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Abstract

The paper analyzes the case law of the US Supreme Court on terrorism with the purpose of answering the question whether the Supreme Court has taken fundamental rights (and especially *habeas corpus*) seriously while reviewing the legality of the measures adopted by the political branches of government to counter the terrorist threat. To provide an adequate answer, the paper distinguishes between three different jurisprudential phases, providing an example for each of them. In each step, in fact, the Supreme Court has adopted a peculiar stand toward the other branches of government and therefore ensured a different degree of fundamental rights protection. In a first, initial phase, the Supreme Court has been very deferential *vis à vis* the executive and legislative powers and has restricted to a minimum the protection of fundamental rights. In a second, intermediate phase, then, the Court has gradually modified its stand toward the executive power and has began raising the level of procedural rights' protection. In the last phase, finally, the Court has reasserted its institutional role and taken fundamental rights seriously, upholding the primary value of the *habeas corpus* provision enshrined in the Constitution.

Key-words

US Supreme Court/terrorism/fundamental rights/*habeas corpus*/separation and balance of powers

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1. Introduction

Interesting times for *habeas corpus* in the US. On October 7, 2008 a federal judge of the district court of Washington DC, Ricardo M. Urbina, has ordered the Bush Administration to release 17 Chinese citizens of the Uighur Muslim minority from the military prison of Guantanamo Bay, in Cuba[1]. On November 19, 2008 then another federal judge of the same district, Richard J. Leon, has ruled that five Algerian nationals have been unlawfully detained in Guantanamo as enemy combatants for nearly seven years, since the beginning of the war against the Al Qaeda terrorist organization, and required the executive to release them immediately[2]. Both decisions have been taken in *habeas corpus* proceeding authorized by a landmark Supreme Court ruling on June 12, 2008, *Boumediene v. Bush*[3], that gave prisoners detained in Guantanamo as enemy combatants the constitutional right to have federal judges review the reason for their detention.

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[1] William Glaberson, *Judge Order 17 Detainees at Guantanamo Freed*, The New York Times, October 7, 2008

[2] William Glaberson, *Judge Declares Five Detainees Held Illegally*, The New York Times, November 20, 2008; See also William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantanamo Detainees*, The New York Times, November 6, 2008. For an recent analysis of these late 2008 decisions, see then William Glaberson, *Rulings of Improper Detention as the Bush Era Closes*, The New York Times, January 18, 2009

[3] U.S. 128 S.Ct. 2229

This paper deals with the case law of the US Supreme Court on terrorism[4]. My purpose is to answer the question whether the Supreme Court has taken fundamental rights seriously into account, while reviewing the legality of the measures adopted by the political branches of government to counter the terrorist threat. For this reason, I will trace the evolution of the jurisprudence of the Supreme Court, from the first decisions on the matter to the most recent one, highlighting the transformations in the protection of fundamental rights. In particular, the main issue of the US Supreme Court's case law on terrorism concerns the privilege of *habeas corpus*: i.e. the right of the enemy combatants, captured in the course of the hostilities with Al Qaeda (mainly in Afghanistan) and imprisoned by the US military forces (mainly in Guantanamo), to challenge the legality of their detention in front of an independent and regularly constituted tribunal.

The *habeas corpus* is a common law privilege, dating back to the Magna Charta of 1215[5]. In the English legal system based on a limited number of forms of action[6], *habeas corpus* was a prerogative writ: i.e. the "order by which the King addressed his local servant, the sheriff, commanding him to assure the satisfaction of the right of the subject who obtained the writ"[7]. Specifically, it was the order that common law courts addressed to the organs of the executive power "to obtain the exhibition of a prisoner to review the legality of detention"[8]. In the years, *habeas corpus* came to be considered as the "bulwark of the British Constitution", since it was the most effective instrument in safeguarding liberty against the "dangerous engine of arbitrary government"[9]. The privilege was later inherited by the US and engraved in the 1787 Constitution,

[4] On the US Supreme Court and terrorism see: David Cole & James Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (2002); David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror (2003); Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J., 2004, 1029-1091 now Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006); Tommaso Edoardo Frosini & Carla Bassu, *La libertà personale nell'emergenza costituzionale, in* Democrazie protette e protezione della democrazia (Alfonso Di Giovine ed., 2004) 75-102; Fulco Lanchester, *La Corte Suprema e l'emergenza*, in Associazione dei Costituzionalisti WP (2004) available at: www.associazionedeicostituzionalisti.it; Ronald Dworkin, *Corte Suprema e garanzie nel trattamento dei terroristi*, 4 Quaderni Costituzionali (2005), 905-920; Michel Rosenfeld, *Judicial Balancing in Time of Stress: Comparing the American, British and Israeli Approaches to the War on Terror*, 27 Cardozo L. Rev. (2006), 2079-2150; Curtis Bradley & Jack Goldsmith, Foreign Relation Law (2006); Paolo Bonetti, Terrorismo, emergenza e costituzioni democratiche (2006); Carla Bassu, *Il ruolo delle corti nella lotta al terrorismo: una comparazione angloamericana*, 3 Quaderni Costituzionali (2006), 467-489; Chiara Bologna, Hamdan v. Rumsfeld*: quando la tutela dei diritti è effetto della separazione dei poteri*, 4 Quaderni Costituzionali (2006), 813-817; Chiara Bologna, *Tutela dei diritti ed emergenza nell'esperienza statunitense: una political question?*, in Forum di Quaderni Costituzionali WP (2007) available at: www.forumcostituzionale.it; Giacomo Delledonne, *Separazione dei poteri e stato di crisi nell'ordinamento degli Stati Uniti: le lezioni di* Hamdan v. Rumsfeld, *in* Scuola Superiore Sant'Anna WP (2007). For an International law perspective on the issue, see Philip Sand, Lawless World: America and the Making and Breaking of International law (2005)

[5] Augusto Barbera, Le basi filosofiche del costituzionalismo (1996)

[6] Frederic Maitland, The Forms of Action at Common Law (1948)

[7] Ugo Mattei, Il modello di *Common Law* 7 (1996)

[8] Id., 14

[9] William Blackstone, Commentaries on the Law of England (1765-1769) quoted in, Federalist Papers, LXXXIV (Hamilton), (Isaac Kramnick ed., 1987), 475

Art.I, §9, cl.2 (the Suspension Clause) stating that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it"[10].

