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# FROM *MILLIGAN* TO *BOUMEDIENE*: THREE MODELS OF EMERGENCY JURISPRUDENCE IN THE AMERICAN SUPREME COURT

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**ABSTRACT**

This article aims to bring philosophical and legal aspects of the discussions of the problem of emergency together by employing classic philosophical views on the problem of emergency to categorize dominating paradigms of legal interpretation in the American Supreme Court.

In the first part of the article I review the American Supreme Court's case-history and single out three dominating legal paradigms for interpreting the problem of emergency: *the rights model, the extra-legal model* and *the procedural model*. I argue that the procedural model has been by far the most influential.

In the second part of the article I ask how this precedence has played out in the context of terrorism cases. I argue that the first four cases that were brought against the government confirmed the procedural model as the Court's primary model for evaluating legal problems related to emergencies. But I also argue that the Court's latest decision on this issue, *Boumediene v. Bush* from 2008, introduces a shift from the previous general

tendency to rely primarily on a procedural model towards including substantial rights concerns.

**KEYWORDS**

The Supreme Court of the United States of America, problem of emergency, terrorism, rights, war

## INTRODUCTION

9/11 stirred renewed reflection on the problem of balancing security and rights during national emergencies. This was the case within both philosophy and law. In the spirit of this special edition of the *Baltic Journal of Law and Politics* this article aims to bring the two aspects of the discussions together by employing classic philosophical views on the problem of emergency to categorize dominating paradigms of legal interpretation in the American Supreme Court.

In the first part of the article I employ philosophical categories framed by Constant, Locke and Machiavelli to single out three legal paradigms for interpreting the problem of emergency in the American Supreme Court. I have labeled the three paradigms *the rights model, the extra-legal model* and *the procedural model*. I argue that these three paradigms can be shown to have dominated the jurisprudence of the American Supreme Court through changing armed conflicts from the Civil War until today. But I also argue that the procedural model has been by far the most influential.

In the second part of the article I ask how this tradition has played out in the context of the terrorism cases. I argue that the first four cases that were brought against the government confirmed the procedural model as the Court's primary model for evaluating legal problems related to emergencies. But I also argue that the Court's latest decision on this issue, *Boumediene v. Bush* from 2008, introduces a shift from the previous general tendency to rely primarily on a procedural model towards including substantial rights concerns. Thereby *Boumediene* re-actualizes the rights model.

A major part of the literature on the problem of emergency since 9/11 has been devoted to the view that the terrorism conflict triggers a radical change in the usual legal order and challenges previously existing legal paradigms of emergency governance.

In a memorandum from 2002, the government stated: "the war against terrorism ushers in a new paradigm" and argued that previous paradigms of international law do not apply in this new kind of conflict.[1]

Writers critical of the Bush government have warned that its response to the problem of terrorism upsets "the historic balance between power asserted and

[1] White House Memorandum on Humane Treatment of Taliban and al Qaeda Detainees from February 7, 2002.
Former legal advisor to the government John C. Yoo has followed through on this statement in numerous academic articles. *See* for instance John C. Yoo, "Courts at War." *Cornell Law Review* Vol. 91, Issue 2 (2006); John C. Yoo, "War and the Constitutional Text." *University of Chicago Law Review* Vol. 69, Issue 4 (2002); John C. Yoo, "Judicial Review and the War on Terrorism." *George Washington Law Review* Vol. 72, Issues 1-2 (2003); John C. Yoo and James C. Ho, "The Status of Terrorists." *Virginia Journal of International Law* Vol. 44, Issue 1 (2003).

power restrained" and that "the Administration claims all the authority that could conceivably flow to the executive branch during a time of armed conflict, but accepts none of the restrictions;"[2] or, on a more radical note, that the Bush government's Guantanamo policy(s) "radically erases any legal status of the individual" and renders detainees the "object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight."[3]

However, if one investigates how the terrorism conflict has played out in the courts, a different picture emerges. The case history related to the war on terrorism in fact constitutes a set of historic blows to the administration's war policies in the midst of an armed conflict. Furthermore, an analysis of the Court's reasoning in terms of the three philosophical models I propose reveals a willingness to scrutinize substantial rights concerns to a degree that has not been seen in such cases since the end of the Civil War. To understand the significance of this shift, we need first to look at the history of the problem of emergency in the American Supreme Court.

## 1. THE RIGHTS MODEL

The most famous American Supreme Court case related to the problem of emergency is the case *Ex Parte Milligan* from 1866. It is famous because of its ringing endorsement of the unchanging nature of fundamental constitutional rights. In a much-quoted paragraph, in the opinion of the Court Justice Davis uncompromisingly confirms 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.[4]

*Milligan* was decided just after the Civil War and concerned the use of military commissions to try civilians during the war. The Court held against the government

[2] Joseph Margulies, *Guantánamo and the Abuse of President Power* (New York: Simon & Schuster, 2006), p. 13.
[3] Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005 (2003)), p. 3.
[4] *Milligan, Ex parte,* 71 U.S. 2, 1866, U.S., 1866, at 76 [emphasis added, hereafter *Milligan*].

and articulated the doctrine that war and national security never provides a legal argument for suspending constitutional rights.[5]

The decision mirrors an intuition that is common among rights advocates, namely that rights are an expression of a fundamental and absolute value and that the very idea that rights can be set aside therefore misconceives the very meaning of rights. One of the clearest expressions of this view is to be found in the writings of the Swiss-born philosopher Benjamin Constant (1767-1830). He 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."[6] He 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."[7] He underpinned this view with the argument of the slippery slope as well as the argument that while compromises on rights might seem to serve their purpose in the short run, they would strengthen the enemy in the long run and thus be counterproductive 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

> There 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. Two 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.[8]

It is rare to find such an uncompromised adherence to rights in the philosophical literature and it is important to note that Constant was addressing the public in the aftermath of the French revolution, where Robespierre's Reign of

[5] Its model of emergency jurisprudence has been labeled the "business as usual doctrine" by Gross and Ní Aoláin to signify the unchanging nature of rights that is promoted in the Court's opinion. See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).
[6] Benjamin Constant, *Political Writings*, trans., ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), p.134.
[7] *Ibid*., p. 136.
[8] *Ibid*., p. 135 and 136.

