Emily Hartz

From the American Civil War to the War on Terror

Three Models of Emergency Law in the United States Supreme Court

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To Carl Schenstrøm Nørrested, Einar Columbus Salvesen, and Viggo Hartz
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Part II Emergency Law in the Context of Terrorism

Chapter 1
Introduction

This book offers a comprehensive discussion of the United States Supreme Court's decisions concerning suspensions of basic liberties during armed conflicts from the American Civil War to the War on Terrorism. The legal questions raised in these cases concern fundamental constitutional issues such as the status of fundamental rights, the role of the court in times of war, and the question of how to interpret constitutional limitations on executive power. At stake in these difficult legal questions is the issue of how to conceive of the very status of law in liberal democratic states.

In liberal democratic states, the constitution and the laws set certain limits to what the executive can do to prevent a crisis. Even if a national security threat makes it tempting to err on the short side of liberty, a national crisis is not perceived as a blank check to the government. On the contrary, a distinguishing mark of liberal democratic states is that the executive's authority to override legal protections of liberal rights and freedoms is limited. In times of crisis, it falls upon a country's supreme court to define this limit.

Supreme court decisions about executive suspensions of liberties during armed conflicts exhibit the potential clash of power between the political and legal branches of government: a supreme court decision against the executive during a national crisis implies running the risk of having to fight it out on the political scene and the risk of losing that fight. This was exactly what happened in the United States during the Great Depression where the Supreme Court initially struck down several provisions of President Roosevelt's "New Deal" which was a series of economic programs designed to counter the devastating effects of the depression. President Roosevelt responded with the Judiciary Reorganization Bill of 1937. If the Bill had been passed into law, it would have allowed President Roosevelt to appoint six new justices, thereby dramatically changing the Court's setup. However, before the bill was passed, the Court turned around and ruled in favor of

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upholding a New Deal based on Washington state minimum wage law in *West Coast Hotel Co. v. Parrish*.[1] After this, Roosevelt dropped the Judiciary Reorganization Bill leaving the setup of the Court intact.[2]

In addition to exhibiting the Court's political weakness during times of national crisis, a decision against the executive potentially weakens the executive office at a critical time for the nation by planting seeds of doubt concerning his or her ability to handle the crisis. For both these reasons, supreme court justices will usually be extremely cautious not to strike down executive emergency measures. And when they do, they often take care not to make the clash between the political and the judicial powers too obvious.

The United States Supreme Court's paradigmatic wartime decisions confirm the picture described above: the Supreme Court has only rarely decided against the executive during an ongoing crisis. Instead, the Court has often embraced the executive's limitations on fundamental rights reluctantly while trying to save face by underscoring its general suspicion towards limitations on basic liberties. The most infamous example of this two-faced strategy is the Court's decision in *Toyosaburo Korematsu v. U.S.*[3] The case tested the constitutionality of a military order that enabled exclusions and subsequent detentions of more than a hundred thousand Japanese Americans during World War II.[4] While siding with the government and implicitly upholding the infamous detentions, the Court stressed that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject [such decisions] to the most rigid scrutiny" (Hartz 2010b; *Korematsu*: 216).

Further, on the rare occasion where the Court *has* voted to strike down executive emergency measures during an ongoing crisis, it has mostly made a conceivable effort to limit the scope of its own decision by tying its conclusion in with a legislative act, thereby pushing responsibility away from itself and back to the political branches of government.[5]

For this reason, the United States Supreme Court's decisions on emergency are notoriously ambiguous. Exactly how deep this ambiguity goes is expressed most eloquently by Supreme Court Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[6] from 1952:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the

[1] 300 U.S. 379 (1937).

[2] Justice Owen Roberts, who had voted against the New Deal legislation in previous cases, provided the fifth vote in the Court's opinion. His move came to be known as "the switch in time that saved nine".

[3] 323 U.S. 214 (1944).

[4] I discuss this case in Chap. 3, Sect. 3.4 (Korematsu v. United States).

[5] For an example, see the discussion of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) in Chap. 4, Sect. 4.3 (The Procedural Model and *Youngstown*).

[6] 343 U.S. 579 (1952).

> dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way (*Youngstown* at 634).[7]

However, in spite of this interpretive ambiguity, the United States Supreme Court decisions on emergency are also held together by a single vision: the vision of law as an objective and legitimate measure of political action. This vision constitutes the power of the Court: even if the Court's arguments may at times seem ambiguous or even bound in mystery, as Justice Jackson claims, the vision underpinning the Court's authority is the vision of an objective reasoning, the purpose of which is to say what the law *is*, not what the Court would want it to be.

This objectivity is not rooted in the idea that the law constitutes anything like a definite set of facts, which the justices can simply look up. The objectivity of the law is first and foremost rooted in methodology. As any law student knows, producing the legally correct solution to a problem depends as much on making the right argument based on the right sources as it depends on being able to state the legally correct answer to the given question at the end of the argument. Legal decisions concerning protections of rights during national emergencies are no exception. They too derive their objectivity from the methodology employed by the justices in reaching their final decision.

The purpose of the following study is to trace how—or if—the Court's methodology adapts to national emergencies. I argue that the strategy of focusing on the argumentative framework, *how the Court says what the law is*, rather than the traditional question of *what the law is*, helps provide a systematic overview of the ambiguous case law existing in this field and brings affinities to the fore that are often lost in traditional accounts.

To bring the Court's argumentative framework to the fore, I rely on classic philosophical discussions of emergency law. There is a long and distinguished philosophical tradition for recognizing that war and national crisis legitimately changes, not just what the law is but who is entitled to say what it is and how. John Locke famously argued that the executive possesses a legitimate "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it" (Locke 1993, p. 198).[8] Constant, on the other hand, argued this view warning that "[w]hen a regular government resorts to arbitrary measures, it sacrifices the very aim of its existence to the means which it adopts to preserve this" (Constant 2006, p. 134).[9]

When dealing with cases related to national emergencies, Supreme Court justices are confronted with the same kind of questions that motivated such philosophical discussions: can national security concerns be balanced against

[7] I discuss *Youngstown* in Chap. 4, Sect. 4.3 (The Procedural Model and *Youngstown*).

[8] I discuss Locke's theory of prerogative in Chap. 2.

[9] I discuss Constant's theory of emergency governance in Chap. 1.

individual liberties? Does the Court have the necessary insight to make legitimate decisions concerning limitations on executive wartime measures? Might a seemingly limited and sensible decision turn into a dangerous precedence in unforeseeable future contexts? Within the area of philosophy, these questions motivate broader theories about things like "the nature of law"; "the just organization of a state" or; "the inalienable rights of individuals". In law, on the other hand, these questions are forced upon justices who are grappling with the much more mundane problems of resolving particular issues of law applying in a concrete and given context. However, more often than not, the Court is well aware of the broader philosophical issues at stake in these cases, and more often than not, the Court's reasoning follows surprisingly close in the path of philosophical models of emergency law. Therefore, a closer attention to philosophical models of emergency law can help us systematize the Court's arguments and create a better overview of this complex area of law than that offered by a traditional focus. This motivates my choice to systematize the following discussion of the United States Supreme Court's paradigmatic decisions related to emergency according to categories informed by classic philosophical discussions of the problem of emergency.

The book singles out three models for interpreting the problem of emergency: *the rights model*, *the extralegal model* and *the procedural model* and uses them as an analytic tool for discussing the Supreme Court's decisions.

It is important to emphasize that these three models do not in and by themselves constitute principles of law. No judge ever refers explicitly to "the rights model" or "the procedural model" as a legal authority. The models in and by themselves do not explicate what the law is. Instead, they constitute the basic argumentative framework employed by the Court in cases related to emergency. Paying attention to this methodological framework makes it easier to relate the complex legal issues at stake in these cases to philosophical discussions about the basic values of liberal democratic states thereby creating a better overview of the principled issues at stake in these cases.

In Part I, I present the three jurisprudential models through a discussion of the United States Supreme Court's decisions concerning suspensions of basic liberties during armed conflicts. The approach in this part is case driven: rather than starting from the abstract models, I focus on the cases themselves and derive the framework of reasoning through a close analysis of the Court's arguments. Starting from one of the most cited cases in this area of law, *Ex Parte Milligan*,[10] I work my way through the cases that have come to define the United States Supreme Court's jurisprudence of emergency: the *Prize Cases*,[11] *Ex parte Milligan, Ex parte Quirin*,[12] *Hirabayashi v. U.S.*,[13]

[10] 71 U.S. 2 (1866).

[11] *The Amy Warwick* (commonly known as the *Prize Cases*) 67 U.S. 635 (1862).

[12] 317 U.S. 1 (1942).

[13] 320 U.S. 81 (1943).

Korematsu v. U.S.,[14] *Ex parte Endo*,[15] *Youngstown Sheet & Tube Co. v. Sawyer*.[16] This selection of cases is uncontroversial.[17] I have simply chosen to engage the cases that are routinely included in the curriculum in constitutional law classes and constitutional law casebooks. The aim is not to seek out the rare exceptional oddity, but to systematize the main jurisprudential tendencies in this kind of cases in order to create a systematic overview.

In Part II, I employ the framework developed in Part I to discuss cases arising out of the Bush government's post-9/11 fight against terrorism. The cases I discuss are *Rasul v. Bush*,[18] *Hamdi v. Rumsfeld*,[19] *Hamdan v. Rumsfeld*[20] and *Boumediene v. Bush*.[21,22]

These cases were all decided against the government, and they all confirm the tendency of the Court to downplay principled issues when deciding against the executive in the midst of an ongoing conflict. Thus, in contradiction to the cases discussed in Part I, the cases discussed in Part II are far from being clean-cut "casebook cases". Instead they have all been criticized for being inconclusive on questions concerning how to legally conceptualize the Bush government's "war on terror" as well as on questions concerning the Court's jurisprudence on emergency issues in general.

The purpose of the discussion in Part II is neither to reduce this complexity nor to pass normative judgments on what the law *is* or *should be* in cases related to suspension of rights during national emergencies. Instead, the point is to show how the justices' opinions reflect broader philosophical discussions of the problem of emergency by relating the justices' argumentative framework to the legal and philosophical traditions discussed in Part I.

[14] 323 U.S. 214 (1944).

[15] 323 U.S. 283 (1944).

[16] 343 U.S. 579 (1952).

[17] Some might argue that the choice to include *The Prize Cases* among the court's paradigmatic cases on emergency is indeed controversial. However, because the government has relied heavily on this set of cases to underpin their legal arguments in cases related to suspension of basic rights during the terrorism conflict, I could not avoid dealing with this case here.

[18] 542 U.S. 466 (2004).

[19] 542 U.S. 507 (2004).

[20] 548 U.S. 557 (2006).

[21] 553 U.S. 723 (2008).

[22] Since the Court decided to remand the case *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), I do not discuss this case.

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Part I
Three Models of Emergency Law

Chapter 2
The Rights Model

2.1 Legal and Philosophical Articulations of the Rights Model

The most famous United States Supreme Court case related to the problem of emergency is the case *Ex Parte Milligan*[1] from 1866. The case is famous because of its ringing endorsement of the unchanging nature of fundamental constitutional rights.

In the opinion of the Court, Justice Davis confirmed that

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. *No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government*. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort [by the secessionist Southern States] to throw off its just authority (*Milligan* at 120, emphasis added).

With this passage, Justice Davis wrote himself into Supreme Court history as the justice who most definitively refuted the idea that national exigencies trigger special emergency powers.

The approach to emergency jurisprudence promoted by Justice Davis in *Milligan* emphasizes that any emergency governance in any kind of crisis must pass muster according to the standard of constitutional rights. This implies that the executive cannot lawfully suspend any rights with reference to the exigencies at hand. In the following, I refer to this model of emergency jurisprudence as "the rights model".

The case in which Davis articulated this model was decided just after the American Civil War and concerned the use of military commissions to try civilians during the war. Military commissions are ad hoc military courts usually convened

[1] 71 U.S. (4 Wall.) 2 (1866).

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to try enemies for offences against the laws of war or to institute a system of justice in areas under martial law when the civil courts are not able to function (Winthrop 1920, p. 831). Using military commissions to try civilians constitutes a potential breach of the constitutional right to equal protection of law because military commissions are not part of the judicial power laid out in the United States Constitution's Article III. Instead, they are constitutionally grounded in the war powers allocated to the political branches of government. As a result, military commissions are not subject to judicial oversight and do not adhere to the same standards of proof that apply in the civilian court system. In *Military Law and Precedents*, Winthrop explains that "[t]he [military]commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war" (Winthrop 1920, p. 831).

During the American Civil War, military commissions were used at several occasions to try civilians suspected of agitating against the war. The petitioner in *Ex Parte Milligan*, Lambdin P. Milligan, was a civilian who was arrested for accusations of plans to conspire against the United States. Less than 3 weeks after his arrest, Milligan was brought before a military commission, where he was tried, found guilty and sentenced to be hanged (Rehnquist 1998, p. 75). He appealed the judgment to the federal courts, arguing that the military commission did not have jurisdiction to try him and that, as a United States citizen and a civilian, he had a constitutional right to a trial by jury. After the war, when the case finally reached the Supreme Court, the Court decided against the government and ordered the immediate and unconditional release of Milligan. But, as Justice Davis' statement quoted above illustrates, the decision did not only focus on the particular legal issues in Milligan's case. It went further and articulated a rights model of emergency jurisprudence arguing that war and national security never provides a legal argument for suspending fundamental rights.

The decision in *Milligan* mirrors a philosophical intuition that is historically rooted in the enlightenment philosophy of John Locke, namely, that legal rights are an expression of a fundamental and absolute value and that the idea that rights can be set aside therefore misconceives the very meaning of rights. As Locke famously argued in *Two Treaties of Government*:

> The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions (Locke 1993, p. 117).

In a different part of *Two Treaties*, Locke himself grappled with the dilemma posed by emergencies. In spite of his emphasis on inalienable rights, he came to the conclusion that there are situations where law must yield for security and that such situations are in principle unpredictable. Thus, Locke begins the chapter "Of Prerogative" in *Two Treaties of Government*, by grounding the executive's special authority, to employ extraordinary means in emergencies, in the problem of predicting a crisis:

> the legislators not being able to foresee, and provide, by laws, for all, that may be useful to the community, the executor of the laws, having this power in his hands, has by the common law of nature, a right to make use of it, for the good of society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it (Locke 1993, p. 197).

This unpredictability of what in particular circumstances "may be useful to the community", Locke argued, entails that the executive must possess some authority to act beyond the law, as long as the action is for the benefit of the community. He defined the power he called the *prerogative* as the, "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it" (Locke 1993, p. 198). Thus, according to Locke, the executive possesses an extralegal authority, implying that executive acts that are not provided for by positive law may still be deemed lawful if they are for the benefit of the public good. Notably, Locke did not advocate a limited role for the legislative body in general; on the contrary, he was a strong advocate of limiting the powers of the king, but he found that the problem of predicting emergencies forced him to introduce and justify this extraordinary executive power (Locke 1993, p. 198). Thus, even if Locke otherwise emphasized the inalienable nature of rights, he ended up arguing that these rights may justly yield in cases of immanent emergency.

The clearest philosophical expressions of the rights model is instead to be found in the writings of the Swiss-born philosopher Benjamin Constant (1767–1830). Constant articulated the unchanging nature of rights as a necessary characteristic of liberal states and argued that "[w]hen a regular government resorts to arbitrary measures, it sacrifices the very aim of its existence to the means which it adopts to preserve this" (Constant 2006, p. 134). Constant argued not only that compromises on rights in emergencies are incompatible with the meaning of rights but also that such a strategy would be self-defeating in practice:

> [b]e just, I would always recommend to men in power. Be just whatever happens, because, if you cannot govern with justice, even with injustice you would not govern for long (Constant 2006, p. 134).

Constant underpinned this view with the argument that while compromises on rights might seem to serve their purpose in the short run, they would ruin the morality and strengthen the enemy in the long run. His point was that once the methods of arbitrary government "have been admitted at all, they are found so economical and convenient, that it no longer seems worthwhile to use any others" and further:

> [t]here are, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through suppression of justice, that such dangers may be averted. It is on the contrary to adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards (Constant 2006, p. 134).

Thus, a key point for Constant was the impact of the symbolic effect of adhering to rights no matter what:

> [t]wo advantages result from such courageous persistence in the path of legality: governments leave to their enemies the odium of violating the most sacred of laws; and

> the more they win by the calm and assurance they display, the trust of that timid mass that would remain at least uncertain, if extraordinary measures were to betray, in the custodians of authority, a pressing sense of danger (Constant 2006, p. 135 and 136).

It is rare to find such an uncompromised advocate of adherence of the rights model in the philosophical literature (Hartz 2010, p. 73). But Constant wrote in the aftermath of the French revolution where Robespierre's Reign of Terror had revealed with horrifying clarity where the slippery slope of compromising fundamental rights could lead to (Hartz 2010, p. 73). Like other philosophers of the age, he saw it as a primary duty of philosophy to clarify how the ideals of liberty, equality and fraternity could lead a government astray with such terrifying results. Constant argued that the problem was the belief that the ends could justify the means: once the thought that the ideal of a government of rights could be compromised in the short run in order to secure its realization in the future, the ideal itself had lost its value.

2.2 The Court's Employment of the Rights Model in *Ex Parte Milligan*

Constant wrote about the problem of emergency in the aftermath of the French Revolution. Justice Davis' ringing endorsement of rights in *Milligan* was written in the aftermath of another war, namely, the American Civil War. At the time when *Milligan* was decided, the Civil War had taken more than 600,000 American lives and torn the country apart (Hartz 2010, p. 74).

As mentioned, the legal issue in the *Milligan* was whether the military commission that had been convened to try the civilian, Lambdin P. Milligan, for accusations of plans to conspire against the United States in connection with the Civil War had jurisdiction to do this. But it has often been pointed out that the Court's uncompromised confirmation of the rights model in *Milligan* must also be seen as a general reaction against President Lincoln's expansive interpretation of the war powers and the government's repeated suspension of fundamental rights.

What fewer (if any) have noted is that while the use of military tribunals to try civilians had not been employed on a massive scale to infringe rights during the war, the theory of emergency that the government promoted to legally defend its use of military tribunals in *Milligan* went much further than embracing military commissions. It suggested that unilateral decisions to impose ad hoc limitations of constitutional rights were a lawful means of protecting national security during a crisis. In their Brief for Respondents in *Milligan*, the government argued:

> [a]fter war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. *He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.*
>
> During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view, – 'to conquer a peace' (*Milligan*, Brief for Respondent at 18, emphasis added).

Thus, rather than defending the trial by military commission of Milligan on a narrow basis, the government set out to defend an expansive interpretation of the president's war powers in general. What the government was defending in its brief was not only the decision to try one civilian by military commission under the specific circumstances applying in Milligan's case. The brief aimed much broader. What it defended was in fact the underpinning tenor of President Lincoln's expansive interpretation of the office of the commander in chief during wartime. Justice Davis' endorsement of the rights model in *Milligan* must be interpreted in light of this challenge.

There is no direct constitutional underpinning for the government's expansive interpretation of the war powers. The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".[2] This passage, which is known as "the Suspension Clause" is the only provision in the Constitution where rights suspensions are explicitly authorized. The wording of the Suspension Clause has consistently been interpreted to imply that the privilege of habeas corpus may not be suspended otherwise. Further, its placement in Article I has consistently been interpreted to imply that the suspension power belongs to Congress and not to the president, whose powers are listed in Article II.

The first step towards authorizing the kind of civilian trials by military commission that was at issue in *Milligan* was Lincoln's unilateral authorization of the suspension of the writ of habeas corpus to deal with emergency situations arising in the initial phase of the Civil War. To understand Lincoln's move, it is necessary to keep the events leading up to the war in mind. In 1861, when several of the southern states formed a confederacy and declared their secession from the United States, the northern states were at first hesitant to coerce the secessionist southern states back into the Union. But after a Confederate attack on Fort Sumter, which was one of a number of federal forts placed within the area of the seceded states, Civil War seemed unavoidable. The Confederate troops opened fire on the fort on April 12, 1861. On April 14, the fort was forced to surrender, and the outbreak of war became fact (Stone 2004, p. 84). The day after, President Lincoln "called for a special session of Congress to meet on July 4" (Brest 2006, p. 271). During the 12 weeks that passed between the attack and the assembling of Congress, Lincoln acted quickly and unilaterally to repel the attack and to coerce the Confederate states back into the Union.[3] During this period, which has been called, "his twelve weeks of executive grace", Lincoln, "assembled the militia, enlarged the Army and the Navy beyond their authorized strength, called out volunteers for three years' service, spent public money

[2] U.S. Const. Art. I, § 9, cl. 2.

[3] Both Schlesinger and Rossiter argue that Lincoln deliberately delayed the convocation of Congress, "as a considered determination to crush the rebellion swiftly without the vexatious presence of an unpredictable Congress to confuse the narrow issue" (Rossiter 2002, p. 225) and took action unilaterally, "lest constitutionalists on the Hill try to stop him from doing what he deemed necessary to save the life of the nation" (Schlesinger 2004, p. 58).

without congressional appropriation, suspended habeas corpus, arrested people 'represented' as involved in 'disloyal' practices and instituted a naval blockade of the Confederacy" (Schlesinger 2004, p. 58).[4] All these measures arguably went far beyond his constitutional powers because while the Constitution makes the president the "Commander in Chief of the Army and Navy of the United States",[5] it specifically allocates to Congress the power to "[. . .] declare war [. . .] raise and support Armies [. . .] provide and maintain a Navy [. . .] make Rules for the Government and Regulation of the land and naval Forces [. . .] provide for calling forth the Militia [. . .] and to provide for organizing, arming, and disciplining, the Militia".[6]

Lincoln's first suspension of habeas corpus occurred as part of an effort to secure federal troops moving through the state of Maryland on the way to Washington. Logistically, Maryland was an extremely important state because it surrounded the capital on three sides (Stone 2004, p. 84). The governor of Maryland supported the Union, but public opinion in the state was divided. As Union troops attempted to march through Baltimore on their way to Washington, they were attacked by huge mobs of confederate sympathizers (Rehnquist 1998, p. 18).

Baltimore connected Washington to the New York and Philadelphia railroad as well as to the line going to Harrisburg, which meant that if troops could not travel through Baltimore, Washington would be virtually cut off from the rest of the Union (Rehnquist 1998, p. 18). This was indeed what happened in the weeks following the Baltimore Riots when, "[n]ot only were no troops arriving, but the telegraph lines had been cut and mail deliveries from the North were irregular" (Rehnquist 1998, p. 22).

On April 27, 1861, Lincoln sent a letter to General Scott, the commanding general, authorizing him to suspend the writ of habeas corpus.[7] Since Congress had not yet assembled, this authorization did not carry congressional approval. As a consequence, Lincoln's suspension of the writ did not have constitutionality underpinning.

In a famous address to Congress on July 4th, Lincoln defended his unilateral decision to suspend the writ by pointing to the sheer necessity of making this drastic

[4] Lincoln's interpretation of the war powers in the initial phase of the Civil Wars is often seen as a defining moment for the subsequent development of presidential war powers in the USA toward the unilateral authority to initiate and conduct war (Schlesinger 2004, p. 61).

[5] U.S. Const. Art. II, § 2.

[6] U.S. Const. Art. I § 8.

[7] His order stated: "If at any point on or in the vicinity of the military line which is now used between the city of Philadelphia via Perryville, Annapolis City and Annapolis Junction you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally or through the officer in command at the point where resistance occurs are authorized to suspend that writ" (Lincoln's Suspension of the Writ of Habeas Corpus, Relating to the Events in Baltimore, Washington, April 27, 1861).

move in order to hold the Union together, thereby fulfilling his presidential oath to "preserve, protect and defend the Constitution of the United States"[8]:

> The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated? Even in such a case would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it? (Cited in McLaughlin 2001, p. 622)

Lincoln's point was that he was faced with the choice between either ordering an unconstitutional suspension of the writ of habeas corpus or risk the defeat of the Union itself: by adhering strictly to the constitutional protection of habeas corpus, he would risk the collapse of the United States and thereby the failure not only of habeas corpus but of all the laws protected in the constitution. He argued therefore that the ethos of his presidential oath and the spirit of the constitution should prevail over a rigid adherence to constitutional rights.

Lincoln's argument mirrors the intuition expressed by Locke that even fundamental rights may justly be compromised by the executive in cases of emergency if such compromise is necessary to secure the common good. Locke's argument expresses a fundamental trust in the executive, whose sovereignty, according to Locke, springs directly from the people and who therefore cannot act against the good of the people. Constant's point in the same case is instead that any compromise on fundamental rights must be seen as a symbolic act that inevitably questions the authority of a government. And, Constant would argue, rightly so because once such means have been admitted at all, the temptation to continue to rely on effective but abusive governance in the future is almost unavoidable (Constant 2006, p. 135 and 136).

In 1861, Congress neither embraced nor denounced Lincoln's Lockean appeal and it was not until March 3, 1863 (almost 2 years after) that Congress passed an act actually authorizing the president to suspend the writ of habeas corpus. The March 1863 Act—named, "An Act Relating to habeas corpus, and regulating judicial proceedings in certain cases"[9] (hereafter cited as "1863 Act")—was far from a full embrace of Lincoln's suspension. Although it authorized the President to suspend the writ, "whenever, in his judgment, the public safety may require it". The act also described a number of limitations on the length and procedure of lawful detention without formal charges.

[8] The Constitution provides: "Before he [the president elect] enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" (U.S. Const. Art. I § 2, Sec. 8).