My argument is that it is possible to identify in the jurisprudence of the US Supreme Court a three steps evolution[11]. In each step the Supreme Court has adopted a particular stand toward the other branches of government and therefore ensured a different degree of fundamental rights protection. In a first, initial phase, exemplified by the 2004 decisions in *Hamdi v. Rumsfeld*[12] and *Rasul v.Bush*[13], the Supreme Court has been very deferential *vis à vis* the executive and legislative powers and has restricted to a minimum the protection of fundamental rights. In a second, intermediate phase, especially in the 2006 *Hamdan v. Bush*[14] ruling, the Court has then abandoned its self restraint with regard to the executive power and enhanced rights protection. Eventually, in a third, final phase, exemplified by the judgment of *Boumediene v. Bush*, the Court has reasserted its constitutional role and has wholly fulfilled his duty of protecting fundamental right.

As far as the structure of the paper is concerned, therefore, in chapters 2, 3 and 4 I will deal separately with each of the three judicial phases I have just delineated. In chapter 5, finally, I will employ the evidences gathered in the analysis of the Supreme Court's case law on the protection of fundamental rights in the fight against terrorism to draw some conclusion about the role that the judiciary plays in the US constitutional system, founded on the Madisonian theory of the separation and balance of powers. Indeed, the Supreme Court does not operate in a vacuum and is influenced by the pressure that the other branches of government exercise, especially during times of emergency, to have more room for manoeuvre[15]. In the long run, however, the Supreme Court turns out to be the crucial institution[16] since it belongs to her, and not the President or the Congress, to say "what the law is"[17].

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[10] US Const., Art. I. § 9, cl. 2. On *habeas corpus* in the US see: Gerald Neuman, Habeas Corpus*, Executive Detention and the Removal of Aliens*, 98 Columbia L. Rev. 1998, 961-1067; Richard Fallon & Daniel. Meltzer, Habeas Corpus *Jurisdiction, Substantive Rights and the War Power*, 120 Harvard L. Rev. 2007, 2029-2112. On fundamental rights more generally see Learned Hand, The Bill of Rights (1958); James Stoner, Common Law and Liberal theory: Coke, Hobbes and the Origin of American Constiutionalism (1992); the Bill of Rights in the Modern State (Geoffry Stone, Richard Epstein & Cass Sunstein eds., 1992); Howard Gilman, The Constitution Besieged: the Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993); John Orth, Due process of law (2003)

[11] In this paper references to the decisions of the US Supreme Court will be made to the slip opinions available in the web site of the Supreme Court at: www.ussupremecourt.gov

[12] 542 U.S. 507 (2004)

[13] 542 U.S. 466 (2004)

[14] 548 U.S. 557 (2006)

[15] Gordon Silverstein, Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy (1997)

[16] Alexander Bickel, The Least Dangerous Branch: the Supreme Court at the Bar of Politics (1986)

[17] *Marbury v. Madison*, 5 U.S. 137 at 177 (1803). On the most famous Supreme Court decision and on its significance in the US constitutional system see: Martin Shapiro, Law and Politics in the Supreme Court (1964); Mauro Cappelletti, Il controllo giudiziario delle leggi nel diritto comparato (1972); John Brigham, *The Constitution of the Supreme Court, in* The Supreme Court in American Politics (Howard Gillman & Cornell Clayton eds., 1999)

2. "Detention of individuals for the duration of the particular conflict is fundamental and accepted an incident to war"[18]: the initial self-restraint towards the executive and legislative powers

The Supreme Court bumped for the first time into the question of the legality of detention of enemy combatants in the cases *Hamdi v. Rumsfeld* and *Rasul v. Bush*, argued in April and decided on June 28, 2004[19]. Both cases originated out of *habeas corpus* proceeding brought by the detainees, held in custody of the US military forces, on the basis of the *habeas corpus* statute, 28 U.S.C. § 2241. This congressional bill recognizes a legislative privilege of *habeas corpus* stating that: " (a) Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. […] (c) The writ of *habeas corpus* shall not extend to a prisoner unless— (3) He is in custody in violation of the Constitution or laws or treaties of the United States"[20].

However, because Hamdi was a US citizen, while Rasul and the other 13 petitioners in his trial were foreign nationals, several differences existed between the two proceedings. In the first case, in fact, other legislative provision specifically tailored for US citizens were applicable: in particular, the non-detention statute, 18 U.S.C. § 4001, which reads: "(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"[21]. Nonetheless, the Supreme Court adopted a minimalist approach[22] in both decisions, showing a substantial deference towards the determinations of the executive and the legislative powers. By avoiding to address the core question of the existence of a constitutional privilege of *habeas corpus*[23], moreover, the Supreme Court afforded only a limited protection of fundamental rights.

The deferent position of the Supreme Court *vis à vis* the political branches of government and its consequence at the substantive level of rights protection, well emerge in *Hamdi*. In the first serious confrontation with a terrorism-related case raising severe constitutional concerns, especially with regards to the respect of the principles of due process, the Supreme Court "responded with a cacophony of opinions"[24] being unable even to agree on a five-Justices majority opinion. Justice Sandra D. O'Connor therefore wrote for a plurality of four judges and answered the two main questions raised by the plaintiff: 1) does the executive power have the authority to detain as enemy

[18] *Hamdi* (Opinion of O'Connor J.) at 10
[19] A third case, *Rumsfeld v. Padilla* 542 U.S. 426 (2004) was decided by the US Supreme Court on the same day, but on mere procedural grounds
[20] 28 U.S.C. § 2241
[21] 18 U.S.C. § 4401
[22] Cass Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America 175 (2005)
[23] See supra note 10
[24] Ackerman (supra note 4) 27

combatant, without trial, for the indefinite duration of the conflict, a US citizen captured on the battlefield? 2) what process is due to a US citizen who disputes his enemy combatant status?

In answering the first question the Court was clever to avoid addressing the argument of the Administration, which maintained that "no explicit congressional authorization [was] required, because the executive possesse[d] plenary authorization to detain pursuant to Art. II of the Constitution"[25]. According to Justice O'Connor (supported here also by the dissenting Justice Clarence Thomas), however, the Authorization for the Use of Military Forces (AUMF)[26], the congressional resolution granting the President the power "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" provided the "explicit congressional authorization for the detention of individuals" required by the non detention statute[27].

The majority of the Court thus concluded that the "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use"[28]. Only Justices John P. Stevens and Antonin Scalia, in their fierce dissent, insisted that "where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, §9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge"[29].

