Constitutions in Crisis: A Comparative Approach to Judicial Reasoning and Separation of Powers

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Abstract

In the ever growing literature on emergencies, writers mostly focus on normative questions. Yet the structural aspect, investigating the interactions between institutions, is often overlooked. This article seeks to add to the institutional discourse by looking at emergencies through an institutional lens, situating the resolution of legal questions within the separation of powers framework. By looking at judicial decisions in emergencies, I argue that most of them can be explained not according to constitutional considerations of substantive individual rights, but by the position the courts assume within the broader governmental framework. In a presidential system, such as the one in the United States, courts are more likely to perceive themselves as enforcing the separation of powers scheme, rather than as protectors of individual rights. However, when looking at how emergencies are handled in a parliamentary system, in this case Israel, the courts tend to assume a more active role, often employing substantive reasoning. The comparison between institutions in different regimes thus suggests an often missed insight: choosing a particular separation of powers scheme does not only shape the inter-institutional discourse, but also impacts the type of reasoning institutions employ and the kinds of decisions they produce.

1. Introduction

Scholarly literature on terrorism, national security, and emergencies has flourished since September 11. The terrorist attacks and the measures taken thereafter by the Bush administration and Congress have proved fertile ground for scholars on both sides of the political spectrum to argue where the country should go, what congress should enact, and how the courts should on seemingly new issues such as coercive interrogations, surveillance, preventive detentions, and suspension of habeas corpus rights for enemy combatants.¹

This debate is mostly carried out in normative terms.² Authors seek to justify or oppose specific measures. They write on varied subjects, from how to structure the


intelligence community\textsuperscript{3} to whether detainees in Guantanamo Bay are entitled to habeas review.\textsuperscript{4} One camp will usually argue that the courts should refrain from adjudicating matters of national security, while the other will claim that our emergencies provide the best test for our cherished values of liberty and freedom.\textsuperscript{5}

All of this is understandable. However, it seems that the literature is not paying enough attention to the structural aspect which ought to concern us as well. By structural aspect I mean the role our institutions play in times of crisis. It is partly through institutional design, in this case the separation of powers scheme, that we can understand why the courts, Congress and the executive are acting the way they do. It is the interplay between these institutions that has the explanatory force that normative theory does not take into consideration.

The overarching argument of this article is simple: the way we design our governmental institutions affects the kinds of decisions these institutions produce. Specifically, a certain form of separation of powers scheme may produce one type of judicial reasoning, whereas a different form will produce another. This feature is salient in "crisis cases"; cases which result from an increased demand for security at the expense of civil liberties. Thus, the Court's position on many of the crisis cases is not simply explained away by the liberal/conservative divide. Rather, separation of powers schemes can constrain judges, or at the very least make them reason differently.

\textsuperscript{3} RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM (2006);
\textsuperscript{4} Fallon and Meltzer, supra note 1.
In the U.S. context, it appears that the Court has been fairly consistent in endorsing an institutional process based approach when deciding crisis cases. Although lacking an agreed upon definition of an emergency or crisis, Professor Mark Tushnet provides a helpful definition:

“An “emergency” occurs when there is general agreement that a nation or some part of it faces a sudden and unexpected rise in social costs, accompanied by a great deal of uncertainty about the length of time the high level of cost will persist... “Emergency powers” describes the expansion of governmental authority generally and the concomitant alteration in the scope of individual liberty, and the transfer of important “first instance” law-making authority from legislatures to executive officials, in emergencies.”

This means that in crisis cases the courts will most likely be limited to examining whether there was congressional authorization for the executive policy being challenged. On this view, each branch is specifically competent in performing particular tasks, while the other branches serve as a check on the use of that branch's power. In resolving crisis cases, the locus of judicial activity will not be the delineation of substantive individual rights, but statutory interpretation in order to conclude whether an authorization has in fact been granted.

For reasons discussed below, this approach can be problematic, both from an internal and an external perspective. Internally, striving to maintain the separation of powers scheme can sometimes, depending on the political constellation, lead to problems of under-enforcement of the same structure the Court is seeking to maintain. Externally, adopting a process based approach can raise normative questions having to do with preserving individual rights.

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6 Defining an emergency or crisis is notoriously difficult, perhaps impossible. See, generally, OREN GROSS AND FIONNuala NI AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006). In this article I would much rather appeal to our sensible conventionalist way of thinking. As articulated in the following footnote, emergency and crisis cases are cases involving an increased demand for security concerns. They suggest that the “normal” way of life, or what life should normally be like, has been altered by some event, most commonly a war, a terrorist attack, a natural disaster etc.

7 Tushnet, supra note 2.

8 THE FEDERALIST NO. 48 (Hamilton) 305 (Clinton Rossiter, ed., 2003).

9 See text accompanying notes 116-132.
Since the main argument this article seeks to advance is that the formal structure of government impacts the way courts argue, it would be helpful to compare the American system of government to other systems in this regard. For the purposes of my argument I have chosen the Israeli context. Israel operates under a parliamentary system and has also faced significant security issues over the years. Although dealing with security concerns as well, the Israeli Court employs different judicial reasoning to adjudicate crisis cases. Initially, the Israeli Supreme Court was inclined to adopt an American style separation of powers approach, but changes in Israeli politics and constitutional law led to the rejection of this line of argumentation, eventually adopting a rights based, rather than process based, approach.

Because the formal structure of separation of powers may result in different judicial approaches in crisis cases, questions of institutional design are important. Institutions constitute the general frameworks in which we operate, thus structuring our everyday choices. While this insight may seem trivial, it is one we often forget at the cost of disconnecting ourselves from our institutions, failing to take account of their pervasive influence over our private and public spheres.

This article will proceed as follows. The first part will briefly discuss emergencies and the types of questions they raise for government. The second part will largely be a historical survey of Supreme Court jurisprudence dealing with emergencies from the Civil War to the present day. This survey will show that when it comes to emergencies, the Court largely perceives itself not as the guardian of individual rights, but as an enforcer of the political process and separation of powers scheme. The third part will discuss the advantages and disadvantages of such an approach and present a possible wrinkle. The fourth part is comparative. In order to demonstrate that different separation of powers schemes produce different judicial
reasoning methods, I will discuss emergency jurisprudence from Israel, which has a parliamentary system. The fifth part will conclude by offering some preliminary thoughts on the role of institutions and the importance of institutional design.

2. The different questions emergencies pose

The past six years have witnessed growing security concerns in the U.S. and Western European countries as a result of terrorist attacks in New York, Washington D.C, London and Madrid. Wars, emergencies, and periods of crisis are a part of life in an organized political society. They raise questions having to do with politics, social, and economic policy. Most of the issues implicate questions of law as well. How should a country conduct itself in an emergency? If it is a security threat, should it go to war? Should it enact special laws governing domestic issues? Should it nationalize or seize important industries connected to the war effort? Should it isolate the population of the same ethnic group as the one it is fighting?

All of these are particular questions that have to do with particular emergencies that have beset modern democracies. But the occurrence of emergencies also raises conceptual and theoretical problems on the constitutional level. How should a constitution address emergencies? Should it ignore them and assume that "life goes on" while applying the same rules? Should it provide special constitutional arrangements dealing specifically with these issues? Or, perhaps, the application of any legal rule to an emergency is misconceived, and the government should be allowed to act outside legal order with impunity.

Questions of the latter type have to do with purposeful institutional design. They are mostly confronted by countries seeking to enact a constitution, countries that are going through some kind of transformative change or a period of transition. Such was the case, for example, in South Africa, when it adopted its new post-apartheid constitution which addressed such concerns, or in Germany during the Weimar Republic, when it enacted Section 48 providing for emergency presidential decrees.

And, of course, there are the general more theoretical issues whether a constitution should even have an emergency provision.

Questions of the former type, those addressing specific proposals such as seizure of crucial industries, military conscription, or increased security at airports, are generally argued first from the level of policy. Legalistic considerations serve as second order considerations. We ask what would be an effective measure to address the current crisis. We then see if it comports with our constitutional and legal framework and proceed accordingly. This process usually takes place outside and before courts have their say (although of course policymakers consider what courts have said in the past), and is carried out in terms of desirability.

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15 These issues are discussed at length in Adam Shinar, Constitutions in Crisis and Judicial Methodology (LL.M thesis, Harvard Law School 2007). For different opinions on these issues see, John Locke, Two Treatises of Government § 160 (Peter Laslett, ed., 1988); Oren Gross, The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm Exception" Dichotomy, 21 Cardozo L. Rev. 1825 (2000); Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab trans. 1985); Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006); Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L. J. 1011 (2003); Mark Tushnet, Defending Korematsu?: Reflections on Civil Liberties in Wartime, Wis. L. Rev. 273 (2003). The positions range from arguing that emergency provisions are meaningless because legality itself disappears in an emergency (Schmit), to a position arguing that emergency statutes are a good way to control executive unilateralism (Ackerman).
16 It is possible for the legalistic and policy considerations to occur simultaneously, but this is not important for present purposes.
These two questions are important, but this article proceeds in neither of these directions. Instead, I believe it helpful to dispense with the theoretical models provided by different writers. These can be useful if and when we decide to adopt a new approach for the way the courts deal with emergencies and crises. At the same time, for the purposes of this article, I shall not focus my attention on one specific issue raised by emergencies, such as detentions, military trials or seizures of vital industries. These issues, however, serve as a background to examine the structural features of the governmental system. Understanding that structure and its inherent limitations should come before examining any proposal for reform. So let us now turn to that.

3. Crisis adjudication in the U.S.

A. Introduction

This part surveys the use of emergency powers throughout American history. It is by no means a definitive historical analysis. It seeks to illuminate the way these powers have been exercised and the way the branches of government have operated in regards to these powers. The cases that will be discussed are familiar and have been analyzed extensively elsewhere. Therefore, they will not be reviewed at length, but only as a means to illustrate the argument that the courts have adopted a process based approach to adjudication of crisis cases.

But before this is done, it will be helpful to outline the basic constitutional framework underlying the use of war powers. Under Article I, the Constitution vests the following powers in the Congress: declaring war and granting letters of marquee and reprisal,\textsuperscript{18} raising and supporting armies and a navy,\textsuperscript{19} calling forth the militia to

\textsuperscript{18} U.S. Const. art I, §. 8, cl. 11
execute the laws of the union, and suppress insurrections and repel invasions. Article II vests the power of commander-in-chief of the army and navy and militia with the President and determines that he shall take care that the laws are faithfully executed. The relationship between these provisions and the internal interpretation of each clause, specifically what is contained in the "commander in-chief-clause", is controversial, and is beyond the scope of this paper. Last, the Suspension Clause permits the suspension of habeas corpus rights in times of rebellion or invasion when the public safety may require it. As we can see, there are very few constitutional provisions dealing with security and crisis.

For present purposes it suffices to say that the Constitution sets a limited government with enumerated powers. However, because these powers are open to interpretation there are political struggles between the President and Congress regarding each other's authority. Although no one questioned the President's power to repel attacks, the framers were cautious about giving too much power to the President, thinking it will be misused for political gains. So, for example, the Constitution separates the President's commander-in-chief powers from the congressional acquiescence required to finance military campaigns. Although the President manages the war, he still needs Congress to declare it and finance it.

19 *Id.* at cl. 12-13.
20 *Id.* at cl. 15.
21 *Id.* at art. II §. 2, cl. 1.
22 *Id.* at §. 3, cl. 4.
24 U.S. Const. art I, §. 9, cl. 2
26 LOUIS FISHER, *PRESIDENTIAL WAR POWER* 10 (2004); THE FEDERALIST NO. 4 and NO. 69 *supra* note 8 at 66, 414.
27 U.S. Const art. I, §9, cl. 7.
But historical developments and practices distorted the line the framers sought to draw.\textsuperscript{28} As commentators have noted, the executive has accreted power over the years and has become much stronger than the framers envisioned.\textsuperscript{29} Instead of providing a meaningful check on executive power, Congress has often rallied behind the President during crises or approved of his actions after the fact.\textsuperscript{30} For example, even though the framers departed from the British model by giving the power to declare war to Congress, many armed conflicts and wars began without congressional declaration, while others were ratified after the fact.\textsuperscript{31}

\textit{B. The jurisprudence}

\textit{i. The Civil War}

When the war broke Congress was not in session. Attempting to convene it would take time the Union did not have.\textsuperscript{32} Lincoln found himself alone with no precedent to guide him.\textsuperscript{33} His first act was to issue an executive order calling forth the militia to combat the secession of the states. He also called on Congress to convene to consider further appropriate steps.\textsuperscript{34} Meanwhile, he imposed a naval blockade on the seceding states, increased the army and navy, and transferred funds without congressional appropriation. These steps were perhaps unavoidable, but few thought

