

2018

## ***Ziglar v. Abbasi* and the Demise of Accountability**

Jules Lobel

*University of Pittsburgh Law School*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

---

### **Recommended Citation**

Jules Lobel, *Ziglar v. Abbasi and the Demise of Accountability*, 86 Fordham L. Rev. 2149 (2018).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss5/9>

This Colloquium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## *Ziglar v. Abbasi* and the Demise of Accountability

### Erratum

Law; Criminal Law; Criminal Procedure; Supreme Court of the United States; Constitutional Law; Fourth Amendment; Legal Remedies; President/Executive Department

# ZIGLAR V. ABBASI AND THE DEMISE OF ACCOUNTABILITY

Jules Lobel\*

## INTRODUCTION

In the recent decision *Ziglar v. Abbasi*,<sup>1</sup> the U.S. Supreme Court rejected constitutional claims brought by Muslim aliens who were detained—allegedly in cruel and harsh conditions, and because of their race, religion, or national origin—in the United States after the attacks of September 11, 2001.<sup>2</sup> Justice Kennedy’s opinion for the four-to-two majority held that the plaintiffs, even assuming that all of their allegations were true, had no damages remedy against the high-level Bush administration officials who authorized the allegedly unconstitutional government policies.<sup>3</sup> The *Ziglar* decision has been criticized as potentially gutting the *Bivens*<sup>4</sup> cause of action, which allows individuals harmed by federal officials’ violations of constitutional rights—such as those under the Fourth<sup>5</sup> and Eighth<sup>6</sup> Amendments—to sue for damages in federal court.<sup>7</sup> Justice Breyer pointed out in his dissent:

---

\* Bessie McKee Walthour Professor of Law, University of Pittsburgh Law School. This Article was prepared for the Colloquium entitled *Access to Justice and the Legal Profession in an Era of Contracting Civil Liability*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 27, 2017, at Fordham University School of Law.

1. 137 S. Ct. 1843 (2017).

2. *Id.* at 1853–54.

3. Justices Sotomayor and Kagan recused themselves, and Justice Gorsuch did not participate in the case, leaving only six Justices to hear the case. *Id.* at 1851.

4. *See generally* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1999).

5. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

6. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

7. *Bivens*, 403 U.S. at 395–98; *see also* Leading Case, *Ziglar v. Abbasi*, 131 HARV. L. REV. 313, 317–18 (2017) (arguing that, by distinguishing *Bivens* and the two Supreme Court cases that recognized a *Bivens* cause of action, and by making it difficult for any case that does not present the *Bivens* facts to survive, *Ziglar* and its forebears have relegated *Bivens* and its progeny to “mere ghosts of their former selves, barely clinging to existence” (quoting WILLIAM O. DOUGLAS, *WE THE JUDGES* 199 (1956))); Michael C. Dorf, *SCOTUS Severely Narrows Civil Rights Suits Against Federal Officers*, DORF ON L. (June 19, 2017, 12:44 PM), <http://www.dorfonlaw.org/2017/06/scotus-severely-narrows-civil-rights.html> [<https://perma.cc/S6JZ-3MAR>] (stating that *Ziglar* “makes it all but impossible for civil rights plaintiffs to sue federal officials for money damages”); Garrett Epps, *The Supreme Court’s*

Given the[] safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's *abolition*, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.<sup>8</sup>

This Article will focus on one important aspect of the *Ziglar* opinion: its attempt to distinguish injunctive relief from damages actions. *Ziglar*'s attempt to distinguish injunctive relief from a damages remedy was central to its decision because, at first glance, *Ziglar* seems in considerable tension with the Court's decision almost ten years earlier in *Boumediene v. Bush*.<sup>9</sup> In *Boumediene*, the court held that alien detainees at Guantanamo Bay had a constitutional right to habeas corpus to challenge their detentions.<sup>10</sup> The Court took an insistent role in *Boumediene* and a number of other War on Terror cases in asserting jurisdiction over claims challenging the Bush administration's national security policies.<sup>11</sup> By contrast, the *Ziglar* Court was extremely deferential to executive officials' claims that even hearing plaintiffs' claims on the merits could harm national security.<sup>12</sup>

Justice Kennedy, who wrote both the *Boumediene* and *Ziglar* opinions, suggested that the difference might lie in the differing remedies sought in each case.<sup>13</sup> This Article challenges that assumption and compares *Ziglar* with two other important national security cases decided almost two centuries apart.<sup>14</sup> It illustrates that the differing remedies in *Boumediene* and *Ziglar*—injunctive relief and damages, respectively—do not explain the differing results in those cases. Rather, the Court and the other political branches have seemingly reached the conclusion that executive officials who violate the Constitution in times of war or national emergency should not be held

---

*Ominous National Security Ruling*, ATLANTIC (June 19, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-supreme-courts-ominous-national-security-ruling/530886/> [<https://perma.cc/U6U3-RQPV>] (stating that “the lurking issue [in *Ziglar*] is whether a court should second-guess *any* administration if plaintiffs seek ‘an inquiry into sensitive issues of national security [that are] the prerogative of the Congress and President’” (second alteration in original) (quoting *Ziglar*, 137 S. Ct. at 1861)); Shirin Sinnar, *The Ziglar v. Abbasi Decision: Unsurprising and Devastating*, LEGAL AGGREGATE (June 20, 2017), <https://law.stanford.edu/2017/06/20/the-ziglar-v-abbasi-decision-unsurprising-and-devastating/> [<https://perma.cc/7TUU-RX32>] (“The unsurprising nature of [*Ziglar*], however, shouldn’t detract from its significance: for certain kinds of constitutional violations, it throttles attempts to hold federal officials accountable. For the victims of human rights violations left without a legal remedy, it’s devastating.”); Steve Vladeck, *On Justice Kennedy’s Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017), <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/> [<https://perma.cc/QKD7-ZYTN>] (stating Justice Kennedy’s opinion in *Ziglar* “will make it much harder, going forward, for almost *any* plaintiff to obtain relief for constitutional violations that have ceased, even though constitutional rights aren’t worth that much if they can’t be enforced”).

