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Presidential War Powers and the Bush Administration
Povratek imperialnega predsedovanja?
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Magistrsko delo

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On November 13, 2001, United States President George W. Bush signed a Military Order (66 Fed. Reg. 57,833) authorizing *ad hoc* military tribunals at the United States naval base in Guantánamo Bay, Cuba, to detain, interrogate, and try those providing assistance for the terrorist attacks on September 11, 2001. The detainees were designated “illegal enemy combatants” and did not have the right to a writ of habeas corpus, which would have given them access to United States civilian courts in wartime. As a precedent, the Bush administration cited *Ex parte Quirin* (1942) in which the United States Supreme Court upheld the constitutionality of military tribunals created by United States President F. D. Roosevelt for the trial of German saboteurs.

Over the period of both G. W. Bush presidential terms, the United States Supreme Court ruled on five high-profile military tribunal-related cases: *Hamdi* (2004), *Padilla* (2004), *Rasul* (2004), *Hamdan* (2006), and *Boumediene* (2008). In these cases, the United States Supreme Court made a decision whether the executive branch remained within its constitutional limits and whether it operated within the international standards for the treatment of prisoners of war established by the 1949 Geneva Conventions, of which the U.S is a signatory.

In *Hamdan* (2006) the United States Supreme Court concluded that i) the President as Commander in Chief does not have inherent power to create military tribunals outside the existing statutory authority and ii) the Geneva Conventions, which are included in the Uniform Code of Military Justice, are applicable to military tribunals. In light of the *Hamdan* decision, President Bush appealed to Congress to adopt legislation that would address the court’s objections. In October 2006, the United States Congress passed the Military Commissions Act, authorizing military tribunals that were by this act exempt from following the Uniform Code of Military Justice. Subsequently, in *Boumediene* (2008) the United States Supreme Court ruled that Section 7 of the Military Commissions Act of 2006 was unconstitutional, since it suspended the habeas right for the detainees at Guantanamo, who under the United States Constitution had a right to petition federal courts for habeas corpus challenges.

An imperial presidency, which is observed when the constitutional balance of power is upset in favor of presidential power, is not built into the structure of the United States government. Nonetheless, just as the presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon were imperial, indeed so also was that of George W. Bush. With its rulings, the United States Supreme Court has on several occasions pointed out to United States Presidents that executive power is limited, even in wartime. Along with the rule of law, the notions of separation of powers and checks and balances are prerequisites for a strong government that protects human rights and limits the danger of tyranny. As James Madison expressed in *Federalist Paper* No. 51: "Ambition must be made to counteract ambition."

Keywords: The United States of America, Constitution, Executive Branch, Imperial Presidency, War Powers, Military Tribunals, Guantanamo.

Povratek imperialnega predsedovanja? Predsednikova vojna pooblastila in Busheva administracija

Ameriški predsednik George W. Bush je 13. novembra 2001 podpisal predsedniško pooblastilo (66 Fed. Reg. 57,833) za ustanovitev *ad hoc* vojaških tribunalov v ameriškem pomorskem vojaškem oporišču Guantanamo na Kubi, ki so dobile pristojnost priprti, zaslišati in soditi vsakomur, ki je nudil pomoč pri terorističnih napadih 11. septembra 2001. Busheva administracija je ustanovila vojaške tribunale z namenom sojenja sovražnim bojevnikom zajetih na teritoriju vojskovanja. Priporniki so bili klasificirani kot »nelegalni sovražni bojevniki«, ki niso imeli pravice do sojenja pred ameriškimi sodišči po civilnem pravdnem postopku. Busheva administracija je kot precedens navajala sodbo *Ex parte Quirin* iz leta 1942, ko je ameriško vrhovno sodišče odločilo, da je pooblastilo predsednika Roosevelta vojaškim tribunalom za sojenje nemškim vojnim sovražnikom zajetih na ameriškem območju del ustavnih in zakonskih vojnih pooblastil predsednika.

V času dveh predsedniških mandatov G. W. Busha je ameriško vrhovno sodišče izdalo pet odmevnih sodb, ki se dotikajo vojaških tribunalov in njihovih zakonskih pooblastil: *Hamdi* (2004), *Padilla* (2004), *Rasul* (2004), *Hamdan* (2006) in *Boumediene* (2008). Naloga vrhovnega sodišča je bila, da presodi ali je izvršilna veja oblasti ostala v mejah svojih ustavnih in zakonskih pooblastil in ali so ta pooblastila skladna z Ženevskimi konvencijami, katerih sopodpisnica so ZDA.

Ameriško vrhovno sodišče je v zadevi *Hamdan* (2006) izdalo sodbo, da i) ameriški predsednik kot vrhovni poveljnik oboroženih sil nima zakonskih pooblasti za ustanovitev vojaških tribunalov in da ii) skupni 3. člen Ženevskih konvencij velja za vojaške tribunale. V luči *Hamdan* odločitve se je predsednik Bush obrnil na ameriški kongres s prošnjo po sprejetju manjkajoče zakonodaje za delovanje vojaških tribunalov. Oktobra 2006 je ameriški kongres sprejel Akt vojaških komisij, ki je zagotovil zakonsko podlago za sojenje priprtim v Guantanamu pred vojaškimi tribunali kot tudi izvzel te tribunale iz Enotnega zakonika vojaškega prava. Ameriško vrhovno sodišče je dve leti kasneje v zadevi *Boumediene* (2008) izdalo sodbo, da je 7. poglavje Akta vojaških komisij neustavno, saj se pripornikom v pomorskem vojaškem oporišču Guantanamo ne more odreči pravica do pravne zaščite, ki jo zagotavlja ameriška ustava, kar med drugim pomeni pravico do sojenje pred ameriškim civilnim sodiščem po pravdnem postopku.

Imperialno predsedovanje, ki se odraža v premiku ustavnega ravnovesja moči v korist izvršilne veje oblasti, ni sestavni del strukture ameriške oblasti. Tako kot predsedovanja John Adamsa, Abraham Lincolna, Franklin D. Roosevelta, Harry Trumana in Richard Nixona je bilo predsedovanje George W. Busha imperialno. Vrhovno sodišče je v svojih odločitvah omenjenim predsednikom sporočilo, da predsednikova pooblastila niso neomejena, niti v vojnem stanju. Ob vladavini prava je vzajemno delovanje načela delitve oblasti ter sistema zavor in ravnovesij predpogoj močne oblasti, ki bo zaščitila človekove pravice in svoboščine, medtem ko je nevarnost tiranije oblasti omejena. James Madison je slednje izrazil v *Federalističnem spisu* #51: ” Ambicija mora biti ustvarjena, da se zoperstavi ambiciji”.

Ključne besede: Združene države Amerike, ustava, izvršilna veja oblasti, imperialno predsedovanje, vojna pooblastila, vojaški tribunal, Guantanamo.

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1 INTRODUCTION

1.1 Overview of the Research Subject

Imperial presidency refers to a President of the United States of America acting above the law during wartime as well as his or her executive orders being the law, even if they are not in line with the provisions of the United States Constitution or the statutory laws passed by the United States Congress. As such, an imperial presidency is not built into the structure of the American government but is rather an assertion of inherent powers by the President.

The term *imperial presidency* emerged in public debate in the late 1960s, but it gained prominence with the 1973 publication of *The Imperial Presidency* by Arthur M. Schlesinger, Jr. In Schlesinger's words (2005, 45): "When the constitutional balance is upset in favor of presidential power and at the expense of presidential accountability, the presidency can be said to become imperial." Although various scholars might agree on the definition of imperial presidency, they do have different views on when it first arose in United States history.

While Schlesinger (Ibid.) asserts that imperial presidency came into existence with the Nixon administration, Irons (2005, 5) claims that "[i]n presiding over this vast expansion of federal power, FDR became the first to occupy the imperial presidency." Adler (2004, 2) shares an opinion similar to that of Schlesinger, arguing the imperial presidency "took flight during the administrations of Lyndon Johnson and Richard Nixon, and it remains in full flight under the pilotage of George W. Bush." On the same topic, Patrick, Pious, and Ritchie (2001, 311) maintain that even during the presidencies of Abraham Lincoln, Franklin D. Roosevelt, and Harry Truman each suspended the execution of certain constitutional provisions or statutes in order to use their war powers expansively.

An imperial presidency can be observed in both domestic and foreign affairs. As Irons (2005, 5–6) illustrates with a case during the Roosevelt presidency: "The crisis of the Depression and World War II marked a massive acceleration in the subversion of the Constitution by the imperial presidency. The Depression allowed Roosevelt to expand—with overwhelming public support but with dubious

constitutional backing—the domestic authority of the presidency, while the war gave him the opportunity to broaden his powers as commander in chief of a military force engaged in combat around the world.” Imperial presidency in domestic affairs was analyzed by ex-Nixon aide Richard Nathan (1983, 34), who sheds light on Nixon’s utilization of administrative discretion to circumvent constitutional and statutory restrictions by attempting to create a "full-scale, parallel-regulatory apparatus within the White House." This master’s thesis, though, explores only the imperial presidency in the field of foreign affairs, which, as Schlesinger (2005, 45) adds, is a “perennial threat to the constitutional balance.”

To understand the scope of and also the limitations on presidential war powers, it is necessary to go back at least to the adoption of the United States Constitution in 1787. The Framers of the United States Constitution were hopeful to establish a government with powers that are few and defined, and having only one aim: to prevent absolutism or tyranny, thereby protecting the rights of the people, by way of dividing the government into three equal branches—executive, legislative, and judicial.

The powers of the President of the United States are greater in wartime than in peacetime, but each President makes a call whether to overreach them or not. Looking at more than two hundred years of American history, one can be seen that on a number of occasions the executive branch asserted that the President, as Commander in Chief, has the prerogative (i.e., inherent power) to act outside constitutional or statutory authority, or even in the face of statutory restrictions.

Drawing upon the notions of individual rights, private property, and limited powers in the writings of Aristotle, Cicero, Machiavelli, James Harrington, Montesquieu, David Hume, and John Locke, the Framers were aware of the human inclination to overstep boundaries in pursuit of unlimited power; hence they created a system of government with checks and balances. When the executive branch steps over its constitutional powers, the other two branches of government—the judiciary and the legislature—are by constitutional design expected to step in to bring the executive back within its own limitations. As James Madison wrote in *Federalist Paper* No. 51: "Ambition must be made to counteract ambition."

In wartime, the United States Congress controls and exercises war-making power and the President executes that power, subject to congressional authorization and oversight. Though, Congress does not always use its constitutional war-making authority, especially when that would mean a check on the President. In fact, it was Congress that visibly contributed to the emergence of imperial presidencies by delegating its powers to the executive. As Justice Jackson (343 U.S. 579 at 654, 1952) in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* observes: "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems […] We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent that power from slipping through its fingers." Rudalevige (2005, 15) similarly contends, "there is no 'imperial presidency' in the structure of the American government. Any such creature is conditional, fragile, and revocable. The presidency, in other words, is contingently imperial. The flip side of the 'imperial presidency,' then, is the invisible Congress. Congress itself has not been run over so much as it has lain supine; it has allowed or even encouraged presidents to reassert power." As with Congress, the Supreme Court is expected to restore the constitutional principle of separation of powers through checks on the other two branches of government. In 1946, the Supreme Court (327 U.S. 304) emphasized that courts and their procedural safeguards are indispensable to the system of government, and that the Framers "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws."

In conclusion, along with the rule of law, the notion of separation of powers intertwined with the notion of checks and balances is a prerequisite for of a strong government that protects human rights and limits the danger of tyranny. As Justice Kennedy (553 U.S. 723, 796-8, 2008) wrote in the opinion of the Court on the *Boumediene* case, "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."

1.2 Research Questions, Hypotheses, and Objectives

This master's thesis will aim to answer the following questions:

1. What was the Framers' intent with the Declaration of the Independence? How did their intent to create the Constitution of the United States differ from of the Declaration of Independence?
2. How is individual liberty defined? Why and how is government's power limited? What is the difference between natural and positive law?
3. What were the ideas underlying the United States Constitution? Upon which political philosophers, political historians, and legal scholars did the Framers draw when setting a vision for the United States? What is executive prerogative, and how did the Framers perceive it? Why is a clearly defined and balanced separation of powers required in a constitutional system of government? What influence did Montesquieu have on the Framers in relation to his emphasis on pitting balanced forces against each other to prevent tyranny? What is the aim of the doctrine of enumerated powers? Why did the Federalists support and the Anti-Federalists oppose the ratification of the United States Constitution?
4. What are the respective constitutional war powers of the President and the Congress? What is the objective of the Articles of War? Is the congressional power of the purse an effective and practical method of limiting presidential war powers? Do executive orders have to be anchored in the Constitution and/or statutory law? Which statutory restrictions curb presidential war powers and protect legislative war prerogatives? How does judicial review place a check on unconstitutional legislative and/or executive acts? Do Presidents follow the War Powers Resolution?
5. Which United States presidencies have been imperial? Did the United States Supreme Court restore the constitutional principles of separation of powers and checks and balances when Presidents acted above the law and their executive orders were the law, even when not in line with the provisions of the Constitution or statutory laws passed by the Congress?

This master's thesis has following hypotheses:

- MAIN HYPOTHESIS: The Bush Administration brought back the imperial presidency.

- HYPOTHESIS #2: The presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon all overreached presidential war powers and, hence, were imperial.
- HYPOTHESIS #3: When the executive goes beyond its constitutional war powers, the other two branches of government—legislative and judicial—have constitutional powers to take steps to bring the executive back within its limitations.
- HYPOTHESIS #4: The powers of the President of the Unites States in wartime are greater than in peacetime, though still limited.
- HYPOTHESIS #5: During the presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, Richard Nixon, and George W. Bush the United States Supreme Court did not side with the imperial presidents and did exercise its check upon the executive.

The main objective of this master's thesis is to examine the imperial presidency closely and thoroughly in the context of the history and legal provisions of the United States of America. The intent, background, and—most importantly—the text of the Constitution of the United States of America will serve as a litmus test of presidencies being imperial or not, as also demonstrated through judicial decisions, primarily those of the Supreme Court of the United States, when determining whether the President was acting above the law. A detailed comparison of judicial decisions before and after September 11, 2001, will be used to determine whether the Bush administration had also acted imperially, as have a few other administrations in American history.

The overriding objective of this master's thesis is to shed light on the fact that imperial presidents go above the law when taking actions justified by the assertion that as Commander in Chief they have the prerogative (i.e., inherent power) to act without enumerated constitutional and/or congressional authority, or to do so in the face of statutory restrictions. As such, the imperial presidency is not built into the structure of the American government, rather it is an assertion of inherent powers by the President. Hopefully, this and other related analyses will discourage future Presidents of the United States of America from being imperial.

1.3 Methodology

When interpreting the Constitution, five possible sources are considered by the judiciary and scholars: (1) the text and structure of the Constitution, (2) the Framers' views of and intentions for the Constitution, (3) judicial precedents, and (4) the social, political, and economic consequences. The first three of these sources are generally considered appropriate guides to interpretation of the Constitution, though disagreement is about the relative weight that should be given to each of them when pointing in different directions. The consequences are rarely considered relevant. In conclusion, those who are substantially relying on originalist sources are referred to as originalists, while those who give significant weight to judicial precedent and consequences are referred to as non-originalists. For United States constitutional interpretation this master's thesis uses the first three sources.

This master's thesis is based on a historical method and comparative analysis of primary United States law (Constitution, court cases, statutes, and related government information) and the personal documents of the Framers of the Constitution (letters, notes, speeches). Additionally, the thesis reviews and analyzes secondary sources (books, journals, and newspapers). In accord with historical method the thesis presents both the background of the American founding documents from idea to realization and a detailed overview of United States Supreme Court cases that at their core address the constitutional principles of separation of powers as also checks and balances upon imperial presidents, i.e., those who act above the law and their executive orders being the law, even when not in line with enumerated constitutional or statutory authority. A comparative analysis is used to review judicial tests of the presidencies of George Washington, John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, Richard Nixon, and George W. Bush with regard to these presidents acting above the law and their executive orders being the law, even when not in line with enumerated constitutional or statutory authority. The judicial tests primarily use opinions of the court, as well as concurring and dissenting opinions of the Justices, both providing clarification of the question as to whether the judiciary did or did not side with the imperial presidents and as such failed or succeeded to exercise its check upon the executive, bringing it back within its limitations.

A wide-range of secondary sources, such as books, journals, and newspaper articles, is used to present the opinions of historians, legal scholars, political scientists, philosophers, and statesmen in regards to presidential war powers in general and specific cases of imperial presidency in the United States of America.

1.4 The Structure

This master's thesis encloses three time periods: i) prior to year 1787, the period when the Declaration of Independence and Constitution of the United States were created; ii) between 1787-2001, the period that includes the United States presidencies of George Washington, John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon; and iii) after September 11, 2001, the period of the George W. Bush presidency.

Chapter 2 provides an overview, mostly through the eyes of the Framers, of the intent and philosophical background of the Declaration of Independence. Chapter 3 provides an overview of the ideas underlying the Constitution of the United States in the context of the Constitutional Convention. It also presents opposing views of Federalists and Anti-Federalists on the Constitution, and the origins of the Bill of Rights. Chapter 4 discusses the executive branch of the government as defined by the Constitution of the United States. Chapter 5 discusses presidential war powers, with special attention to Presidential Executive Orders, the Articles of War, and the War Powers Resolution. It also defines imperial presidency and presents several scholarly views of imperial presidencies in the United States of America. Chapter 6 analyzes the judicial review of the presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon, with an emphasis on the constitutional principles of separation of powers and checks and balances being core notions of the Constitution of the United States of America. Chapter 7 analyzes judicial review of the George W. Bush presidency with an emphasis on the constitutional principles of separation of powers and checks and balances being core notions of the Constitution of the United States of America. Finally, the concluding chapter provides a summary of this master's thesis, as well as a determination whether the hypotheses of this thesis have been confirmed or refuted.

2 THE UNITED STATES DECLARATION OF INDEPENDENCE

The tension between Great Britain and its American colonies spurred sentiment for American independence from Britain and was an impetus for the Colonists to set up a shadow government in each colony. The Continental Congress, first meeting in 1774, then bound these shadow governments together. As the American Revolutionary War began in April 1775, the shadow governments took control of each colony. Soon after, in January 1776 Thomas Paine's pamphlet *Common Sense* denounced British rule and laid down arguments for independence, giving wings to the American Revolution and later influencing the Declaration of Independence.

In June of 1776, the Committee of Five[1] of the Second Continental Congress was formed with the intention to draft a declaration. The committee decided that Thomas Jefferson should first write the draft, with Benjamin Franklin and John Adams making their subsequent commentary.[2] Jefferson was known to possess a masterly pen. When Jefferson joined the Continental Congress, “he brought with him,” said John Adams, “a reputation for literature, science, and a happy talent for composition. Writings of his were handed about, remarkable for the peculiar felicity of expression.” After Jefferson took the comments[3] into consideration, the committee presented his draft to the Continental Congress on June 28, 1776.

The Second Continental Congress reworked the draft somewhat. The revision of Jefferson's draft was approved in Independence Hall in Philadelphia on July 4, 1776. The signed Declaration was transmitted to George III, the King in England. On July 9, 1776, the Declaration was read aloud in New York City.

2.1 The Intent of the Declaration of Independence

Even though the Declaration of Independence was an unusually short document, the Framers successfully distilled and set forth their philosophy of

[1] Committee of Five: John Adams, Benjamin Franklin, Thomas Jefferson, Robert R. Livingston, and Roger Sherman.

[2] Interestingly enough, both Franklin and Adams turned down the offer to write the draft.

[3] Franklin made at least 48 comments on Jefferson’s draft.

government in it. As the Framers' main concern was the legitimacy of government, their intent was to join reason and consent, the two traditional sources of political legitimacy, in this sweeping document of 1776. Along with recognizing individual liberty, the Framers' plan was to limit government, being that it was created with the sole purpose of protecting the people. As Jefferson said, "[t]hat government is best which governs least."[4]

Thach (1922, 14) argues that the political leaders of the newly independent America were first and foremost revolutionists "at heart, but in rebellion against constituted political authority," who in their political philosophy emphasized individual liberty and political security. As the British system of imperial control had proved government to be pernicious, the Framers were seeking "a theoretical justification of the principle of revolution, and they found it in the doctrines of natural rights, the contractual origin of government, the consent of the governed and the right of resistance."

The Framers' plan was twofold. First, they sketched the moral order—as prevailing in the 'state of nature'—as derived from principles of reason, where natural law rules and secures natural rights. With this, a tradition of natural law and its natural rights branch began.[5] Second, the Framers drew forth legal conclusions implied by that moral order, as it prevailed in 'civil society' (Pilon 2002, 27). The Preamble of the Declaration of Independence captured that vision and spelled out the Framers' ideas: "[t]hat to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed," defining individual liberty as the unalienable rights of life, liberty, and the pursuit of happiness, which are to be secured by a government instituted for that purpose with its powers grounded in the consent of the governed (Sample 2002, 2).

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[4] This quotation as an original matter can be attributed to Thomas Paine, Thomas Jefferson, or John Adams—or indeed, to anyone.

[5] In opposition to natural law theory is legal positivism (law is the will of the sovereign) and moral skepticism (there are no moral truths or, if there are, we cannot know them). Natural law theorists hold both that there are such moral truths and that they are accessible through reason (Gewirth 1978, 24).

Only with people's consent can the 'state of nature' be transformed into 'civil society.'' While in the former, the justification and proper role of government did not have to be defined during the course of social exchange, in the latter it did so. The first few lines of the Declaration do not mention government, making it clear what came first (the people) and what second (government).

The justification of the Framers' decision to declare independence is given in a long list of abuses and usurpations. These grievances are "submitted to a candid World." The intent of the list is to expose the violations of British rule. With assertion of the States being "Free and Independent" from British rule in the last paragraph of the Declaration, the future course for the American government is set (Brooks 1993, 57).

2.2 The Philosophical Background of the Declaration of Independence

The Framers, humanists par excellence, were well read and versed in moral and political philosophy, political history, psychology, and foreign languages. The Declaration stresses their "decent Respect to the Opinions of Mankind." At the same time, they exhibited the intellectual capacity to build anew.

The Framers' moral vision drew upon common law, grounded in property[6] and contract, which for centuries had been thought to embody right reason[7] and the thought of moral philosophers, such as John Locke, who more than any other set the philosophical background for the Declaration. Locke especially influenced Thomas Jefferson, the Declaration's principal author. As Becker (1970, 79) observes: "The Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's Second treatise on government […] Jefferson copied Locke." Beside the American revolutionaries, Locke's writings influenced, among others, Voltaire, Rousseau, and Scottish Enlightenment thinkers. Locke's greatest contribution lies in his theory of natural rights and his moral epistemology, particularly as it relates to determining those rights.

[6] Property is referred broadly, as Locke (1988, 350) put it, to ''Lives, Liberties, and Estates.''

