

Qualified Immunity and the Right to Petition: How Avoiding Litigation Abridges a Core Constitutional Right

Wes Dodson*

This Note argues that the Supreme Court’s litigation-avoidance approach to qualified immunity abridges the right to petition. In particular, this Note reviews the historical role of litigation in the private petitioning process and demonstrates that litigation has often played a preliminary or facilitating role in the right to petition. The Supreme Court’s modern approach to resolving questions of immunity at the earliest possible stage of litigation, then, abridges the right to petition by not allowing litigation to serve this preliminary role.

This Note is the first piece of scholarship to thoroughly review the role that litigation has played in facilitating the right to petition. It is also one of the few pieces of scholarship that traces the private right to petition back to its origins in the medieval period. Finally, it is one of the few pieces of scholarship that applies the right to petition to a modern issue: qualified immunity.

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* Managing Online Content Editor, Volume 102, *Texas Law Review*; J.D. Candidate, Class of 2024, The University of Texas School of Law. This Note began as a research assignment during my summer at the Institute for Justice. The law of government accountability is full of giants; fuller still of those who would call them windmills. Some of the knights-errant doing battle with the particular giant this Note addresses—qualified immunity—include Anya Bidwell, Patrick Jaicomo, Dana Berliner, Arif Panju, Jeff Rows, Tori Clark, Kendall Morton, and all those involved with IJ’s Project on Immunity and Accountability. And I owe a particular debt of gratitude to IJ attorney Christie Hebert.

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Introduction

In this Note, I argue that the Supreme Court’s litigation-avoidance doctrine—the doctrine that courts should address qualified immunity at the earliest possible stage of litigation—abridges the right to petition. For centuries, petitioners have used the familiar tools of litigation (discovery, subpoenas, admissions, etc.) to develop the facts of their grievance, even when redress would ultimately come from the sovereign. And sovereigns, in turn, relied on courts to weigh in on the legal issues underlying a petitioner’s grievance before deciding whether to grant redress. Litigation, then, was often vital to the petitioning process.

But the Supreme Court’s recent qualified-immunity precedents instruct lower courts to address dispositive immunity issues at the earliest possible stage of litigation—before would-be petitioners have had the chance to develop the full story of their grievance using the tools of litigation.

To be sure, the Court’s insistence on avoiding litigation would undermine the right to petition in any context. But that the Court insists on avoiding litigation *in qualified-immunity* cases is particularly concerning because, until recently, private petitioning played a central role in redressing wrongs committed by public officials. Below, I argue that, in fact, the Supreme Court’s litigation-avoidance doctrine abridges the right to petition. But first, a bit of table setting.

Qualified immunity is the doctrine under which government officials can be held liable for constitutional violations only if the constitutional right at issue is “clearly established.”¹ First articulated in the 1967 case *Pierson v. Ray*² as a narrow exception to constitutional liability,³ the doctrine today protects “all but the plainly incompetent or those who knowingly violate the law.”⁴

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

2. 386 U.S. 547 (1967).

3. *Id.* at 553, 557; see Janet C. Hoeffel, *The Warren Court and the Birth of the Reasonably Unreasonable Police Officer*, 49 STETSON L. REV. 289, 291 (2020) (“Chief Justice Warren, the author of both *Terry* and *Pierson*, believed each would have a narrow application.”).

4. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This change—from qualified immunity as a narrow exception to constitutional liability, to liability as a narrow (and ever-narrower) exception to immunity—happened in the 1980s. In *Pierson*, the Court at least gestured toward common-law principles of executive-branch immunity,⁵ even though most scholars agree that the Court misapplied those principles.⁶ But in the 1982 case *Harlow v. Fitzgerald*,⁷ “the Court,” by its own account, “completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action.”⁸ Now, whatever their subjective intent, government officials are immune from liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁹ Circuit courts take different positions on what suffices to “clearly establish” a right,¹⁰ but lower courts generally look to “binding case law from the Supreme Court or their own circuit.”¹¹ For its part, the Court has “not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity.”¹²

Even after *Harlow*, though, courts had to first determine whether the defendant had violated the plaintiff’s constitutional rights before determining whether the rights were “clearly established.”¹³ This is a fact-dependent

5. As the Court noted, in a common-law suit for false arrest, “a peace officer who arrests someone with probable cause [was] not liable for false arrest simply because the innocence of the suspect is later proved.” *Pierson*, 386 U.S. at 555. And, according to the Court, “the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.” *Id.* This good-faith defense was part of the “background” of constitutional tort liability at the time § 1983—the statute authorizing constitutional suits against government officials—was passed. *Id.* at 556–57. It follows, the Court reasoned, that some version of a good-faith defense should also be available to officers sued under § 1983 today. *Id.*

6. See, e.g., Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (“Despite the Court’s repeated invocation of the common law, several scholars have shown that history does not support the Court’s claims about qualified immunity’s common-law foundations.”); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018) (“The Court’s account of common-law qualified immunity has several historical problems.”).

7. 457 U.S. 800 (1982).

8. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

9. *Harlow*, 457 U.S. at 818.

10. See Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1044–50 (2005) (cataloguing circuit court standards regarding “which decisional law is relevant”).

11. Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 452 (2019).

12. *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018).

13. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts to first decide whether the defendant violated the plaintiff’s right before deciding whether the right was clearly established).

inquiry, and so qualified-immunity cases typically required at least limited discovery.¹⁴ But in the 2009 case *Pearson v. Callahan*,¹⁵ the Court held that lower courts may skip straight to the clearly established inquiry without deciding whether a constitutional violation occurred.¹⁶ So after *Pearson*, it is at least possible for courts to resolve even the most egregious qualified-immunity cases using little more than Westlaw. Indeed, the more outlandish the facts of the constitutional violation, the less likely it is to be “clearly established.” As Fifth Circuit Judge Don Willett put it: “No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.”¹⁷

And since reinventing the doctrine in 1982, the Court has emphasized “the need to protect government officials from [the] nonfinancial burdens associated with discovery and trial”¹⁸ as an important policy justification for qualified immunity. As Professor Joanna Schwartz details in a recent study, the Court’s qualified immunity precedents dictate that qualified immunity “should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), . . . and it should, therefore, protect defendants from the time and distractions associated with discovery and trial”¹⁹ This “litigation-avoidance” justification was central to the Court’s decision in *Harlow*,²⁰ and has been the driving force behind the most significant developments in the qualified immunity landscape.²¹

Over the last two decades, the Court has coalesced around litigation avoidance as the “fundamental” policy justification for qualified immunity, more so, even, than protecting government officers from financial liability.²² This Note addresses how the litigation-avoidance doctrine undermines the right to petition.

because, otherwise, “[t]he law might be deprived of [elaboration] were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case”).

14. See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (acknowledging that limited discovery may be necessary before resolving qualified immunity claims on summary judgment).

15. 555 U.S. 223 (2009).

16. *Id.* at 236.

17. *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring dubitante).

18. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 9 (2017).

19. *Id.* at 48.

20. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) (reasoning that a goal of qualified immunity is to avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery”).

21. See Schwartz, *supra* note 18, at 16–18 (detailing how the litigation-avoidance justification influenced the Court to eliminate the subjective-good-faith inquiry of qualified immunity in *Harlow*, change the order of the two-step inquiry in *Pearson*, and allow for interlocutory appeals in *Mitchell*) (citing *Harlow*, 457 U.S. at 815–17; *Pearson*, 555 U.S. at 236–37; and *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985)).

22. Schwartz, *supra* note 18, at 6, 9.

As part of its efforts to police lower courts' compliance with the litigation-avoidance justification, the Court has increasingly turned to its shadow docket. By its own admission, the Court has used summary reversals several times to rebuke lower courts for proceeding to trial in qualified immunity cases.²³ Since 2007, the Court has summarily reversed a lower court's refusal to grant qualified immunity in twelve cases.²⁴ In nine of these cases, the Court summarily reversed not because the plaintiff failed to allege a constitutional violation—in each case it took no stance on this issue—but because it found that the unconstitutionality of the officer's conduct was not “clearly established.”²⁵ The message of these summary reversals, which even the Justices view as stinging rebukes,²⁶ is clear: Lower courts, proceed to discovery or trial at your own peril.²⁷ Applied consistently, the Court's logic would leave many victims of constitutional violations not only without a remedy, but without even the opportunity to acquire important evidence

23. See *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (noting that the Court's recent willingness to reverse lower courts in favor of extending qualified immunity was partially motivated by a belief that, “as ‘an immunity from suit,’ [the benefit of] qualified immunity ‘is effectively lost if a case is erroneously permitted to go to trial!’” (quoting *Pearson*, 555 U.S. at 231)).

24. See *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 9 (2021) (per curiam) (reversing circuit court's denial of qualified immunity); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) (same); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam) (same); *Kisela v. Hughes*, 138 S. Ct. 1148, 1154–55 (2018) (per curiam) (same); *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam) (same); *Pauly*, 580 U.S. at 81 (same); *Taylor v. Barkes*, 575 U.S. 822, 827 (2015) (per curiam) (same); *Mullenix v. Luna*, 577 U.S. 7, 19 (2015) (per curiam) (same); *Carroll v. Carman*, 574 U.S. 13, 20 (2014) (per curiam) (same); *Stanton v. Sims*, 571 U.S. 3, 11 (2013) (per curiam) (same); *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam) (same); *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 616 (2007) (per curiam) (same).

25. See *Rivas-Villegas*, 142 S. Ct. at 7 (“Even assuming that controlling Circuit precedent clearly establishes law for purposes of § 1983, *LaLonde* did not give fair notice to *Rivas-Villegas*. He is thus entitled to qualified immunity.”); *City of Tahlequah*, 142 S. Ct. at 11 (“On this record, the officers plainly did not violate any clearly established law.”); *City of Escondido*, 139 S. Ct. at 504 (“The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment.”); *Kisela*, 138 S. Ct. at 1153 (“The Court of Appeals made additional errors in concluding that its own precedent clearly established that *Kisela* used excessive force.”); *Pauly*, 580 U.S. at 78 (“The petition is now granted, and the judgment is vacated: Officer White did not violate clearly established law on the record described by the Court of Appeals panel.”); *Taylor*, 575 U.S. at 825 (“We grant the petition and reverse on the ground that there was no violation of clearly established law.”); *Mullenix*, 577 U.S. at 19 (“Because the constitutional rule applied by the Fifth Circuit was not ‘beyond debate,’ we grant *Mullenix*'s petition for certiorari and reverse the Fifth Circuit's determination that *Mullenix* is not entitled to qualified immunity.”) (citation omitted) (quoting *Stanton*, 571 U.S. at 11); *Carroll*, 574 U.S. at 17 (“*Marasco* does not clearly establish that *Carroll* violated the Carmans' Fourth Amendment rights.”); *Stanton*, 571 U.S. at 7 (“Neither case clearly establishes that *Stanton* violated *Sims*' Fourth Amendment rights.”).