8. *Ziglar*, 137 S. Ct. at 1884 (Breyer, J., dissenting) (emphasis added).

9. 553 U.S. 723 (2008).

10. *Id.* at 771.

11. *See, e.g., id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 539 (2004).

12. *Ziglar*, 137 S. Ct. at 1861.

13. *Id.* at 1863–65.

14. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

individually accountable for their actions, a conclusion at odds with early Supreme Court decisions and the views of prominent early leaders of our government.<sup>15</sup> The most dangerous aspect of the Court's opinion in *Ziglar* is not its near evisceration of the *Bivens* remedy but rather its view that high-level government officials should not be held accountable for unconstitutional decisions made in periods of war or national emergency.<sup>16</sup>

Part I of this Article discusses *Ziglar* in light of the Court's other cases challenging aspects of the executive's conduct in the struggle against terrorism. Part II compares *Ziglar* with other case law that suggests that the *Ziglar* Court's focus on the potential availability of injunctive relief is *not* of central importance to its dismissal of the *Bivens* claims. This Article continues in Part III with a historical discussion of official accountability for unconstitutional conduct during times of national crisis or exigency and early leaders' views regarding such official accountability, and provides instances where unconstitutional official conduct was met with damages liability. Finally, this Article concludes that *Ziglar* is at odds with the basic precepts of the framers' view of the judicial role in addressing official claims of necessity during times of national emergency or serious crisis.

#### I. ZIGLAR AND BOUMEDIENE

Justice Kennedy's opinion in *Ziglar* focused on "special factors necessarily implicated by [plaintiffs'] detention policy claims," which counseled against permitting a *Bivens* action to proceed.<sup>17</sup> For one, the claims "call[ed] into question the formulation and implementation of a general policy" and challenged "major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security."<sup>18</sup> The Court proclaimed that "[n]ational-security policy is the prerogative of the Congress and President" and that the courts have generally deferred to executive branch determinations of essential national security policies.<sup>19</sup>

Yet, as the *Ziglar* Court recognized, all of these talismanic invocations of national security policy to defeat federal court jurisdiction were rejected in *Boumediene* and other War on Terror cases challenging the Bush administration's policies with respect to alleged enemy combatants detained at Guantanamo.<sup>20</sup> The *Ziglar* Court nonetheless dismissed the judicial role in resolving tensions between security and liberty in times of crisis through damages actions, holding that "'congressionally uninvited intrusion' is 'inappropriate.'"<sup>21</sup>

---

15. See *infra* Part III.

16. See *Ziglar*, 137 S. Ct. at 1869.

17. *Id.* at 1860.

18. *Id.* at 1860–61.

19. *Id.* at 1861.

20. *Id.* at 1861–62.

21. *Id.* at 1862 (quoting *United States v. Stanley*, 483 U.S. 669, 683 (1987)).

*Ziglar* disregards the fact that the Court in *Boumediene* was far more intrusive than simply engaging in “congressionally uninvited intrusion.”<sup>22</sup> Justice Kennedy’s *Boumediene* decision struck down—for the first time in American history—a congressional statute on an issue related to an ongoing armed conflict,<sup>23</sup> one that had affirmatively and explicitly stripped the federal courts of their authority to entertain habeas petitions filed by detainees held as alleged enemy combatants at Guantanamo Bay.<sup>24</sup> That decision represents a far more intrusive assertion of judicial review than entertaining a damages action in the face of congressional silence.

Justice Kennedy also suggested that the difference between the two cases lies in the heightened separation of powers concerns posed by damages actions.<sup>25</sup> To Kennedy, the separation of powers concerns inherent in national security cases

are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.<sup>26</sup>

Moreover, for Kennedy, “of central importance” was that large-scale policy decisions at issue in *Ziglar*—unlike the individual claims of discrimination or law enforcement overreach involved in *Bivens*—could be remediable by actions for injunctive relief or possibly habeas relief, which “would have provided a faster and more direct route to relief than a suit for money damages.”<sup>27</sup> Kennedy returns to the refrain that such injunctive actions are preferable to money damages because “high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis.”<sup>28</sup>

Justice Kennedy’s distinction between damages and injunctive remedies is supported by some commentators. For example, Professor Andrew Kent has noted the disconnect between appellate court decisions even prior to *Ziglar*; these courts disfavor *Bivens* actions in national security matters and the Supreme Court’s assertive role in high-profile War on Terror cases.<sup>29</sup> Kent argues that the Court is properly reluctant to allow a damages remedy against federal officials in national security cases and instead prefers a system-wide

---

22. *Id.* (quoting *Stanley*, 483 U.S. at 683).

23. *Boumediene v. Bush*, 553 U.S. 723, 826–27 (2008) (Scalia, J., dissenting); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 47–48.

24. See Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES (June 13, 2008), <http://www.nytimes.com/2008/06/13/washington/13scotus.html> [https://perma.cc/VHG5-RTVC].

25. *Ziglar*, 137 S. Ct. at 1861.

26. *Id.*

27. *Id.* at 1862–63.

28. *Id.* at 1863.

29. See generally Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123 (2014).

injunctive relief through the issuance of what he terms “law declarations” rather than providing individual redress.<sup>30</sup>

However, the Court and Kent’s assertion that the preference of injunctive relief over damages explains the apparent contradiction between *Boumediene* and *Ziglar* is problematic. First, as Justice Breyer pointed out in dissent, our history demonstrates that an injunctive action brought during the height of a war or crisis often presents the most difficult timing for judicial intervention.<sup>31</sup> Such injunctive actions will inevitably be affected by the emotions occasioned by the crisis.<sup>32</sup> The information needed for a court to decide the constitutional issue will usually be shrouded in secrecy, and the executive will strongly argue that such information cannot be publicly disclosed. Moreover, the court will be asked to directly interfere with a government policy that is claimed to be necessary to defend the country. One only has to consider what the judicial reaction would have been if the *Ziglar* plaintiffs had sought judicial relief in the immediate aftermath of September 11 (when their lack of any relationship to terrorists had not been established, as it later was) to recognize that a damages action adjudicated years later would provide a more propitious opportunity for the considered and dispassionate judicial review of the facts and legality of federal officials’ actions.