[7] The legal historian Edward Corwin (1928, 26) argued: ''The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.''

Locke was a rationalist, finding moral knowledge to be almost equal to that of the mathematical. According to Locke, self-evident truths are grasped by reason. In fact, Jefferson's appeal in the Declaration can be conceived as rational; and so also can Hamilton's placement of the maxims of politics and ethics among "certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain internal evidence which, antecedent to all reflection or combination, commands the assent of the mind," described in *Federalist Paper* No. 31 (Rossiter 2003, 193).

The Framers began with an appeal to natural law and natural rights and proceeded with the idea that there is a higher law of principles of right and wrong that are not man-made but, as Corwin (1928, 4—5) observes, are "external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable."[8] Positive (man-made) law is derived from a higher law against which it is to be evaluated at any point in time.

The Framers saw the ultimate source of rights in their Creator, who endowed them with certain unalienable rights. However, any mention of religion in the Declaration is very vague and neutral. Not just that the Framers were of diverse religious views, but they were cognizant of the perils of tying politics and religion together. John Adams (1787, xvi.), one of the Framers, said that the men who erect government are not inspired by gods or a divine power but merely use "reason and the senses." Thus, interpreting Creator in the broad sense, the Framers sought to assert as the universal point of the Declaration that all people have been endowed with natural, unalienable rights, regardless of their religious beliefs or any other features people may have.

In the Declaration, and even later in the Constitution and the Bill of Rights, the Framers were not able to enumerate all rights, for people have an infinite number of

[8] The concept of higher law was first mentioned in the ancient Stoic interpretation of natural law in the Greek and Roman civilizations. Aristotle (350a B.C., III) in *Politics* acknowledged the significance of the higher law being incorporated into human laws, for the reason that "passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."

them. Furthermore, some even argue that when the Framers said that “among” people’s rights are those to “Life, Liberty, and the Pursuit of Happiness” they meant that people have only one right—the right to be free, from which all other rights may be derived (Hart 1955, 175–91).

Epstein (1995, 67) argues that the Framers’ abiding concern was the morality of liberty, not any overweening moral strictures. The Declaration is built upon a premise of moral equality, as defined by our inalienable rights to “life, liberty, and the pursuit of happiness”—so long as we accept responsibility for our own lives and recognize our personal accountability for our failures and misdeeds. The Framers did not mean to imply the kind of twentieth-century-dominant interpretation of rights being egalitarian and purchased at the expense of individual liberty (Cranston 1967, 45). On the contrary, the focal point of liberty is to enable differences to develop and flourish.

The implications of equally granted rights can be explained through an understanding of the source of rights. We do not get our rights from government; rather we are born with them. Whatever rights, more accurately powers, government has, they are given to it by the people. People’s rights come first, and government’s powers come second. Jefferson reasoned on April 19, 1793, “I consider the people who constitute a society or nation as the source of all authority in that nation” (Tucker 1837, 465).

Rights are, in theory and experience alike, intimately bound up with property. Locke (1988, 350) put it well: “Lives, Liberties and Estates, which I call by the general Name, Property.” The Framers understood that all rights can be thought of as property and, as a corollary reduced to property. Thus, since the essence of rights is property—broadly interpreted as lives, liberties, and estates—it follows that rights violations can be viewed as the taking of property that belongs to others by right.

Rights define relationships among people. According to Locke (Ibid. 271), “The state of nature has a law 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.” By thus defining the notion that we are all granted equal natural rights

and are free from the interference of others, we cannot be compelled to conform to the morality of others, because no one's rights are superior to the rights of others. As such, the people are equal before the law.

Each of us has a right to associate or not with others. Through such associations people exchange their various holdings, and civil society, in all the richness of its variety, arises. Here too, however, rights and obligations are constantly being alienated and created. In a free society the only obligation people have is to leave each other alone. There is no obligation to assist others who may need assistance, although people are at perfect liberty to offer such assistance if they wish. If association is compelled, a person's right is violated. In associations that are voluntary, committing torts or crimes violates someone else's rights (Ratcliffe 1966, 19 and Machan 2003, 32–3). People turn to government to discern how far their rights go before violating those of others and the point at which their own rights are violated. Reason assures people of their rights of enforcement, but it reveals only a certain general level of enforcement. At that point, government is called upon to define legitimate arrest or trial procedures and proper sanctions. Without these uniform answers, people would find themselves in a society of certain confusion and, indeed, anarchy.[9] Hence, reason and consent join in limiting government, providing it with legitimacy in the process.

Pilon (1997, 197–9) notes that the Framers couched their moral vision in terms of rights, which are claims against others and entail correlative obligations requiring a carrying out some actions and a refraining from others. On the other hand, the Framers did not couch their moral vision in values or any other moral concepts. People have different values and different paths, both needing to be respected by others. Thus, people have objectivity in rights and subjectivity in values. People are free to criticize the values of others, but people are not free to impose their values on others. The distinction between rights and values, implicit in the right to "the Pursuit of Happiness," is the very foundation of a free society. Most importantly, the Framers did not believe that people have a right to happiness but that they have a right to pursue happiness as they see it. There are no limitations on

[9] Nozick (1974) and Wolff (1970) both discuss the possibilities of the sustainability of anarchy.

the ways to pursue happiness, as long as people respect the right of others to do the same. Rights and their corresponding obligations are the language of law and liberty, which is captured in a phrase attributed to the French philosopher Voltaire: “I may disagree with what you say, but I will defend to the death your right to say it.” The Framers did not believe that man’s purpose in life is to be determined by government but rather that the purpose of government is to secure liberty through law and not to order virtue or impose values (Husted 1990, 78).

The Framers had faith in individual freedom, believing that it would lead to progress. “A wise and frugal government,” advises Jefferson in his inaugural address, “which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government” (Bearce 1995, 45–8).

After the Framers took into consideration all the issues noted in the preceding paragraphs of this chapter, they delved into the realm of government’s legitimacy. Moving from the ‘state of nature’ to a world with government, people are faced with the issues of political (government’s) legitimacy and a path toward the proper scope of governmental power. The Framers believed that the sole purpose or function of government is to secure people’s rights, while the means to such must be obtained with consent. Popular consent, the idea that governments must draw their powers from the consent of the governed, derived from Locke’s social contract theory, but also from the ancient ritual of installing Carinthian Dukes, both paramount for the creation of the Declaration. The installation of the Dukes of Carinthia (slovensko: Karantanija), the first Slovene state in the 7th century, was a non-feudal, bottom-up transfer—from the Slovene peasantry to the dukes—of sovereign power to make laws for the community. In a ceremony inspired by old Slavic egalitarian customs, the assembled people would intone a Slovenian hymn of praise: "Glory and praise to God Almighty, who created heaven and earth, for giving us and our land the Duke and master according to our will." This ceremony, conducted in the Slovenian language, survived for 700 years, until 1414. The uniqueness of the Carinthian installation ceremony is documented in the writing of the humanist Aeneas Silvius Piccolomini (1405–1464), better known as Pope Pius II (1458–1464). President

Clinton (2005) observed that the Pope's tireless praise of this installation process inspired Jean Bodin, a French legal historian and philosopher, to recount it as an original idea for the transfer of sovereignty, having "no parallel throughout the world." A copy of Bodin's book, *The Six Books of the Commonwealth* (1576), came into the hands of Thomas Jefferson. Jefferson carefully read the book and made marginal notations to the text, marking his initial T at the bottom of pages 289 and 290. These marks called attention to the description of the Carinthian installation, which influenced Jefferson in his development of the notion that people had the right to determine their own leaders and to transfer their sovereignty—originating with them—to their representatives. Jefferson drew on this notion when writing the Declaration of Independence (Klemencic 1993, 1031).

Reading "Bodin's account of the Slovene ritual installation and the democratic arrangement between people and ruler is said to have inspired Thomas Jefferson in writing the draft of his Declaration of Independence," notes President Clinton (1995) in a letter to Milan Kučan, President of the Republic of Slovenia, on the occasion of Slovenia's Independence Day in 1995.

Each person has what Locke (1988, 275) defines as "Executive Power"—the power to secure his or her rights. Spencer (1896, 188) argues that when the people's protection of themselves proves to be inadequate, they resort to government's protection "whether it be against internal or external enemies matters not." Thus, when government exercises that power on people's behalf and acts as their protector, it is exercising a power that people would otherwise have a right to exercise themselves. In securing people's rights, government is limited by both ends and means. Even if the end is legitimate, it does not follow that every means toward that end is legitimate. The "long Train of Abuses and Usurpations" listed in the Declaration reveals governmental powers the Framers perceived as illegitimate.

A government's power is not just limited by the consent of the governed, but also by its ends. The Framers limited government to the pursuit of securing people's rights, everything else was to be left to the people. In fact, "that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed," as stated in the Declaration.

George Washington observes, “government is not reason, it is not eloquence, it is force.” Higgs (1995, 50) explains that government claims a monopoly of legitimate coercion within its jurisdiction. In enforcing the rule of law, every government relies on physical violence. If unsuccessful, it will most likely be replaced by another government. As Bastiat (1850, 456–7) said, “[g]overnment acts only by the intervention of force; hence, its action is legitimate only where the intervention of force is itself legitimate.” Or, as Hayek (1978, 21) puts it, a “free society has met this problem by conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons.”

In any society unanimous decisions are extremely rare, especially on political questions. In most cases, majorities and minorities are formed. Majorities cannot bind minorities, if consent is the touchstone of legitimacy. Spencer (1896, 93) argued that “[o]f the many political superstitions, none is so widely diffused as the notion that majorities are omnipotent. Under the impression that the preservation of order will ever require power to be wielded by some party, the moral sense of our time feels that such power cannot rightly be exercised by any but the largest moiety of society.” The right of the majority to govern itself has its basis in natural law, which views political authority as resting with the people, who can create, limit, abolish, or alter their government. Lastly, the notion of tacit consent places the minority in the position of having two rights: to remain where it is and not to become a subject of the majority’s will. Thereby, while the minority does not need to justify its right not to be ruled, the majority must justify its claim to rule the minority.

3 THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Constitution of the United States of America was drafted and adopted in 1787, eleven years after the nation declared its independence. The Constitution, though reflecting the principles of the Declaration of Independence, was created under different circumstances and needs. The Revolutionary War was over, and the government set up by the Articles of Confederation was not functioning well. The Confederation was created in reaction to the arbitrary rule of an imperial British government, due to which the drafters of the Articles of Confederation strayed in the opposite direction, incorporating flaws into the governmental structure and designing a government that was weak, divided, and unable to resolve conflicts.[10]

Efforts to patch up the system were thwarted. Various incidents led the leaders of the country to believe that they were facing a crisis of the greatest magnitude. Government's fundamental defect was the lack of coercive power, especially with regard to the federal government. George Washington even believed "that mankind when left to themselves are unfit for their own government" (Marshall 1807, 118).

James Madison, a member of the Confederation Congress, blamed the Articles of Confederation for the government's inefficiency and failure to recognize the sovereignty of the states. Hence, Madison strove to replace the Articles with a completely new constitution that would establish a strong federal government with three separate branches, avoiding both the instability of government based on legislative supremacy, as was the Confederation Congress, and the monarchical tendencies of unchecked executive power, as had been experienced under the British crown. Before the Constitutional Convention, Madison revealed his thoughts in a letter to Jefferson on October 17, 1788, where he argued that liberty is in peril "whether the Government have too much or too little power." Madison and other delegates who pursued this endeavor at the Constitutional Convention became

[10] The government lacked an executive body to enforce laws passed by the Confederation legislature and did not provide for a national judiciary to adjudicate conflicts between citizens of different states or states themselves.

known as the Federalists and were diametrical to those known as the Confederationists.

The only remedy was to strengthen the central government while balancing governmental powers, individual liberty, and security. Madison's plan for a new constitution was based on "a due supremacy of the national authority," but did not "exclude the local authorities whenever they can be subordinately useful." In other words, the formerly "sovereign" states would yield to the "supremacy" of the federal government. According to Thach (1922, 22–3), the Americans were on the way to establishing a "government that would guarantee the property rights of a minority, secure essential governmental strength and energy, and at the same time retain the fundamental ideals of a free government."

On February 21, 1787, the Second Continental Congress passed a resolution that called for a Constitutional Convention for "the sole and express purpose of revising the Articles of Confederation." Of the twenty-nine delegates who met at the State House in Philadelphia on May 14, 1787, many, chief among them James Madison and Alexander Hamilton, were proponents of the Constitutional Convention understanding that the "united states" of the Confederation were anything but united, the reason they hoped to establish a new government rather than repair the existing one. The delegates understood that calling for a new government could be classified as treasonous. Ultimately, fifty-five[11] delegates out of the seventy-four met behind closed doors and windows[12] in the summer-long Constitutional Convention that took place from May 25 to September 17, 1787. The delegates elected George Washington, the retired Commander in Chief of the Revolution, to preside over the Constitutional Convention.

[11] Thomas Jefferson and John Adams did not attend because they were in Europe at that time. Also, Patrick Henry was absent, refusing to attend because he "smelt a rat in Philadelphia, tending toward the monarchy."

[12] The windows were kept shut and guards posted so that others could not hear the discussions.

3.1 The Constitutional Convention

Due to their respective political partisanships and philosophical stands, the Framers often disagreed with each other. At the same, they were cognizant of the importance of compromise in the implementation of theoretical principles.

3.1.1 Concepts Underlying the Constitution of the United States

Given the principle of 'the will of the people', the Constitution is more than anything else a contract or a compact among the people establishing a government with the primarily purpose of protecting the people's—enumerated and reserved—rights.

Irons (2005, 13–4) notes that the Framers looked back not only to the writings of John Locke, but also to the writings of, among others, Aristotle, Cicero, Machiavelli, James Harrington, Montesquieu, and David Hume. During the months before he arrived in Philadelphia in May 1787, James Madison studied the works of John Locke and other political philosophers, producing extensive notes on the histories of republics and confederacies from ancient Greece to European nations. Though, as Thach (1922, 171) points out, the Framers "used the theories as sources from which to draw arguments rather than specific conclusions."

The quest for a moral foundation of constitutional thought through the natural law tradition stretched into the thirteenth century with Saint Thomas Aquinas, an Italian priest and philosopher who provided a depiction of higher law similar to that of Cicero. Aquinas distinguished four kinds of law: eternal, natural, human, and divine.[13] According to Aquinas (1947, Ia IIae 91.2), the laws of nature are a manifestation of God's design of the universe, asserting that "[i]t is evident that all things participate to some extent in eternal law." In Aquinas' opinion human beings, as rational beings,

[13] Eternal Law: laws of the universe—the whole community of the universe is governed by divine reason; Natural Law: eternal law as it applies to us, which we know by reason; Human Law: created by us for the purpose of carrying out natural law; and Divine Law: the revealed word of God—we need to be guided to our supernatural destiny, our reason being inadequate to reveal it to us.

are able to interpret—albeit imperfectly—eternal law. Aquinas argues that the human understanding of eternal law is natural law.

Almost exactly two thousand years later, Harrington (1656, 35) described government as “the empire of laws and not of men.” Also, Adams (1991, 131) wrote that the definition of a republic is "an Empire of Laws, and not of men.” This particular phrase gained wider significance when Chief Justice Marshall used it in his opinion in *Marbury v. Madison* (1803). Conflict between the desires of those governing and the reason of law is a premise of the United States Constitution.

Cicero's definition of natural law was canonical for the Framers. In *De Republica* (On the Republic) Cicero (1928, 211), the Roman Senator and Stoic moral and political philosopher, set forth his conception of natural law:

> *True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions [...] It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but oneself to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a late time; but one eternal and unchangeable law binding all nations through all time.*

In his *de Legibus* (On the Laws) Cicero (1928, I, 5, 16) finds that in the natural endowment of man, and especially his social traits, “is to be found the true source of laws and rights.”[14] He (Ibid. I, 10, 28) continues: “We are born for justice, and right is not the mere arbitrary construction of opinion, but an institution of nature.” Cicero (Ibid. II, 6, 11) argues that true law is “a rule of distinction between right and wrong according to nature,” and “any other sort of law not only ought not to be regarded as law, it ought not to be called law.” This notion did not begin with Cicero but rather with Aristotle (350b B.C.), who, quoting from Sophocles’ *Antigone* in his *Rhetoric* three centuries earlier, argued “an unjust law is not a law.”

[14] This is the first time that rights were invoked.

Cicero was esteemed by the Framers for his concept of the republic, linking the concepts of people, property, justice, and the common good. Cicero (1928, I, 25, 39) defined a republic (*res publica)* as a "public thing" or "the property of a people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good."

In the thirteenth century, the barons of the English King John thought that he had broken the feudal contract by usurping the lands, rights, and revenues that belonged to them. As a result, the barons rebelled and forced the King to confirm the feudal contract and foreswear his usurpations. The barons were faced with the perennial problem: how to limit the power of the King. Limiting those in power from seeking their own advantage in preference to that of another is reasoned by understanding human nature. The governed impose legislative restraint over those in power, for people have a selfish tendency to pursue gratification at the expense of others (Spencer 1896, 97).

Magna Carta, agreed to by King John of England, was the first compact with a definite, tangible embodiment of the notion of higher law. As such it represented the end of a transformation from the legal tradition of higher law to the political tradition[15]. Two particular ideas from *Magna Carta* (1215) ought to be mentioned: a) Clauses 36, 38, 39, and 40 applied the right of trial by jury (*habeas corpus*), which would play an immense role in limiting the power of government, and b) Clause 29[16] applied the notion of “the law of the land,” which, in a later confirmation of the Clause, became *due process of law*. As a corollary, *Magna Carta* is also called the

[15] Political tradition means that we are talking about a written contract or compact that had its origin in the people’s consent.

[16] Magna Carta, 1215, Clause 29: “No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.” This Clause resembles the *due process* clause, V. Amendment of the United States Constitution, which was later also applicable to the States through the XIV. Amendment.

Great Charter of Liberties. That its influence became worldwide is undisputable, United States and Commonwealth law being examples (Arlidge and Judge 2014, 1).

The clauses of the Charter were very broad and left space for growth in the centuries that followed. The eventual shape and role of *Magna Carta* in the history of American constitutional theory is due most immediately to its revival at the opening of the seventeenth century, largely by Sir Edward Coke, who was hugely influential throughout the Tudor and Stuart periods.[17] Coke's most brilliant contribution is his interpretation of *Magna Carta* such that the Charter did not apply only to the protection of nobles but equally to all subjects of the crown, asserting "Magna Carta is such a fellow, that he will have no sovereign" (Ibid. 134). Coke perceived the Charter as an indispensable method of limiting the powers of the Crown, a popular principle when the kings were proclaiming their divine right and striving towards absolute monarchy (Ibid.). Consequently, with *Magna Carta* it was not only just but also right to usurp a King who is disregarding the law. Consequently, *Magna Carta* began to represent a danger to the Monarchy. Elizabeth I[18] and Charles I[19] tried to fight back, but the powers of Parliament were growing. Parliament viewed *Magna Carta* as the solution to its claim of supremacy over the crown, and its members started to identify themselves as the sworn defenders of the liberties of the Charter (Ibid. 131).

Coke's greatest judicial utterance came with a dictum in the *Dr. Bonham's* Case, which was decided by the Court of Common Pleas in 1610. As Keeler (1995, 37–8) observed, Coke laid down the principles of Judiciary Review by appealing to void an act of the Parliament, "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common

[17] The Tudor dynasty or House of Tudor was a series of five monarchs who ruled England and Ireland from 1485 until 1603. The House of Stuart ruled the Kingdom of Scotland for 336 years, between 1371 and 1707, and it also ascended the thrones of the Kingdom of England and the Kingdom of Ireland during James Stuart's rule between 1603 and 1707.

[18] Elizabeth I (September 7, 1533 – March 24, 1603) was Queen of England, Queen of France (in name only), and Queen of Ireland from November 17, 1558 until her death.

[19] Charles I (November 19, 1600 – January 30, 1649) was King of England, King of Scotland and King of Ireland from March 27, 1625 until his execution in 1649.

law will control it and adjudge such to be void." McGovney (1944, 3) notes Coke's idea of Judicial Review was carried from Britain to their colonies in America both by men and by books. Years later the notion of Judicial Review became one of the centerpieces of US constitutional law, especially after the US Supreme Court case *Marbury v. Madison* (1803). The impact of Coke's doctrine is attested by the respectful ratification if received throughout the constitutional history of the United States. Interestingly, several of Coke's axioms found their way into American judicial decisions: the doctrine that "a statute should have prospective, not retrospective operation;" the principle that "no one should be twice punished for the same offence;" and the maxim that "every man's house is his own castle" (Corwin 1928, 371).

In the seventeenth century, the spotlight of political philosophical debate in England was on Thomas Hobbes and John Locke. These two minds were pitted against each other most of the time, though in the realm of US constitutional theory their contributions, like social contract theory, are predominantly complimentary. Like Hobbes in *Leviathan* (1651), Locke in the *Second Treatise on Civil Government* (1690) argued that human nature allowed men to be selfish. In the state of nature people were equal and having no right to harm another's "life, health, liberty, or possessions." The state of nature, however, can turn into a state of war if a few people seek to violate natural laws. There are inconveniences with meeting out justice in the state of nature, for which, as Locke (1988, 276) says, "civil government is the proper remedy." As Rommen (1998, 78–9) observes, Hobbes agreed with Locke in the dispensing of governmental contract, which they both saw as a necessary evil. The difference between Hobbes and Locke appears in the ways this social contract arises and in its outcome.[20]

Hobbes argued that a sovereign law-making body is the direct outcome of a social compact and needs to intrude on people's rights and liberties to control society and provide the necessary safeguard for property. Locke, on the other hand, argued that the consent of the people is the true basis of any sovereign right to rule and that

[20] Although social contract theorists agreed on the need for government, they did not necessarily agree on the form that a government should take. Thomas Hobbes argues for a single leader; John Locke and Jean-Jacques Rousseau saw the need for less centralized power.

it is the corporate majority that determines the form of government tasked to preserve life, liberty, and property, and insure justice. A corollary: for Locke, natural law is the ultimate test of the validity of civil law, while for Hobbes natural law and civil law are coextensive. Hobbes founded the Positive School of Jurisprudence, which holds that individual rights are granted by government as an outcome of public policy. Locke disagreed with this assertion, arguing government does not create even a single right and is solely designed to secure individual rights that existed before any government did (Corwin 1928, 388–9).

Two of Locke's concepts have more significantly impacted American constitutional law than others: the limitations of legislative power and property rights. The legislature is the supreme body of Locke's commonwealth, and the main protector of individual rights. Both Coke and Locke argued that the maintenance of higher law is entrusted to legislative supremacy, though qualified by annual elections. Legislative supremacy within the law does not create powers that would stretch above the law. Locke (1988, 357–67) identifies four limitations to legislative power.

