or claims against collectors who wrongfully seized vessels or goods.⁷³ And the Supreme Court soon held that tort suits were still allowed in cases concerning import duties if the question was whether or not the goods were in fact imported; if not actual imports, they were not covered by the new administrative process in the 1890 Act.⁷⁴

Additional statutory changes would soon obviate the need for most of the remaining bases for damages litigation against collectors personally. Congress in the early twentieth century enacted detailed provisions requiring forfeiture proceedings to be instituted in the U.S. district courts for any ves-

68 See Pfander & Hunt, *supra* note 40, at 1866–67.

69 See ELMES, *supra* note 63, at 302. Earlier than this, the U.S. government could use summary nonjudicial remedies against its officers to recover funds owed to the Treasury. See, e.g., Act of May 15, 1820, ch. 107, § 2, 3 Stat. 592 (authorizing use of a distress warrant to recover funds owed to the United States by collectors of revenue and other receivers of public money).

70 See *Arnson v. Murphy*, 109 U.S. 238, 241–42 (1883) (explaining the import of the 1864 statute).

71 See 13 Rev. Stat. § 989 (2d ed. 1878). Even before this statute, courts stated that damages judgments against collectors would be paid out of the U.S. Treasury. See *Mason v. Kane*, 16 F. Cas. 1044, 1046 (C.C.D. Md. 1851) (No. 9241) (Taney, Circuit Justice) (“[T]his suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States; the money is in the treasury, and must be paid from the treasury, if the plaintiffs recover.”).

72 See Act of June 10, 1890, ch. 407, §§ 12–14, 25, 26 Stat. 131, 136–38, 141. Congress reiterated the abolition of customs collector personal liability in these circumstances in later statutes. See, e.g., Tariff Act of 1922, ch. 356, §§ 513–14, 42 Stat. 858, 969–70.

73 See § 21, 26 Stat. at 140; see also *In re Fassett*, 142 U.S. 479, 481, 484 (1892) (allowing suit for marine tort against customs collector who seized a pleasure yacht on allegation it was a dutiable imported good).

74 See *De Lima v. Bidwell*, 182 U.S. 1, 177–80 (1901).

sels, vehicles, or goods valued at \$1000 or more and found by customs collectors to be forfeitable.⁷⁵ This meant that judicial review was quickly available to importers in many cases of seizure, without the need for the importer to go the trouble of initiating suit. For items of lesser value, petitions to the Secretary of the Treasury (for disputes about seizures under import laws) and the Secretary of Commerce (for same under navigation laws) allowed administrative recovery of money for wrongful forfeitures and summary sales, again obviating resort to court if these remedies proved sufficient.⁷⁶ Some bit of interstitial damages liability seemingly remained for Treasury employees involved in customs enforcement because Congress in its 1948 reorganization of the federal judiciary provided that no suit shall lie against federal officers on account of a seizure or forfeiture, providing that a court found that there had been reasonable cause to proceed.⁷⁷ Only the little bit of federal officer tort liability not covered by these statutes was left to be finally removed by the 1988 Westfall Act.

* * *

This case study of customs litigation problematizes the narrative of proponents of the historical turn in *Bivens* scholarship and advocacy. Simply because officer suits for damages were common in the early republic provides little reason to think that they make sense today. The conditions that led to widespread reliance on damages litigation against collectors in the early republic changed over the nineteenth century. The system was unfair to collectors, who could be subject to ruinous personal liability simply for doing their jobs. It was unfair to importers, whose only legal recourse for government wrongdoing might be suit against a judgment-proof individual officer. It was inefficient and unpredictable, because binding legal determinations about the meaning and application of the customs laws were made by collectors dispersed throughout the United States, rather than being centralized in the upper echelons of the Treasury Department headquarters. Early and easy resort to the courts likely did not serve the best interests of anyone involved. The rise of bureaucratization and speedier communications made different, more efficient methods of overseeing customs employees possible. If the lack of nonconstitutional damages liability for federal officers is today a problem, the Westfall Act and the 99th Congress that enacted it do not deserve all of the blame. Many Congresses over many years contributed to the decisions to sideline damages lawsuits against collectors in favor of more rational forms of legal and bureaucratic control. And the claim that a long-standing tradition of officer damages liability suggests the legitimacy of a robust *Bivens* doctrine today must grapple with the countertradition—the long practice of Congresses over many years of limiting officer liability.

75 See, e.g., Tariff Act of 1922 §§ 594, 604, 612; Tariff Act of 1930, ch. 497, §§ 592, 602, 604, 607–08, 46 Stat. 590, 750–51, 754–55.

76 See Tariff Act of 1922 § 613; Tariff Act of 1930 § 618.

77 See Act of June 25, 1948, ch. 646, § 2465, 62 Stat. 869, 975.

II. REVISING COMMON CLAIMS ABOUT FEDERAL OFFICER DAMAGES LITIGATION: THE EXAMPLE OF MARITIME SEIZURES

This Part uses a case study of marine tort⁷⁸ claims arising out of maritime seizures by U.S. naval and customs officers to critique several common claims made about early republic federal officer damages litigation. Maritime seizure litigation was very common in the early republic, because in both wartime and peacetime the law gave U.S. officers significant financial incentives to seize vessels and cargo.⁷⁹ The scholarly claims critiqued here are, in brief, that federal and state courts (1) applied “judge-made” law, with the implication that the judiciary independently decided that damages liability for federal officers was appropriate; (2) assessed only legality (what I call the “pure legality” claim), granting officers no immunity of any kind, not considering it their job to qualify tort liability with reference to any policy considerations related to government efficiency, fairness to officers, or the like; and (3) adjudicated damages claims against federal officers anywhere, in any context, brought by plaintiffs irrespective of their nationality.

I will first describe these claims made by current scholars and advocates who seek broader *Bivens* liability in more detail, and then show how the history of judicial and political branch actions in the maritime seizure context revises that narrative. In brief, (1) there was pervasive political branch endorsement of federal officer tort liability in the early republic, meaning that courts hearing damages suits or claims against U.S. officers were acting as instruments of political branch policy, not as independent guardians of rights against the wishes of the political branches; (2) courts actually did grant immunity that looks similar to modern qualified immunity in some instances, apparently because of concerns that the specter of personal damages liability could “dampen the ardor”⁸⁰ of U.S. naval officers; and (3) not all plaintiffs could bring tort suits against federal officers—in particular, alien enemies in wartime were excluded from litigation in U.S. courts.

78 In the eighteenth and nineteenth centuries, the time period covered by this Essay, “marine tort” was a common name for a compensable injury to person or property that had occurred during a maritime seizure. Such marine tort claims could be pursued in admiralty court. They are thus different than common-law forms of action for tort such as trespass *vi et armis*. See *infra* note 103 and accompanying text.

79 In wartime, U.S. naval officers and crew received “prize money” when a vessel or cargo they seized, under substantive rules provided by the law of nations, was found by a U.S. admiralty court to be a valid prize of war. See *infra* note 104–07 and accompanying text. Stated simply, officers and crew split the proceeds with the U.S. government. See, e.g., Act of Mar. 2, 1799, ch. 24, § 6, 1 Stat. 709, 715–16 (providing detailed rules of division). Similar rules incentivized seizures under customs and navigation laws.