Terror had revealed with terrifying clarity the possible results of compromising rights in the immediate situation even if the purpose was to secure the continued reign of a liberal republic.

## 2. *EX PARTE MILLIGAN*

Justice Davis' ringing endorsement of rights was written in the aftermath of another war which had taken more than 600.000 American lives. Davis' confirmation of an uncompromised rights model is a clear reaction against the administration's expansive interpretation of the President's constitutional war-powers and draws on some of the same intuitions as Constant, namely that compromises on rights are self-defeating because they endanger the very liberal values they are supposed to protect.

The case concerned the jurisdiction of a military commission that had been convened to try a civilian, Lambdin P. Milligan, for accusations of plans to conspire against the United States in connection with the Civil War. In 1864, while the war was still going on, Milligan had been arrested by the military while at home in Indiana. Less than three weeks later, he was brought before a military commission, where he was tried, found guilty and sentenced to be hanged.[9] He appealed the judgment to the federal courts, arguing that the military commission did not have jurisdiction and that, as a citizen of America and a civilian, he had a constitutional right to a trial by jury.[10] The case did not reach the Supreme Court until after the end of the war. When the case finally was heard, the Court decided against the government and ordered the immediate and unconditional release of Milligan.

While the use of military tribunals to try civilians, which was at issue in the case, had not been used on a massive scale to infringe rights, the theory of emergency that the Government promoted to defend its use of military tribunals suggested that the curtailment of rights was a legitimate governmental means of protecting national security during a crisis. In the brief for the government it was argued:

> After 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.*

[9] William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartimes* (New York: Knopf, 1998), p. 75.
[10] *Milligan*, *supra* note 4, at 68.

> 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.'[11]

Thus, rather than defending the trial by military commission of Milligan on a narrow basis, the government's brief set-out to defend an expansive interpretation of the president's war powers in general.

Writing for the Court, Justice Davis resolved the question of the legality of Milligan's trial by military commission on purely statutory grounds with reference to an act passed in March 1863 in which Congress had sanctioned a limited suspension of habeas corpus.[12] But, as the above quote illustrates, the opinion also went well beyond the narrow question of whether the military commission had jurisdiction to try Milligan and included a rebuff of the government's general theory of emergency.[13]

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."[14] 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."[15]

If this continuity of law is not secured, he 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.[16]

[11] *Milligan*, *supra* note 4, at 18 [Brief for the Government, emphasis added].
[12] The name of the March 1863 Act was "An Act relating to habeas corpus, and regulating judicial proceedings in certain cases".
[13] Davis' "ringing endorsement of civil liberty" has also been accused of being unrealistic and hypocritical since the principled reasoning of the case, which was decided after the war had ended, stands in stark contrast to some of the decisions handed down by the Court while the war was still ongoing (Norman W. Spaulding, "The Discourse of Law in Time of War: Politics and Professionalism during the Civil War and Reconstruction," *William & Mary Law Review* Vol. 46, Issue 6 (2005)).
[14] *Milligan*, *supra* note 4, at 79.
[15] *Ibid*., at 78.
[16] *Ibid*.

Based on Davis' right-based model of emergency, there is no such thing as an intermediary break in the rule of law; either it reigns or it does not, and any compromises on constitutional provisions signal the breakdown of the legal order: "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[17]

In spite of *Milligan's* clear articulations of the jurisprudential principles that ought to govern the Court's decision-making in emergencies, the influence of the decision has been limited. As Issacharoff and Pildes have argued and as the following analysis of paradigmatic cases confirm, the American Supreme Court has since resolved emergency issues primarily along the lines of a procedural model.[18] Tellingly, one of the most cited passages from *Milligan* is actually from a concurring opinion written by 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.[19]

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 which has been viewed by some to be counter-productive. An example is Justice Jackson's evaluation of the scope of the war powers in *Youngstown Sheet & Tube Co. v. Sawyer* from 1952 where he explicitly notes that

> I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.[20]

[17] *Ibid*., at 80.
[18] Issacharoff and Pildes use the term "process-based approach" to signify a jurisprudential strategy similar to what I have termed "the procedural model" (*see* Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights at Wartime," *Theoretical Inquiries in Law* Vol. 5, Issue 1 (2004)).
[19] *Milligan*, *supra* note 4, at 88.
[20] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, U.S. 1952, at 873 [hereafter *Youngstown*].

## 3. THE EXTRA-LEGAL MODEL

During the first weeks of the American Civil war, before Congress had been able to assemble, President Lincoln ordered the writ of habeas corpus to be partially suspended. The American Constitution allocates the power to suspend habeas corpus to Congress alone, and Lincoln's unilateral decision to suspend the writ therefore arguably constituted an extra-legal act. In a later speech, he pleaded that Congress would sanction this unilateral and unconstitutional suspension of the writ. Lincoln's words capture the ethos of the extra-legal model of emergency governance in a nutshell:

> [...] 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.[21]

At the heart of this dilemma is the idea that situations may occur where public officials seem to be faced with a choice between obeying the law and responding effectively to a security threat. The extra-legal solution to the dilemma articulated by Lincoln is to embrace the idea that an executive decision to act outside the law may sometimes be legitimate if it appears to be the only solution to a clear and present danger.

