CHAPTER 7

Instruments of Judicial Power

The judge's chair is a seat of power. Not only do judges have power to make binding decisions on private citizens, their rulings may also legitimate or negate the use of power by other public officials. Judges are the custodians of authority because their putative expertise in the law, their presumed independence from partisan political control, and their ritualized fact-finding procedures supposedly make their decisions more objective than those of other officials.

The power that judges exercise is not, of course, directly related to the physical force they command. They have only a few officers of the court at their disposal, merely enough to keep order in the courtroom and to move prisoners safely to and from jail. But judicial orders are generally obeyed without overt compulsion. Presumably, even the losers either believe in the fairness of the adjudicative process or recognize that nonacquiescence would be futile because the substantial power of the executive branch usually stands ready to enforce judicial decisions.[1] The constitutional text commands that the president "shall take Care that the Laws be faithfully executed," and specific congressional statutes direct executive assistance in carrying out judicial decisions. Without orders to the contrary, U.S. marshals will enforce decrees of federal courts, and the Department of Justice will cooperate in protecting the integrity of the judicial process. Occasionally, as in 1809, when the governor of Pennsylvania used militia to defy the Supreme Court's judgment in *United States v. Peters*, or when mob violence prevented school desegregation in Little Rock in 1957 and at the University of Mississippi in 1962, additional force might be necessary to secure obedience to a court's order. The marshal can summon a posse, as was done in the *Peters* case, or the president might send in federal troops, as happened in Little Rock and Mississippi. But the fact that force must be used indicates that courts in such cases are approaching the limits of their authority.

[1] Judges, of course, have power to command only the parties in the proceeding before them. Whether their decision in a particular case will become effective as a legal standard controlling conduct or be accepted as a precedent in subsequent litigation pose other questions, which we shall examine in Chapters 10 and 14.

WRITS OF CERTIORARI

Before judges resolve disputes in cases before them, they must ascertain whether those suits belong in their courts. Chapter 6 detailed some of the considerations that guide their decisions about who can have access to judicial power and under what circumstances. But, as we saw, simply because a dispute meets these requirements does not mean judges will decide it. The U.S. Supreme Court and many state courts of last resort enjoy wide discretion in shaping their dockets, accepting less than 5 percent of the cases that reach their doorsteps. Writs of certiorari provide the most common method for exercising that discretion.

These writs, as we noted in Chapter 3, are essentially requests by losing litigants to have their records reviewed by a higher court. That court may grant or deny their requests. These writs hark back to a long tradition.[2] Mentions of them in English law come as early as the thirteenth century, and they developed in Britain much as they began—as a "tool to ensure justice by allowing a superior court to remove proceedings from an inferior court."[3] The colonists carried over this process to America, where it was used in much the same way: high courts could issue extraordinary writs—such as certiorari and habeas corpus (discussed later in this chapter)—unless a statute prohibited them from so doing.

This common-law practice, however, is not what the contemporary Supreme Court typically invokes to hear disputes. Rather, the justices rely on "statutory certiorari," that is, on laws passed by Congress that allow them discretion to issue or deny such writs. One such statute, enacted in 1891, allowed the Court some choice in reviewing decisions of circuit courts (now the courts of appeal) via writs of certiorari. Another, enacted in 1914, extended certiorari to certain decisions of state courts. But it was the Judiciary Act of 1925 that established "statutory certiorari" as the principal method for obtaining access to the Court. Under this Act, the justices were obliged to hear only a few categories of cases, such as those in which a federal court had invalidated a state law or a state court had invalidated a federal law. For the rest, the Supreme Court had discretion to grant or deny "cert." In 1988, Congress further extended the justices' freedom to choose among cases. Today the Court is legally obliged to hear only very few controversies (mostly those involving the Voting Rights Act of 1965) appealed from special three-judge district courts.

Over the years, the Court has promulgated rules to explain what makes a case worthy of cert; and scholars have extensively studied the process in order to identify precisely what factors the justices consider and what weight they give to each in deciding to grant or deny cert. The resulting research, which we describe in some detail in Chapter 13 (see also Reading 6.6), is important to

[2] This discussion draws on H. W. Perry, *Deciding to Decide* (Cambridge, MA: Harvard University Press, 1991), 295–298, and Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: Macmillan, 1928).

[3] Perry, *Deciding to Decide*, 296.

scholars, policy makers, and attorneys alike because the justices, although occasionally providing explanations for granting certiorari, typically issue a one-line order: "The petition for a writ of certiorari is denied."