To answer the second question, concerning the rights that citizens have to contest their designation by the executive power as enemy combatants, the majority of the Court then balanced Hamdi's "most elemental of liberty interests—the interest in being free from physical detention by one's own government"[30] and the "sensitive governmental interests"[31] in providing a swift response to the terrorist emergency. By "employing a framework traditionally reserved for questions of public administration"[32], however, the Court resolved its "calculus"[33], simply holding "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice

[25] *Hamdi* (Opinion of O'Connor J) at 9
[26] Pub. L. 107-40 (2001)
[27] See supra note 20
[28] *Hamdi* (Opinion of O'Connor J.) at 10
[29] *Hamdi* (Scalia J. dissenting) at 1
[30] *Hamdi* (Opinion of O'Connor J.) at 22
[31] Id. at 24
[32] Ackerman (supra note 4) 30. The framework employed by the Supreme Court had been developed in the case *Mathews v. Eldridge*, 424 U.S. 319 (1976)
[33] *Hamdi* (Opinion of O'Connor J.) at 25

of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker"[34].

Furthermore, while asserting that "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator"[35], the Court recognized that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict"[36], e.g. by making admissible hearsay evidence and shifting the burden of the proof from the executive to the detainee. And conclusively, jeopardizing the few guarantees that were just recognized[37], the Supreme Court made also clear that "there remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal"[38].

In conclusion, "although the popular press has haled *Hamdi* for reigning in presidential power, […] a much dimmer view"[39] seems necessary. By adopting a "disturbing"[40] deferential approach *vis à vis* the war making branches of government and by conceding them much room for manoeuvre in the choice of the most appropriate means to tackle the terrorist threat, the Supreme Court severely compressed the fundamental procedural protection of *habeas corpus*. "When one considers where the balance was struck, the departure from [executive] unilateralism was limited. From the standpoint of judicial balancing itself, the plurality accorded too little weight to the serious deprivation of liberty associated with the designation as an enemy combatant and too much weights on security concerns relating to the war on terrorism"[41].

The US Supreme Courts dealt with the statutory right of *habeas corpus* of enemy combatants in *Rasul v. Bush* too. Adopting an approach similar to the one shown in *Hamdi*, the Court focused parsimoniously[42] on a specific, "narrow"[43] issue, i.e. "whether the United States courts lack[ed] jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated [in] Guantanamo"[44], Cuba. Indeed, even if the opinion of the Court (delivered by Justice Stevens, joined by four other judges and supported in a concurring opinion by Justice Anthony M. Kennedy) was favourable to the

[34] Id. at 26
[35] Id. at 28-29
[36] Id. at 27
[37] Dworkin (supra note 4), 910
[38] *Hamdi* (Opinion of O'Connor J.) at 31
[39] Ackerman (supra note 4), 29
[40] Id., 30
[41] Rosenfeld (supra note 4), 2114-2115
[42] Michael Reisman, Rasul v. Bush*: a Failure to Apply International Law,* 2 J. INT. CRIMINAL JUSTICE (2004), 973, 977
[43] *Rasul* (Opinion of the Court) at 1
[44] Id.

petitioner, the ruling was entirely limited to providing an answer to the above mentioned question, with no further consideration about the constitutional principle arising out of the case.

In the first part of the decision, Justice Stevens examined the 1903 Treaty between the US and Cuba on the legal status of Guantanamo[45], acknowledging that whereas the agreement leaves to Cuba the ultimate sovereignty over the Bay, it attributes to the US the complete control over it. The question for the Court therefore turned out to be whether the *habeas corpus* statute applied extra-territorially in Cuba: i.e. by conferring "a right to judicial review of the legality of executive detention of aliens in a territory over which the US exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'" [46]. According to the Court, moreover, the case at stake had to be distinguished "in important respect"[47] from a World War II precedent, *Johnson v. Eisentrager*[48], where the Court denied *habeas corpus* to enemy aliens captured and held in US custody overseas.

In the second part of the decision, then, the Supreme Court took notice of the executive concession's that the *habeas corpus* statute was applicable to citizens held in Guantanamo: however, since "statute draws no distinction between Americans and aliens held in federal custody, [for the majority] there [was] little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship"[49]. In the end, therefore, the Court concluded that "aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241"[50]. Justice Scalia again dissented from the decision: this time, however, criticizing a judgment that granted excessive protection to non-US-citizens[51], "contradicting a half-century-old precedent on which the military undoubtedly relied, *Johnson*"[52].

The Supreme Court decision in *Rasul*, in conclusion, felt short of a truly adequate response to the broad claims of the executive power missing the opportunity "to do much more to right some significant wrongs"[53]. "Because *Rasul* was disposed on threshold grounds the fate of the detainees was not examined in any detail by the US Supreme Court"[54], leaving to future judgments the task of "binding the actions of the government"[55]. Even though the Court ruled that enemy aliens detained as unlawful combatants in Guantanamo have a right to "challenge the legality of their detention"[56], it grounded this fundamental procedural right on a simple congressional statute. It therefore

[45] Lease of Lands for Coaling and Naval Stations between Cuba and the U.S., February 23, 1903. T.S. No. 418
[46] *Rasul* (Opinion of the Court) at 6
[47] Id. at 7
[48] 339 U.S. 763 (1950)
[49] *Rasul* (Opinion of the Court) at 12
[50] Id. at 12-13
[51] Cole (supra note 4), 194
[52] *Rasul* (Scalia J. dissenting) at 1
[53] George Aldrich, *Had the US Executive Gone Too Far?: Comments on* Rasul *and* Hamdi, 2 J. INT. CRIMINAL JUSTICE (2004), 967, 971
[54] Rosenfeld (supra note 4), 2144
[55] Dworkin (supra note 4), 915
[56] *Rasul* (Opinion of the Court) at 15

remained open the possibility for Congress, especially if in disagreement with the Supreme Court's holding in *Rasul*, "to change § 2241"[57]. Which, off course, soon happened.

3. "Ordinary principles of statutory construction suffice to rebut the Government's theory"[58]: first steps in the restoration of the rule of law

In December 2005, the US Congress approved the Detainee Treatment Act (DTA)[59]. This bill aimed at ensuring a minimum standard for the treatment of the detainees held in US custody, to counter the growing international criticism and concern about the recourse to torture and inhumane and degrading treatment in the interrogation techniques employed by the US military forces[60]. Among the provisions of the bill stood, however, also § 1005(e) that, in reply to Supreme Court's decision in *Rasul*, amended 28 U.S.C. § 2241 stripping federal court of the jurisdiction over the *habeas corpus* claims of the enemy combatants, by stating that "no court, justice or judge shall have jurisdiction to hear or consider – (1) an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defence at Guantanamo Bay, Cuba".