26. See *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting) (describing summary reversals as a “bitter medicine”).

27. See *Schwartz*, *supra* note 18, at 48 (“The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible) . . .”).

through discovery, compel witness depositions, and develop a record. And this is not even counting those who are deterred by the litigation-avoidance justification from bringing suit at all.²⁸

Yet despite the Court's admonitions, trial courts have recognized the difficulty in applying a fact-intensive test at the motion-to-dismiss stage.²⁹ Circuit courts, too, have recognized that the determination of qualified immunity is *usually* more appropriate at the summary judgment stage after discovery has been conducted.³⁰ And other courts, it seems, have taken a Judge Reinhardt approach,³¹ relying on the sheer bulk of qualified immunity cases to give them cover.³² So in Professor Schwartz's study, qualified immunity was granted at the motion-to-dismiss stage in less than one percent of cases.³³

Still, lower courts can only dodge, duck, dip, dive, and dodge³⁴ Court precedents for so long, and some circuit courts are already taking heed of the possibility of being summarily reversed.³⁵ As Professor Richard Chen argues, "[a]t the same time that summary reversals are failing to dissuade one group of judges, a different set is likely to be overdeterred by the threat of being summarily reversed."³⁶ And there is always the possibility that the Court will

28. *See id.* at 69 ("One could argue that qualified immunity is serving its intended role by discouraging people from bringing Section 1983 cases when the underlying constitutional rights have not been clearly established.").

29. *Turner v. Weikal*, No. 03:12-CV-00915, 2013 WL 3272481, at *3 (M.D. Tenn. June 27, 2013) ("[T]he determination of qualified immunity 'is usually dependent on the facts of the case, and, at the pleadings stage of a litigation, there is scant factual record available to the court.'" (quoting *Oshop v. Tenn. Dep't of Child. & Servs.*, No. 3:09-CV-0063, 2009 WL 1651479, at *7 (M.D. Tenn. June 10, 2009))).

30. *See Thompson v. Ragland*, 23 F.4th 1252, 1256 (10th Cir. 2022) ("Because they turn on a fact-bound inquiry, 'qualified immunity defenses are typically resolved at the summary judgment stage' rather than on a motion to dismiss.") (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014)); *see also Reed v. Palmer*, 906 F.3d 540, 548–49 (7th Cir. 2018) (arguing that qualified immunity is usually more appropriate at the summary judgment stage and cataloging circuit court decisions containing similar observations).

31. *See Linda Greenhouse, Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html> [<https://perma.cc/U78F-HY7X>] ("When Stephen Reinhardt . . . visited Yale Law School a few years ago, a student asked him what the point was of issuing decision after decision that the Supreme Court would predictably overturn. . . . Judge Reinhardt took it with a smile. 'They can't catch 'em all,' he said.").

32. Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 696–97 (2020) ("Some judges who have strong views about the law in these areas will not be deterred by the threat of summary reversal . . .").

33. *See Schwartz, supra* note 18, at 46 tbl. 12.

34. *See DODGEBALL: A TRUE UNDERDOG STORY* (Red Hour Films 2004) (listing the "five" D's of dodgeball).

35. *See, e.g., Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (citing the threat of summary reversal as a reason to "think twice before denying qualified immunity").

36. Chen, *supra* note 32, at 718.

go from slapping wrists on the shadow docket to issuing a directly on-point merits-docket decision.

So who is right? At what stage of litigation *should* qualified immunity be applied? Of course, no constitutional imperative dictates at what stage of litigation a judge-made doctrine with no basis in history or the common law should be applied. The decision about when to apply qualified immunity—like the doctrine itself—is, *for the most part* then, policy all the way down. In this Note, however, I argue that there is at least a factor of constitutional significance favoring applying qualified immunity after discovery or even after trial. In particular, I argue that litigation has historically facilitated the right “to petition the Government for a redress of grievances.”³⁷

For centuries, courts have promoted the right to petition by allowing petitioners to develop the facts of their dispute and, in some cases, receive a preliminary determination of factual and legal issues through litigation. In Part I, I survey the history of courts’ role in the petitioning process of England and show that courts were integral to that process. In Part II, I discuss how, in the colonial period, the petitioning process itself came to resemble litigation. And in Part III, I rely on the case of *Maley v. Shattuck*³⁸ to show that the Founders saw litigation in the courts as central to the petitioning process.

With this historical backdrop, I argue in Part IV that the Supreme Court’s use of the shadow docket to enforce the litigation-avoidance doctrine undermines the right to petition. Plaintiffs in qualified-immunity cases could establish that the government owes them a “debt,” even if only a “moral” or an “honorary” one.³⁹ In fact, as recently as 1994, Congress compensated a

37. U.S. CONST. amend. I.

38. 7 U.S. (3 Cranch) 458 (1806).

39. Because of sovereign immunity, the actions of government officials typically do not give rise to legally enforceable obligations on the federal or state government unless the defense has been waived by statute. However, the Supreme Court has recognized that “[t]he power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government.” *Pope v. United States*, 323 U.S. 1, 9 (1944). Rather, Congress remains free to “creat[e]” debts “in recognition of claims which are merely moral or honorary.” *Id.*

This picture is marginally more complicated at the state level, where many state constitutions require the legislature to act through “general laws” and prohibit “special” legislation favoring private individuals. Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2096–99 (2020). This could, in theory, limit the ability of a state legislature to provide payments to private persons except in cases where it is legally obligated to do so. However, state courts have struggled with the general versus special law distinction, and “[t]he majority of states now apply ‘rational basis review’ when evaluating a challenge to a statute under a specific law prohibition . . .” *Id.* at 2098. Under rational-basis review, it is difficult to imagine a state court striking down a law granting private relief to a petitioner with bona fide claims that their rights were violated under color of state law. So in § 1983 cases, it is at least *possible* for plaintiffs to petition their state legislature claiming that the state owes them a moral debt because of the actions of its official.

victim of assault by a federal official after she petitioned for a private bill.⁴⁰ Even so, as discussed in Parts I–III, sovereigns have historically required petitioners to go through the rigors of litigation, or a process like it, before they would recognize such debts. Today, would-be petitioners can only turn to courts to administer this process.⁴¹ Encouraging lower courts to “resolv[e] immunity questions at the earliest possible stage in litigation”⁴² and punishing them with summary reversals if they do not resolve those questions in favor of the officer, then, undermines the right to petition by denying would-be petitioners the ability to develop the facts and resolve the legal issues of their case.

I. The Role of Litigation in the English Petition Process

A. *Early Origins of the Petitionary Process in Medieval England*

The Anglo-American tradition of private petitions dates back to the reign of Edward I and has its roots in ensuring government accountability. As Gwilym Dodd exhaustively details,⁴³ the submission of formal petitions to the Crown and the adoption of procedures for their consideration began in earnest in 1275 as part of “an abrupt and deliberate shift in government policy over a very short period of time.”⁴⁴

Edward I’s decision to invite petitions was a response to the widespread breakdown of the rule of law throughout the country and to rampant abuses by unaccountable royal officials, issues inherited from his father’s reign.⁴⁵ Petitions helped preserve the legitimacy of the Crown because the “actions of unscrupulous and unpopular local officials damaged royal prestige and weakened royal authority within local communities.”⁴⁶

But petitions to the king were subject to an important limitation: would-be petitioners had to first exhaust any recourse available in the ordinary

40. An Act for the Relief of Melissa Johnson, Priv. L. No. 103–3, H.R. 572, 103d Cong. (1994).

41. While Congress and state legislatures do *technically* still have investigative powers, they are generally reserved for high-profile political investigations, not the sorts of claims that comprise § 1983 litigation. It is not clear what, if any, investigatory mechanisms Congress still has in place for private bills, as they have only passed four since 2007. See Priv. L. No. 115-1, H.R. 4641, 115th Cong. (2018) (authorizing the President to award the Medal of Honor to a Vietnam War veteran); Priv. L. No. 112-1, S. 285, 112th Cong. (2012) (granting relief in immigration proceedings); Priv. L. No. 111-2, S. 1774, 111th Cong. (2010) (same); Priv. L. No. 111-1, S. 4010, 111th Cong. (2010) (same).

42. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

43. GWILYM DODD, *JUSTICE AND GRACE: PRIVATE PETITIONING AND THE ENGLISH PARLIAMENT IN THE LATE MIDDLE AGES 19–48* (2007).

44. *Id.* at 19–20, 22, 25.

45. See *id.* at 32 (“[Petitioning] provided an excellent opportunity for the king’s subjects to bring to attention the wrongdoing of sheriffs and other royal officials in the localities.”).

46. *Id.* at 33.

common-law courts. In part, this reflects the Crown’s “reluctance to interfere in due legal process”⁴⁷ and the “contemporary understanding that parliament should act as the provider of justice *only* in cases that could not be adequately dealt with in the king’s ordinary common-law courts.”⁴⁸ But it also reflects a pragmatic consideration: litigation is inherently useful in developing the facts of a dispute and local courts are uniquely suited to this task. Highlighting the importance of these preliminary proceedings, petitioners would often append court records to their petitions or request that the king and Parliament order the record to be brought before them. I’ve collected a handful of demonstrative examples from the UK National Archives.⁴⁹

Courts, then, served an important role in developing the record of a dispute even when they lacked the authority to provide the ultimate remedy.

B. *Litigation in the Petition of Right Process*

As the number of private petitions presented to the king and council increased, so too did the centrality of litigation to the petitioning process—

47. *Id.* at 81.

48. *Id.* at 80.

49. *See, e.g.*, Petition of Adam de Moldeworth (c. 1341), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9333887> [<https://perma.cc/M4HP-E75F>] (“Request that the record and process of the petitioner’s case in king’s bench for the recovery of Little Barrow be brought before king and council; the matter has now been pending in the courts for nine years.”); Petition of Thomas de Musegrave and John de Hemington (1319), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9208562> [<https://perma.cc/N2LS-XQZX>] (“Order the justices concerned to bring or send the record of the process of the plea to the next parliament.”); Petition of John de Mountagu (c. 1388), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9208400> [<https://perma.cc/J8VR-4TGD>] (“John de Mountagu asks that the records and processes of a case brought b[y] William de Montagu in the court of chivalry be examined before the King, in order that the judgment made against him be revised.”); Petition of Brice le Daneys (c. 1318–21), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9148628> [<https://perma.cc/U3Z6-V2PA>] (“It is commanded to the justices that they should bring the record before the council and let a remedy by given there.”); Petition of Unnamed Petitioner (1380), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9334193> [<https://perma.cc/8P8S-7QME>] (“Writ of Richard II ordering the mayor and bailiffs of York to send to the Chancery the record and process had before them in the King’s court of York, of the bill by Howom and Sevenhous against Rufford.”); Petition of Arnaud de Luke and William Arnaud de Portan (1318), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9294247> [<https://perma.cc/6D6W-9UXF>] (“And because John de Doncastre has recorded that the process was had before the court, all those named were guilty of trespass, and the merchants are to have writs to bring the records before the king, who will do right.”); Petition of Richard de Berners (c. 1325), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9060499> [<https://perma.cc/947K-T3WK>] (“He requests that the king order the justices to proceed to judgement, and, if there is some difficulty in the case, that the record and process may be brought into parliament now, and judgement rendered there.”); Petition of Alice Oldherying (1333), THE NAT’L ARCHIVES OF THE UK: PUBLIC RECORD(S), <https://discovery.nationalarchives.gov.uk/details/r/C9208751> [<https://perma.cc/ZWU3-9EJS>] (“Let them have a writ to bring the record and process before the king.”).

so much so that, by the end of the seventeenth century, courts exercised almost full control over the private petitioning process in claims relating to the Crown's interests.⁵⁰ Even so, the authority of courts was limited in the most important respect: those who received a favorable disposition of their claims in the royal courts still had to petition the king and council for the payment of any judgments against the Crown. So, in these cases, litigation in the royal courts was less an end of itself—after all, few petitioners were interested in declaratory relief—and more so a way to facilitate the right to petition the king.