In *Two Treaties of Government* John Locke (1632-1704) provides one of the most famous discussions of the extra-legal model of emergency-governance. Here he argues that a ruler possesses a legitimate "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[22] Locke called this power "the prerogative".[23]

Notably, Locke 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:

> […] 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

[21] *Cited in* Andrew C. McLaughlin, *A Constitutional History of the United States* (Simon Publications, 2001), p. 622.
[22] John Locke, *Two Treaties of Government* (London: Everyman, 1993 (1689)), p. 198.
[23] *Ibid*.

> is a latitude left to the executive power, to do many things of choice, which the law do not prescribe.[24]

While the extra-legal model of emergency-governance is intuitively clear, it translates badly into a principle of jurisprudence, because the job of the court is always to say what the law is,[25] not what the reasonable or morally defensible solution to a given problem is. The government's brief in *Milligan* constitutes a rare example of a legal argument based on this model and, as noted above, the Courts responded with a rigid confirmation of the rights model. This is not surprising since asking a court to sanction the extra-legal model of jurisprudence is tantamount to asking it to step outside its role as a court of law.

However, in two notorious cases, *Hirabayashi v. U.S*[26] from 1943 and *Korematsu v. U.S*[27] from 1944 the Court arguably did come close to promote something like an extra-legal model of emergency. While it did not sanction the idea that the law recedes completely during emergencies, it did argue that "pressing public necessity" might sometimes create a special sphere of law, where usual principles of scrutiny do not apply.[28]

## 4. THE JAPANESE INTERNMENT CASES

Both *Hirabayashi* and *Korematsu* concerned the exclusion and detention policies that were enforced on the West Coast in the aftermath of the Pearl Harbor attacks in 1941. These policies resulted in the detention of 120,000 Japanese Americans, 70,000 of which were American citizens.[29] In coram nobis hearings during the Eighties the Court of Appeals for the Ninth Circuit revealed

> [...] that there could have been no reasonable military assessment of an emergency at the time, that the orders were based upon racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens."[30]

The racially based detention was propelled into action through a number of Presidential Orders that authorized "exclusion" "removal" and "relocation" of people living in designated areas on the West Coast.[31] The presidential orders were sanctioned by Congress through the Act of March 21, 1942, which made it a

[24] *Ibid*.
[25] Which is the literal meaning of the term 'jurisdiction'.
[26] *Hirabayashi v. U.S.,*320 U.S. 81, 63 S.Ct. 1375, U.S. 1943 [hereafter *Hirabayashi*].
[27] *Korematsu v. U.S.,* 584 F.Supp. 1406, D.C.Cal., 1984 [hereafter *Korematsu*].
[28] *Ibid.*,, at 194.
[29] Michi Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (Seattle: University of Washington Press, 1996), p. 86.
[30] *Hirabayashi*, *supra* note 26, at 593.
[31] For a detailed discussion of all the cases that arose out of the detention policies *see* Emily Hartz, *The Zone of Twilight*, PhD thesis, Aarhus University, 2009.

criminal offence for anyone to disobey executive exclusion orders issued in special 'military zones'.[32] Both Hirabayashi and Korematsu were convicted of felonies for failing to report to the local control stations and assembly centers, which were set up to organize the detentions.

In the two mentioned cases, both of which have long since been designated to the Supreme Court's Hall of Shame, the American Supreme Court upheld the conviction of Hirabayashi and Korematsu.[33] Justice Stone wrote the opinion for the Court in *Hirabayashi.* He acknowledged that, "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[34] 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.[35]

This principle has no direct constitutional underpinning.[36] Consequently, Justice Stone cited no constitutional provision to underpin his interpretation of the legal framework, which would apply during a "time of war and threatened invasion." Instead he rolled up the facts of the Pearl Harbor attack to lend a sense of urgency to the argument and argued 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."[37]

Justice Black wrote the Court's opinion in *Korematsu*. He invoked the same kind of logic as Justice Stone to argue that while "racial antagonism" can never justify legal restrictions targeted at a single racial group, "[p]ressing public necessity may sometimes justify the existence of such restrictions" and, as Justice Stone, he cited no constitutional provisions to underpin this principle.[38]

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[32] *See* Maurice Alexandre, "Wartime Control of Japanese-Americans," *Cornell Law Quarterly* Vol. 28, Issue 4 (1943): 386; as well as the Supreme Court's account of events in *Hirabayashi*, *supra* note 26, at 85 *et seq*.

[33] *Korematsu* in particular, which upheld the government's curfew policies long after these policies had merged into a scheme of mass detention, has since been publicly denounced by currently sitting justices of the Supreme Court, who have called it "a mistake" or taken to task for giving "a pass for an odious, gravely injurious racial classification" (Eric L. Muller, "Inference or Impact? Racial Profiling and Internment's True Legacy," *Ohio State Journal of Criminal Law* (2003): 107, citing from the case *Adarand Constructors, Inc. v. Pena*, U.S., 1995).

[34] *Hirabayashi*, *supra* note 26, at 1385.

[35] *Ibid*.