\textsuperscript{33} ROSSITER, supra note 25 at 224. Cf. COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829-1901 215 (1984) (noting that on February 28th of that year a House committee published a report that if states were to secede, the President can act only after being enabled to do so by Congress. Congress at the time thought the President lacked the power to initiate or respond to hostilities if lacking congressional authorization).
\textsuperscript{34} ROSSITER, supra note 25, at 225.
they were constitutional.\footnote{Id. at 226. A year after the blockade was imposed it was sanctioned by the Supreme Court. It was ruled in the \textit{Prize Cases} that this was part of his commander-in-chief duties and that he had a duty to defend the nation against an attack. Also, this was not the first time a President transferred funds without congressional appropriation. President Jefferson provided funds to defend American positions when a British frigate attacked US forces in 1806. Congress was not in session at the time, and later ratified the transfer, although recognizing it was illegal. Jefferson didn't legitimize his act, but argued that the emergency warranted his disregard for the Constitution. See Lobel, \textit{supra} note 30, at 1392-93.} Despite general opinion holding that only Congress could suspend habeas corpus under the Suspension Clause, Lincoln authorized the commanding general of the US army, Winfield Scott, to suspend the writ in areas he deemed necessary.\footnote{Id. at 227. However, this wasn't exactly a settled issue. As Finkelman notes, General Andrew Jackson also suspended the writ during the war of 1812. Although he was fined, Congress later remitted the fine, thus perhaps acknowledging that it wasn't the sole body that could invoke the suspension clause. Finkelman, \textit{supra} note 32 at 38.} This led to \textit{Ex parte Merryman}.\footnote{Ex Parte Merryman, 17 F. Cas. 144 (C.C.D. Md 1861) (No. 9,487).}

In \textit{Merryman}, Lincoln ordered the arrest of John Merryman, a Maryland state legislator who belonged to a pro-Confederate militia. Merryman petitioned Chief Justice Taney for a writ of habeas corpus, claiming that the President had no authority to suspend the writ. Taney ordered the government to appear with Merryman, but to no avail.\footnote{Finkelman, \textit{supra} note 32 at 36-7.} Taney then wrote an opinion holding that the President had exceeded his authority and could not suspend the writ, because Article I of the Constitution granted that authority to Congress alone. Taney ordered the decision be sent to Lincoln with the hope that he will "take care that the laws be faithfully executed," to "determine what measures he will take to cause the civil process of the United States to be respected and enforced".\footnote{Ex Parte Merryman, 17 F. Cas. 144, 153 (C.C.D. Md 1861) (No. 9,487).} The decision, however, was ignored.\footnote{\textit{Miller}, \textit{supra} note 29 at 217. Finkelman, \textit{supra} note 32 at 39. Interestingly enough, although \textit{Merryman} is remembered as the first case regarding habeas corpus in the civil war and the refusal of the executive to honor that writ, a similar decision was handed down by Judge Giles three weeks prior to the Merryman decision. In that case, Giles ordered the release of a youth who was conscripted into the army in spite of his young age. Lincoln refused to comply with the writ. See \textit{Ex parte John G. Mullen} discussed in James F. Schneider, \textit{The Court in the Civil War Era}, 50 Md. L. REV 51, 54 (1991).}

When Congress convened, Lincoln justified his decisions on military necessity, arguing that the suspension clause was not specific about the authority that
could suspend the writ, and that he shared that power with Congress.\textsuperscript{41} Congress then ratified the actions. During the war the courts generally remained out of the picture, but two decisions merit discussion, involving habeas corpus and trial by military commissions, issues that will reappear later.

In \textit{Ex parte Vallandigham},\textsuperscript{42} Clement Vallandigham violated an order prohibiting declarations of sympathy for the Confederates. The Order further established military commissions to try these violations.\textsuperscript{43} Vallandingham was convicted and sentenced to imprisonment for the duration of the war.\textsuperscript{44} His petition for a writ of habeas corpus, arguing that he was denied his constitutional rights at trial, was denied, even though the writ was not suspended in that area at the time.\textsuperscript{45} As Professor Stone argues, the court understood its role not as "an independent effort to interpret the first amendment", but as part of a "collaborative effort to support the President". On this view, "the role of the judiciary… is to serve as a junior power, rather than as a critical check on the Executive".\textsuperscript{46} In Emergencies, the court reasoned,

\begin{quote}
\textsuperscript{41} Frank I. Michelman, \textit{Living with Judicial Supremacy}, 38 \textit{Wake Forest L. Rev.} 579, 595 (2003). For a discussion regarding which branch is vested with the authority to suspend the writ see David L. Shapiro, \textit{Habeas Corpus, Suspension, and Detention: Another View}, 82 \textit{Notre Dame L. Rev.} 59, 70-2 (2006) (concluding that unless there are times of dire emergency when Congress cannot be convened, all the evidence supports the conclusion that this power is solely vested in Congress). For an opinion that Lincoln doubted his authority to suspend the writ see Fisher, \textit{supra} note 26 at 47.
\textsuperscript{42} \textit{Ex parte Vallandigham}, 28 F. Cas. 874 (1863).
\textsuperscript{43} The circumstances leading to the trial of Vallandigham are described in Geoffrey R. Stone, \textit{Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism} 94-120 (2004). I rely on his account. General Burnside, appointed by Lincoln as the commander of the Ohio Department, promulgated General Order No. 38 declaring that sympathies for the enemy will be tried by military commissions. Vallandigham, a prominent politician and a former Congressman from Ohio, opposed the war and blamed Lincoln and abolitionists for its initiation. He urged both sides to begin peace negotiations and end the bloodshed. The charges were brought after speaking against that order.
\textsuperscript{44} \textit{Id.} at 101. The conviction generated tremendous backlash and is a definitive point in the history of freedom of speech. Many across the North (and of course in the South) were outraged by the decision. Mass protests ensued and all the newspapers carried to story for a long time. Lincoln himself, although displeased by Burnside's actions, had to publish a response justifying the decision. For an expansive account of the proceedings and the reactions see Michael Kent Curtis, \textit{Lincoln, Vallandigham, and Anti-War Speech in the Civil War}, 7 \textit{Wm. & Mary Bill RTS. J.} 105 (1998).
\textsuperscript{45} \textit{Ex parte Vallandigham}, 28 F. Cas. 874 (1863).
\textsuperscript{46} Stone, \textit{supra} note 43 at 103-4.
\end{quote}
no judge should embarrass the executive in its efforts to win the war. On appeal, the Supreme Court avoided the substantive issue, whether a military commission can try a civilian, and denied certiorari on technical grounds.

In *Ex parte Milligan*, Milligan, an Indiana lawyer charged with conspiracy against the government, was tried before a military commission which sentenced him to death. His petition for a writ of habeas corpus was heard in 1866, two years after the war. The Court unanimously granted the writ, holding that the trial was invalid. However, the court was split on the reasons. Five Justices held that a U.S. citizen who is not in the army could not be tried by a military commission as long as civilian courts were open, and that the constitutional rights enjoyed by a criminal defendant cannot be stripped away by an act of Congress or the President. The four concurring Justices decided the case on narrower grounds. They agreed the commission had no jurisdiction over Milligan, but this was not because Congress lacked the power to subject citizens to these commissions. They pointed to the Act relating to habeas corpus and regulating judicial proceedings in certain cases of 1863, which, although it allowed the President to suspend the writ, imposed limits on that right. The Act held that prisoners had to be turned over to the civil courts, where they had to be indicted.

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47 Vallandigham, 28 F. Cas. at 922 (“It is clearly not a time when any one connected with the judicial department of the government should allow himself, except from the most stringent obligations of duty, to embarrass or thwart the executive in his efforts to deliver the country from the dangers which press so heavily upon it”) (Opinion of Leavitt, J.).

48 The Court held it lacked appellate jurisdiction to entertain Vallandigham's petition because a military commission was not a court within the meaning of section 14 of the Judiciary Act of 1789, which established the courts of the United States. The Court also held that it did not have original jurisdiction to issue a writ of certiorari to revise the proceedings of a military commission. See Ex Parte Vallandigham, 68 U.S. 243 (1863).


50 Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

51 Milligan, 71 U.S. (4 Wall.) at 121-2 ([The laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed… Congress could grant no such power…One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior) (Opinion of Davis J.).
by a grand jury or released. Thus, the Justices held that Congress itself did not allow for trials of citizens by military commissions.\textsuperscript{52}

It is perhaps no coincidence that the most quoted decision from the war was handed down two years after its completion, when Lincoln was already dead and the general sentiment leaned more towards leniency than perceived desert. This led some to pronounce that courts' role in emergency situation should materialize after the emergency has passed.\textsuperscript{53} Be that as it may, what remains of the Civil War jurisprudence is the rule advanced in the concurring opinion of Chief Justice Chase: when the President wishes to exceed his power, congressional authorization is required. Although that rule was not expressed in analytical fashion, future cases implicitly or expressly adopted it.

Upon President Andrew Johnson's election a backlash ensued. Congress restricted many powers formerly held by Lincoln and severely limited his role in foreign affairs.\textsuperscript{54} This suggests that in emergencies Congress will be more inclined to relinquish its checking power and rally behind the President. As long as the crisis persists the courts are likely to do the same.

ii. World War II

The period prior to WWII continued the trend borne out in \textit{Milligan}. During WWI, the Wilson administration tended to follow the \textit{Milligan} plurality by insisting

\begin{flushright}
\textsuperscript{52} Milligan, 71 U.S. (4 Wall.) at 121-2 (1866)(there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention. We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana) (Chase, CJ., Concurring).


\textsuperscript{54} See \textit{Miller, supra} note 29 at 246. Of course, there are other reasons for why Congress didn't trust Johnson. He was a Southerner, his conciliatory policies toward the South during the Reconstruction angered Republicans in Congress, and he vetoed several civil rights bills. This led to his impeachment in the House, although ultimately he was not removed by the Senate. See generally \textbf{WILLIAM ARCHIBALD DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS} (1910).
\end{flushright}
on receiving congressional authorizations.\textsuperscript{55} Congress mostly deferred to the executive and so did the courts. Only after the war had been over for ten years did the courts return to protecting civil liberties at a "normal" level.\textsuperscript{56} During WWII, two events had a direct bearing on the way the Court would make its decisions later on: the trial of the Nazi Saboteurs and the internment of Japanese Americans.

In June 1942 two German submarines landed eight German saboteurs in Long Island and Florida, for the purpose of sabotaging military installations. After two saboteurs had a change of heart and turned to the FBI, all of them were apprehended.\textsuperscript{57} Roosevelt decided they would be tried by military commissions, and issued two proclamations to that effect, despite concerns as to the constitutionality of the commissions, mainly, whether the President had such an authority and whether two of saboteurs, who were U.S citizens, could be subject to their authority.\textsuperscript{58} The saboteurs petitioned for a writ of habeas corpus, challenging the legality of their trial before a military commission.

The Court held that the President had authority to establish a military commission to try the saboteurs, who were determined to be unlawful combatants

\textsuperscript{55} ROSSITER, supra note 25 at 240-53.

\textsuperscript{56} In Moyer v. Peabody 212 U.S. 78 (1909) the Court upheld a detainment of a miner in prison for 16 days after the governor of Colorado called in the National Guard to quell a strike. When martial law was declared in West Virginia the strikers were convicted in military courts, even though, unlike the holding in \textit{Ex parte Milligan}, the courts were open. Congress enacted the Espionage Act and the Sedition Act, prohibiting any speech construed to be disloyal. Even academics were under fire for expressing views against these acts. Professor Zachariah Chafee had to undergo a committee inquiry to determine if he could continue teaching. The Court upheld the sedition act and affirmed convictions of speech violations (Schenck v. U.S. 249 U.S. 47 (1919), Debs v. U.S. 249 U.S. 212 (1919), Abrams v. U.S. 250 U.S. 616 (1919)). It was only after the war was over that the Court returned to protect freedom of speech, first in Whitney v. California 274 U.S. 357 (1927) and then in Near v. Minnesota 283 U.S. 697 (1931). While doing so it acknowledged that in wartime the scope of civil rights changed. See MICHAEL LINFIELD, \textit{FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR} 33-67 (1990); Stone, \textit{supra} note 224 at 136-233; Zachariah Chafee Jr., \textit{Freedom of Speech in Wartime}, 32 HARV. L. REV. 935 (1919); Maurer Maurer, \textit{The Court-Martiaing of Camp Followers}, 9 AM. J. LEGAL. HIST. 203 (1965); ALBERT F. GUNNS, \textit{CIVIL LIBERTIES IN CRISIS: THE PACIFIC NORTHWEST 1917-1940} 1-116 (1983).


under international law. The authority to establish the commission was not necessarily derived from the President's commander-in-chief power – the court left this issue undecided – so much as the express congressional authorization.\textsuperscript{59} However, the Court still had to distinguish \textit{Milligan}. It pointed out that whereas Milligan was not a member of the army and resided in a state which did not take part in the rebellion, the saboteurs were a part of the enemy's armed forces thus subject to the law of war.\textsuperscript{60}

The internment of Japanese Americans occasioned three important decisions.\textsuperscript{61} The day the Japanese attacked, President Roosevelt issued a proclamation restricting travel by Japanese aliens.\textsuperscript{62} Two months later, Executive Order 9066 authorized the Secretary of War to prescribe military areas and to exclude persons from these areas, leading to a proclamation that the western states constitute military areas. The declared purpose was to prevent espionage and sabotage, although there was no proof of such. This was followed by the decision to intern 110,000 Japanese Americans,

\textsuperscript{59} Quirin, 317 U.S. at 29 (“It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions”) (Opinion of Stone, C.J.) The authorization was provided by the Articles of War, 10 U.S.C. §§ 1471-1593. They recognized military commissions as an appropriate tribunal for offenses against the law of war not ordinarily tried by court martial. Moreover, the Articles authorized the President to prescribe to the procedure for military commissions. As the Court noted: “Article 15 declares that “the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.” This ordinarily included military personnel, but Article 12 did not exclude other person who is subject to military commissions by the laws of war, such as the defendants in \textit{Quirin} (at 27).