[9] 12 Stat. 755 (1863).

The 1863 Act became crucial to the reasoning in Milligan's case (Hartz 2010, p. 93). Both the opinion of the court and the opinion of the concurrence relied on this act to argue that the military commission did not have jurisdiction to try Milligan who was therefore entitled to immediate release. But before taking a closer look at the reasoning in *Milligan* that was decided after the war had ended, it is interesting to pose and consider what happened to the habeas cases that were raised *while* the war was still going on.

During the war, there had in fact been several unsuccessful attempts at challenging Lincoln's habeas policies in the courts. The first of these was *Ex Parte Merryman*,[10] which was decided in the circuit court by Supreme Court Chief Justice Roger B. Taney in April 1861.[11] John Merryman was one of many civilians who were arrested and held without charges in connection with resistance in Maryland (McLaughlin 2001, p. 620). Justice Taney first issued a writ of habeas corpus to General Cadwalader, who was the commander at the fort in which Merryman was detained. When both Cadwalader and Lincoln himself refused to obey Taney's order, Justice Taney decided the case against Lincoln, ruling that Lincoln's suspension of the writ was unconstitutional since only Congress was authorized to suspend the writ (*Merryman*, 153). However, the case, which was decided on circuit level, never reached the Supreme Court and had no impact on the government's habeas policies.

In 1863, another habeas corpus case was brought before the courts. This case had even closer resemblance to *Milligan* than the Merryman case did. The petitioner, Clement L. Vallandigham, was seeking nomination for governor by the Democrats in the state of Ohio. On the 5th of May, 1863, four days after giving a speech at a mass meeting at Mount Vernon, Ohio, he was arrested by General Burnside, the commanding general in that area (Rehnquist 1998, p. 63). On the following day, he was charged before a military commission of having expressed sympathies for those in arms against the Government of the United States. The military commission found Vallandigham guilty and sentenced him to be detained until the end of the war.[12]

Vallandigham petitioned for a writ of habeas corpus in the Supreme Court. But the Court refused to grant certiorari arguing that the Court had "no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the United States Army" (*Vallandigham*, 247).[13]

The Court's refusal to review *Vallandigham* stands in stark contrast to the principled priority of the law and the definite nature of constitutional rights advocated by Justice Davis in *Milligan*. Rather than acting as a restraint on the executive, the Supreme Court's reluctance to raise the habeas issue during the war

[10] 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[11] At that time, the Supreme Court justices had to "ride circuit," as it was called, and act as judges on the circuit courts in between their obligations at the Supreme Court.

[12] "The President converted the punishment to banishment within the Confederate lines" (McLaughlin 2001, p. 626).

[13] *Ex parte Vallandigham*, 68 U.S. (I Wall.) 243 (1863).

contributed to enhancing the government's confidence in the Supreme Court's acceptance of a wide margin of executive discretion to suspend fundamental rights for security reasons. This confidence is palpable in the Brief for Respondents in *Milligan* where the government boldly declared that although Milligan would be entitled to a number of constitutional legal protections in normal times, these protections cease to apply when national security is jeopardized by war:

> [t]hese, in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, *are silent amidst arms, and when the safety of the people becomes the supreme law* (Brief for Respondent, *Milligan*, 19 and 20, emphasis added).

What the government argued in *Milligan* was that when a war has broken out, *martial law* reigns, not only in the immediate theatre of war where fighting is actually taking place but in any theatre of "military operations", in any state, "which had been and was then threatened with invasion" (*Milligan*, Brief for Respondent: 17).

With the term "martial law" the government did not refer to any well-defined part of military law or the law of nations but instead to the "law" dictated by the necessity arising from the threat to national security imposed by war. In the *Milligan* brief, the government literally stated:

> [m]artial law is *the will of the commanding officer* of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction (*Milligan*, Brief for Respondent: 14, emphasis added).

This "law", the government argued, is

> as necessity demands and prudence dictates, restrained or enlarged by the orders of [the commanding officer's] military chief, or supreme executive ruler (*Milligan*, Brief for Respondent: 14).

Because of the bold statements in the government's brief, what became at stake in *Milligan* was not just the single issue of how to interpret the 1863 Act by which Congress had authorized certain limited suspensions of habeas corpus. Lurking in the background of the case was the possible precedence set by Lincoln's broad interpretation of the presidential war powers. This background explains why the Court made a strong point of refuting the idea that necessity justifies limitations on constitutional rights. To underpin this point, the Court emphasized that the Constitution was devised to function in war and peace alike:

> [t]he illustrious men who framed that instrument [The United States Constitution] were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right [the privilege of the writ of habeas corpus], and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so (*Milligan* at 126).

In this way, the *Milligan* Court clearly signaled that the exigencies of war did not provide the executive with any kind of authority to impose limitations on constitutional rights. Writing for the Court, Justice Davis underscored this point further by noting that military commissions "cannot justify the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws" (*Milligan* at 121).

Once Justice Davis had refuted the theory that the existence of war authorized the president to institute derogations from constitutional rights, two questions remained. The first was the statutory question of whether Milligan was entitled to his freedom according to the March 1863 Act regulating suspension of habeas corpus during the war; the other was the constitutional issue of whether the trial of civilians by military commission was ever admitted.

The statutory question was fairly straightforward. The 1863 Act required that a detained person must be indicted or presented in front of a grand jury convened at the first subsequent term after the person was detained. As this had not happened in Milligan's case, he was entitled to discharge according to the provisions of the Act (Hartz 2010, p. 75).

Concerning the constitutional question, Davis concluded that the military commission's trial of Milligan was unlawful because it violated the constitutional right to a trial by jury (*Milligan* at 119).[14] Thus, Davis argued, except for members of the militia and the armed forces "[a]ll other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury" (*Milligan* at 123). Davis thus confirmed the fundamental nature of the right to a trial by jury: "[t]his privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity" (*Milligan* at 123).[15]

Again, Davis' argument contains a clear confirmation of the rights model and an equally clear refutation of the government's theory of emergency governance. He argued that the only constitutional power to suspend rights in emergencies is that derived from the Suspension Clause. In addition, he emphasized the limits of the Suspension Clause arguing:

> [t]he Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it (*Milligan* at 126).

[14] Justice Davis cited US Const. Art. II, § 2, cl. 8, as well as amend. IV, V and VI.

[15] In the brief for Milligan, the right to a trial by jury is commended not only because of its clear constitutional underpinning but also for its historical importance as a hallmark of civilized rule by law. In this connection, the brief contrasted it to the uncivilized rule of our Danish predecessors: "[t]he Saxons carried it [the privilege of trial by jury] to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion; and all that they suffered of tyranny and oppression, during the period of their subjugation, resulted from the want of trial by jury. If that had been conceded to them, the reaction would not have taken place which drove back the Danes to their frozen homes in the North. But those ruffian seakings could not understand that, and the reaction came" (*Milligan at* 70, brief for petitioner).

Finally, he made a prudential point arguing the power to suspend habeas corpus was indeed a sufficient means of emergency governance, and there was no practical need to introduce military commissions. To make this point, he argued that the framers were not naive when they limited the government's wartime authority; on the contrary, they were well aware of what they were doing and they deliberately limited the government's war powers to protect the liberty of the people in times of national emergencies:

> [t]hey knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus (*Milligan* at 125).

With this embracement of the rights model, the Court's opinion went well beyond the narrow question of whether the military commission had jurisdiction to try Milligan. In a concurring opinion written by Chief Justice Chase, a minority criticized the broad scope of the Court's opinion. While the concurrence agreed with the majority that Milligan was entitled to be discharged, Chief Justice Chase emphasized that this conclusion followed directly from the 1863 Act and was not conditioned on an acceptance of the rights model.

2.3 *Ex Parte Milligan* and Inherent Difficulties of the Rights Model

As mentioned, Chief Justice Chase's concurring opinion refuted the rights model of emergency jurisprudence advocated by the Court. Instead, Chase centered "on the relationships between political institutions, in particular, the relation-ship between Congress and the president" (Issacharoff and Pildes 2004, p. 303). On that basis, the concurring justices argued that martial law can constitutionally be invoked by Congress, or temporarily by the president, in cases of great peril, when the Congress cannot be convened, "within districts or localities where ordinary law no longer adequately secures public safety and private rights" (*Milligan* at 142, Chase concurring). According to the concurrence, the decision concerning when ordinary law is no longer able to secure public safety lies with Congress. Based on this view, martial law is not a necessity that arises from the breakdown of the legal system; rather, it is a tool that can be employed by Congress to deal with national emergencies. Therefore, according to Chase, Congress did have constitutional power to convene military commissions if it found the need to do so during a national security:

> [w]e cannot doubt that, in such a time of public danger, Congress did have power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy (*Milligan* at 140, Chase concurring).

Chase argued that the Courts

> might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators (*Milligan* at 140, Chase concurring).

As mentioned, the only provision in the United States Constitution that enables compromises on rights during emergencies is the Suspension Clause and therefore Chief Justice Chase's interpretation of Congress' role in emergencies does not rely on any specific provision of the Constitution but on a structural reading of the scope of the power allocated to the different branches. Rather than arguing that the legal provisions must mean the same in all times and during all kinds of situations, as the rights model advocates, Chase argued that the constitutionality of any emergency provisions relies on the adherence to procedural safeguards defined through the pattern of separation of powers that the constitution provides for.

The majority did not accept the idea that the structure of the constitution enables special congressional emergency powers beyond those directly listed in the Suspension Clause. Chase argued:

> Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise (*Milligan* at 122).

In making this argument, Justice Davis emphasized not only the importance of safeguarding civil liberties in the specific context of the Civil War, but equally, or even more importantly, he pointed to the implications that compromises on constitutional privileges might have for the protections of these privileges in the future when the danger might exist that "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln" (*Milligan* at 125). He argued that when "[. . .] society is disturbed by civil commotion [. . .] these safeguards need [. . .] the watchful care of those entrusted with the guardianship of the Constitution and laws", because "[i]n no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution" (*Milligan* at 124).

If this crucial continuity of law is not secured, Davis argued, every guarantee of the Constitution is destroyed and a military commander may

> if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules (*Milligan* at 124).

Davis' argument has clear affinities to Constant's refutation of the idea that compromises on rights in the short run could ever work to sustain rights in the long run. Both Davis and Constant warn that the doctrine that rights may be suspended during exigencies is a counterproductive and dangerous idea that jeopardizes the trust of the people (Constant 2006, p. 134) and "leads directly to anarchy" (*Milligan* at 121).

Davis' "ringing endorsement of civil liberty" has sometimes been accused of being unrealistic and hypocritical (Gross and Ní Aoláin 2006, p. 2006; Reid v. Covert, p. 30; Spaulding 2005). However, if Davis' advocacy of the rights model is read in light of the radical theory of emergency law presented by the government in the Brief for Respondents, it seems reasonable to argue that the opinion does in fact stand out as an important corrective to a very extreme interpretation of presidential emergency powers. Thus, if the Court had decided the case on purely statutory grounds, as the concurring justices urged, the government's radical interpretation of the law of necessity would have stood unrefuted. It could be argued that in that case the precedence set by President Lincoln's broad interpretation of the scope of the presidential war powers would have had more impact. Strangely, however, the radical theory of emergency governance expressed in the brief for the government is rarely, if ever, discussed in connection with the Court's *Milligan* opinion.[16]

That being said, the principled confirmation of the rights model in *Milligan* still stands in stark contrast to the Supreme Court's decision not to hear Vallandigham's petition for habeas corpus while the war was still ongoing. *Milligan* therefore arguably constitutes a strange paradox: on the one hand, it is the Court's strongest confirmation of the rights model, while, on the other hand, it addresses a problem that was no longer present—making its fierce defense of rights ring on a hollow note. Justice Davis admitted this paradox in an extremely interesting passage at the beginning of the opinion where he explains the role and purpose of legal reasoning:

> [d]uring the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation (*Milligan* at 109, emphasis in original).

In this passage, Davis confirmed the image of law and legal deliberation as removed from and ideally unaffected by the—sometimes dirty—pragmatism of security politics. But at the same time, as pointed out by Norman W. Spaulding in the article "The Discourse of Law in Time of War, Politics and Professionalism

[16] In former Chief Justice Rehnquist's book on emergency governance in the United States, the *Milligan* case takes up more than 30 pages but he spends less than half a page on explaining the brief for the government (Rehnquist 1998; He discusses the Government's brief on page 121). Gross and Ní Aoláin also discuss the case in their book *Law in Times of Crisis: Emergency Powers in Theory and Practice*, but they do not mention the government's brief at all (Gross and Ní Aoláin 2006, p. 94). In Geoffrey R. Stone's book *Perilous Times*, he mentions the decision but does not discuss the government's brief (Stone 2004, p. 126). The same is the case in McLaughlin's *A Constitutional History of the United States* (McLaughlin 2001, p. 625 and 660). Furthermore, the section on *Milligan* in the widely used casebook of United States constitutional law *Processes of Constitutional Decisionmaking* neither cites nor discusses the Government's brief (Brest 2006, p. 874).

during the Civil War and Reconstruction" the opinion, "also reveals a trace of relief that Milligan's habeas petition was not presented '[d]uring the late wicked Rebellion'. Relief because '[t]hen, considerations of safety were mingled with the exercise of power'-'feelings and interests prevailed' which might have inhibited a correct conclusion of a purely judicial question" (Spaulding 2005, p. 2004). The peculiar passage in Davis' opinion seems to contain a concession that although law is in principle, "above power, both regulating it and deriving authority from independent sources", power tends to consume law and "[o]nly the end of hostilities, when public safety is assured, offers a proper opportunity for law to reassert its dominion" (Spaulding 2005, p. 2004).

Thus, in spite of *Milligan*'s statement that the law should continue uninterrupted in war and peace alike, the opinion also contains a concession to the problem that war will always constitute a pressure on law that will almost unavoidably disrupt its practice.

Spaulding notes:

> [t]he affirmation [of law] and concession [to its futility in times of war] are, to say the least, difficult to reconcile. Law is displaced by power and, at the same time, or only afterwards, above power (Spaulding 2005, p. 2004).

In this way, Justice Davis' opinion brings the tension between principles and pragmatism to the fore: rather than trying to resolve this tension or cover it up, he articulates the fragility of the law in the face of power almost in the same breath in which he articulates the law's unchangeable and untouchable nature. Spaulding comments:

> [i]f we accept the confession with the same conviction that we celebrate the holding, law is not above power so much as chasing after it. Yet this takes away the very reassurance offered by the holding and makes of the opinion a rather strange gift to civil liberty (Spaulding 2005, p. 2005).

It is hard to say precisely what that "strange gift" is. The opinion confirmed the inalienable nature of rights on the one hand and the alienation of any principle of law in the face of the reality of war on the one hand. Therefore, rather than a naive affirmation of the rights model, the opinion may be said to boldly articulate the inner paradox of law: that it stands at an inevitable distance from reality to which it is to be applied. In this sense, the opinion does not only confirm the absolute nature of rights but also the gap between law and reality which enables legal deliberation to take place, "without passion or the admixture of any element not required to form a legal judgment", while implying that law "is not above power so much as chasing after it" (Spaulding 2005, p. 2005).

Milligan's ringing endorsement of rights and its bold decision against the sitting government, renders the mentioning of *Milligan* unavoidable in any discussion of the United States Supreme Court's jurisprudence on emergency. But while *Milligan* stands as an important symbol of the definitive character of constitutional rights, its paradoxical character renders its actual jurisprudential implications unclear. This comes through in the case history of the Supreme Court where it is routinely mentioned in a number of key cases related to

emergency[17] but is rarely employed directly to underpin a rights model of emergency jurisprudence.[18] Justice O'Connor's 2004 opinion for the Court in the decision *Hamdi v. Rumsfeld*[19] illustrates this point. The case concerned the rights of suspected terrorists held on Guantanamo. In the opinion for the Court, O'Connor referred to *Milligan* as an authority warning that "an unchecked system of detention carries the potential to become a means for oppression and abuse" (*Hamdi* at 530). But in spite of this clear endorsement of *Milligan's* ethos, she interpreted the jurisprudential implications narrowly as tied to the particular circumstances of the case and concluded that *Milligan* "does not undermine [. . .] the Government's authority to seize enemy combatants, as we define that term today" (*Hamdi* at 521).

O'Connor's ambiguous reading of *Milligan* mirrors Chief Justice Stone's interpretation of *Milligan* in the WWII case *Ex Parte Quirin*.[20] The case concerned President Roosevelt's decision to try German spies captured in the USA by military commission. In the opinion of the Court in *Quirin*, Stone first referred to *Milligan* to underscore that "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty" (*Quirin* at 25). But while embracing *Milligan's* emphasis on constitutional rights on the one hand, he went on to warn on the other hand that

> the detention and trial of petitioners-ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger-are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted (*Quirin* at 25)

and finally concluded the case in favor of President Roosevelt's much criticized decision to try German spies captured in the USA by military commission.

It may be argued that *Milligan's* mixed reputation is a result of the inner paradoxes of the opinion which may also explain why the jurisprudential influence of *Milligan* has been rather limited in spite of the fact that the case's philosophical message of the definitive character of constitutional rights continues to be flagged in the literature on emergency-governance.

Tellingly, the passage from *Milligan* which is quoted most often in the subsequent case history is actually from the concurring opinion written by Chief Justice Chase:

> [t]he power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law (*Milligan* at 139, Chase concurring).

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[17] See, for example, *Ex parte Quirin* 317 U.S. 1 (1942), *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952), *Hirabayashi v. U.S.* 320 U.S. 81 (1943), *Ex parte Mitsuye Endo* 323 U.S. 283 (1944), *Rasul v. Bush* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld* 542 U.S. 507 (2004), *Hamdan v. Rumsfeld* 548 U.S. 557 (2006) and *Boumediene v. Bush* 553 U.S. 723 (2008).

[18] Justice Scalia's dissent in *Hamdi v. Rumsfeld* is a rare exception. Here, he relied on *Milligan* to argue in favor of the unconditional release of an American citizen held by the government as an enemy combatant in the War on Terror.

[19] 542 U.S. 507 (2004) I discuss this case in Chap. 6.

[20] 317 U.S. 1 (1942) I discuss this case in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*).

The limited influence of the Court's opinion in *Milligan* is partly due to the fact that suspension of habeas corpus has only rarely been employed as a means to deal with emergencies after the Civil War. But this does not explain the eclipse of the Court's opinion by the concurrence, which is probably also due to the fact that a rigid adherence to the rights model leaves a lesser margin of interpretation. However, even if the court's principled statements in *Milligan* are rarely cited, it might be argued that the influence of *Milligan* is tangible in the fact that the model of emergency governance advocated in the government's Brief for Respondents has been almost completely weeded out of emergency jurisprudence in the United States federal courts.

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Hirabayashi v. U.S., 320 U.S. 81 (1943)
Merryman, Ex Parte 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861)
Milligan, Ex parte, 71 U.S. 2 (1866)
Quirin, Ex parte, 317 U.S. 1 (1942)
Rasul v. Bush, 542 U.S. 466 (2004)
Vallandigham, Ex parte, 68 U.S. (I Wall.) 243 (1863)
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Chapter 3
The Extralegal Model

3.1 Philosophical and Legal Articulations of the Extralegal Model

When Lincoln addressed Congress after his unilateral suspension of the writ of habeas corpus in the beginning of the Civil War, he asked: "are all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?" (cited in McLaughlin (2001), p. 622). Lincoln's rhetorical question captures the dilemma at the root of any form of emergency governance: in times of severe crisis, political societies are faced with the problem that the law ties the hands of the government and may seem to prevent it from dealing effectively with a given threat. The extralegal solution to this dilemma is to set the law aside in order to deal effectively with the crisis (Hartz 2010a, p. 77; Hartz and Kyritsis 2010, p. 161). The point being, as expressed by Lincoln, that "if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it", the ethos of executive oath to "preserve, protect and defend the Constitution of the United States" obliges the executive to disregard that law. Lincoln's expression of this dilemma is given in a political context. The point he makes in the political context raises the legal question of whether courts should embrace the idea that law may be set aside in order to deal effectively with a national crisis. In the following I refer to the jurisprudential model of emergency that embraces this idea as "the extralegal model".

As noted in the previous section, the clearest philosophical articulation of this model is Locke's theory of the prerogative, which he defines as a "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it" (Locke 1993, p. 198).

He is very clear about the point that the prerogative includes a power to disregard positive law in cases where public security requires it:

> it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government – viz., that as much as may be all the members of the society are to be preserved (Locke 1993, p. 197).

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Locke, who was otherwise a strong advocate of limiting the powers of the king, found that the problem of predicting emergencies forced him to introduce and justify this extraordinary executive power:

> since in some governments the law-making power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution: and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities, that may concern the public; or to make such laws, as will do no harm, if they are executed with inflexible rigor, on all occasions, and upon all persons, that may come in their way, therefore there is a latitude left to the executive power, to do many things of choice, which the law do not prescribe (Locke 1993, p. 198).

In this way, he advocated the use of extralegal power during emergencies while underscoring that the prerogative power to act outside the law can only be justified insofar as it is employed for the benefit of the public good (Hartz 2010a, p. 77; Hartz and Kyritsis 2010, p. 161). However, he did not suggest any remedies for limiting executive misuse of this power. Instead, he stated that in case of abuse, "[t]he people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven" (Locke 1993, p. 201).

3.2 The Extralegal Model and the Japanese Internment Cases

Although the framers of the US Constitution were much inspired by Locke, the Constitution does not accommodate any principle allowing the executive to authorize unlawful actions in emergency situations. It should come as no surprise therefore that unlike the case of *Milligan*'s advocacy of the rights model, there is no famous United States Supreme Court case that explicitly embraces the extralegal model of emergency jurisprudence. What is surprising however is that there are in fact two *in*famous cases which come very close to doing just that, namely, *Korematsu v. U.S.*[1] from 1944 and its sister case *Hirabayashi v. U.S.*[2] from 1943. In both cases the Supreme Court sanctioned one or more aspects of the forced exclusion, relocation and detention of Japanese Americans that were enabled by executive order in the aftermath of the Pearl Harbor attack leading up to the United States military engagement in WWII. The underpinning argument in both cases was that normal standards of civil liberties may lawfully be subjected to limitations in order to effectively accommodate national security challenges, and thus those extreme threats to national security might justify otherwise dubious and discriminatory executive acts (Hartz 2010a, p. 79).

This notion is most clearly articulated in *Korematsu* where Justice Black, who wrote the opinion for the Court, first noted "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" but then

[1] 323 U.S. 214 (1944).

[2] 320 U.S. 81 (1943).

immediately went on to state "[t]hat is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny" and concluded the passage by introducing the extralegal principle that while "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can" (*Korematsu* at 216).

The concept of a "pressing public necessity" as a ground for suspending rights has no direct constitutional underpinning (Hartz 2010a, p. 79). Consequently, Justice Stone cited no constitutional provision to underpin his argument. Instead he appealed to the fact that "hardships are part of war" and argued that

> [c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger (*Korematsu* at 219 and 220).

Following the Pearl Harbor attack, the government implemented massive exclusion policies affecting the entire West Coast. 120,000 Japanese Americans—70,000 of which were United States citizens—were subjected to curfew, excluded from their homes, detained for months in hastily established "assemble centers" and finally transported by train to detention sites as far away as Arkansas and Arizona (Weglyn 1996, p. 86).

This mass exclusion and detention was enforced by the military under the command of General De Witt who was general of the Western Defense Command. The exclusion was into action through a number of presidential orders[3] that authorized "exclusion", "removal", and "relocation" of people living in designated areas on the West Coast (Hartz 2010b, p. 175). Furthermore, the President's orders were sanctioned by Congress through the Act of March 21 (1942),[4] which made it a criminal offence for anyone to disobey executive exclusion orders issued in special "military zones" (Alexandre 1943, p. 386; *Hirabayashi* at 85 ff.).

The forced exclusion had massive support in the population and was a response to the fear that lured, if not in reality, then at least at the back of everybody's mind at the time: that residents of Japanese ancestry might help facilitate a new round of devastating attacks on the West Coast.

There was evidence that Japanese spies in the USA had helped plan the attack on Pearl Harbor. According to a government report, spies had provided the Japanese with "the most detailed maps, courses, and bearings, so that each [pilot] could attack a given vessel or field".[5] But it is important to note that the first exclusion

[3] These orders were all substantially based upon Executive Order No. 9066, 7 Fed.Reg. 1407 which declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities" (cited in *Korematsu* at 216).

[4] 18 U.S.C.A. s 97a.

[5] See "Attack upon Pearl Harbor by Japanese Armed Forces", Report of the Commission Appointed by the President, dated January 23, 1942, S.Doc. No. 159, 77th Cong., 2d Sess., Section XVI.

orders, ordering Japanese Americans to leave their home and register at so-called civil control stations and assembly centers, came more than 3 months after the attack and were not triggered by discoveries of new attempts at espionage or sabotage. Nevertheless, the government's exclusion policies were upheld not only in *Korematsu v. U.S.* but also in a preceding case *Hirabayashi v. U.S.*

Both *Hirabayashi* and *Korematsu* concluded that although racial discrimination is always suspect, the government's actions were rationally based and justified in light of the grave threat of new attacks. Thus, in both cases the government's actions were justified by the Court with reference to the emergency posed by the danger of new attacks on the West Coast.[6]

When the two cases were heard, Congress had sanctioned the Act of March 21 (1942). This act provided:

> whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable' to fine or imprisonment, or both (cited in *Hirabayas* at 88).