Eventually, Chancery came to handle petitions seeking justice against the Crown, also called “petitions of right.”⁵¹ Though it was in most other instances a prerogative court, Chancery handled petitions of right on its common-law or “Latin” side.⁵² Unlike proceedings on its equity or “English” side, proceedings on the Latin side of Chancery mirrored ordinary litigation. Petitioners had to draw up a complaint,⁵³ a special Chancery commission investigated the facts,⁵⁴ “the king was . . . called on to plead to the questions of law involved,”⁵⁵ and then King's Bench would preside over a jury trial on the fact issues.⁵⁶

Still, while such proceedings may have mirrored ordinary common-law litigation, invoked common-law principles, and resulted in determinations by a jury, the king never surrendered (as a formal matter, at least) his prerogative to disregard judgments he perceived as against his interests.⁵⁷ In fact, that

50. The progression from the early petitions of Edward I to the eventual control of courts over proceedings against the Crown through “prerogative practice” is well covered in James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 909–17 (1997). As the capstone for this treatment, Pfander relies on the *Case of the Bankers*. *Id.* at 916–17. But, as discussed below, even in this case, the plaintiffs ultimately had to petition parliament for payment of the judgment rendered against the Crown. See David S. Keenan, *Discretionary Justice: The Right to Petition and the Making of Federal Private Legislation*, 53 HARV. J. ON LEGIS. 563, 577 (2016).

51. See 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 15 (1926) (noting that a petition against the Crown came to be known as a “petition of right” because subjects were vindicating their legal rights “against the Crown”).

52. See generally A.D. Hargreaves, *Equity and the Latin Side of Chancery*, 68 LAW Q. REV. 481 (1952) (“[T]he common law jurisdiction of Chancery was mainly concerned with matters affecting the King or a grantee from the King, such as . . . petitions of right . . . and the like.”).

53. JOSEPH CHITTY, JR., *A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN* 345 (London, Joseph Butterworth & Son 1820).

54. HOLDSWORTH, *supra* note 51, at 16.

55. *Id.* at 17.

56. F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 4 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936).

57. See Keenan, *supra* note 50, at 574–75 (“[T]he King could either reject or ignore [a petition of right] by failing to provide the requisite relief. The petition of right was contingent not only upon the King's willingness to listen, then, but also his willingness to pay.”) (footnote omitted); see also DODD, *supra* note 43, at 321 (noting that, while “the Crown generally used its power in a responsible way” and “[t]here is no evidence to suggest that the Crown's interests were routinely placed above

petitions of right were handled on the common-law side of Chancery reflects that the king was as immune from self-executing judgments in these cases as in the ordinary common-law courts.⁵⁸

C. *Litigation Against the Crown in the Common-Law Courts: The Bankers Case*

Perhaps no single case better reflects the penultimate role of litigation in the process of securing extraordinary relief through petitioning than the *Bankers Case*.⁵⁹ In that case, “a group of creditors who had lent money to Charles II several decades earlier sought to recoup the nominal value of their debts plus interest from the Crown.”⁶⁰ The case is notable because, rather than pursue a petition of right in a prerogative court, the creditors brought their suit in the Court of Exchequer, a common-law court with jurisdiction over money claims.⁶¹ The Attorney General demurred to the petition in Exchequer, which entered judgment for the bankers, and then brought a writ of error in the Exchequer Chamber, a sort-of appeals court with jurisdiction

the proper and correct implementation of the law,” still, the ultimate decision “depende[d] . . . on the self-regulation and integrity of the king and his ministers”). For a less rosy view of this same picture, see generally Simon J. Harris, *Taking Your Chances: Petitioning in the Last Years of Edward II and the First Years of Edward III*, in *MEDIEVAL PETITIONS: GRACE AND GRIEVANCE 173* (W. Mark Ormrod, Gwilym Dodd & Anthony Musson eds., 2009) (describing the role of partisan and political influence on the acceptance or rejection of petitions).

Even so, English subjects would have been surprised to learn, as seems to be the modern view, that they lacked effective remedies for government wrongs. “From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown. And when it was necessary to sue the Crown *eo nomine* consent apparently was given as of course.” Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *HARV. L. REV.* 1, 1 (1963). As Professor James Pfander demonstrates, even if preserved as formal matter, the requirement of the Crown’s consent to suit “grew into a fiction.” Pfander, *supra* note 50, at 916. To be sure, petitioners seeking money damages against the Crown were often stymied by the practical reality that “[m]oney was the last thing of which a mediaeval king had too much.” Ludwik Ehrlich, *Proceedings Against the Crown (1216–1377)*, in 6 *OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY* 9, 32 (Paul Vinogradoff ed., 1921). But even in these cases the practice was not to leave the petitioner without relief but “to give land, advowsons, liberties, rights to hold markets; in short, anything rather than hard cash.” *Id.* The “magnificent irony” of American sovereign-immunity law, then, has been to reify this hollow formality of English law—an “accident” of England’s manorial court system—into a doctrine that often deprives America’s sovereigns, the people, of effective remedies against their servant, the government. Jaffe, *supra*, at 2–3 (quoting 1 *FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 518 (2d ed. 1898)).

58. See George Jarvis Thompson, *The Development of the Anglo-American Judicial System*, 17 *CORNELL L.Q.* 203, 220–21 (1932) (“The chancellor was not permitted to resort to his extraordinary jurisdiction when sitting on the common law side of his court.”).

59. *R v. Hornby (The Bankers Case)* (1696) 87 Eng. Rep. 500; 5 Mod. 29.

60. Keenan, *supra* note 50, at 577.

61. *Id.*

over writs of error from Exchequer.⁶² Accordingly, the case presented two issues: “first, whether the King’s debts could be binding on his successors, and second, whether a suit in the Court of Exchequer was the proper method for obtaining redress.”⁶³

The Exchequer Chamber fractured on these issues. Two of the three judges—Treby and Holt—believed that the king’s debts could bind his successors.⁶⁴ The third judge, Somers, thought it unnecessary to decide this issue.⁶⁵ He “contended that the proper remedy for the bankers was a petition of right to the Crown, not a petition to the barons of the Exchequer, for the barons had no independent authority to grant relief.”⁶⁶ Judge Treby agreed.⁶⁷ Ultimately, “[b]ecause the offices of Lord Chancellor and Lord Treasurer were both vacant in 1696, the Lord Keeper [Somers] was empowered to render judgment alone.”⁶⁸ Somers—who, again, thought that the proper remedy was a petition of right—ruled against the bankers with the proviso that this was “meerly [sic] upon his own opinion.”⁶⁹

The bankers then “brought a writ of error to the House of Lords.”⁷⁰ Sitting in its capacity as England’s highest court, the House of Lords reversed “Somers’s judgment in the Exchequer Chamber.”⁷¹ Rather than the petition of right, then, the House of Lords endorsed the bankers’ suit in the common-law Court of Exchequer as the appropriate vehicle for seeking relief in money claims against the Crown. The case remains damning evidence against any theory of *legal*, rather than structural, sovereign immunity existing at the beginning of the eighteenth century.⁷²

62. Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1231–32 (2009).

63. Keenan, *supra* note 50, at 577.

64. Figley & Tidmarsh, *supra* note 62, at 1233 (“Treby and Holt believed that Charles II could alienate his hereditary revenue and thus bind his successors . . .”).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1234 n.227 (citation omitted). The statutory authority for Lord Keeper Somers’s privilege in this respect is outside the scope of this Note.

69. *Id.* at 1234 (alteration in original) (quoting *R v. Hornely & Williams* (1697) 90 Eng. Rep. 825, 826; Carthew 388, 388).

70. *Id.*

71. *Id.*

72. *See id.* (“On the surface, the *Bankers’ Case* provides unequivocal support for those who argue that sovereign immunity did not exist in England in the years before the American Revolution.”). The authors argue instead that sovereign immunity is rooted in the structural fact of Congress’s power over appropriations. *See generally id.* (arguing that the Appropriations Clause offers a textual basis for the immunity of the federal government from suits regarding claims pursuing monetary relief).

Parliament, however, had seized control of the Crown's hereditary revenue—the source of funds for satisfying the bankers' judgment.⁷³ So, because Parliament has plenary discretion over how to discharge the nation's many debts, the relief Exchequer afforded in the *Bankers Case* was inherently *declaratory*.⁷⁴ Indeed, the Barons of the Exchequer recognized as much when they limited the bankers' relief to revenue “not otherwise disposed of or applied by Act of Parliament.”⁷⁵ After receiving the judgment, the bankers still had to present their claims before Parliament.⁷⁶ Ultimately, they fared poorly: five years after the Exchequer's judgment, the bankers received three percent annuities instead of the six percent they had been promised, and they agreed that their claim on the capital sum would be extinguished once half had been paid.⁷⁷

The *Bankers Case* is noteworthy for three reasons. First, the litigation helped clarify the legal rights of the parties and the obligations of the government. It was not obvious that Charles II's grant of annuities would be binding on his successors.⁷⁸ Without this issue resolved in their favor, the bankers would have been left with a meaningless claim against a dead king's hereditary revenue, as they had been in 1685.⁷⁹ Second, the Barons of the Exchequer were perfectly comfortable declaring that the government owed the bankers a debt—even a legal one—while also recognizing Parliament's plenary control over how that debt would be discharged, if at all. By limiting

73. *Id.* at 1235.

74. For the same reason that *all* judgments by a court against a coordinate branch are, at least in some sense, declaratory: In a fight between bailiffs and armies, armies win.

75. See J. Keith Horsefield, *The “Stop of the Exchequer” Revisited*, 35 *ECON. HIST. REV.* 511, 522 (1982) (alteration in original) (quoting *The Case of Many Thousands*, EARLY ENG. BOOKS ONLINE, <https://quod.lib.umich.edu/e/eebo/A35625.0001.001/1:1?rgn=div1;view=fulltext> [https://perma.cc/T7HM-DZFW]) (“So while [the bankers] had secured the Lords' judgment in [their] favour, it was left to the Commons to act upon it.”)

