Material from Chapter 3

The Growth of Statutory Limits on Agency Actions

- In the post-Reagan world, Congress and state legislatures have pulled back from broad grants of agency powers (the powers that a President or Governor can use) to narrower grants of specific authority.
  - The states have been most aggressive at this, driven by model legislation from ALEC (American Legislative Exchange Council), an antiregulatory/antitax thinktank.
- The problem with limiting agency power and requiring specific statutory authorization for action is that makes it very difficult to respond to emergencies.

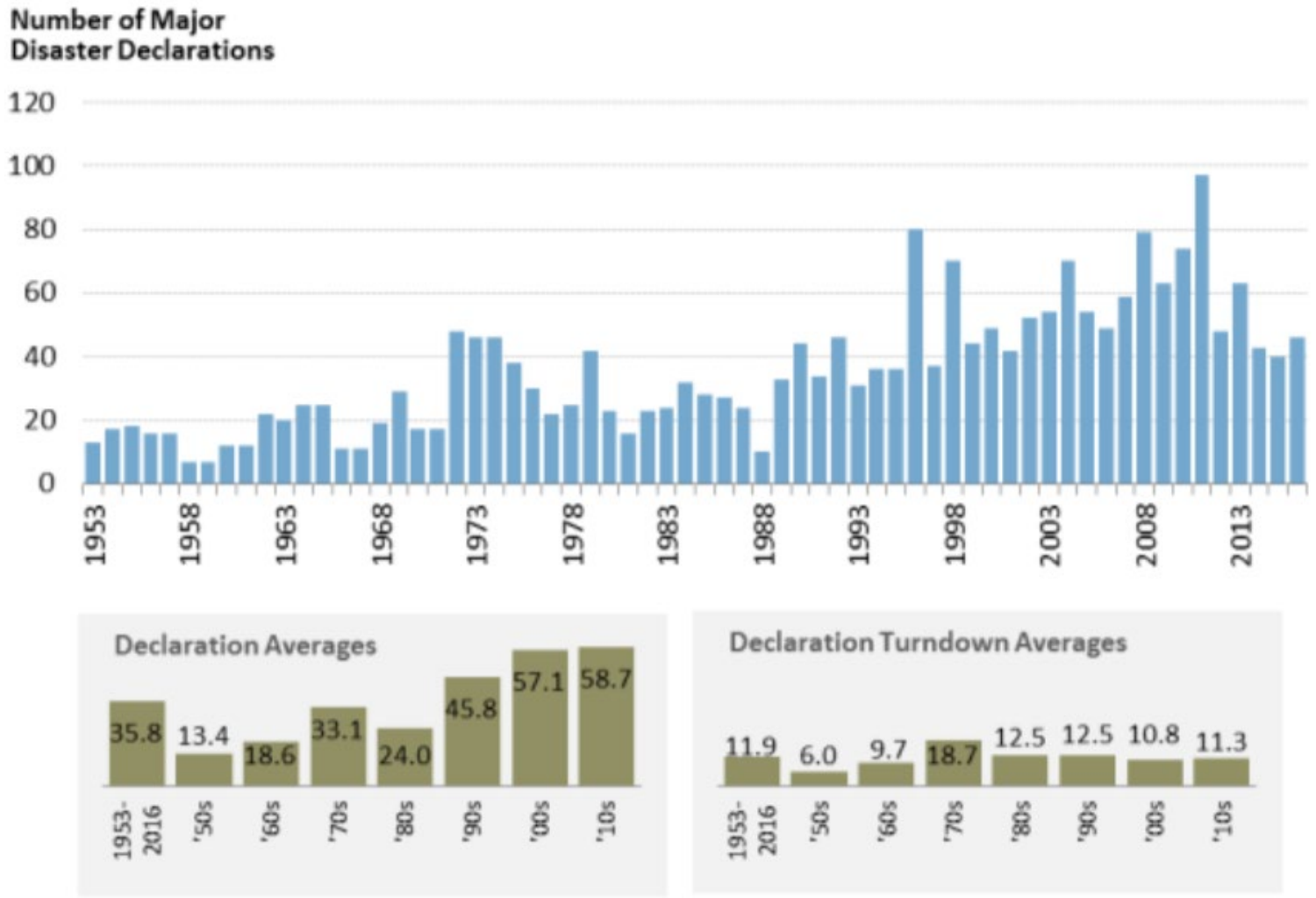
The Growth of Emergency/Contingent Powers