In spite of the broad military discretion enabled by this act, Congress did not invoke the Suspension Clause. On March 24, General De Witt made use of the executive authority granted in the Act and issued the first evacuation regulation, which ordered that all Japanese persons, aliens and non-aliens, be excluded from designated areas by March 30. However, this first exclusion order was withdrawn shortly after "because of resentment against the Japanese in the areas to which they had chosen to remove" (Alexandre 1943, p. 387). Instead the military commander issued Public Proclamation No. 4 of March 27, which recited the necessity to "insure the orderly evacuation and resettlement of Japanese" and prohibited all Japanese persons from leaving the military area until further orders permitted it. Shortly after, Public Proclamation No. 4 was followed through with a number of exclusion orders which directed Japanese persons to report to so-called civil control stations to register for evacuation, bringing no more than they could carry (Alexandre 1943, p. 388).

After registering at the civil control stations, the Japanese were transported by army-commandeered trains and buses to the so-called assembly centers which were quickly improvised camps built on racetracks, fairgrounds and stadiums to house the more than hundred thousand Japanese that had been forced from their homes (Weglyn 1996, p. 79). This "temporary detention" enforced to ensure "the orderly evacuation and relocation", which lasted for most of the summer 1942.

[6] As noted, the constitutional underpinning of this doctrine is highly questionable because unlike many modern constitutions, the United States Constitution includes no special emergency provisions enabling the executive to assume special authority during times of national emergency. The only provision included in the Constitution that specifically enables the suspension of rights during emergencies is the Suspension Clause which is a power allocated to Congress.

The final stage of the detention program was the transferral of the detainees to "relocation centers", which in spite of their optimistic name were in fact permanent detention sites, where the Japanese American population was held up until January 2, 1945, where the President's exclusion order was finally rescinded entirely (Hartz 2010b, p. 176).

The assumed necessity of these "relocation centers" emerged as the logical consequence of the establishment of "military areas" from which more than 100,000 Japanese Americans were removed into territories where they were less than welcome. The intensity of this hostility comes to expression in Wyoming Governor Niels Schmith's protest to become "California's dumping ground" (Wu 2004, p. 1322). He promised that if there would be an influx of Japanese Americans in his state, there would be "Japs hanging from every pine tree" (Wu 2004, p. 1322). This expressed hostility towards Japanese Americans caused the military ordering the exclusions to fear an outburst of violence against the excluded Japanese Americans. It was this fear of "[p]ossible violence, and other evil consequences" in the areas to which the detainees were supposed to be relocated which motivated the military's continued operations of the detention sites (*Ex Parte Endo*,[7] Brief for Respondents at 64). But although it soon became clear that the relocation centers were becoming permanent detention sites, the detentions were never legally formalized as part of the government's policy, but instead continued to operate as a permanent temporary precautionary measure motivated not only as a protection against the Japanese but increasingly also rationalized through a twisted logic as a measure to protect the Japanese against the rest of society.

3.3 *Hirabayashi v. United States*

The first case related to the government's detention strategy to reach the Court was *Hirabayashi v. United States*. Hirabayashi was an American citizen born in Seattle in 1918. His parents had come to the USA from Japan and had never returned (*Hirabayashi* at 84). He was educated in Washington public schools, and at the time the exclusion orders were issued, he was a senior at the University of Washington (*Hirabayashi* at 84). When the order to report to the local civil control station came, Hirabayashi ignored the order and did not show up. Furthermore, on at least one occasion, he failed to remain in his home during the hours of curfew (*Hirabayashi* at 83).

Since Congress passed the Act of March 21, 1942, it had become a crime to disobey such military orders. Hirabayashi was therefore arrested and shortly after he was convicted in the district court of a criminal offence and sentenced to imprisonment for a term of three months on each account. The sentences were to run concurrently (*Hirabayashi* at 83).

[7] 323 U.S. 283 (1944).

Hirabayashi appealed both sentences, and the case reached the Supreme Court in May 1943. At this time, the government's curfew and exclusion policies had reached the stage of forced detention in the so-called assembly centers, and it was clear that the order to report to a civil control station was the first step on the way to forced detention. Nevertheless, the Court conveniently ducked the issue of detention by arguing that the case was solely about curfew.

Justice Douglas invented a technical cat flap through which he escaped even discussing the order to report to a civil control station (Hartz 2010b, p. 177). He simply argued that

> [s]ince the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained (*Hirabayas at* 85).

Therefore, he argued, there is no need to reach the question whether "compliance with the order to report at the Civilian Control Station [did or] did not necessarily entail confinement in a relocation center" (*Hirabayas* at 85).

This technical cat flap had important consequences. First of all it meant that the Court failed to address the elephant in the room: by not discussing the relation between the order to report to a control station and the prospect of detention; the Court did not send even the slightest signal that prolonged forced detention could be legally problematic.

This cautious path confirms the tendency of the Court to be careful not to raise principled issues in the midst of a national crisis. One point of such caution is one not to introduce broad principles that might play out in unintended ways in future cases. In the case of *Hirabayashi* however, the narrow focus employed by the Court turned out to have the exact opposite effect. Rather than limiting the scope of the precedence, the *Hirabayashi* Court's national emergency argument was adopted directly in the next Japanese American Internment case *Korematsu v. United States*. In this case *Hirabayashi* played out as an authority confirming the legality of the government's policies. Thus, in spite of its narrow focus on curfew, *Hirabayashi* came to be interpreted as a precedence supporting the constitutionality of preventive mass detention. In *Korematsu*, Justice Jackson notes the problematic relation between the two cases in his dissent:

> in spite of our limiting words [in *Hirabayashi*] we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding (*Korematsu* at 247, Jackson dissenting).

It is on the background of the subsequent consequences for the Court's infamous conclusion in *Korematsu* that Justice Douglas national emergency argument in *Hirabayashi* must be understood.

Hirabayashi did not deny that he disobeyed the curfew order (*Hirabayashi* at 89). Instead he argued that as an American citizen he was not obliged to follow the order and that "the discrimination made between citizens of Japanese decent and those of other ancestry" was unconstitutional (*Hirabayashi* at 89).

Writing for the Court Justice Stone acknowledged that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people" (*Hirabayashi* at 100). But in the same breath he introduced the principle that national emergencies affect the level of constitutional protection of such fundamental principles:

> [w]e may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and threatened invasion, calls upon the military to scrutinize any relevant fact bearing on the loyalty of populations in the danger areas (*Hirabayashi* at 100).

While Stone's argument seems to paraphrase the Suspension Clause, his conclusion, that privileges and rights of American citizens, who reside inside the USA and are not within an immediate theatre of war, may be compromised with reference to national security even though the Suspension Clause has not been invoked, has no underpinning in the legal tradition. The weak legal underpinning of Stone's argument is underscored by the fact that he does not refer to any legal authority to justify it. Instead he rolls up the facts of the Pearl Harbor attack to lend a sense of urgency to the argument and argues that the decision to institute a curfew "must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942" (*Hirabayas* at 93).

Weighing the relatively limited encroachment on liberty, that was the result of the curfew, order against the danger of imminent attack, which seemed to lure in the first months after Pearl Harbor, he concluded that the measures undertaken by the government were reasonable.

Thus, instead of scrutinizing the possible substantial effect of the curfew on the security situations, the Court settled for inquiring into whether a rational person would have *perceived* the curfew as a reasonable means to meet the emergency. Justice Stone argued:

> [o]ur investigation here does not go beyond the inquiry whether, in light of all the relevant circumstances preceding and attending to the their promulgation, the challenged orders and statute afforded a *reasonable basis* for the action taken in imposing the curfew (*Hirabayashi* at 101, emphasis added).

As we shall see, this reasonable basis inquiry sets the bar much lower than a scrutiny of the actual relation between instituting curfew on the one hand and maximizing protection against future Japanese attacks on the other would have done. An inquiry into the actual basis of the government's policies would have forced the government to prove that the Japanese population did in fact make out a threat. On the reasonable basis inquiry, the government only had to show that it had some rational arguments for suspecting betrayal by disloyal members of the Japanese American population, not that such suspicion was well grounded in facts. Thus, rather than letting the benefit of doubt weigh in favor of the Japanese Americans, whose liberties had been compromised, the Court defined the inquiry so that the benefit of the doubt weighed in favor of the government. This low level of scrutiny explains what otherwise appears to be a mesmerizing Alice-in-Wonderland-like argument.

Justice Stone's main point was that because of ill-treatment, which Japanese immigrants in the USA had been subjected to in the past, the Japanese had ample reason to resent Americans now (Hartz 2010b, p. 181). And as their resentment was reasonable, the government's suspicion that they might act on it was reasonable too. Justice Stone argued:

> [t]here is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measures prevented their assimilation as an integral part of the white population (*Hirabayashi at* 96).

In other words, we treated them so bad that it would be strange if they didn't hate us. And if they hate us, we must protect ourselves against them! Later in the opinion he adds to this point by noting:

> [t]he restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachment to Japan and its institutions (*Hirabayas* at 99).[8]

It is important to notice that Stone did not even attempt to argue that the Japanese were in fact disloyal. The level of scrutiny he introduced at the beginning implies that the only fact that was relevant to the Court's conclusion was whether the government and the military authorities *could reasonably have believed* that there was a cause to fear revenge from the Japanese population. Thus, on the reasonably basis inquiry, there was no need to prove that the government's judgment was right or even the most plausible one in the situation; the only thing that needed to be established was that it was based in a reasonable fear of an imminent attack. And notably this approach to the question implied that the Court did not inquire at all into the question of whether these "reasonable" suspicions applied in any way to the individual case of Hirabayashi who, as Stone himself notes, had never been in Japan and did not seem to have any significant ties to Japanese society (*Hirabayashi* at 84). Thus, once Stone had defined the level of scrutiny, the Court's final decision to uphold the government's detention policies as they applied in the case of *Hirabayashi* seemed inevitable.

3.4 *Korematsu v. United States*

In *Korematsu v. United States*, the *Hirabayashi* Court's emergency argument was invoked to justify the government's policies once again, only this time the issue of detention had moved closer to the center of the case.

[8] Justice Stone is referring to anti-Japanese measures that were implemented following the 1880s where a significant number of Japanese began arriving in Washington, Oregon and California. These measures included "alien land laws, controlled immigration, school segregation, and legislation limiting economic opportunities for orientals" (Grossman 1997, p. 654).

Like Hirabayashi, Korematsu was an American citizen. He lived in San Leandro, California. When the commanding general issued an exclusion order ordering all people of Japanese descent to leave that area, he did not follow the order but instead continued his life and remained in San Leandro (*Korematsu* at 215).

The commanding general's exclusion order was preceded by a public proclamation that prohibited Japanese Americans from leaving the area for any purposes other than those prescribed by the military (*Korematsu* at 228). Therefore, as pointed out by one of the dissenting justices in *Korematsu* "the only way he could avoid punishment was to go to an assembly center and submit himself to military imprisonment" (*Korematsu* at 230, Roberts dissenting). Korematsu was arrested and later convicted by a federal district court for failing to comply with the order. As in the case of Hirabayashi, the district court found that Korematsu's defiance of the order constituted a felony according to the March 21, 1942 Act, which made it "a misdemeanor knowingly to disregard restrictions made applicable by a military commander" in a military area (*Hirabayashi* at 83). Korematsu appealed the conviction. When the Court of Appeals upheld the judgment of the district court, he appealed to the Supreme Court.

In a 5-3 decision, the Supreme Court decided against Korematsu and sanctioned the exclusion order by upholding the conviction.

Once again the Court ducked the issue of detention, this time by arguing:

> [h]ad petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center (*Korematsu* at 221).

Once the detention issue was off the table, the question at issue appeared to be very similar to that in *Hirabayashi*.

After Justice Black had noted that

> the Hirabayashi conviction and this one [Korematsu's] thus rest on the same 1942 congressional act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage

there was only a little step to the conclusion that

> in the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did (*Korematsu* at 217).

It is important to note that Justice Black does not discuss the relation between curfew and exclusion in relation to the security aim of protecting against further attacks. Instead he extracts a legal principle from *Hirabayashi*, and it is this abstract principle, rather than any concrete scrutiny of the facts at hand, that guides his argument. As a result, Black's entire scrutiny of the government's rationale for instituting a forced exclusion of the entire Japanese American population on the West Coast takes up less than half a page in the opinion and does not question the facts of the government's argument (*Korematsu* at 218). As Justice Jackson notes in his dissenting opinion: "How does this Court know that these orders have a reasonable basis in necessity? No evidence whatever on the subject has been taken by this or any other Court" (*Korematsu* at 245, Jackson dissenting).

Rather than investigating thoroughly the basis of the exclusion order in its own right, Black simply noted that

> temporary exclusion of the entire group was rested by the military on the same ground [as the curfew order scrutinized in *Hirabayashi*]. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin (*Korematsu* at 219).

Thus, like in *Hirabayashi*, the Court was guided by the background of the Pearl Harbor attacks which, the Court argued, suggested a shift in the balance between security and rights.

3.5 *Ex Parte Mitsuye Endo*

It is sometimes argued that the case *Ex parte Mitsuye Endo*[9] constitutes an important counterweight to *Korematsu* (Cole 2004, p. 1763). The *Endo* decision was handed down on the same day as *Korematsu* and laid down that "the government was obliged to release internees found not to pose a danger of espionage or sabotage" (Cole 2004, p. 1763). Therefore, Cole argues, "while *Korematsu* should give us pause, it should not cause us to dismiss the courts altogether" (Cole 2004, p. 1763).

Mitsuye Endo was an American citizen of Japanese ancestry. At the time the case was heard (October 12, 1944), she had been detained for more than 2 years. No charges had been brought against her. On the contrary, she had gone through the administrations process of "leave clearance" to ascertain her loyalty. She had obtained the clearance and was, in the words used in the Brief for Respondents, "a loyal citizen and owes allegiance to [the United States] and is a citizen of no other country" (*Endo*, Brief for Respondents at 5). The rational for the continued detention of her and others in a similar situation was no longer the threat of espionage. Instead the reason invoked by the government was the danger of "possible violence, and other evil consequences" triggered by the hostility towards people of Japanese descent in the areas to which the detainees were supposed to be relocated (*Endo*, Brief for Respondents at 64). In the Brief for Respondents, it is argued that "[s]trong opposition was expressed by the Governors [. . .] to any type of un supervised relocation of the evacuees" (*Endo*, Brief Respondents at 26).

The Court found that neither the March 21 Act nor in the Executive Orders No. 9066 and 9102, which the act sanctioned, expressed the intention to authorize detention for the purpose of orderly relocation of evacuees: the purpose of all these decrees was explicitly the threat of espionage and sabotage. Therefore, the March 21 Act could not be interpreted as an authorization of the preventive detention carried out solely to "provide for a planned and orderly relocation in place of one that might be helter-skelter" (*Endo*, Brief for Respondents at 63). He concluded that

[9] 323 U.S. 283 (1944).

> [c]ommunity hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066, and Executive Order No. 9102, offer no support

and

> [t]he authority to detain a citizen or to grant him a conditional release as protection against espionage or is conceded as it was in Endo's case (*Endo* at 302).

The Court held that this possible threat did not constitute a lawful basis for continued detention. It has to be noted, however, that while the Court did rule that Endo was entitled to "unconditional release", and while it ruled that there was no legal authority to detain people who did not pose a threat of espionage or sabotage, it did not say anything about the legality of detaining the huge number of Japanese Americans whose loyalty had not been specifically asserted and recognized by the government (*Endo* at 302 and 304).

Further, although the decision was plainly against the government, it arguably had only minimal practical implications. In "The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review", Pushaw argues that the "Court decided Endo only after the military area had been disestablished and the relocation camps were being broken up" (Pushaw 2007, p. 1039). Even more important for the jurisprudence of emergency, Douglas did not take issue with *Hirabayashi* and *Korematsu*'s introduction of an extralegal model of emergency governance. Instead he specifically took care "not to stir the constitutional issues" (*Endo* at 299). To that purpose he limited the question to the purely statutory issue. The logic being that if Endo's detention was not authorized by the Act of March 21, the case did not require questioning the constitutionality of the Act itself. In light of this, it is difficult to understand how Cole comes to the conclusion that "[w]hile Endo rested on statutory and regulatory grounds, the Court's rationale was plainly driven by constitutional concerns" (Cole 2004, p. 1762).

Contrary to Cole's assessment, the Court reached neither the constitutional issues at stake in Endo's case nor the question of the constitutionality of the initial evacuation or detention program(Hartz 2010b, p. 187). Further, Douglas specifically noted that the Court did not

> mean to imply that detention in connection with no phase of the evacuation program would be lawful. *The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking*. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized (*Endo* at 299, emphasis added).

Thus, in spite of the Court's decision that Endo was entitled to "unconditional release", the decision can hardly be said to be a significant counterweight to *Korematsu* (*Endo* at 304). Instead it arguably suggests a stronger support of the extralegal model than that, which is articulated in the infamous *Hirabayashi* and *Korematsu* decisions.

3.6 Justice Jackson's Critique of the Extralegal Model

In *Korematsu*, three justices filed dissenting opinions: Roberts, Murphy and Jackson. However, only one of the dissenting justices, Justice Jackson, took direct issue with Black's extralegal principle of constitutional interpretation during times of "pressing public necessity".

Roberts' dissent was instead grounded in the implausibility of regarding the detention program as legally irrelevant to the exclusion order. He argued that "the facts [. . .] show that the exclusion was but a part of an over-all plan for forcible detention" (*Korematsu* at 232). He therefore insisted that

> [t]his is not a case of keeping people off the streets at night as was *Kiyoshi Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition toward the United States (*Korematsu* at 226).

The reason Murphy gave for dissenting was the lack of national security rationale and the apparent racial prejudice which he found underpinned the government's basis for issuing the exclusion order (*Korematsu* at 233 ff.). He concluded with a fierce critique of Black's reluctance to take issue with the government's racial prejudice:

> I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution (*Korematsu* at 242).

While Robert's and Murphy's dissents both provide an important critical counterbalance to the Court's opinion, Jackson's dissent is the only opinion that provides a principled counterweight to Black's embracement of the extralegal model of emergency jurisprudence.

In a much quoted passage, Justice Jackson warned that once a court sanctioned a government's claim to special emergency powers beyond the law, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need" (*Korematsu* at 207).

Jackson's point was that the normative impact of the Court's decision had implications far into the future:

> [a] military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case (*Korematsu* at 246).

What is particularly interesting in Jackson's opinion is his reflection on the role of the courts *vis-à-vis* the other branches of government during emergencies. He argued that

> [. . .] a commander [. . .] temporarily focusing [on] the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law (*Korematsu* at 244).

Jackson's dissent thus ends up actually embracing a Lockean principle of prerogative in the sense that he acknowledged the legitimacy, if not the legality, of the extralegal model of emergency. He even went as far as warning that

> [i]t would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal (*Korematsu* at 244).

And further:

> [t]he armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be (*Korematsu* at 244).

But while Jackson did articulate this Lockean intuition in his dissent, he simultaneously took care not to sanction it in his role as a Supreme Court justice and argued that

> a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself (*Korematsu* at 245).

There is thus an interesting tension between legality and legitimacy in Jackson's dissenting opinion: while his warning against loading the "emergency weapon" is by far the most quoted phrase from *Korematsu* in the philosophical and legal literature on emergency, the theory that motivated his reasoning ironically is probably the most direct version of extralegal Lockeanism ever to be articulated from the Supreme Court bench.

Because of the wide repudiation of the Japanese internment cases, it is unlikely that the extralegal principle of pressing public necessity, on which they were decided, will ever be cited as good law (Hartz 2010a, p. 80).[10] The recent terrorism cases may be said to have proven this point, because even though the government

[10] In coram nobis hearings in the 1980s, the racial bias in the military reports underpinning the government's policies has been exposed, and the decisions in both *Hirabayashi* and *Korematsu*. have been overturned. It should be noted however that the coram nobis hearings which overturned the cases was based on new evidence towards the racial underpinnings of the government's policies and not on the constitutionally problematic principle of emergency which was introduced in the cases (Hartz: ##find side).

argued in *Rasul*[11] that during an armed conflict "the president enjoys full discretion in determining what level of force to use", neither this brief nor the government's briefs in the other terrorism cases mentioned any principle of pressing public necessity or referred to the Japanese internment cases. Instead the Bush government relied extensively on an entirely different set of cases, commonly known as the *Prize Cases*,[12] to underpin its expansive interpretation of the President's unilateral powers to initiate extralegal measures of war during pressing public necessities.

3.7 The Extralegal Model and the *Prize Cases*

The *Prize Cases* was a set of cases decided in the initial phase of the American Civil War. In these cases the Supreme Court upheld the legality of a blockade on Southern ports, which Lincoln instituted in the first week of the war, before Congress had been able to assemble.

As President, Lincoln was effectively "Commander in Chief of the Army and Navy of the United States [. . .]" as provided by the Constitution's Article II.[13] However, while this provision puts the President ahead of the army, it does not confer the power to initiate war on the President. On the contrary Article I specifically allocates to Congress the power, "[. . .] to declare war [. . .] to raise and support Armies [. . .] to provide and maintain a Navy [. . .] to make Rules for the Government and Regulation of the land and naval Forces [. . .] to provide for calling forth the Militia [. . .] and to provide for organizing, arming, and disciplining, the Militia"[14]

On this basis petitioners argued in the *Prize Cases* that Lincoln's decision to institute a blockage before Congress had been able to assemble, amounted to an unconstitutional decision to initiate acts of war. Writing for the Court, Justice Grier refused this interpretation and argued

> [t]he question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by a foreign enemy, the Legislature refusing to declare war. But it is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right to initiate a war, as a voluntary act of sovereignty. That is vested only in Congress (*Prize* at 660).[15]

Grier's point was that because the Confederacy had already initiated hostilities, Lincoln's decision to institute a blockage could not be interpreted as a decision to go to war: because the Civil War already existed, as a matter of fact, there was no real decision to be made. He argued

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[11] 542 U.S. 466 (2004) I discuss this case in Chap. 5.

[12] *The Amy Warwick* (commonly known as the *Prize Cases*) 67 U.S. 635 (1862).

[13] US Const. Art. II, § 2, cl. 1.

[14] US Const. Art. I, § 8, cl. 11–16.

[15] Congress was in fact quick to sanction Lincoln's blockage through the Act of August 6 (1861) and Act of March 25 (1862) (*Prize* at 661).

> [t]he President was bound to meet [the war] in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact (*Prize* at 669).

Given this necessity, Grier argued, the fact that the Constitution specifically allocates the power to declare war to Congress loses its relevance:

> [t]hey [the captains on the captured vessels] cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms (*Prize*: 669).

In this way the Court specifically refused to interpret Lincoln's actions as an invocation of extralegal prerogative powers. And as noted by Schlesinger, "[n]o attempt was made to justify Lincoln's theory that the law of necessity made otherwise unconstitutional acts constitutional" (Schlesinger 2004, p. 64). Instead the cases were decided on narrow grounds according to the laws of prize.

However, as the dissenting justices were quick to point out, there is an inevitable loophole in the Court's argument: the Court's implicit acceptance of the initial lack of a congressional authorization of the blockage seems to imply that the President has an implicit mandate to interpret and act upon a perceived threat to the nation (Hartz and Ugilt 2012, p. 303). In some situations this interpretive mandate is difficult to distinguish from the mandate to actually declare a war. Therefore, even though Grier struggled to avoid sanctioning an extralegal model of emergency jurisprudence, he ended up conceding:

> [w]hether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted (*Prize* at 670, emphasis in original).

This concession by the Court in *Prize* played out in the context of terrorism as a key authority underpinning the Bush government's expansive interpretation of the presidential war powers. Thus, during the terrorism trials, the government repeatedly tried to convince the Court that the *Prize* Court had implicitly sanctioned an extralegal model of emergency jurisprudence.

In the 2006 case *Hamdan v. Rumsfeld*,[16] which tested the legality of the President's use of ad hoc military commissions to try enemy aliens for violations of the laws of war, the government quoted the above passage in full to argue that "[t]he Constitution vests in the President the authority to determine whether a state of armed conflict exists against an enemy to which the law of war applies" (*Hamdan*, Brief for Respondents at 24). In the 2004 case *Hamdi v. Rumsfeld*,[17] the government made a similar point relying on *Prize* to argue that the war paradigm applies to the war on terror: "[e]specially in the case of foreign attack,

[16] 548 U.S. 557 (2006) I discuss this case in Chap. 7.

[17] 542 U.S. 507 (2004) I discuss this case in Chap. 6.

the President's authority to wage war is not dependent on 'any special legislative authority'" (*Hamdi*, Brief for Respondents at 19, quoting from *Prize*).

Both *Hamdi* and *Hamdan* were decided against the government, but in dissenting opinions, Justice Thomas took up the thread from the government's *Prize* argument. Thus, in *Hamdi* Thomas relied on *Prize* to argue "[t]his Court has long recognized these features and has accordingly held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion" (*Hamdi* at 581, Thomas dissenting). Thomas further referred to the authority of *Prize* to make the point that "[t]his *deference extends to the President's determination of all the factual predicates* necessary to conclude that a given action is appropriate" (*Hamdi* at 584, Thomas dissenting, emphasis added). He finally relied on *Prize* to conclude that "we [the Court] are bound by the political branches' determination that the United States is at war and that the detentions were legal" (*Hamdi* at 588, Thomas dissenting).