76. In what appears to be an early example of moneyed interests purporting to have grassroots support, the bankers presented a remonstrance and a grievance to the House of Commons purporting to act on behalf of “many thousands” and “several thousands” of aggrieved individuals, respectively. See *The Case of Many Thousands*, *supra* note 75 (“These Proprietors having laid before the Honourable House of Commons their Just and Legal Titles . . .”); *The Case of Several Thousands*, EARLY ENG. BOOKS ONLINE, <https://quod.lib.umich.edu/e/eebo2/A35642.0001.001?rgn=main;view=fulltext> [https://perma.cc/J6F6-7L9M] (“Therefore it is humbly Hoped and Prayed . . .”). The communication presented in *The Case of Several Thousands* is recognizably a petition from its closing request (“Therefore it is humbly Hoped and Prayed . . .”); *The Case of Many Thousands* more resembles a remonstrance (“These Proprietors having laid before the Honourable House of Commons their Just and Legal Titles . . .”).

77. Horsefield, *supra* note 75, at 514, 523.

78. See Figley & Tidmarsh, *supra* note 62, at 1231 (“Lord Chief Justice Holt thought that the [issue of alienability] was ‘the great point of the case.’” (quoting *R v. Hornby* (The Bankers Case) (1696) 87 Eng. Rep. 500, 514)).

79. See Horsefield, *supra* note 75, at 518 (“Judgment on a previous suit by *monstrant de droit* was to have been given on 6 February 1685, but the suit was frustrated by the death on that day of King Charles II.”).

the bankers' relief to revenues "not otherwise disposed of or applied by Act of Parliament,"⁸⁰ the Barons of the Exchequer—who, as Britain's treasurers, were aware of the many debts left over from the Nine Years' War—were implicitly recognizing the *structural* limitations of judgments against the government. And third, for all the sound and fury surrounding the *Bankers Case*, which began in 1665,⁸¹ it was litigation in an ordinary common-law court that ultimately persuaded Parliament to provide at least *some* relief. After all, the bankers had unsuccessfully petitioned Parliament several times before.⁸² With this background, the parallels between the *Bankers' Case* and *Maley v. Shattuck*, discussed in Part III, are unmistakable. And in neither case did the court wring its hands about the fact that the legislative branch would have discretion over how, if at all, the court's judgment would be executed.

II. "Litigation" in the Colonial Petition Process

In the American Colonies, colonial assemblies exercised both legislative and judicial functions.⁸³ In part, this was because the bureaucratic demands of administering justice in the colonies "outstripped the ability of both local and imperial institutions to render effective government."⁸⁴ But it also reflects that colonial assemblies saw the adjudication of private disputes as an important tool for expanding their jurisdiction vis-à-vis the Crown.⁸⁵ Whatever the reason, the petitioning process in the colonial assemblies—more so than in any other tradition of petitioning—came to resemble the process of litigation.⁸⁶ Accordingly, because colonial assemblies themselves

80. *Id.* at 522 (alteration in original) (quoting *The Case of Many Thousands*, *supra* note 75).

81. *Id.* at 511.

82. *See id.* at 517–18 (describing three separate, unsuccessful petitions in 1678, 1689, and 1691).

83. *See generally* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998) (describing the predominantly judicial role played by the colonial assembly in New York); *see also* Keenan, *supra* note 50, at 579 ("As was the case in England, the development of colonial assemblies grew out of their assumption of judicial functions."); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 145–49 (1986) ("Connecticut Colony's legislature, like other colonial assemblies, performed both legislative and judicial functions."); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 28 (1993) ("As in England, the same colonial body often performed legislative, judicial, and executive functions.").

84. Keenan, *supra* note 50, at 579; *see also* Higginson, *supra* note 83, at 146 ("Partly because the early colonies lacked strong judicial institutions, the legislatures heard and resolved these conflicts.").

85. *See* Desan, *supra* note 83, at 1389 ("Over the next decade, the legislators greatly expanded the scope of their financial control and delineated their authority over claims to public money. They achieved, in that way, a jurisdiction that was both large and unprecedented."); Higginson, *supra* note 83, at 150 ("Colonial assemblies seized on petitions to extend their authority.").

86. In part, this is because to avoid the partiality of the royal courts and the incompetence of the colonial courts, petitioners would simply "reformulate causes of action for judicial redress into grievances of abridged liberties in order to secure legislative relief." Higginson, *supra* note 83, at

had the tools and institutional competencies necessary to develop the factual record of disputes and provide adjudication, there is less evidence of reliance on preliminary litigation in courts in the colonial tradition. Even so, colonial petitioning demonstrates the importance of a litigation-like process of discovery, fact-finding, and adjudication to the right to petition.

* * *

“Most petitions in the early colonies involved private disputes that the assemblies, acting in a quasi-judicial capacity, would investigate and resolve.”⁸⁷ As in England, most of the investigatory and administrative work was delegated to committees instituted to handle petitions.⁸⁸ And like Chancery and the prerogative courts in England, these committees possessed the full suite of tools for the investigation of disputes. As Raymond Bailey, in the only book-length treatment of colonial petitioning, recounts:

Committees possessed the necessary powers to conduct thorough investigations: they could subpoena witnesses, papers, and records; testimony could be accepted through depositions; witnesses were privileged from arrest while in transit and compensated for their expenses; legal counsel could be employed by the petitioners or by other interested parties; the house consistently promised to act “with the utmost severity” against anyone who should “tamper with any witness” or hinder the collection of evidence, and this promise was enforced when necessary.⁸⁹

And even the process of receiving petitions “reflected the judicial character of petition consideration.”⁹⁰ Petitioners had to provide proper notice, summons, and copies of the petition to concerned parties, amounts-in-controversy requirements were eventually imposed, and petitions eventually even received docket numbers.⁹¹ In short, the petitioning process in the colonial assemblies was often indistinguishable from ordinary litigation, with many of the same investigatory tools and procedural due process safeguards.

And if colonial assemblies were already inclined toward full investigation and fair hearing in disputes between private parties, they were even more so inclined when petitioners claimed a debt from the public fisc.

145. It is no surprise, then, that the process for handling colonial petitions came to resemble the process for handling lawsuits: many petitions, in essence, were lawsuits.

87. *Id.* at 146.

88. See RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 66 (1917) (describing the diversity of committees instituted to handle petitions in the Massachusetts assembly).

89. RAYMOND C. BAILEY, *POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 29 (1979).

90. Higginson, *supra* note 83, at 147.

91. *Id.* at 148.

Professor Christine Desan exhaustively describes this process,⁹² but it is worth summarizing here. To begin, Professor Desan notes that “[t]he procedures that the [New York assembly] adopted when it began resolving public claims reinforce the impression that participants identified legality, as opposed to assertions of will or dispensations of grace, as the goal of assembly deliberations.”⁹³ This “suggest[s] that the assembly approached its duty as an adjudication that would turn on fact-finding and the existence of obligation.”⁹⁴

The process began with the creation of a public claim, typically when an agent of the assembly purchased (or sometimes commandeered) some necessity from a colonist.⁹⁵ In exchange, the agent would issue a warrant payable by the treasurer describing the nature of the transaction.⁹⁶ If for whatever reason this warrant was not paid by the treasurer, colonists would bring their warrant to assembly-appointed commissioners who “had authority ‘to Receive, Examine and State the several Claims alleged as Debts of the Government.’”⁹⁷ The commissioners had the duty to “‘discover[] the truth of such Debts’ including ‘how they came to be Contracted.’”⁹⁸ And they “were armed accordingly, with the authority to subpoena ‘persons, papers and Records’ and to administer oaths as necessary.”⁹⁹

After receiving the commissioners’ reports, the assembly itself “evidently examined and resettled each claim.”¹⁰⁰ It did so in a committee of the whole with “rules imply[ing] that the House undertook a substantive review.”¹⁰¹ And as Desan notes, “[s]everal factors indicate that the House seriously weighed the evidence before it.”¹⁰² Petitioners were required to take oaths swearing that they had not received payment before the claim was heard and upon receiving payment, and they “could be sued (*qui tam*) if they took the oath falsely.”¹⁰³ The committee defended its work to outside parties as based on a “long examination of the particular accounts.”¹⁰⁴ And in many

92. See generally Desan, *supra* note 83 (explaining the push toward legislative adjudication from the New York constitutional committee).

93. *Id.* at 1472.

94. *Id.*

95. *Id.* at 1427–28.

96. *Id.* at 1428.

97. *Id.* at 1473 (quoting 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 770 (Albany, James B. Lyon 1894)).

98. *Id.* (quoting 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 97, at 770).

99. *Id.* (quoting 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 97, at 770).

100. *Id.*

101. *Id.* at 1474 (describing the rules for the committee of the whole).

102. *Id.*

103. *Id.* at 1474 n.451.

104. *Id.* (quoting Letter from the Council and Assembly of New-York to the Lords of Trade (May 20, 1715), in 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 405 (E.B. O’Callaghan ed., Albany, Weed, Parsons & Co. 1855)).

cases, “claims were reduced, an indication in itself that the House made some affirmative effort to assess value.”¹⁰⁵

The process of public-claims adjudication Desan describes reveals a particular insistence that petitions be factually supported and fully investigated when the petitioner’s relief draws on the public fisc. This was certainly true, as just described, where petitioners claimed a *legal obligation*, but the assembly expected even petitions claiming equitable relief or a gratuity to be well supported and substantially justified.¹⁰⁶

* * *

The petition process in the colonial period relied less on courts as fact-finders and preliminary adjudicators than did the processes in England and the early American republic.¹⁰⁷ But this was not because litigation and adjudication were no longer required to handle petitions. Rather, the colonial petition process itself came to incorporate many tools of litigation, and colonial assemblies developed the institutional competence to adjudicate many of the factual and legal issues that would have normally been the purview of courts. In all cases, but particularly when relief drew on the public fisc, colonial assemblies insisted on a full factual record and claims justified by principles of law or equity. Put another way: denying petitioners access to a means of developing the factual record and establishing the legal or equitable validity of their claim would have been effectively denying them their right to petition for redress entirely. Colonial petitioning, then, demonstrates the importance of a litigation-like process of discovery, fact-finding, and adjudication to the right to petition.

III. Litigation and Petitioning in the Early American Republic

After the period of “legislative adjudication”¹⁰⁸ described above, courts resumed their role as fact-finders and preliminary adjudicators in the early republic era, at least at the federal level.¹⁰⁹ In the seminal paper on this topic, *Public Wrongs and Private Bills*, James Pfander and Jonathan Hunt describe the Supreme Court as a knowing participant in a system of nonadversarial litigation intended to develop a factual record and adjudicate legal issues in disputes ultimately destined for relief through the congressional petitioning

105. *Id.* at 1475.