[36] Even though Justice Stone's notion of "time of war and threatened invasion" may be said to paraphrase the Suspension Clause's notion of "cases of rebellion or invasion", the issue in *Hirabayashi* did not concern Congress' power to suspend the privilege of *habeas corpus*. Congress had not invoked the Suspension Clause, and the Court had constructed the problematics of the cases so as not to be related to the issue of detention without trial in any legally relevant way.

[37] *Hirabayashi*, *supra* note 26, at 1382.

[38] *Korematsu*, *supra* note 27, at 194.

The logic of emergency that was introduced in these cases was strongly criticized in a dissenting opinion written by Justice Jackson.[39] He famously 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."[40]

What is particularly interesting in Jackson's opinion, is his careful reflection on the role of the courts *vis-à-vis* the other branches of government during emergencies. He argues 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.[41]

In this way the only justice who distanced himself clearly from Stone and Black's rhetoric of emergency at the same time came close to advocating the legitimacy of a Lockian principle of extra-legal emergency power, as long as this principle was not introduced as a legal norm.[42] But while he did articulate this constitutional vision in his dissent, he also took care not to sanction it in his role as a justice on the bench. He refuted the government's legal interpretation, arguing 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. A military order, however unconstitutional, is not apt to last longer than the military emergency. [...] But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.[43]

Because of the wide repudiation of the Japanese internment cases it is unlikely that the principle of pressing public necessity, on which they were decided,

[39] There were three justices who dissented in *Korematsu*. The other two dissents focused on the clear racial antagonism that underpinned the detention policies and not on the problem of an extra-legal model of emergency (*see e.g.* Emily Hartz "They Had Good Reasons to Hate Us, so We Had Good Reasons to Fear Them"; in: Gry Ardal and Jacob Bock, eds., *Spheres of Exemption, Figures of Exclusion* (Aarhus: NSU Press, 2010)).
[40] *Korematsu*, *supra* note 27, at 207.
[41] *Ibid*.
[42] Jackson noted that "[t]he chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history," thus seemingly implying that political prudence should sometimes overrule constitutional restraints in executive decision making (*see ibid.*, at 208).
[43] *Ibid.*, at 207. Jackson argued that *Hirabayashi* illustrates this point (*ibid.*, at 246). In addition he argued that, in spite of the Court's attempt to limit the scope of *Hirabayashi*'s precedence, "the principle of racial discrimination is [now] 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" (*see ibid*., at 247).

will ever be cited as good law. [44] The recent terrorism cases may be said to have proven this point, because even though the government argued in *Rasul* 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 internment cases.[45]

## 5. THE PROCEDURAL MODEL

In the work *Discourses on Livy* Niccolò Machiavelli (1469 - 527) warned against extra-legal models of emergency governance as potentially devastating for a government. He argued instead that a republic should always develop a system of checks and balances that would apply in emergencies:

> For 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.[46]

Modern writers have since taken up this procedural model of emergency governance as a key to securing proportionate governance during emergencies.[47] The basic idea of modern versions of the procedural model is that dividing the decision-making power facilitates a response that is both effective and fair. However, when Machiavelli articulated the above warning, the checks he had in mind was not a permanent legislative body, but instead a division of the executive

[44] 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 (*see* Emily Hartz, *supra* note 31).

[45] In these cases the government tried instead to underpin its attempts at extra-legal reasoning with a set of cases decided during the Civil War known as "the Prize cases". The official name of these consolidated cases is *The Amy Warwick,* 67 U.S. 635, 1862, U.S., 1862.
In the 2006 case *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S.Ct. 2749, U.S., 2006 [hereafter *Hamdan*] the Brief for the Government quoted the Prize-cases 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* at 24, Brief for the Government).
In the 2004 case *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, U.S., 2004 [hereafter *Hamdi*] 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, the President's authority to wage war is not dependent on "any special legislative authority" (*ibid.*, at 19 [Brief for the Government, quoting from *Prize*]). For a detailed discussion of this issue *see* Rasmus Ugilt and Emily Hartz, "The Problem of Emergency in the American Supreme Court," *Law and Critique* [forthcoming] Vol. 22, Issue 3 (2011).

[46] Niccolò Machiavelli, *Discourse* (London, Penguin Books, 1984 (1517)), Chapter 34.

[47] *See*, *e.g.*, John Ferejohn and Pasquale Pasquino, "Law of Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* Vol. 2, No. 3 (2004); and Oren Gross and Fionnuala Ní Aoláin, *supra* note 5).

decision-making power modeled on the Roman institution of the dictator.[48] When Machiavelli argued in favor of developing a formal process for dealing with emergencies he had this institution in mind.[49] Furthermore, his 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.[50] In modern liberal democracies however the continuance of a certain form of government has an implicit normative goal, namely the continued recognition of democratic values including some set of individual rights.[51] Modern proponents of the procedural model of emergency argue therefore that separation of powers enables emergency decisions to be tailored to the specific needs posed by a particular threat, while also recognizing the need to limit executive discretion in order to hinder overreactions such as excessive suspensions of individual rights.

In the article "Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime", Issacharoff and Pildes argue that procedural concerns have come to define the main jurisprudential strategy for resolving issues of emergency in the American 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.[52]

In this sense, the two authors argue, the courts "have tied their role to that of the more political branches",[53] and they "have shown great reticence about

[48] 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* John Ferejohn and Pasquale Pasquino, *supra* note 47).