Second, the Court’s rulings on damages actions have established numerous safeguards to ensure that plaintiffs can only prevail in cases presenting the clearest and worst constitutional violations.<sup>33</sup> For one, qualified immunity protects officials unless they have violated a constitutional right that is “clearly established.”<sup>34</sup> In addition, courts have dismissed some *Bivens* claims based on the state-secrets doctrine, which precludes sensitive national security information from being disclosed.<sup>35</sup> Furthermore, the “plausible” pleading requirement of *Ashcroft v. Iqbal*<sup>36</sup> requires the dismissal of a complaint that contains only “conclusory” allegations.<sup>37</sup> All of these judicially constructed doctrines provide considerable protection for federal officials in a national security context. Justice Kennedy’s concern that allowing damages actions may cause future officials to refrain from taking “urgent and lawful actions in a time of crisis”<sup>38</sup> would therefore only impact an official’s decision to refrain from taking actions that are *clearly unlawful*. His rationale therefore seems illogical: Why would damages suits

---

30. *Id.* at 1158 n.149.

31. *Ziglar*, 137 S. Ct. at 1884; see also WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218–25 (1998). See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

32. See RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL STRUCTURE: CASES IN CONTEXT 626 (2d ed. 2018) (stating that “[c]omplaints seeking [injunctive remedies or writs of habeas corpus] relief typically come during the emergency itself, when emotions are strong”).

33. *Ziglar*, 137 S. Ct. at 1884 (Breyer, J., dissenting).

34. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

35. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 311–13 (4th Cir. 2007).

36. 556 U.S. 662 (2009).

37. *Id.* at 678.

38. *Ziglar*, 137 S. Ct. at 1863 (majority opinion).

challenging actions that were clearly unlawful restrain future officials from taking urgent, and even plausibly lawful, actions in times of crisis? Moreover, shouldn't we want some constraints placed on federal and state officials, instead of allowing them to make these decisions free from individual accountability for their actions? The qualified immunity defense is, of course, unavailable in an injunctive action where the Court would be forced to decide the constitutional issue presented.<sup>39</sup>

Third, as already noted, the injunctive/damage dichotomy used to explain the contrasting results in *Boumediene* and *Ziglar* has a perverse logic. Normally, the Court is more deferential to national security determinations where Congress and the President are acting jointly, or as Justice Jackson said in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>40</sup> where executive emergency power is at its strongest.<sup>41</sup> Yet, *Boumediene* held unconstitutional a presidential policy—explicitly supported by congressional statute—to deny the Court habeas jurisdiction to review Guantanamo detentions,<sup>42</sup> whereas *Ziglar* refused to determine whether a purely executive policy was unconstitutional because Congress was silent and had not affirmatively provided for a cause of action.<sup>43</sup> Moreover, the judicial intervention in *Boumediene* was in tension with and had to distinguish precedent that appeared to support the denial of habeas jurisdiction to enemy aliens in wartime and had led the lower courts to unanimously decide against the plaintiffs.<sup>44</sup> In *Ziglar*, the past precedent of *Bivens* and *Carlson v. Green*<sup>45</sup> appeared to support the plaintiffs' claim as a divided en banc circuit court had so found, which forced the majority to argue that the case presented a "new context."<sup>46</sup>

Fourth, Professor Kent's view that the Court has preferred its "law-declaring"<sup>47</sup> role to that of adjudicating individual disputes is inconsistent with the Court's restriction of injunctive remedies through the use of standing doctrine,<sup>48</sup> which has increasingly been narrowed to preclude law-declaring instead of the Court's traditional role of resolving individual rights claims where there has been discrete, nongeneralized harm.<sup>49</sup> Moreover, had the Court wished to prefer law-declaring over resolving individual disputes, it would have left untouched the qualified immunity doctrine, which favors judicial resolution of constitutional questions even where the ultimate decision is that a constitutional doctrine is not "clearly established."<sup>50</sup> Thus,

---

39. See *Harlow*, 457 U.S. at 819–20.

40. 343 U.S. 579 (1952).

41. *Id.* at 637 (Jackson, J., concurring).

42. *Boumediene v. Bush*, 553 U.S. 723, 794–98 (2008).

43. *Ziglar*, 137 S. Ct. at 1869.

44. See *Boumediene*, 553 U.S. at 761–64 (distinguishing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

45. 446 U.S. 14 (1980).

46. *Ziglar*, 137 S. Ct. at 1859–60.

47. Kent, *supra* note 29, at 1155.

48. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–13 (1983).

49. See, e.g., *United States v. Richardson*, 418 U.S. 166, 192–93 (1974) (Powell, J., concurring).

50. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

the tension between *Boumediene* and *Ziglar* cannot be explained simply by the Court's preference for injunctive law-declaring relief over the resolution of individual damages actions.

Finally, of "central importance" to Justice Kennedy's *Ziglar* opinion was the theoretical availability of injunctive relief and the possibility of habeas remedy for plaintiffs in Abbasi's situation.<sup>51</sup> As various commentators have noted, it is unclear whether habeas is even theoretically available to a detainee in Abbasi's position who seeks to challenge his conditions of confinement.<sup>52</sup> That the plaintiffs in *Ziglar* were held incommunicado and practically had no way to challenge the conditions of their detention made either a habeas petition or a lawsuit seeking injunctive relief difficult, if not impossible, to bring.<sup>53</sup> Indeed, in torture cases, the prisoner will generally either be held incommunicado or the torture will not continue for the lengthy time needed to bring a lawsuit, thereby normally rendering the injunctive relief route unavailable.<sup>54</sup> It is no accident that of the various cases challenging alleged torture by U.S. officials under the Bush administration, none were brought while the torture was still ongoing, and thus injunctive relief was unavailable.