106. *See id.* at 1465 (detailing the consideration that went into providing equitable relief for petitioners whose claims were technically time-barred); *id.* (distinguishing between debts that the assembly paid as a matter of obligation and those it paid as a matter of gratuity on the basis that the gratuitous claims were well justified).

107. *See supra* Part I; *infra* Part III.

108. Desan, *supra* note 83, at 1384.

109. A full survey of courts’ role in the petition process at the state level in this era is currently the subject of further research by the author.

process.¹¹⁰ Though Pfander and Hunt’s paper focuses on how the political branches used the petition process to “shape the incentives of government officers to comply with the law,”¹¹¹ the cases they discuss paint a compelling picture of how the judicial branch used its core institutional competency—the process of litigation and adjudication—to facilitate the right to petition. I will discuss only the most demonstrative case, *Maley v. Shattuck*, in this Note.

A. *The Madisonian Compromise—No, Not That One*

By 1789, “[l]eading thinkers of the day agreed that, from the perspective of the separation of government powers, the task of adjudicating money claims against the government was one that the courts should perform.”¹¹² Even so, the *theory* of separation of powers had to contend with the well-established *practice* of legislative adjudication described in Part II. After independence, states experimented with various models, some continuing the practice of legislative adjudication, some providing for government suability in the regular courts, and still others adopting a more-or-less hybrid model.¹¹³ The Constitution reflects this same ambivalence, with provisions that “authorize, but do not necessarily require, Congress to assign the adjudication of money claims to the federal courts.”¹¹⁴

Enter James Madison. In the “Quasi-War” between the United States and the French First Republic, several Danish ships were caught in the crossfire, seized by American naval officers who suspected them of being American smugglers using Danish papers to evade the trade embargo with France.¹¹⁵ This led to a minor diplomatic crisis, with Danish officials interceding on behalf of the dispossessed ship captains to request compensation for their losses.¹¹⁶ In particular, the Danish resident minister, Peder Blicherolsen, began corresponding with then-Secretary of State James Madison in 1802, requesting that a method “of adjudicating [the] issue be agreed upon.”¹¹⁷

In response, Madison struck (another) compromise, balancing “the role of the federal courts in adjudicating claims of liability and the role of

110. See generally James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010) (describing the way official liability, as determined by courts, often led to private legislation enacted by Congress in the antebellum era).

111. *Id.* at 1862.

112. *Id.* at 1873.

113. *Id.*

114. *Id.* at 1874.

115. *Id.* at 1877–87 (detailing the background of the Quasi-War and the seizures of the Danish vessels the *Flying Fish*, *Charming Betsy*, *Amphitheatre*, and *Mercator*).

116. *Id.* at 1894.

117. *Id.* at 1895 & n.139.

Congress in making any appropriation of funds to pay the claims.”¹¹⁸ Madison recognized that “general usage requires that redress should be first prosecuted judicially,” but also that the cases might give rise to an “obligation[] of the United States”¹¹⁹—a telling admission, for the cases were nominally to proceed against the American naval officers.

Inquiries from the Attorney General, Levi Lincoln, soon “confirmed Madison’s view about the need for adjudication” in these cases.¹²⁰ In response to a request from Madison for an opinion of the Attorney General relating to the case involving the seizure of the Danish vessel *Mercator* by Captain William Maley, Lincoln first pointed out the threadbare factual record.¹²¹ He then questioned whether Maley himself would even be liable, given that the ultimate condemnation of the vessel was pursuant to a British prize claim.¹²² Finally, even “admitting [Maley] liable,” Lincoln could “find no principle of the law of nations, or adjudication, by which the government is bound to answer in the first instance for the unlawful captures of its subjects, or become so from their insolvency or avoidance.”¹²³ Clearly, then, there were factual and legal issues in the case that needed preliminary adjudication.

“Following his receipt of Lincoln’s opinion, Madison made arrangements to secure a judicial determination of Shattuck’s [the Danish ship captain] claim against Maley.”¹²⁴ Madison wrote a tactful letter to Blicherolsen, explaining that “Shattuck’s claim could not be adjusted without a prior judicial investigation.”¹²⁵ “Such an adjudication would enable the government to determine the circumstances surrounding the seizure” and could help resolve the legal issues raised in Lincoln’s opinion.¹²⁶ Madison also recommended to Blicherolsen that—oh, by the by—it might be a good

118. *Id.* at 1895.

119. *Id.* at 1895–96 (quoting Letter from James Madison to Richard Söderström (July 23, 1801), in 1 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 461 (Robert J. Brugger et al. eds., 1986)).

120. *Id.* at 1896.

121. See Opinion of Levi Lincoln to Secretary of State (Mar. 11, 1802), in 1 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS, IN RELATION TO THEIR OFFICIAL DUTIES 106–07 (Benjamin F. Hall & Robert Farnham eds., 1852) (“The reasons for the first or the second capture, for the condemnation, for the appeal, or for the non-prosecution of the appeal, are not stated. There is no circumstance separate from the decision of the admiralty court by which it can be determined that either . . . seizure[] was justifiable . . .”).

122. *Id.* at 107 (“If, therefore, the Experiment was justifiable in sending its prize to the commodore, it could not become tortious and liable from the legal or illegal subsequent conduct of the British.”).

123. *Id.* at 108.

124. Pfander & Hunt, *supra* note 110, at 1896.

125. *Id.* at 1897 & n.149.

126. *Id.* at 1897.

idea to address how the United States, “distinct from the conduct of Captain Maley,” would still be liable for the loss of the ship given the potentially supervening intervention of the British.¹²⁷ After all, Madison intimated, “it may be made an eventual question.”¹²⁸

Madison then arranged for the amicable suit of *Shattuck v. Maley* (read: *Blicherolsen v. United States*). Blicherolsen chose the forum closest to *his own* residence, the District Court of Pennsylvania, as the venue for the suit.¹²⁹ And Madison arranged for Alexander Dallas, the U.S. Attorney for the District of Pennsylvania, to appear “in behalf of Captn. Maley; in whose defence the United States are interested.”¹³⁰ Dallas’s intercession might have also had something to do with the fact that Maley, the nominal defendant, “was both absent from the country and presumed insolvent.”¹³¹

With a mostly unexplained delay of two years,¹³² the suit got underway. Shattuck apparently lost at first in the district court, but then appealed to the circuit court, which “reversed the decree of the district court.”¹³³ The court “overruled and rejected the protest of Maley, and ordered him to appear absolutely without protest, before the district court.”¹³⁴ The circuit court, it seems, was unaware of its role in Madison’s carefully orchestrated judicial theater.

On remand, the district court entered judgment for Shattuck, who claimed that his total loss amounted to \$41,658.67¹³⁵—slightly more than a million dollars in today’s money if the online inflation adjuster is to be believed.¹³⁶ But “Maley” (Dallas) excepted to this figure on several bases, and, on appeal, the circuit court ultimately adjusted the figure down to \$33,244.67 with costs.¹³⁷ Dallas appealed this judgment to the Supreme

127. Letter from James Madison to Peder Blicherolsen (Apr. 23, 1802), in 3 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 152 (David B. Mattern et al. eds., 1995).

128. *Id.*

129. Pfander & Hunt, *supra* note 110, at 1897.

130. Letter from James Madison to Alexander J. Dallas (June 15, 1802), in 3 PAPERS OF JAMES MADISON, *supra* note 127, at 308.

131. Pfander & Hunt, *supra* note 110, at 1897.

132. *Id.* at 1903. A possible explanation for the delay is that Alexander Dallas was busy litigating the related case *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and the parties were waiting on the outcome of that case and to see how Congress would react. See Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 10 (2001) (describing the request for assistance by the Acting Secretary of the Navy to Alexander Dallas).

133. I have not been able to locate these opinions, but their holdings are mentioned in William Cranch’s lengthy reproduction of the court record. See *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 472 (1806) (replicating these holdings).

134. *Id.*

135. *Id.* at 472–73.

136. 1806 to 2023 Inflation Calculator, OFF. DATA FOUND. / ALIOTH LLC, <https://www.officialdata.org/us/inflation/1806?amount=41658> [<https://perma.cc/723S-HGHD>].

137. *Maley*, 7 U.S. at 477.

Court, which took the case to resolve three questions: “Was the capture lawful? . . . Was there probable cause? . . . [And] whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted by the counsel for Maley[?]”¹³⁸

In delivering the opinion of the Court, Marshall treated the first two questions “as essentially governed by prior decisions.”¹³⁹ The Court had decided almost identical issues in the *Charming Betsy* case, and it was not going to rehash them here.¹⁴⁰ Even still, the Court had a few quibbles with how the circuit court had adjusted the damages award, remarking that “in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear.”¹⁴¹ The Court held that, *contra* the circuit court, the expenses associated with outfitting the vessel and paying the crew should have been allowed, while the costs associated with Shattuck’s prior efforts at petitioning Congress and the British government should have been disallowed.¹⁴² The parties then entered into an agreement that the final damages award with these adjustments accounted for would be \$33,864.55.¹⁴³

Given the absent and insolvent Maley, “Shattuck, acting with the assistance of Danish agents, sought compensation from Congress a short time later.”¹⁴⁴ Yet for reasons that we can only speculate about, “his private bill did not become law until February 1813, some seven years after the Court’s decision and thirteen years after his loss.”¹⁴⁵

And while Pfander and Hunt do not dwell on the details of the Act, they are of central importance. Congress awarded Shattuck \$33,864.55 plus interest accrued since the Supreme Court’s decision in his favor.¹⁴⁶ This figure is critical, because it is, in one sense, entirely arbitrary. Remember, the district court had entered judgment in Shattuck’s favor for \$41,658; in the circuit court, this figure was adjusted down to \$33,244; and after the Supreme Court’s decision in the case, the parties’ attorneys agreed that the final amount was \$33,864.55. And in most of the cases collected by Pfander and

138. *Id.* at 484.

139. Pfander & Hunt, *supra* note 110, at 1887.

140. *Maley*, 7 U.S. at 491.

141. *Id.*

142. *Id.* at 491–92.

143. INDEMNITY FOR THE ILLEGAL CAPTURE AND SUBSEQUENT LOSS OF A SHIP AND CARGO BY A NAVAL OFFICER, H.R. DOC. NO. 190 (1808), *reprinted in* AMERICAN STATE PAPERS: CLASS IX CLAIMS 358, 360 (Walter Lowrie & Walter S. Franklin eds., 1834) (“Afterwards the following agreement was filed . . . viz: ‘It is agreed in these cases . . . that a final decree be made by this court awarding to the libellant, the said Jared Shattuck, the payment of \$33,864.55, by the said William Maley’”).

144. Pfander & Hunt, *supra* note 110, at 1903.

145. *Id.* (citing Act for the Relief of Jared Shattuck, ch. 19, 6 Stat. 116 (1813)).

146. *Id.* at 1887, n.108.