\textsuperscript{60} Quirin, 317 U.S. at 45-6.

\textsuperscript{61} The Japanese air force attacked Pearl Harbor on December 7\textsuperscript{th} 1941. Martial law was immediately declared by the Hawaii governor, who also suspended the writ of habeas corpus after receiving presidential approval. Military tribunals were established to adjudicate over civilian matters, and although civilian courts resumed authority over the years of the war, the commissions still tried people for civilian violations. It was only in 1946, after the war was over, that the Court invalidated the jurisdictions of these commissions over civilian affairs. In Duncan v. Kahanamoku 327 U.S. 304 (1946), a habeas corpus case concerning the conviction of two men by military commissions for committing civilian crimes, the Court held that the commissions had no jurisdiction over civilian matters, thus affirming its ruling in \textit{Ex parte Milligan}. Admittedly this was too late. Martial law lasted until 1944 while the decision was in 1946. Thus, it can be argued that the Court had no real problem in affirming \textit{Milligan}. See also Rossiter, supra note 25 at 284-5.

\textsuperscript{62} LINFIELD, supra note 56 at 92.
70,000 of whom were citizens.\textsuperscript{63} Concerns over possible legal challenges led to the enactment of a statute making it a federal misdemeanor to violate any of the restrictions that followed from the Executive Order.\textsuperscript{64}

In \textit{Hirabayashi},\textsuperscript{65} the Court upheld a curfew order imposed on people of Japanese ancestry while affirming the principle that executive actions regarding war powers must be authorized by Congress. Similar to \textit{Quirin}, the Court did not find it necessary to rule whether the President had inherent power to issue the order since there was congressional authorization.\textsuperscript{66}

In \textit{Korematsu},\textsuperscript{67} the Court upheld the exclusion order ordering Korematsu to leave his home. Relying on \textit{Hirabayashi}, the Court grounded its decision on military necessity, but also on the congressional authorization.\textsuperscript{68} In \textit{Ex parte Endo},\textsuperscript{69} Endo argued she was a loyal citizen and thus could not be placed in a detention center. The Court agreed, but not because of the constitutional issues at stake, so much as on statutory interpretation grounds. Since the purpose of the Orders and the Act was to combat espionage and sabotage, loyal citizens should not be detained. In other words, the Court reaffirmed its principle of congressional authorization: the Act did not

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\textsuperscript{64} An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones”, approved March 21, 1942 (56 Stat. 173, 18 U.S.C.A. §97a).

\textsuperscript{65} Hirabayashi v. U.S. 320 U.S. 81 (1943).

\textsuperscript{66} Id. at 92 (“Executive Order No. 9066… and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution… We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress…”) (Opinion of Stone, CJ.).

\textsuperscript{67} Korematsu v. U.S. 323 U.S. 213 (1944).

\textsuperscript{68} Id. at 223 (“Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire..., because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this”) (Opinion of Black J.) (emphasis added).

\textsuperscript{69} Ex parte Endo 323 U.S. 283 (1944).
mention detention, only exclusion. The detention system set up by the government exceeded this authority.\textsuperscript{70} 

\textit{Endo}, then, attempted to resolve the internment crisis upheld in \textit{Korematsu}, but on less controversial grounds.\textsuperscript{71}

The WWII cases entrenched the principle of congressional authorization. As long as there was congressional authorization, the Court was hesitant in proceeding further to check substantive individual rights violations.

iii. The Korean War

In response to the developing crisis in Korea, President Truman declared a national emergency in 1950. The President, backed by congressional authorization, seized property deemed necessary to the war effort.\textsuperscript{72} The Courts stayed out of the picture as previous precedent suggested the President had exclusive and plenary powers when it came to foreign affairs. This was construed by some to apply to matters of national defense as well.\textsuperscript{73}

Decided during the Korean War, \textit{Youngstown}\textsuperscript{74} is arguably the most important decision concerning the use of war powers; important in the sense that it provided the analytical framework almost every use of war power decision would later employ. In 1951 a labor dispute arose between steel companies and their employees over the

\textsuperscript{70} Rostow, \textit{supra} note 63 at 513.

\textsuperscript{71} For an argument that \textit{Endo} is the more important case of the two see Patrick O. Gudridge, \textit{Remember Endo?}, 116 HARV. L. REV. 1933 (2003).

\textsuperscript{72} By the 1970's, 15 years after the war ended, there were 470 emergency statutes delegating power to the executive in a multitude of areas. See Jules Lobel, \textit{The War on Terrorism and Civil Liberties}, 63 U. PITT. L. REV. 767, 773 (2002).

\textsuperscript{73} See United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 319-20 (1936) (“we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution… congressional legislation… must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war) (Opinion of Sutherland, J.). See also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 4 (2006).

\textsuperscript{74} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952).
terms of their collective bargaining agreements. Attempts to resolve the dispute failed. The steel workers union gave notice of a nation-side strike. Truman, believing the impending strike would put national security at risk, issued an executive order authorizing the Secretary of Commerce to seize and manage most of the country's steel mills. The Secretary ordered the mills to keep running while Truman reported his actions to Congress. When Congress did not respond, Truman sent a second message. It was then that the steel companies filed suit claiming that the seizure lacked congressional authorization. The Government argued, in part, that the seizure could be justified based on the President's inherent war powers as commander-in-chief.

The Court disagreed. While it recognized that congressional authorization was required for presidential seizure, it was divided as to the nature of requisite authorization. It was Justice Jackson who provided the framework for the exercise of presidential power by invoking three categories, the famous tripartite test. The first category provides that when the President acts according to express or implied authority from Congress his authority is at its maximum. The second category provides that when the President acts in absence of either a permission or negation from congress, he can only rely on his own power. Here there is a zone of twilight of overlapping authority where the distribution of power is uncertain. The decision in these cases will depend on the circumstances. The third category provides that when the President acts in a way that is incompatible with Congress his force is at its lowest ebb, meaning that the act is prohibited, unless he acts according to Article II enumerated power discounted by Congress's power over the matter.

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75 The chain of events was recounted by the Court in *Youngstown*, 343 U.S. 579, 582-3.
76 The Justices' reasoning stemmed from the Taft-Hartley act enacted in 1947 which purported to solve labor disputes by ruling out the use of presidential seizures, deeming them counterproductive to the successful resolution of the dispute. The Act and the history surrounding it demonstrated the President lacked the seizure power in this case.
77 Youngstown, 343 U.S. 579, 635-38.
Jackson’s categories explain the Civil War, WWI and WWII decisions: the President has power under the commander-in-chief clause. However, courts are reluctant to define its scope. Therefore, unless the circumstances are clear, the Court would rather not delineate what this power entails. Rather, it prefers that Congress authorizes the act so as to guarantee its constitutionality.

iv. Post 9/11 enemy combatant cases

In response to the 9/11 terrorist attacks, Congress enacted the USA PATRIOT Act, authorizing the President to use military force (AUMF) in order to prevent future terrorist attacks. Soon after the war in Afghanistan began, suspected Al-Qaeda members and Taliban fighters, declared by President Bush as enemy combatants, were arrested and detained in Guantanamo Bay Cuba. Similarly, two U.S. citizens and a legal alien suspected of assisting Al-Qaeda were detained in American prisons.

*Rasul v. Bush* addressed the question whether enemy combatants could file such habeas petitions. The government relied on a former decision suggesting otherwise, but the Court distinguished the case, holding that the base in Guantanamo is an area where the US exercised complete jurisdiction and control. Relying on Federal habeas corpus statute the Court held that any federal district court had jurisdiction to hear Rasul’s case. To be sure, Congress can change the statute, but as

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79 The two citizens are Jose Padilla and Yaser Hamdi. The legal alien is Ali Saleh Kahlah al-Marri, whose habeas petition was recently decided. See Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).


81 Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that a German citizen cannot file for habeas corpus relief when he was convicted of war crimes by a military commission in China and imprisoned in Germany).

82 28 U.S.C. §2241
long as it didn't the Courts had jurisdiction. And indeed, two years later Congress attempted to repeal the right of habeas corpus for detainees in Guantanamo Bay.\textsuperscript{83}

In \textit{Padilla}, Jose Padilla, a U.S. citizen, was arrested in Chicago in 2002 suspected of planning to detonate a "dirty bomb".\textsuperscript{84} Declared an enemy combatant, he was held without charges, trial or access to counsel. His petition to the New York District Court was partially successful, in that the Court recognized the President's power under the AUMF to detain as enemy combatants citizens apprehended in the U.S. during a time of war, but it also held that Padilla had a right to contest the facts constituting his detainment.\textsuperscript{85} The Second Circuit went a step further and held the President lacked power to detain U.S. citizens who were arrested on American soil and not in the zone of combat. The Court relied on \textit{Youngstown}, holding the AUMF did not provide the requisite authorization.\textsuperscript{86} On review by the Supreme Court the case was remanded,\textsuperscript{87} and when the case came before it again, certiorari was denied.\textsuperscript{88}

In \textit{Hamdi v. Rumsfeld},\textsuperscript{89} a U.S. citizen picked up in Afghanistan was initially brought to Guantanamo and later removed to South Carolina. In his habeas petition he

\textsuperscript{83} 28 U.S.C. §2241 ((e)(1) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination"). It remains to be seen whether the statute will hold up in court. The Supreme Court will hear arguments challenging the statute in Boumediene v. Bush, 127 S. Ct. 3078, 168 L. Ed. 2d 755 in the October 2007 term. The Circuit Court for the D.C. Circuit has ruled that the statute prevents detainees from seeking habeas review. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (holding that congressional authorization suffices to deny detainees in Guantanamo Bay the right for habeas review).

\textsuperscript{84} Rumsfeld v. Padilla, 542 U.S. 426 (2004).


\textsuperscript{86} Padilla v. Rumsfeld, 352 F.3d 695 (2\textsuperscript{nd} Cir. 2003). The AUMF provides in relevant part: "[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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

\textsuperscript{87} Padilla v. Hanft, 423 F.3d 386 (4\textsuperscript{th} Cir. 2005). The 5-4 majority avoided the substantive issue by holding that Padilla should have filed the original petition in South Carolina, the federal district he was detained, and not in New-York, where he was initially held. Padilla re-filed the case in South Carolina, where the Fourth Circuit rejected his claims.


\textsuperscript{89} 542 U.S. 507 (2004).
argued that the President had no authority to detain him, and further, that his
detainment violated the Non Detention Act, which prohibited detention unless
pursuant to an act of Congress. The government relied on the AUMF, arguing that it
provided the necessary congressional authorization, and that the president also had
inherent authority as commander-in-chief to detain him.

The Court, in a three Justice plurality written by Justice O'Connor, declined to
decide on the issue of inherent power, finding that the AUMF provided authority to
detain persons who fought against the U.S. in Afghanistan. Detainment in these cases,
the Court noted, was a fundamental incident of war included in the AUMF. Regarding
due process rights, Justice O'Connor applied a balancing test, holding that Hamdi
must be given access to counsel so he could challenge his designation as an enemy
combatant before a neutral decisionmaker.

In Hamdan, termed by Professor Harold Koh as a "Youngstown for the
twenty-first century," the Court decided whether Hamdan, at one point Bin-Laden's
driver, could be tried before a military commission set up in an executive order.
Hamdan argued that the commissions were void because they lacked congressional
authorization, violating the Uniform Code of Military Justice (UCMJ) and the
Geneva Conventions. The Government relied on Quirin, but also argued, again, that
the President had inherent power as commander-in-chief to set up the commission and
that Congress authorized the commission in the AUMF. The Court struck down the
military commissions, holding that they did not conform to the Youngstown

90 18 U.S.C. §4001(a) provides: "No citizen shall be imprisoned or otherwise detained by the United
States except pursuant to an Act of Congress". The Act was enacted as a result of the Japanese-
American internment in WWII.
91 See also Fallon and Meltzer, supra note 2 at 2071. These later became to be known as the CSRT
(Combatant Status Review Tribunals), the procedures of which are challenged in Boumediene v. Bush,
No. 06-1195.
framework. The Court held that while military commissions are not unconstitutional per-se, they have to be properly established. The problem was that the AUMF did not expand the President's authority to establish military commissions under the UCMJ, and the existing commissions deviated from UCMJ standards because the laws of war in the Geneva Conventions that apply through the UCMJ call for judgment to be passed by a "regularly constituted court". Because the military commissions deviated from numerous requirements of procedural justice found in the UCMJ (mostly regarding juries and evidentiary standards) they were not considered a "regularly constituted court" and were therefore invalid.

The Bush Administration thus returned to Congress for express authorization. This led to the enactment of the Military Commissions Act of 2006, which basically adopts the military commissions set up by the executive. Furthermore, it attempts to repeal habeas rights for Guantanamo detainees. Whether the Act has succeeded in doing so will be determined in the summer of 2008 when the Court rules in Boumediene v. Bush. Ruling in the case, the D.C. Circuit Court, relying on Rasul, has applied the Youngstown framework to the hilt when it held that congressional authorization suffices to deny habeas rights to Guantanamo detainees.