80 *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)) (describing poor incentives for officials created by personal damages liability).

A. *The Claim: A Pure Legality Model of Worldwide Liability of U.S. Officers Under Judge-Made Tort Law*

One of the core claims made by recent scholarly works using the history of officer suits to argue for broadened availability of *Bivens* is that

[n]ineteenth century courts passed solely on the issue of legality and left the task of determining issues of good faith, immunity, and indemnity to the legislative branch. The task of balancing the interest of the victim in vindication of his rights and that of the officer in securing protection against liability for actions in the course of employment fell to Congress.⁸¹

As another work put it, “[e]xecutive officials were . . . not entitled to any immunity at all but were instead strictly liable for torts committed in excess of their authority or otherwise contrary to law.”⁸² And similarly, “[c]ourts in this era were not insensitive to the situation facing federal officers subject to personal liability for acting in good-faith (but erroneous) reliance on federal law or instructions, but they did not think such concerns could or should stop the courts from providing a damages remedy.”⁸³

Frequently cited cases include some involving maritime captures. *Little v. Barreme*,⁸⁴ decided in 1804, held a U.S. Navy officer liable for damages for a maritime trespass after he wrongfully seized a neutral ship during the Quasi-War with France.⁸⁵ The officer had conformed to orders from the Secretary of the Navy, but violated a statute.⁸⁶ As Chief Justice Marshall explained: “If [an officer’s] instructions [from the executive branch] afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him.”⁸⁷

Another case frequently cited also grew out of the Quasi-War, *Murray v. Schooner Charming Betsy*⁸⁸ of 1804. As in *Little*, a U.S. naval officer whose warship wrongfully captured a neutral vessel pursuant to superior orders that swept more broadly than statutory authority was ordered to pay damages.⁸⁹ More or less the same fact pattern produced another damages judgment against a naval officer in another oft-cited Supreme Court decision, *Maley v. Shattuck*⁹⁰ of 1806.

Finally, the frequently cited decision in *The Apollon* was issued in 1824, arising from a wrongful seizure of a French ship in Spanish waters for suspected violation of U.S. import and revenue statutes.⁹¹ The commander of

81 Pfander, *supra* note 10, at 1395.

82 Vázquez & Vladeck, *supra* note 10, at 534.

83 Brief of Vázquez & Bernstein, *supra* note 10, at 11.

84 6 U.S. (2 Cranch) 170 (1804).

85 *See id.* at 176, 179.

86 *See id.* at 176–77.

87 *Id.* at 178.

88 6 U.S. (2 Cranch) 64 (1804).

89 *See id.* at 88, 107.

90 *See* 7 U.S. (3 Cranch) 458, 492 (1806).

91 22 U.S. (9 Wheat.) 362, 363, 367, 372 (1824).

the U.S. vessel was held responsible for damages.⁹² Proponents of broad *Bivens* liability cite Justice Story's opinion, which "dismissed the diplomatic ramifications,"⁹³ and refused to "stretch the law to accommodate the interests of the government in national security or tax collection or what have you."⁹⁴ Instead, Justice Story explained that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress" in damages.⁹⁵

This "pure legality" view of the role of federal and state courts in damages actions against federal officials accurately describes a good deal of caselaw in the early nineteenth century. But during the Taney Court, as Ann Woolhandler has shown, the Supreme Court also started employing a "discretion" model which immunized officials, particularly senior-level ones, in situations in which the Court found that the law had granted discretionary room for judgment to be exercised.⁹⁶ Woolhandler agrees with Pfander, Vladeck, and other scholars, however, that the pure legality model dominated during the Marshall Court.⁹⁷

A central tenet of the pure legality claims made by many of these scholars is that courts in the early republic applied tort law to federal officers for conduct occurring anywhere in the world, in any context, against any person. For example, as Carlos Vázquez and Anya Bernstein put it, the "robust framework for official liability applied . . . to the actions of federal officers outside the Nation's borders, often in the midst of armed conflict, and where foreign nationals and sensitive diplomatic relationships were involved"—"wherever the misconduct occurred and whomever the officers injured."⁹⁸ As Pfander writes, the "common-law model" featured personal tort liability "whenever an official of the United States invaded the legal rights of an individual (even a foreign citizen or subject who suffered losses on the high seas or in a foreign port of call, well outside the territory of the United States)."⁹⁹

The following Sections seek to complicate and qualify these claims by examining judicial and political branch actions with regard to damages liability for seizures outside U.S. territorial waters by naval officers and revenue collectors during war or other situations in which armed conflict might erupt.

B. *The Existence of Judicially Crafted Immunity*

As I have said, the claims made by scholars and advocates leading the historical turn in *Bivens* and qualified immunity analysis contain a large

92 See *id.* at 378–80.

93 Vladeck, *supra* note 10, at 268.

94 PFANDER, *supra* note 10, at 15.

95 *The Apollon*, 22 U.S. (2 Cranch) at 367.

96 See Woolhandler, *supra* note 20, at 422–29.

97 See *id.* at 414–22.

98 Brief of Vázquez & Bernstein, *supra* note 10, at 4, 9.

99 PFANDER, *supra* note 10, at xviii–xix.

amount that is accurate and useful. But the historical record reveals additional nuance and complexity. In maritime seizures arising under domestic regulatory statutes concerning taxes, licensing, embargoes and the like, U.S. courts—for the most part—applied the “pure legality” model. Congress having legislated, sometimes in great detail, about the substantive law and process to be followed upon seizure, the courts seemingly treated it as Congress’s job also to provide any immunity or indemnity to U.S. officials. Pfander has written in illuminating detail about Congress’s role in ex post indemnification of federal officers who were held liable for damages.¹⁰⁰ But the pure legality model does not accurately describe all types of damages litigation against U.S. officers in the early republic.

A commonly cited example of courts refusing to immunize is the Supreme Court’s decision in *The Apollon*, discussed above. Pfander, for example, uses *The Apollon* as a leading example of the nineteenth-century model of adjudication of damages claims against federal officers. Under the model, according to Pfander, “the job of the courts was to pronounce the law and to leave matters of policy, military necessity, and indemnity to the political branches.”¹⁰¹ He continues that “courts owe a narrow duty to the law as stated and cannot bend and stretch the law to accommodate the interests of the government.”¹⁰² And he further contends that nineteenth-century courts did not “view themselves as properly situated to recognize judge-made immunity defenses for officials who committed reasonable errors of law in carrying out their mission.”¹⁰³

But outside the context of municipal-law seizures under Congress’s revenue and other regulatory statutes, the federal judiciary was sometimes active in protecting officers with immunity if they acted reasonably and in good faith. The most high-stakes context in which U.S. officers seized vessels and their cargoes for potential judicial condemnation and sale was during wartime. A vessel that was a lawful target of capture during war, under the international laws of war, was called a prize. As Tom Lee explains, under the law of prize in the early republic, “a combatant vessel had the right to capture enemy vessels and to stop and search the merchant ships of a neutral sovereign for war contraband,”¹⁰⁴ or enemy goods.¹⁰⁵ Enemy vessels, contraband cargo, and neutral or friendly vessels violating the laws of maritime war—for instance, by attempting to run a blockade—could be seized.¹⁰⁶ The vessels

100 See Pfander & Hunt, *supra* note 40, at 1866–71.

101 PFANDER, *supra* note 10, at 13.

102 *Id.* at 15.