In the view of the political branches of government a new procedure had to be established to review the legality of the aliens held as enemy combatants in Guantanamo, without all the burdensome safeguards of a trial before a federal court. Indeed, following the *ratio decidendi* of the Supreme Court in *Hamdi*, the President created, with military order[61], the Combatant Status Review Tribunals (CSRT). *Ad hoc* Military Commissions (MC) then were set up, again with executive order[62], to try and sentence the combatants for war crimes committed against the US. According to §§ 1005(e)(2)(3) of the DTA, the Court of Appeal for the District of Washington DC was entrusted only of the limited power to review whether the determinations of the CSRT and the MC were consistent with the standards and procedure specified in the military order establishing them.

Thus, when the *Hamdan v. Rumsfeld* made its way to the Supreme Court three compelling constitutional issue were at stake: 1) the application of the jurisdiction stripping provision of the §

[57] *Rasul* (Scalia J. dissenting) at 1
[58] *Hamdan* (Opinion of the Court) at 11
[59] Pub. L. 109-148
[60] Seymour Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004; Marcy Strauss, *Torture*, 48 N. Y. Law School L. Rev., (2004), 201-274; Philip Sand, (supra note 4), 205-222. For a restrictive interpretation of the prohibition of torture an inhumane and degrading treatments and for a justification of them in exceptional cases see the works of: Jonh Yoo e Julien Ho, *The Status of terrorists*, 136 UC Berkeley School of Law, Public Law and Legal Theory Research Paper, (2004); Alain Dershowitz, *The Torture Warrant*, 48 48 N. Y. Law School L. Rev., (2004), 275- 294
[61] Order of the US Deputy Secretary of Defence, July 7, 2004, "Establishing Combattant Status Review Tribunal", Defence Pentagon 20301-1010, available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf
[62] Order of the President of the United States, November 13, 2001, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism", 66 Fed. Reg. 57,833

1005(e) DTA; 2) the authority of the President to establish a MC to try enemy aliens for war crimes; 3) the legality of the procedure for the trials in front of the MC. The Supreme Court, this time, however, abandoned his previous self-restraint, especially toward the executive power, and took an intermediate step in the direction of the restoration the principle of the rule of law[63]. In fact, by interpreting narrowly the statutory provisions limiting its jurisdiction and adopting a "'process-based institutional approach' requiring coordination between Congress and the President"[64] in the fight against terrorism, the Court was able to ensure a higher protection of due process rights.

As far as the first issue was concerned, the majority of the Court (lead by Justice Stevens), rejected the argument advanced by the Administration arguing that § 1005(e) DTA deprived the Supreme Court of its jurisdiction to hear the claim of Hamdan, an enemy combatant detained in Guantanamo. According to the Court, "ordinary principles of statutory construction suffice[d] to rebut the Government's theory"[65]. The DTA contained, in fact, an effective date provisions, § 1005(h) stating that §§ 1005(e)(2)(3) "shall apply with respect of any claim […] that is pending on or after the date of enactment of this Act" but saying nothing about the retroactive application of § 1005(e)(1). It followed that if "Congress was reasonably concerned to ensure that §§ 1005(e)(2)(3) be applied to pending cases, it should have been just as concerned about § 1005(e)(1)"[66].

The Court hence concluded that "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation"[67]. In addition, it hold that "the Government has identified no other 'important countervailing interest' that would permit federal courts to depart from their general 'duty to exercise the jurisdiction that is conferred on them by Congress'"[68]. In their dissents, instead, both Justice Scalia and Justice Thomas sharply criticized the majority decision, arguing that "the *most natural* reading"[69] of the DTA excluded the jurisdiction of the Supreme Court and that in any case "an exercise of sane equitable discretion"[70] was here required to "respect the executive judgments in a matter of military operations and foreign affairs"[71].

On the second issue, the petitioner was challenging the authority of the President to set up a MC to try him for committing a war crime, i.e. the crime of conspiracy to commit terrorism against the US. The Supreme Court while recalling that, according to the US Uniform Code of Military

[63] Neal Katyal, *Hamdan v. Rumsfeld: the Legal Academies Goes to Practice*, 120 HARV. L. REV. (2006), 65
[64] Rosenfeld (supra note 4), 2082
[65] *Hamdan* (Opinion of the Court) at 11
[66] Id. at 14
[67] Id. at 14-15
[68] Id. at 25
[69] *Hamdan* (Scalia J. dissenting) at 1
[70] Id.
[71] *Hamdan* (Thomas J. dissenting) at 1

Justice (UCMJ), MCs needed to be authorized "by statute or by the law of war"[72], dismissed the argument of the executive claiming that an "overriding authorization"[73] was granted by the AUMF or the DTA. Clearly showing the distance that separated its current approach from the deferential *Hamdi* jurisprudence (where the AUMF was considered as a sufficient authorization for the President to detain citizens as enemy combatants), the Supreme Court ruled that "neither of these congressional Acts, however, expand[ed] the President's authority to convene MCs"[74].

According to Justice Stevens, furthermore, the analysis of the law and practice of the *ius in bello*[75] led to the conclusion that "none of the overt acts that Hamdan is alleged to have committed violates the law of war"[76] with the consequence that also the second potential authorization for the establishment of MCs is missing, because the crime of conspiracy to commit terrorism "is not triable by a law-of-war MC"[77]. Justice Kennedy however did not join in this part of the opinion of Justice Stevens, arguing that "in light of the conclusion that the MC here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality"[78] concerning issues of international law: this specific part of the decision, therefore, may not be considered as part of the opinion of the Court.

On the last question, finally, the Supreme Court refused to remand the case to a lower court, arguing that Hamdan "*indeed already has been* excluded from his own trial"[79], and thus also addressed the issue of the legality of procedure set up by the executive to govern trials in front of the MCs, concluding that "the rules specified for Hamdan's trial are illegal"[80]. As the Court pointed out, to begin with, the accused person was precluded from ever learning the evidence adduced against him that the judging officer of the MC deemed necessary to keep secret. In addition, the officer could admit in trial any evidence (including hearsay and evidences obtained through coercion), whenever he thought they had a probative value for a reasonable person and without the requirements of relevance and admissibility that apply even in courts-martial proceedings.