Hunt, it is the federal officer who petitions Congress to indemnify them against a judgment that they have already paid or will have to pay. Here, however, it is Shattuck, not Maley, who petitions Congress. Finally, everyone involved agreed that this judgment was not *legally* binding on the United States; relief was granted as a matter of “practice.”¹⁴⁷

Given, then, (1) that there was some reasonable disagreement as to the amount of damages, (2) that the relief requested was not remuneration for sums already paid, and (3) that Shattuck was asking for relief as a matter of grace, not entitlement, the point is this: there is nothing to commend the figure of \$33,864.55 other than that it was the final result of a long process of fact-finding and legal adjudication by Article III courts. Shattuck could have asked for more; Congress could have insisted on less. Instead, all parties agreed that the results of litigation were the appropriate measure of relief. This shows how both petitioners and the petitioned often relied on courts to determine what the parties’ legal rights were and whether and to what extent they were infringed—the exact questions today’s federal courts mostly refuse to answer in § 1983 cases because of the modern qualified-immunity doctrine.

B. *Maley v. Shattuck and Judicial Power Concerns*

In *Maley v. Shattuck*, “[t]he government, through James Madison, arranged an amicable proceeding in which Maley appeared as a nominal defendant to facilitate a judicial test of Shattuck’s legal claims.”¹⁴⁸ And Shattuck could not have *effectively* exercised his right to petition without this judicial test. As Pfander and Hunt recount, “Shattuck could presumably have obtained a default judgment against Maley, but the government doubtless would have declined to pay such a judgment without a judicial investigation of Maley’s defenses.”¹⁴⁹ Further, “[n]o one appears to have been offended by the thin formality of this model.”¹⁵⁰ That is, “Madison issued the order that authorized the litigation, Dallas . . . [conveyed] that the proceeding was an amicable one, and the presiding courts proceeded to enter judgment as if Maley were really before the court.”¹⁵¹

147. See Letter from Attorney General William Pinkney to Chairman of the Committee of Claims Thomas Gholson (May 30, 1812), in *AMERICAN STATE PAPERS: CLASS IX CLAIMS*, *supra* note 143, at 419 (“The practice of the United States, as far as it has gone, appears to have recognised and established the same principle [that it pay for damages in these cases]; and the case of Shattuck is completely within it.”).

148. Pfander & Hunt, *supra* note 110, at 1919.

149. *Id.* at 1898 (footnote omitted).

150. *Id.* at 1919.

151. *Id.*

And perhaps most importantly, there was no pearl-clutching about whether the litigation transgressed the limitations Article III purportedly imposes on the exercise of the judicial power. As Pfander and Hunt remark:

[T]he case presented the whole gamut of judicial power issues: It did not involve proper parties but was brought to determine the interests of the United States; it was subject to a measure of congressional revision (at least to the extent that Congress chose not to pay Shattuck by private bill); and the judgment, unenforceable either against Maley or the United States by writs of execution, could have been regarded as an advisory opinion. Notwithstanding these difficulties, federal courts heard the case and resolved it on the merits. They did so, moreover, without suggesting that Article III posed a problem.¹⁵²

The case paints a compelling picture of litigation's role in the petition process, relying as it did on the parties—Maley and Shattuck nominally, but Dallas and Blicherolsen in truth—to adduce facts and present legal arguments, and on courts to resolve factual disputes and adjudicate legal issues. And ultimately, though this was by no means a given, both Shattuck and Congress took the results of litigation as determinative of their claims and obligations, respectively. The case, then, serves as the model for how courts can facilitate the right to petition for redress by simply doing their job.¹⁵³

IV. The Impact of the Court's Summary Reversals

Against this historical backdrop, the Supreme Court's insistence that lower courts “resolv[e] immunity questions at the earliest possible stage in litigation,”¹⁵⁴ and its practice of summarily reversing those that do not, undermine the right to petition. Even in 1991, the Court, in a merits decision scolding the Ninth Circuit, reminded lower courts that it had “repeatedly . . . stressed” the importance of deciding immunity questions as

152. *Id.* at 1921 (footnote omitted).

153. The history of courts' role in the process of resolving claims against the government through the eighteenth century is well covered in Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985). So well covered, in fact, that a discussion here would be redundant. The highlights are: (1) Congress maintained final control over the payment of claims against the government until well into the twentieth century, (2) courts frequently played an explicitly fact-finding role in the process of adjudicating claims against the government, albeit not without some fussiness, (3) the Court of Claims—which the Supreme Court recognized as an Article III court—played a central role in the process of claims adjudication as a fact-finder, and (4) eventually, a wholly judicial model of claims adjudication was adopted with expanded jurisdiction for courts to hear claims against the government and the automatic payment of most judgments in such cases. *Id.* at 626–27, 638–40, 670.

154. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

early as possible.¹⁵⁵ Since then, rather than waste a merits decision on little more than knuckle-rapping, the Court has increasingly turned to summary reversals to rebuke lower courts for proceeding too far in qualified immunity cases.¹⁵⁶ But before further discussing this trend and how it impacts the right to petition, it is worth situating these summary reversals in the Supreme Court's modern history with qualified immunity generally.

Since *Harlow*, the Supreme Court has addressed the clearly established test of qualified immunity thirty-six times.¹⁵⁷ “It has only found that a government official violated clearly established law three times,”¹⁵⁸ and only one of these cases, *Taylor v. Riojas*,¹⁵⁹ was decided within the last fifteen years.¹⁶⁰ But more important than the raw numbers showing what the Court has *done* in recent qualified-immunity cases, stark as they are, is what the Court has *said* in recent cases. As Professor Kit Kinports writes, the Court has “made a *sub silentio* assault on constitutional tort suits” in its recent qualified-immunity cases.¹⁶¹ That is, “[i]n a number of recent rulings, the Court has engaged in a pattern of covertly broadening the [qualified-immunity] defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.”¹⁶² And so, “without offering any explanation, and without even acknowledging it is doing so,” the Court has “broadened the protection qualified immunity offers government officials in § 1983 litigation.”¹⁶³

Part of this trend has been the use of summary reversals to enforce the litigation-avoidance doctrine. Since 2007, the Court has summarily reversed

155. *Hunter*, 502 U.S. at 227; *see also id.* at 227–28 (“The decision of the Ninth Circuit ignores the import of these decisions. The Court of Appeals’ confusion is evident from its statement [of the law] . . .”).

156. *See generally* Chen, *supra* note 32 (“[C]ommentators generally agree that summary reversals are most commonly used to rebuke lower courts for having resisted the Court’s precedents, and in particular when those courts improperly grant federal habeas or deny qualified immunity.”); *see also* Baude, *supra* note 6, at 83 (“[L]ower courts are somewhat regularly reversed for erring on the side of liability, but almost never reversed for erring on the side of immunity . . .”).

157. Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court’s Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 129 (2022).

158. *Id.*; *see Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (finding that a warrant was so deficient that the officer could not have reasonably believed it was valid); *Hope v. Pelzer*, 536 U.S. 730, 744 (2002) (finding that the respondents had violated clearly established law); *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (finding, based on the “particularly egregious facts of this case,” that “any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution”).

159. 141 S. Ct. 52 (2020) (per curiam).

160. The most recent case before *Taylor* was *Groh*, decided in 2004. 540 U.S. at 565.

161. Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016).

162. *Id.*

163. *Id.* at 65.

a lower court's refusal to grant qualified immunity in twelve cases.¹⁶⁴ In the 2017 case *White v. Pauly*, the Court acknowledged that these summary reversals were, in part, due to lower courts proceeding too far in qualified immunity cases.¹⁶⁵ As the Court stated, "In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. . . . [This is] because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'"¹⁶⁶ After that warning shot, the Court issued five more summary reversals in qualified immunity cases, including two in 2021 alone.¹⁶⁷

And while "summary disposition[s] do[] not enjoy the full precedential value" of a merits opinion,¹⁶⁸ there is reason to think that these decisions will influence lower court judges, who, so far, have been reluctant to apply qualified immunity at the motion-to-dismiss stage.¹⁶⁹ Professor Richard Chen has noted that these decisions have more reasoning than most summary reversals¹⁷⁰—they certainly have more words. Likewise, the Court's 2021 summary reversals, *Cortosluna*¹⁷¹ and *City of Tahlequah*,¹⁷² have already been cited in hundreds of lower court opinions.¹⁷³ And in the recent case of *Salazar v. Molina*,¹⁷⁴ the Fifth Circuit cited the two "strongly worded summary reversals" in a decision reversing a trial court's denial of qualified immunity.¹⁷⁵ The Supreme Court then denied cert in the case.¹⁷⁶ Professor Chen also notes that some judges, such as those who "believe that being summarily reversed harms their reputations," are "likely to be overdeterred by the threat of being summarily reversed" and "grant qualified immunity at every opportunity."¹⁷⁷

164. See cases cited *supra* note 24.

165. See 580 U.S. 73, 79 (2017) (per curiam) (stating that one reason its qualified-immunity reversals have been necessary is that qualified immunity is meant to prevent cases from erroneously proceeding to trial).

166. *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

167. See cases cited *supra* note 24.

168. See *Connecticut v. Doehr*, 501 U.S. 1, 12 n.4 (1991) ("A summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion.").

169. See *supra* notes 32–36 and accompanying text.

170. See, e.g., Chen, *supra* note 32, at 725 (noting that the summary reversals "consist of several pages laying out the relevant factual circumstances, the governing legal standard, and a concise rationale").

171. *Rivas-Villegas v. Cortosluna*, 142 S. Ct. 4 (2021) (per curiam).

172. *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam).

173. As of August 8, 2023, Westlaw shows that *Cortosluna* has been cited in 317 cases; *City of Tahlequah*, in 233 cases.

174. 37 F.4th 278 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 1781 (2023).

175. *Id.* at 285.

176. 143 S. Ct. 1781 (2023).

177. Chen, *supra* note 32, at 718.

So what would strict adherence to the Court's litigation-avoidance rationale look like and how would it impact the right to petition in qualified immunity cases? One recent case offers a view through the looking glass. *Hernandez v. Mesa*¹⁷⁸ was a cross-border shooting case raising *Bivens* and qualified immunity issues. Though the case actually involved quite a lot of litigation,¹⁷⁹ it proceeded entirely at the motion-to-dismiss stage without any discovery. So at the end of nearly ten years of litigation, the plaintiffs were in no better a position to petition Congress for private relief than when they started.