As a matter of fact, the Bush Administration's interpretation of the cases was not entirely unprecedented. Already in the *Prize Cases* themselves, four dissenting justices explicitly expressed the worry that the Court's argument could end up having exactly this kind of legal implications. The dissenting justices did not try to deny that there were in fact hostilities taking place, and hence a war going on. They explicitly recognized that "in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects" (*Prize* at 689). But they argued that this

> is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States (*Prize* at 689).

According to Nelson, Grier's theory of war as a fact would fundamentally alter the constitutional principles of distribution of sovereign power by taking the sovereign power to declare war away from Congress.[18]

The reason Justice Nelson reached the conclusion that Lincoln had no constitutional authority to institute a blockade is thus not that the Court got the facts wrong, neither that Lincoln did not act in good faith to save the nation, but that the consequences of lending legal authority to those facts would gravely change the meaning of the Constitution and would jeopardize the system of government defined by it (*Prize* at 693).

While it can be argued that the extralegal model does play some role in the *Prize Cases* as well as in *Hirabayashi* and *Korematsu*, all three cases also illustrate that whenever the question of extralegal emergency powers has come up, the Court has struggled not to sanction the extralegal model as a general principle. Rather than admitting expansive executive powers, the Court has aimed to tie its decision closely to the particular facts at hand and avoided general embracements of broad executive war powers.

[18] In the article "The Problem of Emergency in the American Supreme Court" Rasums Ugilt discuss this point further by comparing Nelson's theory to Carl Schmitts discussion of the state of exception (Hartz and Ugilt 2012).

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Chapter 4
Procedural Model

4.1 Philosophical Articulations of the Procedural Model

In the work *Discourses on Livy*, Niccolò Machiavelli (1469–1527) warned against extralegal models of emergency governance as potentially devastating for a government (Hartz 2010, p. 81). He argued instead that a republic should always make sure to develop a system of checks and balances that it could resort to in emergencies:

> [f]or when a like mode is lacking in a republic, it is necessary either that it be ruined by observing the orders or that it break them so as not to be ruined. In a republic, one would not wish anything ever to happen that has to be governed with extraordinary modes. For although the extraordinary mode may do good then, nonetheless the example does ill; for if one sets up a habit of breaking the orders for the sake of good, then later, under that coloring, they are broken for ill (Machiavelli 1984, Chapter 34).

While Machiavelli refutes the extralegal model here, he is clearly not arguing in favour of a set of fundamental rights either. What he is arguing instead is that a system of checks and balances should be put in place to secure effective governance during emergencies without jeopardizing the stability of governance. In the following I refer to the legal affirmation of this model of emergency governance as the "procedural model of emergency jurisprudence".

Recently, constitutional theorists have taken up Machiavelli's procedural model as a framework for securing proportionate governance during emergencies (e.g. Ferejohn and Pasquino 2004; Gross and Ní Aoláin 2006).[1] The basic idea of such modern versions of the procedural model is that dividing the decision-making power facilitates a response to emergencies that is both effective and fair (Hartz 2010, p. 81).

[1] The influence of Machiavelli's analysis of the Roman institution of dictatorship can also be traced to classical philosophical discussions of emergency powers by, for example, Rousseau (*Du contrat social*); Schmitt (*Die Diktatur*); and Rossiter (*Constitutional Dictatorship*).

E. Hartz, *From the American Civil War to the War on Terror*,
DOI 10.1007/978-3-642-32633-2_4,

When Machiavelli articulated the above warning, however, the procedural check he had in mind was not a permanent legislative body, but instead a division of the executive decision-making power modelled on the Roman institution of the dictator.[2] Another way that Machiavelli's theory differs from modern theories of emergency governance is that Machiavelli's aim was the pragmatic one of securing control in the long run, not the moral one of ensuring a minimum of rights for the people. The following observation from *The Prince* illustrates this point:

> there is nothing wastes so rapidly as liberality, for even whilst you exercise it you lose the power to do so, and so become either poor or despised, or else, in avoiding poverty, rapacious and hated. And a prince should guard himself, above all things, against being despised and hated; and liberality leads you to both. Therefore it is wiser to have a reputation for meanness which brings reproach without hatred, than to be compelled through seeking a reputation for liberality to incur a name for rapacity which begets reproach with hatred (Machiavelli 2005, Chapter XVI).

In contradiction to the project of securing stability of governance in the early Italian principalities addressed in Machiavelli's comment, the project of securing stability in modern liberal democracies has an implicit normative goal, namely, the continued recognition of democratic values including some set of individual rights.[3]

In the article "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime", Issacharoff and Pildes argue that procedural concerns have in fact come to define the main jurisprudential strategy for resolving issues of emergency in the United States Supreme Court. They argue that

> [t]he judicial role has centered on the second-order question of whether the right institutional processes have been used to make the decisions at issue, rather than on what the content of the underlying rights ought to be.
>
> (Pildes and Issacharoff 2004, p. 2).

Ex Parte Quirin[4] (1942) and *Youngstown Sheet & Tube Co. v. Sawyer*[5] (1952) both confirm this picture.

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[2] In ancient Rome the institution of dictatorship was a constitutional mechanism for lending special authorities to a single person—a dictator—for a limited period of time aimed at addressing a particular threat to national security. The appointment of the dictator was controlled by a complex system of checks and balances in order to ensure that he was not able to abuse his special authorities beyond the task of dealing with the emergency at hand. For further details, see Ferejohn and Pasquino (2004).

[3] While there is no indication that the framers were influenced by Machiavelli's discussion of the need for formal procedures governing decision-making process in emergencies, there is amble evidence that the Constitution's division of the war powers signifies a conscious strategy to curb the president's powers during emergencies as a means to secure liberal values (Fisher 2004, p. 1 and 8).

[4] 317 U.S. 1 (1942).

[5] 343 U.S. 579 (1952).

4.2 The Procedural Model and *Ex Parte Quirin*

Ex Parte Quirin does not articulate a specific doctrine of emergency or engage in the same kind of principled discussions of the limits of the executive's war powers as *Milligan* and *Prize*. Instead, its jurisprudential significance lies in the Court's argumentative framework which has come to define the Court's subsequent procedural approach to the problem of emergency (see e.g. *Hamdi*[6] at 518 or *Hamdan*[7] at 597).

Quirin was a WWII case which challenged President Roosevelt's authority to try German saboteurs (one of whom was an American citizen) by military commission. In June 1942, approximately 6 months after the United States had entered the war, eight German saboteurs entered the USA secretly by submarine in order to carry out acts of sabotage inside the United States. The plot was foiled, and the German saboteurs were captured before they were able to realize their plans. Roosevelt acted quickly by convening a military commission to try the saboteurs.[8] The German saboteurs challenged the legality of Roosevelt's commissions by filing petitions for writs of habeas corpus in the federal district courts.

The saboteurs in *Quirin* were thus not just eight isolated individuals, and the attempts to stage acts of sabotage were not accidental; rather, they were part of a larger scheme plotted by the German High Command. Nevertheless, Roosevelt's use of a military commission was controversial because the saboteurs had been captured inside American borders. They had entered the U.S. from two different points: Long Island, New York and Ponte Vedra Beach, Florida (*Quirin* at 21). They had entered at night by submarine wearing military uniform or parts of military uniform. Upon landing, they buried their uniforms together with "a supply of explosives, fuses and incendiary and timing devices", and proceeded in civilian dress (*Quirin* at 21).

The plot was discovered because at least two of the saboteurs presumably got cold feet and decided that "they might be saved through betrayal of their remaining colleagues" (Bryant and Tobias 2003, p. 318). One of them travelled to Washington, D.C., and confessed to the FBI. Subsequently, the FBI was able to capture the rest of the two groups (Bryant and Tobias 2003, p. 318).

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[6] 542 U.S. 507 (2004) I discuss this case in Chap. 6.

[7] 548 U.S. 557 (2006) I discuss this case in Chap. 7.

[8] The procedure of the commission was later criticized for being strictly controlled by Roosevelt. Luis Fisher's account of the procedure of the commission constitutes a typical example of this critique:

> Roosevelt appointed the tribunal, selected the judges, prosecutors, and defence counsel, and served as the final reviewing authority. The generals on the tribunal, the colonels serving as defence counsel, and the two prosecutors [...] were all subordinate to the President. "Crimes" related to the law of war came not from the legislative branch, enacted by statute, but from executive interpretations of "the law of war" (Fisher 2004, p. 206).

Following the capture of the German saboteurs, President Roosevelt issued Executive Order of July 2, 1942, in which he "appointed a Military Commission and directed it to try petitioners for offences against the law of war and the Articles of War" (*Quirin* at 22). The trial quickly commenced and actual hearings began less than a week later (on July 8). Three weeks after all of the evidence for the prosecution and the defence had been taken by the Commission and the case had been closed except for arguments by the counsel (*Quirin* at 23).

The saboteurs filed petitions for writs of habeas corpus in the District Court for the District of Columbia, contending that the President lacked the statutory and constitutional authority to order the petitioners to be tried by military commission (*Quirin* at 19). The District Court denied their applications. The petitioners then asked leave to file petitions for habeas corpus directly in the Supreme Court. The Court accepted to hear the cases and set a special term for oral argument on July 29, 1942.

The Court was under a lot of pressure to decide the case against the petitioners both because of public opinion and because Roosevelt had indicated that he would disregard the Court's order if the case was decided against the commission (Pushaw 2007, p. 1035). The Court did decide the case against the petitioners. But, while holding with the government, the justices avoided addressing Roosevelt's assertion that he had independent constitutional power to convene military commissions by resolving the case within the framework of a procedural model of emergency governance. Thus, rather than recognizing Roosevelt's unilateral authority to convene the commissions, the Court relied on a heavy-handed interpretation of an ambiguous statute, Art. 15 of the Articles of War,[9] to argue that Congress had in fact authorized the use of military commissions to try unlawful enemy combatants for violations of the law of war (Pushaw 2007, p. 1036).

Justice Stone's argument for the unanimous Court proceeded through three steps. The first step was to argue that the use of military commissions was "[a]n important incident to the conduct of war" and therefore flowed from the joint war powers granted to the President and Congress by the Constitution (*Quirin* at 28).

The next step was to interpret Art. 15 of the Articles of War as congressional authorization for the President to convene military commissions to try unlawful enemy combatants for violations of the law of war.

The third and final step of the argument was to establish that this congressional authorization did not violate any provisions in the Constitution, more specifically, that it did not violate the Fifth and Sixth Amendments which state that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury", and "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed".[10]

[9] Art. 15 of the Articles of War was later incorporated into the Uniform Code of Military Justice as Art. 21 see 10 USCA § 801 et seq.

[10] US Const. amend. V and VI.

To establish the first step, that the constitutional authority to convene military commissions flows from the combined war powers of Congress and the President, Justice Stone argued that

> an important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war (*Quirin* at 28).

The second step, in which the Court establishes that Congress had in fact "authorized trial of offences against the law of war before such commissions", was theoretically crucial because it is this step that enabled the Court to avoid determining "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation" (*Quirin* at 29).

The Court found that Congress had indeed "explicitly provided [. . .] that military tribunals shall have jurisdiction to try offenders or offences against the law of war in appropriate cases" (*Quirin* at 28). The Court found this "explicit" provision in Art. 15 of the Articles of War, which states that

> the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions [. . .] or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the law of war may be triable by such military commissions [. . .] or other military tribunals (*Quirin* at 28).

As has been pointed out by commentators, it is not clear how this indirect inference came to be an explicit authorization, and the soundness of the Court's legal interpretation has subsequently been questioned (Pushaw 2007, p. 1036; Katyal and Tribe 2002 at note 138).

Even the Court itself chose to label this interpretation "controversial" 64 years later in *Hamdan v. Rumsfeld*[11] (Hamdan at 593). But in relation to the theoretical question of how the *Quirin* Court conceptualizes the problem of emergency, the fact to be noted is that the Court in fact goes a long way in its effort not to tie the power to convene military commissions to the presidential power as commander in chief alone. Thus, with the use of a "clever interpretation" of an ambiguous statute, the Court managed to avoid the necessity of dealing with the question of whether "presidential authority itself sufficed to establish military commissions", but instead emphasized the role of Congress (Pushaw 2007, p. 1036 note 1136; Bryant and Tobias 2003, p. 327).

The third and final step of the argument was to make the case that the Fifth and Sixth Amendments' guarantee of a trial by jury in cases involving "a capital or otherwise infamous crime", did not apply to the German saboteurs (*Quirin* at 38). Justice Stone argued that "[p]resentment by a grand jury and trial by a jury" had

[11] 548 U.S. 557 I discuss this case in Chap. 7.

never been employed by military tribunals. Therefore, the Fifth and Sixth Amendments did not apply to military commissions. "The object" of these amendments, the Court argued:

> was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future [. . .] but not to bring within the sweep of the guaranty those cases [such as military commissions] in which it was then well understood that a jury trial could not be demanded as of right (*Quirin* at 39).

By showing in this way that the "explicit" authorization for military commissions granted by Congress in Art. 15 of the Articles of War did not conflict with constitutional guarantees of trial by jury, the Court was able to ground its decision in the finding of congressional authorization.[12]

The *Quirin* Court's decision has been heavily criticized. In "The 'Enemy Combatant' Cases in Historical Context: The Inevitability of Pragmatic Judicial Review", Pushaw argues that the Chief Justice's argument provided "a convenient way for it to uphold FDR's actions in a situation where attempting to thwart him would have proved futile" (Pushaw 2007, p. 136). In a lecture delivered on the William W. Cook Foundation at the University of Michigan in March 1946, Edward S. Corwin remarked that the Court's hearing was "little more than a ceremonious detour to a predetermined goal intended chiefly for edification" (cited in Rossiter and Longaker 1976, p. 115). Even the Court itself has later labelled the decision as "controversial" (*Hamdan* to 593). However, although the *Quirin* Court yielded to the government on grounds that have since been strongly criticized, it is important to note that the Court did not sanction anything like an extralegal model of emergency. Instead, the Court bent over backwards to find congressional authorization for Roosevelt's military commissions (*Quirin* at 29). Thereby, the Court explicitly avoided determining "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation" (*Quirin* at 29). As a result, in spite of the fact that the decision unavoidably signaled deference to the government "in time of war and of grave public danger" (*Quirin* at 25), it also celebrated the "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty" (*Quirin* at 19). Thus, while the Court's struggle to find congressional authorization could be criticized as a form of judicial activism, it could also be seen as the best way out of an impossible situation—"best" in the sense of least damaging to the rule of law:

[12] The Court also narrowed the scope of the decision by emphasizing that the saboteurs had violated the laws of war.

Citing *Military Law and Precedents* by William Winthrop, Justice Stone argued:

> The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals (*Quirin* at 12).

rather than exhibiting the Court's weakness, by handing down a decision that was bound to be ignored by the President, the Court went out of its way to at least avoid crafting a decision which would come to form a dangerous precedent for extralegal emergency powers during times of war. As a result, this case—which has been characterized as "highly questionable ex parte arm-twisting by the executive" by commentators—has in fact played out in the terrorism context as a check on executive discretion (Pushaw 2007, p. 1036). An example of this is the 2006 case *Hamdan v. Rumsfeld*,[13] which concerns the Bush administration's authority to try suspected terrorists by military commission. In this case, the Court quotes *Quirin* to underscore that the authority to convene military commissions, "if it exists, can derive only from the powers granted jointly to the President and Congress in time of war" (*Hamdan* at 2773).

Therefore, while the *Quirin* Court's decision can—and has been—criticized for being driven by purely pragmatic concerns and for providing a smokescreen for a constitutionally problematic result, the Court's struggle to tie the argument in with the question of congressional authorization bears witness to the procedural model as key to understanding emergency jurisprudence in the USA (see e.g. Pushaw 2007; Rossiter and Longaker 1976). But of course the case also proves a more pessimistic point, namely, that the procedural model of emergency is by no means a security against infringements on rights during emergencies.

4.3 The Procedural Model and *Youngstown*

If *Quirin* proves the pessimistic point that the procedural model does not necessarily provide any security against excessive infringements on rights during emergencies, the case *Youngstown Sheet & Tube Co. v. Sawyer* from 1952[14] may be said to prove a more optimistic point, namely, that the procedural model may at least sometimes function as a limit on excessive presidential emergency powers.

In *Youngstown* the Court decided 6-3 to overturn President Truman's decision to seize privately owned steel mills in order to buttress the ongoing war efforts in Korea. As previously noted, it is extremely rare for the Court to overturn a presidential decision related to an ongoing war. In the article "Youngstown Goes to War", Michael Stokes Paulsen therefore accentuates the importance of the case by noting that *Youngstown*

> is probably the Supreme Court's first genuine assertion *and exercise of* the Court's modern claim of constitutional interpretive supremacy over the actions of the President of the United States, in a case where such claim really mattered (Paulsen 2002, p. 218, emphasis in original).[15]

[13] I discuss this case further in Chap. 7.

[14] 343 U.S. 579 (1952).

[15] This observation may be read as an indirect rebuff of the practical significance of the Court's celebrated defense of the rule of law in *Ex Parte Milligan* [71 U.S. (4 Wall.) 2 (1866)].

In the same article, Paulsen summarizes the meaning of the case to be that "the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency" thus confirming a procedural model of emergency governance (Paulsen 2002, p. 215).

The background of *Youngstown* was the Korean War. The war was triggered in June 24, 1950, when the North Korean army invaded South Korea. The next day, the UN Security Council pronounced the aggression "a breach of peace" and called for the withdrawal of the invading forces (Schlesinger 2004, p. 131). That same evening, Truman "decided to commit American air and sea forces to the support of South Korea" (Schlesinger 2004, p. 131). Although the UN resolution had not specified military intervention, Truman cited the resolution as his authorization when he announced the decision publicly on June 27.[16] Truman never asked Congress to sanction his decision to take the country into war, and Congress never formally declared war on North Korea. However, Congress confirmed and, as Schlesinger puts it, "in a sense, ratified American intervention by voting military appropriations and extending selective service" (Schlesinger 2004, p. 134).

The background of the Korean War was the Cold War, and the national security issue at stake was the threat of communist aggression. As Schlesinger notes "[i]f North Korea succeeded in its attack, the peace system would collapse, and communist aggression would be encouraged at every soft point along the periphery of free states" (Schlesinger 2004, p. 131). Writing for the dissent, Chief Justice Vinson drew attention to this context:

> [t]hose who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict (*Youngstown* at 668).

The success of the war effort in Korea was dependent on the continuous production of steel to supply the United States army with military equipment. Therefore, when a labour dispute between American steel companies and their employees threatened to close down production in the latter part of 1951, the steel-mill crisis became a matter of national security.

Following the failure of several mediation efforts by the Federal Mediation and Conciliation Service and the Wage Stabilization Board,[17] the steelworkers' union gave notice of a nationwide strike. However, a few hours before the strike was to begin, President Truman issued an executive order directing the Secretary of Commerce to take possession of the steel mills and keep them running

[16] A second UN resolution, passed later on the same evening, did call for "urgent military measures [. . .] to repel the armed attack" (Schlesinger 2004, p. 131).

[17] Both *The Federal Mediation and Conciliation Service* and *The Wage Stabilization Board* were established under the authority of the Defense Production Act of 1950 (64 Stat. 798) which was part of a massive federal wage and price stabilization effort designed to support defence production during the war.

(*Youngstown* at 865).[18] President Truman notified Congress of his actions shortly thereafter; however, Congress neither sanctioned Truman's seizure nor condemned it. The steel companies immediately brought proceedings against the President, and the case quickly made its way to the Supreme Court. The Supreme Court granted certiorari and set the cause for argument on May 12.

As mentioned the case was decided 6-3 against President Truman. Justice Black wrote the opinion for the Court, arguing that Truman had neither authority granted to him by Congress nor, absent Congressional authorization, independent constitutional authority to order the seizure of the steel mills.

All five concurring justices joined Black's opinion, but all of them also wrote separate concurrences emphasising different aspects of the constitutional issues at stake. Therefore, *Youngstown* consists of no less than seven different opinions: one for the court, one for the dissent and five different concurrences. The number of judges who felt the need to write a separate opinion illustrates the complexity of the theoretical issue of how to interpret the constitutional division of powers in relation to the problem of emergency. Furthermore, given the complexity of the issue, it should come as no surprise that, as noted by Paulsen:

> [e]verybody seems to agree that *Youngstown* established the dominant paradigm for evaluating disputes between Congress and the President over the scope of their respective constitutional powers. Ironically, though, nobody seems to agree on what that paradigm is (Paulsen 2002, p. 218).

Black's opinion for the Court emphasized the principled nature of the case and summarized the constitutional issues at stake by noting that

> [w]e therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution. That in turn requires an analysis of the conditions giving rise to the seizure and of the seizure itself (*Youngstown* at 630).

Black framed the analysis by noting that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself" (*Youngstown* at 585). In this way he invoked an important distinction between on the one hand situations where an express or implied authorization from Congress exists and on the other hand situations where there is no such authorization and the President's authority must stem from the Constitution itself.

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[18] The order stated that

> a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.

Therefore, the order went on:

> in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided (Executive Order 10340).

He found that Congress had indeed defined the legal means available to the government in the Labor Management Relations Act of 1947 (also known as the Taft–Hartley Act)[19] which regulated certain union activities, permits suits against unions for proscribed acts, prohibits certain strikes and boycotts and specifically provided steps for settling strikes involving national emergencies (*Youngstown* at 599).

On this basis he found Truman's seizure to be unlawful emphasising that

> [i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute (*Youngstown* at 587).

Black's opinion for the Court thereby emphasized the division of powers as key to interpreting constitutional issues of emergency governance in the United States and confirmed the procedural model of emergency jurisprudence.

However, the opinion which more than any other has come to frame the Court's procedural model methodology is not Black's opinion for the Court but instead Justice Jackson's concurring opinion, and *Youngstown* has subsequently come to be identified with the three-step model Jackson developed to explain the relation between the constitutional authority of Congress and the President (Paulsen 2002, p. 224).

Jackson began his opinion with what he called:

> a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity (*Youngstown* at 635).

Jackson grouped the situations in which presidential powers are challenged into three: first, where the President's "authority is at its maximum"; second, where there is "a zone of twilight in which he and Congress might have concurrent authority"; and, third, one in which the presidential powers are "at its lowest ebb" (*Youngstown* at 635).

Because of the influence of Jackson's model in the Supreme Court's interpretation of issues of emergency governance, not least in connection with the terrorism cases which I discus in Part II of this book, I quote the model in full:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

[19] 61 Stat. 136, Pub.L. 80–101.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system (*Youngstown* at 635).

While the structural clarity with which Jackson spelled out the constitutional allocations of war powers is compelling, the jurisprudential content of the model does not differ in any substantial way from Black's (Paulsen 2002, p. 226). Further, the model may be said to simply sum up the points the Court made in *Quirin*, namely, that the President's authority is at its maximum when his actions are supported by congressional consent, and that actions that are not supported by congressional consent should be subject to careful scrutiny by the Court.

What Jackson's model added to the *Quirin* Court's analysis were (1) the clarity of a bullet-point model and (2) an interesting middle category, the "zone of twilight", whereby he argued that the President may gain authority from the fact that Congress has failed to act either in favour of the President's initiative or against it. In such cases, he argued, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law" (*Youngstown*: 871). With this "zone of twilight", he inserted considerable elasticity into the Court's interpretation of the war powers. It is thus in no way clear what may Count as "imperatives of events" or "contemporary imponderables" within this twilight zone.[20] Thus, while Jackson's model structures the legal discussion of separation of powers, it also leaves the concrete evaluation of presidential powers very open.[21]

In Jackson's concurring opinion in *Youngstown*, he employed his three-point model to argue against Truman's authority to seize the steel mills. He agreed with the Court that Congress had indeed acted, namely, by defining the legal means available to the government in the Taft–Hartley Act. Therefore, both justice Black

[20] In *Oxford Advanced Learner's Dictionary of Current English* (1987 edition) the word "imponderable" is explained to mean that "which cannot be weighed or measured", or that "of which the effect cannot be estimated".

[21] The 2006 case *Hamdan v. Rumsfeld* is a good illustration both of the influence of Jackson's model and of the elasticity of its interpretation. *Hamdan* concerned the legality of a military commission convened by the Bush administration to try suspected terrorist detainees in Guantánamo Bay. Jackson's model was invoked in *Hamdan* to underpin the conclusions of *both* the concurring opinion written by Justice Kennedy *and* one of the dissenting opinions written by Justice Thomas.

and Justice Jackson found that there was neither express nor implied congressional authorization for the seizure and concluded that "[i]t is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution" (Black) and that such action can be "justified only by the severe tests under the third grouping" (Jackson) (*Youngstown* at 587 Opinion of the Court and 640, Jackson dissenting).

While Jackson's middle category enabled more interpretational leeway than Black's distinction between situation where an express or implied authorization from Congress exists and situations where it does not, he also used the case to reiterate his "loaded-weapon" argument from *Korematsu*. His main point being that, in the context of the United States Constitution, emergencies do not trigger any special legal powers and that there is no "law of emergency" or "principle of necessity" which is coherent with the Constitution. Thus, like in *Korematsu*, he warned against the conception of special emergency powers. He argued that the Court should not be tempted to lend legal authority to adjectives such as "inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers, and "emergency" powers which are "without fixed or ascertainable meanings" (*Youngstown* at 646).

Jackson's elaborated discussion of emergency stands in contrast to Black's short and narrowly focused opinion, but the two justices agreed on the factual issues as well as on the jurisprudential approach. Both decided against Truman and declared the seizure unconstitutional. None of them found the government's claim to inherent emergency powers plausible. And by emphasising the role of Congress, both confirmed a procedural model to emergency governance.