103 *Id.* at 16.

104 Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 869 (2006).

105 See ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 69 (2017); Ryan C. Williams, “Judicial Role” and Judicial Duty in Foreign Affairs, 43 FORDHAM INT’L L.J. 1235, 1241 (2020).

106 See, e.g., WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 37–38 (2006); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1334 (1996); Lee, *supra* note 104, at 869. For an excellent

or cargo were then subject to judicial condemnation by the filing of a libel in admiralty court.¹⁰⁷ Damages liability for capturing officials arose because the laws of maritime warfare provided that neutral or friendly persons whose vessels, cargo, or bodies were harmed during the seizure and detention could make a claim for damages and costs in admiralty court.¹⁰⁸

Contrary to the claims that courts in the early republic applied no immunity doctrines, it was firmly established that, in cases of prize seizures during war, if “there was probable cause of seizure, the captors are completely justified and exonerated from all consequential damages.”¹⁰⁹ As the Court in *The Apollon* put it, “no principle is better settled in the law of prize” than the rule that, “[i]f there be probable cause, the captors are entitled, as of right, to an exemption from damages,”¹¹⁰ even though the vessel turned out not to have been legally seized. Probable cause was a low bar—a seizure made under circumstances which warrant suspicion.¹¹¹ Among other things, probable cause protected against damages when the seizing captain made “an honest mistake of the law.”¹¹²

Probable cause relieving the officer from damages was a judge-made doctrine of the law of nations that provided a kind of immunity to U.S. government captors who reasonably but erroneously thought that a vessel was a lawful wartime prize. It seems quite likely that the desire to incentivize vigorous prosecution of naval warfare is the primary policy reason justifying this rule. As a further inducement to vigor, admiralty courts also applied the rule

overview of the international law of prize that the United States inherited from Great Britain, see Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMPAR. L. REV. 445 (1995).

107 See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1369 (2015). The same judicial process was used when privateers rather than naval officers made the prize capture. See Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 391 (2017).

108 See Lee, *supra* note 104, at 880. Although such a claim is often described by modern scholars as a “common law” action in tort, see, e.g., Fallon, *supra* note 14, at 943, this is inaccurate. See *Le Caux v. Eden* (1781) 99 Eng. Rep. 375, 375–76, 378–79; 2 Dougl. 594, 595–96, 600–01 (explaining that “costs and damages” against the captor who made an unjustified prize seizure are available in admiralty court but not by suit at common law).

109 *The Rover*, 20 F. Cas. 1277, 1278 (C.C.D. Mass. 1814) (No. 12,091) (Story, J.); see also *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 28–29 (1807) (“A belligerent cruiser who with probable cause seizes a neutral and takes her into port for adjudication, and proceeds regularly, is not a wrong doer. The act is not *tortious*.” (emphasis in original)); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 31–32 (1801) (“It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe the vessel met with at sea, is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts.”). Captors under the maritime laws of war were financially responsible only “for two things, for safe and fair custody” after a seizure was made. *Burke v. Trevitt*, 4 F. Cas. 746, 748 (C.C.D. Mass. 1816) (No. 2163) (Story, J.).

110 *The Apollon*, 22 U.S. (9 Wheat.) 362, 372 (1824).

111 See *The La Manche*, 14 F. Cas. 965, 968 (D. Mass. 1863) (No. 8004); *The George*, 10 F. Cas. 201, 202 (C.C.D. Mass. 1815) (No. 5328) (Story, J.).

112 *The La Manche*, 14 F. Cas. at 972.

that if government captors had more than probable cause—had facts before them justifying “strong and vehement suspicion” that a vessel was a lawful prize of war—even if ultimately found wrong by the admiralty court—the captors were not only exempted from damages but could also recover affirmatively from the owner of the vessel “costs and expenses in proceeding to adjudication.”¹¹³

The courts did not stop there in adjusting the law to protect U.S. officials, consistent with international law. The Supreme Court in the early nineteenth century extended the “probable cause” immunity from the prize or *jure belli* (international laws of war) context to some seizures under domestic statutes.

Consider the case of *The Marianna Flora*.¹¹⁴ While the U.S. warship *Alligator* was cruising the Atlantic, it crossed paths with a vessel lacking a visible national flag, and which appeared to be in distress.¹¹⁵ As the *Alligator* approached, the unknown vessel starting firing cannon rounds and grape shot.¹¹⁶ Thinking he was being attacked by either a pirate or a slave trader, Lt. Stockton commanding the *Alligator* decided to subdue the vessel.¹¹⁷ After it surrendered, the *Marianna Flora* raised a Portuguese flag and told the *Alligator* that it was a merchant vessel and had mistaken the *Alligator* for a pirate.¹¹⁸ Not impressed with this explanation, Lt. Stockton directed the *Marianna Flora* to be carried into a U.S. port, where a libel in admiralty was filed to condemn the vessel and cargo under an 1819 Act of Congress.¹¹⁹ Congress had provided that “any armed vessel or boat . . . which shall have attempted or committed any piratical aggression” may be captured by the U.S. navy and “brought into any port of the United States . . . [and] adjudged and condemned . . . after due process and trial, in any court having admiralty jurisdiction,” with the proceeds split between the United States and the capturing U.S. crew.¹²⁰

The Supreme Court held that the *Marianna Flora* had not committed “piratical aggression” under the statute, because it “made a mediated, and, in a sense, a hostile attack, upon the *Alligator*” but “upon a mistake of the facts, under the notion of just self-defence, against what the master [of the *Marianna Flora*] very imprudently deemed a piratical cruiser.”¹²¹ Having won on the main issue, the owners of the *Marianna Flora* sought damages from Lt.

113 *The Apollon*, 22 U.S. at 373. See also HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 285 (New York, R. M'Dermut & D.D. Arden 1815) (stating that, when a seizure was justifiable because of misconduct of the seized vessel, the owners must pay the captor's legal expenses even if ultimately a court finds no legal cause to condemn the vessel or cargo).

114 *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826).

115 See *id.* at 39, 45–46.

116 See *id.* at 4–6.

117 See *id.* at 39.

118 See *id.* at 46.

119 See *id.* at 5–6, 46; Act of Mar. 3, 1819, ch. 77, §§ 2–4, 3 Stat. 510, 512–14.

120 §§ 2, 4, 3 Stat. at 512–14.

121 *The Marianna Flora*, 24 U.S. (11 Wheat.) at 39 (emphasis added).