Yet, there is one scenario that would test the *Ziglar* majority's insistence that injunctive relief as an alternative remedy was really of "central importance" to its decision.<sup>55</sup> What if U.S. officials affirmatively obstructed a detainee from seeking injunctive relief to prevent his torture by lying to his attorneys and taking other measures which deliberately barred his access to court? Surely such deliberate denial of a detainee's ability to seek injunctive relief for torture ought to yield the result that no alternative remedy is available, and *Ziglar*'s reasoning should lead to the recognition of a *Bivens* claim in that specific situation.

Unfortunately, a *Bivens* remedy for a violation that implicates national security does not appear available even in that situation, belying the claim

---

51. *Ziglar*, 137 S. Ct. at 1862.

52. Vladeck, *supra* note 7 (noting that the federal circuit courts are split on whether plaintiffs may use habeas petitions to challenge their conditions of confinement).

53. *Ziglar*, 137 S. Ct. at 1879 (Breyer, J., dissenting).

54. There are, however, some cases in which it is possible to bring a habeas petition fairly soon after the detention, as the recent ACLU action challenging a U.S. citizen's detention in Iraq or the Center for Constitutional Rights original habeas petition in *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), illustrate. See Charlie Savage, *American Detained by Military Wants a Lawyer, Government Acknowledges*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/politics/american-citizen-detained-isis-hearing.html> [<https://perma.cc/N2TF-XPXA>]; Doe v. Mattis—*Challenge to Detention of American by U.S. Military Abroad*, ACLU (Feb. 14, 2018), <https://www.aclu.org/cases/doe-v-mattis-challenge-detention-american-us-military-abroad?redirect=cases/aclu-foundation-v-mattis> [<https://perma.cc/ZZJ2-5FTX>] (discussing a habeas petition, filed approximately three weeks after detention appears to have begun, on behalf of an unidentified American citizen detained in Iraq after being allegedly captured in Syria fighting alongside the Islamic State); see also Petition for Writ of Habeas Corpus, *Rasul*, 215 F. Supp. 2d 55 (No. 1:02-cv-00299-CKK). In *Rasul v. Bush*, the habeas petitions were filed in February 2002, approximately one month after the first detainees were brought to Guantanamo. See *id.*; *Rasul v. Bush: Historic Case*, CTR. FOR CONST. RTS. (July 3, 2014), <https://ccrjustice.org/home/what-we-do/our-cases/rasul-v-bush> [<https://perma.cc/D3PD-EC3P>] (detailing timeline of action).

55. See *Ziglar*, 137 S. Ct. at 1862.

that the availability of alternative injunctive or habeas relief is of critical importance. That exact scenario had been litigated in *Arar v. Ashcroft*,<sup>56</sup> where a divided en banc Second Circuit held, in an opinion foreshadowing the Supreme Court's *Ziglar* decision, that Mr. Arar did not have a *Bivens* claim for damages under federal law.<sup>57</sup> The Supreme Court denied Arar's petition for certiorari.<sup>58</sup>

## II. *ARAR V. ASHCROFT* AND THE UNAVAILABILITY OF INJUNCTIVE OR HABEAS RELIEF

*Arar v. Ashcroft* suggests that the *Ziglar* Court's focus on the availability of injunctive relief is *not* of central importance to the dismissal of the *Bivens* claims. In *Arar*, government officials were alleged to have deliberately blocked Arar from pursuing the injunctive remedy explicitly provided by Congress, yet the court nonetheless held that he had no *Bivens* claim for damages.<sup>59</sup>

Maher Arar, a dual citizen of Canada and Syria, resided in Ottawa, Canada with his wife and children.<sup>60</sup> In September 2002, Arar was on vacation with his family in Tunisia when he was asked to return to work in Canada by his employer, a Massachusetts-based developer and supplier of computing software.<sup>61</sup> Arar purchased a plane ticket back to Canada with a stop at John F. Kennedy International Airport in New York.<sup>62</sup>

When Arar arrived at the airport in New York, immigration officials prevented him from boarding his connecting flight to Canada.<sup>63</sup> The officials erroneously suspected that Arar might be associated with a terrorist group.<sup>64</sup> Federal officials detained Arar for the next thirteen days, first at Kennedy Airport and then at the Metropolitan Detention Center in Brooklyn, New York.<sup>65</sup> He was placed in solitary confinement, denied any food for almost two days, and repeatedly subjected to harsh and lengthy interrogations by federal agents concerning his alleged contacts with terrorist groups.<sup>66</sup> Arar categorically denied any such contacts.<sup>67</sup>

Despite Arar's denials of any association with terrorist groups, Immigration and Naturalization Service (INS) Regional Director Scott Blackman determined that Arar was "clearly and unequivocally" a member of Al Qaeda, and ordered that he be removed not to Canada, but to Syria.<sup>68</sup>

---

56. 585 F.3d 559 (2d Cir. 2009) (en banc).

57. *Id.* at 581–82.

58. *Arar v. Ashcroft*, 560 U.S. 978 (2010) (No. 09-923).

59. *Arar*, 585 F.3d. at 580–81.

60. *Id.* at 584. (Sack, J., concurring in part and dissenting in part). For convenience, this Article cites to the facts alleged in Arar's complaint as set forth by Judge Sack.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 584–85, 595.

66. *Id.* at 585.

67. *Id.* at 584–85.

68. *Id.* at 586.

Arar repeatedly and strenuously objected to his removal to Syria, stating that it was well known that he would be tortured if sent there.<sup>69</sup> While State Department reports at the time consistently found credible evidence that Syria's security forces frequently tortured prisoners in custody, Blackman determined that Arar's removal to Syria was consistent with the United Nations Convention Against Torture (the "CAT"),<sup>70</sup> which prohibits the removal of an alien to a country where he or she faces a substantial risk of torture.<sup>71</sup> Arar was sent to New Jersey, where he was placed on a small plane and flown to Jordan.<sup>72</sup> Jordanian authorities delivered him to Syria that same day.<sup>73</sup>