[49] The influence of Machiavelli's analysis of the Roman institution of dictatorship can be traced to the discussions of emergency powers held by e.g. Rousseau (*Du contrat social*); Schmitt (*Die Diktatur*); and Rossiter (*Constitutional Dictatorship*). The literature on emergency after 9/11 continues to refer to the Roman dictatorship as a basic model for emergency governance. *See*, *e.g.*, Bruce Ackerman, "The Emergency Constitution," *Yale Law Review* 113(5) (2004); J John Ferejohn and Pasquale Pasquino, *supra* note 47; Oren Gross and Fionnuala Ní Aoláin, *supra* note 5).

[50] 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" (Niccolò Machiavelli, *The Prince* (Cambridge: Cambridge University Press, 2005 (1515)), Chapter XVI).

[51] 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 even during emergencies as a means to secure liberal values. For a detailed discussion *see* Louis Fisher, *Presidential War Power* (University Press of Kansas, 2004), pp. 1 and 8.

[52] Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights at Wartime," *Theoretical Inquiries in Law* Vol. 5, Issue 1 (2004), p. 2.

engaging the permissible scope of liberties in direct first-order terms".[54] Pildes' and Issacharoff's interpretation is confirmed by a closer look at some of the paradigmatic cases on emergency in the case history of the American Supreme Court.[55]

### 6. *YOUNGSTOWN*

The 1952 case *Youngstown Sheet & Tube Co. v. Sawyer* is probably the American Supreme Court's strongest confirmation of the inherent legislative nature of the war. The case concerned the running of American steel mills during the Korean War. The background of the Korean War was the Cold War, and the national security issue at stake was the threat of communist aggression. The production of steel was vital for the war effort. 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,[56] the steelworkers' Union gave notice of a nation-wide 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.[57]

The steel companies immediately brought proceedings against the president and the case quickly speeded its way to the Supreme Court. Truman notified Congress of his actions shortly thereafter; however, Congress neither sanctioned Truman's seizure nor condemned it. The question at issue in the case therefore tested the principle of separation of powers: in the absence of direct congressional authorization, could the president assert the power, "to rule by decree in a field – industrial seizure – customarily controlled by Congress" with reference to his role as commander in chief and the necessity to protect national security.[58]

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[53] *Ibid.*, at 44.
[54] *Ibid*.
[55] In fact most of the standard textbook cases on emergency law exemplify the process-based approach.
[56] 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.
[57] *Youngstown*, *supra* note 20, at 865. 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).
[58] Arthur Meier Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 2004 (1973)), p. 142

Justice Black wrote the opinion for the Court, arguing that Truman had neither authority granted to him by Congress nor, in the absence of congressional authorization, independent constitutional authority to order the seizure of the steel mills. Five justices concurred in Black's opinion for the Court.[59] 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."[60] He found that Congress had defined the legal means available to the government in the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Act) which regulates certain union activities, permits suits against unions for proscribed acts, prohibits certain strikes and boycotts, and specifically provides steps for settling strikes involving national emergencies.[61]

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.[62]

Black's opinion thus stands as a clear and uncompromised confirmation of the procedural model to emergency governance in the US. And *Youngstown* is rightly celebrated for constituting

> […] 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.[63]

Nevertheless, the fact that the Court decided against the president in Youngstown does not imply that the procedural model will always function in practice as a curb on unilateral presidential decisions to suspend rights during emergencies. This fact is illustrated by an earlier Supreme Court case *Ex Parte Quirin.*

[59] The *Youngstown* case nevertheless consists of no less than seven different opinions because each of the five concurring justices also wrote separate 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 (*see also* Emily Hartz, *supra* note 31).
[60] *Youngstown*, *supra* note 20, at 866.
[61] *Ibid*.
[62] *Ibid*., at 867.
[63] Michael Stokes Paulsen, "Youngstown Goes to War," *Constitutional Commentary* Vol. 19, Issue 1 (2002): 218 [emphasis in original]. This observation may be read as an indirect rebuff to the significance of the Court's celebrated defence of the rule of law in *Milligan.*

### 7. *EX PARTE QUIRIN*

*Ex Parte Quirin* was a challenge against President Roosevelt's authority to convene ad hoc military commissions inside the US to try eight German saboteurs (one of whom was an American citizen) during the course of the Second World War. Roosevelt's decision to convene the commissions was not directly sanctioned by Congress and the procedure of the commission was later criticized for being strictly controlled by Roosevelt, who "had indicated his intent to execute these saboteurs regardless of any contrary judicial order."[64] The Court decided the case in favour of Roosevelt. However, instead of arguing that Roosevelt, as commander in chief, had unilateral power to convene the commissions, the Court relied on a rather heavy-handed interpretation of an ambiguous statute, Art.15 of the Articles of War, 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.[65]

Justice Stone's argument for the unanimous Court proceeded through three main 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.[66]

The next step of the argument 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.[67] To establish the first step 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."[68]

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 this step enabled the Court to decide in favour of

[64] Robert J. Pushaw, Jr., "The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review," *Notre Dame Law Review* Vol. 82, Issue 3 (2007): 1035.
[65] Ibid at 1036.
[66] *Quirin, Ex parte,* 317 U.S. 1, 63 S.Ct. 2, U.S., 1942, at 11 [hereafter *Quirin*].
[67] 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."
[68] *Quirin*, *supra* note 66, at 11.

Roosevelt while still upholding the principle of separation of powers as the key to interpreting the legal implications of the problem of emergency.[69]

In spite of the fact that Congress had not sanctioned Roosevelt's commissions 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." [70] 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.