Stockton, arguing that both the initial seizure and the sending in for adjudication were clearly unlawful and therefore Lt. Stockton should be strictly liable.¹²² He would have been if this were an ordinary case of a peacetime seizure, because the *Marianna Flora* was not condemnable under U.S. statutes and no immunity defense would have been available.

But the Supreme Court rejected the claim for damages.¹²³ Lt. Stockton was authorized under the law of nations to approach the *Marianna Flora* to observe whether it appeared to be a pirate vessel, or to render aid to a vessel in distress.¹²⁴ When Lt. Stockton lawfully approached, the Portuguese ship—observed to be armed, “full of men,” flying no national flag, and seeming to have feigned distress as a decoy—opened fire on the *Alligator*.¹²⁵ The American commander’s duty, said the Supreme Court, was “to oppose force [with] force.”¹²⁶ Having been attacked “in a hostile manner, without any reasonable cause or provocation,” Lt. Stockton had to decide whether the *Marianna Flora* was condemnable under Congress’s statute.¹²⁷ The Court noted the difficulties faced by commanders who must “draw conclusions at sea, with very imperfect means of ascertaining facts and principles.”¹²⁸ It noted the difficulty of forcing a commander to “exercise the discretion intrusted to him at the peril of damages, because a Court of law might ultimately decide, that he might well have exercised that discretion another way.”¹²⁹ The Court noted “the real difficulties of Lieutenant Stockton’s situation,” because he might have thought that the unprovoked and unreasonable assault on a U.S. naval vessel was “an indignity to the nation” which his duty required him to remedy.¹³⁰ The Court pointed out that it was conceded by all that Lt. Stockton had acted “with honourable motives, and from a sense of duty to his government.”¹³¹ And the Court pointed out that Lt. Stockton’s situation was even more difficult because “the case was confessedly new in its character and circumstances,” and that being “the first case of the kind” should have a bearing on the question of damages.¹³² For these reasons, no damages would be assessed against Lt. Stockton.¹³³ The Supreme Court soon reaffirmed these rules from the *Marianna Flora* in a decision in the *Palmyra*, another case arising under the antipiracy statute.¹³⁴

The Court’s discussion sounds very much like both today’s objective “no clearly established law” immunity, which protects officers from damages lia-

122 See *id.* at 41.

123 See *id.* at 58.

124 *Id.* at 44–45.

125 See *id.* at 46.

126 *Id.*

127 *Id.* at 49.

128 *Id.* at 52.

129 *Id.*

130 *Id.* at 53.

131 See *id.* at 52.

132 *Id.* at 53, 55.

133 See *id.* at 55–58.

134 See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 16–18 (1827).

bility “when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,”¹³⁵ and the subjective, good faith component of immunity which the Supreme Court initially required as well.¹³⁶ It is notable that the Court crafted and applied immunity doctrines protecting U.S. officers from personal damages liability in very high-stakes contexts. Vigor in pursuing piracy suppression and commercial warfare against enemy shipping during war were national interests of the highest order for the young American republic. The cases might be said to teach that when government efficiency and energy really mattered, the Court was willing to craft immunity doctrines for federal officials to protect those values.

C. Pervasive Political Branch Endorsement of Officer Damages Liability for Maritime Seizures

Although some commentators have argued that the Westfall Act’s carve-out for constitutional claims¹³⁷ is an endorsement of across-the-board availability of *Bivens*,¹³⁸ the Supreme Court disagrees. Most recently, in 2020 the Court stated that the statute “simply left *Bivens* where it found it. It is not a license to create a new *Bivens* remedy in a context we have never before addressed.”¹³⁹ Supreme Court decisions for decades have opined that, in almost all cases, the job of deciding whether to subject federal officers to personal damages liability is one for Congress, not the courts¹⁴⁰—suggesting that it views Congress as failing to have endorsed *Bivens*.

Some scholars and advocates have responded that the history, dating back to the Founding and beyond, of damages liability for government officers shows the propriety of the judiciary—instead of or in addition to Congress—taking the lead in determining what kind of remedies for official misconduct should be allowed. These claims often imply or assume that, having both a kind of quasi-originalist pedigree and a longstanding customary existence over the centuries, a leading judicial role has been accepted as a foundational part of our constitutional system. A key aspect of this claim is that early republic damages liability doctrines were “judge-made.”¹⁴¹ And as

135 *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)).

136 See *Scheuer v. Rhodes*, 416 U.S. 232, 245–48 (1974); *Butz v. Economou*, 438 U.S. 478, 507 (1978). On the Court’s decision to eliminate the subjective good faith component, see, for example, John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

137 See Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified as amended at 28 U.S.C. § 2679) (preserving any civil action against a federal officer acting within the scope of his or her employment “brought for a violation of the Constitution of the United States”).

138 See Pfander & Baltmanis, *supra* note 24, at 132–38.

139 *Hernández v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020).

140 See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

141 See *supra* note 26 and accompanying text.

Steve Vladeck has put it, common-law damages suits against federal officers were a “jurisprudence of private litigation against federal officers without any regard for congressional intent.”¹⁴²

This Section seeks to qualify that claim. Of course, it is true that common-law courts in England, and later in the North American colonies and the United States post-independence, played the leading role in creating (and modifying) damages claims for tortious and other wrongs. But, in the context of damages actions arising from maritime seizures, the substantive law applied by courts was decisively shaped by the customs and practices of maritime nations of Europe over the centuries—law created and developed in judicial decisions to be sure, but also in statutes, international treaties, and executive practice. The courts of the United States applied, sometimes with slight modifications, a preexisting body of international law. And most crucially for my purposes in this Essay, the application of the international law of maritime seizures, and the forms of action and remedies for damages by overzealous or malicious government officials, received repeated endorsement from the political branches of the U.S. government.

The political endorsement started right as the United States declared independence. In 1776 the Continental Congress appointed a committee comprised of John Dickinson, Benjamin Franklin, John Adams, Benjamin Harrison, and Robert Morris to draft a template for treaties that the new United States wished to sign with France and other friendly European powers.¹⁴³ Generally referred to as the Model Treaty or Plan of Treaties, one provision of this model provided that the United States and its treaty partner shall forbid their men of war and privateers from “doing any Injury, or Damage to the other Side,” and “if they act to the contrary, they shall be punished, and shall more over be bound to make Satisfaction for all matter of Damage, and the Interest thereof, by Reparation, under the Pain and Obligation of their Person and Goods.”¹⁴⁴ Thus, the United States contemplated affirmatively binding itself by treaty to provide a damages remedy against its naval commanders and privateers if they caused unjustified injury while carrying out maritime seizures and other operations.¹⁴⁵ The duty of a nation to provide a damages remedy was established in preexisting international mari-

142 Stephen I. Vladeck, *Bivens Remedies and the Myth of the “Heady Days,”* 8 U. ST. THOMAS L.J. 513, 516 (2011).

143 See *Editorial Note*, in 4 PAPERS OF JOHN ADAMS (Robert J. Taylor, ed., digital ed.), <http://www.masshist.org/publications/adams-papers/index.php/view/PJA04d170>.