In Syria, Arar was placed in a "grave" cell measuring six feet long, seven feet high, and three feet wide.<sup>74</sup> The cell was damp, cold, and rat infested.<sup>75</sup> Arar was only allowed to bathe once a week with cold water, was "prohibited from exercising[,] and was provided barely edible food."<sup>76</sup> He lost forty pounds during his ten-month detention in Syria.<sup>77</sup> For the first period in Syrian detention, he was brutally, physically, and psychologically tortured.<sup>78</sup> He was interrogated by the Syrians for eighteen hours per day and asked strikingly similar questions to those that U.S. officials had asked him in New York.<sup>79</sup> Eventually, after almost a year, Arar was released by the Syrians without any charges and flown by Canadian officials back to Ottawa.<sup>80</sup>

Arar's complaint alleged that U.S. officials deliberately conspired with the Syrians to intentionally send him from the United States to Syria for the purpose of being tortured.<sup>81</sup> At the time, the Bush administration had a policy of "extraordinary rendition," by which suspected terrorists were transferred to countries that engaged in torture so that these countries could obtain information about terrorism from them using methods that would be illegal in the United States.<sup>82</sup> Arar alleged that he was subjected to this policy.<sup>83</sup> There is no other plausible reason that U.S. officials would send a Canadian citizen who they suspected was a terrorist not to Canada—an ally in the fight against terrorism—but instead to Syria, except that high-level U.S. officials believed that Syria could get information from him using methods that

---

69. *Id.* at 585–86.

70. G.A. Res. 39/46 (III), ¶ 1 (Dec. 10, 1984) ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

71. *Arar*, 585 F.3d. at 586.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 586–87.

76. *Id.* at 587.

77. *Id.*

78. *Id.*

79. *Id.* Arar alleged that those officials had sent the Syrians a dossier of questions to ask. *Id.*

80. *Id.* at 587–88.

81. *Id.* at 588.

82. *See id.*; *see also* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1335–50 (2007).

83. *Arar*, 585 F.3d at 588.

neither the United States nor Canada could legally use.<sup>84</sup> As Judge Barrington Parker's dissenting opinion in the Second Circuit summarized:

Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest.<sup>85</sup>

Judge Parker and his dissenting colleagues also found that Arar "credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress."<sup>86</sup> After his initial detention, federal officials denied Arar's repeated requests for counsel and to make a phone call.<sup>87</sup> His family, upon finding out about his detention, retained an attorney to represent him and Arar finally met with his lawyer ten days after he was detained.<sup>88</sup> The very next day—a Sunday—federal officials hastily scheduled an interrogation of Arar at 9:00 p.m., ostensibly to determine whether he had a legitimate fear of torture if sent to Syria.<sup>89</sup> The officials provided no meaningful advance notice to Arar's attorney of that meeting, leaving a voicemail on her office phone earlier that day.<sup>90</sup> Moreover, Arar alleged that the officials had falsely told him that his lawyer had chosen not to participate.<sup>91</sup>

The next day, Arar's lawyer had two phone calls with INS officers who falsely informed her that Arar had been taken for processing to an INS office in Manhattan and that he would eventually be placed in a detention facility in New Jersey.<sup>92</sup> In fact, Arar remained in New York that day, was taken out of his cell at 4:00 a.m. the next morning, and

served with his "Final Notice of Inadmissibility," a prerequisite to a petition for review in federal court, and secretly transported out of the country [to Jordan and then to Syria]. Defendants never served the order on Arar's lawyer, as required by 8 C.F.R. § 292.5(a) (2002), and never informed her that Arar had been removed to Syria.<sup>93</sup>

In implementing treaty obligations under the CAT, Congress provided a means for a person in Arar's situation to petition a court of appeals to gain relief from a removal from the United States to a country where there would be a significant fear that he or she would be tortured.<sup>94</sup> But the *Arar* defendants affirmatively colluded to prevent Arar from exercising his statutory right to seek injunctive relief by (1) denying his access to counsel,

---

84. *See id.*

85. *Id.* at 610 (Parker, J., dissenting).

86. *Id.*

87. *Id.* at 584–85 (Sack, J., concurring in part and dissenting in part).

88. *See id.* at 585.

89. *See id.* at 585–86.

90. *Id.* at 585; *see also id.* at 566 (majority opinion).

91. *Id.* at 585–86 (Sack, J., concurring in part and dissenting in part).

92. *Id.* at 586.

93. Petition for Writ of Certiorari with Appendix at 5, *Arar v. Ashcroft*, 560 U.S. 978 (2010) (No. 09-923), 2010 WL 500089, at \*5.

94. *See* 8 C.F.R. § 208.31 (2017).

(2) lying to him and his counsel, and (3) only providing him with the requisite notice hours before he was secretly transferred out of the country.<sup>95</sup> If the Supreme Court was really serious about its pronouncement that a *Bivens* remedy is unnecessary when there is some alternative forum to obtain injunctive or habeas relief,<sup>96</sup> Arar should have been provided with the vehicle to demonstrate that point. Judge Parker, who wrote separately and was joined by three dissenting colleagues, noted that “[i]f the Constitution ever implied a damages remedy, this is such a case—where executive officials allegedly blocked access to the remedies chosen by Congress in order to deliver a man to known torturers.”<sup>97</sup> Indeed, he continued

to emphasize the heightened need for a *Bivens* remedy in cases such as this where executive officials have deliberately thwarted the remedies provided by Congress and obstructed access to the courts. Arar’s claims in this regard supply an exceptionally compelling justification for affording a *Bivens* remedy, going well beyond the allegations that gave rise to *Bivens* in the first place.<sup>98</sup>

In the *Arar* case, the court held that Congress had spoken affirmatively that persons facing removal to a country where they might be tortured had a right to seek judicial relief to enjoin such a removal.<sup>99</sup> Yet, executive officials deliberately thwarted Arar’s right to injunctive relief, not simply by holding him incommunicado for a period of time but by lying to his lawyer and deliberately not giving him notice of removal until it was too late to file a petition.<sup>100</sup> The rationale of *Ziglar* strongly suggests that Arar should have been entitled to a *Bivens* claim for damages.