First, Locke (Ibid. 357) argues that legislative power is not arbitrary. Not even an agent of the majority can be vested with arbitrary power, for the origins of majority rights are delegated by "free, sovereign" individuals who had "in the state of nature no arbitrary power over the life, liberty, or possessions" of others, or even over their own. Today, this caveat against "arbitrary power" is known as the concept of due process of law.

"Secondly, the legislative […] cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges," nor may it arbitrarily vary the law from a case to a case. In this passage, Locke (Ibid. 358) foreshadows some of the most fundamental concepts of American constitutional law: a) law must be general; b) it must guarantee equal protection to all; c) it may not act retroactively; and d) it must be enforced through the judiciary.

Thirdly, the legislature "cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot

pass it over to others." With this Locke (Ibid. 362) advocates for what is today know as separation of powers.

Finally, Locke (Ibid. 367) argues that legislative power is not the ultimate power of a society, for "the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject." While legislative supremacy is the acceptable sanction of the rights of men, it is not the final one. “For when the people are made miserable, and find themselves exposed to the ill usage of arbitrary Power,” revolution is not only a right but also an obligation (Ibid.).

From the European continent, the most important influence on the Framers was Charles de Montesquieu.[21] This French political philosopher of the Enlightenment was highly regarded in the British colonies in America as a champion of British liberty, though not of American independence. Montesquieu was a powerful influence on many of the Framers, most notably James Madison, also known as the Father of the Constitution (Kozinski and Engel 2002, 15).

Montesquieu argued for balanced governmental forces pitted against each other for the purpose of preventing tyranny over the people. In Montesuieu's words this would mean that "government should be set up so that no man need be afraid of another." This warning reminded Madison and the other Framers that a foundation for the new United States government “required the inclusion of a clearly defined and balanced separation of powers” (Malcolm 2002, 49).

3.1.2 The Preamble to the Constitution

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty*

[21] In colonial pre-revolutionary British America, Montesquieu was the most frequently quoted authority on government and politics, followed by Blackstone, Locke, Hume, Coke, Cicero, Hobbes, and Rousseau (Lutz 1984, 189-97).

to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The sentence-long Preamble to the Constitution is a statement of purpose, whereby the American people laid down the objectives they sought to realize and the norms by which those objectives would be evaluated. While the opening words "We the People" provide that the power and authority of the United States federal government does not come from the consent of the states but rather from the people of the United States, the reason for enacting and establishing the Constitution is introduced with the phrase “in Order to.”

3.1.3 The Body of the Constitution

The Framers wanted to draft a constitution that would establish a government strong enough to secure people’s rights yet not so strong as to violate those rights as it proceeded. Toward that end the people limited the government’s powers, as they had granted those powers to it in the first place. James Madison argued in *Federalist Paper* No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." While the Federalists advocated for a limited government the Anti-Federalists advocated for even greater limitations on the government.

The Framers feared a concentration of government power. Acton put this fear into words in a letter to Bishop Mandell Creighton dated April 5, 1887: “All power tends to corrupt and absolute power corrupts absolutely.” History has proven this dictum to be undisputable, and the Framers had proof of it in the most recent history of the colonies, when the British crown had unlimited powers. In a speech at the Constitutional Convention on July 11, 1787, Madison expressed his suspicion, if not presumption, of government: "[A]ll men having power ought to be distrusted to a certain degree.” Trying to persuade the citizens of New York to ratify the Constitution, Madison wrote in *Federalist Paper* No. 51 one of the most quoted passages by the Framers on the nature of government, justification for it, and reasoning for constitutional constraints on political authority:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. […] *Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

Unlimited government brings out the worst in people in the position of power. Madison in *Federalist Paper* No. 55 argued that humans were neither angel nor devils: “As there is a degree of depravity in mankind that requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”

Madison’s Constitutional Convention preparatory notes on the histories of republics and confederacies included a notebook with a list of the "Vices of the Political System of the United States." For Madison, the main vice of the Articles of Confederation was the absence of the tripartite system of government. There was no opportunity to claim executive or judicial independence under the terms laid down in the state constitutions. The Framer’s endeavor was to change this imbalance with the U.S. Constitution, where the three branches of the federal government would be “jealous defenders of their turf and thus effective checks against unrestricted power” (Samples 2002, 4). At the same time, as George Washington remarked in his farewell address: "It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another." Thereby, the Framers

divided government's power into three independent branches–legislative, executive, and judicial–intertwined with a system of checks and balances; just as Locke (1988, 364–6) proposed a century earlier in the *Second Treatise of Government*.

Another person having an impact of the Framers on this issue was Montesquieu, who in *The Spirit of the Laws* (1748) emphasized that, "there can be no liberty where the executive, legislative, and judicial branches are under one person or body of persons because the result is arbitrary despotism (tyranny)," which is why forces need to be pitted against each other. Madison perceived Montesquieu's vision of the separation of powers[22] as one of the most fundamental ideas of government and sought to include it in the United States system. In *Federalist Paper* No. 47 Madison stated: "The accumulation of all powers—legislative, executive, 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." In *Federalist Paper* No. 51 Madison argued that, "the interior structure of the government" must be so contrived "as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." In Madison's words from *Federalist Paper* No. 51: "Ambition must be made to counteract ambition." A governmental system with separation of powers and checks and balances creates healthy competition that is expected to restrain government's overambition and violation of individual rights.

Madison agreed with Locke that the legislative branch, a direct representative of the people, should be "first among equals" of the three branches. The laws enacted by the legislature would be enforced by an executive, with a judiciary available to resolve conflicts between the two branches. Among the delegates of the Constitutional Convention, Madison did not hide his "strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the federal legislature; but also brought doubts concerning its practicality" (Vile 2005, I, 127). On May 31, 1787, in one of his first addresses before the delegates, Madison assessed he "should shrink from nothing which should be found essential to such a form of government as would provide for the safety, liberty, and happiness of the community"

[22] The Constitution does not specifically use the term separation of power. Even still, the vast majority of constitutional experts agree that this principle is embodied in the document.

(Elliot 1836, V, 139). The ‘safety’ of the community to which Madison referred depended on the ability of the federal government to protect the American people from possible foreign threats.

The first three Articles of the Constitution draw a clear line regarding the power invested in the respective branches: Congress with the power of making laws, the President with the power of executing them, and the judiciary with the power of interpreting them. Although the powers of the respective branches are distinct, they sometimes overlap. As Rudalevige (2005, 20) argued, the goal of the Framers was to separate institutions rather than to separate powers per se. Hence, powers would necessarily be shared to the extent required to give each branch some ability to prevent unilateral action by the others. The judiciary’s work is of high value because the rule of law is all that stands between freedom and tyranny.[23] Noteworthy, although it is not worded in the Constitution, the judicial branch has long exercised the power of judicial review, deciding on the constitutionality of legislation that arises in cases brought before it. With respect to executive strength, the United States Constitution embodies many of the ideas of the New York constitution, where constitutional limitations and provisions of separation of powers gives greater weight to the executive and judiciary in proportion to the legislative branch. As a corollary, the legislature retains its independence, while executive assures its own independence and equality with the legislature (Thach 1922, 41).

How the notion of separation of powers is intertwined with the notion of checks and balances in the United States Constitution can be demonstrated with an example: Congress is invested with legislative power, but the President has veto power over legislation Congress passes.[24] Congress, then, has an option to strike down a presidential veto with a two-thirds vote in both houses. Further, the

[23] Originally under the British system, the courts were agents of the king. Under the US Constitution they became independent and a branch coequal to the other two. The courts needed to be powerful enough to have a check over the constitutionality of the acts of the political branches of government.

[24] With the exception of the temporary South Carolina government of 1776, veto power was never included in any state constitution.

constitutionality of specific legislation can be challenged with an appeal to the Supreme Court to make such a determination.

Along with creating a horizontal separation of powers with three branches of government, a vertical separation (or division) of powers was established between the state and federal governments, leaving them supreme in their respective realms—creating dual sovereignty. Most importantly, vertical separation asserts that while the federal government's powers are limited, the Constitution reserves the remaining powers "to the States respectively, or to the people." In Federalism, as an institution that results from a vertical separation of powers, is the hope that state and federal governments can coexist as sovereigns over the same territory, representing and acting on behalf of the same people. As Madison observed in *Federalist Paper* No. 51, the separation of powers and division of powers between state and national authorities is providing "a double security […] to the rights of the people."

The Framers understood that if you do not want power to be abused you should not give it in the first place. The doctrine of enumerated powers was meant to protect the people from an overweening government. The Constitution limits government by granting it only certain powers. Madison argued that an enumeration of powers is requirement for constitutional legitimacy and wrote in *Federalist Paper* No. 45, that the powers delegated "to the federal government are few and defined," and restricted mostly, "on external objects, as war, peace, negotiation, and foreign commerce." The remaining powers are vested in the state governments, or retained by the people, and are numerous and indefinite.[25] As Pilon (2002, 30) explained, "the federal Constitution creates a government of delegated, enumerated, and thus limited powers."

Jefferson (1993, 104) contended that the federal government possesses only the "powers specifically enumerated" in the Constitution. To claim an authority to any power beyond those expressly authorized in the Constitution would be "prostitution of our laws, which constitute the pillars of our whole system of jurisprudence." In a

[25] This objective is reiterated in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

letter to Wilson Cary Nicholas on September 7, 1803, Jefferson observes that when—in addition to enumerated powers—further powers are desired, they can only be so by adding an amendment to the Constitution:

> *When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather risk an enlargement of power from the nation, where it is found necessary, than to assume it by a construction that would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.*

On September 17, 1787, the Constitution was completed at the Constitutional Convention. As for its ratification, only nine of the thirteen states were required for it to go into effect. The drafted Constitution was submitted to the Congress of the Confederation.

3.2 The Road to Ratification of the Constitution

The final version of the Constitution was submitted for signing on September 17, 1787. Fifty-five men wrote the Constitution, but only thirty-nine signed it. Delegates like Samuel Adams and Patrick Henry were opposed to the final version of the Constitution because they did not think it put enough limits on the power of the federal government. While some of those disagreeing with the final proposal even left before the signing ceremony, three of them remained but refused to sign: Edmund Randolph, George Mason[26], and Elbridge Gerry. Of those who signed, no one was fully satisfied, but they knew that compromise was necessary to reach the common goal. Benjamin Franklin summed their views (Elliot 1836, V, 554):

> *I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them. [...] I doubt too whether any other Convention we can obtain, may be able to make a better Constitution. [...] It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies.*

[26] George Mason demanded a Bill of Rights if he was to support the Constitution.

3.2.1 The Federalists and Anti-Federalists

After the Constitutional Convention, a fight over the Constitution began. The proponents of the Constitution referred to themselves as Federalists. While the Federalists advocated for limited government, the Anti-Federalists advocated for an even more limited government. The Anti-Federalists, such as Patrick Henry, George Mason, George Clinton, Thomas Paine, and Luther Martin, were deeply suspicious of political power. They conceded that the central government needed more power than it had under the Articles of Confederation, but not as much as the Framers of the Constitution gave it. Throughout the period of debate over the ratification of the Constitution, numerous speeches, letters, and articles opposing the ratification were published nationwide, and later gathered by historians as the *Anti-Federalist Papers*. At first, the authors used pseudonyms, such as "The Federal Farmer," "Cato," "Brutus," and "Cincinnatus." Later on, prominent revolutionary figures such as Patrick Henry stood publicly against the Constitution.

In response to the Anti-Federalists' letters and speeches, the Federalists Alexander Hamilton, John Jay, and James Madison[27] wrote 85 letters, under the pseudonym "Publius," advocating the ratification of the United States Constitution. These letters both outlined their philosophy underlying the proposed system of government and answered the charges of the Anti-Federalists. The letters were written with an intent to persuade the people of the merits of the Constitution. A compilation of these letters were collected in 1788 into a volume called *The Federalist Papers*. According to Morris (1987, 309), they are an "incomparable exposition of the Constitution, a classic in political science unsurpassed in both breadth and depth by the product of any later American writer."

Within three months of the Constitution being completed at the Constitutional Convention, Delaware, Pennsylvania, and New Jersey ratified it. Georgia and Connecticut followed in January 1788. The problem arose in the key states of Massachusetts, New York, and Virginia, where ratification was not as certain.

[27] Madison, who is often referred to as the father of the Constitution, was the fourth President of the United States. Hamilton was the first Secretary of the Treasury. John Jay was the first Chief Justice of the Supreme Court.

Massachusetts eventually ratified it after the advocates of the Constitution assured those in opposition that the Bill of Rights would be added to it. New Hampshire's vote on June 21, 1788 was decisive, as with it the required quota was reached, also then being sufficient to establish the new government. New York and Virginia remained among those that did not ratify the document. Eventually all thirteen states ratified the Constitution, albeit after it took effect.

On March 4, 1789, the republic's first Senate and House of Representatives met, and George Washington became the first President of the United States of America. New York City became the first federal capital, though it took only a year before the government relocated to Philadelphia.

3.2.2 The Bill of Rights

As promised by the proponents of the Constitution during the ratification discussions, passing the Bill of Rights was one of the first tasks to which the newly created Congress was morally obligated, by which the concerns of the Anti-Federalists were also addressed.

While Madison argued in *Federalist Paper* No. 84 that the Bill of Rights would be "unnecessary and dangerous,"[28] Jefferson thought that without further limits, the federal government would become tyrannical. Ratified as a whole, the first ten amendments to the Constitution[29] were adopted by the states between 1789 and 1791, and all of them were meant to limit the power of the federal government. By December 1791 the Bill of Rights became part of the Constitution.[30]

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[28] In Madison's view, the Bill of Rights was considered "unnecessary" because the Constitution had not granted the powers to the government that these ten amendments were supposed to guard against. It was viewed as "dangerous" because people pose an infinite number of rights, and enumerating some of them would leave an impression that those that were not enumerated were also not expected.

[29] Today, there are twenty-seven of them.

[30] The text is based on the Virginia Declaration of Rights, written by George Mason in 1776, the English Bill of Rights and Magna Carta, and France's Declaration of the Rights of Man (Liptak 2006, 1).

4 THE EXECUTIVE POWER

The Framers' aim was to create a system that would be the opposite of monarchy. For them, the model of executive leadership exercised by King George III and his colonial governors was both normatively and politically unacceptable. Thomas Paine's *Common Sense* (1976, 98) rejected monarchy:

> *But where say some [sic] is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.*

The first United States government under the Articles of Confederation lacked any separate executive power—the power to make war, to pardon crimes, to convene and dismiss the legislature. The Federalists, advocates for a strong federal government at the Constitutional Convention, argued that the Constitution should give the federal executive sufficient powers to repel any military invasion, while the Congress should be granted appropriate powers to protect the United States from foreign threats to its sovereignty or trade. The proposed federal executive powers were far more defined and extensive than those in the state constitutions. Though as Thach (1922, 52) notes, only when those powers are checked and controlled will the Constitution "secure a strong, albeit safe, national executive."

One challenge for the Constitutional Conventional delegates was to balance the powers of the federal government in such a way that neither the executive nor the legislature would be granted exclusive control of foreign relations, while at the same time each played a pivotal and existential role in the federal government. The judiciary, the third branch, would decide foreign policy-related cases involving the first two branches. As Irons (2005, 13–4) observes, the Federalists were greatly influenced by Locke's support for a tripartite system with a federal government of dispersed powers.

Arriving at the Constitutional Convention in 1787, Madison's thoughts over executive power were not crystallized. He was displeased with the power of the executive in the Virginia Constitution but did not see a remedy. Madison admitted to Washington in a letter dated April 16, 1787, that his ideas on the subject of the executive were vague: "I have scarcely ventured as yet to form my own opinion either of the manner in which it [the executive] ought to be constituted or of the authorities with which it ought to be cloathed." Early in the Constitutional Convention, a discussion over the proper balance between executive and legislative powers in foreign and military affairs did not produce an agreement as to whether executive power should be vested in a single person or a privy council. A large minority, led by Virginia governor Edmund Randolph, favored a plural executive where a number of people in the council would vary according to the will of the legislature. Others, Madison and Wilson among them, thought the President should gather legislative advice from and share veto power with a council of revision, which would bring together the executive and members of the judiciary or a constitutional council made up of regional representatives of the states. On July 21, Elbridge Gerry opposed such a proposal on the basis of separation of powers (Elliot 1837, V, 345): "The motion was liable to strong objections. It was combining and mixing together the Legislative and the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as guardians of the Rights of the people." At the end, the idea of the single chief executive prevailed among the delegates.

Authorship of Article II of the United States Constitution, which defines the executive power, belongs to John Jay, New York Governor Morris, and Robert Livingston, who determined the construction of the New York constitution; however, it was James Wilson who crystallized the concept and laid it down before the Constitutional Convention. Madison was a major supporter of Wilson's idea but was not an author of the Article (Thach 1922, 176–7).

Not everyone agreed with the executive powers as granted in the proposed Constitution. The argument against it was based on a belief that the drafted Article II would bring the United States back to monarchy or some form of tyranny. As the Constitution went to the states for ratification, criticism of a unified executive was

spurred in public speeches and writings. Under the pseudonym “Cato” (1787), an author in the *New York Journal* warned that concentrating power in an individual “would lead to oppression and ruin” in a United States that awaited “arbitrary and odious aristocracy or monarchy,” for presidential power under the Constitution “differs but very immaterially” from that of the British king. “The world is too full of examples, which prove that to live by one man’s will became the cause of all men’s misery,” Cato continued, “[y]ou do not believe that an American can be a tyrant. […] [Y]our posterity will find that great power connected with ambition, luxury, and flattery, will […] readily produce a Caesar, Caligula, Nero, and Domitian in America.” At the Virginia Convention called to ratify the Constitution of the United States, Patrick Henry in his speech on June 5, 1788, suggested that the Constitution had many “deformities,” chief among them “an awful squinting: it squints toward monarchy. […] Your President may easily become king. […] If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute?” (Mackenzie 2016, 9). In a contra-argument, Hamilton pointed out that an individual head of the executive branch is able to act decisively, quickly, and, if necessary, in secrecy (Rudalevige 2005, 23). Moreover, since executive ambition would be checked by the ambition of the other branches, the fear of slipping back into monarchy did not seem real to Hamilton. Madison echoed this in *Federalist Paper* No. 51, "the interior structure of the government" must be so contrived "as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. […] Ambition must be made to counteract ambition.” The Federalists won the argument with ratification by a narrow margin in both New York and Virginia.

John Locke immensely influenced the Federalists James Madison, Alexander Hamilton, and John Jay. All agreed with Locke’s defense of what he called the "prerogative" of the king to make unilateral decisions as to war and peace, without any check from the legislature. Locke (1988, 366) perceived legislative bodies as unwieldy and slow acting;[31] thus, foreign affairs power to employ troops and naval

[31] John Yoo (2006, 85) agrees with Locke: “Presidents can act with a speed, unity, and secrecy that the other branches of government cannot match. Because executives are always on the job, they can adapt quickly to new situations. By contrast, legislatures are large, diffuse, and slow.”

forces to repel sudden invasion "is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive." According to Locke (Ibid. 375), prerogative is “[p]ower to act according to discretion, for the publick good, without the prescription of Law, and sometimes even against it.” Hence, Locke’s prerogative is a power outside the legal framework. As such, exercise of prerogative cannot be determined or considered *ex ante*. Locke (Ibid.) argues that at the end the people are still the ones to decide whether or not the public good has been served:

> *This power whilst imployed for the benefit of the Community, and suitably to the trust and ends of the Government, is undoubted Prerogative, and never is questioned. For the People are very seldom, or never scrupulous, or nice in the point: they are far from examining Prerogative, whilst it is in any tolerable degree imploy'd for the use it was meant; that is, for the good of the People, and not manifestly against it. But if there comes to be a question between the Executive Power and the People, about a thing claimed as a Prerogative; the tendency of the exercise of such Prerogative to the good or hurt of the People, will easily decide that Question.*

Locke was not the only influential liberal thinker who proposed a notion of executive power with discretionary powers in cases of emergency. English jurist William Blackstone, Scottish philosopher David Hume, and Genevan constitutional theorist Jean Louis de Lolme independently developed similar political theories. The liberal thinkers were justifying the means by the ends, rejecting the legalistic maxim *fiat justitia ruat coelum* (let justice be done though heaven may fall) and favoring the more pragmatic maxim *inter arma silent leges* (the laws are silent in time of war) (Fatovic 2004, 431). As an example, Hume (1985, 489) notes that "by sacrificing the end to the means, [it] shews [*sic*] a preposterous idea of the subordination of duties." Hume (1983, 128) also declared that "[i]n every government, necessity, when real, supercedes all laws, and levels all limitations." De Lolme (2007, 381–2) argues that discretionary judgment is trusted only to the executive, the most natural candidate for this responsibility.

Most of the delegates were familiar with Blackstone's *Commentaries on the Laws of England*, a four-volume work that covered virtually every facet of law. Blackstone (1979, 244) explicitly endorsed "the discretionary power of acting for the

public good, where the positive laws are silent." In his endorsement of executive prerogative in foreign and military affairs Blackstone surpassed Locke, asserting that the British king had absolute authority over foreign relations, including the power to deploy and command military and naval forces and to make treaties and alliances. In practice, however, the British king had yielded some of its executive powers to Parliament, which controlled the purse strings; this situation led to a weakening of the King's prerogative during the eighteenth century. In fact, the developments progressed so far that by the time of the Constitutional Convention, the British Parliament had established that the king could act in foreign affairs only by and with the advice and consent of the people (i.e., the body that was elected by the people). The exception to this rule was the executive's right to repel any invasion of the nation's territory, since the legislature was seen to be too slow and ineffective to move and make decisions during an emergency. Therefore, the power to repel invasion was conceded to the king (Irons 2005, 18–9).

At the Constitutional Convention Thomas Jefferson and Alexander Hamilton had disagreements. Even though they both accepted Locke's theory of prerogative and agreed that the President may legitimately exercise prerogative powers in cases of emergency with a threat to vital ends, they had respective opinions regarding a constitutional basis for prerogative. Questioning constitutionality of prerogative, Jefferson asserted that the federal government, also the executive, possesses only powers specifically enumerated in the Constitution. Jefferson (1993, 104) argues anything beyond those powers, would be a "prostitution of our laws, which constitute the pillars of our whole system of jurisprudence." Jefferson draws a close link between the legality and legitimacy of executive prerogative, as the exercise of prerogative is presumed to be in violation of law until—and only if—the people are convinced of the merit of executive actions.[32] Jefferson's solution to the executive acting precipitously by claiming greater power than granted constitutionally was to enable the people to publicly and effectively raise legal concerns. In two separate

[32] In his days in the White House, Jefferson's stance on executive prerogative shifted a bit. While he was still an advocate of, as Fatovic (2004, 12) notes, "a criterion of strict constitutionality, he also argued that without prerogative a nation couldn't survive." In his letter to John B. Colvin on September 20, 1810, Jefferson (1984, 1231–2) indicated that there are ends higher than written law.

letters, one to P. S. Dupont de Nemours on April 24, 1816, and the other to John Taylor on May 28, 1816, Jefferson (1984, 1385–6 & 1394) argued that if self-government means anything at all, it means the right of the people to judge matters for themselves. Furthermore, in a letter to Edward Carrington on January 16, 1787, Jefferson (Ibid. 880) expressed his belief that the great advantage of a democracy is that it is self-correcting. In contrast, Hamilton argued the people are neither reliable nor competent enough to be the judge on certain matters, especially in emergencies. Hamilton doubted that people could recognize the intentions of a president in times of emergency.