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95 Chief Justice Roberts did not participate since he was one of the judges who heard the case in the D.C. Circuit.
96 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (Stevens, J.)
97 "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check."... Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. 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 Constitution places its faith in those democratic means. Our Court today simply does the same" 126 S. Ct. 2749, 2799 (Breyer, J., concurring).
C. The importance of congressional authorization

While most of the literature after the enemy combatant cases focused on the substantive issues the court dealt with,101 few emphasized the structural framework the courts employ, crystallized in Justice Jackson's opinion in Youngstown. While there have been some deviations now and then, such as the Court's opinion regarding due process requirements in Hamdi, the Youngstown categories serve as a litmus test for the legality of executive power. Indeed, the decisions before Youngstown embraced similar principles without providing the analytical framework. To be sure, the fact that executive actions in times of crisis require congressional authorization did not escape legal scholars.102 However, while most commentators pointed to the virtues of such a framework, few have addressed the problems it entails. In the two sections that follow I elaborate on each.

i. The virtues of the Youngstown framework

Enforcing the separation of powers scheme makes sense. As the Constitution does not assign a specific role for the judiciary in emergencies, the courts enforce the general constitutional design on the branches that were vested with war making power.103 Because the Framers wanted to prevent the concentration of too much power in the hands of one branch, the purpose for separating the powers and having them check each other was to impede, rather than accelerate, government action.104 Checks and balances were designed to encourage deliberation among government

101 See, e.g., Posner, supra note 73; Peter Berkowitz (ed.), Terrorism, the Law of War, and the Constitution: Debating the Enemy Combatants Cases (2005); Martha Minow, What is the Greatest Evil?, 118 Harv. L. Rev. 2134 (2005); Erwin Chemerinsky, Detainees, 68 ALB. L. REV. 1119 (2005).


entities.\textsuperscript{105} Mutual checks were thought to be a good way for ambition to counter ambition.\textsuperscript{106} That way, only when the branches were in agreement could action be taken. This creates incentives for inter-branch bargaining and, as a result, makes the decision making process more deliberative.\textsuperscript{107} The Framers' vision was that Congress would be the big player, but they also granted strong powers to the executive. The courts were assigned a monitoring duty, making sure that the general scheme did not malfunction and that there would be multiple centers of political authority that can check each other for unwarranted accretion of power.\textsuperscript{108}

In the context of the war-making powers maintaining this structure was extremely important. War is a stressful time, so the Constitution was arranged that these kinds of decisions (specifically going to war) would not be easy to make. As John Hart Ely put it, the point was to "clog the road to combat by requiring the concurrence of a number of people with various points of view".\textsuperscript{109} Congress, the Framers thought, can serve as a meaningful check on presidential power thus making for better decisions. The meaningful check is interbranch dialogue. If you get the two branches talking this will ensure a "sustained democratic response to external crisis".\textsuperscript{110} This also comports with our notion of the rule of law. Congress enacts the laws which the President must faithfully execute. He must act within the scope authorized by Congress. Congress, on its part, is supposed to oversee the crisis. It tries

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\textsuperscript{105}Cass R. Sunstein, The Partial Constitution 7-13 (1993)
\textsuperscript{106}The Federalist No. 51 (Madison) supra note 8 at 317.
\textsuperscript{110}Koh, supra note 93 at 2364.
\end{flushright}
to prevent mistakes, either by expressing more viewpoints or harnessing past experience. It can also cut waste and make sure policy makers are alert.\textsuperscript{111}

In short, the Constitution eschews unilateral executive action, except in the clear case where it grants that power to the executive. When the branches are in agreement, the requirement is satisfied, the court is equally less likely to intervene and will not be perceived as an activist in issues where it lacks institutional competence or legitimacy. Now, this is basically the argument made by Samuel Issacharoff and Richard Pildes.\textsuperscript{112} They argue that the courts' role in times of crisis is to make sure that the right institutional process supports the tradeoff between liberty and security.\textsuperscript{113} They correctly observe that in times of crisis courts usually do not address legal issues through the framework of individual rights, but also refrain from granting unfettered discretion to the executive. Instead, the courts employ a process based institutional approach, whereby they shift responsibility from themselves and pass it to Congress so it can check the executive.\textsuperscript{114}

In the following section I suggest that the seemingly straightforward institutional process based approach can almost always be applied and therefore does not pose a real constraint. Moreover, it systematically and ultimately fails at curbing unilateral executive action. However, the \textit{Youngstown} framework does do at least one good thing. By avoiding substantive judgments and narrowing itself to statutory interpretation the Court frees up the political process. It calls on the political branches to cooperate and work together. It signals to them that the answer should be found in the political process rather than through constitutional law. And, in a way, the results

\textsuperscript{111} Norman J. Ornstein, Thomas E. Mann, \textit{When Congress Checks Out}, 85 FOREIGN AFFAIRS 67 (2006).
\textsuperscript{113} \textit{Id.} at 194.
\textsuperscript{114} \textit{Id.} at 162-3.
can motivate Congress to become a more active participant in shaping national security policy.  

ii. The problems with Youngstown

Because the Youngstown categories are vague, it is notoriously easy (or difficult, depending on your desired result) to apply. Youngstown itself was a complicated case because it required determining exactly what Congress gave permission to do, given that there was no clear statute on point. There are statutes that are in the neighborhood which specify a set of methods the President could have used to resolve a labor dispute, but one needs to interpret them in a certain way to conclude that the seizure is unconstitutional. Also, merely having a statute is not enough since one can still ask whether it grants authority or denies it. Because this is a matter of interpretation courts have enough room to play around the categories. This point is particularly prominent in two Supreme Court Cases, Haig v. Agee and Dames & Moore v. Reagan, where the Court adopted a broad notion of what constitutes congressional authorization.

In a similar vein, there are a lot of statutes to go through, virtually the entire U.S. code. Conceivably then, it is just a matter of finding a statute that comports with the preferred outcome. And, of course, there is Jackson's second category – the zone of twilight. If Congress does not say anything then there is no clear answer, or at

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115 Whether that is a good thing is another question. For an opinion that more weight and power should be given to the executive in times of emergency see POSNER AND VERMEULE, TERROR IN THE BALANCE, supra note 5.
118 In these cases, the Court held that congressional acquiescence can be inferred from the lack of legislation opposing longstanding presidential practice. It also held that a specific grant of statutory authority should not be read to preclude presidential action in the unauthorized circumstances, since Congress cannot possibly predict all the future scenarios where presidential action might be necessary. See also David J. Barron and Martin S. Lederman, The Commander-in-Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008).
119 Thus, for example, the Court in Rasul relied on habeas corpus statute provisions enacted in 1867, and the Hamdan Court relied on UCMJ provisions enacted in 1950.
least there are no clear guidelines. More so than that, what would be the decision in a case where the President acted within his Article II powers and Congress limited that action by exercising its Article I powers? The *Youngstown* framework gives us no answer to this predicament.

Thus, it is a real question whether the institutional process based approach can serve as a meaningful check on an executive determined to exercise its war powers. Contrary to Issacharoff and Pildes, five reasons suggest that it cannot.

First, the Framers assumed that there will be contention between Congress and the President. Issacharoff and Pildes assume this as well. But this is not always the case. For one thing, the Framers did not envision the party system that exists today. In fact, they generally abhorred the idea of political parties. More importantly, when the presidency and Congress are controlled by the same party, in a situation of undivided government, more often than not they will share policy preferences. In these cases it is hard to see how Congress can seriously impede executive action. Indeed, why should it? This was striking after the events of September 11 when President Bush enjoyed a Republican Congress from 2003 up until 2007. Congress has routinely either failed or acquiesced in the face of a determined executive. Of course, this is not because Congress was determined to curtail unilateral executive action and failed to do so, but because for the most part it happened to agree with the President's policies, so there was no need to object. And, even if individual members


\[121\] For a similar argument see Daryl J. Levinson and Richard D. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2351 (2006) (“The Madisonian visions founders on the realities of partisan political competition. Especially when government is unified by party, we should not expect Congress to resist executive power in the way that courts and commentators take for granted”) (the authors then go on to analyze congressional behavior post 9/11 to find that Congress has been largely dormant).
Norman Ornstein and Thomas Mann, for example, observe that "In the mid-1990s, the Republican Congress took 140 hours of testimony on whether President Clinton had used his Christmas mailing list to find potential campaign donors; in 2004-5, House Republicans took 12 hours of testimony on Abu Ghraib." To be sure, Congress is perfectly capable to stand up to the President even when both branches are controlled by the same party. Such was the case in the enacting of the "McCain Amendment" seeking to prohibit cruel, inhuman or degrading treatment of detainees in U.S. custody and restricting interrogation techniques to those limited in the Army field manual. The same happened after *Hamdan*, where the President struggled against a group led by Senators John McCain, Lindsay Graham and Mark Warner, ultimately "compromising" on the content of the Military Commissions Act of 2006. However, this is the exception rather than the rule. As a result, some commentators have called for a default rule against "latitudinous interpretations in support of executive power during unified government" so as to force congressional deliberation in the hope that Congress will undertake its power sharing constitutional responsibility with the executive.

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122 Ornstein and Mann, *supra* note 111. However, the authors identify a decline in institutional authority that has been taking place since the 1980's, causing Congress to be more deferential when confronting the executive, caring more about their constituencies than about national affairs.

123 Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005). When President Bush signed the Act he attached a signing statement which said: "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks." (http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html) (Last visited on 2/6/08).

124 Levinson and Pildes, *supra* note 121 at 2356.
Second, since the time of the framing the executive has gradually been accreting power.\textsuperscript{125} Consider, for instance, the modern administrative state.\textsuperscript{126} Congress regularly delegates its legislating authority to government agencies which are controlled by the executive, arguably violating Article I non-delegation doctrine. Concentration of war powers is simply a part of a larger process that has steadily been taking place for the past 200 years, accelerating since the New Deal. The courts, for the most part, refrained from intervening, realizing perhaps that modern times necessitate a bigger and more complex governmental mechanism, but also because they believed that the separation of powers scheme is largely a self-enforcing mechanism.

Not only is the executive already powerful, in emergencies there is a natural tendency to "rally around the flag".\textsuperscript{127} In times of crisis, real or perceived, the nation rallies behind the leader. Sometimes this is due to patriotic fervor, sometimes panic, but the President almost always has wide support in the beginning of a war or national crisis. This support comes from the citizenry, but also from Congress, which usually exhibits a high degree of deference to executive action, not wanting to "rock the boat", or perhaps happy to shift responsibility to the President. Because the realities of war require a central leadership that can operate quickly and decisively it is reasonable to entrust these duties to the executive branch as opposed to a collective body like Congress.

Third, there will be cases where the Court will strike down a presidential act, even in a time of crisis, if it did not receive congressional authorization. But this is not...
necessarily a rebuke.\textsuperscript{128} The Court in \textit{Rasul} and \textit{Hamdan} gave specific instructions to the President how to legalize his actions. Sure enough, the President went to Congress which promptly authorized the suspension of habeas corpus for Guantanamo detainees and reformulated military commissions to comply with the decisions. In times of crisis this authorization is almost a sure thing, so even if the President failed to acquire congressional authorization ex ante, it will not be too difficult getting authorization ex post. When the Court is merely enforcing a \textit{process}, virtually any substantive decision can pass constitutional muster as long as it received congressional authorization. This can be good or bad, depending on one's perspective, but it does mean that as long as there is authorization almost any measure has the potential of receiving a judicial stamp of approval.\textsuperscript{129}

Fourth, even if Congress tries to perform a meaningful check on executive action there is a good chance it will fail. A case in point is the War Powers Resolution.\textsuperscript{130} The War Powers Resolution attempts to force interbranch dialogue by requiring the President to consult Congress before engaging in hostilities, to give regular reports to Congress, and to withdraw troops within sixty days absent congressional approval. But the resolution has mostly been ineffectual.\textsuperscript{131}

\textsuperscript{128}John Yoo, \textit{Courts at War}, 91\ CORNELL L. REV. 573 (2006) (arguing that the recent Court decisions regarding enemy combatants affirmed the notion of the "war on terror" and provided a flexible framework for the administration).

\textsuperscript{129}Benjamin Wittes, \textit{Judicial Baby-Splitting and the Failure of the Political Branches, in TERRORISM, THE LAW OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANTS CASES 101, 117-8 (Peter Berkowitz (ed.), 2005) ("The simple truth is that the administration could have gotten almost anything it wanted from Congress in the way of detention authority for enemy aliens abroad in the wake of September 11. If the debate over the USA Patriot Act proved anything, it was that Congress had little appetite for standing in the way of the most robust response the executive could muster… It is simply inconceivable that Congress would have crafted a regime that did not amply accommodate the president's wartime needs… [had the President gone to Congress] I believe the deference he sought from the Supreme Court would have been forthcoming and very nearly absolute").