As has been pointed out by commentators, it is not clear how this indirect inference came to be an explicit authorization, and the Court's interpretation has subsequently been questioned. 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."[71] 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."[72] Sixty-four years later even the Court itself chooses to label the decision as "controversial".[73]

In the context of emergency jurisprudence, the fact to be noted however is that the Court 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. With the use of a "clever interpretation" of an ambiguous statute,[74] the Court managed to avoid the necessity of dealing with the question of whether, "presidential authority itself sufficed to establish military commissions", but instead emphasises the role of Congress.[75]

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

[69] *Ibid*., at 11.
[70] *Ibid*.
[71] Robert J. Pushaw, Jr., *supra* note 64: 1036.
[72] *Cited in* Clinton Lawrence Rossiter and Richard P. Longaker, *The Supreme Court and the Commander in Chief* (Ithacam N.Y.: Cornell University Press, 1976 (1951), p. 115.
[73] *Hamdan*, *supra* note 45, at 2774.
[74] As Pushaw ironically phrases it (Robert J. Pushaw, Jr., *supra* note 64: 1036, note 136).
[75] A. Christopher Bryant and Carl Tobias, "Quirin Revisited," *Wisconsin Law Review*, 2003: 327; Robert J. Pushaw, Jr., *supra* note 64: 1036, note 136).

otherwise infamous crime", did not apply to military tribunals.[76] Once the Court had confirmed 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 that is on the procedural model of emergency governance.

Therefore, although the Court decided in favour of the government, it simultaneously confirmed the importance of the principle of separations of powers as the key to interpreting cases related to the problem of emergency. As a result, this case – which has been characterized as "highly questionable ex parte arm-twisting by the executive" by commentators[77] – has in fact played out in the terrorism context as a check on executive discretion. An example of this is the 2006 case *Hamdan v. Rumsfeld*, 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."[78]

Therefore, while the decision can – and has been – criticized for being driven by purely pragmatic concerns and providing a smokescreen for a constitutionally problematic result, the Court's struggle to tie the argument in with the principle of separations of power bears witness to the procedural model as key to understanding emergency jurisprudence in the US.[79]

But of course the case also proves a more pessimistic point: that the principle of separation of powers is by no means a security against infringements on rights during emergencies.

## 8. THE TERRORISM CASES

The recent terrorism conflict added a new set of concrete dilemmas to the Court's evaluation of the problem of emergency.

While the Bush administration's approach to the balance between security and rights is well documented elsewhere,[80] the interesting question to ask in the context of this article is how the Supreme Court responded to the administration's approach.

[76] *Quirin*, *supra* note 66, at 16.
[77] Pushaw, Jr., *supra*: 1036.
[78] *Hamdan*, *supra* note 45, at 2773.
[79] *See*, *e.g.*, Robert J. Pushaw, Jr., *supra* note 64, and Clinton Lawrence Rossiter and Richard P. Longaker, *supra* note 72.
[80] *See*, *e.g.*, Benjamin Wittes, *Law and the long war* (London: Penguin Books, 2009).

So far, the Supreme Court has heard five cases testing the government's balance between security and rights in the face of threats from terrorism.[81] While there is disagreement about the broader implications of the courts decisions,[82] it is undeniable that the government suffered a rare set of defeats in the midst of an armed conflict.

In *Rasul v. Bush* from 2004 the Court answered the question of whether any law applied to Guantanamo with a yes: Guantanamo was not completely removed from oversight by the Courts; detainees held in Guantanamo had a statutory right to a judicial review of the legality of their detention by the federal courts. In a part of the opinion, which was joined by a plurality, not a majority, the Court even went as far as arguing that the commission convened to try Hamdan was unlawful because it violated Common Article Three of the Geneva Conventions.[83]

The case *Hamdi v. Rumsfeld*, also from 2004, tested the legality of the government's detention of a United States citizen suspected of being a terrorist captured abroad and detained on United States soil. While not granting Hamdi all the legal protections he had requested, the plurality concluded 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.[84]

*Rumsfeld v. Padilla*[85] (also from 2004) raised the issue of how far the government's use of the enemy combatant label could be stretched by questioning whether an American citizen apprehended on American soil far from any traditional battlefield could lawfully be designated and treated like an enemy combatant.[86] The Court remanded the case on technical grounds, whereafter the administration decided to try Padilla in a criminal court rather than risk another defeat in the Supreme Court by pushing the enemy combatant issue.

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[81] Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," *Yale Law Journal* Vol. 111, Issue 6 (2002). In 2004, the Court decided *Rasul v. Bush* 542 U.S. 466 (2004) [*Rasul*], *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) [*Hamdi*] and *Rumsfeld v. Padilla*, 124 S.Ct. 2711 [*Padilla*]. In 2006, it decided *Hamdan v. Rumsfeld* 126 S.Ct. 2749 [*Hamdan*"]. The last in this line of cases is *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) [*Boumediene*].

[82] *See*, for instance, discussion about the implications of *Rasul* in Paul Taylor, "The Historical and Legal Norms Governing the Detention of Suspected Terrorists and the Risks Posed by Recent Efforts to Depart from Them," *Texas Review of Law & Politics* Vol. 12, Issue 2 (2008): 245; Steven R. Shapiro, "The Role of Courts in the War against Terrorism: A Preliminary Assessment," *The Fletcher Forum of World Affairs* Vol. 29, Issue 1 (2005): 108; Tung Yin, "The Role of Article III Courts in the War on Terrorism," *William & Mary Bill of Rights Journal* Vol. 13, Issue 4 (2005): 1127; John C. Yoo, "Courts at War," *supra* note 1: 574.

[83] Emily Hartz, *supra* note 31.