Hamilton argued that prerogative is inherent in executive power, as stated in the executive vesting clause in the first section of Article II of the Constitution, “[t]he executive Power shall be vested in a President of the United States of America” (Staab 2006, 92). Hamilton argued that the executive acting with the best intentions could always find justification for its actions in the Constitution. Thus, whereas for Jefferson it was acceptable for the executive to admit forthrightly a violation of the law and to seek *post hoc* approval from the public—as did Locke (1988, 373), who argued that "the Consent and Approbation of the Community" are required to validate an exercise of prerogative after the fact; for Hamilton, the executive could invoke powers implicit in the Constitution when justifying the exercise of prerogative that is not within the legal framework (Fatovic 2004, 430). Hamilton argues in *Federalist Paper* No. 26 that “no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government," and that power is assigned to the executive. Emergencies require the government to resort to measures that are not included in a constitution. When Hamilton wrote to John Jay on March 14, 1779, he stressed that "[e]xtraordinary exigencies demand extraordinary means." Furthermore, he wrote in *Federalist Paper* No. 23 that the powers of government to deal with emergencies "ought to exist without limitation." Interestingly enough, James Madison in *Federalist Paper* No. 44 shared this view.

Hamilton perceived the executive as the only branch of government expected to face unforeseeable events. In those events, Hamilton did not see a conflict between the executive’s ability to push constitutional limits in times of emergency

and the notion of limited government. In fact, Hamilton could not see how his view on the executive was inconsistent with the underlying objective of the United States Constitution to establish clear procedures and set rules for governing. As Fatovic (Ibid. 432) argues, Hamilton was “preoccupied with the problem of emergencies.”

On the executive’s prerogative, Locke argued both ways. At one point he said (1988, 158) that prerogative is an executive power outside a constitutional framework and thereby violates the will of the people and needs approval from the people after the fact. Shortly after, Locke argued (Ibid. 374–5) that prerogative is an intrinsic part of executive power in the scope of separation of power, unless a Constitution lays out limits on prerogative.

When it comes to the executive’s exercise of prerogative, there could be a presumption of guilt or of innocence. In the former case the burden falls on the executive to prove that it was unavoidable to exceed its authority, whereas in the latter case the burden falls on Congress to prove the executive exceeded its authority. While in the former case the executive assumes approval, in the latter, it is required to seek approval from the people (Fatovic 2004, 430).

Since it would be futile to strive to foresee all contingencies, the Constitution strives to accomplish two goals at the same time. First, it must enable the government to face ordinary and extraordinary problems. Second, the government should not have the possibility of becoming a threat to the liberties of citizens, as its first purpose is to protect those liberties.

With the aim to establish a workable but limited government the greatest challenge for a liberal constitutional democracy is to cope with emergencies. On one hand, by locating prerogative in the Constitution, as an intrinsic aspect of Hamiltonian executive power, the President has an opportunity to respond to emergencies swiftly, which reduces the check on the exercise of that prerogative by the other two branches of government as well as by the public. On other hand, if the President is expected to seek approval from the people prior to taking actions, as Jefferson advocated, it could constrain the President from taking necessary steps in a prompt and decisive manner.

Even though most Americans at the time regarded a powerful executive as a threat to their liberties, Hamilton did not believe that limits on the executive were going to protect individual rights. While acknowledging the tension between vigilance and responsibility, Hamilton argued that a strong executive branch is essential for the protection of individual rights and the preservation of liberty (Elkins and McKitrick 1993, 50).

As Schlesinger (1973, 9) observes, “[t]he idea of prerogative was not part of presidential power as defined in the Constitution.” At the same time, when the Constitution emerged from the Constitutional Convention in Philadelphia, it contained few if any limitations that could hinder executive prerogative dealing with emergencies. Hamilton believed a Constitution is a flexible instrument of effective yet limited government. In his view, it was wiser to have a Constitution able to meet emergency situations rather than one with narrowly defined and enumerated executive powers (Flaumenhaft 1992, 163).

Neither Jefferson nor Hamilton preferred judicial review as a method of checking executive power, for neither wanted to set legal precedents that would fetter presidential ability to respond effectively to emergencies or expand its discretionary powers in non-emergency situations. As Fatovic (2004, 29) explains, even though a judicially approved exercise of executive prerogative does not necessarily establish a precedent, it makes it “easier to push the limits in circumstances that might not warrant the use of extraordinary powers.” Conversely (Ibid.), when the courts rule against the use of such powers, it becomes “more difficult for the president to act swiftly in cases of emergency.” As such, emergency presidential powers “do not necessarily subvert or supplant an existing constitutional order since they are supposed to be temporary exercises of extraordinary powers limited both in duration and in scope by the length and severity of the crisis” (Ibid. 29–30).

5 PRESIDENTIAL WAR POWERS

The Framers had no intention to model the United States executive after the British monarchy, where the executive (i.e., the monarch) possessed all powers, including an exclusive power to declare war. At the Constitutional Convention on June 1, 1787, James Wilson remarked that the powers of the British King did not constitute “a proper guide in defining the executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war and peace” (Farrand 1937 I, 65–6). Edmund Randolph joined the opinion, arguing that the delegates had "no motive to be governed by the British Government as our prototype" (Elliot 1836, V, 141). Indeed, the delegates were determined to balance war powers in order to prevent either branch from drifting toward despotism. The notion of checks and balances divides war powers between the executive and legislative branches of government, where Congress controls and exercises war-making power and the President executes that power though subject to congressional authorization and oversight.

The delegates enormously respected George Washington, considering him to be the first President of the United States. While hardly anyone feared that Washington would overstep the constitutional limitations of the presidency, the delegates kept in mind that the position of the President would carry on after him. For this reason, the delegates needed to manage the inclination in human nature to overstep the boundaries of delegated power, seeking to make it unlimited. Drafting the Constitution with this thought in mind provided it the possibility of enduring for generations, even centuries, to come.

In fact, the delegates saw through the executive’s inclination for war, as Madison wrote to Jefferson on April 2, 1798: “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.” Writing as *Publius*, on March 14, 1788, in *Federalist Paper* No. 69 Hamilton, who favored a relatively strong executive branch, observed that the President's

…authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all of which by the constitution under consideration would appertain to the Legislature.

As Healy (2003, 110) notes, the committee's constitutional draft of August 6, 1787, established legislative supremacy over war-making power, rather than entrusting it to the executive, by stating: "The legislature of the United States shall have the power to make war." Still, some delegates questioned a provision placing the war-making power in the hands of Congress. As a corollary, Madison and Elbridge Gerry (Ibid.) proposed a motion to substitute the verb "declare" for "make." Moreover, the motion also provided for "leaving to the Executive the power to repel sudden attacks." The Madison-Gerry proposal was widely accepted by the delegates, resulting in an approval by a vote of eight states to one.

Pierce Butler, who did not agree with Madison and Gerry, proposed a motion to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it." The delegates unanimously rejected his proposal. Roger Sherman objected that, "[t]he Executive should be able to repel and not to commence war." Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Moreover, by Madison's notes from the Constitutional Convention, George Mason spoke "against giving the power of war to the Executive, because [he is] not to be trusted with it. […] He was for clogging rather than facilitating war." In *Federalist Paper* No. 4, John Jay echoed Mason by calling for caution over executive power to make war

...absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often

lead him to engage in wars not sanctified by justice or the voice and interests of his people.

Alexander Hamilton, a supporter of a strong President, explained in *Federalist Paper* No. 74 that the reason for making the President Commander in Chief was unity of command, as the direction of war "most peculiarly demands those qualities which distinguish the exercise of power by a single hand." Even with the President's authority of unity of command, Congress still possesses a constitutional check over the executive branch to monitor and decide on future developments in the scope and duration of military operations.

Hamilton wrote in *Federalist Paper* No. 69 that the President could exercise his power as "first General and Admiral," though adding that the President should only "have the direction of war when authorized or begun," implying that it was not up to the President to initiate war (Berger 1972, 37). Healy (2003, 111) notes that once war is declared, it is the President's responsibility as Commander in Chief to direct it. The Framers made it clear that only in the event of invasion could the President act without a congressional declaration of war in order to repel it, but only Congress could authorize the deployment of forces abroad, whether to protect the United States or American citizens there.

Speaking at the Constitutional Convention, James Wilson voiced confidence that the system of checks and balances in the federal government (Elliot 1937, II, 528)

…will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war.

Thereby, as Healy (2003, 110) observes, the power of initiating war was vested in Congress. Most importantly, while 'declare war' means the initiation of hostilities, it does not imply their subsequent ratification or approval by Congress. As

such, Congress was given the authority to make decisions regarding the scope and duration of a war. In fact, since 1787, the legislature has on many occasions enacted appropriations bills and legislative authorization to limit, or even restrict, military operations by the President.[33] Through its power of the purse, the legislature can define and limit presidential military actions. Though, as Fisher (2007, 9) argues, efforts to restrain presidential wars are limited, since it is difficult for the legislature to restrict and terminate presidential wars without being accused of jeopardizing the safety of American troops. Consequently, the power of the purse is often considered an ineffective and impractical method of limiting presidential military actions. In fact, Senator Jacob Javits (1984, 3) observed that, the “Congress can hardly cut off appropriations when 500,000 American troops are fighting for their lives, as in Vietnam.”

Article II of the Constitution states, “the executive power shall be vested in a President of the United States,” with ”execution” to follow, not precede, authorization by Congress of any power, including the one of declaring war. Congress was assigned, as Adler (2000) observes, "senior status in a partnership with the president for the purpose of conducting foreign policy." Section 2 of Article II provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.” The President being the Commander in Chief guarantees civilian supremacy over the military. Further, the delegates’ speeches at the Constitutional Convention, later writings, and speeches at the ratification of the Constitution in the state conventions uphold that the President as Commander in Chief has no powers that Congress could not define or limit.

Five clauses of Article I of the Constitution grant Congress broad authority with regard to the military and navy. First, Congress was authorized "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.” Second, Congress could “provide and maintain a navy” through appropriations to the executive branch. Third, empowering Congress “to make rules for the government and regulation of the land and naval forces” of the United States.

[33] The Congressional Research Service (2007) published a study listing all statutory provisions.

Fourth, enabling Congress to "provide for calling forth the militia to execute the laws of the United States, suppress insurrections and repel invasions."[34] Fifth, Congress has the responsibility "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."

More than a half of a century after the Constitutional Convention, President Lincoln wrote in a letter to William H. Herndon on February 15, 1848 (Nelson 2012, 791):

> *The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.*

5.1 Presidential Executive Orders

Executive orders are not explicitly mentioned in the Constitution and are therefore a political construction of presidential implied powers. Article II, Section 1 of the Constitution vests the President with "executive power" and Section 3 of the same Article charges him or her to "take Care that the Laws be faithfully executed." From a practical point of view, it can be argued that executive orders are a necessary aspect of governance. Presidential executive orders date back to President Washington's Proclamation of Neutrality on April 22, 1793,

Prior to the Supreme Court ruling in *Youngstown Sheet & Tube Co. v. Sawyer* (1952) no rules or guidelines existed outlining what the President could or could not do with executive orders. The aforementioned ruling stated that President Truman's Executive Order 10340, placing all steel mills in the United States under federal

[34] At the time of the convention, the nation's armed forces consisted of separate state militias, rather than a standing army or navy. In Article I of the United States Constitution control of these forces was placed in the hands of Congress.

control was illegal because it attempted to legislate, rather than execute a law put forth by the Congress or the Constitution (Irons 2005, 175). The ruling reasoned that executive orders must be anchored in the Constitution or statutory law. Otherwise, executive orders exceed the boundaries of Article II authority. Douglas Kmiec (2000, 48), who served in the Office of Legal Counsel under President Reagan, argued: “The duty of the president is to faithfully execute, not invent, the law. While the extent of executive power can be debated […] those sworn to ‘taking care’ of the execution of the law must be held to a higher standard.” The Office of Legal Counsel, according to Kmiec (1993, 349), “operates with an institutionalized conservatism when addressing questions of presidential authority, in the form of a reluctance to sanction practices other than those that are so thoroughly established as to be beyond all legal question." Frank M. Wozencraft (1971, 35), the head of President Johnson’s Office of Legal Counsel, observed, “[t]he authority of the President to ‘make law’ by executive order does not exist in mid-air. It must find its taproot in Article II of the Constitution or in the status enacted by the Congress.”

An opposing opinion was held by Oscar Cox, assistant solicitor general under President Roosevelt, who advocated for a more aggressive approach to legal interpretation. In time of emergencies, Cox argued, the country needs smart lawyers to argue flexible interpretations of the law in order to facilitate the government to do what it desires. In 1942, ten years prior to *Youngstown Sheet & Tube Co. v. Sawyer* (1952), Cox said that even within the constraints of "our law, our democratic processes, and the social and human values we are fighting to preserve, the fact remains that our legal framework allows far more latitude for administrative action than is popularly supposed" (Mayer 2001, 19).

5.2 The Articles of War

The Articles of War, which were largely taken from British precedents, were enacted by the Second Continental Congress on June 30, 1775, during the War of Independence. At that time the aim of the 69 articles was to administer justice and provide a code of conduct for the Continental Army. With the enactment of the Articles of War, the Second Continental Congress defined not only the procedures but also the applicable punishments in the realm of military law, ranging from cash fines for petty offenses to a court martial for serious crimes such as mutiny, sedition,

assistance to enemies, and desertion. On September 20, 1776, the Continental Congress repealed the 1775 code and enacted an expanded one consisting of 101 *Articles*. On December 8, 1779, when the Continental Congress was considering the adoption of amendments to the Articles of War, General George Washington argued that any change "can only be defined and fixed by Congress." Hence, he submitted recommendations to Congress encouraging legislative change (Fitzpatrick 1931, 239). After the Revolution, the *Articles* needed a few changes, resulting in the Rules and Articles for the Administration of Justice, approved by Continental Congress on May 31, 1786. The articles went into effect with the ratification of the Constitution in 1789.

Article I, Section 8 of the Constitution, grants the legislature the power, among others, to "constitute Tribunals inferior to the Supreme Court," to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," and to "make rules for the Government and Regulation of the land and naval Forces."[35] As such, the Articles of War became one of the main legislative controls over presidential war powers. In the decades that followed, the United States Congress reenacted and modified the Articles of War several times.

Davis (2007, 342–3) takes note of the Act of Congress on September 29, 1789, which stated that military troops "shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established." The various statutory actions of adopting and modifying the Articles of War since 1789 attest to congressional constitutional authority. William Winthrop (1896, 831), the leading 19th-century authority on military law, wrote: "In general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and

[35] Justice Story (1833, 1192) noted that the legislature's power to make rules for the military is "a natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy. […]The whole power is far more safe in the hands of congress, than of the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive."

proper agencies for its due prosecution, from which this tribunal [the military commission] derives its original sanction."

On May 31, 1951, the Articles of War were supplanted by the Uniform Code of Military Justice (UCMJ).

5.3 The War Powers Resolution

In 1973 Congress decided that a new statutory restriction upon presidential war powers was necessary to protect legislative prerogatives, resulting in the War Powers Act of 1973, also referred to as the War Powers Resolution.

The first steps of the War Powers Resolution can be traced to the incompatible versions developed by the House and the Senate. On one hand, the House (H.R.J. Res. 542, 93d Cong. § 3, 87 Stat. 555, 1973) didn't see a problem in recognizing the President's prerogative to use military force without prior authorization by the Congress. In the House version, the President was only vaguely requested to consult with Congress "in every possible instance," before sending military into hostile situations. Under Sections 4 and 5 of this version of the Resolution (119 Cong. Rec. 24653–708, 1973), the President was granted the authority to act unilaterally for 60 to 90 days. There were no limits regarding when, why, and for what reason the President would go to war. The only instance of imposing a limit on the Presidential use of the military forces was a requirement that the President pull back the troops in case Congress did not declare war within 120 days or specifically authorize the use of force. On the other hand, the Senate in its own version of the Resolution was not prepared to vest unilateral authority in the President. Therefore, the Senate specified the conditions under which Presidents could act unilaterally. Fisher (2008b, 100) lays out the three situations, where the Senate was willing to give the President unilateral power for military force:

> *(1) to repel an armed attack upon the United States, its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an armed attack against U.S. armed forces located outside the United States, and its territories and possessions, and forestall the direct and imminent threat of such an attack;*

and (3) to rescue endangered American citizens and nationals in foreign countries or at sea.

Due to the incompatible versions, a conference committee had to find a compromise between the House and Senate bills, resulting in a bill that some congressmen viewed as a success[36] and others as a widening of presidential power[37] (Fisher 2008b, 104).

On October 24, 1973, President Nixon vetoed the bill (Pub. Papers 893), declaring that it is contrary to "the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches." Furthermore, President Nixon regarded the bill unconstitutional, since it "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." After the bill was sent back to the Congress, the Senate voted of 75 to 18 and House 284 to 135 to override Nixon's veto.

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[36] Senator Jacob K. Javits (119 Cong. Rec. 33549, 1973) believed that the bill from conference was "an excellent vehicle for expressing the congressional will perhaps better than either of the preceding bills." Senator Edmund Muskie (Ibid. at 33551) referred to the conference bill as "a powerful reaffirmation of congressional responsibility in the warmaking sphere." Senator Hubert Humphrey (Ibid. at 33552) said the bill "represent[ed] one of the finest legislative accomplishments in [his] memory."

[37] Senator Tom Eagleton (119 Cong Rec. 36177, 1973), a principal sponsor of the Resolution, denounced the conference committee's version, stating that the bill gave the President "unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days" Senator Barry Goldwater (119 Cong. Rec. 33553, 1973) noted that the bill "gives the President even broader powers than the authors of the original bill thought they were correcting." Rep. William Green (Ibid. at 36204) objected that the resolution "is actually an expansion of Presidential warmaking power, rather than a limitation." Rep. Vernon Thomson (Ibid. at 36207) observed that the "clear meaning" of the bill pointed to "a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war." Rep. Bob Eckhardt (Ibid. at 36208) argued that the resolution is providing "the color of authority to the President to exercise a warmaking power which I find the Constitution has exclusively assigned to the Congress."

The aim of the War Powers Resolution (87 Stat. 555, 1973) is defined in Section 2(a):

> *[T]o fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.*

The War Powers Resolution grants the President authority to send United States Armed Forces into action abroad only by congressional authorization, declaration of war, or in case of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." At the same time, the War Powers Resolution requires that the President notifies the legislature with timely and complete information about a use of force within 48 hours of committing armed forces to military action. The Resolution guarantees the President a sixty-day time frame to dispatch troops into combat without congressional authorization or declaration of war. However, as Irons (2005, 199) observes, since the “clock does not start ticking until the President submits the ‘report’ to Congress, the timepiece has rarely started ticking.”

Irons (Ibid. 204) observes that between 1973 and 1989, “the War Powers Resolution failed to curb the unilateral military actions of four presidents.” In fact, since the Resolution’s enactment, every President has ignored—or even not followed—its provisions. Fisher (2002, 3) adds that after the Resolution’s enactment the Presidents began seeking authority for their military intervention from international and regional bodies rather than from the United States Congress.[38] The

[38] Presidents Truman in Korea, G. H. Bush in Iraq, Clinton in Haiti, Bosnia, and Kosovo, respectively, acted independently of Congress by arguing that their authority to wage war originates in the international bodies of the UN and NATO. While all these U.S. presidents were implying that U.S. Congress gave them unilateral power to wage war through international bodies the U.S. has joined, their actions had no legal precedents in the history of the UN or NATO.

Constitution Project's report (2005, xii) points out that Congress "should not and cannot delegate the use-of-force decision to an international body. Authorization by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress." Along the same lines, Schlesinger (2005, 7) sees "a *constitutional obstacle*" in reconciling with it "the provision in the United States Constitution giving Congress exclusive power to declare war with the dispatch of American troops into hostilities at the behest of a collective security organization." Most importantly, as Irons (2005, 202) notes, the legislature has been willfully overlooking the Presidents' evasion of the War Powers Resolution and appears to have little interest in remedying the situation.

The War Powers Resolution could be updated. The Constitution Project (2005, xii) suggested that, "Congress should replace the War Powers Resolution with legislation that fairly acknowledges the President's defensive war powers, omits any arbitrary general time limit on deployments of force, reaffirms the constitutionally-derived clear statement rule for use-of-force bills, and prescribes rules for their privileged and expedited consideration." In contrast Irons (2005, 271) argues that, however well intended, such proposals represent "tinkering with a badly damaged system." Hence, he (Ibid.) sees only "one realistic prospect for ending the subversion of the Constitution and returning war-making power to Congress, where it was placed by the Framers and where it belongs. And that prospect, however slim and remote it may seem today, depends largely on the political process."

5.4 Judicial Review

The power of judicial review enables justices to invalidate laws or executive acts that the Supreme Court deems to be unconstitutional, after being presented in the form of judicial cases arising before the courts. As John Rutledge argued at the Constitutional Convention, "the Judges ought never give their opinion on a law till it comes before them" (Farrand 1937, II, 80).

The supremacy clause in Article VI states that "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," though it does not specifically invest courts with the

responsibility of invalidating laws contrary to the Constitution. Article II, while not specifically vesting courts with the power of judicial review, does vest them with jurisdiction in cases arising under the Constitution and laws of the United States.

Because the Constitution does not specifically grant federal courts the power to invalidate legislation, scholars have long debated whether the Framers intended that courts exercise this power. Relying on private letters, subsequent votes on the Judiciary Act in the first Congress, and other expressions of opinion, historian Charles Beard professed to show that a majority of those who penned the Constitution favored judicial review (Vile 2005, 389). Further, Farrand (1937, I, 97–8) documented that the Framers debated judicial review on a several occasions at the Constitutional Convention. The first recorded mention came on June 3, 1776, during discussion of the proposed Council of Revision, when Elbridge Gerry expressed doubt over whether members of the judiciary should be part of this council, observing that judges, “will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution.”