\textsuperscript{131}David Cole, \textit{The Priority of Morality: the Emergency Constitution's Blind Spot}, 113\ YALE L. J 1753, 1765 (2004); Michael Ratner and David Cole, \textit{supra} note 28 (noting that Presidents have not respected the Resolution and that the courts have been reluctant to enforce it); Kelly L. Cowan, \textit{Rethinking the War Powers Resolution: a Strengthened Check on Unfettered Presidential Decision Making Abroad}, 45\ SANTA CLARA L. REV. 99 (2004) (arguing that the War Powers Resolution
Fifth, it is possible that congressional authorization actually eggs the President on as opposed to restricting him. According to Ely, congressional power sharing slows down the war making process; but some argue that congressional authorizations in the war powers context may have perverse effects, since by distributing responsibility to more branches the President will be more comfortable in pursuing higher risk wars than he otherwise would choose were he to act unilaterally.\textsuperscript{132}

\section*{iii. A possible wrinkle: a substantive impulse}

Before proceeding, it is important to introduce a possible wrinkle to the foregoing analysis. Part of the criticism leveled against the institutional process based approach is that by maintaining the separation of powers and seeking congressional authorization, the court is abdicating its role as a protector of individual rights.\textsuperscript{133} Insistence on process invites the political branches to violate individual liberties during crisis, precisely when they are most vulnerable.\textsuperscript{134} There is some evidence suggesting that the courts have been more receptive to such arguments. The plurality opinion in \textit{Hamdi}, where the court provided a minimal due process guarantee by allowing each detainee to contest his designation as an enemy combatant, is a good example. In their \textit{Hamdi} dissent, Justices Scalia and Stevens went even further by

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\textsuperscript{132} Jide Nzelibe, \textit{Are Congressionally Authorized Wars Perverse?}, 59 STAN. L. REV. 907 (2007).
\textsuperscript{133} See, e.g., Jerry Kang, \textit{Judgments Judged and Wrongs Remembered: Examining the Japanese Americans Civil Liberties Cases on Their Sixtieth Anniversary: Watching the Watchers: Enemy Combatants in the Internment's Shadow}, 68 LAW & CONTEMP. PROB. 255 (2005) (arguing that this mechanism removes accountability from the courts and the political branches for civil rights violations).
\end{flushright}
arguing that the Constitution allows the detention of an American citizen only when a criminal prosecution is in place and all the constitutional rights have been provided, regardless of an emergency or a congressional authorization.\textsuperscript{135} The Court in \textit{Boumediene} is also likely to consider the substantive rights afforded to detainees.\textsuperscript{136}

It is too soon to tell whether this possible move to a more substantive individual rights approach during emergencies is here to stay. One can argue that today we are more sensitive to individual rights concerns than we were back in the Civil War or WWII. Over time, these sensitivities come to be reflected in the opinions of the Justices we appoint to the Court, who embody these preferences themselves.\textsuperscript{137} Whether we are indeed witnessing a sea change in crisis jurisprudence or whether these are exceptions, has yet to be determined conclusively. If induction is any guide, I am not certain the basic structure will change. In a system of separated powers the courts have traditionally assumed a modest role, and the cases where they intervened can be explained on the basis of specific historical contingencies.\textsuperscript{138} Ultimately, then, the separation of powers scheme plays an important role in the \textit{kind} of reasoning the courts employ.\textsuperscript{139}

\textsuperscript{135}542 U.S. 507, 554-79.
\textsuperscript{136} However, that examination will most likely be limited to few substantive issues, and not the host of issues the appellants addressed in their briefs. Justin Florence, \textit{Substantive Detention Law Matters: The Big Questions About Guantanamo the Supreme Court Should Answer}, HARV. L. POLY REV. ONLINE (available at http://www.hlpronline.com/Florence_Substantive_Detention_Law.pdf) (Last visited on 2/6/08).
\textsuperscript{138} The Court’s decisions in \textit{Milligan}, \textit{Duncan}, and \textit{Endo}, are regarded as “brave”, but they were decided after the crisis was over (in \textit{Milligan} the Civil War, in \textit{Duncan} WWII), or when the end was in sight and the outcome clear (\textit{Endo}).
\textsuperscript{139} See Robert J. Pushaw, Jr., \textit{The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review}, 82 NOTRE DAME L. REV. 1005, 1083 (2007) (arguing that “it would be a mistake to interpret the recent cases upholding the rights of enemy combatants as portending a more general shift towards greater protection of individual liberty in the military context. History has taught us that such decisions are the exception, not the rule. During wartime, judicial discretion is usually the better part of valor.”)
D. Summary

The possible wrinkle aside, it seems clear that the *Youngstown* framework does not serve as a real check on executive power. If the courts are only enforcing the separation of powers scheme then they are not doing much, except, perhaps, calling on Congress to work with or against the President. But since congressional authorization is very easy to get in times of crisis, especially when the executive and legislative branches share similar policy preferences, this is not a major hurdle.

Moreover, if the court really wants to find authorization then interpretive acrobatics can yield the desired outcome. It is true that the Court sometimes opposes executive actions, but many times the circumstances surrounding the case are more illuminating than the decisions themselves.\(^{140}\)

Judicial deference, the result of the *Youngstown* framework, flows from the structure of separation of powers. Thus, the question is what happens in countries with a different separation of powers scheme. The next section examines crisis adjudication in Israel, where I will suggest that one of the factors leading to different substantive judicial decisions is that the court does not view its role as the enforcer of separation of powers. When courts are not applying a structural model they are more likely to apply a substantive individual rights model, according less deference to the executive.

4. Israeli Crisis Adjudication

A. Introduction

Unlike the U.S., which has fairly distinct periods of peace and crisis, Israel can be characterized as a country having one long crisis since its founding in 1948. Wars,

\(^{140}\) See fn. 138.
the imposition of military law on the Palestinian minority within Israel until 1966, the occupation of the Gaza Strip and the West Bank as a result of the Six Day War in 1967, and persistent terrorist attacks, have been fertile ground for the adoption of varied security measures dealing with issues such as detention, deportation, house demolitions, torture, targeted killings, the Separation Fence and immigration policy. Indeed, Israel has been under a formal state of emergency since 1948. However, when discussing crisis adjudication this formal declaration of emergency is relatively inconsequential. Rather than describe the legal situation in each area, I aim to paint a picture of how the courts resolve crisis cases.

I begin with a description of the Israeli constitutional system focusing on the "constitutional revolution" in 1992 and key judicial doctrines relating to standing and justiciability. I then examine crisis adjudication and the willingness of courts to substantively resolve such disputes over a general policy of deference. Last, I suggest some reasons why this is so and why the courts in Israel assume a different role than

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142 As part of the "disengagement plan" Israel pulled out of the Gaza Strip and evacuated its settlements in August 2005. Whether Israel still has effective control over that territory and whether it still has duties to the inhabitants under international law is controversial. These complex issues are not within the scope of this paper.
143 The declaration was enacted in section 9 of the Law and Administration Ordinance – 1948, which was the first piece of Israeli legislation. Maintaining a state of emergency enables the operation of many laws concerning detentions, arrests, price control, labor laws etc. which can be enacted in very speedy way, mainly by executive officials rather than the legislature. The authority to declare an emergency has since been relocated to section 38 of the Basic Law: The Government, but a state of emergency is still in effect, the Knesset extending it every six months or a year. A petition to the Supreme Court challenging the constitutionality of the continued state of emergency has received some sympathy from the Court, and the Government has been attempting to integrate the vast legislation dependent on a declaration of emergency with regular legislation. The petition is still pending. See H.C. 3091/99 The Association for Civil Rights in Israel v. The Knesset (unpublished decision from 8/1/06). See also Claude Klein, On the Three Floors of a Legislative Building: Israel's Legal Arsenal in its Struggle Against Terrorism, 27 CARDozo L. REV. 2223, 2234 (2006).
144 This is not to say that it's not important. Indeed, detentions, for example, are governed by a law that requires that a state of emergency be in effect. However, that law or a similar version thereof, would probably have been enacted anyways. Regarding the occupied territories, the emergency laws that apply there are a remnant of the British Mandate and do not rely on the Israeli emergency declaration. For a critical position on Israel's continuing emergency declaration see John Quigley, Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?, 15 MICH. J. INT'L L. 491 (1994).
145 The term was coined by then Justice of the Israel Supreme Court, Aharon Barak. See Aharon Barak, The Constitutional Revolution: Protected Human Rights, 1 MISPAT UMIMSHAL 9 (1993) (Hebrew).
U.S courts. Specifically, I speculate that one of the reasons accounting for the
difference is the separation of powers scheme in Israel resulting in the Knesset's
(ISrael's parliament) inability to pose a meaningful check on executive power.
Consequently, the system promotes judicial, rather than legislative, oversight.

B. The Israeli Constitutional Structure

Israel is a parliamentary democracy modeled after the British system of
government. The largest party forms a coalition with smaller parties for a majority
of the seats, going on to form the government. This means that by definition the
government has the majority of the Knesset, although of course political turmoil and
breakups of coalitions can occur, resulting in the loss of Knesset confidence in the
government.

The Declaration of Independence provided that Israel shall have a constitution,
enacted by a constituent assembly. But in its first legislative act, the Constituent
Assembly determined that it should become the first Knesset. Due to political
difficulties the first Knesset did not enact a constitution, but decided on a
compromise, known as the Harari Resolution, to hand over the enactment process to a
Knesset committee, instructing that the constitution be composed in piecemeal
fashion of individual chapters, each constituting a basic law. The Basic Laws were
not considered to have supreme status over other legislation.

146 For a full although a bit dated description of the Israeli legal system see Asher Maoz, The System of
147 The specific provisions regarding these arrangements are stipulated in the Basic Law: The Knesset
148 1 L.S.I. 3 (1948).
149 Transition Law, 1949 S.H 5709, 1.
150 An English translation of all of the Basic Laws can be found at
http://www.knesset.gov.il/description/eng/eng_mimshal_vesod1.htm
151 However, the Supreme Court has held that the Knesset can entrench statutory provisions requiring
supermajorities for their amendment, see HCJ 98/69 Bergman v. Minister of Finance, 23(1) P.D 693.
In 1992 the Knesset enacted two Basic Laws dealing with civil rights: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.\(^{152}\) Up until that point some individual rights were judicially protected, but the Knesset could restrict these rights. The court performed judicial review over administrative actions and policies, but did not exercise judicial review over primary legislation,\(^{153}\) although it did hold that laws should be constructed so as to avoid impairing these rights.\(^{154}\)

In 1995 the Court established judicial review over Knesset legislation. In \textit{United Mizrachi Bank v. Migdal Cooperative Village},\(^{155}\) the Court held that the Basic Laws are normatively superior to Knesset legislation and that Knesset legislation violating the rights protected in these Basic Laws not in accordance with their limitations clause will be struck down by the courts.\(^{156}\) The limitation clause introduced the concept of proportionality to Israeli jurisprudence.\(^{157}\)

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\(^{152}\) The rights protected in these Basic Laws are the rights to dignity, liberty, movement, property, privacy and occupation. Other individual rights have been developed and derived for the general right to liberty, such as a constitutional right to freedom of speech and assembly, religious liberty and a general constitutional principle of equality. See, Hillel Sommer, \textit{The Unenumerated Rights – On the Scope of the Constitutional Revolution}, 28 \textit{MISHPATIM} 257 (1997) (Hebrew).


\(^{156}\) Section 8 of the Basic Law: Human Dignity and Liberty provides that "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required". An almost identical clause is found in section 4 of the Basic Law: Freedom of Occupation. See also Daphne Barak-Erez, \textit{From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective}, 26 \textit{COLUM. HUM. RTS. L. REV.} 309, 312-331 (1995); Yehudit Karp, \textit{Basic Law: Human Dignity and Liberty: A Biography of Power Struggles}, 1 \textit{MISHPAT UMIMSHAL} 323 (1993) (Hebrew). For a critical analysis of Israel's "struggle for a constitution" see Michael Mandel, \textit{Democracy and the New Constitutionalism in Israel}, 33 \textit{ISRL. L. REV.} 259 (1999) (arguing that the purpose of the constitutional revolution was to consolidate the power of those who lost it on the political front). For an approach arguing that the constitutional revolution served to entrench neo-liberal principles thus ignoring Israel's socialist and collectivist background see Ran Hirschl, \textit{Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order}, 46 \textit{AM. J. COMP. L.} 427 (1998).