144 Plan of Treaties, art. XVII (July 18, 1776), *reprinted in* 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 576, 582 (Worthington Chauncey Ford ed., 1906). The plan was adopted in September, 1776. See *id.* at 768.

145 The model treaty provision appears to have been copied from English treaties with European powers. See, e.g., Marine Treaty, Gr. Brit.-United Provinces, art. IX, Dec. 1, 1674, *reprinted in* A COMPLETE COLLECTION OF ALL THE MARINE TREATIES SUBSISTING BETWEEN GREAT-BRITAIN AND FRANCE, SPAIN, PORTUGAL, AUSTRIA, RUSSIA, DENMARK, SWEDEN, SAVOY, HOLLAND, MOROCCO, ALGIERS, TRIPOLI, TUNIS, ETC. COMMENCING IN THE YEAR 1546, AND INCLUDING THE DEFINITIVE TREATY OF 1763, at 85, 91–92 (London, D. Steel, 1779).

time law,¹⁴⁶ but the nascent United States wanted to confirm its existence and the country's willingness to be bound.

This political endorsement of a judicial damages remedy against wayward naval officers and privateers did not stay in the realm of theory. The United States proposed a treaty to Denmark in 1783 that was based on the 1776 model.¹⁴⁷ And provisions like that outlined in the Plan of Treaties from 1776 were placed in ratified treaties with most of the important European military and commercial powers: France (1778), the Netherlands (1782), Sweden (1783), Prussia (1785), and Great Britain (1794).¹⁴⁸ The Continental Congress had hoped that treaties of commerce and amity, containing the provisions about damages, would also be concluded with other states such as "Russia, the Emperor of Germany for his Austrian possessions, . . . Hamburg . . . Spain, Portugal, Genoa, Tuscany, Rome, the two Sicilies, Venice, Sardinia and the Ottoman Porte."¹⁴⁹ Moreover, the Continental Congress issued a proclamation during the Revolutionary War to "all captains, commanders and other officers and seamen belonging to any American armed vessels," enjoining them to respect the maritime commerce of neutral nations, or pain of criminal punishment and personal damages liability.¹⁵⁰ Under the law of nations at the time, the United States was responsible internationally for any damages sustained by nonenemies during prize seizures;¹⁵¹ these treaty provisions and other political acts were confirmation of the United States' intent to comply with its international obligations by providing judicial redress.

The new Constitution of 1787 continued the process of political endorsement of judicial policing of U.S. maritime seizures, as required by the

146 See, e.g., *The Invincible*, 13 F. Cas. 72, 74–75 (C.C.D. Mass. 1814) (No. 7054) (Story, J.) (stating "the admiralty courts of every country have general jurisdiction in all cases of torts committed on the high seas, wherever the person or thing, by which the tort is committed, is within the territory" and questions of "damages" are "as an incident to the general jurisdiction of such courts"), *aff'd* 14 U.S. (1 Wheat.) 238 (1816); RICHARD LEE, A TREATISE OF CAPTURES IN WAR 239–41 (London, W. Sandby, 1759) (stating that costs and damages are available from an admiralty court when a wrongful capture of a vessel is made in war); WHEATON, *supra* note 113, at 280–81 (suggesting that states have a duty to have prize cases adjudicated in a proper court which can award "compensation in damages for [an] unjust seizure and detention").

147 See NAT'L ARCHIVES, *Editorial Note*, FOUNDERS ONLINE <https://founders.archives.gov/documents/Adams/06-16-02-0242-0001> (last visited Mar. 3, 2021).

148 See Treaty of Amity and Commerce, Fr.-U.S., art. XVII, Feb. 6, 1778, 8 Stat. 12, 22; Treaty of Amity and Commerce, Neth.-U.S., art. XIII, Oct. 8, 1782, 8 Stat. 32, 40; Treaty of Amity and Commerce, Swed.-U.S., arts. XIII & XV, Apr. 3, 1783, 8 Stat. 60, 68–70; A Treaty of Amity and Commerce, Prussia-U.S., art. XV, Sept. 10, 1785, 8 Stat. 84, 92; Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. XIX, Nov. 19, 1794, 8 Stat. 116, 126 (Jay Treaty).

149 Friday, April 2, 1784, *reprinted in* 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 180, 180 (Gaillard Hunt ed., 1928).

150 See A Proclamation (May 9, 1778), *reprinted in* 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 486, 486 (Worthington Chauncey Ford ed., 1908).

151 Cf. Clark, *supra* note 106, at 1335.

law of nations. As Anthony Bellia and Bradford Clark have written, in provisions of Article III including the grant of federal jurisdiction over “all Cases of admiralty and maritime Jurisdiction,”¹⁵² “the Constitution enlisted the federal judiciary to apply the law of nations as a set of default rules in certain types of cases.”¹⁵³ The law of nations at that time “was understood to arise variously from custom and practice, natural law, and mutual compacts and conventions.”¹⁵⁴ Nations had strong incentives to follow and apply the law of nations to disputes of a transnational nature, because applying such law “fostered peaceful relations and international commerce.”¹⁵⁵ The law of prize was one aspect of the law of nations applied frequently by U.S. courts in the early republic. The knowledge of admiralty and prize law by the Constitution’s drafters cannot be doubted. Out of the fifty-five men who attended the Constitutional Convention in Philadelphia, twenty “either had practiced before the federal admiralty courts or had served as judges thereof.”¹⁵⁶

“Admiralty courts took care in adjudicating questions of prize because mistakes could trigger or escalate a war.”¹⁵⁷ In addition, judicial oversight was crucial to the success of the political objectives that led the government to authorize its agents to make maritime seizures. Obtaining a judicial decree of condemnation for a captured vessel or cargo, in conformity with international law, was needed in order to transfer legal title of a prize to a buyer.¹⁵⁸ Thus, judicial review was needed in order to fully monetize a capture; without title from a prize court, an illegal sale transferring only bare possession of a vessel would net far less money for the captors.¹⁵⁹ Judicial review also had “the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other nations.”¹⁶⁰ To the former point, the Supreme Court noted U.S. naval officers and privateers “will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the Courts of their own nation, and under the very eye of the sovereign, under whose sanction they are committing hostilities.”¹⁶¹ Since neutral shipping was often seized during wartime for violating blockades or the like, keeping these neutral

152 U.S. CONST. art. III, § 2, cl. 1.

153 BELLIA & CLARK, *supra* note 105, at xx.

154 *Id.* at 1.

155 *Id.* at 6.

156 Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1429 (citing HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775–1787*, at 328–31 & nn.22–24, 26 (1977)). As Holt explains, the number is large because, for a time, committees of the Continental Congress were the appellate bodies hearing admiralty cases. *See id.* at 1429 n.24.

157 BELLIA & CLARK, *supra* note 105, at 8.

158 *See, e.g.*, CASTO, *supra* note 106, at 37–38; Williams, *supra* note 105, at 1241–43.