Barnett (2004, 134–7) observes that the main criticism of judicial review came from a few Framers who perceived it as too weak, not being able to stand up for constitutional principle when necessary. Patrick Henry declared he did not believe the Federal judges “had firmness to counteract the legislature.” Likewise, James Wilson argued that Congress should have the power to nullify state laws because “[t]he firmness of Judges is not itself sufficient.” Therefore, it “would be better to prevent the passage of an improper law, than to declare it void when passed” (Farrand 1937, II, 518). On June 18 Alexander Hamilton proposed to the Constitutional Convention that, “[a]ll laws of the particular States contrary to the Constitution or laws of the United States” would be “utterly void,” although the specific method he advanced for invalidating these laws consisted of the national government appointing state governors and giving them the power to negative such laws (Farrand 1937, I, 293). As Barnett (2004, 133) notes, James Madison argued for the superiority of the congressional negative, claiming it is better to stop bad legislation in its tracks than to try dealing with it after it had caused injuries. Madison

was in favor of some sort of judicial review, at least over state legislation (Farrand 1937, II, 27–8):

> *In all the States these are more or less dependt. on the Legislatures. In Georgia they are appointed annually by the Legislature. In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked & arbitrary plans of their masters. A power of negativing the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system.*

Roger Sherman, on the other hand, contended that a congressional negative of state laws would be unnecessary since “the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived” (Farrand 1937, II, 27). Gouverneur Morris, who opposed the congressional negative of state laws, went even further stating, “[t]he proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the judiciary department, and if that security should fail, may be repealed by a national law” (Farrand 1937, II 28).

The majority of those, who voiced their opinion on the subject at the Constitutional Convention, supported judicial review. Among supporters can be counted: Elbridge Gerry, James Madison, James Wilson, George Mason, Gouverneur Morris, Roger Sherman, and Rufus King. Even Luther Martin, an opponent of the Constitution, conceded the function of judicial review. In a statement to the legislature of Maryland, Martin said: "Whether, therefore, any laws or regulations of the Congress, any acts of its President or other officers, are contrary to, or not warranted by the constitution, rests only with the judges, who are appointed by Congress to determine; by whose determination every State must be bound.” (McMaster 1900, 400).

It is Chief Justice John Marshall who established the precedent of judicial review of congressional legislation. In *Marbury v. Madison* (5 U.S. 137, 1803, 176–7) he reasoned that a “legislative act contrary to the constitution is not law. […] It is emphatically the province and duty of the judicial department to say what the law is.

Those who apply the rule to particular cases must, of necessity expound and interpret that rule." With respect to "judiciary power," Marshall (Ibid. at 178) argues that it "is extended to all cases arising under the constitution." Marshall concludes (Ibid. at 179–80): "It is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts as well as of the legislature. […] Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument." Levinson and Balkin (2003, 255) stress that, "Marbury is not just any case. It is a veritable symbol of judicial independence and of commitment to the Rule of Law, the hallmarks, most lawyers believe, of the United States Constitution." Additionally, Brisbin (2005, 98) observes that, "the single most important post-1787 addition to checks and balances is judicial review." Constitutional history witnessed that the other two branches of government have recognized legitimacy of judicial review as an element of the rule of law.

5.5 Imperial Presidency

The notion that the President is above the law and that his or her executive orders are the law, even if not in line with provisions of the Constitution or statutory laws passed by Congress, is characterized as an imperial presidency.

The term *imperial presidency* emerged in public debate in the late 1960s, but it gained prominence with the publication of the book *The Imperial Presidency* (1973) by Arthur M. Schlesinger, Jr., who contended that the Nixon administration over-stepped constitutional limits, particularly with regard to the power of the Congress to declare war and to appropriate funds. In Schlesinger's words (2005, 45): "When the constitutional balance is upset in favor of presidential power and at expense of presidential accountability, the presidency can be said to become imperial."

An imperial presidency can be observed in both domestic and foreign affairs. As Irons (2005, 5–6) illustrates with a case during the Roosevelt presidency: "The crisis of the Depression and World War II marked a massive acceleration in the subversion of the Constitution by the imperial presidency. The Depression allowed Roosevelt to expand—with overwhelming public support but with dubious

constitutional backing—the domestic authority of the presidency, while the war gave him the opportunity to broaden his powers as commander in chief of a military force engaged in combat around the world." An imperial presidency in domestic affairs was analyzed by ex-Nixon aide Richard Nathan (1983, 34), who sheds light on Nixon's utilization of administrative discretion to circumvent constitutional and statutory restrictions by attempting to create a "full-scale, parallel-regulatory apparatus within the White House." This master's thesis, though, explores only the imperial presidency in the field of foreign affairs, which, as Schlesinger (2005, 45) adds, is a "perennial threat to the constitutional balance."

While Schlesinger (2005, 45) asserts that imperial presidency came into existence with the Nixon administration, Irons (2005, 5) claims that "[i]n presiding over this vast expansion of federal power, FDR became the first to occupy the imperial presidency." Adler (2004, 2) shares a similar opinion to that of Schlesinger, arguing that the imperial presidency "took flight during the administrations of Lyndon Johnson and Richard Nixon, and it remains in full flight under the pilotage of George W. Bush." On the same topic, Patrick, Pious, and Ritchie (2001, 311) maintain that even earlier, during the presidencies of Abraham Lincoln, Franklin D. Roosevelt, and Harry Truman, there were suspensions of the execution of certain constitutional provisions or statutes in order to use their war powers expansively. Similarly, Rabkin (2008, 3–4) argues that the Bush administration did nothing more extreme than past Presidents, including Roosevelt, Truman, and McKinley, had done in times of war. Yoo (2000, 159) also contributed to this issue, stating: "President Clinton exercised the powers of the imperial presidency to the utmost in the area in which those powers are already at their height—in our dealing with foreign nations." Constitutional law scholar Bruce Fein (2008, 2) summarized these opinions during the House Judiciary Committee hearing on the Executive Power and Its Constitutional Limitations, remarking that the "executive branch, however, has made our natural rights sport for its political ambitions and craving for power."

Schlesinger (2005, 47) warns that "emergency powers temporarily confined to presidents soon hardened into authority claimed by presidents as constitutionally inherent in the presidential office: thus the imperial power." Along the same lines, Irons (2005, 6) argues that "[d]uring the twelve years of Roosevelt's presidency, the

political center of gravity shifted from Congress to the White House, and has not yet returned to the balance of powers envisioned by the Constitution's Framers."

Importantly, it has been Congress itself that has contributed to the emergence of imperial presidencies by way of delegating its powers. As Justice Jackson (343 U.S. 579 at 654, 1952) in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* observes: "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems […] We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent that power from slipping through its fingers." Therefore, as Rudalevige (2005, 15) contends

> *… the idea of inherent 'imperialism' must be rejected: there is no 'imperial presidency' in the structure of the American government. Any such creature is conditional, fragile, and revocable. The presidency, in other words, is contingently imperial. The flip side of the 'imperial presidency,' then, is the invisible Congress. Congress itself has not been run over so much as it has lain supine; it has allowed or even encouraged presidents to reassert power.*

6 JUDICIAL TESTS OF PRESIDENTIAL WAR POWERS PRIOR TO SEPTEMBER 11, 2001

When deciding executive war powers cases, the Justices on the United States Supreme Court rely primarily on the text of the Constitution. Additionally, they use as secondary sources judicial precedents, international laws, and historically documented thoughts of the Framers, such as remarks made during the Constitutional Convention and writings on constitutional issues. Still further, they consider British and American history and political traditions.

With regard to the boundaries of executive war powers, the Justices—along with legal scholars and interested public—have historically debated between two positions. Some Justices hold a broad interpretation of executive war powers, while others argue that the enumeration of executive powers in the Constitution provides a firm line against presidential efforts to claim implied or inherent powers (Brisbin 2005, 100). During the Washington presidency, this issue spurred such debate between Alexander Hamilton and James Madison. Even though their arguments were utilized during debates at the contemporaneous Supreme Court, they laid down a foundation for Supreme Court cases that followed in the next years, decades, and centuries.

It all began with President Washington pondering whether to honor a treaty the United States had with its ally France, thus battling the British once again, or to remain neutral with regard to a French-British bilateral dispute. He decided to issue a Proclamation of Neutrality dated April 22, 1793, essentially a declaration that the Treaty of Alliance of 1778 did not obligate the United States to defend French territory in America. It was Alexander Hamilton, Washington's Secretary of the Treasury, who advised the President to issue this proclamation. However, James Madison did not agree with Hamilton, arguing that issuing such a proclamation was a congressional power. This controversy then led to their heated Pacificus-Helvidius debates of 1793–1794.

As Staab (2006, 92) observes, Hamilton, writing under a pseudonym "Pacificus," argued that the President has sole responsibility to conduct foreign relations and that the executive power to issue a proclamation is grounded in the vesting clause of Article II, "[t]he Executive is charged with the execution of all laws,

the laws of Nations as well as the Municipal law, which recognises and adopts those laws." Additionally, Hamilton (Ibid.) asserted that the enumerated powers did not exhaust the powers of the executive, as the President possesses a range of executive powers that are bound to be implicit. Lastly, Hamilton viewed respectability in government as essential to its success, an idea that mirrors Blackstone's (1979, 233–4) defense of the maxim: "The king can do no wrong." As such, in a letter to Washington on May 5, 1789, Hamilton wrote that a President needs to maintain distance from the people since "the public good requires as a primary object that the dignity of the office should be supported" (Hamilton, Hickey, and Clark 2006, 127).

Writing under a pseudonym "Helvidius," Madison, in his rebuttal to Hamilton,[39] wrote: "[T]hose who are to conduct a war can not in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separate the sword from the purse, or the power of executing from the power of enacting laws" (Hamilton and Madison. 2007, 62). Issuing a proclamation, Madison argues, is introducing "new principles and new constructions" into the Constitution (Ibid. 84). Siding with Madison, in a letter to William Moultrie dated August 28, 1793, during the time of the Pacificus-Helvidius debate, President Washington himself, acknowledged that the "Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure" (Fitzpatrick 1931, 73).

6.1 The Quasi War: The Adams Presidency

6.1.1 Little v. Barreme (1804)

The first time the Supreme Court ruled that Congress could limit the President's war powers was in the landmark case *Little v. Barreme* (6 U.S. 170, 1804), also known as the Flying Fish case.

[39] Madison's rebuttal to Hamilton appeared in a series of articles in the *Gazette of the United States* between August 24 and September 18, 1793.

On February 9, 1799, during the undeclared war at sea between France and the United States (i.e., the “Quasi War”), Congress (1 Story's L.U.S. 558) authorized President Adams to seize “vessels or cargoes [that] are apparently, as well as really, American” and “bound or sailing to any [French] port” in an attempt to clamp down on trade between the two nations. But President Adams went further, ordering United States navy commanders “to intercept any suspected American ship sailing to or from a French port.” While sailing from a French port, the Danish vessel Flying Fish was seized by the frigate *USS Boston* commanded by Captain George Little, after which the ship’s owner took the issue to the United States courts. In *Little v. Barreme* (6 U.S. 170, 1804), the Justices unanimously decided in owner’s favor, ruling that the President exceeded his powers with an unlawful order. In the opinion of the Court, Chief Justice John Marshall (6 U.S. 170 at 177, 1804*)* opined that while the President could, as Commander in Chief, do all necessary to defend the country in a time of hostilities, he or she does not have an inherent power to act beyond a law passed by the legislature, writing thus:

> *It is by no means clear that the President of the United States, whose high duty it is to ‘take care that the laws be faithfully executed,’ and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.*

The *Little v. Barreme* ruling on the executive war powers was thenceforth the law of the land, being so now for more than two hundred years.

6.2 The Civil War: The Lincoln Presidency

During the Civil War from 1861 to 1865, the courts exercised a limited role in placing constraints on President Lincoln, who suspended the writ of habeas corpus[40] and authorized martial law in some parts of the country. After the war the courts

[40] A writ of habeas corpus is not the right itself, but rather the ability to issue orders demanding the enforcement of the right.

were more courageous in letting the President know the limits of executive powers, as exemplified by the prominent cases involving John Merryman and Lambdin Milligan.

In 1861, President Lincoln was faced with the secession of several states from the Union. Concerned about the Union's future and not wanting to recognize the Confederacy as a nation, President Lincoln avoided asking Congress for a declaration of war on the Confederate States of America. Instead, on April 19, 1861—when Congress was in recess—President Lincoln issued a proclamation suspending the writ of habeas corpus in selected territories, calling out the state militia, increasing the size of the army and navy, and placing a naval blockade on southern ports.

When Congress assembled on July 4, 1861, for a special session, President Lincoln argued that his suspension of the writ was a necessity on his part "to call out the war power of the Government and so to resist force employed for the destruction by force for its preservation." President Lincoln knew he had exceeded presidential limits and needed approval of the Congress, but he also claimed that he did not act outside the Constitution, stating that his "measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now that Congress would readily ratify them." Lincoln continues, "[i]t is believed that nothing has been done beyond the constitutional competency of Congress" (Richardson 1925, 3224–5).

Congress responded twofold. First, regarding the army and navy and calling out the state militia on August 6, 1861, it adopted legislation (12 Stat. 326, 1861) authorizing the President to declare a state of insurrection and retroactively ratifying "all the acts, proclamations, and orders" of President Lincoln after March 4, 1861. Second, regarding suspension of habeas corpus Congress failed to pass legislation for its authorization. Though, a year and a half later, a bill suspending habeas corpus on Congress's own authority was passed. President Lincoln signed Habeas Corpus Act into law on March 3, 1863.

6.2.1 Ex parte Merryman (1861)

On April 27, 1861, Lincoln wrote to General Winfield Scott with an order authorizing the suspension of habeas corpus within the vicinity of the "military line." As Tillman (2016, 988) notes, “Lincoln’s order meant, at least, that the military had authority to arrest, seize, and detain individuals suspected of treasonous activity, and if the detained person brought judicial proceedings in regard to the arrest, etc., then the military personnel could put in a good faith defense, or otherwise plead valid authorization by the President under the Suspension Clause.” Among people imprisoned under this order was Lieutenant John Merryman, a vocal opponent of the Union, who was charged with treason. Merryman filed a petition for a writ of habeas corpus.

Chief Justice Roger B. Taney, sitting at the time as a judge of the United States Circuit Court for the District of Maryland, ordered that a petition for a writ of habeas corpus be issued. Chief Justice Taney (17 Fed. Cas. 144, 148, C.C. Md. 1861) ruled that the Constitution does not confer upon the President the authority to suspend the writ: “That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it.” Taney argued that suspension power resided in the legislature, since the authorization of it is in Article I, Section 9 that deals with the powers and prohibitions of the legislative branch.[41] Chief Justice Taney (Ibid.) rejected the constitutionality of Merryman's imprisonment and upheld that he was denied a right to due process:

> *The great importance which the framers of the constitution attached to the privilege of the writ of habeas corpus, to protect the liberty of the citizen, is proved by the fact, that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers; and even in these cases the*

[41] The ability to suspend the writ lies solely with the legislature, while the executive is granted no such authority under the Constitution. This understanding is noted for reiterating the opinion of Chief Justice Marshall and the court ruling in *Ex Parte Bollman* (1807), and was recently restated by the Supreme Court in *Hamdi v. Rumsfeld* (2004).

power is denied, and its exercise prohibited, unless public safety shall require it.

Consequently, Chief Justice Taney called on President Lincoln to release Merryman, though his call was ignored. Between 1861 and 1863 several other federal district and circuit court rulings affirmed Taney's opinion, which did not stop Lincoln from making unauthorized suspensions. On or about July 13, Merryman was remanded to the custody of the civilian authorities, before being released on bail, at $40,000. The trial was scheduled for November 1961, later postponed until May 1962, by which time the district attorney dropped the charges (Tillman 2016, 953).

6.2.2 The Prize Cases (1863)

By placing a naval blockade on southern ports rather than closing them down, President Lincoln declared the Confederacy to be belligerents. The blockade resulted in the capture of dozens of American and foreign ships, carrying either goods or munitions.

During this time, even if several states waged war against the United States federal government, neither Congress nor the President had any constitutional authorization to declare war against a state of the Union. Nevertheless, in the majority opinion Justice Grier (67 U.S. 635 at 668) held that as Commander in Chief President Lincoln was bound "to resist force by force" and as such acted within his executive powers defined by Article II when he ordered a seizure of four ships for violating the naval blockade of the South, even though congressional authorization for the seizure was lacking at the time. Justice Grier (Ibid. at 669) opined that in the event of invasion the President is “bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name.” The Court did not provide an opinion whether approval by the *post facto* legislature was necessary to legitimate the blockade.

Another issue raised in *Prize Cases* was whether capturing ships and impounding them without formal declaration of war is piracy. A ship captured during war may be kept as a prize, while capturing ships and impounding them during peace time is piracy. The Court (Ibid. at 666) contended that after the firing on Fort

Sumter on April 12, 1861, the Southern Confederacy were in insurrection against the United States by acts of belligerency, which meant that a state of civil war existed *de facto*.

6.2.3 Ex parte Milligan (1866)

Habeas Corpus Act of March 3, 1863, suspended the privilege of the writ of habeas corpus. The statute denied authority of the judiciary to deal with matters related to persons detained under authority of the President. Instead, these people were brought in front of military tribunals.[42]

Lambdin P. Milligan and four other men planned to steal Union weapons, invade Union prisoner-of-war camps, and take over the state governments of Indiana, Ohio, and Michigan. In 1864, the men were detained and put on a trial before a military tribunal on charges of conspiracy. They were found guilty and sentenced to be hanged in May 1865. Milligan presented a petition of habeas corpus to a federal judge, arguing that military did not have jurisdiction over him and that he was entitled to trial by jury before a civilian court. By the time Milligan's case reached the Supreme Court the Civil War had ended.

In *Ex parte Milligan* (71 U.S. 2, 1866) the Supreme Court held that the suspension of habeas corpus could be constitutional only if civilian courts were forced closed or a state was not upholding the Constitution of the United States, adding that "the Constitution of the United States is a law for rulers and people,

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[42] Not everyone in President Lincoln's team regarded the resort military tribunals as wise. Edward Bates, Attorney General from 1861 to 1863, believed that "Such a trial is not only unlawful, but it is a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of Law, and that the law is strong enough, to rule the people wisely and well; and if the offenders be done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world." Moreover, Bates saw a problem in the fact that people serving on military tribunals were "selected by the military commander from among his own subordinates, who are bound to obey him, and responsible to him; and therefore, they will, commonly, find the case as required or desired by the commander who selected them" (Fisher 2003, 488).

equally in war and in peace." A suspension of the writ of habeas corpus provides authority to hold citizens without charges; however, military tribunals had no jurisdiction to try or sentence Milligan, a United States citizen from Indiana, while civilian courts in Indiana were open and Indiana was not rebelling against the United States. It follows that Milligan's trial and conviction by a military tribunal "was illegal," and Milligan was entitled to be released (71 U.S. 2 at 130, 1866).[43]

Fisher (2005, 59) observes that the *Milligan* decision lacked popularity, with some seeing it as throwing "weight against those in the North who intended to carry out a program of reconstruction on the South." In response, Congress passed legislation (14 Stat. 432–3, 1867) to limit the Supreme Court's jurisdiction to hear cases involving military law: "And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid..."

Throughout the Lincoln presidency the Supreme Court—with five Justices appointed by President Lincoln—and the Republican Congress were reluctant to question or even deny the legitimacy of military courts, especially those involving the South during its rebellion. Records for the period between April 1865 and January 1869 show that in the South under martial law 1,435 trials appeared before military tribunals (Neely 1991, 176–7).

6.3 The World War II: The Roosevelt Presidency

6.3.1 Ex parte Quirin (1942)

The German saboteurs in this case were born in Germany but had also lived in the United States at some time. They all returned to Germany prior to 1941. After the declaration of war between the United States and the German Reich, the eight men in question[44] received training at a sabotage school in Germany, where they

[43] The Supreme Court revisited *Milligan* in the Nazi saboteurs case in 1942.

[44] Ernest Peter Burger, George John Dasch, Herbert Hans Haupt, Heinrich Heinck, Edward Keiling, Herman Neubauer, Richard Quirin and Werner Thiel. Burger and Haupt were naturalized U.S. citizens.

were instructed in the use of explosives, secret writing, and other terrorist tactics. In their travel by sea from Europe back to the United States, they were split into two groups. Burger, Heinck, Dasch, and Quirin traveled by the German submarine U-202 to Amagansett Beach, New York, landing on the night of June 13, 1942.[45] The remaining four men traveled by the German submarine U-584 to Ponte Vedra Beach, Florida, where they landed on the night of June 17, 1942. All eight men wore German uniforms ensuring treatment as prisoners of war should they be captured upon landing. After reaching shore, they all disposed of the uniforms, changed into civilian clothing, and proceeded to New York City and Jacksonville, respectively, from where they traveled to other points in the United States. Their primary intent was to destroy United States facilities supporting the war effort. The men—or their relatives in Germany in case the men were captured—were supposed to receive salary payments from the German government after completing the job.

Soon after landing, Dasch decided to turn himself in to the Federal Bureau of Investigation (FBI). When Dasch called FBI's New York City office on June 14, he was not taken seriously. He then traveled to Washington, DC, where the FBI office did take him seriously after a few hours with him and seeing the $80,000 in cash he had in his briefcase. Following a five-day interview of Dasch, the FBI in New York and Chicago rounded up the remaining men (Katyal and Tribe 2002, 1280–1). On June 27, 1942, FBI Director J. Edgar Hoover announced the capture of the Nazi Saboteurs.

Goldsmith and Sunstein (2002, 2) observe that while the public, press, and politicians demanded the death sentence, the Roosevelt administration was uncertain about how to prosecute and punish the saboteurs for two reasons. First, a civilian court cannot impose the death penalty on a non-United States citizen.[46] Second, Article III of Constitution requires that the government try United States citizens for treason. Hence, the Roosevelt administration felt a proclamation would address these issues (discussed below). Fisher (2002a, 17) observes: "Without the proclamation, the maximum penalty for sabotage in time of war could not exceed 30

[45] Coast Guard beach patrolman Frank Cullen noticed the first group on the shore. On returning to his station, Cullen sounded the alarm.

[46] As Yoo (2006, 92) noted, "no law authorized capital punishment for their crime."

years. In the case of espionage, the death penalty was not mandatory. Roosevelt's proclamation allowed the death penalty if two-thirds of the tribunal agreed, even though Article of War 43 required a unanimous vote for a death sentence." As a consequence, Attorney General Francis Biddle was determined to replace civil and martial courts with military tribunals, after suspension of the writ.

On July 2, President Roosevelt issued Proclamation 2561 (7 Fed. Reg. 5101, 1942) under the caption Denying Certain Enemies Access to the Courts of the United States, stating that "the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the Law of War." By referencing law of war President Roosevelt aimed to avoid the statutory procedures for a court martial established by the legislature with the Articles of War, the precursor to UCMJ. Hence, the order freed the military tribunal from the congressional limits authorized by the Articles of War, such as the votes needed for sentencing and Roosevelt being the one to do the final review of the military tribunal's decision (Fisher 2005, 98–9).

On the same day, the President issued a Military Order (7 Fed. Reg. 5103, 1942) establishing a military tribunal of seven appointed general officers as members to try the accused for "offenses against the law of war and the Articles of War."[47] Roosevelt was not claiming inherent power, rather citing statutory law and his constitutional authority as Commander in Chief.