Hopwood v. Texas (1996) is among the exceptions to the justices' general silence. There, the Court declined to hear an affirmative action case in which a lower court had essentially refused to follow the Supreme Court's doctrine laid down in *Bakke*. Perhaps because such action by a lower tribunal is so unusual, two justices felt compelled to explain why they voted to deny cert (Reading 7.1). Intriguingly, the Court waited nearly a decade after *Hopwood* before it jumped back into the fray over affirmative action. In a pair of cases it decided in 2004 (*Grutter v. Bollinger* and *Gratz v. Bollinger*), the Court held that universities may maintain affirmative action programs for the purpose of diversifying their student body so long as those programs are "holistic" and "individualized" in approach, and are not quota systems.

DECISIONS, OPINIONS, AND ORDERS

A judge's authority varies, depending on the particular level of the court and on whether the case is heard with or without a jury. But, even when the final decision is left to a jury, the judge's instructions to the jurors and rulings on what evidence they may or may not consider typically have great influence in determining the outcome of litigation.

The judge's capacity to command is made more palatable by the general assumption that judicial decisions are based on reason and knowledge of the law. Federal rules of procedure require judges of district courts to file findings of fact and conclusions of law to explain their decisions, and judges of appellate courts typically support their rulings with lengthy essays—opinions—justifying those decisions. Jurists have long recognized that carefully drafted explanations of their interpretations and applications of the law not only help demonstrate the correctness of particular decisions but can also increase their impact on public policy. John Marshall fully realized the potential of judicial opinions as instruments to achieve fundamental political goals. His opinions in *Marbury v. Madison* (1803) (first fully asserting judicial review), *McCulloch v. Maryland* (1819), and *Gibbons v. Ogden* (1824) (marking the constitutional expansion of federal power) stand among the most significant of American political writings.

Marshall was the original master of this technique, but many later judges such as Oliver Wendell Holmes, Louis D. Brandeis, Harlan Fiske Stone, and Robert H. Jackson have rivaled his persuasiveness, if not his authoritative voice. Judicial opinions can have a great impact not only on other jurists but also on public officials and even on national public opinion. Phrases like "one person, one vote" may become political slogans around which interest groups and political parties rally. Equally eloquent statements, such as this by Justice Jackson—"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

word or act their faith therein"—can encapsulate an entire political philosophy and set ideals for public policy.

The results of an opinion often come years, even decades, later. Dissenting in *Olmstead v. United States* (1928), Justice Louis D. Brandeis made an impassioned argument for a constitutional right to privacy, but his eloquent reasoning did not bear full fruit for thirty-seven years, when *Griswold v. Connecticut* (1965) so ruled. In the intervening decades, however, his ringing claim for recognition of privacy as "the most comprehensive of rights and the right most valued by civilized men" gnawed at the consciences of the justices and of the nation.

The compelling element in every judicial decision is the order, which terminates the proceeding and appears at the conclusion of the written opinion. Most litigation ends with a simple order that prescribes imprisonment for a period, imposes a fine, commands payment of a sum of money in settlement of a claim, terminates a marriage, or announces who owns a piece of property. On occasion, however, an order can be quite lengthy and complex—for example, a detailed set of instructions as to what specific steps public officials must take to end racial segregation in a school system or to provide proper care and medical treatment for inmates of state mental institutions. At the Supreme Court level, the order typically issued merely affirms or reverses a contested decision of a lower court and remands the case to the lower court for further proceedings in conformity with the Supreme Court's opinion.

THE INJUNCTION

As we suggested above, common-law judges in England invented a number of specialized orders, or writs (including certiorari), that were available to litigants for achieving particular purposes. Most of these writs, however, were adapted only to the settlement of disputes over money, property, or office. In many situations a case concerned not a past wrong that could be compensated for by monetary damages, but a continuing or potential source of injury that a complainant wanted to have stopped or prevented. Because writs at common law looked backward rather than forward, judicial intervention to control future action was not possible.

This gap was filled by courts of equity,[4] which developed a writ called an injunction: a command the court directed to named defendants forbidding them to perform certain specified acts. It may also take the form of a mandatory injunction commanding performance of specific acts. Under traditional rules of

[4] Historic English practice created a dichotomy between cases in law and cases in equity. In its early development the common law had gone through periods of extreme rigidity during which courts simply turned away would-be litigants if their suits could not be settled by issuance of certain specific technical writs. These litigants began appealing to the king for his personal justice. By the fourteenth century such petitions for grace were being referred to the king's chancellor for settlement. Out of this practice, courts of chancery, or equity, grew up alongside the courts of law. In the Judiciary Act of 1789, the first Congress made a major, perhaps revolutionary, reform in judicial administration by providing that federal courts would have jurisdiction both in law and equity, a practice now followed in almost all American states and even in England.

equity, to obtain an injunction a litigant must show that she or he has a real right at stake, is suffering or is about to suffer "irreparable injury," no action at law offers an adequate remedy (that is, the injury is of a type that cannot be compensated for by an award of money), and when "the equities are balanced," righting this wrong will outweigh any inconvenience or damage suffered by the defendant or the public at large.