[84] *Hamdi*, *supra* note 45, at 2648; *see also* Emily Hartz, *supra* note 31.

[85] *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S.Ct. 2711, U.S., 2004.

[86] The case concerned a habeas petition brought on behalf of a designated enemy combatant, Jose Padilla, who was a United States citizen born and raised in the United States. Padilla was apprehended on United States soil as he stepped out of a plane in Chicago Airport in May 2002.

*Hamdan v. Rumsfeld* from 2006 concerned the jurisdiction of military commissions authorized by President Bush to try designated enemy combatants held in Guantanamo. In this case the Court once again decided against the government, finding that the offences that Hamdan was charged with were not triable by law-of-war military commissions.[87]

Finally in *Boumediene v. Bush* from 2008 the Court decided that the jurisdiction-stripping provisions in two acts; the 2005 Detainee Treatment Act (DTA) and the 2006 Military Commission Act (MCA), which defined the government's detention policies, violated the constitutional guarantee of *Habeas Corpus.*[88]

These cases constitute an unprecedented set of defeats of the government during an on-going armed conflict. However, the interesting legal and philosophical questions to ask are not only whether the first round in the battle of rights was lost or won in these cases against the government, but also how the Court conceptualized the problem of emergency in this new context. In this respect, the question of how – or whether – traditional formulations of the problem of emergency play out in the Court's argument is central.

## 9. THE TERRORISM CASES AND THE PROCEDURAL MODEL

The first four cases seemed to confirm the persistence of the procedural model as the main jurisprudential strategy for dealing with issues of national emergency.

The result in *Rasul* was based on the Court's interpretation of The Habeas Statute (28 U.S. § 2241 (c) (3). The Court argued that this provision granted detainees on Guantanamo a statutory right to have their habeas claims heard in the federal courts. However, the Court went no further and neither discussed whether the detainees had a constitutional right to habeas hearings nor what substantial rights the detainees might be entitled to.

The *Hamdi* decision was based on the Authorization for Use of Military Force issued by Congress in September 2001. The Court argued that this authorization extended to the detention of enemy combatants captured in Afghanistan, because preventing captured individuals from returning to the field of battle by detaining them, is a "fundamental and accepted incident to war."[89]

[87] *Hamdan*, *supra* note 45, at 2779.
[88] Emily Hartz and Dimitrios Kyritsis, *supra* note 45.
[89] Justice O'Connor, who wrote the opinion for the Court, went as far as concluding that the AUMF constituted, "…*explicit* congressional authorization for the detention of individuals in the narrow category we describe" (*Hamdi*, *supra* note 45, at 2640 [emphasis added]).

The *Hamdan* decision too was based on statutory interpretation. Justice Stevens based his conclusion on a careful reading of the Uniform Code of Military Justice (UCMJ)[90] and argued that

> [t]hese simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.[91]

Thus, while substantial questions were arguably also involved in the Court's reasoning,[92] its final conclusions were ultimately tied in with the issue of Congressional authorization.

However, when the (Republican) Congress responded to the *Hamdan* decision by passing the Military Commission Act, which sanctioned more or less the exact same type of military commissions which the Court had turned down in *Hamdan* due to lack of congressional support, the Court was forced to tackle the issue of rights on a substantial, rather than procedural level. The result of this was *Boumediene v. Bush*.

## 9. BOUMEDIENE

In *Boumediene* the Court delivered yet another blow to the government's detention policies by arguing that the MCA constituted an unconstitutional suspension of the writ of habeas corpus.[93] Furthermore Justice Kennedy, who wrote the opinion of the Court, repeatedly underscored the persistence of rights during times of emergency.

The case consolidated two cases filed by a group of detainees who were not American citizens. Relying on the Court's ruling in *Rasul,* the claimants sought habeas corpus from the federal courts. In the meantime, however, the legal landscape had changed dramatically. As a response to *Rasul* and *Hamdi,* Congress had enacted the 2005 Detainee Treatment Act (DTA) regulating the treatment and legal protections of detainees in the custody of the Department of Defense. And, as mentioned*,* Congress had enacted the Military Commission Act (MCA) in 2006 as a response to *Hamdan.* MCA set up military commissions to try unlawful enemy combatants for acts related to the war on terror. Both Acts contain jurisdiction-

[90] UCMJ, 64 Stat. 109, 10 U.S.C. ch.47. The UCMJ was first passed by Congress on 5 May 1950 and signed into law by President Harry S. Truman. The word Uniform in the Code's title refers to the congressional intent to make military justice uniform or consistent among the armed services.
[91] *Hamdan*, *supra* note 45, at 2785.
[92] Emily Hartz and Dimitrios Kyritsis, *supra* note 45.
[93] The Suspension Clause is the only provision in the Constitution where rights suspensions are explicitly authorized in cases where national security is threatened. It states 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" (Article 1, Section 9, Clause 2).

stripping provisions, limiting detainees' access to federal courts. The DTA § 1005(e) provides that "no court, justice, or judge shall have jurisdiction to ... consider ... an application for ... habeas corpus filed by or on behalf of an alien detained ... at Guantanamo," and it gives the D.C. Court of Appeals "exclusive" jurisdiction to review decisions by the Combatant Status Review Tribunal (CSRT) set up by the government to assess the enemy combatant status of detainees. MCA § 7(a) further explicitly denies "jurisdiction with respect to habeas actions by detained aliens determined to be enemy combatants."[94]