Congress, with the Democrats controlling both houses, passed an act declaring that spies (i.e., "unlawful combatants") who discarded their uniforms upon their arrival to the United States were not offered the protection of a trial by jury and, hence, were subject to military tribunals.[48] Schaffer (2002, 1469) points to the fact

[47] Yoo (2006, 92) observes that enactment of Articles of War in the case of Nazi saboteurs was in contradiction to the *Milligan* decision requiring the government to use a federal court, if the civilian courts were open and the defendant did not associate with the enemy.

[48] On August 21, 1776, the Continental Congress adopted the first legislation regarding the punishment of spies—a resolution stating that all persons not owing allegiance to America,

that United States citizenship did not exclude anyone from being classified as an enemy combatant or being so treated. As such, even though Burger and Haupt were naturalized United States citizens, the administration denied them a civilian court trial. Moreover, the act created an offense *ex post facto* and assured its application. However, the legislature, following the Constitution, cannot pass an *ex post facto* law—a law that inflicts punishment for an act that was not illegal at the moment it was committed. In addition, the legislature cannot increase the penalty for a past crime. Yet Roosevelt's proclamation violated both limitations and was, therefore, *ex post facto.* In Bernstein's words (1943, 135): "Congress could not have passed an ex post facto law of that tenor; congress could not have authorized the President to issue such a proclamation."

On July 8, the trial commenced for all eight German saboteurs, represented by Army attorneys, against the charges of committing or attempting to commit "sabotage, espionage, hostile or warlike acts, or violations of the laws of war." The saboteurs petitioned the Supreme Court for a writ of habeas corpus, arguing that they should be tried in a civilian court, for those courts were open and functioning and as such not precluded from hearing their case. The Supreme Court (317 U.S. 1 at 37–8, 1942) rejected their petition:

> *Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.*

On July 31, 1942—in the midst of the trial and after the oral argument at the Court—the Supreme Court issued a unanimous *per curium* opinion,[49] stating that the

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"found lurking as spies in or about the fortifications or encampments of the armies of the United States," shall be sentenced to death or punishment by sentence of a court martial. During the War of Independence, both the United States and England used military courts to try spies (Winthrop 1896, 1191).

[49] *A per curium* is an unsigned opinion on behalf of the court.

military tribunal was legally constituted and, thus, German saboteurs were lawfully detained. On the same day, the Supreme Court—to which President Roosevelt nominated eight out of the nine Justices—did not provide reasoning for its opinion. Instead, it announced that the full opinion on the case would follow at a later time (Goldsmith and Sunstein 2002, 3). After the *per curium* opinion, the work of the military tribunal resumed.

Yoo (2006, 93) writes that it took only twenty days for the military tribunal to try and convict the German saboteurs. All of the men were found guilty and sentenced to death. On August 8, President Roosevelt exercised his authority to review the proceedings and the decision itself, after which President issued an order to execute six men and spare Burger and Dasch in light of their cooperation. The German saboteurs were executed the same day (Fisher 2005, 114).

Almost three months after the six German saboteurs had been executed, Chief Justice Harlan Stone penned the full opinion of the Court in *Ex parte Quirin* (317 U.S. 1, 1942), rejecting the Nazi saboteurs' plea. By the time the opinion was written, Chief Justice Stone had made sure that there was a unanimous decision among the Justices, which he believed was necessary for the particular circumstances of these proceedings. While upholding FDR's military tribunals, the *Ex parte Quirin* decision was narrower than *Milligan* since the Nazi saboteurs had joined the Nazi armed forces (Ibid. at 21).

Ex parte Quirin (Ibid. at 28) extended support to President Roosevelt, citing the congressional declaration of war and its authorization of military tribunals, to "have jurisdiction to try offenses against the law of war in appropriate cases," because (Ibid. at 31) "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." Chief Justice Stone, writing for the Court, did not provide an opinion whether the President could independently create military tribunals.

As Fisher (2005, 199) notes, the proceedings in *Ex parte Quirin* “had nothing to do with judging guilt; it was to determine the jurisdiction of the [military] tribunal.” Yoo (2006, 95) argues that while Congress in 1916 most likely did not intend specifically to authorize military commissions with article 15 of the Article of War, the Supreme Court in *Quirin* still read the article “as direct congressional authorization of commissions.” Already on November 5, 1942, Frederick B. Wiener, an expert on military law, in his letter to Justice Frankfurter, observed that the Supreme Court was a “careless or uninformed” handler of the Articles of War, arguing that the legislative history of article 15 of the Articles of War demonstrated its intent as a restriction on military tribunals (Fisher 2005, 121–2). Corwin (1947, 118) echoed, evaluating the Court’s ruling as “little more than a ceremonious detour to a predetermined end.”

6.3.2 *Korematsu v. United States (1944)*

On February 19, 1942, three months after the Imperial Japanese Navy attacked United States naval base at Pearl Harbor, President Roosevelt in an attempt to protect the United States against espionage and sabotage issued Executive Order 9066 authorizing the military to remove all Americans of Japanese ancestry from areas that were deemed critical to national defense. On March 27, 1942, General John L. DeWitt barred Japanese Americans from leaving the limits of Military Area No. 1, where Toyosaburo Koromatsu also lived. On May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34, ordering Japanese Americans to report to Assembly Centers on May 9, as a prelude to being moved to camps. On May 9, 1942, the United States government passed Civilian Restrictive Order No. 1 (8 Fed. Reg. 982), which denied freedom of movement to western Americans of Japanese ancestry, forcing them to move to relocation camps.

Koromatsu wanted to remain with his girlfriend, who was not of Japanese ancestry, thus he refused to obey the orders and became a fugitive. Levy and Mellor (2008, 132–3) note that if Koromatsu stayed at home, he would have been liable for prosecution under the new order. In addition, if he left the area, he would be liable to prosecution under the earlier March 27 order. The combined orders had only one purpose: to drive all Japanese Americans into the assembly centers, where people

were not permitted to leave without permission.[50] Additionally, Korematsu changed his name on a draft card to Clyde Sarah and decided to undergo plastic surgery on his eyelids and nose to be able to claim Spanish and Hawaiian heritage. In spite of his efforts to escape the authorities, Korematsu was arrested on May 30. He was held at a jail in San Francisco and indicted on June 12.

Shortly after Korematsu's arrest, Ernest Besig, a local director of the American Civil Liberties Union (ACLU), presented his case in court to test the legality of the Japanese-American interment. Referring to a violation of his Fifth Amendment rights,[51] Korematsu argued that Japanese Americans “should have been given a fair trial in order that they may defend their loyalty at court in a democratic way, but they were placed in imprisonment without a fair trial!” (Irons 2005, 137–8).

On September 8, 1942, Korematsu was convicted and sentenced to a five-year probation period (Irons 1993, 99). From the courtroom, Korematsu was transferred to the Tanforan Racetrack and later to the Central Utah War Relocation Center, where he was as an unskilled laborer eligible to receive only $12 per month for working eight hours per day at the camp. Korematsu appealed to the United States Court of Appeals, which on January 7, 1944, upheld the original verdict (Ibid. 153–4). As a result, Korematsu appealed to the United States Supreme Court.

On December 18, 1944, a Supreme Court 6-3 decision (323 U.S. 214, 1944) written by Justice Black held that compulsory exclusion and placement in detention camps of Japanese Americans was justified during circumstances of "emergency and peril." Dissenting Justice Murphy (Ibid. at 233) pointed out that exclusion of Japanese Americans “goes over ‘the brink of constitutional power’ and falls into the ugly abyss of racism.” Also dissenting was Justice Jackson (Ibid. at 243), who argued that, “if any fundamental assumption underlines our system, it is that guilt is personal and not inheritable.” Justice Jackson (Ibid.) continued, pointing out that

[50] Justice Roberts (323 U.S. 214 at 232, 1944), in his dissent in *Korematsu*, pointed out that “[T]he two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp.”

[51] “No person shall be […] deprived of life, liberty, or property, without due process of law.”

Article III of the Constitution forbade punishment of treasonable acts by parents or ancestors, “no Attainder of treason shall work Corruption if Blood, of Forfeiture except during the Life of the Person attained.” Yet (Ibid. at 243) the United States government, with the Court’s approval, made “an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.” He further asserted (Ibid. at 246), “the Court for all time has validated the principle of racial discrimination […] The 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.”

In fact, a number of Supreme Court decisions arose out of Japanese American internment that addressed in some way the government’s power to sentence United States citizens to detention in internment camps without being charged with any crime and without any hearing. In two cased decided on June 21, 1943, *Yasui v. United States* (320 U.S. 115, 1943) and *Hirabayashi v. United States* (320 U.S. 81, 1943) the Court unanimously upheld the constitutionality of curfews against more than 120,000 Americans with Japanese ancestry (Hartz 2012, 29–30). On another hand, in *Ex parte Endo* (323 U.S. 283 at 297, 1944)—decided on the same day as *Korematsu*—the court accepted a petition for a writ of habeas corpus and ruled that military officials had “no authority to subject citizens who are concededly loyal.” Irons (2005, 345) notes that the contradiction in the opinions did not bring expected public attention, for only a day earlier on December 18 the War Department had announced that after two years the internment camps would be closed before the end of 1945 and that Japanese Americas would be “permitted the same freedom of movement throughout the United States as other loyal citizens and law abiding aliens.”

Prior to implementing exclusion and restriction of rights for Americans of Japanese ancestry, the Roosevelt administration did not couple evidence of misbehavior with nationality, nor did it confine its profile to identifying targets for further investigation. In fact, J. Edgar Hoover, the director of the Federal Bureau of Investigation (FBI), wrote to Attorney General Francis Biddle in a “Personal and Confidential” memorandum on February 7, 1944, that the FBI had no information that “attacks made on ships or shores in the area immediately after Pearl Harbor have

been associated with any espionage activity ashore" (Levy and Mellor 2008, 129–34). Biddle, who sided with the President in the Nazi saboteurs' cases, had serious doubts about President Roosevelt's authorization of exclusion and restriction of the rights of Japanese Americans. In his letter to President Roosevelt on December 30, 1943, Biddle wrote: "The present practice of keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our Government" (Irons 1993, 271).

President Roosevelt and Congress stepped beyond their war powers by implementing exclusion and restriction of rights for Americans of Japanese ancestry. Failing to invalidate the government's actions against Japanese Americans, does not denote a failure of the Constitution, but rather that the Supreme Court was unwilling to exercise constitutional independence and provide a check upon the executive and legislature, something Fisher (2005, 140) characterizes as the "ingrained instinct of Justices to defer to wartime executive and military judging." As Bannai and Minami (1992, 774) highlight, "[t]he Supreme Court first denied that there was any connection between race and the exclusion, and then accepted the argument that exclusion and, implicitly, incarceration was necessitated by race-based affinity Japanese Americans were presumed to have for Japan." As opined by Chief Justice Warren (1962, 193) in a law review article the decisions in the Japanese American cases deemed "that a given program is constitutional, [but] does not necessarily answer the question whether, in a broader sense, it actually is." Chief Justice Warren (Ibid. 202) concludes that in a democratic society "it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution."

President Carter appointed a special commission to investigate the internment of Americans of Japanese ancestry. In December 1982, the Commission on Wartime Relocation and Internment of Civilians (1982, 18) released a 467-page report, entitled *Personal Justice Denied*, which concluded that the removal of Americans of Japanese ancestry to prison camps occurred because of "race prejudice, war hysteria, and a failure of political leadership."

On April 19, 1984, the federal Judge Marilyn Hall Patel vacated Korematsu's conviction on the basis that the War Department had in Koromatsu's original case

knowingly submitted false information to the Supreme Court (Fisher 2005, 143). Judge Patel (584 F. Supp.1406, N.D. Cal. 1984) states that although the Court's decision in his case "remains on the pages of our legal and political history," it stands as a "constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."

On August 10, 1988, President Reagan signed the Civil Liberties Act of 1988, acknowledging that the internment was unjust, for which he formally apologized and granted personal compensation of $20,000 to each surviving prisoner. On January 15, 1998, President Clinton awarded Korematsu the Presidential Medal of Freedom, the highest civilian honor in the United States (Kenney 2012, 132).

6.3.3 In re Yamashita (1946)

During World War II, Tomoyuki Yamashita was a commanding general for the Japanese army in the Philippines. From October 29 to December 7, 1945, a United States military tribunal of five United States generals tried General Yamashita for war crimes on charges of failing to control the troops under his command who in the Manila Massacre had committed atrocities against the civilian population and prisoners of war. While a considerable body of evidence supported Yamashita's claim that he did not have ultimate command responsibility over all military units in the Philippines, it was not allowed in court, and no evidence to the contrary was presented. The military tribunal sentenced Yamashita to death (Fisher 2005, 134). Yamashita appealed the decision of the military tribunal and filed a petition for a writ of habeas corpus to the United States Supreme Court, contending that the tribunal lacked jurisdiction to place him on trial. Yoo (2006, 94) argues that the appeal to the United States Supreme Court was possible because "the trial was held on the American territory in the Philippines."

On February 4, 1964, the Supreme Court in *In re Yamashita* (327 U.S. 1 at 10, 1946) affirmed the conviction by a vote of 7-2, pointing to "congressional recognition of military tribunals and its sanction of their use in trying offenses against the law of war," despite the creation of this principle coming after the cessation of hostilities between the United States and Japan. Chief Justice Stone (Ibid. at 11–4) in the opinion of the Court concluded that military tribunals were authorized by Congress in

the Articles of War and found that Yamashita had been "unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes."[52]

The legitimacy of the hasty trial was questioned by many at the time, including Justice Murphy (Ibid. at 27-8), who argued that Yamashita's rights under the Fifth Amendment were violated without any justification, since he "was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged." Justice Rutledge (Ibid. at 43) wrote in a separate dissent that the proceedings and rules of evidence in the Yamashita tribunal violated two Articles of War enacted by Congress, pointing out that it was not in the American tradition "to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; or in language not sufficient to inform him of the nature of the offense or to enable him to make defense." Justice Rutledge (Ibid. at 72–8) also argued that Yamashita's trial was in conflict with the Geneva Convention of 1929.

On February 23, 1946, two weeks after the Supreme Court's decision, Tomoyuki Yamashita was hanged at Los Baños Prison Camp, 30 miles south of Manila, the Philippines.

6.4 The Post World War II & The Korean War: The Truman Presidency

6.4.1 Johnson v. Eisentrager (1950)

The issue in this case was whether a United States military tribunal has jurisdiction to try and convict nonresident enemy aliens, in this case persons identified as German war criminals and held in a United States-administered prison in Germany for offenses against law of war committed outside the United States, thereby also denying them a writ of habeas corpus to United States civilian courts. The German war criminals had at no time lived or been on United States sovereign territory, while their imprisonment was entirely outside the United States.

[52] *In re Yamashita* has become a precedent of the command responsibility for war crimes, known as the *Yamashita Standard*.

In 1948, Lothar Eisentrager, a German intelligence officer, was—along with twenty other men—tried and convicted by a United States military tribunal in China for violating laws of war due to his engaging in, permitting, or ordering continued military activity against the United States after the surrender of Germany on May 8, 1945. Shortly after the verdict, the men were transported to Bavaria, the United States-occupied part of Germany, to serve their sentences in the custody of the United States Army. On April 26, 1948, Eisentrager filed for a writ of habeas corpus in the United States District Court in Washington, DC, arguing that his detention, trial, and conviction, being without the independent review of federal courts, violated provisions of the United States Constitution (Article I and Article III, the Fifth Amendment, etc.), laws of the United States, and provisions of the Geneva Conventions (Hartz 2012, 65). In response, the Truman administration argued that nonresident enemy aliens do not have the right to a writ of habeas corpus to access United States civilian courts in wartime.[53]

On Sept. 30, 1948, District Court Judge Edward A. Tamm (335 U.S. 188, 1948) dismissed the petition, writing that since the Germans "are not now and have never been in the United States," they had no case to argue for a writ of habeas corpus to United States civilian courts.

In April 1949, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit in *Eisentrager v. Forrestal* (174 F.2d 961, D.C. Cir. 1949) unanimously reversed the decision, citing that enemy agents tried and convicted abroad by a military tribunal have a right to a writ of habeas corpus. The Court (Ibid. at 963) held that any person deprived of liberty by a United States official, and who can show that his or her confinement violates a prohibition of the United States Constitution, has a right to the writ regardless of whether he or she is a citizen or an alien, the ruling noting that the Fifth Amendment applies broadly to “any person.”

The Truman administration appealed the reversal at the Supreme Court. Sutherland (1955, 1381) writes that Solicitor General Philip B. Perlman in his brief to

[53] In this part of the arguments, the executive quoted the Geneva Conventions, implicitly recognizing that the prisoners had rights and obligations, which created a precedent for the *Hamdan* decision (2006).

the Court argued that, even if the Constitution follows the flag, as the D.C. Circuit had ruled, "it does not necessarily follow […] that a judicial remedy is available. […] There are many instances, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution."[54] Eisentrager's counsel dismissed that argument by stating that this "would make the exercise of fundamental rights depend on the accident of locus of incarceration."

A 6-3 majority on the Supreme Court in *Johnson v. Eisentrager* (339 U.S. 763, 1950) reversed lower court's decision giving enemy aliens Fifth Amendment rights denied to Americans in service[55] and indicated an exclusion of judicial review for military tribunals located outside the United States (Ibid. at 768–86)

> *…our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and non-resident enemy aliens who at all times have remained with, and adhered to, enemy governments. […] But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. […] If this [Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. […] We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.*

The Court (Ibid. at 789) also stated that the Geneva Conventions cannot be enforced by the federal courts: "Rights of alien enemies are vindicated under [the Geneva Conventions] only through protests and intervention of protecting powers as

[54] The Truman administration even argued that habeas corpus was not available to United States citizens convicted and imprisoned by United States military outside the United States.

[55] Fisher (2005, 156) observes that, "[t]he issue was not whether aliens are entitled to superior rights but what rights they have, if any, before a tribunal. The Court declined to say."

the rights of our citizens against foreign governments are vindicated only by Presidential intervention.”

Justice Black (Ibid. at 791, 798) wrote in his dissent: “Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. […] I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern. Courts should not for any reason abdicate this, the loftiest power with which the Constitution has endowed them."

The Johnson v. Eisentrager (1950) decision was used by the Bush administration in their arguments in *Rasul v. Bush* (2004).

6.4.2 Youngstown Sheet and Tube Co. v. Sawyer (1952)

After a lengthy dispute between the owners of steel companies and their employees over terms and conditions within new collective bargaining agreements, the Union gave notice on April 4, 1952, of a nation-wide strike called to begin April 9th. At the time steel was an indispensable component of all war materials; a strike on its production threatened to jeopardize national defense of the United States, being still war weary from the World War II and fearing the Korean War will move to the American territory. Consequently, President Truman believed a governmental seizure of the nation’s strikebound steel mills was necessary. On April 8, 1952, only hours before the strike was to begin, President Truman issued Executive Order 10340 (17 Fed. Reg. 3139 at 3141), directing Secretary of Commerce Charles Sawyer to take possession of most of the steel industry with an intent to avert a nationwide strike, thereby keeping the mills running (Marcus 1994, 58–82). The next morning the President reported on these actions to Congress (Cong. Rec., April 9, 1952, p. 3962) and again twelve days later (Cong. Rec., April 21, 1952, p. 4192). Congress declined to take any action.

President Truman did not have statutory authority for Executive Order No. 10340, a fact known to the President and his team. Instead, President Truman—as laid out in national radio and television addresses—argued that in the case of this seizure he claimed inherent powers acting "by virtue of the authority vested in me by

the Constitution and the laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States."[56] Further, assistant Attorney General Holmes Baldridge acknowledged that the President Truman lacked statutory authority to seize the steel mills, but rather he was exercising "the inherent executive powers of the President." The next day (April 18, 1952), *New York Times* reported that the White House source confirmed that the President had power in an emergency to take over "any portion of the business community acting to jeopardize all the people." Throughout the subsequent legal proceedings, the Truman administration continually cited what it referred to as the president's "emergency," "inherent," or "residual" powers (Adler 2002, 157).

The steel mill companies brought legal proceedings to the Federal District Court, contending that the seizure had no authorization in any statutory or constitutional provisions. Therefore, the President's order should be declared invalid, followed by preliminary and permanent injunctions restraining their enforcement. Many were surprised when Judge David A. Pine did not agree with the Administration's claim of an inherent power.[57] Judge Pine (103 F. Supp. at 576) ruled that the seizure was invalid, finding nothing in the Constitution to support the Administration's claim of an inherent power in the presidency (Ibid. at 253):

> *Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does `not perceive how Article II [of the Constitution] can be read […] so as to limit the Presidential power to meet all emergencies,' and he claims that the finding of the emergency is `not subject to judicial review.' To my mind this spells a form*

[56] President Truman had an expansive view of inherent war powers, as it was evidenced during his April 17, 1952 press conference, where a reporter asked: "Mr. President, if you can seize the steel mills under your inherent powers, can you, in your opinion, also seize the newspapers and, or, the radio stations?" President Truman answered: "Under similar circumstances the President of the United States has to act for whatever is for the best of the country." (Marcus 1994, 100).

[57] Chief Justice Rehnquist (1986, 758) observes: "A single district judge was thought very unlikely to be willing to take on the President of the United States in this fashion."

of government alien to our Constitutional government of limited powers. I therefore find that the acts of defendant are illegal and without authority of law.

After moderating their arguments, the Truman administration asked the Supreme Court to uphold the seizure. On June 2, 1952, the Supreme Court with a vote of 6-3 in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579, 1952) (i.e., The Steel Seizure Case) upheld Judge Pine's ruling, deciding that the President had no power to seize private property in the absence of either specifically enumerated authority under Article II of the Constitution or statutory authority conferred on him by Congress (Hartz 2012, 49). In his concurring opinion, Justice Black (343 U.S 585, 1952) rejected the claim of an inherent emergency power:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.

Kmiec (2000, 49) notes that in his concurring opinion Justice Jackson defined the limits and scope of presidential powers, providing a framework for courts to evaluate the adequacy of presidential power claims. The most poignant message that Jackson (343 U.S. 579, 635) brings forth in his concurrence is the way to preserve the balance of power between the President and Congress:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Further, Justice Jackson (Ibid. 637) viewed President Truman's action as a measure "incompatible with the expressed or implied will of Congress," since it was inconsistent with the three mechanisms that Congress had already provided the President for responding to threatened industrial disruptions: the Taft-Hartley Act, the Selective Service Act's provisions, and the Defense Production Act. Justices Burton, Frankfurter, and Clark agreed (Bellia 2008, 23–4). Kmiec (2000, 49), who served in the Office of Legal Counsel under Ronald Reagan, commented on Justice Jackson's opinion: "[A] president has maximum authority when he acts pursuant to express or implied authority from Congress; he possesses ambivalent or equivocal authority when Congress has neither granted nor denied the president the authority to act; he enjoys the least latitude when he acts contrary to the express or implied will of Congress." Also commenting on the Steel Seizure Case was Chief Justice Rehnquist (1986, 752): "I am sure the case simply represents one of several important judicial milestones defining the limits of the power of a President of the United States to act on his own, without congressional authorization." While Louis Fisher notes that *Youngstown* represented "one of the rare occasions when the Court has rebuked a presidential act in wartime […] To that extent it stands as a warning to occupants of the Oval Office that their actions are subject to judicial scrutiny and control" (Marcus 1994, ix). For Banks (1953, 536), *Youngstown* "will jut out among the landmarks of constitutional law." Lastly, as Pritchett (1954, 206) remarks, when measured against Youngstown, "all other [separation of powers] cases pale into insignificance."