159 *See* CASTO, *supra* note 106, at 37–38, 80–81; MATTHEW P. HARRINGTON, *JAY AND ELLSWORTH, THE FIRST COURTS: JUSTICES, RULINGS, AND LEGACY* 144 (2008).

160 *Cushing v. Laird*, 107 U.S. 69, 76 (1883).

161 *The Estrella*, 17 U.S. (4 Wheat.) 298, 308 (1819).

nations neutral—rather than disposed to go to war against the United States—was furthered greatly by the deterrence, return of wrongfully seized property, and compensation for damages that courts provided.¹⁶²

Starting immediately in 1789, the first Congress under the new Constitution formalized the enlistment of the courts to apply the international laws governing maritime seizures. Congress created courts, provided jurisdiction, and gave guidance on procedure, but essentially delegated to the courts to provide substantive law to govern admiralty disputes.¹⁶³ The Judiciary Act of 1789 provided that the federal district courts would have “exclusive original cognizance” of civil suits arising under admiralty law filed by the United States or anyone else, and all suits to determine the legality of “all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas,” and all other seizures for violations of U.S. law.¹⁶⁴ But suits seeking traditional common-law remedies—such as trespass suits against customs collectors—might be filed in other courts, such as state courts.¹⁶⁵

Congress followed these grants of jurisdiction with a temporary and then a permanent process act. The temporary Act required that in the federal courts “forms and modes of proceedings” in common-law actions should follow the law of the state in which the court sat, whereas “in cases of . . . admiralty and maritime jurisdiction,” they “shall be according to the course of the civil law.”¹⁶⁶ In 1792, the permanent Act continued the same rule in common-law cases and provided that federal courts hearing admiralty cases would apply “forms of writs, executions and other process . . . according to the principles, rules and usages which belong to . . . courts of admiralty . . . as contradistinguished from courts of common law,” while granting the federal courts ability to make “alterations and additions as the said courts respectively shall in their discretion deem expedient.”¹⁶⁷

In the early republic period, Congress enacted some statutes providing substantive law to govern for prize cases or cases of seizures under navigation,

162 See PARRILLO, *supra* note 47, at 313–14 (discussing the great irritation of neutral powers caused by maritime commerce raiding by belligerents); see also HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 388 n.1, at 480 (Richard Henry Dana, Jr. ed., Boston, Little, Brown & Co. 8th ed. 1866) (“[T]rial by a prize tribunal is not a right enemies can claim, nor a duty to them. They have no standing in court. If it be assumed that all captures are enemy’s property, there need be no prize courts. But the fact that so large a proportion of them are of neutral property charged as involved in violation of rights of war, or of property whose nationality as neutral or hostile is doubtful, has led to the establishing of these tribunals. Their origin is in the responsibility of the belligerent government to neutral governments, for the acts of its cruisers.”).

163 See STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 287–88 (2007).

164 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

165 See *id.*

166 Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94.

167 Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

customs, nonintercourse, antipiracy, or embargo acts. But there were many gaps in coverage. Congress acted repeatedly as if the courts already knew what substantive law to provide to fill gaps.¹⁶⁸ Sometimes Congress expressly noted its understanding that international law would be applied in maritime seizure cases.¹⁶⁹ And the federal courts in turn well understood that they were to act as admiralty courts had always done, applying longstanding international law principles, unless superseded by domestic statute.¹⁷⁰ For instance, regarding the substantive law of prize, the Court held that “the principles of general law” fill any gaps left by Congress and determine the powers and rules of proceedings of U.S. prize courts.¹⁷¹

Pervasive congressional recognition and endorsement of the courts’ application of default rules drawn from the law of nations can be seen throughout the early republic. In 1792, Congress enacted a statute which provided for the registration and licensing of “ships or vessels which may hereafter be captured in war . . . and lawfully condemned as prize, or which have been, or may be adjudged to be forfeited for a breach of the laws of the United States.”¹⁷² Congress in 1799 enacted rules regulating the naval service, a decade after the new government came into existence. These rules recognized that officers and seamen could receive “prize money,”¹⁷³ and required that papers and other writings “found on board any ship or ships which shall be taken, shall be carefully preserved and the originals sent to the court of justice for maritime affairs, appointed or to be appointed for judging

168 See, e.g., Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578 (stating, without specifying the underlying substantive law, that commanders of U.S. public armed vessels may seize French armed vessels, which “shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited”); see also Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1310 (1985) (“Once Congress vested the jurisdiction, however, the historical assumption has been that the courts involved were to act as admiralty courts always had acted.” (citation omitted)).

169 See, e.g., Act of May 28, 1798, ch. 48, § 1, 1 Stat. 561, 561 (“[I]t shall be lawful for the President of the United States, and he is hereby authorized to instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any [French] armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof . . .”).

170 See, e.g., *Am. Ins. Co. v. 356 Bales of Cotton* (Am. Ins. Co. v. Canter), 26 U.S. (1 Pet.) 511, 545–46 (1828); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *The Schooner Adeline & Cargo*, 13 U.S. (9 Cranch) 244, 284 (1815); *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 91 (1795) (opinion of Iredell, J.); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 844 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.); *Thompson v. The Catharina*, 23 F. Cas. 1028, 1028 (D. Pa. 1795) (No. 13,949); see also SNELL, *supra* note 163, at 331 (stating that federal judges applied the law of nations to govern admiralty disputes because that law “became binding upon the country’s accession into the community of nations” (citation omitted)).

171 *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 34 (1801).

172 Act of Dec. 31, 1792, ch. 1, § 2, 1 Stat. 287, 288; see also *id.* § 4, 1 Stat. at 289 (same).

173 Act of Mar. 2, 1799, ch. 24, § 1, 1 Stat. 709, 710 (emphasis omitted); *id.* § 6, 1 Stat. at 715.

concerning such prize or prizes.¹⁷⁴ The revision of the articles governing the Navy the next year was equally clear about congressional knowledge and endorsement of prize litigation in federal courts, and similarly left the substance of the governing law to be determined by the courts.¹⁷⁵ Also in 1800, Congress enacted a law concerning salvage in case of recaptures during war, and showed its recognition that prize litigation happened before “court[s] of the United States, having competent jurisdiction.”¹⁷⁶ Numerous statutes from the War of 1812 and immediately afterward speak of prize jurisdiction and condemnation of vessels in admiralty without needing to specify that international law was the default substantive law.¹⁷⁷

In particular, Congress was clearly aware of and endorsed the damages liability of naval officers, customs collectors, and others who wrongfully seized vessels and goods on the high seas or in U.S. waters.¹⁷⁸ For instance, in the Collection Act of 1789, the first Congress recognized that persons seizing goods under the statute might be “sued or molested for any thing done in virtue of the powers given by this act,” and stated the customs officers civilly sued might “plead the general issue, and give this act in evidence.”¹⁷⁹ Similar recognition of money suits against customs officers is found in a 1790 statutory revision.¹⁸⁰ In the Collection Act of 1799, Congress recognized that if a federal customs collector was found to have wrongfully seized “any ship or vessel, goods, wares or merchandise,” the officer could be found “be liable to action, suit or judgment on account of such seizure and prosecution.”¹⁸¹

174 *Id.* § 1, 1 Stat. at 711.