The procedure governing trials in front of the MC violated, in fact, the UCMJ: the UCMJ, while acknowledging, on one hand, that the rules governing the various type of military trials may differ from the rules applicable in front of civil courts, if the President deems it impracticable, require, on the other hand, trials before courts-martial, courts of inquiry, military commissions, and

[72] Art. 21 UCMJ
[73] *Hamdan* (Opinion of the Court) at 29
[74] Id.
[75] Fiona de Londras, *The Right to Challenge the Lawfulness of Detention: an International Perspective on US Detention of Suspected Terrorists*, 12 J. OF CONFLICT AND SECURITY L. (2007), 223-260
[76] *Hamdan* (Opinion of the Court) at 36
[77] Id.
[78] *Hamdan* (Kennedy J. concurring in part) at 18
[79] *Hamdan* (Opinion of the Court) at 53 (emphasis in the original)
[80] Id. at 62

other military tribunals to be, among themselves "uniform insofar as practicable"[81]. According to the Court, however, the executive did not meet the burden imposed by the test and "nothing in the record before us demonstrate[d] that it would be impracticable to apply court-martial rules in this case"[82]. It hence followed that "the rules applicable in courts-martial must apply"[83] with the consequence that the procedure of the MC were illegal.

"The procedures adopted to try Hamdan also violate[d] the Geneva Conventions"[84], treaties duly ratified and therefore part of federal common law[85]. According to the Court, Common Art. 3 is relevant to the case: this provision in fact shall apply in "a conflict not of an international character" and a literal interpretation suggest that this means a conflict that "does not involve a clash between nations"[86]. Art. 3, in particular, sets a minimum standard of protection for the person placed *hors de combat* by prohibiting "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples". For the Court, "these requirements are general ones […] But requirements they are nonetheless"[87] and the MC did not meet them.

Hence, on the whole, *Hamdan* represents a step forward in the restoration of the rule of law. The wide margin of appreciation that was conceded to executive power in the first set of terrorist-related decisions was significantly reduced and the protection of fundamental procedural rights, as a consequence, enhanced[88]. The Supreme Court exercised a strict review over the measures adopted by the President, reasserting that "the executive is bound to comply with the Rule of Law that prevails in this jurisdiction"[89]. On the other hand, though, the Court left untouched the room for manoeuvre of the legislature: as a matter of fact, rather than in the adoption of a "civil libertarian maximalism"[90] approach that safeguards constitutional rights *tout court*, the true novelty of the decision laid in "the acknowledgment of a relevant role for the Congress in times of emergency"[91].

4. "The laws and the Constitution are designed to survive, and remain in force, in extraordinary times"[92]: taking rights seriously

[81] Art. 36(b) UCMJ
[82] *Hamdan* (Opinion of the Court) at 60
[83] Id. at 61
[84] Id. at 62
[85] 6 U.S.T. 3314
[86] *Hamdan* (Opinion of the Court) at 67
[87] Id. at 72
[88] Bologna (supra note 4), 817
[89] Id.
[90] Rosenfeld (supra note 4), 2082
[91] Bologna, (supra note 4) 13-14
[92] *Boumediene* (Opinion of the Court) at 70

In October 2006, to answer to the objections of the Supreme Court in *Hamdan*, Congress adopted the Military Commission Act (MCA)[93]. The bill, first of all, granted the President the explicit authorization to convene MCs to try the detainees held in Guantanamo. It then re-established the inquisitorial provisions governing trials in front of the MCs. Finally, it striped again federal courts of the jurisdiction to hear *habeas corpus* claims from the enemy aliens held in custody of the US military. This time, however, §7 MCA made clear that the prohibition "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" was to "take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act".

It was at this time evident, therefore, that "if this ongoing dialogue between and among the branches of government [had] to be respected, [the Supreme Court could] not ignore that the MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases"[94]. Hence, when the case *Boumediene v. Bush* reached the bench, the Supreme Court could nothing but affirm that "the MCA deprives the federal courts of jurisdiction to entertain the *habeas corpus* action now before us"[95]. This nonetheless, ultimately, allowed the Court to address "a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of *habeas corpus*, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2"[96].

Seven years after the beginning of the war against terror, the Supreme Court wore confidently the clothes of the guardian of the Constitution and faced, at last, the fundamental question concerning the core right of enemy aliens, captured by the US military in the theatre of war, designated as unlawful combatants and deprived of liberty without due process of law. Reasserting its institutional position and eventually taking fundamental rights seriously, the Supreme Court addressed, in fact, "the constitutional issue […that] was n[either] reached in *Rasul*"[97], nor in *Hamdan*: do these enemy combatants have a constitutional privilege to contest the legality of their detention in front of an independent and regularly constituted tribunal? "We hold these petitioners do have the *habeas corpus* privilege"[98].

Writing for a 5 to 4 majority, Justice Kennedy began the opinion of the Court providing an historical account of the writ of *habeas corpus*, from its development in the English common law as

[93] Pub. L. 109-366 (2006)
[94] *Boumediene* (Opinion of the Court) at 8
[95] Id.
[96] Id. at 1
[97] Id. at 3
[98] Id. at 1

a tool to restrain the *arbitrium* of the executive power[99] to its adoption in the American legal system, where it "was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights"[100]. Abandoning with determination the self-restraint of its previous judgments in favour of a bold stand *vis à vis* the two political branches of government, moreover, the Court made clear that the purpose of the constitutional privilege of *habeas corpus* was to ensure "that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty"[101].

The Court, then, assessed the technical issue of the extra-territorial application of the Suspension Clause of the Constitution in Guantanamo, discarding the formalistic approach lobbied by the Administration based on the idea that the Constitution applies only where the US exercise full sovereignty. On one hand, in fact, the Court highlighted "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over"[102] Guantanamo. On the other hand, Justice Kennedy acknowledged that the precedents on the issue (together with *Johnson*[103], also *Reid v. Covert*[104], where actually the Court concluded that US citizens tried oversee had a right of trial by jury) conveyed "the idea that questions of extraterritoriality turn on objective factors and practical concern, not formalism"[105].

Hence, the Court adopted a functional approach[106], arguing "that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ"[107]. Now, given the peculiar features of the case, that involved "individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history"[108] for the Court there were "few practical barriers to the running of the writ"[109]. Hence, the Court concluded "that Art.I, §9, cl.2, of the Constitution has full effect at Guantanamo Bay"[110].