Bellia (2008, 26) argues that "the strength of the Jackson opinion lies less in its doctrinal categories than in its critique, explicit and implicit, of the decision-making in the political branches that gave rise to the *Steel Seizure* case." Since Congress was silent in the steel mill seizure, the courts had only a limited role in being a check on the executive.

Chief Justice Rehnquist (1987, 94–5) serving as a law clerk for Justice Jackson at the time of the *Youngstown Sheet & Tube Co. v. Sawyer* decision wrote: "I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence

on the Court." A similar observation was made by Maeva Marcus (1994, 130) who pointed out that the decision by District Judge Pine to hold against the administration

> *…apparently influenced public opinion, for the Gallup Poll taken after the announcement of the ruling showed less support for the seizure than had been evidenced in previous polls. This popular reaction, which theoretically should not have had any effect on the outcome of the steel seizure as it traveled through the higher courts […] [became] an important element in the legal decision-making process.*

As a corollary, the public can be an invisible check on presidential power, as long as their concerns are expressed and communicated to the courts and Congress. Hence, individual citizens—while supporting independent legislative and judicial constraints—can transform from passive observers of checks and balances between governmental branches into a factor that would not be overlooked (Marcus 1994, xix).

6.5 Vietnam War: The Nixon Presidency

6.5.1 New York Times v. United States (1971)

In 1971, a classified Defense Department study of the history of United States military involvement in Vietnam (i.e., the *Pentagon Papers*), officially known as *History of U.S. Decision-Making Process on Viet Nam Policy* was leaked by a government official to the *New York Times*.[58] On June 13, 1971, the first article based on the documents appeared in the Times' Sunday edition. Even though the documents did not directly implicate President Nixon, but rather the Kennedy and Johnson administrations, the Nixon administration, in an attempt to prevent further publication, sought a temporary restraining order through the Department of Justice, claiming that the further publication of the papers would endanger the security of the United States (Healy 2008, 108). On Tuesday, June 15, a District Court in New York granted a temporary order against the *New York Times* to stop publishing the documents, an injunction subsequently extended to the *Washington Post* when it

[58] Daniel Ellsberg, a former Defense Department staffer, gave most of the Pentagon Papers to *New York Times'* reporter Neil Sheehan.

also began publishing the documents. On June 19, the District Court rejected the administration's request for an injunction. Both the *New York Times* and the Nixon Administration appealed to the Supreme Court.

President Nixon had claimed executive authority to force the *New York Times* to stop printing the *Pentagon Papers*. In a petition to the Supreme Court, the Nixon Administration argued that only the executive branch could make assessments and decisions with regard to national security needs. Solicitor General Erwin N. Griswold, former dean of the Harvard Law School, claimed that publication would pose a "grave and immediate danger to the security of the United States," asserting that releasing the study to the public "would be of extraordinary seriousness to the security of the United States" and "will affect lives," the "termination of the war," and the "process of recovering prisoners of war" (Fisher 2008a, 6).[59] Opposing arguments were made by the *New York Times*, in which the newspaper asserted that prior restraint violated the constitutional freedom of the press under the First Amendment and that the executive's claim that publication of "classified information" needs to be prevented was motivated by political censorship rather than protection of national security. The Court had to decide whether the administration had a sufficient justification for prior restraint, which would subordinate the constitutional freedom of the press to national security. The Court heard arguments from the Nixon administration, the *New York Times*, the *Washington Post*, and the Justice Department on June 25 and 26, 1971.

On June 30, with six Justices concurring and three dissenting, the Supreme Court ruled in *New York Times Co. v. United States* (403 U.S. 713, 1971) that the First Amendment did protect the *New York Times'* right to print the materials and the documents subsequently published. In a *per curiam* opinion,[60] the Court (403 U.S. 713 at 723, 1971) asserted that the Constitution has a "heavy presumption" against

[59] In an op-ed piece "Secrets Not Worth Keeping", Griswold (1989, A25) admitted that he never recognized "any trace of a threat to the national security from the publication" and that the principal concern of executive officials in classifying documents "is not with national security, but rather with governmental embarrassment of one sort or another."

[60] A *per curiam* opinion (unnamed opinion) is a ruling handed down by a court with multiple judges in which the decision rendered is made by the court acting as a whole.

prior restraint of the press, and that the Nixon administration failed to show sufficient evidence to meet the burden, prior restraint being thus unjustified (Dadge 2006, 50).[61] The *New York Times Co.* case was decided together with *United States v. Washington Post Co.* Justice Black (403 U.S. 719), with whom Justice Douglas joined, argued that the vague word "security" should not be used "to abrogate the fundamental law embodied in the First Amendment." Justice Brennan noted that since publication would not cause a direct and immediate event imperiling the safety of American forces, prior restraint was unjustified. Justice Stewart (Ibid. at 728), with whom Justice White joined, reasoned that "[i]n absence of governmental checks and balances […] the only effective restraint upon executive policy and power in [these two areas] may lie in an enlightened citizenry - in an informed and critical public opinion which alone can here protect the values of democratic government." In his dissent, Chief Justice Burger (Ibid. at 744) argued: “[T]he imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government." He also opined (Ibid. at 746) that the *New York Times* should have discussed the possible repercussions with the administration prior to publication of the documents.

Commenting on the case, Jim Goodale (2004), general counsel to the *New York Times* during the time of this landmark decision, said that the decision in the *New York Times* case "serves as a shield against an overzealous government."

Table 6.1: The Supreme Court’s Check on the Imperial Presidents

THE ADAMS PRESIDENCY		CHECK
Little v. Barreme (1804)	The Supreme Court ruled that the President exceeded his powers with an unlawful order.	YES
THE LINCOLN PRESIDENCY		
Ex parte Merryman (1861)	The Supreme Court ruled that the Constitution does not confer to the President the authority to suspend the writ.	YES
The Prize Cases (1863)	The Supreme Court ruled that the President acted within his executive powers when ordering a seizure	NO

[61] The Justices supported to different degrees the clear superiority of the First Amendment and no Justice fully supported the administration’s case.

	of ships for violating the naval blockade, even though congressional authorization was lacking at the time.	
Ex parte Milligan (1866)	The Supreme Court ruled that the suspension of habeas corpus was constitutional only if civilian courts were forced closed or a state was not upholding the Constitution of the United States.	YES
THE ROOSEVELT PRESIDENCY		
Ex parte Quirin (1942)	The Supreme Court stated that the military tribunal was legally constituted and, thus, German saboteurs were lawfully detained and tried.	NO
Korematsu v. United States (1944)	The Supreme Court ruled that compulsory exclusion and placement in detention camps of was justified during circumstances of "emergency and peril."	NO
In re Yamashita (1946)	The Supreme Court ruled that military tribunals were authorized by Congress in the Articles of War.	NO
THE TRUMAN PRESIDENCY		
Johnson v. Eisentrager (1950)	The Supreme Court ruled that enemy aliens cannot have Fifth Amendment rights, which are denied to Americans in service.	NO
Youngstown Sheet and Tube Co. v. Sawyer (1952)	The Supreme Court ruled that the President had no power to seize private property in the absence of either authority under Article II of the Constitution or statutory authority conferred on him by Congress.	YES
THE NIXON PRESIDENCY		
New York Times v. United States (1971)	The Supreme Court ruled that the First Amendment did protect the *New York Times'* right to print the materials and the documents subsequently published.	YES

7 JUDICIAL TESTS OF PRESIDENTIAL WAR POWERS AFTER SEPTEMBER 11, 2001

During the two terms of President George W. Bush, the executive invoked a broad understanding of the Commander in Chief clause (Article 2, Section 2) as well as unilateral presidential power to wage war. Adler (2004, 3) notes that President Bush claimed “to have an executive power to wage preemptive war, and an inherent executive power broad enough not only to detain American citizens indefinitely, and to deny them rights guaranteed under the Bill of Rights, but also one that is so far-reaching that it precludes judicial review of executive action.” Fatovic (2004, 3) observes that in addition to claims of inherent power with regard to trying enemy combatants in military tribunals, the Bush administration sought the enhancement of executive powers—from the passage of the USA Patriot Act and the creation of the Department of Homeland Security to the expansion of the Freedom of Information Act (FOIA) and the Foreign Intelligence Surveillance Act (FISA).

7.1 The War on Terror: The George Bush Presidency

In the wake of the September 11, 2001, terrorist attacks, President Bush was determined to track down terrorists and prevent future attacks. The United States government did not consider the attacks of September 11 as simply a crime, but rather as an act of war. On September 18, 2001, Congress passed the Authorization for Use of Military Force resolution (Public Law 107-40, 115 Stat. 224), which granted special powers to the executive branch: “[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Then on September 25 the Office of Legal Counsel at the Department of Justice issued a memo declaring that the President as Commander in Chief has inherent constitutional authority to take any military action he deems necessary. The memo’s definition of the enemy went beyond that of Congress, which on September 14 had passed legislation (S.J.Res. 23) authorizing the President to use military force against “nations, organizations, or persons” directly linked to the attacks. The executive memo acknowledged that Article I of the Constitution gives Congress the power to declare war but argued that the article does not give Congress the lead role in war-making. Instead, the memo said, “it is

beyond question that the President has the plenary Constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. […] These decisions, under our Constitution, are for the President alone to make" (Bjerre-Poulsen, Balslev Clausen, and Gustafsson 2012, 22). However, as Adler (2004, 3) notes, the United States Constitution grants Congress sole and exclusive authority to initiate military hostilities, while the President has authority to repel invasions and to conduct war when authorized or begun. As such, the United States Constitution does not authorize the President authority to wage preemptive war.

The Bush administration deemed United States criminal and military courts too cumbersome and insufficient to handle threats from terrorism, especially because of their exacting standards of evidence and the protection of defendants' rights. Consequently, on November 13, President Bush signed the Military Order "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (66 Fed. Reg. 57,833), authorizing military tribunals at the United States naval base in Guantánamo Bay, Cuba, to detain, interrogate, and try non-United States citizens accused of providing assistance for the terrorist attacks in New York City and Washington, DC.[62,63] This system, which designated terror suspects as "illegal enemy combatants," was set to operate outside the 1949 Geneva Conventions, the established international standards for the treatment of prisoners of war[64] (Fisher 2003, 503–4).

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[62] Any individual "not a United States citizen" for whom the President determines there is a "reason to believe […] is or was a member of the organization known as al Qaida, […] has engaged in, aiding or abetted or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy," or has "knowingly harbored one or more individuals."

[63] Restricting the order to non-U.S. citizens, the President followed the *Ex parte Millian* decision that U.S. citizens are entitled to a trial in civilian courts, if open and functioning.

[64] In a January 25, 2002, memorandum the Bush administration dismissed the Geneva Conventions as obsolete, quaint, and irrelevant to the war on terror, and argued that Taliban and Al Qaeda detainees were illegal enemy combatants, which eliminated "any argument regarding the need for case-by-case determination of P.O.W. status" (Mayer 2006).

Under the laws and customs of war enemy combatants can be detained for the duration of an armed conflict.[65] The Bush administration classified foreign nationals captured on the battlefield as illegal enemy combatants, without protection under the United States Constitution or access to the American justice system. Due to this classification, it was the captives' relatives and friends who filed petitions for habeas corpus in the names of the prisoners. Vice President Dick Cheney[66] argued that illegal enemy combatants are not lawful combatants since they "violate the laws of war," and as such "don't deserve to be treated as a prisoner of war" (Schaffer 2002, 1465–6). The Vice President agreed with German saboteurs being "executed in relatively rapid order" under the military tribunals set up by President Roosevelt (Bumiller and Myers 2001, B6). While the Military Order of November 13, 2001, closely tracks Roosevelt's Proclamation and Military Order of 1942, it ignores certain differences found in that of the Roosevelt administration, which resulted in a significantly different proceeding for two other German spies in 1945.

Attempting to augment executive power at the cost of legislative and judicial controls, the Military Order of November 13 (66 Fed. Reg. 57835-36, Section 7) prohibited judicial review, so that a defendant would not be "privileged to seek remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf in (1) any court of the United States, or any State thereof, (2) any court of any foreign nation, or (3) any international tribunal." With this step, the order went further than that of Roosevelt, which only denied access to civilian courts. Nevertheless, John Yoo (2006, 91), the Deputy Assistant United States Attorney General in the Office of Legal Counsel during the Bush administration, claimed that "FDR took far more liberties with the constitutional law of the day than the current [Bush] administration."

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[65] See *Quirin*, 317 U.S. 1 at 48.

[66] Vice President Cheney and his chief of staff and legal adviser David S. Addington had a central role in shaping the Bush Administration's legal strategy for the war on terror. Both men thought the Presidency was too weakened. Michael J. Malbin, Cheney's adviser on executive power, observed that Dick Cheney "thought that Presidents from Nixon onward yielded too quickly," and that it was Cheney's express aim to restore the balance of power so the President would be able to act as described by Hamilton in the Federalist Papers: with "secrecy" and "despatch" (Mayer 2008, 58).

Some constitutional scholars did not agree with the Bush administration's interpretation of constitutional executive power. Mayer (2006) provides a few examples. First, Bruce Fein, a constitutional law scholar, said that the Bush administration lawyers were without "legal stature, certainly no one like Bork, or Scalia, or Elliot Richardson, or Archibald Cox. […] It's frightening. No one knows the Constitution—certainly not Cheney." Second, Scott Horton, a professor at Columbia Law School, said that the Bush's legal team had attempted to "overturn two centuries of jurisprudence defining the limits of the executive branch. They've made war a matter of dictatorial power." Additionally, Adler (2004, 7), a professor at Idaho State University, sums up: "President Bush's claim to a unilateral presidential power to wage war finds no support in the text of the Constitution or in the debates in the [Constitutional] Convention."

7.1.1 Hamdi v. Rumsfeld (2004)

Yaser Esam Hamdi, an American citizen who had been living in Saudi Arabia, was captured in Afghanistan by the Afghan Northern Alliance in 2001 and then turned over to the United States military. Hamdi was held at the United States Naval Station Guantanamo Bay, Cuba,[67] before being transferred to a naval brig in Norfolk, Virginia, and later to a brig in Charleston, South Carolina. The administration argued that since Hamdi was caught in arms fighting for the Taliban against the United States, he could be detained as an unlawful enemy combatant. Hamdi was denied access to an attorney or the court system. Oversight regarding these executive decisions did not exist.

Through his father Hamdi filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia in June 2002. The Court's ruling (316 F.3d 450, 4th Cir. 2003) instructed that a federal public defender should be given access to Hamdi, but this was later reversed by the Fourth Circuit Court, which argued that the District Court failed to give deference to the government's "intelligence and security interests." On January 8, 2003, the United States Court of

[67] The U.S. Naval Station Guantanamo Bay was leased from Cuba indefinitely in 1903, and Cuba retains "ultimate sovereignty" while the United States has all effective powers in the area.

Appeals for the Fourth Circuit (316 F. 3d 450, 4th Cir. 2003) dismissed Hamdi's habeas corpus petition, concluding that the government had adequately demonstrated that Hamdi was an enemy combatant, “because it was undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict." The Court additionally held, "[t]he safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict" (Lewis 2003, A1). The Court (316 F. 3d 450, 4th Cir. 2003 at 58) also ruled that the broad constitutional presidential war powers under Article II and the principle of separation of powers prevented courts from probing too deeply into the detention of Hamdi, as such review could interfere with national security: “Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed.”

Hamdi's father appealed to the United States Supreme Court, which in *Hamdi v. Rumsfeld* (542 U.S. 507, 2004) recognized the power of the government to detain unlawful combatants but ruled that Yaser Esam Hamdi, a detained United States citizen, has a right under due process to contest the facts underlying his or her detention before an impartial judge. At the same time, the Court (Ibid. at 535) affirmed that presidential war powers are not a blank check: “Whatever power the U.S. Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”

Hamdi did not face a military tribunal and was not charged with any crime. Instead, the United States government flew him to Saudi Arabia on October 11, 2004, where he was released from custody. In return, Hamdi renounced his United States citizenship.

7.1.2 Rasul v. Bush (2004)

On February 19, 2002, the Center for Constitutional Rights filed—on behalf of a group of two British and two Australia citizens[68]—a habeas corpus petition

[68] Shafiq Rasul, Asif Iqbal, Mamdouh Habib, and David Hicks.

challenging the Bush administration's practice of indefinitely holding non-United States citizens captured during the United States invasion of Afghanistan or Pakistan and later transferred to Guantanamo Bay, Cuba.

Citing *Johnson v. Eisentrager*, the District Court (215 F.Supp.2d 55, 62, D.D.C. 2002) dismissed the case on July 30, 2002, and held that United States courts have no jurisdiction to handle imprisonment cases of the foreign nationals held at United States Naval Station Guantanamo Bay, Cuba.[69] Later that year, the United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, stating there was no United States court that had jurisdiction over United States Naval Station Guantanamo Bay.

On June 28, 2004, with six Justices concurring and three dissenting, the United States Supreme Court in *Rasul v. Bush* (542 U.S. 466, 2004) "restored a semblance of judicial supervision" by reversing the Court of Appeals' ruling, deciding that the United States Constitution entitles the non-United States citizens held at the United States Naval Station Guantanamo Bay, Cuba, to challenge in the United States federal courts the validity of their detention. The Court did not say what type of hearing must be accorded to the Guantanamo detainees. Justice Stevens, penning the majority opinion, emphasized that *Johnson v. Eisentrager* is distinguishable on two accounts: i) while the defendants in the *Eisentrager* case were accorded a trial in a military tribunal, those held in Guantanamo were denied any form of a trial or due process and b) while the defendants in *Eisentrager* were tried and confined abroad, the United States Naval Station Guantanamo Bay is functionally under the control and sovereignty of the United States government (Chemerinsky 2005, 75).

As a result of both the *Hamdi* and *Rasul* decisions, the Bush administration began using Combatant Status Review Tribunals (CSRT) on July 7, 2004, to determine whether the detainees were no longer designated as enemy combatants. Over 550 detainees went through this process. While more than several dozen were found not to be enemy combatants, 23 detainees were charged with crimes by a military tribunal. In addition, the Department of Defense established Administrative Review Boards, to conduct a yearly review for detainees at Guantanamo to

[69] The Ninth Circuit in *Gherebi v. Bush* (352 F.3d 1278, 2003) reached the same decision.

determine whether they should continue to be held, transferred to the custody of another country, or released (Chambliss 2009, 823).

7.1.3 Rumsfeld v. Padilla (2004)

On May 8, 2002, José Padilla, a United States citizen, flew from Pakistan to the United States. As he stepped off the plane at Chicago's O'Hare airport, Padilla was apprehended on a material witness warrant in connection with a grand jury investigation into the September 11 terrorist attacks. Padilla was allegedly planning to build and detonate a 'dirty bomb' in the United States. Initially Padilla was considered a material witness. As such, no charges were filed against him, and he was given a limited access to legal counsel. Later, his designation was changed to enemy combatant, who as the Bush administration argued could be imprisoned indefinitely and without the right to file a habeas petition.

On December 4, 2002, the United States District Court for the Southern District of New York (243 F. Supp. 2d 42, S.D.N.Y. 2003) denied Padilla a habeas corpus petition, reasoning that the President as Commander in Chief has the authority to designate him as an enemy combatant and to detain him for the duration of armed conflict with al-Qaida, even though he is a United States citizen captured on United States territory. The United States Court of Appeals for the Second Circuit (352 F.3d 695, 2003 U.S. App. LEXIS 25616, 2003) reversed the ruling of the District Court.

The case was petitioned to the Supreme Court, which was asked to consider whether the congressional Authorization for Use of Military Force of 2002 granted the President the powers to detain United States citizens classified as enemy combatants. The Court did not provide an opinion on this issue. Instead, the Court in *Rumsfeld v. Padilla* (542 U.S. 426, 2004) concluded that Padilla's habeas corpus petition had been improperly filed. Chief Justice Rehnquist, who wrote the majority opinion, reasoned that shortly before the District Court set the date for hearing the motions filed on Padilla's behalf, he was taken into custody by the Department of Defense and transferred from New York to a military prison in Charleston, South Carolina. Therefore, the Court in New York lacked jurisdiction to hear Padilla's petition. Hence, the Supreme Court reversed the decision of the United States Court

of Appeals for the Second Circuit and remanded the case for dismissal without prejudice, allowing José Padilla to file the petition in South Carolina (Chemerinsky 2005, 79).

After the Bush administration dropped charge against Padilla, the case was moved to a civilian court, where Padilla faced criminal conspiracy charges. On August 16, 2007, a federal jury found Padilla guilty of conspiring to kill people and to support terrorism. On January 22, 2008, Judge Marcia G. Cooke of the United States District Court for the Southern District of Florida sentenced Padilla to 17 years and four months in prison. On September 9, 2014, the Federal Appeals Court increased the sentence to 21 years.

7.1.4 Hamdan v. Rumsfeld (2006)

Salim Ahmed Hamdan, a citizen of Yemen, was a driver for Osama Bin Laden. After being captured by militia forces during the invasion of Afghanistan, Hamdan was turned over to the United States forces, which detained him at the United States Naval Station Guantanamo Bay, Cuba. Under the charge of conspiracy to commit terrorism, Hamdan awaited a trial by a military tribunal authorized under Military Commission Order No. 1 of March 21, 2002. Following the Supreme Court rulings in *Hamdi* and *Rasul*, Hamdan was granted a hearing before the Combatant Status Review Tribunal, which determined that he was indeed an enemy combatant or a person of interest.

In April 2004, Hamdan filed a habeas corpus petition, arguing that the military tribunal rules and procedures were inconsistent with the United States Uniform Code of Military Justice (UCMJ) and that he had the right to be treated as a prisoner of war under the Geneva Conventions.[70] In November 2004, the United States District Court (344 F.Supp.2d) granted Hamdan's petition, finding no inherent power in the President as Commander in Chief to create military tribunals outside the existing statutory authority. The Court (Ibid. at 161) also concluded that the Geneva Conventions apply to the entire conflict in Afghanistan, including the situations

[70] The most relevant out of four Conventions is the *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949.

related to the hostilities there, and that Hamdan consequently could not be a subject to a military tribunal unless he was first found not to be a prisoner of war in accordance with Article 5 of the Third Geneva Convention from 1949.