175 *See* Act of Apr. 23, 1800, ch. 33, § 1, 2 Stat. 45, 46 (requiring the commanding officer who seizes a vessel as a prize to deliver all papers “to the judge of the district to which such prize is ordered to proceed,” “on pain of forfeiting his whole share of the prize money resulting from such capture”); *id.* § 1, 2 Stat. at 46 (banning naval personnel from removing any property (except the ship’s paperwork) from a vessel seized as a prize “before the same shall be adjudged lawful prize by a competent court”).

176 Act of Mar. 3, 1800, ch. 14, § 2, 2 Stat. 16, 17.

177 *See* Act of June 26, 1812, ch. 107, § 4, 2 Stat. 759, 759–60; *id.* § 5, 2 Stat. at 760; Act of Apr. 16, 1816, ch. 56, § 1, 3 Stat. 287, 287.

178 *See* Mashaw, *supra* note 34, at 1279 (“Congress presumed that a common law action would lie for any improper seizure . . .”).

179 Act of July 31, 1789, ch. 5, § 27, 1 Stat. 29, 43–44. Revenue officers who were sued unsuccessfully—“nonsuited”—could recover double costs from the plaintiff. *See id.*

180 *See* Act of Aug. 4, 1790, ch. 35, § 51, 1 Stat. 145, 170 (“[I]f any officer . . . executing or aiding and assisting in the seizure of goods, shall be sued or molested for any thing done in virtue of the powers given by this act, or by virtue of a warrant granted by any judge or justice pursuant to law, such officer or other person may plead the general issue, and give this act and the special matter in evidence.”); *id.* § 67, 1 Stat. at 176 (“[W]hen any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise, and judgment shall be given for the claimant or claimants; if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the same court shall cause a proper certificate or entry to be made thereof, and in such case the claimant shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor be liable to action, suit or judgment, on account of such seizure or prosecution.”).

181 Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695–96.

Similar provisions can be found in embargo statutes from the Jefferson administration,¹⁸² including some that contemplated damages suits but provided protections for officers,¹⁸³ and in nonintercourse statutes from the War of 1812.¹⁸⁴ The War of 1812 also saw the enactment of statutes which expressly noted that naval officers who wrongfully seized putative prizes were liable to have “damages” awarded against them by the U.S. courts.¹⁸⁵

D. *Alien Enemy Disability to Appear in Court*

The last claim of historically minded critics of *Bivens* and qualified immunity doctrines I will address is that damages actions could be brought in the early republic against U.S. officers by anyone injured anywhere in any context.¹⁸⁶ This claim, more often implied than expressly made and defended, requires revision. Prize cases were the most important context in which U.S. courts in the early republic were involved in overseeing extraterritorial coercive actions by U.S. officers. And in this context—as well as more generally—there was a significant limitation on who could sue U.S. officers in U.S. courts. Alien enemies—nationals or residents of a country at war with the United States—were barred by old rules of the common law and law of nations from initiating lawsuits or filing affirmative legal claims in wartime. Pfander notes this limitation on judicial review when discussing English caselaw prior to American independence,¹⁸⁷ but the significance of alien

182 See, e.g., Act of Jan. 9, 1809, ch. 5, § 10, 2 Stat. 506, 509–10 (“That the powers given to the collectors, either by this or any other act respecting the embargo . . . to take into their custody any articles for the purpose of preventing violations of the embargo, shall be exercised in conformity with such instructions as the President may give And if any action or suit be brought against any collector or other person acting under the directions of, and in pursuance of this act, he may plead the general issue, and give this act and the instructions and regulations of the President in evidence, for his justification and defence.”).

183 See, e.g., Act of Feb. 24, 1807, ch. 19, § 1, 2 Stat. 422, 422–23 (“That when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof: and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment on account of such seizure and prosecution.”).

184 See Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99 (“[I]f any suit or prosecution be commenced in any state court, against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, . . . for any thing done, or omitted to be done, as an officer of the customs . . . and the defendant shall, at the time of entering his appearance in such court, file a petition for the removal of the cause for trial at the next circuit court of the United States . . .”).

185 See, e.g., Act of June 26, 1812, ch. 107, § 6, 2 Stat. 759, 761.

186 See *supra* notes 13–26 and accompanying text.

187 See PFANDER, *supra* note 10, at 5.

enemy disability to sue is not fully reflected in much of the scholarship and advocacy under review in this Essay.

Blackstone's *Commentaries on the Laws of England*, a hugely influential book in America during the eighteenth and nineteenth centuries, stated that "alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war."¹⁸⁸ As I have previously written, "[t]he stark rule stated by Blackstone, that no alien enemy had standing in court during wartime unless by special license of the sovereign, was accepted by prominent members of the American Founding generation" and applied by American courts in the early republic.¹⁸⁹

It is clear that the rule barring alien enemies from invoking the aid of courts during wartime was understood to apply in prize courts as well as tribunals hearing other kinds of claims.¹⁹⁰ In *The Adventure*, a prize case arising out of the War of 1812 with Great Britain, the Supreme Court indicated that British subjects cannot make a claim in a U.S. prize court during wartime.¹⁹¹ The U.S. circuit court in New York announced the same rule during that war.¹⁹² Major treatises from U.S. experts in admiralty and prize law also held that alien enemies were disabled from invoking courts during wartime.¹⁹³ When the stakes were the highest, U.S. courts applied longstanding rules that prevented U.S. officers from being sued by enemies. That is surely

188 1 WILLIAM BLACKSTONE, COMMENTARIES *361.

189 Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 188–89 (2013).

190 See Sweeney, *supra* note 106, at 453 ("The condemnation of an enemy merchant vessel in a court of prize would usually take place as a matter of course. It was identified by the national flag it flew. The flag was conclusive of its enemy character. Hence this character, the legal basis for the capture, could not be denied in the prize court. Moreover, the master and members of the crew were deemed to possess the national character of their vessel and hence to be enemy aliens. As such, they had no standing to assert any right in a court of prize." (footnotes omitted) (citing 3 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 582, 603–04, 606 (Philadelphia, T. & J.W. Johnson & Co. 1857))).

191 See *The Adventure*, 12 U.S. (8 Cranch) 221, 228 (1814).

192 See *Johnson v. Thirteen Bales*, 13 F. Cas. 836, 837–38 (C.C.D.N.Y. 1814) (No. 7415) ("[T]his claim to the protection of our courts does not apply to those aliens who adhere to the king's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity. The disability to sue is personal. It takes away from the king's enemies the benefit of his courts" (quoting *Daubigny v. Davallon* (1793) 145 Eng. Rep. 936, 937; 2 Anst. 463, 467)).