After losing in the Court of Appeals en banc by a seven-to-four vote, Arar sought Supreme Court review.<sup>101</sup> The Court denied his petition for a writ of certiorari without any comment or dissent.<sup>102</sup>

Finally, as a postscript, after Arar’s return to Canada, the Canadian government convened a commission chaired by a prominent judge to investigate the *Arar* affair. In September 2006, the commission issued a three-volume report that fully exonerated Arar.<sup>103</sup> Commissioner Dennis O’Connor importantly concluded, “I am able to say categorically that there is no evidence to indicate that Mr. Arar has committed any offence or that his activities constitute a threat to the security of Canada.”<sup>104</sup> The Canadian Parliament unanimously apologized to Arar, as did Canada’s Prime Minister, and the Canadian government paid him 10.5 million Canadian dollars for its

---

95. *See Arar*, 585 F.3d at 584–88.

96. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (2017).

97. *Arar*, 585 F.3d at 611 (Parker, J., dissenting).

98. *Id.* at 620.

99. *Id.* at 572–73 (majority opinion).

100. *Cf. id.* at 585–86 (Sack, J., concurring in part and dissenting in part).

101. Petition for Writ of Certiorari with Appendix, *supra* note 93, at 2.

102. *Arar v. Ashcroft*, 560 U.S. 978 (2010) (No. 09-923).

103. *See* COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, ANALYSIS & RECOMMENDATIONS 361–62 (2006) [hereinafter COMM’N REPORT].

104. *Id.* at 59.

role in providing false information about him to U.S. officials.<sup>105</sup> The Canadian government also sent letters to the Syrian and U.S. governments formally objecting to Arar's treatment.<sup>106</sup> To date, the U.S. government has not apologized to Arar nor formally recognized any wrongdoing on its part in his removal to Syria.<sup>107</sup>

### III. OFFICIAL ACCOUNTABILITY FOR UNCONSTITUTIONAL ACTIONS IN TIME OF CRISIS

For many commentators and dissenting Justices Breyer and Ginsburg, the *Ziglar* decision's key deficiency is that it contradicts the basic premise of both *Bivens* and *Marbury v. Madison*<sup>108</sup> that "[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws whenever he receives an injury."<sup>109</sup> Yet, as important as the overarching maxim that where there is a right there must be some legal remedy, the most dangerous aspect of *Ziglar* is its denial of accountability for officials' actions that violate the Constitution and are taken in response to a national emergency or crisis. The key early opinion that *Ziglar* contradicts in that respect is not *Marbury* but *Little v. Barreme*,<sup>110</sup> which was decided by a unanimous Court one year after the former. Moreover, *Ziglar* is inconsistent with the constitutional theory of accountability in times of national emergency held by not only the early courts but also important political leaders of the founding generation.<sup>111</sup>

---

105. See *Ottawa Reaches \$10M Settlement with Arar*, CBC NEWS (Jan. 25, 2007, 9:06 PM), <http://www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875> [<https://perma.cc/43NB-SS53>].

106. *Arar v. Ashcroft*, 585 F.3d 559, 589 (2d Cir. 2009) (en banc) (Sack, J., concurring in part and dissenting in part). The Commission found that while Canadian officials had provided false information to U.S. officials about Arar's purported ties to terrorism, the Canadians were not complicit in the U.S. officials' delivery of Arar to Syria. COMM'N REPORT, *supra* note 103, at 29.

107. Press Release, Ctr. for Constitutional Rights, 60,000 People Ask President Obama for Apology to Torture Victim Maher Arar (May 21, 2012), <https://ccrjustice.org/home/press-center/press-releases/60000-people-ask-president-obama-apology-torture-victim-maher-arar> [<https://perma.cc/VK82-EL9G>].

108. 5 U.S. (1 Cranch) 137 (1803).

109. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163); Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, 28 A.B.A. NAT'L SECURITY L. REP. 1, 4–5 (2006) (commenting on the trends in the courts of appeal even before *Ziglar* was decided); Alexander Steven Zbrozek, *Square Pegs and Round Holes: Moving Beyond Bivens in National Security Cases*, 47 COLUM. J.L. & SOC. PROBS. 485, 502 (2014) (discussing court of appeals opinions dismissing national security *Bivens* actions as "strik[ing] at the heart of *Marbury*'s aphorism" that a right must have a remedy); Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2168 (2018) ("[*Bivens*] stands for the maxim *ubi jus, ibi remedium* (where there is a right there is a remedy), a principle that Justice John Marshall ironically celebrated in *Marbury v. Madison* . . . . The near dismissal of *Bivens* in *Ziglar* manifests a much larger aspect of where the Supreme Court, like our legal culture more generally, has gone in its thinking about an individual's right of redress." (footnotes omitted)).

110. 6 U.S. (2 Cranch) 170 (1804).

111. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1397–99, 1404–07 (1989).

The predominant constitutional thought of the late eighteenth and early nineteenth centuries sought to resolve the inherent tension between the rule of law and the necessity of the government to exercise emergency powers during national crises by preserving a boundary between normal constitutional order and the ominous world of crisis government.<sup>112</sup> Emergency and the normal constitutional order were counterposed.<sup>113</sup>

Normalcy permitted a governmental structure based on separation of powers, respect for civil liberties and the rule of law, while emergencies required strong executive rule, premised not on law and respect for civil liberties, but rather on [executive] discretion to take a wide range of actions to preserve the government.<sup>114</sup>

As Oliver Cromwell pithily stated before Parliament, “Necessity hath no law.”<sup>115</sup>

The framers as well as nineteenth-century political leaders thus feared emergency action and saw in foreign crisis the loss of liberty.<sup>116</sup> As William Pitt put it in 1783, “*Necessity* [is] the plea for every infringement of human freedom.”<sup>117</sup> The framers’ failure to provide for any general emergency rule or martial law, apart from permitting the federal government to call out the militia to suppress insurrections and suspend the writ of habeas corpus, undoubtedly reflects their unwillingness to allow the federal government to suspend constitutional rights or the rule of law in times of great necessity.<sup>118</sup>

Nonetheless, early leaders recognized that there were times that government leaders would need to take actions that were not in accordance with constitutional principles.<sup>119</sup> Their solution was to permit political or military leaders who believed that a crisis required emergency action to act *unlawfully*, *extraconstitutionally*, or even *unconstitutionally*, but, if they took such action, to require them to openly acknowledge the potential

112. *See id.* at 1388–92.