4.4 The Problematic Elasticity of the Procedural Model

In *Youngstown* the consenting justices emphasized that "[t]he function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree" (*Youngstown* at 690). Thus, although Chief Justice Vinson, writing for the dissent, warned that "these are extraordinary times" and emphasized the severity of the threat from Communist aggression, his conclusion in support of Truman's seizure did not confirm the extralegal model but instead rested on the observation that "[c]ongressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization" (*Youngstown* at 668).

Vinson emphasized that a connection did exist between the functioning of the steel mills, the success of the war effort in Korea and the protection of national security. Therefore, Vinson argued, since Congress had proven its support for the war effort in Korea and had also recognized the Cold War threat through the adoption of various acts, Truman's seizure was not lawmaking but was an act of carrying out legislative will (*Youngstown* at 704, Vinson dissenting).

Thus, the methodological framework employed by the Court as well as the dissent in *Youngstown* illustrates the procedural model of emergency governance and may be said to confirm the thesis, proposed by Issachroff and Pildes, that this is the most persistent model of emergency governance in the American Supreme Court's jurisprudential history (Issacharoff and Pildes 2004, p. 297). However, the fact that both the Court and the dissent relied on this model also illustrates the extent to which this model can be stretched to reach a desired conclusion and thereby underscores the lesson from *Quirin* that the procedural model in and by itself does not always play out as an effective restraint on executive suspensions of basic liberties during armed conflicts (Hartz 2010, p. 84).

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Part II
Emergency Law in the Context of Terrorism

Chapter 5
Rasul v. Bush

Rasul v. Bush[1] was the first case concerning suspensions of basic liberties in relation to the post-9/11 terrorism conflict to be heard by the Supreme Court. *Rasul* raised the question whether the federal courts had jurisdiction to hear habeas petitions filed by alien detainees held in detention facilities on Guantánamo Bay. Before *Rasul*, these detainees had been given no opportunity to contest the grounds of their detention in front of a neutral decision-maker (federal or military). In a response to this lack of legal process, petitioners in *Rasul* brought various habeas actions to the District Court for the District of Columbia contesting the legality of their detention. Both the District Court and the Court of Appeals denied jurisdiction to hear the cases because petitioners were held on Guantánamo which is not United States territory. However, petitioners appealed to the Supreme Court maintaining that the federal courts did have jurisdiction to hear the petitions because the control exercised by the United States government on Guantánamo Bay amounted to sovereign control over the area.

When *Rasul* reached the Supreme Court, the detention facilities on Guantánamo had long since become emblematic of the darkest side of the Bush administration's policies regarding the war on terror. The 45 square miles of land had been called "the Bermuda Triangle of human rights" (by Wendy Patten, the US advocacy director at Human Rights Watch), a "legal black hole" (in a 2002 opinion of the British Supreme Court), and a "permanent United States penal colony floating in

[1] 542 U.S. 466 (2004).

E. Hartz, *From the American Civil War to the War on Terror*,
DOI 10.1007/978-3-642-32633-2_5,

another world" (by Professor Michael Ratner).[2] Therefore, the *Rasul* decision had immense symbolic impact.

Rasul brought the image of Guantánamo Bay as a legal black hole to the test by asking whether detainees held in Guantánamo had a statutory right to a judicial review of the legality of their detention by the federal courts. To the surprise of many commentators, the Court answered this question with a yes: Guantánamo was not completely removed from oversight by the federal courts (Hartz 2010, p. 88). But the Court's "yes" was far from the clear affirmation of the rights model that civil libertarians had hoped for; instead, it was a "yes" that engaged as little as possible with the issue of emergency jurisprudence.

The right that was at stake in *Rasul*, the right of habeas corpus, is arguably one of—if not *the* most—fundamental right in a liberal democratic society.[3] The fact that it was this fundamental right that was at stake makes the rights model seem as an obvious route for arguing in favor of petitioners: if any right would seem crucial enough to deserve the protection without compromise "equally in war and in peace" this most fundamental of rights would seem to be the one (*Milligan*, 120).[4] It should come as no surprise therefore that the petitioners did in fact invoke the paradigmatic rights model case *Ex Parte Milligan* and argued in favor of the rights model, if not in general then at least as the only feasible jurisprudential model for evaluating cases concerning the right of habeas corpus.

The government's position was that petitioners did not have any right to bring their habeas claims to the federal courts. In the Brief for Respondents, it referred to some of the most controversial passages from the *Prize Cases*[5] which suggested that it was consciously trying to push the Court in the direction of an extralegal model of emergency jurisprudence.

The arguments of the petitioners and the government thus positioned the case between two extremes: on the one hand, the Scylla of the rights model with its far-reaching consequences for limiting a government's power to take effective measures during national emergencies and, on the other hand, the Charybdis of the extralegal model with its total lack of control over executive security measures.

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[2] As Kaplan points out, many of these descriptions have become commonplace. The phrase "Bermuda Triangle of human rights" was coined by the US advocacy director at Human Rights Watch, Wendy Patten; see Human Rights News, "Guantánamo: Three Years of Lawlessness" January 11, 2005 at http://hrw.org/english/docs/2005/01/11/usdom9990.htm.

Kaplan draws attention to the fact that Guantánamo was described as a "legal black hole" for the first time in the British Supreme Court in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* (2002). As Kaplan underscores, the description of Guantánamo as a "permanent United States penal colony floating in another world" is to be found in Michael Ratner's article "The War on Terrorism: The Guantánamo Prisoners, Military Commissions, and Torture", January 14, 2003, http://www.humanrightsnow.org/Guantánamoprisoners.htm.

[3] In the Federalist Papers, Hamilton lists the right of habeas corpus as one of the three most fundamental guarantees of freedom in the constitution (Federalist No. 84, Hamilton).

[4] 71 U.S. (4 Wall.) 2 (1866) (I discuss this case in Chap. 2).

[5] *The Amy Warwick* (commonly known as the *Prize Cases*) 67 U.S. 635 (1862). I discuss this set of cases in Chap. 3.

Not willing to commit to either side, the Court delivered a highly technical argument that shied away from the dilemmas implicit in both the rights and the extralegal models.

While siding with the petitioners, the Court however abstained from following the *Milligan*-based rights model suggested in the Briefs for Petitioners. Instead, the Court carefully avoided taking principled stances on the issue of emergency jurisprudence by tying the decision in with the question of how the federal habeas statute[6] had been interpreted in a previous habeas case, *Braden v. 30th Judicial Circuit Court of Kentucky*,[7] which had no connection to issues of emergency or national security but was about a petition by an Alabama prisoner alleging denial of his right to a speedy trial. In order to rely on *Braden* and shift the issue away from the principled issues of emergency jurisprudence, the Court engaged a highly technical discussion of whether or not a related WWII habeas case, *Johnson v. Eisentrager*[8] from 1950, could be viewed as indirectly overturned through *Braden*.

5.1 Factual Background

The petitioners in *Rasul* were 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban.[9] In April 2004, when the case was heard, petitioners had been held at the naval base at Guantánamo Bay for approximately 2 years, along with some 640 other aliens captured abroad (*Rasul* at 466).

In 2002, relatives of the petitioners filed various habeas corpus actions in the US District Court for the District of Columbia to challenge the legality of their detention at the base (*Rasul* at 471). All alleged that none of the petitioners had "ever been in combat against the United States or has ever engaged in any terrorist attacks" (*Rasul* at 471). They further alleged that none had "been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal" (*Rasul* at 2691). The Australians "each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations" (*Rasul* at 472). The "Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal" (*Rasul* at 472).

The District Court dismissed all the actions on the ground that it did not have jurisdiction to hear the cases. The District Court held that "aliens detained outside

[6] 28 U.S.C.A. § 2241.

[7] 410 U.S. 484 (1973).

[8] 339 U.S. 763 (1950).

[9] At the time the Supreme Court granted certiorari, the petitioners included two British citizens: Shafiq Rasul and Asif Iqbal.

the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus" (*Rasul* at 472, quoting the opinion of the District Court). The Court of Appeals confirmed the ruling by the district court. The Supreme Court granted certiorari in November 2003.

The question for which the Supreme Court granted certiorari was

> the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba (*Rasul* at 470).

5.2 Brief for Petitioners: A Limited Rights Model

The Brief for Petitioners opened by noting that "[t]his case stirs fundamental questions about judicial function in a constitutional democracy dedicated to the rule of law" (*Rasul*, Brief for Petitioners at 6). In this way, the Brief for Petitioners made clear from the start that what was at stake in this case was not only the specific rights of the 14 detainees in the case but the question of how to adjudicate issues concerning the protection of fundamental rights during emergencies in general.

The Brief for Petitioners linked the issue of habeas corpus rights and judicial review to the problem of emergency by underscoring how the drafters of the Constitution had consciously tied the issue of fundamental rights to the problem of emergency:

> Our nation was the first to be deliberately founded on principles of individual liberty, fundamental fairness, and justice under law. Those principles were embodied in our Constitution and safeguarded through its structure of separated powers. An independent judiciary with authority to check the excesses of executive action that are particularly likely to occur in times of stress and danger was considered essential to ensure that freedom and the rule of law would not be disregarded or sold short whenever, in the view of the executive, they were inconvenient impediments to the executive's policies for addressing the exigencies of the moment (*Rasul*, Brief for Petitioners at 6).

What petitioners are arguing here is that the fundamental nature of the right of habeas corpus is evident in the care that the drafters took to safeguard that the judiciary would function as an independent power even in times of emergency. The brief relied on Alexander Hamilton to place the problem of arbitrary detention at the very centre of the problem of emergency and argued that "[t]he need for judicial oversight was always considered greatest to protect against arbitrary detention" (*Rasul*, Brief for Petitioners at 7).

While the government argued that constitutional habeas protections do not apply outside the United States boarders, petitioners argued that the extraterritorial reach of habeas rights was well established under the common law at the time when Hamilton explained its importance in the Federalist Papers (*Rasul*, Brief for Petitioners at 7). Therefore, petitioners argued, the extraterritorial reach would seem to be implicit in the Suspension Clause. Petitioners argued further that

> [a]ny retreat from this principle-and, in particular, any rule disjoining the territorial reach of judicial authority from the territorial reach of plenary executive power-would encourage manipulation by executive officials anxious to avoid having to defend their conduct against charges that it is unwarranted in law or baseless in fact (*Rasul*, Brief for Petitioners a 7).

The point the petitioners wanted to establish was that if constitutional habeas protections were not extraterritorial, they would be so easy to manipulate, that they would have no real effect. The problematic of the Guantánamo Bay detentions illustrates this point: if habeas rights did not apply on the detention facilities there, then all the government had to do to avoid judicial oversight was to move its prisoners to similar detention facilities. Thus, petitioners argued, the consequences of erecting a categorical geographic boundary

> beyond which the executive has total power to act but the courts have no jurisdiction to examine that action is to allow the executive itself to decide whether its actions can or cannot be called to account under the law (*Rasul*, Brief for Petitioners at 7).

In other words, by denying the application of habeas rights outside the United States boarders, the Court would effectively enable the government to pursue an extralegal approach to emergency. According to the petitioners, that would even be the case of policies of right *within* the United States because all the government would have to do to avoid judicial oversight of rights compromises would be to move the detainees in question to facilities outside of the country:

> [t]o allow government officials acting within the United States to insulate the decisions they make here from court review simply by holding their prisoners outside the borders would deprive the judiciary of its essential function as a check on the power of the executive. *Authorizing them to do so violates the very essence of the separation of powers that the Constitution's framers implemented to guard against tyranny* (*Rasul*, Brief for Petitioners at 8, emphasis added).

Petitioners quoted *Milligan* to remind that

> [t]he Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances (Opinion of the court in *Milligan* quoted in *Rasul*, Brief for Petitioners at 20).[10]

By quoting the most ringing confirmation of the rights model ever articulated by the Supreme Court, petitioners signaled that they would pursue a rights model approach to the issue at stake.

On the same note, petitioners made a clear stance against any kind of extralegal model by quoting Justice Jackson's refutation of this model in his *Youngstown* concurrence: "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role" (*Youngstown* at 646, Jackson concurring).

[10] Recall that although the *Milligan* decision was unanimous, two opinions were issued in the case. The court's opinion relied on a rights-based model of emergency jurisprudence, while the concurring opinion relied on a procedural model. See discussion in Chap. 2.

However, the petitioners did not advocate a completely uncompromised application of the rights model. Instead, they maintained the limited rights model position that the right of habeas corpus was of such a fundamental nature that it could not lawfully be set aside in emergencies without disregarding the constitutional structure of separated powers.

To strengthen their position, petitioners argued that even such notorious cases as *Quirin*[11] and *Korematsu*[12] confirmed the fundamental right to judicial review:

> [i]n accordance with these traditions, this Court has not hesitated to review executive actions alleged to be contrary to law, notwithstanding invocations of the war power and concerns over national security. The Court has thus held that the war power does not encompass unlimited and unreviewable authority [...] to maintain military production during wartime; to punish acts of sabotage by alien enemies; [... and] to impose internments on resident aliens and U.S. citizens. In upholding judicial jurisdiction to review the merits of those actions, this Court has never accepted the proposition that the courts should be off-limits to challenges to executive action undertaken to protect national security (*Rasul*, Brief for Petitioners at 44).

The petitioners did not reject the possibility that limitations on rights may be constitutional if they are justified by national security concerns. But they rejected the idea that judicial review itself could be balanced against national security concerns because

> [j]udicial review does not threaten national security; rather, it ensures that measures taken in response to the nation's need for security remain consistent with its democratic principles of fundamental fairness and liberty (*Rasul*, Brief for Petitioners at 11).

As a result, the rights model advocated in the Brief for Petitioners centered only on the fact that this particular right, the right of habeas corpus, was of such a fundamental nature that no security threat could ever justify its being set aside.

To establish this point, petitioners argued first that habeas corpus is a fundamental principle of the United States Constitution. Secondly, that the protection of this principle did not stop at the water's edge but that a compromise of this right outside the United States boarders would effectively enable the government to disregard the principle in practice also inside the United States boarders. Finally, the petitioners refuted the government's claim that the WWII case *Johnson v. Eisentrager* enabled the government to disregard the principle of habeas corpus. Taken together, these points paved the way for applying a limited version of the rights model: even if compromises on rights are not in general ruled out, at least the principle of habeas corpus should always be applied "equally in war and peace".

Finally, petitioners refuted the government's argument that the WWII case *Johnson v. Eisentrager* established precedence for denying habeas rights to enemy combatants held outside the United States borders. *Eisentrager* was a World War II case. It concerned the habeas petitions filed in the federal courts by

[11] 317 U.S. 1 (1942) I discuss this case in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*).

[12] 323 U.S. 214 (1944) I discuss this case in Chap. 3, Sect. 3.4 (Korematsu v. United States).

21 German citizens who were captured in China by the United States Army. All twenty-one petitioners in *Eisentrager* had been tried and convicted for violations of the laws of war by a United States military commission. In *Eisentrager*, the Court decided that these German combatants, who were all admitted enemy aliens, were not entitled to habeas hearings in the federal courts (*Rasul*, Brief Respondents at 10).

The petitioners dismissed the authority of this case on the ground that the situation of these German WWII detainees differed from that of the Guantánamo detainees in several significant ways. First of all, petitioners argued, the cases of the *Eisentrager* detainees had not been precluded from judicial review. The petitioners in *Eisentrager* "had been tried and convicted overseas by a duly constituted military tribunal established under law" (*Rasul*, Brief for Petitioners at 8). Secondly, petitioners argued, *Eisentrager* dealt exclusively with enemy aliens whose status as enemy combatants was not contested, while all of the petitioners in *Rasul* contested their status as enemy combatants (*Rasul*, Brief for Petitioners at 9). Finally, petitioners argued, unlike the case in China, "where the petitioners in Eisentrager were tried and convicted, or Germany, where they were imprisoned", the United States exercised complete jurisdiction and control over Guantánamo Bay (*Rasul*, Brief for Petitioners at 9).[13] Therefore, the petitioners argued, *Eisentrager* did not establish the rule that habeas protections did not extend overseas; on the contrary, *Eisentrager* illustrated that even admitted enemy combatants held in countries where the United States did not exercise sovereign control had the chance to present their cases in front of a court. This, petitioners argued, was not the case on Guantánamo where detainees had been denied any kind of legal process to contest the grounds of their detention.

Petitioners emphasized that they were not arguing against compromises on rights in general and that they were not opposing the thought of judicial deference during times of war all together. On the contrary, the Brief for Petitioners acknowledged that "[t]he court's role may be limited in times of crisis" (*Rasul*, Brief for Petitioners: 11). "But", petitioners argued further, "the government here is not asking for deference. It contends that the courts do not even have the authority to defer; that they lack jurisdiction even to examine the government's actions" (*Rasul*, Brief for Petitioners: 11). Such total lack of judicial oversight, petitioners argued, "would raise grave constitutional questions", because it would "deny the courts their historic role as a check on executive power and would cede to the executive unreviewable authority to confine petitioners indefinitely" (*Rasul*, Brief for Petitioners at 13). According to petitioners, the alternative to acknowledging the minimal version of the rights model would be to accept that constitutional protection of rights would mean little or nothing during national security crises and that the extralegal model of emergency jurisprudence would become the practical—if not the legal reality in the United States.

[13] In this connection, the petitioners cited the navy's own official website which states that Guantánamo "for all practical purposes, is American territory" (Official Navy website, cited in *Rasul*, Brief for Petitioners at 9).

5.3 Brief for Respondents: A Push Towards the Extralegal Model

The government argued that the fundamental jurisdictional question presented in *Rasul* was in fact governed by the *Eisentrager* (*Rasul*, Brief for Respondents at 10). The government emphasized that the *Eisentrager* Court concluded that neither the federal habeas statute nor the Constitution conferred jurisdiction to federal courts to hear habeas petitions by enemy aliens captured and held outside the United States borders (*Rasul*, Brief for Respondents at 10). Further, the government argued, the situation of the Guantánamo detainees resembled that of the detainees in *Eisentrager* in all of the most crucial respects:

> [t]he Guantánamo detainees, like the detainees in Eisentrager, are aliens who were captured overseas in connection with an armed conflict and have no connection to the United States. In addition, the Guantánamo detainees, like the detainees in Eisentrager, are being held by the U.S. military outside the sovereign territory of the United States (*Rasul*, Brief for Respondents at 11).

Underpinning this understanding of the *Eisentrager* precedence is a much broader understanding of the scope of the President's war powers than the one offered in the Brief for Petitioners. While petitioners argued that the federal courts had a constitutional duty to oversee the government's treatments of detainees, the government held that the court had a duty to acknowledge the President's decisions concerning the status of detainees.[14]

The Brief for Respondents relied on *Prize* to underpin the argument that federal courts were precluded from reviewing the President's decision to designate the Guantánamo detainees as "enemy combatants":

> [t]he "enemy" status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches. The U.S. military has determined that the Guantánamo detainees are enemy combatants. The President, in his capacity as Commander in Chief, has conclusively determined that the Guantánamo detainees-both al Qaeda and Taliban-are not entitled to prisoner-of-war status under the Geneva Conventions (*Rasul*, Brief for Respondents at 35, internal references to *Prize* and other cases).

The sweeping nature of the claim put forward by the government is underscored by the reference to *Prize*. This is especially the case when considering the fact that the passage from *Prize* which the government refers to is the most radical passage of the opinion, where Justice Grier concludes that "[. . .] this Court must be governed by the decisions and acts of the political department of the Government

[14] The government's interpretation of the scope of the President's war powers was partly acknowledged in a dissenting opinion written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas. In the dissenting opinion, Justice Scalia warned that the court's interference "springs a trap on the executive, subjecting Guantánamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction and thus making it a foolish place to have housed alien wartime detainees" (*Rasul* at 497, Scalia dissenting).

to which this power [of Commander-in-Chief] was entrusted" (*Prize* at 670, emphasis in original).

As I argued in Chap. 3, Sect. 3.7 (The Extralegal Model and the *Prize Cases*), there is good reason to believe that the Court never intended this passage to implement the embracement of an extralegal model of emergency jurisprudence. However, in the *Prize* dissent, Justice Nelson argued that this passage in particular had problematic constitutional implications. Thus, Nelson argued, even if the passage was not intended to promote an extralegal model, there was no way of limiting the Court's concession that the decision concerning whether the nation was in a state of war was up to the President in his capacity as commander in chief. According to the dissenting justices, the case therefore introduced a dangerous precedent that conflicted with fundamental constitutional principles.

In his Prize dissent, Justice Nelson drew attention to the passage cited above as a warning: his errand was not to promote this radical interpretation of the President's wartime powers; instead, his errand was to limit its effect by making sure that at least four justices had specifically dissented from interpreting the Commander in Chief Clause[15] as absorbing legislative power in times of war. In *Rasul*, the government instead relied on the same passages of the Court's opinion to argue that the President *did* have the kind of broad authorities during times of war that Nelson warned against in the *Prize* dissent.[16]

This government's broad understanding of the presidential war powers is also apparent in the summary of the argument in the Brief for Respondents:

[15] U.S. Const. Art. II, § 2, cl. 1.

[16] In *Rasul*, the government only refers to *Prize* once to underpin the President's discretion to decide who are to be designated as "enemy combatants". But the significance of this reference for the brief's interpretation of the President's war powers is underscored by the fact that the administration has continuously relied on this particular and controversial passage to underpin the most sweeping interpretations of the President's commander in chief authority. Thus, the same passage has been used by former Deputy Assistant Attorney General in the Office of Legal Counsel John Yoo to explain the role of judicial review in the war on terrorism in a 2003 comment in the *George Washington Law Review* published a few months before the government submitted its brief:

> Article II [. . .] vests full control of the United States military forces in the president. The power of the president is at its zenith under the Constitution when directing military operations of the armed forces because the power of commander in chief is assigned solely to the president. In The Prize Cases, for example, the Court explained that "[whether] the President in fulfilling his duties as Commander in Chief[ ]" was justified in treating the southern States as belligerents and instituting a blockade, was a question "to be decided by him[.]" The Court could not question the merits of his decision, but must leave evaluation to, "the political department of the Government to which this power was entrusted". As the [*Prize*] Court observed, "*the president enjoys full discretion in determining what level of force to use*" (Yoo 2003, p. 435, emphasis added).

The *Prize* reference in *Rasul* therefore arguably signifies the respondent's endorsement of a very broad interpretation of the President's war powers in general and a conscious attempt to push the court towards an extralegal model of emergency jurisprudence.

> [t]he Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation's foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantánamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantánamo (*Rasul*, Brief for Respondents at 12).

As the above passage illustrates, the government's brief focused on the importance of being able to respond effectively to a national security crises. However, while invoking the rationale behind the extralegal model of emergency jurisprudence, the government took care not to directly advocate the kind of complete suspension of law promoted in the brief for the government in *Milligan*. That been said its emphasis on the need to recognize presidential discretion and its controversial invocation of *Prize* suggested that it was aiming to push the Court in the direction of the extralegal model.

5.4 The Opinion for the Court: A Reluctant Rights Model

The Court's decision in *Rasul* constitutes an unusual revocation of government security policies during an ongoing conflict. The decision confirms the tendency of the Court to take care not to make the clash between the political and the judicial powers to obvious by deciding such cases against the executive on a narrow ground and taking care "not to stir the constitutional issues" (*Endo*[17] at 299). Because of this precaution, many have criticized the *Rasul* Court's conclusion for being inconclusive and open ended. In the article "Guantánamo, Rasul, and the Twilight of Law", Mark A. Drumbl notes that "[t]he Rasul decision provides precious little in the way of specific guidance" (Drumbl 2005, p. 899). And in the article "The Role of Article III Courts in the War on Terrorism", Tung Yin notes that "it is reasonable to wonder what the [*Rasul*] Court has accomplished" (Yin 2005, p. 1065).

Because of the *Rasul* decision's ambiguity, it is difficult to categorize it according to the three models. One thing is clear; however, the Court blatantly refused to go along with the government's attempt to push the case towards an extralegal model of emergency jurisprudence. However, the Court's rejection of the extralegal model does not imply that the Court directly embraced any of the other two models. Because the decision ultimately insists on petitioner's rights to habeas hearings in the federal courts and because it seems to insist on this right as a right that applies regardless of whether or not a war is going on, the decision could arguably be categorized as an example of the rights model; if not the uncompromised rights model endorsed in *Milligan*, then at least a moderate rights model that insists that the basic right to some kind of habeas hearings exists in war

[17] 323 U.S. 283 (1944) I discuss this case in Chap. 3, Sect. 3.5 (Ex Parte Mitsuye Endo).

and peace alike. But while some have interpreted the Court's decision in this direction, the Court itself does not articulate anything like a principled defense of the rights model. Instead, it emphasized the narrow scope of its own decision:

> [w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing (*Rasul*: 485).

Thus, while the decision rules out the extralegal model, it nevertheless leaves it up to the political branches to articulate a concrete practical solution to how the detainees' habeas rights should be acknowledged. The open-endedness of the Court's conclusion therefore renders the decision a very reluctant embracement of the rights model it at all.

The opinion of the Court was written by Justice Steven. Steven began the opinion by recounting the 2001 terrorist attacks and the factual circumstances of the petitioners' apprehension and detention. He then noted that the question that the Court was asked to answer was the narrow one of "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'" (*Rasul* at 475). As noted above, the Court answered this question with a "yes" concluding that the federal habeas statute provided the detainees held in Guantánamo with a statutory right to have their habeas petitions heard in the federal courts.