193 See CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 56 (Peter Stephen Du Ponceau trans., Philadelphia, Farrand & Nicholas 1810) (noting the doctrine that an enemy lacks "*persona standi in judicio*"—meaning the ability to sue in court); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 68 (Legal Classics Libr. special edition 1986) (1826) (same); WHEATON, *supra* note 113, at 211 (stating that in the law of "almost every country," an alien enemy is "totally *ex lex*" and lacks "*persona standi in judicio*" even in courts applying the law of nations, unless granted a specific exception by the government); WHEATON, *supra* note 162, § 388 n.1, at 480 ("[T]rial by a prize tribunal is not a right enemies can claim, nor a duty to them. They have no standing in court. If it be assumed that all captures are enemy's property, there need be no prize courts.").

an important qualification to suggestions about the global availability of judicial review of U.S. officers.

At least three caveats are in order. First, the rule barring alien enemies from court during wartime was softened over time to allow enemy aliens who were civilians and peacefully resident in the United States to access the courts.¹⁹⁴ Second, if alien enemy status was contested, courts could resolve any factual or legal issues at the threshold.¹⁹⁵ Third, nothing written here should detract from the important truth that the U.S. Constitution and early statutes like the Judiciary Act of 1789 were designed to protect, through the courts and otherwise, non-U.S. citizens (assuming they were not alien enemies).¹⁹⁶

CONCLUSION

This Essay has made a number of claims which seek to qualify or contextualize the conventional wisdom about damages suits against federal officers in the early republic as it relates to contemporary disputes about *Bivens* and qualified immunity. It's true that such suits were once very common, but many of the types of officer damages suits that were once common did not survive into the twentieth century. The specific material, legal, and political conditions of the early republic made personal damages liability for federal officers seem attractive, in ways that faded over time. In particular, the early republic featured bureaucratic underdevelopment; a geographically vast territory; slow communications, travel by foot, sail, or beast of burden; part-time

194 See Kent, *supra* note 189, at 190 (“[A]n ameliorative trend regarding civilian alien enemies was soon apparent in both the decisional law and the treatises and digests, especially during and after the War of 1812 with Great Britain. English law had long recognized that protection of the law and courts was available to civilian enemy aliens who were in England under the license of the Crown. This enlightened policy encouraged both trade and immigration, great sources of strength to the state. American courts came to presume that civilian enemy aliens were here under license—and came to presume that they were within protection of the law and courts—when they arrived in the United States prior to wartime, or when they arrived during war but were permitted to remain by the U.S. government, as long as they did not show any actual hostile designs against the United States.” (footnotes omitted)).

195 See, e.g., *The Frances*, 12 U.S. (8 Cranch) 335, 347 (1814); *The Venus*, 12 U.S. (8 Cranch) 253, 273–80 (1814).

196 See Holt, *supra* note 156, at 1425–27 (showing that protecting creditors, many of whom were European, was a key driver of the establishment of the federal judiciary); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 505 (2007) (“An important purpose of the Constitution, visible in its text, was to provide certain judicial and executive protections to foreign nations and foreign nationals.”); Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 FORDHAM L. REV. 1895 (2021) (showing that protecting non-U.S. citizens and providing them favorable fora for maritime and commercial disputes with Americans was a central reason for establishing the federal judiciary). For an argument that Article III and the Fifth Amendment’s Due Process Clause were originally intended to provide judicial protections to foreign nations also, see Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 690 (2019).

government officials who often held side gigs; and antiquated ways of compensating many U.S. officers (with fees and bounties rather than salaries). When bureaucratic sophistication, speedier communications and modes of travel, professionalization of the civil service, and salarization came to characterize U.S. government over the course of the nineteenth century and early twentieth century, the United States began turning away from personal officer liability for damages. Moreover, starting in the mid-nineteenth century, Congress began waiving sovereign immunity for certain types of claims against the United States.¹⁹⁷ The waivers expanded over time, obviating the need for many types of officer suits.¹⁹⁸ Some scholars and advocates have suggested that the prevalence of federal officer liability for common-law wrongs in the early republic gives these suits—and by extension *Bivens* suits under the Constitution also—a kind of quasi-originalist pedigree. Maybe that's right. But since *Bivens* was not created until 1971, and since we are having debates about the desirability of *Bivens* at the beginning of the third decade of the twenty-first century, it seems important to recognize changes in conditions and to debate whether widespread personal liability for damages among federal officers makes sense in the modern world.

Congress is an important part of the story, one that has been underemphasized in much scholarship about *Bivens* and federal officer suits more generally. Congress often appears in such scholarship only as a kind of reverse *deus ex machina*, enacting the Westfall Act in 1988 (cutting off state-law tort liability of federal officers within the scope of their employment), but otherwise staying out of the picture. I have tried to show above that Congress was very active from early on, in two important ways. First, Congress has been actively at work substituting other types of administrative and judicial review in place of officer liability for at least 170 years—as shown in my review of customs collection litigation. Second, Congress in the early republic clearly endorsed and supported officer liability for damages in a number of contexts—as shown in my review of maritime seizure litigation. The historical record thus provides support for the Supreme Court's claim in *Bivens* cases that Congress has an important role to play in deciding when to authorize personal damages liability of federal officers. Contrary to the assertion by one leading scholar, common-law damages suits against federal officers were not a “jurisprudence of private litigation against federal officers without any regard for congressional intent.”¹⁹⁹

I dissent partially from the claim, made by the scholars whose work I have discussed throughout, that the early republic saw the courts imposing damages liability on federal officers without any immunity protection and without regard to government efficiency, national interests, or other contextual factors. That certainly describes a lot of the caselaw. But as I have

197 See FALLON ET AL., *supra* note 18, at 896–904 (stating that before an 1855 congressional act, “no statute gave consent to suit against the United States on claims for money damages”).

198 See *id.*

199 Vladeck, *supra* note 142, at 516.

shown, in what was arguably the most consequential type of litigation that came before the courts in the early republic—prize cases and cases concerning antipiracy seizures—the Supreme Court did in fact apply immunity doctrines to protect officers from damages liability and advance national interests. This complicates claims made in current debates about qualified immunity that such immunity is a late invention by the Supreme Court. It was present from the beginning, in some important contexts. The immunity caselaw I canvassed also complicates narratives suggesting that the Court’s current *Bivens* doctrine lacks foundation in our early constitutional history to the extent that it balances needs like government efficiency rather than always allowing damages suits to proceed against federal officers.

Where does that leave us? I do not claim that the modest criticisms and revisions I have offered here about the work of participants in this symposium yield any ready answers about which version of *Bivens*—the very narrow one seen in cases like *Abbasi* and *Hernández*, the very broad one sought by many scholars, or something in between—is normatively most attractive today. In my view, the lack of any judicial remedy because of the unavailability of *Bivens* is sometimes deeply unjust and troubling from a rule-of-law perspective. But there are countervailing interests that would be implicated by a wide availability of *Bivens* suits, and those countervailing interests have been acted on by the courts and Congress for hundreds of years. So ultimately, I offer some historical revisions simply to say that the Supreme Court’s *Bivens* caselaw today may not be quite as great a departure from the past—in particular the early history of this nation—as is sometimes said.