- The major driver of statutes providing emergency powers and funding are natural disasters.
  - Hurricanes
  - Floods
  - Forest Fires
  - Pandemics and bioterrorism (post SARS1 and the anthrax attacks in the early 2000s)
- Once the president issues the emergency declaration, usually at the request of a state governor, the relevant emergency powers are triggered.

What Does a Hurricane Emergency Declaration Trigger?

- FEMA and the Stafford Act are the major vehicle for hurricane, flood, and fire relief.
  - Once triggered by a presidential declaration, usually at the request of a state governor, money is immediately available (without needing congressional appropriation) for emergency relief, housing, and repairs.
- Effects on other laws
  - The small business administration has emergency provisions to allow interest free loan for rebuilding.
  - Medical licensing laws may be waived to allow out of state providers to work in the disaster zone.
  - Many other provisions are triggered that affect federal programs and benefits.

Disaster Declarations Through Time



Emergency Powers Become Long-Term

- Natural disaster declarations can be renewed for years.
- Federal relief provided under emergency powers granted after Hurricane Katrina is still not finished for New Orleans
- This is very different from the traditional notion of emergency as contemplated by the Courts in the old cases.

Today's Limitations on Emergency Powers

- The courts will not review the validity of the Declaration because there is no standard for review.
- The court will review whether the President is complying with the statutes that are triggered by the Declaration and their spending provisions.
- In some cases, the current Supreme Court is short-circuiting the review process by using the shadow docket and other procedural short-cuts to rule on issues that have not been fully developed in the lower courts or briefed and argued at the Supreme Court.

Proposals for Congressional Reform

- Presidential Proclamation No. 9844, Declaring a National Emergency Concerning the Southern Border of the United States
  - Most of the factual assertions in the declaration were not emergent conditions and many were inaccurate.
  - But without a standard of review, the Court did not review these claims.
  - There were also attacks based on whether Congress intended the statutes triggered by the Declaration to be used for the building a border fence which Congress had specifically rejected.
- These are purely statutory problems which Congress can fix if it can get the votes. They do not raise Constitutional issues.

Material from Chapter 4

LIMITATIONS ON CONGRESSIONAL WAR POWERS

Lovett v. US, 328 US 303 (1946)

- There Congress had enacted a rider to the Wartime Urgent Deficiency Appropriation of 1943, which forbade the executive branch to disburse salaries to certain identified “subversive” employees unless they were reappointed with the advice and consent of the Senate. Because the House would not approve any appropriation without this provision, the Senate agreed to it. The President reluctantly signed the bill into law, asserting that the rider was unconstitutional.
- What due process does this deny them?
- Why is this a bill of attainder?
- What is the general principle?
  - Can you use appropriations to accomplish things would be unconstitutional if Congress tries to do them directly?

INS v. Chadha 462 U.S. 919 (1983)

- What was the legislative veto?
- What was the separation of powers issue?
- Why does this prevent Congress from having legally binding resolutions?
- What is the only joint resolution that does have legal effect?

May Congress use Appropriations to Control Foreign Policy?

- While there is dicta to this effect, there is not clear precedent.
- What is the problem in enforcing this?
- What if congress just shuts down the state department?
- Why does the use of omnibus bills make it difficult to fight about specific appropriations riders?
- If congress is prohibited from using appropriations to mess with foreign policy, does it follow that the president may divert money from other appropriations to accomplish foreign policy purposes?
  - This has been rejected in other contexts.