The Court's conclusion rested on three key observations: (1) that the common law had a long tradition for extraterritorial application of habeas privileges, (2) that Guantánamo's territorial status according to the 1903 lease contract was similar to sovereign control, and (3) that *Eisentrager*'s denial of jurisdiction did not apply.

Justice Steven began the argument by remarking that habeas corpus is "a writ antecedent to statute" [Rasul at 473, Stevens quoting from *Williams v. Kaiser* (1945)]. This remark would seem to signal the fundamental nature of the right of habeas corpus and to signal that it was a right that not even Congress could tamper with; however, Stevens did not invoke the constitutional protection of habeas in the opinion, and he did elaborate on what—if any—legal meaning was to be derived from the fact that habeas historically is a right antecedent to statute.

He further noted that the extraterritorial application of a habeas statute was "consistent with the historical reach of the writ of habeas corpus" (*Rasul* at 481). To underpin this point, he recounted the history of the writ in the common law and argued that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest" [*Rasul* at 474, Stevens citing from *INS v. St. Cyr* (2001)].

By emphasizing both the fundamental nature and the historic roots of habeas corpus, Stevens seemed to emphasize that the right to habeas hearings is fundamental in a rule of law society. Thereby, he arguably could be interpreted as

signaling a rights model approach to the issue of habeas corpus. However, Stevens did not develop the historical argument further, and in his final conclusion, he did not even recount these historical points. It is therefore not clear what work the historical account of habeas rights is doing in the argument, and it would be unreasonable to conclude that Stevens' opinion should be interpreted as an example of the rights model simply on the basis of these initial references to the fundamental nature of this right.

After reviewing the history of habeas rights, Stevens proceeded to consider the territorial status of Guantánamo Bay. Emphasizing that "[b]y the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantánamo Base, and may continue to do so permanently if it chooses", he dismissed the government's argument that the federal habeas statute did not have extraterritorial application on the base (*Rasul* at 467). However, just as the case with Steven's historical argument, it is not clear what work his discussion of the United States control over Guantánamo is doing in the Court's opinion because Stevens concludes the opinion by noting that the question of Guantánamo's territorial status is redundant. "In the end" he argues, "the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241 [the habeas statute],[18] by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base" (*Rasul* at 483, internal quotations omitted).

The above conclusion is based on the Court's analysis of the *Eisentrager* precedence. The Court interpreted the *Eisentrager* precedence differently than both petitioners and respondents. While both petitioners and respondents had interpreted *Eisentrager* as a principled decision laying the ground for when and how the executive has legal authority to limit habeas hearings, the Court gave an interpretation of *Eisentrager* which avoided taking a clear stance on the principled issues at stake.

Justice Stevens began his analysis of *Eisentrager* by noting that the petitioners in *Rasul* differed from the petitioners in *Eisentrager* in important ways: "[t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control" (*Rasul* at 467). He further noted that "the Eisentrager Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners' *constitutional* entitlement to habeas review" (*Rasul* at 467, emphasis added). Stevens thus agreed with petitioners that the situation of the Guantánamo detainees was distinguishable from *Eisentrager*. However, he did not base his conclusion on these differences; instead, he argued that the authority of *Eisentrager* should be dismissed altogether.

[18] 28 U.S.C.A. § 2241.

Stevens argued that the constitutional question was critical to *Eisentrager* because at that time, there was no statutory regulation of the extraterritorial reach of the federal habeas statute. This, he argued, was not the case in *Rasul* because "subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager's* resort to 'fundamentals', persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review" (*Rasul* at 478). Therefore, Stevens argued the question concerning jurisdiction could be resolved on a statutory basis in *Rasul*. Thus, rather than taking issue with the principled issues of *Eisentrager* raised in the Brief for Petitioners as well as in the Brief for Respondents, the Court relied on a complex discussion of the status of *Eisentrager* in light of subsequent habeas cases heard by the Supreme Court.

Stevens' argument involved two Supreme Court cases, one of which had nothing to do with the issues related to wartime detentions addressed in *Eisentrager*. The cases were *Ahrens v. Clark*[19] and, as mentioned above, *Braden v. 30th Judicial Circuit Court of Kentucky*.

Ahrens was decided shortly before the petitioners in *Eisentrager* filed their petition for habeas corpus. In *Ahrens*, the Court decided that the District Court for the District of Columbia did not have jurisdiction to hear the habeas petitions of 120 Germans who were then being detained at Ellis Island, New York, for deportation to Germany (*Rasul* at 476). In *Eisentrager*, the court relied on *Ahrens* to reach a similar conclusion, namely, that United States federal courts did not have jurisdiction to hear habeas petitions by enemy aliens captured and held outside the United States.

The issue in *Ahrens* was the question "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of habeas corpus" (*Ahrens* at 189). The petitioners in *Ahrens* were detained on Ellis Island which was not within the territorial jurisdiction of the District Court for the District of Columbia. The Court in *Ahrens* decided that the fact that the detainees were not within the territorial boundaries of the District Court implied that the Federal Habeas Statute did not grant jurisdiction for the Court to hear the habeas petitions. On the authority of *Ahrens*, the Court in *Eisentrager* denied that the federal habeas statute granted the federal courts jurisdiction to hear the habeas claims presented by the petitioners, who were held outside the territorial jurisdiction of *any* federal court.

Because the Court in *Eisentrager* followed the interpretation of the federal habeas statute laid down in *Ahrens*, the Court in *Eisentrager* found that petitioners had no statutory right to habeas hearings. For this reason, the Court turned to the constitutional question concerning whether the Suspension Clause conferred a right to habeas hearings to enemy aliens. The Court found that the Suspension Clause did not confer such rights to enemy aliens detained under the circumstances of the petitioners in *Eisentrager*. As noted above, the *Eisentrager* Court mentioned six conditions, which together precluded jurisdiction in the federal courts.

[19] 335 U.S. 188 (1948).

According to the Court in *Rasul*, the *Eisentrager* ruling was occasioned by the need fill to a gap in the statutory framework which the *Ahrens* decision had occasioned, that is, the lack of statutory provisions laying down rules for habeas petitions brought by detainees who were not within the jurisdiction of any federal court (*Rasul* at 478). However, the *Rasul* Court argued, the statutory gap occasioned by *Ahrens* had since been filled by the Court's ruling in *Braden* because while the *Ahrens* Court had held that the detainees presence within the territorial jurisdiction of the Court in which the habeas petitions were being filed was an invariable prerequisite for the court's jurisdiction to hear the petitions, the *Braden* Court held that the petitioners presence within the territorial jurisdiction was not an invariable prerequisite, since the writ acted upon the custodian not the detainee. Thus, according to the *Braden* Court, all that was necessary for the court to have jurisdiction was that the custodian could be reached by service of process (*Rasul* at 478). According to the *Rasul* Court, *Braden* therefore reversed the rule laid down in *Ahrens*, and since *Ahrens* controlled *Eisentrager*, the *Eisentrager* decision was reversed indirectly through *Braden* too.

Justice Stevens' argument for the Court in *Rasul* is structured around a double disjunctive syllogism.

The disjunctive syllogism takes the following form:

A => B
NOT B
NOT A

Stevens' argument in *Rasul* is

Eisentrager => Ahrens
Braden => NOT Ahrens
Braden
NOT Eisentrager

With this indirect argument, the *Rasul* Court dismissed the government's argument that *Eisentrager* precluded federal courts from hearing habeas cases brought by detainees held overseas. The *Rasul* Court held that due to the rule laid down by the *Braden* Court, all that was needed was that the custodians, that is, the military authorities who ultimately report to the President, could be reached by service of process.

As noted, *Braden* did not deal with issues of national security at all. The petitioner in *Braden* was an Alabama prisoner who had been indicted of storehouse breaking, safe breaking and various other felonies and who had submitted a petition for habeas corpus alleging denial of his constitutional right to a speedy trial (*Braden* at 486). In concurring and dissenting opinions, the Court's indirect *Braden* argument was criticized for being weak (*Rasul* at 485, Kennedy concurring) and for constituting an "oblique course" (*Rasul* at 493, Scalia dissenting). Further, the Court's argument is arguably so technical that it hides rather than resolves the principled issues relating to issues of habeas rights in relation to national security and emergency. The indirect nature of the Court's *Eisentrager* argument therefore

makes it difficult to categorize the decision according to the three models of emergency jurisprudence. While the *Eisentrager* argument refutes the extralegal model, it does not directly confirm a rights model. Further, the case can hardly be categorized as an example of the procedural model because while the argument ultimately ties the Court's conclusion to statutory interpretation, it does not engage in any of the principled discussions underpinning typical procedural model cases such as *Quirin* or *Youngstown*. Further, while the Court did bring both the historic reach of the writ and the special status of Guantánamo Bay into play, it was the indirect *Eisentrager* argument that underpinned its final decision (*Rasul* at 483). In the end, the Court therefore did not embrace any of the three models of emergency jurisprudence but chose a route that suppressed rather than explained the principled issues of emergency governance brought to the fore in the Brief for Petitioners as well as in the Brief for Respondents.

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Chapter 6
Hamdi v. Rumsfeld

The decision in *Hamdi v. Rumsfeld*[1] was handed down on the same day as the decision in *Rasul*.[2] Like *Rasul*, *Hamdi* was a habeas corpus case questioning the legality of the government's detentions of alleged enemy combatants in the War on Terror.

The petitioner, Yaser Esam Hamdi, was a United States citizen. In 2001 Hamdi was captured during hostilities in Afghanistan and designated as an "enemy combatant". He was initially detained on Guantánamo Bay. However, when the authorities realized that he was a United States citizen, he was transferred to a naval brig in Norfolk, Virginia. Later he was transferred to a brig in Charleston, South Carolina, where he was held at the time his habeas petition was heard by the Supreme Court (*Hamdi* at 510).

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus under the federal habeas statute[3] in the Eastern District of Virginia, naming as petitioner his son and himself as next friend (*Hamdi* at 511). He alleged that Hamdi's detention in the United States without charges, access to an impartial tribunal or assistance of counsel violated the Fifth and Fourteenth Amendments to the United States Constitution.

Unlike in *Rasul* where petitioners were aliens, the jurisdiction of the federal courts to hear Hamdi's habeas petition was not questioned because Hamdi was a United States citizen.

When Hamdi's case reached the Supreme Court, a plurality held that "although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker" (*Hamdi* at *509*). Thus, on the one hand, the Court decided in favor of the government that the detention of a United

[1] 542 U.S. 507 (2004).

[2] 542 U.S. 466 (2004).

[3] 28 U.S.C.A. § 2241.

E. Hartz, *From the American Civil War to the War on Terror*,
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States citizen designated as an "enemy combatant" was authorized by Congress and therefore lawful. On the other hand, the Court decided against the government that an alleged enemy combatant should have "a meaningful opportunity" to contest his designation as such.

6.1 Factual Background

As mentioned, Yaser Esam Hamdi was an American citizen. He was born in Baton Rouge, Louisiana, in 1980 when his father, a citizen of Saudi Arabia, was working with Exxon Chemical in the United States (*Hamdi*, App. 188–189, Letter by Hamdi's father).[4] While still a child, he moved with his family back to Saudi Arabia (*Hamdi* at 510).

When the American military campaign against the Taliban government in Afghanistan began, Hamdi had been in the Afghanistan for approximately 2 months. According to his father, he was there to do relief work. His father explained that this was the first time the twenty-year-old had traveled on his own and "[b]ecause of his lack of experience, he was trapped in Afghanistan once the military campaign began" (*Hamdi*, App. 188–189, Letter by Hamdi's father). Hamdi's father pointed out that "he had been in that country less than two months before September 11, 2001, and could not have received military training" (*Hamdi*, App. 188–189, Letter by Hamdi's father).

The government contended that Hamdi had taken up arms with the Taliban against the United States (*Hamdi* at 535). The government therefore designated Hamdi an "enemy combatant" and contended that this status justified holding him until the end of the armed conflict or until his detention was no longer necessary in light of the interests of national security (*Hamdi*, Brief for Respondents at 16).

Hamdi had been captured by the Northern Alliance in Afghanistan sometime in 2001 (*Hamdi* at 510). The Northern Alliance turned him over to the American military (*Hamdi* at 510). He was interrogated by the military while in Afghanistan and subsequently transferred to the United States Naval Base in Guantánamo Bay during January 2002 (*Hamdi* at 510). When the authorities realized that he was an American citizen, he was transferred to a naval brig in Norfolk, Virginia, until he was finally transferred to a brig in Charleston, South Carolina, where he was held at the time the case was heard by the Supreme Court (*Hamdi* at 510).

As mentioned, Hamdi's father filed a petition for a writ of habeas corpus in the Eastern District of Virginia in June 2002 after learning that his son had been detained by the US military (*Hamdi* at 511). Hamdi's father alleged among other things that the government's detention of Hamdi was a violation of the Non-Detention

[4] I write "was" because Hamdi later renounced his American citizenship and returned to Saudi Arabia as part of a deal struck with the American government to be released.

Act[5] which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" (*Hamdi*, Brief for petitioners at 13).

In addition, he alleged that because Hamdi was denied access to counsel and had been given no opportunity to question the factual basis for his detention before any impartial tribunal, the government's detention violated the Fifth and Fourteenth Amendment to the United States Constitution (*Hamdi*, Brief for petitioners at 16). The purpose of both these amendments is to secure individuals' rights of due process of the law. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law", and the Fourteenth Amendment's Due Process Clause[6] explicitly prohibits states from violating an individual's rights of due process.[7]

6.2 Opinion for the Court: A Partly Procedural Model

Justice O'Connor announced the judgment of the Court, which was decided by a plurality consisting of four justices. Justice O'Connor began the opinion by dividing the legal issues at stake in the case into two parts:

> [a]t this difficult time in our Nation's history, we are called upon to consider [1] the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and [2] to address the process that is constitutionally owed to one who seeks to challenge his classification as such (*Hamdi* at 509).

O'Connor first addressed the first question "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants'" which turned on whether the detention was in violation of the Non-Detention Act[8] (*Hamdi* at 516). The Court answered this question with a "yes" arguing from on procedural model that Congress had authorized such detention with the Authorization for Use of Military Force[9] (AUMF). The AUMF was a joint resolution passed by Congress a week after the 9/11 attacks. It did not explicitly mention the issue of preventive detention of enemy combatants. However, O'Connor argued that preventing

[5] 18 U.S.C.A. § 4001.

[6] U.S. Const. amend. XIV § 1.

[7] The question of the legality of Hamdi's confinement as an enemy combatant further tied into the question of the nature of a War on Terror: what does it mean to be an enemy combatant in this war? Is there any well-defined end to the War on Terror? And if not, did it mean that Hamdi could be detained indefinitely?

A plurality of the court, however, found that while the potentially indefinite nature of detentions of enemy combatants in a War on Terror was indeed legally problematic, the court did not have to reach these issues in order to decide Hamdi's case because Hamdi's capture and detention should be viewed in light of the ongoing armed struggle in Afghanistan (*Hamdi* at 520).

[8] 18 U.S.C.A. § 4001(a).

[9] 115 Stat. 224, Pub.L. 107–40, §§ 1–2.

captured individuals from returning to the field of battle by detaining them, "[. . .] for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use" (*Hamdi* at 518).[10] On this basis, she concluded that "the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe" (*Hamdi* at 517). In this way, the court answered the first of the two questions with a "yes"; the government's detention of a United States citizen on United States soil as an enemy combatant was lawful because it was authorized by Congress.

O'Connor's argument in this first part arguably mirrors the paradigmatic procedural model case *Ex Parte Quirin*.[11] As mentioned in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*), the *Quirin* Court found that although Congress had not specifically authorized military tribunal of enemy combatants within United States territory, such tribunals were an "important incident to the conduct of war" and therefore authorized by the Articles of War (*Quirin* at 28). On this basis, the *Quirin* Court found that Congress had "*explicitly* provided [. . .] that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases" (*Quirin* at 28, emphasis added). Like the case of *Quirin*, O'Connor's reliance on the question of congressional authorization thus invokes a procedural model of emergency jurisprudence.[12]

O'Connor then turned to the second question noting that

> [e]ven in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status (*Hamdi* at 524).

While the first question turned on the statutory issue of congressional authorization, this second question turned on constitutional interpretation of due process rights. Thus, O'Connor argued, even if the Court had found that Congress had authorized preventive detention of citizens, such authorization was limited by constitutional guarantees of due process.

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[10] O'Connor did in fact conclude that the AUMF constituted, "[. . .] *explicit* congressional authorization for the detention of individuals in the narrow category we describe" (*Hamdi*: 2640, emphasis added). During a lecture on constitutional law in the fall semester of 2006 at New York University, Professor Noah Feldman commented that it was less than obvious how O'Connor managed to detect an explicit authorization for detention in the very broad and general language of the AUMF, which does not mentioned the word "detention" even once.

[11] Discussed in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*).

[12] In a parenthesised remark, she added "assuming, without deciding, that such [Congressional] authorization is required" (*Hamdi* at 517). This remark arguably suggests that a jurisprudential path leaning more towards the extralegal model was not unthinkable.

In *Quirin*, the court also leaves such a path open, noting that

> It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions (*Quirin* at 29).

By raising the constitutional issue, O'Connor seemed to be signaling a rights model point, namely, that there were limits to the political branches authority to limit core constitutional rights even during times of national crisis. However, far from advocating a rights model of emergency jurisprudence, she implemented a balancing test arguing that "[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat" (*Hamdi* at 532). The purpose of O'Connor's balancing test was not to confirm the uncompromisable nature of core constitutional rights but on the contrary to balance such core rights against national security concerns.

However, O'Connor also made clear that while "balancing" necessarily means taking the government's interest into account as a guide for the legal standards of rights protection during war, "balancing" did not mean ignoring the fundamental importance of rights altogether: "it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship" (*Hamdi* at 532).

She relied on the case *Mathews v. Eldrige* for constructing the right balance in the case of Hamdi (*Hamdi* at 529). As Scalia pointed out in his dissent, *Mathews v. Eldrige* does not deal with national security at all but with the withdrawal of disability benefits (*Hamdi* at 575, Scalia dissenting). Nevertheless, O'Connor employed the framework from this case for weighing, "the private interest that will be affected by the official action", against the government's asserted interest, "'including the function involved', and the burdens the government would face in providing greater process" in the case of Hamdi (*Hamdi* at 529, O'Connor quoting from *Mathews*). The balancing "calculus" that O'Connor takes from *Mathews* is based on "an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards'" (*Hamdi* at 529, O'Connor quoting from *Mathews*).

In *Mathews*, this approach causes a balancing between (1) the interests of the individual in retaining their statutory right to a social security benefit on the one side and (2) the costs and administrative burdens of the additional process as well as the risk of error and probable value, if any, of additional or substitute procedural safeguards (*Mathews* at 903).

In O'Connor's opinion for the Court in *Hamdi*, this calculus translates into an analysis of (1) the risk of detaining a person, who was in fact not an enemy combatant, over and against (2) the risk of letting someone who was an enemy combatant go as well as the risk of hampering the war effort by imposing the practical burdens of a trial-like process on the military (*Hamdi* at 529).

On the side of Hamdi, what O'Connor found was, "the most elemental of liberty interests-the interest in being free from physical detention by one's own government" (*Hamdi* at 529). She underscored both Hamdi's private interest and the societal interest in protecting due process. Further, she noted that

> history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat (*Hamdi* at 530).

Against this "fundamental" right, she weighed

> the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States (*Hamdi* at 531).

This interest, she argued, included detaining enemy combatants until the end of the specific conflict in which they were captured and

> the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities (*Hamdi* at 531).

Further, she acknowledged that "the practical difficulties that would accompany a system of trial-like process", should be "taken into account in our due process analysis" (*Hamdi* at 532).

The compromise the Court ended up making on the one hand granted that

> a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker (*Hamdi* at 533).

And, on the other hand that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" (*Hamdi* at 533). More specifically, the Court granted

> [h]earsay[13] [. . .] may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria (*Hamdi* at 533).

On the one hand, the Court argued that

> [a] burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant (*Hamdi* at 534).

However, on the other hand, the Court also noted that it was "unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts" (*Hamdi* at 534).

Even though the Court stated that, "[w]e reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law", the standards the Court ended up suggesting should apply in hearings concerning a detainee's status are far removed from the legal standards applying in a normal civil habeas corpus case (*Hamdi* at 531).

[13] Hearsay means "testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. [. . .] Such testimony is generally inadmissible under the rules of evidence. [. . .] In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" (Blacks Law Dictionary).

The Court's willingness to balance fundamental liberties against national security concerns distances the Court's methodological framework from that of the rights model. The Court distanced itself even further from the rights model by distinguishing the paradigmatic rights model case *Ex parte Milligan* arguing

> *Ex parte Milligan* [. . .] does not undermine our holding about the Government's authority to seize enemy combatants, as we define that term today (*Hamdi* at 521).

The Court further emphasized the authority of the procedural model case *Quirin* over the rights model case *Milligan* by arguing

> [*Quirin*] both postdates and clarifies Milligan, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances (*Hamdi* at 523).

Thus, although the Court reached the constitutional questions in the second part of the opinion, it seems to refute the framework of the rights model. Further, although the Court seems to embrace *Quirin* as an authority on emergency jurisprudence, the balancing test employed by the Court in the second part of the opinion does not follow the methodology of *Quirin*. In the end, it is therefore not clear what methodology of emergency jurisprudence is embraced in the opinion.

6.3 Dissenting Opinion I: The Rights Model Applied to United States Citizens

In a dissenting opinion, Justice Scalia embraced the rights model as the appropriate model of emergency jurisprudence when the rights of United States citizens were at stake. He strongly criticized O'Connor's balancing approach arguing that it reflected a "Mr. Fix-it Mentality" that upset the structure of the constitution:

> [t]he problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people (*Hamdi* at 576 and 577, Scalia dissenting).

Scalia's point was that if the Court takes upon itself the responsibility to lay out a procedural framework, which ought to be laid out by Congress, it allows Congress to flout their political responsibility.

He insisted that the correct paradigm for evaluating "competing demands of national security and our citizens' constitutional right to liberty" was governed by the model of emergency jurisprudence that was articulated in *Milligan* (*Hamdi* at 575 and 577, Scalia dissenting).

Scalia therefore rejected O'Connor's attempt at distinguishing *Milligan*. While O'Connor had argued that *Milligan* "[. . .] turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there", Scalia interpreted *Milligan* as a case explaining the general

constitutional paradigm for emergency governance regarding United States citizens (*Hamdi* at 522, Opinion of the Court and 575, Scalia dissenting). He cited *Milligan* at length to argue that

> *Milligan* responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war: "If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended" (*Hamdi* at 568, Scalia dissenting).

Thus, Scalia strongly insisted that war or national security can never be an excuse for submitting fundamental rights of citizens to the kind of balancing carried out in the opinion of the Court.

Like the Court in *Milligan*, Scalia took care to note that the Framers were well aware of the exigencies caused by emergencies and that they did not intend constitutional principles to be modified according to national emergencies. Scalia therefore argued that "[a] view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions" (*Hamdi* at 569, Scalia dissenting).

On this basis, he argued that unless the privilege of habeas corpus is suspended by Congress' invocation of the Suspension Clause of the Constitution,[14] the existence of war cannot change the kind of process due to United States citizens:

> [t]he Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal (*Hamdi* at 568, Scalia dissenting).

Scalia therefore argued that Hamdi—being a United States citizen—was entitled to unconditional release unless criminal proceedings were promptly brought against him. In this way, he underscored the role of the Court in peace as well as in war:

> [w]hatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent (*Hamdi* at 579, Scalia dissenting).

He argued that O'Connor's point "that captured enemy combatants [. . .] have traditionally been detained until the cessation of hostilities and then released" was probably an accurate description of wartime practice with respect to enemy *aliens* (*Hamdi* at 558, Scalia dissenting). But this tradition could not constitutionally be

[14] U.S.C.A. Const. Art. 1, § 9, cl. 2.

transferred to citizens: "[t]he tradition with respect to American citizens [. . .] has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process" (*Hamdi* at 559, Scalia dissenting).

Scalia therefore refuted the idea that the constitutional rights of citizens may ever be compromised with reference to national emergency and he upheld the Suspension Clause as the only constitutional tool for accommodating emergencies.

Scalia thereby offered a vindication of the jurisprudential paradigm of *Milligan* when United States citizens are concerned, that is, probably the strongest confirmation of the rights model presented in a Supreme Court opinion since *Milligan* itself was decided.

6.4 Dissenting Opinion II: A Push Towards the Extralegal Model

While Justice Scalia's dissent vindicated the rights model, Justice Thomas' dissent went in the opposite direction. Although he agreed with the Court that Hamdi's detention was authorized by Congress through the AUMF, he also expressed a willingness to push the Court's interpretation towards an extralegal model of emergency jurisprudence. He did that by advocating a much broader conception of the scope of executive war powers than that expressed in the opinion for the Court.

His view on emergency governance comes through in the precedent he chose to rely on. While Scalia relied extensively on the rights model case *Milligan* to argue that national emergencies do not silence or alter the Constitution or the law, and while the Court relied on the procedural model case *Quirin*, Thomas relied on the extralegal model from the *Prize Cases*[15] to argue that "[t]his Court has long recognized these features and has accordingly held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion" (*Hamdi* at 581, Thomas dissenting).[16]

On the basis of the *Prize Cases*, he suggested that even if Congress had not authorized detention, "the President [may very well] have inherent authority to detain those arrayed against our troops" (*Hamdi* at 587, Thomas dissenting). He cited the most controversial statement in *Prize* to underpin this point:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the

[15] *The Amy Warwick* (commonly known as the *Prize Cases*) 67 U.S. 635 (1862). I discuss this set of cases in Chap. 3, Sect. 3.7 (The Extralegal Model and the *Prize Cases*).