A. *Through the Litigation-Avoidance Looking Glass: Hernandez v. Mesa*

1. *Factual Disputes.*—The facts of the case as alleged in the plaintiff's complaint are that on June 7, 2010, Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican national, was playing a game with his friends that involved “run[ning] up and touch[ing] the barbed-wire United States high fence, and then scamper[ing] back down the incline.”¹⁸⁰ United States Border Agent Jesus Mesa, Jr. then appeared and detained one of Sergio's friends, at which point “Sergio retreated and stood still beneath the pillars of the Paso del Norte Bridge”¹⁸¹ Mesa “then stopped, pointed his weapon across the border, seemingly taking careful aim, and squeezed the trigger at least twice.”¹⁸² “Sergio, who had been standing safely and legally on his native soil of Mexico, unarmed and unthreatening, lay dead”¹⁸³

The government contested this version of the shooting. Shortly after the shooting, a spokeswoman for the FBI stated that Sergio and his friends had “surrounded the agent and continued to throw rocks at him.”¹⁸⁴ Yet cellphone footage of the event seemed to disprove this claim.¹⁸⁵ And in 2012, the Justice Department released a statement claiming that the shooting had “occurred while smugglers attempting an illegal border crossing hurled rocks from

178. 140 S. Ct. 735 (2020).

179. It proceeded for nearly ten years and went to the Supreme Court twice.

180. Appendix to the Petition at 198–99, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

181. *Id.* at 199.

182. *Id.*

183. *Id.*

184. *Id.* at 200.

185. While it is unclear from the video whether rocks are being thrown, Agent Mesa is not “surrounded.” See JUAREZVIOLENTOO, *Momento en que Asesina a Sergio Adrian un Agente de la Patrulla Fronteriza (Migra)*, YOUTUBE (June 11, 2010), <https://www.youtube.com/watch?v=7wI2Q1XikLw> [<https://perma.cc/WQS6-VN XR>] (depicting cell phone footage of the incident).

close range.”¹⁸⁶ The report noted that after a “comprehensive and thorough investigation,” the Department felt that there was “insufficient evidence to pursue federal criminal charges” and also that “no federal civil rights charges could be pursued in this matter.”¹⁸⁷ But the full factual findings of the report—the witness testimony, 911 recordings, video footage, etc.—were not released. Against this account, the family responded that the cellphone footage of the event showed that Sergio was hiding behind a trestle underneath the Paso del Norte bridge and was not among those throwing rocks.¹⁸⁸

Besides the circumstances of the shooting, there were several other factual issues. One scholar reports that Border Patrol agents had “developed an ‘unofficial’ policy of responding [to rock throwing] with the use of deadly force ‘instead of taking cover or calling for backup.’”¹⁸⁹ There were also allegations that the Department of Justice and Border Patrol had cooperated to “conceal the facts surrounding the death of Sergio Hernández.”¹⁹⁰ Further, as Justice Breyer alluded to in his 2017 dissent, there were complicated, fact-dependent jurisdictional issues about who had jurisdiction over the “limitrophe” area where the shooting took place.¹⁹¹

2. *Procedural History*.—Sergio’s parents sued in the Western District of Texas, bringing statutory claims against the United States and *Bivens* claims against Mesa and his supervisors alleging Fourth and Fifth Amendment violations. The trial court granted a motion to dismiss the claims against the United States, severed the parents’ *Bivens* claims, and granted the

186. *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, DEP’T OF JUST., <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-herandez-guereca> [https://perma.cc/BQ7B-94PT] (Sept. 15, 2014).

187. *Id.*

188. See Zuri Davis, *Supreme Court: Mexican Family Can’t Sue Border Patrol Agent in Cross-Border Shooting*, REASON (Feb. 25, 2020, 4:50 PM), <https://reason.com/2020/02/25/supreme-court-mexican-family-cant-sue-border-patrol-agent-in-cross-border-shooting/> [https://perma.cc/V5J6-H8AX] (reporting that the Hernández family was informed by American officials that “Hernández was not among those throwing rocks”); see also *Cross-Border Slaying: Can Dead Teen’s Family Sue U.S. Agent?*, AZCENTRAL (Oct. 3, 2017, 12:19 PM), <https://www.azcentral.com/story/news/politics/border-issues/2017/09/20/cross-border-slaying-can-dead-teens-family-sue-us-agent/686160001/> [https://perma.cc/GED6-WKSR] (juxtaposing the accounts of the Justice Department and the Hernández family).

189. See Alexandra A Botsaris, Note, *Hernandez v. Mesa: Preserving the Zone of Constitutional Uncertainty at the Border*, 77 MD. L. REV. 832, 850 (2018) (quoting Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 9, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam) (No. 15-118)) (discussing how “[t]he most frequent example of lack of training arises in incidents involving rock throwing”).

190. VICE News, *What Happens When Border Patrol Agent Shoots a Man Across the U.S.—Mexico Border?* (HBO), YOUTUBE (Mar. 13, 2017) (at 4:23), <https://www.youtube.com/watch?v=xkkZZXZJE7Q> [https://perma.cc/E6QJ-RF7J].

191. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2009–10 (2017) (per curiam) (Breyer, J., dissenting).

parents leave to amend their complaint.¹⁹² On a motion to dismiss the amended complaint, the trial court held that “excessive force claims should be analyzed only under the Fourth Amendment,”¹⁹³ and so dismissed the Fifth Amendment claim, and then dismissed the Fourth Amendment claim because of alienage.¹⁹⁴ The court also dismissed the claims against Mesa and his supervisors.¹⁹⁵

Sergio’s parents appealed these orders to the Fifth Circuit. There, a three-judge panel affirmed the trial court’s dismissal of the Fourth Amendment claim against Mesa.¹⁹⁶ But the court held that the parents could “assert a Fifth Amendment claim against Agent Mesa and that they ha[d] alleged sufficient facts to overcome qualified immunity.”¹⁹⁷ Next, the Fifth Circuit, sitting en banc, affirmed the dismissal of the Fourth Amendment claim but reversed the three-judge panel and held that Mesa was entitled to qualified immunity because the law of cross-border shootings was not clearly established.¹⁹⁸

From this, Sergio’s parents appealed to the Supreme Court. In a 5–3 per curiam opinion,¹⁹⁹ the Court first chastised the Fifth Circuit for resolving the “sensitive” question of the Fourth Amendment’s extraterritorial application without resolving the “antecedent” question of whether a *Bivens* claim even existed in the case.²⁰⁰ Next, it held that the Fifth Circuit should consider whether a *Bivens* claim existed for the Fourth Amendment violation under *Abbasi*.²⁰¹ Finally, the Court held that the Fifth Circuit had impermissibly

192. *Hernandez v. United States*, 802 F. Supp. 2d 834, 847 (W.D. Tex. 2011), *aff’d in part and rev’d in part*, 757 F.3d 249 (5th Cir. 2014), *aff’d on reh’g en banc*, 785 F.3d 117 (5th Cir. 2015) (per curiam), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam).

193. *Hernandez*, 757 F.3d at 256 (discussing trial court’s opinion), *aff’d in part and rev’d in part on reh’g en banc*, 785 F.3d 117 (5th Cir. 2015) (per curiam), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam).

194. *Id.*

195. *Id.* at 256–57.

196. *Id.* at 267.

197. *Id.* at 280.

198. *Hernandez*, 785 F.3d at 119.

199. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam). Though the opinion is an unsigned per curiam, the votes of all the Justices can be determined. Justice Gorsuch took no part in the proceedings, Justice Thomas wrote a dissent, and Justice Breyer wrote a dissent joined by Justice Ginsburg. This leaves Roberts, Alito, Kennedy, Kagan, and Sotomayor in the majority. *See id.* (detailing the positions of the Justices).

200. *Id.* at 2006–07. It remains unclear why deciding that the Fourth Amendment *does not* apply extraterritorially is somehow more “sensitive” than deciding that, while it *may* apply, courts will not, in any event, recognize a claim to enforce it.

201. *Id.* at 2007 (referencing *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). Because the Fifth Circuit had disposed of the Fourth Amendment claim on qualified immunity grounds, the Supreme Court stated that it had “assum[ed] the existence of a *Bivens* remedy.” *Id.* The instruction to consider the case in light of *Abbasi*, where the Court declined to recognize a *Bivens* claim in a new context, was all but an instruction to do likewise here.

granted qualified immunity on the basis of facts not known to the officer at the time.²⁰² The Court therefore vacated the Fifth Circuit’s en banc decision and remanded the case.²⁰³

On remand, the Fifth Circuit, again sitting en banc, refused to recognize a *Bivens* action for either the Fourth or Fifth Amendment claim.²⁰⁴ The case went back to the Supreme Court, which affirmed 5–4 the Fifth Circuit’s refusal to recognize a *Bivens* claim.²⁰⁵ As noted in Justice Ginsburg’s dissent, the nearly ten-year litigation had proceeded entirely at the motion-to-dismiss stage, without the opportunity for discovery and with only the facts as alleged in the complaint.²⁰⁶

B. The Impact of the Litigation-Avoidance Justification on Petitioning

Hernandez is a sobering example of how “resolving immunity questions at the earliest possible stage in litigation”²⁰⁷ undermines the right to petition. Historically, foreign citizens injured by the actions of federal officials would have been able to petition Congress for relief.²⁰⁸ But throughout the history of petitioning, sovereigns would not grant relief if the facts of a disputed case had not been fully developed.²⁰⁹ This factual development came through actual litigation or through a petitioning process that approximated litigation.²¹⁰ Denying would-be petitioners the process of discovery and litigation in disputed cases, then, amounts to denying them the effective exercise of the right at all.

Hernandez fits this bill. As discussed above, the circumstances of the shooting were hotly contested, and the case raised complicated jurisdictional questions. Yet despite nearly ten years of litigation, none of these issues were resolved because the case was dismissed on immunity grounds before it even proceeded to discovery. “[R]esolving [the] immunity questions” in *Hernandez* “at the earliest possible stage in litigation,”²¹¹ then, undermined any chance the Hernándezes might have had at petitioning Congress for redress. If lower courts take heed of the Court’s summary reversals and begin

202. *Id.*

203. *Id.* at 2008.

204. *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc), *aff’d*, 140 S. Ct. 735 (2020).

205. *Hernandez*, 140 S. Ct. at 739, 750.

206. *Id.* at 753 (Ginsburg, J., dissenting).

207. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant* 502 U.S. 224, 227 (1991) (per curiam)).

208. *See supra* subpart III(A) describing the case of *Maley v. Shattuck* and the successful petition of Shattuck, a Danish citizen, to Congress for monetary relief.

209. *See supra* Parts I–III.

210. *See supra* Parts I–III.

211. *Pearson*, 555 U.S. at 232 (quoting *Hunter*, 502 U.S. at 227).

routinely dismissing qualified immunity cases before discovery, others will be similarly left without meaningful recourse to the petition process.

Conclusion

To finally address the elephant in the room: yes, private petitioning today is, for the most part, a constitutional vestige, a “kiwi’s wing” left over in the United States’ evolution from agrarian, coastal commonwealth to industrial, continental nation. From a peak in the 1830s and 1840s, the number of petitions submitted to Congress per capita has, with a few exceptions, steadily declined.²¹² The only historical counterpose to this broader trend was tort claims against the government, which continued to number in the thousands well into the twentieth century.²¹³ But after jurisdiction over most tort claims was transferred to the federal courts in 1946 with the passage of the FTCA,²¹⁴ “the petition volume in Congress dropped to near-zero levels, where it has remained until modern day.”²¹⁵ And the private bills enacted to provide redress for petitioners—which had accounted for nearly half of all laws passed by Congress up to 2007²¹⁶—have likewise faded from prominence. Since 2007, Congress has enacted only four private bills.²¹⁷

212. Maggie Blackhawk, Daniel Carpenter, Tobias Resch & Benjamin Schneer, *Congressional Representation by Petition: Assessing the Voices of the Voteless in a Comprehensive New Database, 1789–1949*, 46 LEGIS. STUD. Q. 817, 826 (2021).

213. Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 MICH. L. REV. 341, 345 (1949) (“Nevertheless, the inadequacy of remedies against the government, particularly in tort, caused both United States and England to provide some other relief. . . . For instance, the 74th and 75th Congress each considered more than 2,300 private claim bills demanding relief exceeding \$100,000,000.”).

214. In 1946, Congress “transfer[red] government tort litigation to the federal courts” through the FTCA. James E. Pfander & Neil Aggarwal, Bivens, *the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 426 (2011). Most states have also effectively transferred the adjudication of constitutional- and government-tort claims to their courts through state tort claims acts, though there are many exceptions and immunities. See Kendall Morton, Anya Bidwell, Patrick Jaicomo & Megan Cairns, *50 Shades of Government Immunity*, INST. FOR JUSTICE (Jan. 25, 2022), <https://ij.org/report/50-shades-of-government-immunity/> [<https://perma.cc/R96K-Q3ZA>] (“While most of the 50 states allow for limited tort claims against government officials, they are riddled with exceptions and immunities.”).

215. Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1570 (2018).

216. See A HISTORY OF THE COMMITTEE ON THE JUDICIARY, 1813–2006, H.R. DOC. NO. 109-153, at 143 & 148 n.1 (2007) (“[B]etween 1789 and 2006, Congress enacted a total of 94,120 laws. Of these, 45,937—49 percent—have been private laws.”).

217. This included one bill authorizing the President to award the Medal of Honor to a Vietnam War vet notwithstanding the statute of limitations and three naturalization bills. See Priv. L. No. 115-1, H.R. 4641, 115th Cong. (2018) (authorizing the President to award the Medal of Honor to a Vietnam War veteran); Priv. L. No. 112-1, S. 285, 112th Cong. (2012) (granting relief in immigration proceedings); Priv. L. No. 111-2, S. 1774, 111th Cong. (2010) (same); Priv. L. No. 111-1, S. 4010, 111th Cong. (2010) (same).

Since then, efforts to obtain relief against the government through petitioning and private bills have been comparatively rare. But a few post-FTCA examples suggest Congress's continued willingness to provide relief for plaintiffs frustrated by immunity doctrines.

A 1994 private bill provided relief for Master Sergeant James B. Stanley,²¹⁸ who lends his name to the Supreme Court case *United States v. Stanley*.²¹⁹ Stanley had been "secretly administered doses of lysergic acid diethylamide (LSD), pursuant to an Army plan to study the effects of the drug on human subjects."²²⁰ The LSD caused Stanley to experience violent psychotic episodes that led to his premature discharge and the dissolution of his marriage.²²¹ Stanley brought FTCA claims against the United States and *Bivens* claims against the government officials involved.²²² The Eleventh Circuit affirmed the viability of Stanley's *Bivens* claims and reinstated his FTCA claims, which had been dismissed by the district court under the *Feres* doctrine.²²³ The Supreme Court then vacated the Eleventh Circuit's opinion with respect to the FTCA claims, finding the reinstatement of the FTCA claims "astonishing," and reversed on the *Bivens* claims.²²⁴

Stanley did not accept defeat. Instead, he turned to Congress for relief, petitioning for a private bill to redress his grievances. After unsuccessful attempts to get relief from the 101st and 102nd Congresses, Stanley managed to secure a private bill in the 103rd.²²⁵ The bill provided Stanley \$400,577 "to compensate [him] for the physical, psychological, and economic injuries sustained by him as a result of the administration to him, without his knowledge, of [LSD] by United States Army personnel in 1958."²²⁶

The success of Stanley's petition was directly influenced by the prior litigation of his claims. In the Judiciary Committee report accompanying the bill, the Committee notes that "[t]he court record indicated that Mr. Stanley would occasionally 'awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident.'"²²⁷

A similar sequence of events occurred with the claim of Melissa Johnson. As a House Judiciary Committee report details, "On June 3, 1982, and various dates prior thereto, Melissa Johnson, then six years old, was

218. An Act for the Relief of James B. Stanley, Priv. L. No. 103-8, H.R. 808, 103d Cong. (1994).

219. 483 U.S. 669 (1987).

220. *Id.* at 671.

221. *Id.*

222. *Id.* at 672-73.

223. *Id.* at 675-76.

224. *Id.* at 677-78, 686.

225. An Act for the Relief of James B. Stanley, Priv. L. No. 103-8, H.R. 808, 103d Cong. (1994).

226. *Id.*

227. H.R. REP. NO. 103-221, at 2 (1993).

molested and sexually abused by a [USPS] employee, a letter carrier by the name of Luis Ojeda”²²⁸ Melissa’s mother brought suit under the FTCA, but the district court dismissed the claims, finding that the mother had failed to allege the requisite facts in her administrative claim to the USPS and so was barred from bringing a federal suit under the FTCA’s presentment requirement.²²⁹ On appeal, the Second Circuit reversed on the presentment issue, but held that the claims were still barred because they “‘ar[ose] out of’ assault [or] battery” and were thus not actionable under the FTCA.²³⁰

At the same time, Johnson sought relief in Congress, with the earliest bill granting her daughter relief proposed in 1985.²³¹ While her court claim was still pending, more bills were presented in the 100th, 101st, and 102nd Congresses before she ultimately found success with a bill passed by the 103rd Congress.²³² Here again, the prior litigation significantly impacted Johnson’s ability to successfully petition for relief. The House Judiciary Committee report described at length the course of litigation in the district and circuit courts.²³³ In particular, the Committee Report noted that “[t]he [Second Circuit] said that the Johnsons did not provide sufficient facts indicating that Ojeda had committed past offenses or manifested previous aberrant behavior that his employers should have detected.”²³⁴ The Committee disagreed. It found that “the facts in this case . . . support the conclusion that Ojeda’s supervisors at the U.S. Postal Service knew of his prior record involving similar incidents of this nature.”²³⁵ Congress apparently agreed, because it passed a bill appropriating \$125,000 for Melissa’s relief to be deposited in a trust.²³⁶

The centrality of litigation to Melissa Johnson’s successful petition for relief is perhaps best demonstrated by a letter of then-Assistant Attorney General John Bolton to the Chairman of the Judiciary Committee.²³⁷ Bolton notes that “when this bill was considered during the last Congress,” Johnson’s “suit against the United States under the Federal Tort Claims Act

228. H.R. REP. NO. 103–191, at 1 (1993).

229. *Johnson ex rel. Johnson v. United States*, 594 F. Supp. 728, 730 (E.D.N.Y. 1984), *aff’d*, 788 F.2d 845 (2d Cir. 1986).

230. *Johnson ex rel. Johnson*, 788 F.2d at 849–50.

231. *See* An Act for the Relief of Melissa Johnson and Barbara Johnson Lizzi, H.R. 3287, 99th Cong. (1985) (showing the proposed act on the Legislative Calendar).

232. An Act for the Relief of Melissa Johnson, Priv. L. No. 103–3, H.R. 572, 103d Cong. (1994); *see also* H.R. REP. NO. 103–191, at 3 (1993) (reporting the prior consideration on Johnson’s claim).

233. *See* H.R. REP. NO. 103–191, at 1–2 (1993).

234. *Id.* at 2.

235. *Id.*

236. Priv. L. No. 103–3, H.R. 572, 103d Cong. (1994).

237. H.R. REP. NO. 103–191, at 6–7 (1993).

was pending.”²³⁸ He then references a 1986 DOJ letter submitted in response to the proposed 1985 bill in which the Department expressed that it “felt that the bill was premature in light of the then pending litigation.”²³⁹ Accordingly, Johnson could not secure relief until after the federal courts had fully adjudicated the legal and factual issues in her case.

True, Stanley and Johnson are rare birds: petitioners with extremely compelling claims of government abuse who were able to secure relief from Congress—where so many others have failed. But the private bills passed to redress their grievances show that Congress can still play a role in providing relief to those frustrated by immunity doctrines. Stanley and Johnson’s claims also demonstrate the enduring importance of litigation in the modern-day petition process. In both cases, the committee reports recommending passage of the private bills relied on the facts and legal theories developed in the courts.

And even if the prospect of a plaintiff eventually petitioning Congress for relief *were* wholly speculative, it would be no different than the other considerations that factor into the qualified-immunity doctrine. Despite some recent suggestions to the contrary,²⁴⁰ the doctrine has no basis in the common law.²⁴¹ The original policy justification—sparing officers from ruinous individual liability—was always and remains a canard (in fact, successful petitioners are hardly rarer than nonindemnified officers).²⁴² And as *Hernandez* aptly demonstrates, in many cases the burdens of litigation are actually *increased* by immunity doctrines as the parties sometimes spend years litigating about whether to litigate.²⁴³ Further, the Court’s concerns that lawsuits may “deter[] . . . able citizens from acceptance of public office” and “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties,”²⁴⁴ have not

238. *Id.* at 6.

239. *Id.*

240. See generally Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (arguing that the common law recognized a form of qualified immunity around 1871).

241. See generally William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022) (arguing that the common law recognized a doctrine of quasi-judicial immunity, not qualified immunity).

242. See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (reporting results of a study showing that police officers are “virtually always indemnified”).

243. See *Hernandez v. United States*, 802 F. Supp. 2d 834, 846 (W.D. Tex. 2011) (beginning litigation on preliminary proceedings that would last for a decade), *aff’d in part and rev’d in part*, 757 F.3d 249 (5th Cir. 2014), *aff’d on reh’g en banc*, 785 F.3d 117 (5th Cir. 2015) (per curiam), *vacated and remanded sub nom.* *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam). Reducing the burdens of litigation indeed.

244. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

been borne out.²⁴⁵ Finally, the clearly established test for determining when officers have been put on notice relies on the frankly risible image of police officers leafing through the pages of the federal reporter in their spare time.

Among these mostly speculative and decidedly policy-based considerations, the role of courts in facilitating “the right to petition the Government for a redress of grievances” at least adds a consideration of constitutional dimensions. As the history presented in Parts I–III demonstrates, sovereigns have generally insisted that would-be petitioners develop their claims through the rigors of litigation or a process quite like it before seeking redress from the public fisc. So, by simply exercising their core institutional competencies of fact-finding and adjudication, courts can facilitate the right to petition. Conversely, by shirking this role, as the Supreme Court’s summary reversals on the shadow docket have increasingly encouraged lower courts to do, courts undermine the right to petition.

245. Schwartz, *supra* note 6, at 1811–14.