Even if Justice Scalia criticized the decision as a *ultra vires* "intervention in military matters"[111], the Court drew from the recognizance that the constitutional privilege of *habeas corpus*

[99] CHARLES MCILLWAIN, COSTITUZIONALISMO ANTICO E MODERNO 162 (1990)
[100] *Boumediene* (Opinion of the Court) at 8
[101] Id. at 15
[102] Id. at 25
[103] See supra note 48
[104] 354 U.S. 1 (1957)
[105] *Boumediene* (Opinion of the Court) at 34
[106] Gerald Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 39 HARV. PUB. L. WP (2008), 4
[107] *Boumediene* (Opinion of the Court) at 36-37
[108] Id. at 41
[109] Id.
[110] Id.
[111] *Boumediene* (Scalia J. dissenting) at 1

applies in Guantanamo, the consequence that "if the privilege of *habeas corpus* is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause"[112]. The Court therefore also exercised judicial review over §7 of the MCA, stripping federal courts of the jurisdiction to hear *habeas* claims from the enemy aliens held in the military base. Indeed, since "the MCA does not purport to be a formal suspension of the writ; and the Government […] has not argued that it is"[113], either "Congress has provided adequate substitute procedure for *habeas corpus*"[114] or the MCA is unconstitutional.

The alternative procedure to review the legality of the detention of enemy combatants established by the political branches of government were two-stepped: to begin, the detainee faced a trial in front of the CSRT established by presidential order[115]; according to § 1005(e)(2) of the DTA, then, the Court of Appeal for the District of Washington DC could review the CSRT decision, but only on very limited procedural grounds. At both levels, however, the accused had severe limitation in the right to defend himself and rebut the reasons that legitimize its detention. The federal court, moreover, did not have "adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release"[116].

In the end, therefore, the Court recognized that "the easily identified attributes of any constitutionally adequate habeas corpus proceeding"[117] were missing and ruled that the alternative review process set up by the legislature was, "on its face, an inadequate substitute for *habeas corpus*"[118], with the consequence that "MCA §7 thus effects an unconstitutional suspension of the writ"[119]. Moreover, the Court held that *habeas corpus* proceedings could be brought directly before the federal courts, without awaiting for the determinations of the CSRT. Indeed, "in some of these cases six years have elapsed without the judicial oversight that *habeas corpus* or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to *habeas corpus* actions"[120].

The dissent of the Chief Justice well enlightened how the Court freed itself from its 'original sin': John G. Roberts, while recognizing that the Suspension Clause applied in Guantanamo, defended the substitute procedure for *habeas corpus* set up by the political branches of government

[112] *Boumediene* (Opinion of the Court) at 41
[113] Id. at 42
[114] Id.
[115] See supra note 60
[116] *Boumediene* (Opinion of the Court) at 58
[117] Id. at 50
[118] Id. at 64
[119] Id.
[120] Id. at 66

as meeting "the minimal due process requirements outlined in *Hamdi*"[121], and urged the Court to show precisely the self-restraint initially adopted in terrorist-related cases, from which the majority, on the contrary, departed. Here the Court, in fact, stroke the balance between liberty and security in favour of fundamental due process rights, in the awareness that "security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers"[122].

In conclusion, the ruling in *Boumediene* represents the final step in the judicial efforts of the Supreme Court to restore the rule of law in the US constitutional system. After having already demanded, in an intermediate phase, that the acts of the executive power complied with the Constitution, the Court now submitted also the activity of the legislative power to a strict, consistent review in order to ensure the respect of fundamental rights in countering the threat of terrorism[123]. Eventually, the Court confidently acknowledged its prominent institutional role, upheld to its full extent the supremacy of the Constitution with regard to all the political branches of government and "for the first time in history, […] found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity"[124].

Boumediene put an end to the legal black hole which had characterized the status of the detainees held in the military prison of Guantanamo. The Court took fundamental rights seriously and reasserted the importance of the constitutional liberties, especially the *procedural* remedy represented by the *habeas corpus* privilege, opening up a stream of litigation in front of the federal courts to review *on the merit* the legality of the detention of enemy combatants[125]. To put it simpler: it unequivocally clarified that "the laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that *habeas corpus*, a right of first importance, must be a part of that framework, a part of that law"[126].

5. "Ambition must be made to counteract ambition"[127]: separation and balance of powers in the US Constitution

[121] *Boumediene* (Roberts C.J. dissenting) at 5
[122] *Boumediene* (Opinion of the Court) at 68-69
[123] Martin Katz, *Guantanamo,* Boumediene *and the Jurisdiction-Stripping: The Imperial President Meets the Imperial Courts*, 25 University of Denver Legal Research WP (2008), 38
[124] Neuman (supra note 103), 2-3
[125] See supra note 1&2
[126] *Boumediene* (Opinion of the Court) at 70
[127] Federalist Papers, LI (Madison), (supra note 9), 319

The analysis of the case law of the Supreme Court on terrorism emphasizes a gradual jurisprudential evolution, from the earlier decisions (in the aftermath of the terrorist attacks of September 11, 2001), to the most recent judgment. Three different judicial phases, in particular, may be identified and distinguished, on the basis of the peculiar institutional position adopted by the Supreme Court and the degree of protection of fundamental rights that was, consequently, ensured. In the previous sections these phases were exemplified as follows: the 2004 rulings in *Hamdi v. Rumsfeld* and *Rasul v. Bush* were employed to describe the features of first phase; the 2006 ruling in *Hamdan v. Rumsfled* to illustrate that of the second one; and the late decision in *Boumedine v. Bush* in 2008 to address the third one.

In each phase the Supreme Court has acknowledged for itself a specific role and adopted a peculiar institutional position *vis à vis* the other branches of government. In the initial phase, the Court pleaded deference toward the war making branches of government and left wide margin of manoeuvre to both the executive an the legislative powers. In the second, phase then, the Court abandoned its self-restraint toward the executive power, while recognizing the relevant discretion of Congress in times of emergency. In the third phase, eventually, the Court, showed full confidence about its institutional role in the US balance of governance, strictly reviewed the measure adopted by Congress too and quashed them, re-asserting that the legislative power, as well as the executive power, must comply with the rule of law.

Since, however, the safeguard of liberties follows from the allocation of powers among the different institutions, the evolving role of the judiciary has necessarily effected the protection of fundamental rights: chief among this, the right of *habeas corpus* of the detainees held in Guantanamo, i.e. the privilege to have an independent judge review the reason for their detention. In the initial phase, the Court ensured only a limited protection of rights, by recognizing that due process may be tailored to alleviate excessive burden on the military. In the intermediate phase, then, the Court raised the level of protection by narrowly interpreting congressional legislation and requiring the executive to respect the rule of law. In the last phase, finally, the Court took fundamental rights seriously, upholding the *habeas corpus* provision enshrined in the Constitution.