Other Legislative Controls

- Durational limits on authorizations (“sunset” provisions),
- Joint resolutions of approval or disapproval (requiring presentment, unlike concurrent resolutions)
  - These are just laws changing appropriations or the president’s authority.
- Report-and-wait rules that require reporting to Congress for some specified period before executive action becomes legally effective.
  - There is a report and wait provision for major agency rules to give Congress time to pass a law to modify or block the rule.
- What if the president ignores the joint resolution or the reporting requirement?
  - The courts would enjoin the president’s actions in the domestic context.
  - Not as clear in the national security context.

Chapter 5 - THE COURTS' NATIONAL SECURITY POWERS

Basic Standing Still Applies in National Security Cases

- (1) suffered an injury in fact,
- (2) that is fairly traceable to the challenged conduct of the defendant, and
- (3) that is likely to be redressed by a favorable judicial decision."
  - Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992)
- [I am assuming you learned basic standing in conlaw or adminlaw. I have posted review materials in the Resources.)
- This is complicated in national security cases by:
  - Political question doctrine
  - Sovereign immunity, unless waived
  - Group versus individual injury (injury to all is injury to none)
  - Pure claims of national security exceptionalism

Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)

- Born in Baton Rouge, thus a US citizen. Allegedly captured on the battlefield in Afghanistan and detained as a terrorist.
  - Foreign soil, US citizen, Constitution applies.
- Government argued that his detention was unreviewable.
- The duty of the judicial branch to protect our individual freedoms does not simply cease whenever military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would : : : seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120 (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. [316 F.3d at 464.]

Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017)

- Are National Security Related Immigration Actions Unreviewable?
- There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. See Boumediene v. Bush, 553 U.S. 723, 765 (2008) (rejecting the idea that, even by congressional statute, Congress and the Executive could eliminate federal court habeas jurisdiction over enemy combatants, because the "political branches" lack "the power to switch the Constitution on or off at will"). Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the "[r]esolution of litigation challenging the constitutional authority of one of the three branches." Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (quoting INS v. Chadha, 462 U.S. 919, 943 (1983)). : : :
- It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties : : : which makes the defense of the Nation worthwhile."); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[S]imply because a statute deals with foreign relations [does not mean that] it can grant the Executive totally unrestricted freedom of choice."). : : : [847 F.3d at 1161-1163.

Deferential Review

- Hamdi: The standards of the review are governed by *Mathews v. Eldridge*, an adlaw case that allows balancing due process against governmental interests and costs. (SC)
- "In view of the knowledge, experience and positions held by the three [government] affiants regarding military secrets, military planning and national security, their affidavits were entitled to 'the utmost deference.'" Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982)
- With no statute or regulation directly on point as guidance, the court has no standard for the review. This is often the case in national security law. The default in national security is deferential review.

Is the Court a Reliable Protector of Rights?

- *Plessy v. Ferguson*, 163 US 537 (1896), endorsing the framework for Jim Crow laws.
- *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the exclusion of persons of Japanese ancestry (including U.S. citizens) from West Coast military areas out of deference to "military judgment" during World War II.
- *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), limiting the power of the state to protect against the spread of the COVID virus and overturning 200 years of precedent that held that churches did not have special standing to resist public health orders.

Smith v. Obama – Plaintiff's Claims

- The Plaintiff, Nathan Michael Smith, was deployed to Kuwait on an intelligence mission in Operation Inherent Resolve, the military campaign against the Islamic State of Iraq and the Levant (ISIL) initiated by the United States and its allies in 2014. He sought a declaration that the Operation was unlawful because Congress had not authorized it.
- Plaintiff also claims that the Take Care Clause requires President Obama to publish a "sustained legal justification" for Operation Inherent Resolve to enable Plaintiff to determine for himself whether this military action is consistent with his oath to preserve and protect the Constitution.
- The court reviews the argument that the war was justified under AUMF, but this is not necessary to resolve the case.