113. *Id.* at 1388.

114. *Id.*

115. Max Radin, *Martial Law of the State of Siege*, 30 CALIF. L. REV. 634, 640 (1942) (quoting Oliver Cromwell).

116. *See* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at ix (1973) (“Perhaps it is a universal truth . . . that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.” (quoting James Madison, Letter from James Madison to Thomas Jefferson (May 13, 1798), in *THE COMPLETE MADISON* 258 (S.K. Padover ed., 1953))); *THE FEDERALIST* NO. 8, at 114 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates.”).

117. 1 *SPEECHES OF THE RIGHT HONOURABLE WILLIAM PITT, IN THE HOUSE OF COMMONS* 91 (W.S. Hathaway ed., 1806).

118. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866) (viewing the absence of any provision in the Constitution providing for a general suspension of rights as indicating that the framers had limited the power of “suspension to one great right [(habeas corpus)], and left the rest to remain forever inviolable”); *see also id.* at 120–21 (stating that the Constitution works “equally in war and in peace” and protects “all classes of men, at all times, and under all circumstances”); *id.* at 121 (“No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution’s] provisions can be suspended during any of the great exigencies of government.”).

119. Lobel, *supra* note 111, at 1392–97.

unlawfulness of that action and to be willing to risk the possibility that Congress and the courts might not ratify it.<sup>120</sup> The founding generation thus attempted to create a strict boundary between constitutional, nonemergency acts, and unconstitutional acts taken during times of emergency and necessity but nonetheless unjustified by the law.<sup>121</sup>

For example, President Thomas Jefferson believed that the Constitution carefully limited executive emergency power but that a President should nevertheless act unlawfully when a great public necessity required it and openly acknowledge the illegality and risk public sanction or approval as a consequence.<sup>122</sup> This Jeffersonian dichotomy was illustrated when Jefferson, confronting the Burr conspiracy<sup>123</sup> in 1807, argued that “[o]n great occasions . . . every good officer must be ready to risk himself in going beyond the strict line of the law, when the public preservation requires it; his motives will be a justification.”<sup>124</sup>

After leaving the presidency, Jefferson was asked whether there are “not periods when, in free governments, it is necessary for officers in responsible stations to exercise an authority beyond the law.”<sup>125</sup> Jefferson responded:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.

. . . .

The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the [C]onstitution, and his station makes it his duty to incur that risk.

. . . .

The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.<sup>126</sup>

The role of the courts under this theoretical framework is therefore to determine in individual cases whether executive officials have exceeded their constitutional powers in wartime or national emergencies and to assess fines or damages, which Congress may later indemnify. The Supreme Court’s

120. *Id.* at 1392.

121. *Id.*

122. SCHLESINGER, *supra* note 116, at 24.

123. For a discussion of the Burr conspiracy, a suspected secession plot allegedly inspired by Aaron Burr, see BRIAN F. CARSO, JR., “WHOM CAN WE TRUST NOW?: THE MEANING OF TREASON IN THE UNITED STATES FROM THE REVOLUTION THROUGH THE CIVIL WAR 96–105 (2006).

124. SCHLESINGER, *supra* note 116, at 24.

125. Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 328 (1952) (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810)).

126. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 11 THE WORKS OF THOMAS JEFFERSON 146, 148–49 (Paul Leicester Ford ed., 1905). Other early leaders generally supported Jefferson’s position on emergency power. Wilmerding, *supra* note 125, at 322–27.

decision in *Barreme* is the best example of Jefferson's principle applied in judicial practice.<sup>127</sup>

In *Barreme*, a unanimous Court upheld the imposition of individual liability on a naval commander for his violation of a congressional statute during wartime, even though he had acted pursuant to a presidential order.<sup>128</sup> The statute at issue, enacted during the United States' 1790s quasi-war with France, provided for the seizure of American vessels that were "bound or sailing to" French ports.<sup>129</sup> The Adams administration, apparently believing that the constrictive statute would allow American shipping to evade its prohibitions, issued instructions to naval commanders to seize ostensibly neutral ships they determined to be American that were "bound to or from French ports."<sup>130</sup> Captain Little, believing that *The Flying-Fish*, a Danish vessel, was an American ship traveling from a French port, captured the ship and brought it into an American port to be salvaged as a prize of war.<sup>131</sup>

Chief Justice John Marshall, writing for a unanimous Court, sympathized with the administration's instructions to its naval commanders, noting that the instructions were designed to avoid evasions of the Act and that they provided a "construction [of the statute] much better calculated to give it effect."<sup>132</sup> Nonetheless, the instructions violated the express language of the Act and were therefore unlawful even though issued by the Commander in Chief during a military conflict.<sup>133</sup> Captain Little's seizure of *The Flying-Fish* was therefore unlawful even if he had legitimate reason to believe that it was an American ship because it was indisputably sailing from, rather than to, France.<sup>134</sup> The question then became whether to impose individual liability for damages on Captain Little.<sup>135</sup>

Marshall held that Little must be answerable in damages to the owner of the vessel, noting:

I confess the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from

---

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

128. *Id.* at 179.

129. Act of June 13, 1798, ch. 53, 1 Stat. 565.

130. *Barreme*, 6 U.S. (2 Cranch) at 178.

131. *Id.* at 170.

132. *Id.* at 178.

133. *Id.* at 179.

134. See *id.* at 178.

135. *Id.* at 178-79.

the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions cannot change the nature of the transaction or legalize an act which without those instructions would have been a plain trespass.<sup>136</sup>

*Barreme* was not a unique case; in numerous other cases the Court held military commanders or other federal officers liable in damages for unlawful seizures or trespasses.<sup>137</sup> For example, in *The Apollon*,<sup>138</sup> Justice Joseph Story, writing for a unanimous Court, assessed damages against an official of the seizure of a ship and cargo motivated by perceived necessity:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.<sup>139</sup>

Similarly, in *Mitchell v. Harmony*<sup>140</sup> the Supreme Court upheld a damages award against a commander for the improper seizure of property during the Mexican War, ruling that the jury had properly determined that an emergency did not exist at the time of the officer's actions, even though the officer believed such an emergency existed.<sup>141</sup>

The most politically prominent judicial application of Jefferson's theory of emergency power came in the aftermath of General Andrew Jackson's victory in 1815 over the British during the War of 1812 at New Orleans. When Jackson's activities under martial law were challenged in a federal contempt proceeding, he justified his actions by citing Jefferson's view that necessity "may in some cases . . . justify a departure from the [C]onstitution."<sup>142</sup> President Madison, relieved that Jackson based his defense on necessity, observed that even though a suspension of liberties "may be justified by the law of necessity," a commander "cannot resort to the

---

136. *Id.* at 179.

137. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 125 (1804) (affirming a commander's liability for the unlawful seizure of a ship); 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, 1904–05 (2010) (finding sixty-eight instances between 1789 and 1860 in which federal officials were found liable and were forced to pay damages for seizures or trespass in either military or civilian contexts).

138. 22 U.S. (9 Wheat.) 362 (1824).

139. *Id.* at 366–67.

140. 54 U.S. (13 How.) 115 (1851).

141. *Id.* at 133–35.

142. Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 245 (1981).

established law of the land, for the means of vindication.”<sup>143</sup> The federal court held Jackson’s actions to be unlawful and fined him \$1000.<sup>144</sup>

In many of these cases, Congress eventually indemnified the officials who had been required to pay damages for their unlawful actions.<sup>145</sup> For example, Congress indemnified Captain Little several years after the Court’s decision because his unlawful actions had aided the nation during wartime.<sup>146</sup> Congress also indemnified Captain Murray for the damages he was forced to pay as a result of his unlawful seizure of the schooner *Exchange* during the quasi-war with France.<sup>147</sup> Finally, almost thirty years after Jackson was fined for contempt, Congress enacted legislation to repay Jackson the principal and interest on the fine.<sup>148</sup>

#### CONCLUSION

*Barreme* and other similar cases from the early period of the Republic demonstrate that Justice Kennedy’s opinion in *Ziglar* is at odds with the basic precepts of the framers’ view of the judicial role in addressing official claims of necessity during serious crises.<sup>149</sup> The *Ziglar* Court’s position that qualified immunity was insufficient to protect federal officials from actions they take in times of crisis cannot be reconciled with the framers’ view of the doctrine.<sup>150</sup> Further, permitting any risk that an official might face from a damages action—even for violating rights clearly established by the Constitution—would cause officials to unacceptably second-guess and possibly avoid taking difficult but arguably necessary actions to protect national security. This, too, is simply inconsistent with the views of Justice Marshall, Justice Story, and their brethren at the country’s founding.<sup>151</sup>

In fact, Jefferson and Madison’s perspective was the exact opposite of Kennedy’s: they believed that if officials took potentially unconstitutional action in the face of a grave emergency, they should only do so with the recognition that they might face a damages action or other serious consequences for unlawful conduct unless Congress either indemnifies or ratifies their action.<sup>152</sup> For it is the recognition of that risk that provides some accountability and caution on the part of political leaders in taking unconstitutional actions. Jefferson’s perspective does not merely focus on the individual’s right to a remedy but on ensuring that, when political or

---

143. *Id.* at 249 (quoting 2 CORRESPONDENCE OF ANDREW JACKSON 211–13 (J. Basset ed., 1927)).

144. *Id.* at 250.

145. Pfander & Hunt, *supra* note 137, at 1905 (finding congressional indemnification in roughly 60 percent of such cases).

146. Wilmerding, *supra* note 125, at 324 n.6; *see also* Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807) (setting forth payment of money from the U.S. Treasury to satisfy the judgment in the case of *The Flying-Fish*).

147. Act for the Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805).

148. Act to Refund the Fine Imposed on General Andrew Jackson, ch. 2, 5 Stat. 651 (1844); *see also* Sofaer, *supra* note 142, at 251.

149. *See supra* Part III.

150. *See supra* notes 112–26, 143 and accompanying text.

151. *See supra* notes 136, 139 and accompanying text.

152. *See supra* notes 126, 136 and accompanying text.

military commanders violate the law in taking actions that they believe necessity demands, such decisions are only made with the check that a legal violation brings with it personal risk and peril.<sup>153</sup>

Unfortunately, the abdication of postaction accountability for emergency decisions extends beyond the judiciary. One of the Obama administration's first actions upon taking office was to prohibit the future use of torture, including measures such as waterboarding.<sup>154</sup> Nonetheless, the Obama administration refused to criminally prosecute federal agents who, following Bush administration policy, used such methods in the interrogation of terror suspects.<sup>155</sup> Moreover, the Obama administration consistently argued in federal court that officials who committed such actions could not be held accountable, even in a damages action in federal court.<sup>156</sup> The Obama administration, as well as the courts, thus refused to demand accountability for these abuses, arguing that changing the rule for the future negated the need for looking backward to address prior misconduct. The problem with this argument is that one of the most powerful means of ensuring future adherence to the constitutional and legal rule prohibiting torture is to ensure that officials who consider violating that norm under the guise of emergency clearly understand that they are taking a personal risk in doing so.

It is the judiciary's role under checks and balances—and not simply its ability to provide a remedy for the violation of a right—that provides the most compelling reason that *Ziglar* is wrong. For it is the assurance that future officials will address emergencies with a recognition that they face personal risks for violating the law, and not—as Nixon once famously said—that presidential national security orders are per se constitutional,<sup>157</sup> that will make our country and Constitution safer.

---

153. See *supra* note 126 and accompanying text.

154. Transcript of News Conference, President Barack Obama (Apr. 29, 2009), <https://obamawhitehouse.archives.gov/the-press-office/news-conference-president-4292009> [<https://perma.cc/JGS9-VZPF>].

155. Press Release, Dep't of Justice, Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees> [<https://perma.cc/ZZ2F-7C59>].

156. See, e.g., Alexandra A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181, 2186 (2018).

157. In an interview with David Frost on April 6, 1977, the former President stated, “[if] the President does it, that means that it is not illegal.” *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.