\(^{157}\) H.C. 1715/97 Lishkat Menhalei Hahashkaot in Israel v. Minister of Finance, 541(1) P.D. 367; R. v. Oakes [1986 1 S.C.R. 103. The test is composed of three sub-tests: 1. The means taken must be rationally connected to the purpose. 2. The means have to impair the right as little as possible. 3. The harm caused to the individual has to be proportionate to the benefits brought on by the action. For an elaboration on the reasonableness and proportionality requirements in administrative law see Baruch
This process was also accompanied by the gradual accretion of power by the Supreme Court. Due to a model remnant of British Mandatory rule, the Court serves not only as a court of criminal and civil appeals, but also sits as a court of first instance as a High Court of Justice. In this capacity it has expansive powers, which include review of all administrative bodies and officials.\textsuperscript{158} Of course, the Court can still proscribe its standing and justiciability requirements, but these were significantly eroded by the Court itself. In an important decision concerning the drafting of ultra-orthodox men to the military,\textsuperscript{159} the Court held that the lack of a personal interest in the petition and its political nature should not deter the Court from exercising review. The Court reasoned that its role is to protect the rule of law: when it is undermined by any state authority the identity of the petitioner does not matter. This increased public interest litigation.\textsuperscript{160} The same decision also virtually eliminated the Court's justiciability doctrine.\textsuperscript{161}

These relaxed standards also applied to security policy and review of military decisions. To this we should add the expansion of the scope of administrative review, which now includes a reasonableness test, meaning that all administrative actions

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\textsuperscript{158} § 15 to the Basic Law: the Judiciary provides, among others:
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\item The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court…
\item Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent -
\begin{enumerate}
\item to make orders for the release of persons unlawfully detained or imprisoned.
\item to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting;
\item to order courts... and bodies and persons having judicial or quasi-judicial powers under law, other than courts dealt with by this Law and other than religious courts (batei din), to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given;
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\textsuperscript{159} H.C. 910/86 Resler v. Minister of Defense, 42(2) 441, 462 (Barak, J.).
\textsuperscript{160} ITZHAK ZAMIR, THE ADMINISTRATIVE AUTHORITY 82-3 (1996) (Hebrew).
\textsuperscript{161} For an elaboration of the Court's standing and justiciability doctrines see Aharon Barak, \textit{Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy}, 116 HARV. L. REV. 19, 97-110 (2002).
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have to be reasonable and proportional.\textsuperscript{162} The reasonableness test asks the question whether a reasonable public authority could have reached the decision which has actually been reached; for proportionality the Court imported the tripartite test used in constitutional adjudication.\textsuperscript{163}

These administrative standards also apply to the military government in the Occupied Territories. On top of The Hague Regulations and the Fourth Geneva Convention, the Court has repeatedly held that Israeli administrative law applies to actions by the military commander.\textsuperscript{164} Accordingly, Palestinians can challenge military actions, administrative acts and regular Knesset legislation.\textsuperscript{165}

C. Crisis Adjudication

Although today the Israeli Supreme Court imposes almost no limits to its review of security measures, this was not always the case.\textsuperscript{166} When Israel was founded all British mandatory legislation was automatically incorporated into Israeli law, including emergency legislation. In 1945 the British High Commissioner promulgated the Defense (Emergency) Regulations,\textsuperscript{167} granting substantial discretionary powers to the executive in areas such as detentions, arrests, house demolitions and military courts. These powers were considered beyond the reach of

\textsuperscript{162} H.C. 389/80 Yellow Pages v. Israel Broadcast Authority 35(1) P.D. 421; H.C. 297/82 Berger v. Minister of Interior pages, 37(3) P.D. 29; H.C. 581/87 Tzucker v. Minister of Interior, 42(4) P.D. 529.
\textsuperscript{163} See fn. 157.
\textsuperscript{164} See, e.g., H.C. 69/81 Abu Ita v. Commander of the Judea and Samaria area, 37(2) P.D. 197; H.C. 393/82 Jamayat Askan v. I.D.F. commander in the Judea and Samaria area, 4(37) P.D. 785.
\textsuperscript{166} Ariel L. Bendor, \textit{The Israeli Constitution and the Fight Against Terrorism}, 13 FORUM CONSTITUTIONEL 37, 39 (2003).
\textsuperscript{167} Iton Rishmi (Official Gazette) 1442, supplement no. 2 p. 855.
either the Knesset or the courts. Some of these regulations were later modified, but most regulations remain and are especially relevant to security administration in the Occupied Territories where Israel applies them as well.

The Court started scrutinizing the use of emergency powers in 1950, albeit in a limited fashion. One of the first cases concerned an Israeli Palestinian, subject to military rule imposed at the time, who traveled from his village to Jaffa to receive medical treatment. He procured the necessary permit from the military authorities but remained in Jaffa after it expired. An order was issued to deport the man back to his village to which he objected by a petition to the Court. Rejecting the petition, the Court held that its jurisdiction is limited, since the regulation gives the authorities subjective discretion to decide on the measures as they see fit. The Court's task was thus only to determine whether the authority exceeded its power under the statute and if it acted in good faith – the basic ultra vires requirement.

In the Kardosh cases, decided ten years later, the Court rejected the concept of unlimited subjective discretion and subjected all administrative actions to judicial review. Although Kardosh excluded security actions from its review, this changed in Baransa, and later in Schnitzer, where the Court announced its conception of judicial review of security measures which applies today. According to this

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169 See The Proclamation on Law and Administration, which may be found in MEIR SHAMGAR (ed.), MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 450 (1982).
170 H.C. 46/50 Al Ayubi v. Minister of Defense, 4 P.D. 222. For more on the military rule imposed on Arabs in Israel see MENACHEM HOFNUNG, DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL 89-95 (1996).
conception, security considerations are no different than any other considerations the Court is entitled to examine.\textsuperscript{175}

Several reasons account for this switch. First, there was a general increase in judicial review of administrative actions. Second, the introduction of military law in the Occupied Territories and the continuing occupation raised increasing concerns of human rights violations that the Knesset and government were somewhat reluctant to address through the political process. Third, the Court maintained a very high level of public trust when compared to the political branches and was perceived as a professional apolitical institution.\textsuperscript{176} Fourth, the Court held that since security organizations are essentially administrative entities, they should not be exempt from legal supervision. It rationalized this by maintaining that it will not replace the security officials' discretion with its own, but will only examine its legality.\textsuperscript{177}

By going over some paradigmatic cases, the next sections will consider the way the Court reviews security measures, showing two distinct judicial approaches. The first, and somewhat similar to the U.S. process approach, examines whether the Knesset authorized the executive action. This approach, prominent in the years before

\textsuperscript{175} Id. at 640.
\textsuperscript{176} In a comprehensive survey conducted in 1991, 72\% of those polled said the Court is the most moral institution in the country, 57\% said it represents the common citizen, 79\% said it acts wisely, and 80\% said the Court makes sure the state won't harm the citizens and exceed its authority. Overall, 87\% thought that the Court greatly contributes to the country, see GAD BARZILAI ET. AL., THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC 211, 217 (1994) (Hebrew). Admittedly, the number might have changed in the past 15 years, and there are indications to that effect. Comprehensive surveys for the 'Israel Democracy Institute' demonstrate that although public support for the Court has decreased somewhat, it is still very strong. In response to the question how much do you trust the Supreme Court, the result in 2003 was 70\%, in 2004, 79\%, in 2005, 72\%, and in 2006, 68\%. In response to the question which institution best protects Israel's democracy, the result in 2003 was 42\%, in 2004, 47\%, in 2005, 48\%, and in 2006 47\%, still the highest compared with the Prime Minister, the Knesset, and the media. See Asher Arian, NIR ATMOR, YAEL HADAR, AUDITING ISRAELI DEMOCRACY 2006: CHANGES IN ISRAEL'S POLITICAL PARTY SYSTEM: DEALIGNMENT OR REALIGNMENT 38 (2006) (available at http://www.idi.org.il/hebrew/catalog.asp?pdid=223&did=1&hom=1) (last visited on 2/6/08).
\textsuperscript{177} H.C. 680/88 Schnitzer v. Chief Military Censor, 42(4) P.D. 617, 641-2. It should be noted that up until then the Court relied on the British case of Liversidge v. Anderson (3 All E.R. 338 (1941)), which held that review of security measures should be extremely limited and deferential. However, the British conception of the role the courts should play changed, and they accordingly assumed a more active role. The Israeli development thus reflects a similar transition.
the "constitutional revolution", is seldom used today. The second approach, prevalent today, is the substantive individual rights approach: it examines whether the security measure fits substantive constitutional requirements. The cases below are examples. They are perhaps the most salient cases of the past decade, but they are indicative of the general trend of Israeli jurisprudence on security issues.

i. Torture

In 1987 an inquiry committee (the Landau committee) was charged with examining the GSS's (General Security Service, the equivalent of the FBI) interrogation methods. The Commission concluded that the use of moderate physical force when interrogating suspects was permitted and that GSS interrogators may enjoy the criminal defense of necessity.

The GSS continued to conduct coercive interrogations, including playing loud music, deprivation of sleep, prolonged sitting in painful positions, tightening of hand and leg cuffs, shaking, hitting, and kicking. Although the report was the subject of criticism, the Court refused to intervene until 1999, when it decided a petition submitted five years earlier by an NGO - The Public Committee Against Torture.

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178 Two events led to the founding of the commission. The first was the case of Izat Nafsu, a lieutenant in the Israeli army charged with treason. After his conviction he claimed to have been tortured by the GSS, resulting in a coerced confession. He was later acquitted. The second case was the "bus 300 affair". Palestinian terrorists hijacked an Israeli bus full of civilians. The GSS took control of the bus, apprehended the terrorists, and later claimed they were dead. However, a picture in the newspaper the following day revealed that two terrorists were alive when taken off the bus. It was later found out that GSS agents executed the two. The GSS tried to cover its tracks and coordinated testimonies between agents. The cover up operation was ordered by the head of the GSS. When this was revealed the President took it upon himself to pardon the agents who were involved, even though charges had yet to be brought against them. The Court approved the pardons. See also H.C. 428/86 Barzilai v. Government of Israel, 40(3) P.D. 505. For a more general overview see Jordana S. Rubel, A Missed Opportunity: The Ramifications of the Committee Against Torture's Failure to Adequately Address Israel's Ill-Treatment of Palestinian Detainees, 20 EMORY INT'L L. REV. 699, 709-717 (2006).

179 The Commission balanced the competing interests: on the one hand some physical harm to the suspect; on the other hand, the damage that can be caused by a terrorist attack. See Miriam Gur-Arye, Can the War Against Terror Justify the Use of Force in Interrogations?, in TORTURE: A COLLECTION 184 (Sanford Levinson, ed., 2004).

180 Id. at 186. See also EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM 76-8 (2006).

The Court held that the GSS does not have the requisite statutory authority to conduct coercive interrogations. It argued that the need for express authorization to conduct such interrogations is a demand of the rule of law and separation of powers, and that the Knesset should address the issue directly.\textsuperscript{182} Even though the Court struck down most of the techniques the GSS used, those were struck down not because they were unconstitutional per-se, so much as they could not be exercised under the then legal regime. However, the Court invited the Knesset to legislate on the matter. When the issue later came before the Knesset opinions were split. Despite speculation that the Knesset will legalize some of the methods prohibited by the Court,\textsuperscript{183} it refrained from doing so, possibly because it did not want to go on the books as permitting torture or coercive treatment; possibly wary of international criticism.\textsuperscript{184}

The decision challenged the conception that security is the exclusive realm of the executive, deciding a sensitive issue that possibly entailed a future loss of lives due to the prohibition of certain interrogation methods. But it is also important, I believe, not to overstate the importance of the case. The Court did not ban the use of torture or coercive treatment. It referred the issue to the Knesset, so that the decision can be contemplated there. By doing so, the Court adopted the American notion of separation of powers discussed above.\textsuperscript{185} In this respect, the torture decision was

\textsuperscript{182} \textit{Id.} at 843-4 (Granting authority to GSS interrogators to engage in physical force during the interrogation of suspects of terrorist activities, which infringe on their right to dignity and liberty, raises basic question of law and society, morality and policy, rule of law and security. These should be answered by the legislature. This is what the principles of separation of powers, rule of law and democracy mandate) (Opinion of Barak, P.).

\textsuperscript{183} Melissa Clark, \textit{Israel's High Court of Justice Ruling on the General Security Service use of "Moderate Physical Pressure": an End to the Sanctioned Use of Torture?}, 11 \textit{IND. INT'L. & COMP. L. REV} 145, 182 (2000).

\textsuperscript{184} Three years later, when the Knesset enacted the GSS Law, the first piece of legislation officially recognizing the GSS, it did not address the issue of the use of physical force in interrogations (GSS Law – 2002, S.H. 1832 p. 179 (2002).

\textsuperscript{185} H.C. 5100/94 at 845 (“Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people... It is there that various considerations must be weighed... It is there that the required legislation may be passed, provided, of course, that the law “befit[s] the values of the State of Israel, is
similar to the older jurisprudence which examined the scope of administrative authority. Absent statutory authorization the action was struck down.

ii. The Separation Barrier cases

The "Constitutional Revolution" of 1992 facilitated substantive adjudication on individual rights grounds in constitutional and administrative law. No longer was statutory authorization sufficient to warrant the legality of the act. The court, bolstered by the new Basic Laws, was willing to go further into its scrutiny of security matters. Nowhere was this more evident in cases involving Palestinian terrorism as most of the security measures were directed at that population. Indeed, after the Court did away with justiciability requirements it no longer made sense to carve out a specific realm free from judicial review.

This also explains why the Court did not encounter great doctrinal difficulty in deciding the Separation Barrier cases, which are illustrative of the break from process-based discourse. After many military operations failed in curtailing terrorist activities, the Israeli government decided, in 2002, to build a barrier from the northern part of the West Bank to the South, in the hope of imposing a physical obstacle on terrorists. The barrier itself was complicated, comprised of concrete walls, fences and electronic surveillance. Construction in the specific route the government wanted

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186 Using the word "barrier" rather than "wall" or "fence" has real and symbolic meaning. Israel uses the term "fence", but the terminology itself is controversial and there is no accepted term. See Geoffrey R. Watson, The "Wall" Decisions in Legal and Political Context, 99 A.J.I.L. 6, 7 (2005).