Standing and the Political Question

- The Court notes that the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).
- Is this at issue to the extent that Plaintiffs' claim depends on the President violating the War Powers Resolution?
  - If the War Powers Resolution requirement of Congressional action is unconstitutional, it cannot be a basis for the Plaintiff's claims.
- The court will not want to resolve this unless necessary.

Plaintiff Fails to Raise Traditional Standing Injuries in Military Action Cases

- : : : Plaintiff does not allege the traditional types of injuries one might expect a service person challenging the legality of military action to allege.
- Plaintiff does not allege that he suffers any injury in the form of physical or emotional harms, or the risk thereof, associated with deployment to a theatre of combat.
- He also does not allege that he has been involuntarily forced to participate in a military action in violation of his own constitutional rights or liberties.
- And he does not allege that he has any moral or philosophical objections to the military action against ISIL.
- Indeed, Plaintiff has no qualms about participating in a fight against ISIL, and his lawsuit does not seek to relieve him of his obligation to do so. : : :

Plaintiff's Injuries

- First, Plaintiff alleges that he "suffers legal injury because, to provide support for an illegal war, he must violate his oath to 'preserve, protect, and defend the Constitution of the United States.'"
- In addition, Plaintiff alleges that he is at risk of being punished for disobeying legally-given orders. : : :
- Are these "concrete" and "particularized" in *Lujan* sense?
  - Is a concern about a future legal injury a legitimate injury under Lujan?
  - Is the fear of future punishment for a risk of being required to violate an order sufficiently concrete?
  - Would this standing have been stronger if he had refused to go?
- The court could have ended the case without any further discussion.

Little v. Barreme Does Not Require Plaintiff to Disobey Orders

- The underlying cause of action in *Little* was a trespass claim for improperly seizing the ship.
- Little stands for the proposition that "a federal official [is] protected for action tortious under state law only if his acts were authorized by controlling federal law."
  - The *Little* Court puts the captain in a bind: he must obey orders, but he can be sued for damages if the order is illegal.
- "To the contrary, it appears well-settled in the post-Little era that there is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort."
  - With the end of the prize system and subsequent case law, it becomes almost impossible to sue federal officials for civil damages. (*Bivens*)

When Can Must You Disobey an Order?

- Once civil liability is gone, the remaining question is criminal liability for obeying an illegal order.
- "The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness."
- In theory, this ends the Nuremberg Defense – just following orders.
  - In practice, in the US legal system, if someone in authority tells you that what you are doing is OK, you can probably dodge criminal liability because intent fails - you thought that what you were ordered to do was not really committing war crimes.

Plaintiff Does Not Have Standing Under the "Oath of Office" Cases

- These cases generally stand for the proposition that an official who has taken an oath to support the Constitution has standing to challenge a government action if he or she is then forced to choose between violating the Constitution and facing concrete harm.
- Who is really violating his oath of office, if the Plaintiff is right about the War Powers Resolution?
  - [T]he alleged violation of the War Powers Resolution in this case is based solely on the alleged actions, or lack thereof, of President Obama, not Plaintiff. The same is true with regard to the alleged violation of the Take Care Clause. : : : Even accepting his allegations as true, he is not himself being ordered to violate the Constitution, and therefore his oath

Injury Claims in the Vietnam War Cases

- In the cases referred to by Plaintiff, plaintiff-service members claimed that they were being forced to fight in violation of their constitutional rights, and the injuries that they alleged were the deprivation of liberty and the risk of injury or death.
- See Berk, 429 F.2d at 304 (soldier ordered to dispatch to Vietnam alleging violations of his constitutional rights could bring suit challenging legality of war where "the complaint can be construed as putting in controversy his future earning capacity, which serious injury or even death might diminish by an amount exceeding $10,000");
- Massachusetts v. Laird, 451 F.2d at 28 (soldiers serving in Southeast Asia had standing to challenge Vietnam War where "[t]hey allege[d] that their forced service in an undeclared war is a deprivation of liberty in violation of the due process clause of the Fifth Amendment"). : : :