[16] Thomas chooses *Hirabayashi* as one of the three other cases he relies on to make this point. This arguably further indicates the radical nature of Thomas' position. As I argue in Chap. 3, Sects. 3.3 (Hirabayashi v. United States) and 3.4 (Korematsu v. United States), it was exactly the jurisprudence of emergency developed in *Hirabayashi* that underpinned and defined the court's argument in one of its most infamous decisions ever, *Korematsu v. United States*.

> challenge without waiting for any special legislative authority [. . .]. Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance [. . .] is a question to be decided *by him* (*Prize*, cited in *Hamdi* at 581, Thomas dissenting, emphasis in original).

I argued in Chap. 3, Sect. 3.7 (The Extralegal Model and the *Prize Cases*) that the Court's opinion in *Prize* has been interpreted as advocating broad presidential war powers by some. However, I also argued that this interpretation is problematic because it is contradicted by other parts of the *Prize* Court's opinion—in particular by the narrow factual basis of the opinion. Thomas however seems to interpret the cases unhesitantly as a clear confirmation of the extralegal model.

With a gesture towards embracing the Court's procedural solution to the question of the legality of Hamdi's detention, Thomas did note that "Congress, to be sure, has a substantial and essential role in both foreign affairs and national security" (*Hamdi* at 582, Thomas dissenting). However, according to Thomas, this "substantial role" is defined first and foremost by the authority to authorize the use of military force. Once Congress has made this step and "provided the President with broad authorities does [it] not imply-and the Judicial Branch should not infer-that Congress intended to deprive him of particular powers not specifically enumerated" (*Hamdi* at 583, Thomas dissenting). In other words, Thomas' argument seems to be that if Congress authorizes the use of military force, it simultaneously authorizes large presidential discretion in decisions related to the war effort. In that sense, Thomas' embracement of the procedural model is much more reluctant than the one presented in the opinion of the Court. Although the procedural model is embraced in the opinion for the Court, O'Connor also emphasizes that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" (*Hamdi* at 536). On Thomas' reading the role of Congress is not to engage in assessments of the executive war measures; once Congress has authorized the use of military force, Congress has outplayed its role and the rest is up to the executive.

If Thomas is ambiguous as to whether or not Congress' authorization of executive detention is necessary, he leaves no doubt that the role of the Court in matters of national security is first and foremost to back off: "it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive" (*Hamdi* at 582, Thomas dissenting).

He gives three reasons for the Court's obligation to defer to the executive branch in matters related to national security:

1. [. . .] the court simply lacks the relevant information and expertise to second-guess determinations made by the President based on information properly withheld.
2. [. . .] even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because '[t]hey are delicate, complex, and involve large elements of prophecy'.
3. [the Court must recognize] the primacy of the political branches in the foreign-affairs and national-security contexts (*Hamdi* at 582, Thomas dissenting, numbering added).

On this basis, he strongly refuted the second part of the Court's opinion and its embracement of a set of minimum standards for the process owed to a citizen detained as an enemy combatant. He did not only refute the conclusion but also the argumentative framework, which he accused of "failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs" (*Hamdi* at 579).

Justice Thomas found further support for his interpretation of constitutional emergency powers in the writings of the Framers. He argued that

> [t]he Founders intended that the President have primary responsibility-along with the necessary power-to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains (*Hamdi* at 580, Thomas dissenting).

Thomas grounded this interpretation of the framer's intention by quoting from Federalist No. 70 (Hamilton). In Federalist No. 70, Hamilton argues that "[e]nergy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks" (Quoted in *Hamdi* at 580, Thomas dissenting). At first glance, this passage by Hamilton does in fact seem to speak in favour of broad executive war powers. However, upon closer inspection, the passage's confirmation of broad executive power is far from obvious because Federalist No. 70 does not deal with the issue of executive war powers at all. Instead, the passage is concerned with the question whether the United States executive office should be assigned to a single person or if it should be modeled on the office of the Roman consuls, in which executive offices were always shared between two men with equal authority, or on other power-sharing models (Federalist No. 70, Hamilton). While the Framers finally decided in favor of a unitary executive, the passage illustrates that they were willing to consider subjecting even the presidential office itself to the checks and balances brought about by a shared presidency. Thus, rather than a dismissal of legislative control of executive action, this passage arguably indicates the framers' general suspicion regarding the concentration of power in one person. A suspicion that is confirmed by Madison in Federalist no. 47: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (Federalist No. 47, Madison).

In contradiction to Madison's emphasis on the divisions of powers, Thomas argued in favor of broad discretionary executive powers. While Thomas did gesture towards the procedural model, emphasizing the AUMF as congressional authorization of the executive's detention policies, he left very little room for congressional interference in matters related to national security. Thus, while he did not argue directly in favor of a radical extralegal model, the level of deference which he finds to be suitable is so high that it is questionable as to whether the Court would ever be able, in practice, to rule against a presidential decision concerning a national emergency on the terms he laid down.

List of Cases

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)
Hirabayashi v. U.S., 320 U.S. 81 (1943)
Mathews v. Eldridge, 424 U.S. 319 (1976)
Milligan, Ex parte, 71 U.S. 2 (1866)
Korematsu v. U.S., 323 U.S. 214 (1944)
Prize Cases, The Amy Warwick, 67 U.S. 635 (1862)
Quirin, Ex parte, 317 U.S. 1 (1942)
Rasul v. Bush, 542 U.S. 466 (2004)

Chapter 7
Hamdan v. Rumsfeld

In contradiction to both *Rasul*[1] *and Hamdi*,[2] the legal issue in *Hamdan v. Rumsfeld*[3] was not Hamdan's right to challenge his status as an enemy combatant. Instead, the legal issue was whether the executive had authority to try Hamdan in front of a specially convened military commission.

The use of military commissions to try detainees held on Guantánamo was authorized by the President who issued a military order to that effect in November 13 2001 (hereafter referred to as the "November 13 Order").[4] In July 2003, the President further announced his determination that Hamdan and five other detainees at Guantánamo Bay were subject to the November 13 Order and thus triable by military commission (*Hamdan* at 569, Syllabus). In response, Hamdan filed a habeas petition and other petitions in the United States District Court for the Western District of Washington.[5]

The military commissions authorized by the President to try Hamdan and other detainees must be distinguish sharply from the Combatant Status Review Tribunal (CSRT)[6] that was set up by the administration in response to the Court's rulings in *Rasul* and *Hamdi*. The CSRT was set up by military order on July 7th in 2004. The use of the CSRT as a substitution for federal habeas review was acknowledged by Congress in the Detainee Treatment Act (DTA)[7] in 2005. The purpose of the CSRT was to determine whether individuals detained at the US Naval Station at

[1] 542 U.S. 466 (2004).

[2] 542 U.S. 507 (2004).

[3] 548 U.S. 557 (2006).

[4] 66 Fed.Reg. 57833, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (November 13, 2001).

[5] The Washington Court later transferred Hamdan's to the United States District Court for the District of Columbia.

[6] Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004).

[7] 119 Stat 2680, Pub. L. No. 109–148 (2005). See in particular §1005 (a)(1)(A).

E. Hartz, *From the American Civil War to the War on Terror*,
DOI 10.1007/978-3-642-32633-2_7,

Guantánamo Bay were enemy combatants. While the procedural protections of the CSRT were limited, it fulfilled the demands on due process laid down in *Hamdi*. Thus, the articulated purpose of the CSRT and the DTA was to enhance the legal protection of detainees by giving them a chance to contest the government's classification in front of a neutral decision-maker.

In contradiction to the review offered by the CSRT, the aim of military commissions is, "[t]he need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield" (*Hamdan* at 607). Thus, in contradiction to the CSRT—whose articulated purpose was to *increase* legal protections—trial by military commission *decreases* legal protections by enabling not only continued executive detention but executive administration of punishments including the death sentence. Military commissions are not part of the judicial power laid out in the Constitution's Article III but are instead constitutionally grounded in the war powers listed in Article I and II. They are ad hoc military courts usually convened to try enemies for offences against the laws of war or to institute a system of justice in areas under martial law when the civil courts are not able to function (Winthrop 1920, p. 831). In *Military Law and Precedents*, Winthrop explains that "[t]he [military] commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war" (Winthrop 1920, p. 831). Thus, far from constituting an extension of civil justice into the realm of war, the jurisdiction of the military commission is grounded in war powers and the executive's increased authority in response to exigencies arising from war. In *Hamdan*, it was questioned whether the use of military commissions was authorized in Hamdan's case.

The Court decided against the government both (1) that the charges brought against Hamdan were not triable by military commissions and (2) that the commissions themselves were unlawful because they did not comply with the Uniform Code of Military Justice (UCMJ)[8] which lays down the regulation of military law in the United States.

The Court framed its argument around the procedural model of emergency jurisprudence laid down in *Ex Parte Quirin*.[9] As argued in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*), the *Quirin* Court decided that a military commission convened by President Roosevelt to try enemy combatants during WWII was lawful because it was authorized by Congress through Art. 15 of the Articles of War.[10] The central question in *Hamdan* therefore became whether that article also constituted congressional authorization for the military commissions convened to try Hamdan. The government argued that it did. The Court found that it did not.

[8] 10 U.S.C.A § 801 *et seq*.

[9] 317 U.S. 1 (1942).

[10] Art. 15 of the Articles of War was later incorporated into the UCMJ as Art. 21 see 10 U.S.C.A. § 801 et seq.

The Court's conclusion was criticized in a three dissenting opinions. Two of the opinions argued that the Detainee Treatment Act (DTA),[11] passed by Congress in 2005, barred the Court from hearing Hamdan's petition at all. In a third dissenting opinion, Justice Thomas repeated his extralegal argument from *Hamdi* and insisted that "[t]his Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security *in the manner he deems fit*" thus once again quoting the *Prize Cases* in attempt to push the Court towards deference (*Hamdan* at 679, Thomas dissenting, emphasis added).

Since Thomas dissenting opinion does not ad anything substantially new to the analysis he presented in his *Hamdi* dissent, I discuss only the argument for the Court in the following.

7.1 Factual Background

The petitioner in *Hamdan*, Salim Ahmed Hamdan, was a Yemini national. He had been captured in Afghanistan in 2001 and had been detained on Guantánamo Bay since June 2002. In 2003, after having been detained at Guantánamo for more than a year, "the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes" (*Hamdan* at 557, Syllabus). In July 2004, Hamdan was charged with conspiracy to violate the law of war (*Hamdan* at 566, Syllabus). The alleged conspiracy was to have consisted in four overt acts, which Hamdan was supposed to have committed sometime between 1996 and November 2001. The four acts were:

(1) Acting as Osama bin Laden's bodyguard and personal driver, believing all the while that bin Laden and his associates were involved in terrorist acts prior to and including the attacks of September 11, 2001

(2) Arranging for transportation of, and actually transporting, weapons used by Al Qaeda members and by bin Laden's bodyguards

(3) Driving or accompanying Osama bin Laden to various Al Qaeda-sponsored training camps, press conferences or lectures, at which bin Laden encouraged attacks against Americans

(4) Receiving weapons training at al Qaeda-sponsored camps (*Hamdan* at 570, Opinion for the Court, Justice Steven quotes from App. to Pet. for Cert)

Hamdan challenged (1) the jurisdiction of a military commission to try him for these kinds of charges, which he argued did not fall under the violations of the laws of war, and therefore were not triable by military commission. He further challenged (2) the legality of the commission itself, arguing that the procedures that the President had adopted violated both military and international law.

Unlike the petitioner in *Hamdi*, Hamdan did not challenge the executive's authority to detain him without trial, neither did he challenge the executive's

[11] 119 Stat 2680, Pub. L. No. 109–148 (2005).

authority to try him by court martial if constituted in accordance with the UCMJ. What he argued was solely that the military commission convened by the President lacked jurisdiction to try him for the alleged offences and that it further did not meet the procedural standards laid down in UCMJ.

It is important to note that the Court's scrutiny of the military commission convened to try Hamdan exclusively concerned the jurisdiction of the commission and the legality of its procedures; it was not a scrutiny on the merits of the charges brought against Hamdan by the government.

The federal courts do not have appellate authority to review decisions made by military commission because, as mentioned, the authority of these commissions is grounded in the joint war powers of Congress and the executive not in the judiciary powers. This means that they are not Art. III courts and are therefore not part of the judiciary system as laid down in the Constitution (Winthrop 1920, p. 49). They are in fact "not a *court* in the full sense of the term" (Winthrop 1920, p. 49).

But while the Supreme Court does not have appellate jurisdiction over courts martial and military tribunals, it does have jurisdiction to try the legality of the proceedings themselves (Winthrop 1920, p. 52). This means that while a person subject to trial by military commission cannot appeal the decision of a military commission in the federal courts, he or she can petition for a writ of habeas corpus to try the legality of the prosecution itself, which was what Hamdan had done.

7.2 Opinion for the Court: An Example of the Procedural Model

As mentioned, Hamdan had questioned the legality of the military commission on two accounts. He had questioned (1) whether a military commission could lawfully exercise jurisdiction over the kind of charges brought against him and (2) whether the procedure of the particular commissions convened to try him were lawful, that is, whether they complied with the UCMJ.

The Court resolved both these issues through a procedural model of emergency jurisprudence. Relying primarily on the jurisprudential framework laid down in *Quirin*, the Court argued first (1) that the charges which were brought against Hamdan could not be tried by military commission and secondly (2) that the commissions themselves were unlawful because they failed to fulfill the procedural requirements laid down in UCMJ as well as in the Third Geneva Convention.[12]

Justice Stevens wrote the opinion for the Court. Before reaching Hamdan's claims, the Court had to decide whether it had jurisdiction to review the claims. The government argued that it did not because the DTA specifically limited the federal courts' jurisdiction to review decisions of both the Combatant Status

[12] 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention).

Review Tribunals and of military commissions. The Court found that the DTA's limitations on jurisdiction did not apply in Hamdan's case and proceeded to review the two issues raised by him against the legality of the military commissions.

Justice Stevens began his analysis by refuting the authority of the extralegal model of emergency. On this basis, he dismissed the government's argument that "military necessity" could legitimize the recourse to extralegal means of emergency governance:

> [e]xigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article 1, § 8 and Article III § 1 of the Constitution unless some other part of that document authorizes a response to the felt need (*Hamdan* at 591).[13]

He went on to quote the *Milligan* concurrence at length to emphasize the procedural model as the correct framework for evaluating limitations on liberties in war and national emergencies arguing that the correct interpretation of the "interplay between these powers [the war-powers of the Executive and Congress] was described by Chief Justice Chase in the seminal case of Ex parte Milligan" (*Hamdan* at 591):

> [t]he power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President[. . .] . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature (Hamdan at 591, Stevens quoting from Justice Chase's concurrence in *Milligan*).

Stevens' argument takes its lead from the authority of this concurring opinion in *Milligan* as well as from the opinion for the Court in *Ex Parte Quirin*. As argued in Chaps. 1 and 2, both these opinions have become emblematic of the Court's procedural model of emergency jurisprudence because both Chief Justice Chase (writing for the concurrence in *Milligan*) and Justice Stone (writing for the Court in *Quirin*) are careful to ground the authority of the expansion of executive authority during war in congressional approval.

Interestingly, the government also relied extensively on *Quirin*. Thus, while acknowledging the procedural model as the correct paradigm for evaluating the issues in Hamdan, the government argued that on the authority of *Quirin*, Congress had indeed authorized trial by military commission to try enemy combatant for crimes against the laws of war. Therefore, the government argued, the commissions convened to try Hamdan were legal.

[13] US Const. Art. I, § 8, Cl. 9 provides "[Congress shall have power to] constitute Tribunals inferior to the Supreme Court". Art. III, § 1 provides "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish".

Justice Stevens acknowledged *Quirin*'s controversial conclusion that Art. 15 of the Articles of War constituted congressional authorization to try enemy combatants for violations of the law of war. Stevens further acknowledged that the congressional authorization of military commissions found in *Quirin* was still valid because the content of Art. 15 had since been incorporated into UCMJ as Art. 21. However, Stevens did not agree with the government that this authorization covered the commission convened to try Hamdan.

Justice Stevens emphasized that the *Quirin* Court's finding of congressional approval was strictly dependent on the fact that such commissions were an incident to the conduct of war and argued that "[t]hat limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield" (*Hamdan* at 607). On this basis, he rejected the government's argument that *Quirin* authorizes the President "to invoke military commissions when he deems them necessary" and argued instead that "absent a more specific congressional authorization [than that provided by Art. 21], the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified", that is, justified in "the Constitution and laws, including the law of war" (*Hamdan* at 595 and 560, internal quotation marks omitted). Thus, according to Stevens, the *Quirin* Court did not interpret Art. 15 as a "sweeping mandate for the President to 'invoke military commissions when he deem[. . .ed] them necessary'" (*Hamdan* at 559, quoting from the Government's brief). Rather, Stevens argued, Art. 15 imbeds the authority of military commissions in the legal framework regulating the conduct of war.

In this way, the *Quirin* Court's procedural argument in support of the legality of the commissions convened to try German spies during WWII translated into an investigation of whether the military commission convened to try Hamdan could be viewed as an incident to the conduct of war, which, according to Stevens, was the very basis of the *Quirin* Court's conclusion that such commissions were indeed authorized through the Articles of War.

Stevens based his interpretation of the lawful purpose of military commissions on Winthrop's treatise on *Military Law and Precedence*. According to Winthrop, the aim of military commissions is strictly tied to the effective prosecution of war and the authority of military commissions derives from the war powers (Winthrop 1920, p. 831). Based on Winthrop's treatise, Stevens listed four preconditions for exercise of jurisdiction by the type of commission convened to try Hamdan:

1. *First*, the alleged offence must have been committed within the theatre of war.
2. *Second*, it must have been committed during the period of war.
3. *Third*, if the accused is an enemy combatant, the alleged offence must be an offence in violation of the laws of war.
4. *Finally*, military commissions have jurisdiction to try only two kinds of offences: offences against the law of war and breaches of military orders or regulations that are not legally triable by courts martial under the Articles of War (*Hamdan* at 563).

Stevens underscored that all of these four conditions tie the jurisdiction of military commissions strictly to the actual conduct of war. Stevens then proceeded to analyze the charges brought against Hamdan to evaluate whether they fulfilled the four conditions.

As mentioned, the charge for which Hamdan was to be tried was conspiracy to violate the law of war. The alleged conspiracy was to have consisted in four overt acts which Hamdan was supposed to have committed sometime between 1996 and November 2001. As mentioned the four acts were:

(1) Acting as Osama bin Laden's bodyguard and personal driver, believing all the while that bin Laden and his associates were involved in terrorist acts prior to and including the attacks of September 11, 2001

(2) Arranging for transportation of, and actually transporting, weapons used by Al Qaeda members and by bin Laden's bodyguards
(3) Driving or accompanying Osama bin Laden to various Al Qaeda-sponsored training camps, press conferences or lectures, at which bin Laden encouraged attacks against Americans
(4) Receiving weapons training at al Qaeda-sponsored camps (*Hamdan* at 570)

Evaluating these allegations, Stevens underscored that "[t]here is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity" (*Hamdan* at 570). He further argued that the allegations failed to fulfill at least three of the four prerequisites.

Firstly, Stevens argued, the crimes with which Hamdan was charged were not strictly confined to the period of war but took place mainly in the 4 years preceding the 9/11 attacks (Winthrop's second condition) (*Hamdan* at 598).

Secondly, Stevens argued, the alleged offences did not occur in the theatre of war (Winthrop's first condition) (*Hamdan* at 600).

Finally, he argued, the alleged offence of conspiracy "is not tryable by law-of-war military commission" because it is not an offences in violation of the laws of war (the fourth of Winthrop's pre-conditions) (*Hamdan* at 600).

Stevens underscored that

> [t]he charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity (*Hamdan* at 612).

Thus, he argued

> Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an agreement the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime, but it is not an offense that "by the law of war may be tried by military commissio[n]" (*Hamdan* at 612).

On this basis, the Court found that the military commission convened to try Hamdan was not within the authority granted by Congress through the Art. 21 of the UCMJ. Hence, although the *Hamdan* Court followed the same procedural model

which the Court applied in *Quirin*, the Court found that the military commission was unlawful because the congressional authorization, which had underpinned the legality of the military commission at issue in *Quirin*, did not apply in Hamdan's case because, in contradiction to the allegations of brought against the petitioners in *Quirin*, the allegations brought against Hamdan were not triable by military commissions.

Finding against the government on the first issue, the Court proceeded to investigate the second issue: whether the commission itself was lawful. The Court also decided against the government on this second issue finding that "[w]hether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" (*Hamdan* at 613).

Like the first part of the Court's argument, the second part was based on a procedural model of emergency. The aim of the Court's analysis was thus to investigate whether the commission convened to try Hamdan could be found to be authorized by Congress. Key to answering this question was whether the procedural rules governing the military commission fulfilled the procedural requirements laid down in the UCMJ.

Stevens found that they failed to live up to the requirements in the UCMJ on at least two accounts.

Firstly, on account that the procedural rules governing the commission allowed that the accused and his civilian counsel may be excluded from any part of the proceeding and from learning about evidence presented during the time they were excluded.

Secondly, on account that any evidence which "would have probative value to a reasonable person" in the presiding officer's opinion may be admitted in the trial (*Hamdan* at 614). This implies that "testimonial hearsay and evidence obtained through coercion [is] fully admissible" (*Hamdan* at 614).[14]

To reach this conclusion, Stevens analyzed the Uniform Code of Military Justice and argued that the procedural rules governing trial by military commission were to be modeled on those governing trial by court martial. A court martial is a regularly constituted military court primarily used to try members of the armed forces for breaches against military law, while military commissions are ad hoc tribunals primarily used to try enemy combatants for breaches against the law of war. The legal protections offered by a court martial are more firmly fixed than those of military tribunals because the court martial is part of an integrated system of military justice that is regulated by Congress and enforced by the military through a system of established tribunals.

[14] Justice Kennedy, who joined most of Justice Stevens' opinion, did not join this analysis. In a concurring opinion, he emphasized the role of Congress as the only body authorized to judge when a military commission could legally be convened due to a military necessity. He underscored the strict procedural approach: "Congress, not the Court, is the branch in the better position to undertake the sensitive task of establishing a principle not inconsistent the national interest or international justice" (*Hamdan* at 655, Kennedy concurring).

Stevens argued that the procedures governing trials by military commission have historically been the same as those governing courts martial (*Hamdan* at 561). He argued that this historical precedence had established a "uniformity principle" according to which any departures from court-martial procedures "must be tailored to the exigency that necessitates it" (*Hamdan* at 561). According to Stevens, the uniformity principle therefore lends some procedural protections to trials by military commission by linking them to the established system of military tribunals such as the court martial.

In addition, Stevens argued, the uniformity principle is also mirrored in Article 36 of the UCMJ, which states in sections (a) and (b) that:

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article *shall be uniform insofar as practicable* and shall be reported to Congress (UCMJ, quoted in *Hamdan* at 639, emphasis added).

Analyzing these two provisions, Stevens underscored that "[t]he uniformity principle is not an inflexible one", and that "it does not preclude all departures from the procedures dictated for use by courts-martial" (*Hamdan* at 620). But, he also argued, "any departure must be tailored to the exigency that necessitates it" (*Hamdan* at 620).

Thus, Stevens did not argue that deviations from court-martial procedure can never be legally justified with reference to, for example, impracticability, but he insisted that no such impracticability had been demonstrated in Hamdan's case:

> [n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming arguendo that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial (*Hamdan* at 623).

On this basis, Stevens concluded that the procedure governing the military commissions convened to try Hamdan "lack[ed] the power to proceed because its structure and procedures violate [. . .] the UCMJ" (*Hamdan* at 560).

In a part of the opinion which was joined only by a plurality, Stevens also argued that the commission convened to try Hamdan was unlawful because it violated Common Article Three of the Geneva Conventions.

The Court's Geneva argument received a lot of attention because it is unusual for a federal court to rely on international authorities. However, according to Stevens' argument, the judicially enforceable authority of the Geneva Conventions derives

from the UCMJ: it is based not in the judicially enforceable authority of international law but in the authority vested in Congress through the constitutional war powers. He argued:

> [t]he UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the rules and precepts of the law of nations, including, inter alia, the four Geneva Conventions signed in 1949 (*Hamdan* at 613, internal quotations and citations omitted).

Common Article Three prohibits

> the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples (*Hamdan* at 613, Stevens quoting from Common Article Three).

Stevens argued that like the uniformity principle of the UCMJ, the demand in Common Article Three that trials against enemy combatants must be conducted by "a regularly constituted court" suggests that the procedure of military commissions be modeled, as far as practically possible, on an existing and integrated system of military justice, that is, court martial.

Stevens further argued that "[w]hile the term 'regularly constituted court' is not specifically defined in Common Article 3 [. . .]", the phrase is described in "commentary accompanying a provision of the Fourth Geneva Convention" to include "ordinary military courts" and "definitely exclud[e] all special tribunals" (*Hamdan* at 632).

Thus, on Stevens' interpretation, Common Article Three confirms the uniformity principle and dictates that the procedure for military commissions must conform to those laid down in the military system of justice to a reasonable extent. He concluded that "[a]t a minimum, a military commission can be regularly constituted by the standards of our military justice system only if some practical need explains deviations from court-martial practice" (*Hamdan* at 645, internal quotation marks omitted).