187 Examples include H.C. 4764/04 Physicians for Human Rights v. Commander of the IDF forces in the Gaza Strip, 58(5) P.D. 585 (when carrying out its military operations against terrorists, the IDF must take care of the local population, including water supply, medical attention, food and electricity); H.C.10356/02 Hass v. Commander of the IDF in the West Bank, 58(3) P.D. 443 (when closing off a route to protect Israeli settlers in Hebron the military must take into consideration the rights of Palestinians, including their civil liberties, such as freedom of movement and religious liberty); H.C. 7015/02 Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352 (the military commander cannot relocate family members of terrorists from the West bank to the Gaza Strip if they themselves are not involved in terrorist activity).

required the military commander to issue seizure decrees, seizing private Palestinian lands in return for monetary compensation.

In a series of several dozen cases from 2004 to 2006, the Court addressed petitions filed by Israelis and Palestinians challenging the legality of the fence and its route. The majority were rejected, but two decisions, *Beit Sourik* and *Mar’abe*, culminated in an order to remove and relocate several parts of the barrier. Although the Court upheld the military commander's authority under international law to construct a barrier, when the decision was based on security grounds, it held that segments of the barrier failed the proportionality test in that the damage to Palestinians was greater than the added net gain in security for Israelis.

After the decision was handed down the military was forced to reconsider all of the planned routes that would likely be challenged. Some were changed according to the outlines provided by the court, and were later upheld to be proportionate.

Separated by just five years from the torture decision, the Court completed a move from a process based approach to a substantive individual rights approach when reviewing security decisions. However, it did this when the Israeli separation of

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189 See, e.g., H.C. 5488/04 Al-Ram Local Council v. Government of Israel (yet to be published); H.C. 2942/05 Mantzur v. State of Israel (yet to be published); H.C. 426/05 Bidu Village Council v. Government of Israel (yet to be published).
190 H.C. 2056/04 Beit Sourik Village Council v. Government of Israel, 58(5) P.D. 807 (Hereinafter Beit Sourik); H.C. 7957/04 Mar'abe v. Prime Minister (yet to be published).
191 There was also international treatment of Israel's decision to construct the fence. Pursuant to a Palestinian request, the ICJ delivered an advisory opinion denouncing the construction of a wall in the occupied territories, connecting it to the protection of settlements which are themselves illegal under article 49(6) of the 4th Geneva Convention prohibiting the transfer of the occupier's population into the occupied land. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 4. 3 ILM 1009 (2004). For an analysis and criticism of the ICJ's decision see David Kretzmer, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: the Advisory Opinion: the Light Treatment of International Humanitarian Law*, 99 A.J.I.L. 88 (2005).
193 See, e.g., H.C. 4289/05 Bir Naballah Local Council v. Government of Israel (yet to published) (rejecting a petition challenging the fence around Jerusalem, after the route was amended according to the Court's instructions).
powers scheme remained essentially the same. Nevertheless, as will be shown below, the parliamentary system enabled this shift by not being able to confront the Court's new direction. This inability, although political, resulted from the parliamentary separation of powers scheme.

iii. Family unification

Israel immigration policy is governed mainly by three statutes. The Law of Return, the symbol of the Jewish state, grants immediate citizen status to Jews and their families. The Citizenship Law and the Entry into Israel Law deal with non-Jews and status other than citizenship.\textsuperscript{194} To these are added dozens of administrative regulations which establish procedures for obtaining citizenship and permits. One such proceeding refers to "family unification", meaning an Israeli citizen (Jewish or non-Jewish) who married a non-citizen living outside Israel. The Israeli citizen would then petition for his or her spouse to receive Israeli citizenship. That petition would usually be granted, barring fictitious marriage or if the person presents a danger to public safety in Israel.\textsuperscript{195}

In 2002 this changed for Israeli Palestinians who wished to marry a Palestinian living in the Occupied Territories. Palestinian terrorism had reached all time highs. Military operations were partially successful, and the fence would take a long time to complete. Moreover, several terrorist attacks were carried out through the assistance, at some level, of people being granted Israeli status by the family unification

\textsuperscript{194} Law of Return, 1950, 4 L.S.I 114 (1950) (Isr.); Citizenship Law, 1952, 6 L.S.I 50 (1951-52 (Isr.); The Entry Into Israel Law, 1952, 111 S.H. 354. The Court has held that the government has wide discretion in its immigration policy, which is the manifestation of state sovereignty H.C. 482/71 Clark v. Minister of Interior, 27(1) P.D. 113; H.C. 758/88 Kendall v. Minister of Interior, 46(4) P.D. 505; H.C. 1689/94 Harari v. Minister of Interior, 51(1) P.D. 15, 19; H.C. 4156/01 Dimitrov v. Ministry of Interior, 56(6) P.D 289, 293; H.C. 8093/03 Artmayev v. Minister of Interior (yet to be published, at §11)

\textsuperscript{195} H.C. 3648/97 Stamka v. Minister of Interior, 53(2) P.D. 728.
Consequently, the government decided to halt family unifications for people living in the Territories altogether. Aware that the decision, which would be reviewed as a regular administrative decision, would have difficulty passing constitutional scrutiny, the Knesset stepped in to bolster the government by enacting the Citizenship and Entry into Israel (Temporary Order) Law of 2003. The Law prevents residents of the Occupied Territories (excluding Israeli settlers) from receiving Israeli status, subject to some very narrow exceptions. A couple can still get married, but joint residence in Israel was prohibited. Although the Law used neutral language, prohibiting the acquisition of status for any resident of the Occupied Territories, it invariably affected almost only Arab residents of Israel, who were the ones marrying people from the Territories. The Law had a sunset clause of one year, but was continually extended by the Knesset. Realizing that the Knesset would keep on extending the Law the Court decided the challenges to the law in 2006.

The Court decided by a 6-5 majority to reject the petitions. Although the Court agreed with petitioners that the Law violated the right to dignity and equality by discriminating against Arabs, The difference between the majority and minority

196 Over 250,000 Palestinians were extended Israeli citizenship since 1967: 97,000 of them between 1993 and 2001. These post-1967 Israeli Palestinians numbered a quarter of all Israeli Palestinians involved in terrorism during the first 20 months of the second intifada. See Alex Fishman, The Right of Repatriation is Already Here, Yediot Aharonot (5/24/02), cited in Sammy Smooha, The Model of Ethnic Democracy: Israel as a Jewish and Democratic State, 8 NATIONS AND NATIONALISM 475, 487 (2002).


199 If the husband is above 35 years or the wife is above 25; children under 14 and children over 14 if the child has regularly lived in Israel; if the person has aided Israel (i.e. collaborator) (§§ 3, 3A, 3C). However, these exceptions are at the discretion of the minister of Interior. His discretion is subject of regular administrative review.

200 For an analysis condemning the law on constitutional and moral grounds see Guy Davidof et al., State or Family? The Citizen and Entry into Israel Law (Temporary Provision) – 2003, 8 MISHPAT UMIMSHAL 643 (2005) (Hebrew).


202 It was conceded that although the law was phrased on neutral language, its effects were discriminatory, since almost only Israeli Palestinians marry Palestinians from the Occupied Territories.
rested on the application of the proportionality requirement that can justify an impairment of a right. Whereas the dissent held that a sweeping provision preventing almost all of those seeking status from living in Israel is disproportionate, the majority argued that considering the emergency situation in Israel such limitations are proportionate. Some majority judges specifically stated that the constitutionality of the law relied on its sunset clause, believing that it will be changed.\textsuperscript{203}

Notwithstanding the result, the citizenship case demonstrates the Court's willingness to inquire into matters commonly held to be beyond judicial review – immigration policy and security measures. The Court examined the evidence presented by the parties, checking whether the security concerns justified an impairment of constitutional rights. The fact that it was a Knesset law being reviewed, rather than a government policy or administrative decision, seemed to have no significant bearing on the decision. In that sense, the methodology advanced by the Court in the GSS case of checking for Knesset authorization, was dismissed in the citizenship case. Here the Knesset echoed the government's decision by enacting a law which essentially ratified the decision. Yet this did not put an end to judicial scrutiny.

iv. Judicial involvement in other security related areas

The cases above are paradigmatic. They illustrate the level of judicial involvement in matters relating to national security. The occupation of the West Bank and Gaza Strip in 1967 greatly contributed to the Court's willingness to adjudicate security matters. As a result, the Court found itself involved in almost every aspect of the occupation. So, for example, the court decided cases concerning deportations of

\textsuperscript{203} See § 9, 11 to Judge Levi's opinion. This assessment proved incorrect. Although after the release of the decision a public committee started work on a new Israeli immigration law, the law was extended. It was amended, but not in a way that reflected the judges' concerns. Upon another extension, several NGOs re-petitioned the Supreme Court. The cases are still pending.
terrorists, suspected terrorists and political leaders, and, while approving the practice of deportation in emergencies, held that deportees must be given a right to be heard prior to the deportation, or, if not possible, then after the deportation took place.\textsuperscript{204} It ruled that the military cannot use Palestinian civilians as "human shields" by prohibiting military practice to send Palestinians to knock on suspected terrorists doors so as not to expose soldiers to being shot.\textsuperscript{205} It held that targeted killings as a general practice are permitted under international law but that every decision must be analyzed according to the particular circumstances of the case.\textsuperscript{206} It ruled that seizures of Palestinian land must be grounded in security reasons, invalidating seizure decrees used to establish the Elon Moreh settlement.\textsuperscript{207} It held that detainment of suspected Palestinian terrorists for 12 and 18 days prior to bringing them before a judge is illegal.\textsuperscript{208} It decided that relocation of Palestinians from the West Bank to the Gaza Strip can only be done where it is shown they are connected to terrorist activity.\textsuperscript{209} It held that a law granting sweeping government immunity from tort suits filed by Palestinians harmed in an "area of conflict" is unconstitutional, because it disproportionately infringes on the constitutional right to property.\textsuperscript{210} And it held that the state cannot hold persons in administrative detention in the hope that they will serve as bargaining chips in the future release of Israeli prisoners of war.\textsuperscript{211}

\textsuperscript{205} H.C. 3799/02 Adalla v. I.D.F Commander of the Central Front (yet to be published).
\textsuperscript{206} H.C 769/02 Public Committee Against Torture v. Government of Israel (yet to be published).
\textsuperscript{207} H.C. 390/79 Dawikat v. Government of Israel 34(1) P.D. 1
\textsuperscript{208} H.C. 3239/02 Mar'ab v. I.D.F. Commander in the West Bank Area 57(2) P.D. 349.
\textsuperscript{209} H.C. 7015/02 Ajuri v. IDF Commander in the West Bank, 56(6) P.D. 352.
\textsuperscript{210} H.C. 8276/05 Adalla v. Minister of Defense (yet to be published).
In all these cases, aside from the torture case and the early cases challenging the emergency regulations, the Court applied substantive doctrines, meaning it identified the individual rights violations and proceeded to examine their severity.\textsuperscript{212} The Court did experiment with U.S. style separation of powers reasoning but abandoned it in favor of examining the legality of the act itself. Of course, from the fact that the Court examines every case brought before it does not follow that it reaches overall better decisions or that it is more inclined to curb executive action. It merely shows that the Israeli Court, located in a different separation of powers system, chose to adjudicate crises cases differently.\textsuperscript{213} The Court's method of substantive adjudication, coupled with relaxed threshold requirements, make every security or crisis issue a legal one as well. The Court doesn't perceive itself as bound by a separation of powers scheme, and, in theory, is unconstrained in invalidating a specific policy or law, regardless of the way it came into being.\textsuperscript{214}

\section*{5. The relationship between separation of powers schemes and judicial methodology – courts as regulators}

\subsection*{A. A Political constitution of emergency powers}

Accounting for differences between two countries' legal regime is tricky. Many reasons can plausibly account for the differences elaborated thus far. The

\begin{footnotesize}
\textsuperscript{212} For a more detailed, cases by case development concerning the early and middle period see Bracha, \textit{supra} note 171.

\textsuperscript{213} There is a body of critical literature arguing that the Court's decisions in these areas merely helped to perpetuate and legitimize the occupation. These arguments, which seem to me to be partially correct, cannot be analyzed here as my argument is confined to the structural aspect of the judicial doctrines. For these arguments see Ronen Shamir, \textit{Landmark Cases and the Reproduction of Legitimacy: the Case of Israel's High Court of Justice}, 24 LAW & SOC'Y REV. 781, 783 (1990); KRETZMER, \textit{supra} note 204 at 187.

\textsuperscript{214} See also Yigal Mersel, \textit{Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era}, 38 N.Y.U. J. INT'L L. & POL. 67, 90-1 (2005) (arguing that the Court adjudicates "almost any aspect of counter-terrorism, as well as a willingness to nullify important executive actions. The Israeli court not only hears cases concerning ex post activities, but also considers policies on an ex ante basis. It does not limit the scope of its review to procedural aspects; instead, it rules on delicate issues of combatant activities and interrogation conditions.") (Footnote omitted).
\end{footnotesize}
different histories, the different national groups comprising the state, and, of course, the constitutional and institutional structure. All of these factors result in different approaches to adjudication generally, and crisis adjudication, specifically. Evaluating the causality, i.e., which factor is more responsible for the disparity, is probably impossible. Thus, we remain with reasonable educated guesses. Of course, terrorist attacks, constant clashes with neighbors, and most of all the ongoing occupation, have shaped Israeli security adjudication in a way unlike any other country.