Plaintiff Does Not Allege Physical or Individual Liberty-Based Injuries

- Finally, the Court rejects Plaintiff's argument that the "decisions in cases brought by service members challenging the Vietnam War further confirm [Plaintiff's] standing." To be sure, such cases do stand for the proposition that service men and women ordered into a war that they contend is illegal may have standing to challenge that war, and the Court finds the reasoning of those cases logical and persuasive.
- [While those soldiers got standing, they were not found to have a redressable claim and their cases were dismissed. No one got relief, only standing. That was also a more sympathetic court.]

Clapper v. Amnesty International USA, 568 U.S. 398 (2013)

- Human rights workers, labor union leaders, and journalists sought an injunction against secret, warrantless electronic surveillance of them, claiming violations of their First and Fourth Amendment rights. Because the plaintiffs were unable to obtain or present evidence that they were actually targeted for surveillance, however, the Supreme Court ruled that any injuries were too speculative to confer standing. Instead, they had to show that their imminent injury was "certainly pending."
- Basically, they had to show that they were being personally surveilled, which they could only prove if they could get discovery – which the court would never grant.

What if Your Client is on the Kill List?

- A foreign journalist alleged that the Trump administration had included him (on the basis of metadata from his communications, writings, social media postings, and travel) on SKYNET, [not that SKYNET] a classified list of potential terrorists, and that he was therefore probably on the "kill list" for targeted killing as well.
- The court held that:
  - [w]hile it is possible that there is a correlation between a list like SKYNET and the Kill List, the Court finds no allegations in the Complaint that raise that possibility above mere speculation. Accordingly, the Court finds Mr. Zaidan has failed to allege a plausible injury-infact and therefore has no standing to sue."
- Same Clapper problem – you cannot get discovery, so no proof.

Injuries by Illegally Supplied US Proxies

- Suppose, for example, that an American who had been injured in Yemen by a Saudi air raid sued the President and other executive branch defendants for supplying military aid to the Saudi Air Force in violation of a statutory ban on military assistance to Saudi Arabia.
- Even if he sufficiently asserted a concrete and particularized injury, a court might well rule that it was not caused by the defendants and not redressable by an injunction, because the Saudis could continue their air campaign in Yemen without U.S. aid.

Taxpayer or Citizen Standing

- In *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y. 1991), a citizen sought a court order preventing hostilities between the United States and Iraq before the 1991 Gulf War.
- According to the court, Pietsch's claim that he was being made "an accessory to murder against his will," a compulsion causing him emotional distress, was "too abstract" to meet Article III requirements. Id. at 65-66. Indeed, with one equivocal exception, see *Flast v. Cohen*, 392 U.S. 83 (1968) (recognizing the standing of taxpayers to bring certain types of claims that government spending violates the Establishment Clause), the Supreme Court has generally rejected "citizen" or "taxpayer" standing even where no one would otherwise have standing to enforce the Constitution.

Congressional Standing

- A Congress member might get standing if denied the chance to vote by the President going to war without Congressional authorization, but this was mooted by a vote to support the President.
  - *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).
- You do not get standing to oppose something that you voted against and lost. Probably kills Dellums.
  - *Raines v. Byrd*, 521 U.S. 811, 829 (1997).
- Once again, litigation is not a substitute for a losing vote in Congress.
  - *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), aff'd, 203 F.3d 19 (D.C. Cir. 2000).

United States House of Representatives v. Mnuchin, 976 F.3d 1 (D.C. Cir. 2020) - Standing

- The House sued Trump, claiming he violated the Appropriations Clause by using unappropriated money on the border wall.
- We already looked at the Appropriation Clause standing arguments in Chapter 4

Political Questions

Even if you get standing, you will seldom get a ruling.