He further argued that Common Article Three's reference to "judicial guarantees which are recognized as indispensable by civilized peoples", must, as a minimum, "be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law", including the requirement "that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him" (*Hamdan* at 563 and 564).

On this basis, Stevens concluded that the procedural shortcomings of the commission violated both the uniformity principle laid down in the UCMJ and Common Article Three, which is enforced by Congress through UCMJ.

Stevens' argument is legally complex because it involves statutory interpretations, as well as interpretations of international law and of the common law of war. But the main thread which runs through the opinion is the requirement of congressional authorization tantamount to the procedural model of emergency jurisprudence as laid down in *Quirin*. While the government interpreted the result in

Quirin to be that Art. 15 of the Articles of War authorized any kind of military commissions the executive deemed appropriate, the Court insisted that the congressional authorization also set certain limitations. The elasticity of the procedural model is reflected in the fact that both the government and Court underpinned their conclusion through applying the procedural framework.

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Rasul v. Bush, 542 U.S. 466 (2004)

Chapter 8
Boumediene v. Bush

Boumediene[1] consolidates two cases, both of which were filed by a group of Guantánamo detainees. The petitioners were all aliens. They filed their petitions after the *Rasul*[2] Court decided that Guantánamo detainees had a statutory right to bring habeas corpus claims in United States federal courts. They all filed their habeas corpus claims in the United States District Court for the District of Columbia.

In a first set of cases, the petitions were dismissed because the Court found that the federal courts did not have jurisdiction to hear review the petitions. In a second set of cases, the cases were dismissed in part. On appeal, all cases were dismissed for lack of jurisdiction.

Thus, *Boumediene* like *Rasul* concerned the jurisdictions of federal courts to hear petitions for writs of habeas corpus filed by detainees held on Guantánamo Bay. In *Rasul*, the Court had found that detainees did have this right, which was why the *Boumediene* petitioners had filed their cases in the federal District Court. However, as mentioned, both the District Court and the Court of Appeals found that it did not have jurisdiction to hear these claims, this time due to legislation passed by Congress in response to the Court's previous rulings in *Rasul*, *Hamdi*[3] and *Hamdan*.[4] In the aftermath of these three cases, Congress had passed two acts that specifically limited the federal courts' jurisdiction to hear habeas claims brought by detainees: the Detainee Treatment Act (DTA)[5] passed in 2005 and the Military Commission Act (MCA).[6]

Both Acts contain jurisdiction-stripping provisions that limit detainees' access to the federal courts. The DTA § 1005(e) provides that "no court, justice, or judge shall have jurisdiction to [. . .] consider [. . .] an application for [. . .] habeas corpus filed

[1] 553 U.S. 723 (2008).
[2] 542 U.S. 466 (2004).
[3] 542 U.S. 507 (2004).
[4] 548 U.S. 557 (2006).
[5] 119 Stat. 2680, Pub. L. No. 109–148 (2005).
[6] 120 Stat. 2600, Pub. L. No. 109–366 (2006).

E. Hartz, *From the American Civil War to the War on Terror*,
DOI 10.1007/978-3-642-32633-2_8,

by or on behalf of an alien detained [. . .] at Guantánamo", and it gives the D.C. Court of Appeals "exclusive" jurisdiction to review decisions by the Combatant Status Review Tribunal (CSRT).[7] The MCA further explicitly denies "jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants". In addition, it provides that the amendments to the DTA that it introduces "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date [. . .] which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained [. . .] since September 11, 2001". Hence, it also covers petitioners in *Boumediene*, whose cases were pending when the Act was passed.

Both the DTA and the MCA "follow hard on the heels of the Court's decisions in *Rasul* and *Hamdan* with the purpose of extinguishing the procedural rights that these two cases had recognized" (Hartz and Kyritsis 2010, p. 167). By clearly expressing Congress' intent to limit habeas rights of detainees held on Guantánamo, the Acts undermined the statutory arguments in both *Rasul* and *Hamdan*. Therefore, while the issue in *Boumediene*—detainees' right to habeas hearings in the federal courts—was the same as in *Rasul*, the legal landscape was now dramatically different: there was now unambiguous legislation in place that went directly against the Court's ruling in both *Rasul* and *Hamdan*.

Boumediene therefore tested the limits of the procedural model of emergency jurisprudence, the model that had provided the argumentative framework for *Rasul* (in part), *Hamdi* (in part) and *Hamdan* (in full): given the exigencies that informed the issue, was the Court then obliged to defer to an explicit authorization from Congress overturning the Court's previous statutory findings, or would such an explicit authorization cause the Court to move beyond the procedural model and turn to the first-order rights issue as advocated in the rights model?

Because both *Rasul* and *Hamdan* were resolved on the procedural model, none of these cases reached the constitutional issue of whether the constitutional habeas clause, the Suspension Clause,[8] in and by itself provided habeas protections to detainees held on Guantánamo.

As Kyritsis and I have argued elsewhere: "The case therefore brought into sharp relief the institutional issue that was lurking in *Hamdan*, concealed behind the proceduralist language of the majority opinion, namely whether courts have the power in an emergency context to enforce their own view of the content of a constitutionally guaranteed individual liberty, such as the privilege of habeas corpus, that runs contrary to the view jointly held by the political branches" (Hartz and Kyritsis 2010 p. 167).

[7] Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal (July 7, 2004). As mentioned, the CSRT is a special tribunal set up by the government in response to *Rasul* and *Hamdi* to assess the enemy combatant status of detainees. The procedural rules divert substantially both from normal procedural rules of civil courts and from the procedural rules governing trial by court marshal.

[8] U.S. Const. Art. I, § 9, cl. 2.

By bringing the issue to the constitutional level, the Court would have to exceed the procedural analysis of congressional authorization and address the rights issue directly (Hartz 2010, p. 91). The questions looming large in *Boumediene* were therefore "[w]ould the Court pursue a procedural approach and simply defer to those interventions? Would it reinterpret congressional intent, so as to read away any content-based concerns raised by the government's detention policies? Or, would it directly address those concerns even in the teeth of explicit bipolar endorsement?" (Hartz and Kyritsis 2010, p. 167)

The Court resolved the case on a rights model. Further, as Kyritsis and I have argued elsewhere, even the two dissenting opinions issued in the case did not stop as the procedural issue, but proceeded to review the first-order rights issues (Hartz and Kyritsis 2010, p. 173). However, the rights model comes most clearly to expression in the opinion of the Court which is the focus of the following discussion.

8.1 Factual Background

Petitioners in *Boumediene* were all aliens that had been designated as enemy combatants and detained at Guantánamo Bay. Some of the petitioners "were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia" (*Boumediene* at 734). None of them were United States citizens but neither were any of them citizen of a nation at war with the United States (*Boumediene* at 734). All of the petitioners had been designated as an enemy combatant by the CSRT, though all of them denied being a member of the "al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda" (*Boumediene* at 734).

As mentioned, the petitioners had all filed petitions for habeas corpus in the District Court for the District of Columbia after the Court had ruled in *Rasul* that detainees held on Guantánamo Bay were entitled to habeas review in the federal courts. Both the District Court and the Court of Appeals had dismissed the petitions for lack of jurisdiction referring to the jurisdiction-stripping clauses in DTA and MCA.

Like in *Rasul*, the Court did not address the substance of petitioners' habeas claims, that is, whether the President had authority to detain petitioners or whether the writ should issue (*Boumediene* at 733). The sole question addressed by the Court was whether the lower courts correctly dismissed the cases for lack of jurisdiction. This question raised the issue of the constitutionality of the jurisdiction-stripping provisions in the DTA and MCA on the authority of which the lower courts had dismissed the petitions.

The DTA §1005, (e)(2)(A) provided that

> the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

The DTA §1005 (e)(1) further explicated that except as provided in the above provision

> no court, justice, or judge shall have jurisdiction to hear or consider [. . .] an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.

In *Hamdan*, the Court decided that Hamdan was not subject to the DTA because his case was pending at the time the provisions were passed. However in the MCA § 7(b), Congress provided that the DTA's limitations on jurisdiction should apply to all cases pending at the time the MCA was enacted.

Since the cases of the petitioners in *Boumediene* were pending when the MCA was passed, the lower courts had found that the petitions were subject to the jurisdiction-stripping clauses of the MCA. Further, because all of the *Boumediene* petitioners were designated enemy combatants held on Guantánamo, the lower courts had held that they were subject to the jurisdiction-stripping provisions of the DTA. This was the basis of the lower courts' decision to dismiss.

8.2 Opinion of the Court: Reverting to the Rights Model

Writing for the Court, Justice Kennedy began the opinion by articulating the legal question confronting the Court:

> [p]etitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantánamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause (*Boumediene* at 732).

The reason Kennedy found that this question was "not resolved by our earlier cases relating to the detention of aliens at Guantánamo" that is, *Rasul*, *Hamdi* and *Hamdan*, was that these cases had been resolved on statutory ground, and Congress had since passed both the DTA and the MCA that undermined the Court's statutory argument (Hartz 2010, p. 91).

Kennedy's analysis divided the legal question into three sub-questions:

1. Does the DTA and the MCA strip the federal courts of jurisdiction to hear the petitioner's cases?
2. If so, are petitioners barred from "invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantánamo Bay" (*Boumediene* at 739)?
3. If petitioners are not barred from invoking the protections of the Suspension Clause do the jurisdiction-stripping provisions in DTA and MCA, that bars the federal courts of jurisdiction to hear such claim, constitute an unconstitutional suspension of the writ?

Kennedy found that the answer to question 3 depended on whether the review procedures laid down in DTA provide an adequate substitute for federal habeas review. Thus, the fourth question the Court had to confront was:

4. Do the review procedures laid down in DTA provide an adequate substitute for federal habeas review?

Concerning question (1) "Does the DTA and the MCA strip the federal courts of jurisdiction to hear the petitioner's cases?" Kennedy argued that it did. He thus acknowledged that the MCA was enacted as a direct response to the Court's decision in *Hamdan*, and he recognized that the Court is obliged to recognize the MCA as a clear expression of congressional intent:

> [i]f the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. *If Congress amends, its intent must be respected even if a difficult constitutional question is presented* (*Boumediene* at 738, emphasis added).

Thus, while Kennedy recognized that the federal courts are under a duty to presume that Congress has considered the constitutional issues when passing a new piece of legislation, he also makes clear that the Court cannot allow congressional interpretations of the constitutional restrictions "to trump or neutralize their own independent responsibility to interpret the Constitution" (Hartz and Kyritsis 2010, p. 169). Here is a characteristic expression of this point:

> [t]he usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case (*Boumediene* at 738).

Reaching the conclusion that DTA and the MCA did in fact strip the federal courts of jurisdiction to hear the petitioner's cases, Kennedy proceeded to the second question: whether the jurisdiction provisions in the DTA and the MCA were constitutional.

This move took the argumentative framework from a procedural model to a rights model: from the question of congressional authorization to the question of constitutional protections of rights.

As Kyritsis and I have noted elsewhere, a

> hard-nosed proceduralist will say that such scrutiny oversteps the Court's constitutional powers and amounts to illegitimate second-guessing by courts of an issue that in an emergency rests squarely with the political branches (Hartz and Kyritsis 2010, p. 168).

The point we made in that article was that if the procedural model is interpreted radically, not only as an argumentatory framework, but also as a strict norm specifying the limits of the Court's authority, then, on the procedural model, the Court should not proceed beyond the procedural inquiry when deciding issues related to national emergency. As Kyritsis and I have noted elsewhere: "[f]or the [radical] proceduralist, when the political branches have spoken in one voice, the Court cannot intervene" (Hartz and Kyritsis 2010, p. 168). According to such a

radical procedural model of emergency governance, the only possible option for a court confronted with a clear congressional authorization of constitutionally dubious position is to (1) defer to the clearly expressed intent of both political branches or (2) to take advantage of the elasticity of the procedural model by simply interpreting the provisions at issue in a way that would make them compatible with what the Courts deems the constitutional requirements to be.

However, Kennedy specifically rejects this interpretational strategy:

> To hold that the detainees at Guantánamo may, under the DTA, challenge the President's legal authority to detain them, contest the CSRT's findings of fact, supplement the record on review with exculpatory evidence, and request an order of release would come close to reinstating the § 2241 [the federal habeas corpus statute] habeas corpus process Congress sought to deny them. The language of the statute, read in light of Congress' reasons for enacting it, cannot bear this interpretation (*Boumediene* at 792).

Kennedy's reason for rejecting this interpretational strategy is not only the questionable legal interpretation it would require to underpin it, he also specifically confronts the structural problems tantamount to stretching the elasticity of the procedural model to far:

> even if it were possible, as a textual matter, to read into the statute each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so (*Boumediene* at 792).

In other words, even if such a decision would be accepted, it would undermine the authority of Congress and jeopardize the constitutional separations of powers (Hartz 2010, p. 92).

What Justice Kennedy's remark emphasizes is that the procedural model does not exhaust the Court's obligation of review. Or, as Kyritsis and I have argued elsewhere: "the majority in *Boumediene* does not consider congressional authorization the be-all and end-all in the emergency context" (Hartz and Kyritsis 2010, p. 170).

Kennedy then addressed question (2): are petitioners barred from

> invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantánamo Bay? (*Boumediene* at 739).

After reviewing both the historic evidence and the legal precedence on the matter, Kennedy found that petitioners were not barred from invoking the protections of the Suspension Clause. While he found the historical arguments inconclusive, he found that restricting the reach of habeas review to places within the United States borders would undermine the constitutional separation of powers by allowing the Executive to turn constitutional limitations on and off at will. Therefore, Kennedy argued:

> [t]he necessary implication of the argument [that habeas protections stop at the United States borders] is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint (*Boumediene* at 765).

The point Kennedy is making is that once the federal court gives up its jurisdiction to hear habeas claims brought by detainees held outside United States borders in places where the government otherwise exercises sovereign control, the courts would have enabled a constitutional black whole, where the principle of separations of power and the constitutional protection of habeas corpus was put out of force.

On this basis, he refutes that such a scheme could be constitutional:

> [o]ur basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply (*Boumediene* at 727).

Therefore, he argues:

> [a]bstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is" (Boumediene at 765, internal references and quotation-marks omitted).

Kennedy's point is that the government's attempt to exclude Guantánamo detainees from the constitutional privilege of habeas is unlawful because it enables a construction of the constitution, which is not in accordance with its basic principle of separation of powers. Therefore, he answered the second question with a clear "no": petitioners are not barred from "invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantánamo Bay" (*Boumediene* at 739).

Finally he addressed the third and the fourth question: do the jurisdiction-stripping provisions in DTA and MCA constitute an unconstitutional suspension of the writ, or does the review procedures laid down in DTA provide an adequate substitute for federal habeas review (*Boumediene* at 771)?

The DTA authorized the use of the CSRT to determine for each particular detainee whether detention is warranted. Further, the DTA provided that the United States Court of Appeals for the District of Columbia Circuit was to have exclusive jurisdiction to hear habeas petitions on behalf of detainees. Finally, the DTA §1005 (e)(2)(C)(i) limited the Court of Appeals jurisdiction to consideration of

> whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals.

Thus, the authority of the Court of Appeals did not include jurisdiction to hear petitioner's claims on the merits, but only scrutiny of the standards and procedures employed by the CSRT.

The review procedure provided in the DTA did not provide an adequate substitute for federal habeas review according to Justice Kennedy, and he therefore found that the DTA and the provisions in the MCA effecting the DTA operated as an unconstitutional suspension of the writ.

To reach this conclusion, Kennedy first reviewed the legal history of the writ. Although he found that no definite rules could be devised on the basis of the historical evidence, he also argued that it was

> uncontroversial [. . .] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law (*Boumediene* at 779, internal quotations omitted).

Further, Kennedy argued, "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings" because lack of rigor naturally increases the risk of error (*Boumediene* at 781). Kennedy noted several problematic shortcomings in the rigor of the proceedings offered by the CSRT. In particular, he noted that:

1. Detainees do not have the assistance of counsel.
2. Detainees may not be aware of the most critical allegations that the Government relied upon to order his detention.
3. There are in effect no limits on the admission of hearsay evidence (*Boumediene* at 729).

Because the procedural protections offered by the CSRT were very limited, Kennedy argued that there was a "considerable risk of error in the tribunal's findings of fact" (*Boumediene* at 729). This risk of error, Kennedy argued, made the need for thorough habeas corpus review more urgent (*Boumediene* at 729). However, he found that the review offered by the Court of Appeals according to the DTA did not offer an adequate scope of habeas review given the shortcomings of the procedures governing the CSRT and also given the prospect of indefinite detention with which the detainees were faced. In particular, he noted as problematic that the Court of Appeals only had jurisdiction "to assess whether the CSRT complied with the standards and procedures specified by the Secretary of Defense and whether those standards and procedures are lawful" and hence does not have jurisdiction not to inquire into the legality of the particular detention itself (*Boumediene* at 777).

For this reason, Kennedy argued, the DTA did not permit the Court of Appeals to make requisite findings of fact (*Boumediene* at 788). Therefore, Kennedy concluded, the DTA review proceeding fell short of being a constitutionally adequate substitute for federal habeas review and the jurisdiction-stripping provisions of the DTA and MCA operated as an unconstitutional suspension of the writ (*Boumediene* at 789 and 792).

Reaching this conclusion, Kennedy's analysis went beyond the procedural model and reached the first-order rights issue. However, rather than embracing the uncompromised model of rights advocated by the *Milligan*[9] Court, he conceded that

> [a]lthough we hold that the DTA is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the

[9] 71 U.S. 2 (1866).

> detention in these cases was intended to prevent [. . .] the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ (*Boumediene* at 795).

However, he argued, such qualifications did not apply in *Boumediene* where

> six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions (*Boumediene* at 794).

In this way, he took care to emphasize that the Court's conclusion was tailored to the particular situation confronting petitioners. However, in spite of these qualifications, Kennedy's conclusion leaves no doubt that the above concession is not to be interpreted as a blank check to the government: the Suspension Clause constitutes a substantive protection of rights even in the face of national security threats.

To underpin this principle, Kennedy introduced Justice Holmes' famous vision of the habeas protection into the emergency context:

> Habeas corpus is a collateral process that exists [. . .] to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell" (*Boumediene*: 785, citing Holmes' dissenting opinion in *Frank v. Mangum*).[10]

In light of the case history reviewed in the previous chapters of this book and in spite of Kennedy's cautious reservations, it is therefore fair to say that Kennedy's opinion for the Court in *Boumediene* constitutes the strongest confirmation of the rights model ever issued by a Supreme Court during an ongoing conflict (Hartz 2010, p. 93).[11]

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[10] 237 U.S. 309 (1915), *Frank v. Mangum* concerned a petition for a writ of habeas corpus on behalf of a Leo Frank who was in custody in the state of Georgia and claimed to have been wrongly accused of murder and denied due process of law.

[11] Recall that *Milligan* was decided after the American Civil War had ended, see Chap. 2.

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Chapter 9
Concluding Remarks

The purpose of this book was to offer a comprehensive discussion of the United States Supreme Court's decisions concerning suspensions of basic liberties during armed conflicts from the American Civil War to the War on Terrorism.

In the first part of this book, I approached this task by discussing a set of Supreme Court emergency cases that are routinely cited in textbooks as well as by the Court itself. Through this discussion, I identified three basic models of emergency jurisprudence: the rights model, the procedural model and the extralegal model.

In the second part of this book, I employed the three models identified in Part I to discuss cases arising out of the Bush government's post-9/11 fight against terrorism.

The discussions in Part I as well as Part II illustrate a point made in the introduction, namely, that the Court's decisions in cases related to suspensions of basic liberties during national emergencies are notoriously inconclusive. As noted by Justice Jackson, this inconclusiveness is partly due to "the judicial practice of dealing with the largest questions in the most narrow way" (*Youngstown*[1] at 634). But it is also due to the fact that whenever the Court has sided with the government on national emergency issues, it has tried to reign in the possible scope of its own precedence by articulating its general obligation to uphold basic liberties. Thus, while siding with the government in *Ex Parte Quirin*,[2] which the Court itself has later argued "represents the high-water mark of military power to try enemy combatants for war crimes" (*Hamdan*[3] at 597), the Court noted that "the duty [...] rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty" (*Quirin* at 19). Likewise, while siding with the government in one of its most notorious decisions ever,

[1] 343 U.S. 579 (1952) I discuss this case in Chap. 4, Sect.4.3 (The Procedural Model and *Youngstown*).

[2] 317 U.S. 1 (1942) I discuss this case in Chap. 4, Sect. 4.2 (The Procedural Model and *Ex Parte Quirin*).

[3] 548 U.S. 557 (2006).

E. Hartz, *From the American Civil War to the War on Terror*,
DOI 10.1007/978-3-642-32633-2_9,

Korematsu v. U.S.,[4] the Court stressed that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject [such decisions] to the most rigid scrutiny" (*Korematsu* at 216). Furthermore, while voting *against* the President in *Youngstown Sheet & Tube Co. v. Sawyer*[5] which has since been heralded as "one of the most significant Supreme Court decisions *of all time*" because it determined "at a crucial juncture in the nation's political history" that "the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency" (Paulsen 2002, p. 215), the Court took care to note that, while the President could not unilaterally claim such power, "[t]he power of Congress to adopt such public policies as those proclaimed by the [presidential] order is beyond question" (*Youngstown* at 588).

The impression emerging from the terrorism cases discussed in Part II does little to reduce this inconclusiveness. In *Rasul*[6] the Court confirmed on the one hand that aliens held in places like Guantánamo Bay, where the government exercised complete jurisdiction and control, had a statutory right to the privilege of petitioning for writs of habeas corpus in the federal courts. But on the other hand, the opinion of the Court was notoriously unclear about what that right might entail. Further, while acknowledging in *Hamdi*[7] that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker" (*Hamdi* at 509), the Court also devised a set of minimum procedural standards based on the idea that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" (*Hamdi* at 533).

In addition, while finding in *Hamdan* that the military commissions convened by the government to try enemy aliens were in conflict with Common Article 3 of the Geneva Conventions, the Court also took care to note that "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems" (*Hamdan* at 634). Finally, while deciding against the Executive on the issue of military commissions in *Boumediene*,[8] the Court also emphasized that "[t]he law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security" (*Boumediene* at 797).

A consequence of this inconclusiveness is that it is extremely difficult to predict how Supreme Court decisions on emergency will play out in subsequent cases arising in a different context. The discussions in both Part I and Part II confirm this basic unpredictability. *Quirin*, which has been labeled the "high-water mark of

[4] 323 U.S. 214 (1944) I discuss this case in Chap. 3, Sect. 3.4 (Korematsu v. United States).

[5] 343 U.S. 579 (1952) I discuss this case in Chap. 4, Sect. 4.3 (The Procedural Model and *Youngstown*).

[6] 542 U.S. 466 (2004) I discuss this case in Chap. 5.

[7] 542 U.S. 507 (2004) I discuss this case in Chap. 6.

[8] 553 U.S. 723 (2008) I discuss this case in Chap. 8.

military power to try enemy combatants for war crimes" (*Hamdan* at 597), has played out repeatedly as a leverage for judicial review due to its rule of law rhetoric, even though this rule of law rhetoric arguably functions as pure dicta in the opinion. *Korematsu* and *Hirabayashi*, which have long since earned a place in the Supreme Court's "Hall of Shame" (Cole 2004, p. 1761) because of their racially biased conclusions, have played out in later cases as an important tool in the political struggle against racial segregation due to the principle of strict scrutiny and the dismissal of "racial antagonism" (*Korematsu* at 216) with which the justices wash their hands in the decisions.

These examples confirm the assumption that defines the focus of this book, namely, that we cannot fully comprehend the impact of the Court's decisions if we look to the specific legal conclusions alone. In order to correctly asses the possible legal implications of these cases, we need to take the methodological framework into account.

The ambition of this book has therefore not been to try to reduce the inconclusiveness of the Court's decisions or to pass normative judgments on what the law *is* or *should be* in cases related to suspension of rights during national emergencies. Instead, the aim of this book has been to create an overview of *how* such cases are decided by tracing *what methodological models* the Supreme Court's justices engage in these kinds of cases. In particular, the purpose was to trace how—or if—the Court's methodology adapts to national emergencies.

In the first part of this book, I argued that the jurisprudential models employed by the Court in paradigmatic emergency cases correspond to philosophical theories about how the state should govern in emergencies. Obviously, this correspondence does not in and by itself imply that the justices are consciously applying philosophical theories of emergency when they are dealing with issues related to emergency. More likely, the correspondence is rooted in the fact that the justices are confronted with the same kind of basic questions, which motivated classical philosophical theories of emergency governance. Thus, Supreme Court cases on emergency routinely bring questions about the status of individual rights, the limits on executive power and the role of the legislature to the fore. These questions thematize basic values of liberal democratic states. Therefore, the way the Court approaches these questions tells us something about the judiciary's role in defining, upholding and confirming such basic values. The case analysis presented in both the first and the second part of this book shows that legal disagreements, for instance between the Court and the dissent, can often be traced to the models of emergency jurisprudence employed. In other words, the justices opinion on *what the law is* seems to be closely tied in with the question of *how the justices says what the law is* or what argumentative framework they choose to engage.

By focusing on the Court's methodology, and on how the Court's methodological approach shapes the particular legal issues at stake, this aim of this book has therefore been to create an overview of the Court's emergency decisions that help the reader relate the complex legal issues at stake in these cases to basic philosophical discussions about the basic values of liberal democratic states.

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