From this point of view, the analysis of the case law of the Supreme Court on terrorism give us the opportunity to reflect, one more time, on the effectiveness of the US constitutional model[128],

[128] On the US constitutional model see in general: Laurence Tribe, American Constitutional Law (1988) (Gerald Gunther & Kathleen Sullivan, Constitutional Law (1997); Barbara Bardes, Mac Shelley & Steffen Schmidt, American Government and Politics Today (2005); Augusto Barbera & Carlo Fusaro, Il governo delle democrazie (2001); Ralph Rossum & Alan Tarr, American Constitutional Law: (volume 1) the Structure of Government. For an historical perspective on the US system of governance see: Giovanni Bognetti, Lo spirito del costituzionalismo americano (2000); Lawrence Friedman, Law in America (2004); Akil Reed Amar, America's Constitution (2005); Bruce Ackerman, The Failure of the Founding Fathers (2005); Luca Stroppiana, Stati uniti (2006). On the President see, among many: Roberto Toniatti, Costituzione e direzione della politica estera negli Stati Uniti d'America (1983); Arthur Schlesinger, The Imperial Presidency (1989); Silverstein (supra note 15). On the Congress see, among many: Steven Smith, Jason

founded on the Madisonian intuition that the check and balance among powers is "in a way essential […] if one wants to protect the liberty of citizens against an arbitrary government"[129]. Since power corrupts, and absolute power corrupts absolutely, to guarantee a better protection of the natural inalienable rights of the individual "ambition must be made to counteract ambition"[130]. The US Constitution adopted in Philadelphia in 1789, therefore, rejected the system of fusion of powers prevailing in the European parliamentary models of the 18th century and established a form of government where separated institutions control and balance each other, while sharing power[131].

In the US system of separation of powers, hence, the judiciary plays a far more important role than the one described by Hamilton (perhaps to minimize the anti-majoritarian elements of the US Constitution) according to which: "The judiciary is beyond comparison the weakest of the three departments of power; it can never attack with success the other two; and all possible care is requisite to enable it to defend itself against their attacks"[132]. Even though the Supreme Court has neither the power of the purse (which belongs to Congress on the basis of Art.I of the Constitution), nor the power of the sword (a prerogative of the President under Art.II of the Constitution), it benefits of the institutional prerogative recognized by Art.III[133], and additionally of the power to review the constitutionality of the decisions of the political branches of government.

For sure, the counter-majoritarian difficulty generated by judicial review is a τοπος in the law & political science literature about the Supreme Court[134]. Even though the Supremacy Clause, Art.VI, §1, cl.2, states that the "Constitution […] shall be the Supreme Law of the land", no express reference to judicial review may be found in the constitutional text, and it was only in the landmark

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Robert & Ryan Vander Wielen, The American Congress (2005). On the Supreme Court see: Robert McCloskey & Sanford Levinson, The American Supreme Court (2004); Charles Fried, Saying What the Law Is: The Constitution in the Supreme Cpurt (2004); David O'Brien, Storm Center: The Supreme Court in American Politics (2005) and the literature quoted infra in note 134

[129] McIlwain (supra note 97), 36 On the link between separation of powers and protection of fundamental rights see also, Angioletta Sperti, Corti Supreme e conflitti tra poteri: Spunti per un confronto Italia-USA sugli strumenti e le tecniche di giudizio del giudice costituzionale (2005)

[130] Federalist Papers, LI (Madison), (supra note 9), 319

[131] Richard Neustadt, Presidential Power and the Modern President 33 (1960)

[132] Federalist Papers, LXXVIII (Hamilton), (supra note 9) 437

[133] According to Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the US Supreme Court*, in The Future of the European Judicial System in a Comparative Perspective (Ingolf Pernice et al. eds., 2006) 33, 49 the Supreme Court is endowed of the "power of the pen", i.e. the power deriving from the ability of arguing and persuading. On the link between political responsibility and motivation of the decisions see also Mitchel Lesser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy (2004)

[134] See, among many: Robert Dahl, *Decision-Making in a Democracy: the Supreme Court as a National Policy Maker*, in 6 J. Pub. L. (1957), 279; Charles Black, The People and the Court (1960); Shapiro (supra note 17); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Bickel (supra note 16). For a comparative approach to judicial review of legislation see: Cappelletti (supra note 17); Paolo Carrozza, *Spunti comparatistici in tema di motivazione delle sentenze costituzionali (tra judicial review of legislation e constitutional adjudication)*, in La motivazione delle decisioni della Corte Costituzionale (Antonio Ruggeri eds., 1994), 153; Andrea Morrone, Il custode della ragionevolezza (2000); Lucio Pegoraro, *La Giustizia costituzionale*, in Manuale di Diritto Pubblico Comparato (Giuseppe Morbidelli et al. eds., 2006), 417

Marbury v. Madison[135] decision that the Court recognized it. On the other hand, however, the idea of judicial review is implicit in the structure of the US Constitution[136], since "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void"[137].

Hamilton himself, after all, wrote that "a Constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has a superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute […]"[138]. It is, in fact, the distinction between the constituent and the constituted power, between "the intention of the people and the intention of their agents"[139], that demands the annulment, by the judiciary, of the executive and legislative acts that violate the division of competence or the substantive limits established by the Constitution and its Bill of Rights.

The analysis of the case law of the Supreme Court on terrorism also brings light over another peculiar feature of the compound US system of governance. The judiciary, in fact, does not operate in a vacuum: it faces reality and is affected by the pressure of the other branches of government[140]. In times of terrorist emergencies, the Supreme Court may thus be compelled to make short term concessions to the executive and the legislature, reducing its review to a minimal, unsatisfactory, scrutiny. Nevertheless, in the long run, as the conditions justifying the *état de siège* fade away, the Supreme Court is the first institution to realign with the constitutional principles, fully reviewing the legality of the measures adopted by the political branches of government in order to ensure that the State remains "a government of laws and not of men"[141].