Political Question Review: Baker v. Carr, 369 U.S. 186, 217 (1962)

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- [2] a lack of judicially discoverable and manageable standards for resolving it; or
- [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- [5] an unusual need for unquestioning adherence to a political decision already made; or
- [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Political Question Analysis

- How many do you need to make a case a political question?
- The constitution leaves setting immigration policy to Congress: Why wasn't I.N.S. v. Chadha, 462 U.S. 919 (1983) dismissed as a political question?
  - Violations of the Constitution are not political questions.
- How does the standard for judging what is a political question resemble a mandamus proceeding?
  - The key to mandamus is that there must be no discretion.
  - The Court will not order the President to stop a national security action unless it is clearly outside his discretion.
  - Lawyering tip: mandamus is almost never what your client needs.

Smith v. Obama – The Political Question

- Plaintiff is asking the Court to interpret both the War Powers Resolution and Constitutional war making authority and find that the President is acting illegally.
  - [My only question continues to be why this was not a summary dismissal.]
- For the reasons set out below, the Court finds that these are political questions under the first two Baker [v. Carr, 369 U.S. 186 (1962)] factors: the issues raised are primarily ones committed to the political branches of government, and the Court lacks judicially manageable standards, and is otherwise ill-equipped, to resolve them.
- Note – if it is a political question, no one can litigate it.

Why War Powers are Always Political Questions

- There can be “no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government.”
- “It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches : : : [than the] complex, subtle, and professional decisions as to the : : : control of a military force. : : :”;
- “The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”.

Ripeness – The Final Hurdle to Stopping Presidential War Making

- In February 2003, active-duty members of the military, parents of military personnel, and members of Congress sued to enjoin the President from initiating a war against Iraq. *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003). The plaintiffs argued that "Congress and the President are in collision—that the President is about to act in violation of the October Resolution"

The Purposes of the Ripeness Doctrine

- Ripeness doctrine involves more than simply the timing of the case. It mixes various mutually reinforcing constitutional and prudential considerations.
- One such consideration is the need “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.”
- Another is to avoid unnecessary constitutional decisions.
- A third is the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts.
- The case before us raises all three of these concerns.

Suing the United States for Money Damages

A Brief Introduction

The Cases We Have Discussed So Far were Seeking Injunctions, Not Money Damages

- Injunctive relief – most of what we see in cases challenging national security actions.
- Brought under the Administrative Procedure Act and/or the Constitution.
- Injunctions are prospective, to stop future wrongdoing.
- Injunctions do not involve individualized determinations of injury and compensation, and thus are not specific to the plaintiffs before the court. This allows them to be resolved on the law without extensive discovery and testimony.
- They do not raise sovereign immunity questions.

Tort Damage Claims

- Traditional Sovereign Immunity
- US Constitution
  - "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9.
- No jurisdiction to sue in court.
- All compensation had to be by private bills
  - What problems do private bills pose?

Constitutionally Claims for Damages

- Takings under the 5th Amendment.
- Money owed through contracts with the United States.
  - May be difficult to collect if you need classified information to prove the contract exists.
- Originally paid by special bills in Congress.

Court of Federal Claims

- 1855
- Contracts, tax refunds, takings - not torts
  - The intent was to regularize the process and end individual special bills by setting up a fund for paying claims.
- Administrative tribunal to review claims and make recommendations to Congress
  - Later Congress made the decisions binding.
  - Not an Art III court - like bankruptcy courts.
- Appeal to the Federal circuit and the United States Supreme Court.
  - The Court of Federal Claims found the Corps liable for a taking because it did not protect New Orleans from Hurricane Katrina.
  - The Federal Circuit overruled the holding and found no taking because the Federal Government has no duty to protect in the absence of a statutory or regulatory requirement.

Suing State Officials

- 42 USC 1983, part of the post-Civil War civil rights laws, allows persons who violate an individual's civil rights, while acting under the color of state law, to be sued in federal court.
- Thus, Congress authorized suing state officials for violating an individual's constitutional rights 100 years before the Supreme Court allowed the same claims to be made against federal officials.