I think that a good way to think about why the judicial reasoning is different in these two countries has to do with the function of courts in a political system. Similar to the task of regulators when there is market failure, courts can function as regulators when it comes to correcting political failures in the political "market". To do this, the court first has to identify when a political failure has taken place. Political failure, broadly conceived, is a situation where one or more governmental institutions are not functioning as they should, under the applicable democratic theory. Political failure, therefore, is dependent on the political structure a country adopts, and in this case the separation of powers scheme.

Consider the U.S. system of separation of powers. The idea behind creating co-equal branches of government was for "ambition to counter ambition". At its most basic, this means that Congress was supposed to serve as a check on the President and vice versa. When there is disagreement, the branches were meant to work things out by deliberation. The same holds true for deliberation between the Senate and the House. Taking this to be the objective of separation of powers the U.S. crisis jurisprudence makes sense. The President has commander-in-chief powers, but

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215 For a similar view see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-03 (1980). For an even more stringent view see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 182 (1989).

216 THE FEDERALIST NO. 10 (Madison) supra note 8 at 71.
since those are hard to delineate the courts often prefer that the President receive congressional authorization when discharging an order. The Framers' vision is thus secure because the President is not acting alone but conferring with another branch. When the Court polices this process it is not making sure that the branches made a good or wise decision, but that the constitutional structure has been preserved. To borrow from Professor Mark Tushnet, this is the "political constitution of emergency powers," according to which the court does not enforce substantive individual rights norms, but rather attempts to maintain a procedural framework of government manifested by the separation of powers scheme.

But is this the same in a parliamentary structure? Not quite. Parliamentary systems embrace a different type of separation of powers. Most importantly, there is no clear separation between the executive and the legislature. Indeed, it hardly exists because the legislative and executive branches are intertwined. In order to form a government the party that received the most seats needs to form a coalition with other parties to ensure control of the legislature. Once that control has been established, via coalition agreements, the process of assembling a government gets underway by putting together a cabinet. If everything is functioning as it should, this government, by definition, will continue to enjoy parliamentary majority. The government will stay in power as long as it has a parliamentary majority and the statutes will usually enjoy

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217 Mark Tushnet, The Political Constitution of Emergency Powers: Some Lessons from Hamdan, 91 MINN. L. REV. 1451, 1458 (2007) (hereinafter Tushnet, Emergency Powers) (“The Hamdan decision and its aftermath illustrates what I call the political constitution of emergency powers, by which I mean nothing more elaborate than that (a) the way in which emergency powers are structured in a well-functioning democracy is a matter of fundamental importance, (b) the way in which they are structured is at least as much a product of the fundamental structures of political power - the distribution of authority between executive and legislature, only a small part of which flows from the Constitution's texts or judicial precedents - as it is of judicially interpreted law, and (c) these structures are as permanent as those found in the Constitution's written text. The role of the courts in a constitution of emergency powers structured importantly by political interactions between executive and legislature is, I suggest, a secondary or collateral issue, important only in some circumstances”).

governmental backing. 219 Of course, this is not always the case. Oppositions can sometimes have their way if they happen to have a specific majority in a specific session. Renegade party members who officially belong to one of the coalition parties will choose to vote differently on a specific issue if party discipline is not enforced. 220 These things happen, although I am less certain that they happen very often, at least in a meaningful way that permanently alters the political balance.

The situation is even more stable in a party system where if one party wins more than half the seats it has control of parliament (and government) with no need for power sharing. Of course, even there nothing is guaranteed since, as Professor Tushnet argues, there will be backbenchers who belong to the ruling party but still attack its policies. 221 But here, I think, Professor Tushnet's point can be countered. In countries that have proportional representation from a party list (like Israel), members of parliament have a strong incentive to comply with party policy even if they object to it on a personal level. Because they need party endorsement for reelection, they cannot risk losing that support by not towing the party line, at least most of the times, and in the most important issues.

Other mechanism might help curb the government in a parliamentary regime, such as bureaucracies, informal guidelines, and the press. 222 It is also true "the executive government in a parliamentary system does not have a free hand in putting into effect the policies initially favored by its leading members." 223 But even if it does not have a "free hand" it is still considerably less constrained, at least politically, than in a system of divided government where there is a clear demarcation between legislature and executive.

219 Id.
220 For such cases see Tushnet, Separation of Powers Regulation, supra note 2.
221 Id.
222 Id.
223 Id.
A preliminary conclusion suggests that the political constitution of emergency powers which Professor Tushnet supports\textsuperscript{224} is weaker in a parliamentary structure. Of course it can still exist to some extent, as Professor Tushnet demonstrates in the British context,\textsuperscript{225} but at least in the Israeli context, as the cases above demonstrate, it is less plausible.

B. The move to a legal constitution of emergency powers

A political constitution of emergency powers thus designates a smaller role for courts. However, we have seen that in the Israeli context the Court almost always has a say and many important issues will eventually make their way there. Some may explain this trend by referring generally to judicial activism and judicial aggrandizement.\textsuperscript{226} Others cite a general move from formalistic doctrines to value laden standards.\textsuperscript{227}

Yet it seems to me that the reasons for this trend also have to do with structural political failures, which are perhaps more subtle in the U.S. It is thus no coincidence that the enlarged role for the Court happened during a period when the public's trust of the political branches was low. The reality of Israeli politics is that no one party has ever managed to control the Knesset without the need to form coalitions with other parties. A typical Israeli government, therefore, is usually comprised of four or more parties. In order for a government to function many deals are struck with

\textsuperscript{224} Tushnet, Emergency Powers, supra note 217 at 1471-2.

\textsuperscript{225} Tushnet Separation of Powers Regulation, supra note 2.


small parties, giving them disproportionate power when compared to their constituency.

Realizing this problem in Israeli politics, people and organizations began to look elsewhere for a solution. They gradually turned to the Supreme Court, which eventually accommodated their demands. The Court, unlike the political branches, was highly regarded by the general public and the Israeli intelligentsia, second only to the army. It was perceived as a neutral apolitical branch free of political partisanship. The Court then, rather than the Knesset or government, came to embody majoritarian preferences.\(^{228}\)

Now, add to this the separation of powers scheme. Because the government is comprised of Knesset members, a parliamentary majority is almost always guaranteed. This means that opposition parties exercise very weak supervisory functions. Moreover, most of the Knesset committees, where the real legislative work is done, are headed by coalition members, further frustrating meaningful checks on executive power. In addition, foreign affairs and security policy were historically considered the exclusive realm of executive power, so although the Knesset can legislate on these matters it rarely does so.\(^{229}\) Similarly, Knesset supervision over the judiciary is weak. There is a high level of judicial independence and appointments are tenure until the age of 70. Removal of judges for disciplinary reasons is possible but very rare. Consequently, most of the constraints imposed on judges are self-imposed, and, unlike in the U.S., there is very little in the way of tradition advocating such

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\(^{228}\) Yoav Dotan, *Judicial Review and Political Accountability: the Case of the High Court of Justice in Israel*, 32 *Isr. L. Rev.* 448, 450 (1998). One of the reasons is the way supreme court judges are appointed, which is through an essential non-political committee comprised of three supreme court judges, two ministers, two Knesset members (from the coalition and opposition, and two lawyers selected by the Israeli Bar.

\(^{229}\) H.C. 5128/94 Federman v. Minister of Police, 48(5) P.D. 647 (the realms of foreign relations and foreign affairs are considered to be under the government's responsibility).
restraint or adherence to a strict separation of powers scheme.\textsuperscript{230} Consider also Israeli constitutional law and theory – all developed by the Court in a relatively short amount of time. There is no discussion of "the Framers" or "original intent".\textsuperscript{231} Because there is little in the form of constitutional text and traditions, the court has been virtually unopposed in developing judicial review while the Knesset's acquiescence was striking considering the vocal (but only vocal) opposition it engendered. Thus, in many areas the Court has stepped in to discount for parliamentary ineffectiveness. The Court, unlike the Knesset, did not feel it needed to acquiesce to government policy. On the contrary, it saw itself as a protector of the rule of law where the Knesset failed.

These developments are perhaps most salient in the area of national security and emergencies. In the beginning the Court employed a process based approach familiar from the U.S. context. Things soon changed as part of a larger transformation the system was undergoing. Especially noteworthy is the change that took place after the "Constitutional Revolution". The Court shifted to a rights based approach, adopting doctrines of judicial balancing and proportionality. It abandoned the process based approach when it realized there wasn't much process to begin with, as there was virtually no interbranch dialogue, so important in the U.S. context. Initially, this was due to British Mandatory legislation which gave wide discretionary powers to the executive. But the Knesset opted not to amend many of these statutes, thus relegating emergencies to the government and voluntarily excluding itself from having a say in these areas.\textsuperscript{232} Security measures, especially in, but not limited to, the Occupied Territories, do not even require the Knesset's authorization (the equivalent of congressional authorization) because under the international law of occupation the

\textsuperscript{230} Gelpe, \textit{supra} note 154 at 64-5.
\textsuperscript{231} \textit{Id.} at 65.
\textsuperscript{232} Bracha, \textit{supra} note 171 at 56.
military government is both the executive and the legislator. Coupled with the prolonged state of emergency and military occupation of the Palestinian Territories, the Court was bound to step in and "exert [its] balancing influence". Indeed, since the judiciary accreted power generally, there was no particular reason to stay away from security measures. In fact, because of the almost nonexistent legislative check on executive power when it came to emergency measures, the Court was conceivably even more justified in reviewing these actions.

Now, compare this with the U.S., where the emergency-normalcy dichotomy is more distinct and where a tradition of separation of powers was articulated back in the 18th century. The constitutional structure aspires to achieve a confrontation between Congress and the President, the opposite from a parliamentary system. The President knows that he needs congressional authorization on many issues and that acting solely on the premise of inherent executive power is risky. These elements are lacking in the Israeli situation. Thus, it seems very likely that in addition to all of the differences between the two countries, the separation of powers scheme – a formal structure designed to organize government – affects substantive judicial decisions in crises and emergencies. Because the U.S. advocates a stricter separation of powers scheme, at least rhetorically, the courts are more inclined to enforce such a scheme in emergencies, notwithstanding some recent substantive impulses. This comports with the general sentiment of judicial restraint in emergencies. In the U.S. context, crisis adjudication is synonymous with separation of powers since the political branches are considered the best equipped to deal with these situations. Courts, from an

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234 Bracha supra note 171 at 58.
institutional perspective, are not. But in Israel, where the government invariably has a majority in the Knesset, and where security measures are almost the exclusive realm of the executive, the weight shifts to the Court as an institution that is better suited at curbing executive enthusiasm. It is true that the political history in Israel, which left many unsatisfied with the performance of the Knesset, has contributed to this institutional shift. This is why, perhaps, in other countries with established parliamentary history, the courts are more inclined to take a backseat during emergencies. A separate and interesting sociological question is why the dissatisfaction with the political branches occurred, and why people turned to the courts, but this article's argument is that whatever the reasons behind this phenomenon may be, the separation of powers scheme may have played an important role in that shift.

6. Conclusion

This paper attempted to explain the U.S and Israeli approaches for adjudicating crisis cases. It did so by arguing that a helpful way to understand emergency adjudication is through the lens of the separation of powers. Both systems seek to accommodate emergencies within the existing constitutional structure. However, they achieve this in different ways. The U.S. adopts a process based institutional approach focusing on the separation of powers scheme. On this view, the

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235 There can be several reasons for this. Emergencies require real time decision making; the decisions are informed by complex security considerations which the court lacks the competency to evaluate; and there is far less institutional legitimacy for the court to shape national security policy. See, e.g., Eric A. Posner and Adrian Vermeule, Accommodating Emergencies, 56 STAN. L. REV. 605 (2003).

236 Although this too may be changing. The British House of Lords, following the enactment of the Human Rights Act of 1998 and in compliance with the European Convention on Human Rights – 1950, has recently ruled that the British government cannot detain terrorist suspects indefinitely. See A(FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, available at http://www.publications.parliament.uk/pa/id200405/idjudgmt/id041216/a&oth-1.htm (Last visited on 2/6/08).
Court serves as a referee between the President and Congress, making sure that they will share power in the exercise of war powers and national security. In contrast, the Israeli Supreme Court asserts a more forceful position. It subjects security measures to substantive individual rights doctrines and shows less deference to the political branches. I then sought to explain the reasons for these differences. Although many factors account for these disparities, I suggested that the separation of powers structure in Israel, political instability, and the concentration of great power in the executive at the expense of the legislature is a probable reason accounting for the different approaches.

There is still the question which approach is better. I did not address that issue. First, because to judge what is better one needs a more or less comprehensive theory of what is the good in these situations and this is impossible to accommodate in one paper. Moreover, the question "what is better" is somewhat incoherent as it is very probable that both systems produce good and bad results and the decision as to which generates more good results will depend on what is good. This is where reasonable people tend to disagree. Second, I was more interested in showing how different separation of powers schemes can lead to different substantive results. This insight is uncontroversial but is rarely recognized. In this respect, I believe the connection between form and substance is striking.

One thing is clear though. Providing a good recipe for government is contingent on institutional design. Yes, there can be activist judges or political considerations. That too is part of constitutional politics. But judges, like other institutional actors, are also constrained by their institutional affiliation. The way that institution – in this case the court – is positioned in the overall scheme of

governance has far reaching results, ones we often neglect to address. At the same time, this conclusion also has a liberating message. Since much of the methodology hinges on institutional design, we have the power to change it through a purposeful transformation of our institutions.