When, in times of emergency, the Court strikes down legislation enacted by popularly elected bodies, the counter-majoritarian difficulty reaches its zenith. As, however, Advocate General Poiares Maduro of the European Court of Justice has, *mutatis mutandis*, stated: "especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the

[135] See supra note 16
[136] Mario Patrono, *La Costituzione vivente, in* La Costituzione degli Stati Uniti d'America (Gigliola Sacerdoti Mariani & Antonio Reposo eds., 1985), 43
[137] *Marbury* at 177
[138] Federalist Papers, LXXVIII (Hamilton), (supra note 9) 439
[139] Id.
[140] Roberto Bin, *Democrazia e terrorismo*, in Forum di Quaderni Costituzionali WP (2006), 10 available at: www.forumcostituzionale.it
[141] Constitution of Mussachussetts (1780), Art. XXX

political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper"[142].

In general, for that reason, the trend in the jurisprudence of the Supreme Court analyzed in this paper, confirms that the US constitutional architecture altogether stood the challenges posed by terrorism and by the reactions to it. Despite a weak departure, the Supreme Court has been able, step by step, to defend the US delicate balance of governance and to ensure an effective protection of fundamental due process rights. In the long run, just as the European judiciary, the US one "experimented its capacity of being rigorous in the protection of rights in one of the most thorny fields, given the fact that the seriousness of the international situation tends to attenuate the sensitiveness toward the rights of the suspected terrorist and produces a stronger propensity toward the demand of security rather than towards the demand of liberty and justice"[143].

The French Declaration of Rights of Men and Citizen denied the existence of a Constitution in those societies "where the fundamental rights are not protected and the separation of powers not guaranteed"[144]: the US Constitution meets both requirements because its judges (especially the Supreme Court judges) operate as guardians of both its institutional structure (the Framework of government) and of its substantive principle (the Bill of Rights). Notwithstanding the vehement Commander in Chief rhetoric of the White House, or the budget-based arguments of the Capitol, it is the Supreme Court the institutions that hold the last word, the real strongest branch of government. Because, as the Chief Justice Charles H. Hughes already in 1907 could realistically say: "We are under a Constitution, but the Constitution is what the judges say it is"[145].

6. Conclusion

The purpose of this paper was to address the question whether the US Supreme Court has taken fundamental rights (and especially *habeas corpus*) seriously while reviewing the legality of the measures adopted by the political branches of government to counter the terrorist threat. Since the jurisprudence of the Supreme Court has gradually evolved, I have argued that an adequate answer to the question requires a distinguishing between three different judicial phases. In its first decisions, the Court adopted a minimalist approach, affording only a limited protection of

[142] Opinion of the Advocate General Poiares Maduro in Case C-402/05P *Kadi v. Council of the European Union and Commission of the European Communities* §45 available at www.curia.europa.eu
[143] Marta Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea, in* I DIRITTI IN AZIONE (Marta Cartabia ed., 2007), 13, 51
[144] Declaration of the Rights of Men and Citizen (1789), Art. 16
[145] Epigram available at: http://www.c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html

fundamental rights. In a second step, then, the Court heightened rights protection at an intermediate level by narrowly interpreting congressional legislation and requiring the executive to respect the rule of law. Eventually, in the last phase, the Court undertook a strict scrutiny of the acts of the legislature ensuring full respect of the human rights standard enshrined in the US Constitution.

In particular, by recognizing in *Boumediene* the applicability of the "fundamental *procedural* protection"[146] represented by the constitutional privilege of *habeas corpus*, the Supreme Court has opened the route for enemy combatants, held in the military prison of Guantanamo, to challenge their detention before regular US federal courts. As the recent holdings by Justices Urbina and Leon in Washington DC underline, federal judges will now have to rule *on the merit* whether the Administration legally detains the enemy combatants[147]. In his decision, indeed, Justice Urbina, while ordering the executive to release five prisoners, confirmed the detention of a sixth combatant (an Algerian for which grounded evidences existed that linked him to terrorism), confirming that the *ratio* of *Boumediene* is not to cause a generalized amnesty, but just to reaffirm the need of a procedural tool to review the reasons that justify the limitation of liberty.

The Supreme Court itself will soon provide further clues with regard to the protection of fundamental rights: having accepted on December 5, 2008 the writ of certiorari in the case *Al Marri v. Pucciarelli*[148], the Court will have to decide (perhaps in March) whether the AUMF authorize and, if so, whether the Constitution allow, the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities[149]. The case will moreover give the opportunity to understand what position the new Obama Administration will take on the appropriate mean to fight the war against terror, either supporting or disavowing one of the most aggressive legal claims made by the previous Administration: that the President may order the seizure of a legal resident and hold him indefinitely without charge[150].

The solution to the case is anything but certain. The analysis of the case law of the Supreme Court - from the initial self-restraint of *Hamdi* and *Rasul*, through the intermediate step of *Hamdan*

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[146] *Boumediene* (Opinion of the Court) at 70 (emphasis added)
[147] See supra note 1&2
[148] No. 08-368 certiorari granted
[149] Adam Liptak, *Justice Take Case on President Power to Detain*, The New York Times, December 5, 2008
[150] Adam Liptak, *Early Test of Obama View on Power over Detainees*, The New York Times, January 2, 2009. The executive orders adopted by President Obama in his first day of office, on January 22, 2009, to close the Guantanamo detention camp within a year, ban the CIA's coercive interrogation methods and end its secret overseas prisons and halt the prosecution of enemy combatants in front of the military commissions established by President Bush mark, however, an abrupt break with some of the most disputed policies of the previous Administration and suggest that the new Administration will shift in defence of the US constitutional values and the rule of law in countering the terrorism threat: see on this, Mark Mazzetti & William Glaberson, *Obama Issues Directives to Shut Down Guantanamo*, The New York Times, January 21, 2009; William Glaberson, *Obama Orders Halt to Prosecution at Guantanamo*, The New York Times, January 21, 2009; Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, The New York Times, January 22, 2009

till the final confidence of *Boumediene* - showed a growing importance of the fundamental rights discourse in reviewing the legality of the counter-terrorism measures adopted by the political branches of government. Nonetheless, as wisely prof. Neuman underlined, "precedents can be interpreted broadly, interpreted narrowly and overruled"[151]. The threat of terrorism is not dawning, as daily news constantly remember us. The hope is, however, that the new political mood that just emerged in the US will favour a constitutionally adequate response to the new terrorist emergencies and that the Supreme Court will continue answering with a clear voice to the (not always rhetorical) question asked in the title of this paper: taking fundamental rights seriously? Yes, please.

[151] Speech given in the Seminar on "Legal Issues in National, European and International Action against Terrorism", European University Institute, Department of Law, October 15, 2008