The Court of Appeals for the District of Columbia (10 U.S.C. § 821 and 10 U.S.C. § 836) reversed the ruling of the District Court, arguing that the President did not violate the separation of powers in the United States Constitution by establishing the military tribunals for the Guantánamo detainees, recognizing presidential authority for establishing military tribunals granted by congressional Authorization for the Use of Military Force and two additional statutes (Elsea 2006, 2). As such, Hamdan's appeal to be tried by court martial was rejected. Further, the Court's opinion was that the 1949 Geneva Convention is not enforceable in United States federal courts and, therefore, is under Article VI, Clause 2 of the United States Constitution something "to the contrary notwithstanding."

The Supreme Court granted review. Before reaching the merits of the case, the Supreme Court declined to accept the Bush administration's argument that the Court's jurisdiction to hear pending cases, including the case before it, was stripped by the Detainee Treatment Act of 2005 (P.L. 109-148, §1005(e)(1)).[71] On June 29, 2006, with five Justices concurring and three dissenting, the Court in *Hamdan v. Rumsfeld* (548 U.S. 557, 2006)[72] held that although the President has authority to hold the petitioner as an enemy combatant for the duration of active hostilities or grave threats to national security, non-United States citizens being detained as enemy combatants at United States Naval Station Guantanamo Bay have a right to challenge the legality of their detention in the federal district court in Washington, D.C. The Court (Ibid. at 635) reasoned that President Bush's Military Order of November 16, 2001, (66 Fed. Reg. 57,833) exceeded his authority by overstepping congressional limits placed on the use of military tribunals, since "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to

[71] The Act intended to limit jurisdiction of federal court over habeas corpus petitions from the Guantanamo detainees.

[72] As is customary, the case includes only the first-named defendant Secretary of Defense Donald Rumsfeld, while the defendants include several United States government officials allegedly responsible for Hamdan's detention.

comply with the Rule of Law that prevails in this jurisdiction." All eight participating Justices in *Hamdan v. Rumsfeld* (548 U.S. 557, 2006) followed the framework set forth by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which accords greater deference to the executive branch in national security cases, where the President acts with legislative authority rather than without it.

In the *Hamdan* decision the Court (126 S. Ct. 2749, 2774 n.23) repeatedly emphasized that constitutional war powers are "granted jointly to the President and Congress," which was a repudiation of the Bush administration's claim that Congress is without power to limit or regulate the constitutional war powers of the President. As an example, Justice Kennedy (126 S.Ct. 2749, 2799, 2006) in his concurrence lays out how the presidential powers defined in Article II could be limited by statute:

> *This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis.*

Justice Breyer (548 U.S. 557, 636, 2006) wrote in his concurrence: "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so."

The Supreme Court (126 S.Ct. 2749, 2795, 2006) further held that since Common Article 3 of the Geneva Convention applies, as a matter of a treaty obligation, to the United States conflict against Al Qaeda, military tribunals did not comply with the "law of war" in section 821 of the UCMJ, including in particular the prohibition in Common Article 3 of the Geneva Conventions against 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." As emphasized in a concurrence by Justice Ginsburg, the Court left open the possibility for the President to ask Congress to grant the necessary authority to create military tribunals that depart from strictures of the UCMJ. Moreover, the Court did not provide an opinion on the extent to which the Constitution restricts Congress' authority to establish rules regarding the right of habeas corpus for non-citizen enemy combatants held outside of the United States territory (Elsea 2006, 1).

7.1.5 The Military Commissions Act (2006)

In the wake of the *Hamdan* decision President Bush returned to Congress to obtain the authorization for military tribunals, as well as "harsh techniques on terror suspects." Congress passed the Military Commissions Act (MCA) on September 28 and 29, 2006, (Pub. L. No. 109-366, 120 Stat. 2600) with the purpose "to authorize trial by military commission for violations of the law of war, and for other purposes." The MCA allowed the President to interpret Common Article 3 of the Geneva Convention, which prohibites inhumane treatment of combatants seized in wartime. The President issued an Executive Order 13440 of July 20, 2007, specifying which "alternative interrogation practices" for terrorism suspects the Central Intelligence Agency (CIA) was allowed to use.

On September 24, 2007, in its first decision, the Court of Military Commissions Review (CMCR), being created by the MCA, rejected the Bush administration's claim that the CSRT's determination that a detainee is an "enemy combatant" was a sufficient basis for jurisdiction. It also rejected the military judge's conclusion that the military commission was not empowered to make the appropriate determination on it. Consequently, the CMCR reversed a dismissal of charges based on lack of jurisdiction, ordering the judge to determine whether the accused is an "unlawful enemy combatant" subject to the military tribunal's jurisdiction (Elsea 2006, ii).

Bradley (2007, 322) argues that the MCA drew criticism mainly for limiting habeas corpus judicial review over the detention and trial of enemy combatants and

for precluding courts from applying the Geneva Conventions in those cases. The MCA does though purport to preclude federal court jurisdiction over habeas corpus applications filed by enemy combatants, providing them instead with review of their status determinations and military tribunal judgments by the United States Court of Appeals for the District of Columbia Circuit.

7.1.6 Boumediene v. Bush (2008)

Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, was held at the United States naval base in Guantánamo Bay, Cuba. On behalf of Boumediene, a writ of habeas corpus was submitted in a United States civilian court. The *Boumediene* case challenged the legality of his detention at the United States Naval Station Guantanamo Bay, Cuba, as well as the constitutionality of the Military Commissions Act (MCA) of 2006.

In February 2007, a three-judge panel of the Appeals Court for the D.C. Circuit (476 F.3d 934, 2006) considered Boumediene's habeas corpus submission, and upheld Congress' authority to quash outstanding habeas corpus submissions by way of passing the Military Commissions Act of 2006. On June 29, 2007, the Supreme Court granted a writ of certiorari[73] to Boumediene and his co-defendants. The case was consolidated with the habeas petition *Al Odah v. United States*.

On June 12, 2008, the Supreme Court in *Boumediene v. Bush* (553 U.S. 723, 2008) ruled in a 5-4 decision that Section 7 of the Military Commissions Act (MCA) of 2006 was an unconstitutional suspension of the habeas right and that detainees had the right under the United States Constitution to petition federal courts for habeas corpus challenges. Justice Kennedy (Ibid. at 771) in the opinion of the Court wrote that the military tribunals failed to offer the detainees the "fundamental procedural protections of habeas corpus." Justice Kennedy (Ibid. at 796) continued, “[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.” Chief Justice

[73] A writ of certiorari, which the U.S. Supreme Court uses to pick most of the cases that it hears, is an order to a lower court to deliver its record in a case so that the higher court may review it.

Roberts dissented, joined by Thomas, Scalia, and Alito, arguing that the Supreme Court should have deferred to the choices made by Congress and the President. Chief Justice Roberts (Ibid. at 801) wrote, "[t]oday the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."

Based in part on the Supreme Court ruling in the *Boumediene* case, the United States District Court for the District of Columbia (Civil Case No. 04-1166 (RJL)) ruled in November 2008 that five of the six defendants—Lakhdar Boumediene, Hadj Boudella, Mustafa Ait Idir, Saber Lahmar, and Mohammed Nechla—were being held unlawfully at United States Naval Station Guantanamo Bay and ought to be released forthwith. Judge Richard J. Leon ruled that the case against the petitioners rested "exclusively on the information contained in a classified document from an unnamed source" and that "to allow enemy competency to rest on so thin a reed would be inconsistent with this court's obligation." As Kommers, Finn, and Jacobsohn (2009, 254) observe, in December 2008 the Pentagon announced that three of the men would be transferred to Bosnia and Herzegovina, where they became citizens before being arrested in 2001. Sutton (2008) reported that Mustafa Ait Idir, Mohamed Nechla and Hadj Boudella landed in Sarajevo, Bosnia and Herzegovina on December 16, 2008, where they were taken into protective custody.

Table 7.1: The Supreme Court's Check on the Imperial Bush Presidency

THE BUSH PRESIDENCY		CHECK
Hamdi v. Rumsfeld (2004)	The Supreme Court ruled that the President exceeded his powers with an unlawful order.	YES
Rasul v. Bush (2004)	The Supreme Court ruled that the Constitution does not confer to the President the authority to suspend the writ	YES
Rumsfeld v. Padilla (2004)	The Supreme Court held that Padilla's habeas corpus petition had been improperly filed.	/
Hamdan v. Rumsfeld (2006)	The Supreme Court held that although the President has authority to hold the petitioner as an enemy combatant for the duration of active hostilities or grave threats to national security, non-United States citizens being detained as enemy combatants at Guantanamo have a right to	YES

	challenge the legality of their detention in the federal district court in Washington, D.C. The Court reasoned that President Bush's Military Order of November 16, 2001, exceeded his authority by violating restrictions that Congress had placed on the use of military tribunals.	
Boumediene v. Bush (2008)	The Supreme Court held that Section 7 of the Military Commissions Act (MCA) of 2006 was an unconstitutional suspension of the habeas right and that detainees had the right under the United States Constitution to petition federal courts for habeas corpus challenges.	YES

CONCLUSION

After more than two hundred years, the moral and political vision set in the American founding documents, the Declaration of Independence and the United States Constitution, is still alive. While English philosopher John Locke immensely influenced the Framers of these documents, his notion of prerogative extending to the executive's power to act against the law was rejected at the Constitutional Convention in Philadelphia.

Section 2 of Article II provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States." Even though the President has authority of unity of command, Congress has the power to declare war and to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." While to 'declare war' means the initiation of hostilities, it does not imply their subsequent ratification or approval by Congress. As such, Congress was given an authority to make decisions regarding scope and duration of military operations. Concretely, five clauses of Article I of the Constitution grant Congress the authority to raise and support armies, to provide and maintain the nation's navy, to make rules for the government and regulation of the land and naval forces, and to provide for organizing, arming, and disciplining the militia. Since the ratification of the Constitution in 1787, the legislature has on many occasions enacted appropriations bills and authorizing legislation to limit, or even restrict, military operations by the President. That said, HYPOTHESIS #4 (The powers of the President of the Unites States in wartime are greater than in peacetime, though still limited.) is confirmed.

Along with the rule of law, the notion of separation of powers intertwined with the notion of checks and balances is a prerequisite for a strong government that would protect human rights and also limit the danger of tyranny. In his delivery of the opinion of the Court in the *Boumediene* case (2008) Justice Kennedy explained: "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law." The Framers of the United States Constitution were hopeful to establish a government that would have

powers that were few and defined, and that would have only one aim: to protect the rights of the people. In order to prevent absolutism or tyranny the government was divided into three equal branches—executive, legislative and judicial. As the Framers were aware of the human inclinations to overstep its boundaries and seek unlimited power, they created the system of government with checks and balances. As James Madison voiced in *Federalist Paper* No. 51: "Ambition must be made to counteract ambition." In wartime, the United States Congress controls and exercises war-making power, and the President executes that power, subject to congressional authorization and oversight. Congress decides independently whether or not to use its constitutional whip on the Executive. When Congress does not push back against presidential prerogative, it signifies that legislative ambition has failed to counteract presidential ambition. As President Kennedy aide Ted Sorensen commented, “Congress already has enormous power, if it only had the guts to use it.” Like Congress, the judiciary is empowered to balance the power of the three branches to their original proportion and is expected to restore the constitutional principle of separation of powers when a President acts above the law. In 1946, the Supreme Court (327 U.S. 304) emphasized the constitutional principle that courts and their procedural safeguards are indispensable to the governmental system and that the Framers “were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.” That said, HYPOTHESIS #3 (When the executive goes beyond its constitutional war powers, the other two branches of government—legislative and judicial—have constitutional powers to take steps to bring the executive back within its boundaries.) is confirmed.

A review of the Constitutional Convention’s discussions and debates on war making yields that the Framers recognized that executive war making, without constitutional constraints, was a recipe for disaster. Even though the imperial presidency is not built into the structure of the American government, Presidents have repeatedly asserted their prerogative (i.e., inherent power) to employ military force without enumerated constitutional or statutory authority, even against the clear declarations of war by Congress, evidencing that Locke's concept of executive prerogative remains alive today. In fact, Presidents John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon all took actions that were above the law and treated their executive orders as law, even when not in line with

provisions of the Constitution or the statutes passed by Congress. In those cases, we have witnessed the imperial presidency, which by definition upsets the constitutional balance of power in favor of presidential power. It follows that HYPOTHESIS #2 (The presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon all overreached presidential war powers and, hence, were imperial.) is confirmed.

Analysis of the George W. Bush Administration demonstrates that the President initiated war powers on November 13, 2001, when he signed a Military Order (66 Fed. Reg. 57,833), authorizing *ad hoc* military tribunals at the United States Naval Station Guantánamo Bay, Cuba, to detain, interrogate, and try those providing assistance for the terrorist attacks in New York City and Washington, DC on September 11, 2001. The detainees were designated as “illegal enemy combatants” and did not have the right to a writ of habeas corpus to access United States civilian courts during wartime. Vice President Dick Cheney argued that illegal enemy combatants are not lawful combatants since they “violate the laws of war,” and as such "don't deserve to be treated as a prisoner of war." As a precedent, the Bush administration cited *Ex parte Quirin* (1942) in which the United States Supreme Court upheld the constitutionality of military tribunals created by President Roosevelt for the trial of German saboteurs. In Vice President Dick Cheney’s opinion the German saboteurs were “executed in relatively rapid order.”

Over the period of both Bush presidential terms, the Supreme Court ruled in five cases related to military tribunals: *Hamdi* (2004), *Padilla* (2004), *Rasul* (2004), *Hamdan* (2006), and *Boumediene* (2008). In these cases, the Supreme Court was called upon to rule whether the Bush administration remained within its constitutional and statutory limits and whether it operated within the international standards for the treatment of prisoners of war established by the 1949 Geneva Conventions, of which the United States is a signatory. In *Hamdan* (2006) the Supreme Court concluded that: i) the President as Commander in Chief does not have inherent power to create military tribunals outside of the existing statutory authority and ii) the Geneva Conventions, which are included in the Uniform Code of Military Justice (UCMJ), are applicable to the military tribunals. In the light of the *Hamdan* decision, President Bush appealed to Congress to adopt the missing legislation. In October 2006,

Congress passed the Military Commissions Act (MCA) to authorize military tribunals that were by this act exempt from following the Uniform Code of Military Justice (UCMJ). The Supreme Court in *Boumediene* (2008) ruled that the Military Commissions Act (MCA) of 2006 unconstitutionally suspended the "fundamental procedural protections of habeas corpus" and that detainees at the United States Naval base in Guantanamo Bay, Cuba, had the right under the United States Constitution to petition federal courts for habeas corpus challenges. With its five decisions on cases related to military tribunals the Supreme Court sent a clear message to President Bush that executive power is limited and subject to the laws of Congress, even in wartime; it stated that the President was acting above the law when he seized historical aberrations and turned them into a doctrine of presidential prerogative. Like the presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, and Richard Nixon, the presidency of George W. Bush was imperial, which confirms the MAIN HYPOTHESIS (The Bush Administration brought back the imperial presidency.)

The legislative and judicial branches do not always act as the Framers had hoped and as the check and balance for which the Constitution provides authority. A corollary is that Congress and the Supreme Court contributed to the emergence of imperial presidencies by the legislature delegating its powers to the executive or the judiciary not using Judicial Review to invalidate unconstitutional laws or executive acts. As Rudalevige (2005, 262) wrote “[t]he presidency is contingently, not inherently, imperial.” A review of Supreme Court cases during the Adams presidency (*Little v. Barreme, 1804*), the Lincoln presidency (Ex parte Merryman, 1861; The Prize Cases, 1863; and *Ex parte Milligan*, 1866), the Roosevelt presidency (Ex parte Quirin, 1942; *Korematsu v. United States*, 1944; and *In re Yamashita*, 1946), the Truman presidency (*Johnson v. Eisentrager*, 1950; and *Youngstown Sheet and Tube Co. v. Sawyer*, 1952), the Nixon presidency (*New York Times v. United States*, 1971), and the Bush presidency (*Hamdi v. Rumsfeld*, 2004; *Rasul v. Bush*, 2004; *Rumsfeld v. Padilla*, 2004; *Hamdan v. Rumsfeld*, 2006; and *Boumediene v. Bush*, 2008) reveals that throughout United States history the Supreme Court has not been consistent in pushing back against presidential prerogative, i.e., it did not exercise its own ambition to counteract presidential ambition with an aim to restore the constitutional principles of separation of powers and checks and balances. The

Supreme Court did fully push back during the Adams, Nixon, and Bush presidencies; only partly during the Lincoln and Truman presidencies; and not at all during the Roosevelt presidency. Therefore, HYPOTHESIS #5 (During the presidencies of John Adams, Abraham Lincoln, Franklin D. Roosevelt, Harry Truman, Richard Nixon, and George W. Bush the United States Supreme Court did not side with the imperial presidents and did exercise its check upon the executive.) is rejected.

Clayton (2002, 85) provides an explanation for the Supreme Court being on the side of the imperial President one time and other times not: “[T]he role of courts relative to the degree of division within the electoral system ought to be thought of as both a dependent and an independent variable.” As such, Clayton (Ibid.) continues, we ought to pay “attention to the normative, not just the positive, institutional contexts of judicial decision-making and returning to a messy, but probably more realistic, view of judging as a human enterprise.”

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POVZETEK V SLOVENSKEM JEZIKU

Po več kot dvesto letih sta moralna in politična vizija ameriških ustanovnih dokumentov Deklaracije o neodvisnosti in ustave še vedno živi.

Pregled razprav tako na sami Ustavni konvenciji v Filadelfiji leta 1787 kot po njej razkrije, da so se ameriški ustanovni očetje zavedali, da v kolikor izvršilna veja oblasti pri svojih vojaških pooblastilih ni ustavno omejena, sledi pogrom. Čeprav ameriški ustanovni očetje niso vgradili *imperialnega predsedovanja* v sistem ameriške oblasti, je zgodovina pokazala na primere, ko so ameriški predsedniki bili mnenja, da imajo kot vhovni poveljniki posebna pooblastila za uporabo vojaških sil in to brez zakonske podlage ali celo v nastrotju z izraženo voljo ameriškega kongresa.

Drugi odstavek 2. člena ameriške ustave določa, da "je predsednik vrhovni poveljnik vojske in mornarice Združenih držav Amerike ter obrambnih sil posameznih zveznih držav, ko se jih vpokliče k služenju Združenim državam Amerike". Čeprav je predsednik edini s pooblastilom vodenja obrambnih sil, ima kongres ustavno pooblastilo napovedi vojne in pooblastilo, da omogoči “vpoklic obrambnih sil za izvajanje zakonov zvezne države, zatiranje vstaj in obrambo pred zunanjimi napadi". Ko ameriški kongres "napove vojno", pomeni začetek sovražnosti, vendar le-to ne pomeni nadaljno odobritev vojaških aktivnosti, kar pomeni, da ima kongres ustavno pooblastilo, da sprejema odločitve o obsegu in časovnem trajanju vojaških operacij.

Ameriški predsednik George W. Bush je 13. novembra 2001 podpisal pooblastilo (66 Fed. Reg. 57,833) za ustanovitev *ad hoc* vojaških tribunalov v ameriškem pomorskem vojaškem oporišču Guantanamo na Kubi, ki so dobile pristojnost priprti, zaslišati in soditi vsakomur, ki je nudil pomoč pri terorističnih napadih 11. septembra 2001. Busheva administracija je ustanovila vojaške tribunale z namenom sojenja sovražnim bojevnikom zajetih na teritoriju vojskovanja. Priporniki so bili klasificirani kot »nelegalni sovražni bojevniki«, ki niso imeli pravice do sojenja pred ameriškim sodiščem po civilnem pravdnem postopku. Busheva administracija je kot precedens navajala sodbo *Ex parte Quirin* iz leta 1942, ko je ameriško vrhovno sodišče odločilo, da je pooblastilo predsednika Roosevelta vojaškim tribunalom za sojenje nemškim vojnim sovražnikom zajetih na ameriškem območju del ustavnih in zakonskih vojnih pooblastil predsednika.

V času dveh predsedniških mandatov G. W. Busha je ameriško vrhovno sodišče izdalo pet odmevnih sodb, ki se dotikajo vojaških tribunalov in njihovih zakonskih pooblastil: *Hamdi* (2004), *Padilla* (2004), *Rasul* (2004), *Hamdan* (2006) in Boumediene (2008). V njih je vrhovno sodišče presojalo ali je izvršilna veja oblasti ostala v mejah svojih ustavnih in zakonskih pooblastil in ali so ta pooblastila skladna z Ženevskimi konvencijami, katerih sopodpisnica so ZDA.

Ameriško vrhovno sodišče je v zadevi *Hamdan* (2006) izdalo sodbo, da i) ameriški predsednik kot vrhovni poveljnik oboroženih sil nima zakonskih pooblasti za ustanovitev vojaških tribunalov in de ii) skupni 3. člen Ženevskih konvencij velja za vojaške tribunale, saj je le-ta del ameriškega Enotnega zakonika vojaškega prava. V luči *Hamdan* odločitve se je predsednik Bush obrnil na ameriški kongres s prošnjo po sprejetju manjkajoče zakonodaje. Oktobra 2006 je kongres sprejel Akt vojaških komisij, ki je zagotovil zakonsko podlago za sojenje priprtim v Guantanamu pred vojaškimi tribunali kot tudi izvzel te tribunale iz Enotnega zakonika vojaškega prava. Ameriško vrhovno sodišče je dve leti kasneje v zadevi *Boumediene* (2008) izdalo sodbo, da je 7. poglavje Akta vojaških komisij neustavno, saj se pripornikom v pomorskem vojaškem oporišču Guantanamo ne more odreči pravica do pravne zaščite, ki jo zagotavlja ameriška ustava, kar med drugim pomeni pravico do sojenje pred ameriškim civilnim sodiščem po pravdnem postopku.

Imperialno predsedovanje, ki se odraža v premiku ustavnega ravnovesja moči v korist izvršilne veje oblasti, ni sestavni del strukture ameriške oblasti. Tako kot predsedovanja John Adamsa, Abraham Lincolna, Franklin D. Roosevelta, Harry Trumana in Richard Nixona je bilo predsedovanje George W. Busha imperialno. Ameriško vrhovno sodišče je v svojih odločitvah omenjenim ameriškim predsednikom sporočilo, da predsednikova pooblastila niso neomejena, niti v vojnem stanju.

Ob vladavini prava je vzajemno delovanje načela delitve oblasti ter sistema zavor in ravnovesij predpogoj močne oblasti, ki bo zaščitila človekove pravice in svoboščine, medtem ko je nevarnost tiranije oblasti nad državljani omejena. James Madison je slednje izrazil v *Federalističnem spisu* #51: ”Ambicija mora biti ustvarjena, da se zoperstavi ambiciji”.