Both Acts amount to clear statements that Congress intended to limit the access of alien detainees to federal courts. Therefore, when the habeas issue reached the Court in *Boumediene*, it was no longer open for the Court to say that the detainees were entitled to habeas hearings under § 2241, as it had done in *Rasul*, since Congress had specifically acted to limit that jurisdiction in the case of detainees held on Guantanamo. Nor could the Court invoke lack of congressional authorization for the Government's decision to try some detainees by military commission, for the executive policies now had explicit congressional backing. The case therefore re-actualized the constitutional issues that were resolved through a procedural model in *Hamdan* and raised the question whether courts have the power in an emergency context to enforce their own interpretation of the content of a constitutionally guaranteed individual liberty, such as the privilege of habeas corpus, even if that interpretation runs contrary to the view jointly held by the political branches.[95]

One possible cat flap the Court could have considered was to interpret the provisions in question in a way that would make them compatible with habeas review requirements and thus portray the conclusion as procedurally based after all.

> By pursuing this option, the Court would conceal the collision between Congress and Court and thus muzzle accusations of judicial interventionism. But it would not be showing Congress genuine respect. In essence, it would be following the extra-legal approach, which recommends that the Court manipulate the legal materials to avoid confrontation and save face, while at the same time implementing its own political agenda.[96]

However, Justice Kennedy, who wrote the opinion of the Court, dismissed this interpretive cat flap as a real option:

[94] The background of the Boumediene case is explained in greater detail in Emily Hartz and Dimitrios Kyritsis, *supra* note 45.
[95] *Ibid*.
[96] *Ibid*.

> To hold that the detainees at Guantanamo 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 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.
> [...]
> [E]ven 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.[97]

Instead Kennedy explicitly recognized that when Congress decides to revisit an issue decided by the Court, its decision is owed the Court's respect.[98] As a consequence the case came to turn on the constitutionality of the said provisions. After scrutinizing the DTA and the MCA in light of the relevant case history, as well as the common law history of the writ of habeas corpus predating the American Constitution, Kennedy concluded that the MCA constituted an unlawful suspension of habeas corpus and confirmed that petitioners were entitled to the privilege of habeas corpus to challenge the legality of their detention.[99]

Throughout the opinion Kennedy underscored the importance of safeguarding rights during emergencies. He argued

> [t]hat the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "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".[100]

He further underscored that this protection extends unquestionably to times of national emergencies:[101]

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[97] *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, U.S., 2008, at 792.
[98] *Ibid*., at 738.
[99] *Ibid*., at 771.
[100] *Ibid*., at 743.
[101] It is to be noted that Kennedy did qualify this point noting that "The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate" (*ibid*., at 793). He further noted that
"In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody" (*ibid.*).
And further:
"If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way [...]" (*ibid*.).
But he also underscored that
"[t]he cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary

> [t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.[102]

At one point he (knowingly or unknowingly) even came close to echoing Constant's pragmatic arguments in favor of upholding rights at all times:

> Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives. [103]

Kennedy insists that

> [t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.[104]

This arguably echoes Justice Davis' ringing endorsement of rights in *Milligan*. But in spite of *Milligan's* grand and principled language *Milligan* did in fact neither tackle the constitutionality of Lincoln's original suspension of the writ nor did it tackle the constitutionality of Congress' later sanctioning of a limited version of Lincoln's suspension in the March 1863 Act. In *Milligan* the Court's conclusion was based on its evaluation of the facts of Milligan's detention in light of the said act. Therefore, Kennedy's opinion arguably constitutes an even stronger confirmation of the rights model: while Davis' confirmation of the Constitution's applicability "equally in war and in peace" can easily by dismissed as unsubstantial dicta,[105] Kennedy's conclusion was directly tied in with the principle that constitutional rights do not diminish during times of crisis.

*Boumediene* therefore establishes a strong precedence for engaging substantial issues of rights when evaluating issues related to emergencies.

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abstention or exhaustion of alternative remedies would be much stronger" (*ibid*., at 794) and concluded that "[t]hese qualifications no longer pertain here" (*ibid*.).

[102] *Ibid*., at 742.
[103] *Ibid.*, at 797.
[104] *Ibid.*, at 798.
[105] *Milligan*, *supra* note 4, at 76. See also discussion of this quote above.

## CONCLUSION

The Court's opinion in *Boumediene v. Bush* is noteworthy alone for the fact that it delivered yet another blow to the Bush administration's detention policies. But it is first and foremost remarkable for going against both the President and Congress during an ongoing crisis and for its willingness to engage substantial issues of rights in so doing. As I (with Kyritsis) have argued elsewhere, it shows that "the majority in *Boumediene* does not consider congressional authorization the be-all and end-all in the emergency context. It confirmed that the established doctrine of judicial review extends to cases related to issues of national security."[106]

However, it is important to keep in mind, that Kennedy's confirmation of the rights model constitutes a rare exception in the Court's evaluation of cases related to rights during emergencies.

The procedural model is by far the Court's most persistent model for evaluating issues of rights in relation to the problem of emergency. And, as the examples of *Quirin, Hirabayashi* and *Korematsu* show, the Court's willingness to hear cases against the government does not guarantee that it will function as an effective curb on excessive curtailments of rights.

While *Boumediene* enlarges our understanding of the problem of emergency in relation to the American Constitution, it also adds to the complexity of the issue and thereby arguably confirms Justice Jackson's lament in a concurring opinion in *Youngstown* that when it comes to the question of the problem of emergency

> [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.[107]

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[106] Emily Hartz and Dimitrios Kyritsis, *supra* note 45.
[107] *Youngstown*, *supra* note 20, at 635.

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