The injunction fulfills a very important function for public policy, because it is the principal instrument available to private parties for testing the constitutionality or legality of official action or restraining other private parties from committing allegedly illegal acts. (Sometimes public officials also use injunctions to compel private citizens to comply with the law.) This writ may take one of three basic forms:

1. *Ex parte restraining orders* are issued at the request of a complainant, without hearing the opposing party; these simply maintain the status quo until the court can hold a full hearing.
2. *Temporary injunctions* are issued after both parties have been heard, but these writs control action only for a specified time, after which the situation will presumably have stabilized or no longer exist. At the end of that period, the court may consider a motion to dissolve the injunction, continue it for another set term, or make it permanent.
3. *Permanent injunctions* control acts into the indefinite future.

Although an injunction addresses named defendants, it binds not only those people but also their servants, agents, attorneys, and employees, as well as all other persons who, knowing the injunction is in effect, conspire with the defendants to violate it. If the defendant is a public official, the injunction runs against the office rather than the incumbent, thus binding his or her successors. The writ differs from a statute in that it does not bind all persons within a particular jurisdiction, only those people described above.

An important feature of an injunction is that the judge can draft a decree with specific provisions aimed to secure the goal that she or he believes equity requires. For example, in 1972 a federal judge in Mississippi issued an injunction aimed at ending discrimination against blacks in the hiring policies of the state highway patrol. The writ ordered the state to stop refusing to give employment applications to blacks, to withdraw a recruiting motion picture portraying an all-white patrol, to advertise vacancies thirty days in advance, and to make recruiting visits to black colleges. In 1974, three years after Judge Frank M. Johnson in Alabama had issued a similar order, that state had a larger percentage of blacks in its state police force than any other state in the nation.

In more recent years, detailed and specific injunctions against people protesting against abortion clinics have generated a good deal of controversy. In an effort to protect their workers and patients from both physical intimidation and moral arguments, operators of those clinics have often asked courts to enjoin pro-life advocates from engaging in certain activities near their facilities. The pro-life demonstrators have countered that such injunctions violate their First Amendment rights to freedom of speech and association. The Supreme Court attempted to resolve the issue in *Madsen v. Women's Health Center, Inc.*

(1994) (Reading 7.2) and *Schenck v. Pro-Choice Network of Western New York* (1997). In both cases, the majority upheld most, but not all, parts of the lower courts' injunctions.[5]

On the use of injunctions to halt efforts to persuade or even physically prevent women from going to abortion clinics, courts have received reinforcement from Congress. The Freedom of Access to Clinic Entrances Act of 1994 specifically authorizes judges to enjoin people threatening or intimidating "persons seeking to obtain or provide reproductive health services." In other instances, however, Congress has attempted to curtail the injunctive power. During the first few decades of the twentieth century, many federal judges were willing, indeed eager, to use injunctions to break strikes or block unions' efforts to organize workers. In response, Congress adopted in 1932 the Norris-LaGuardia Act, which largely withdrew jurisdiction from federal courts to issue injunctions in labor disputes. There was some initial question whether this statute imposed an unconstitutional limit on judicial discretion and perhaps also on the rights of businessmen. *Truax v. Corrigan* (1921) had seemed to say that employers had a constitutionally protected right to seek an injunction in a dispute with their workers, for in that case the Supreme Court invalidated a state statute prohibiting state courts from enjoining certain kinds of actions in labor disputes. But, in *Lauf v. E. G. Shinner and Co.* (1938), the Supreme Court sustained the Norris-LaGuardia Act as an exercise of congressional authority "to define and limit the jurisdiction of the inferior courts of the United States." Nevertheless, the Court has subsequently recaptured for federal judges a substantial measure of power to issue injunctions in labor disputes by narrowly interpreting the prohibitions of the Norris-LaGuardia Act or finding them in conflict with more recent congressional legislation. Moreover, in 1947, Congress enacted the Taft-Hartley Act, which authorized federal courts to issue injunctions against strikes imperiling the national health or safety. Such injunctions, however, cannot be sought by private parties. Only the attorney general of the United States can ask for the writ, and the order is limited to barring strikes during an eighty-day "cooling-off" period so that negotiations to end the dispute can proceed.

Injunctions and Positive Action

As many of these examples indicate, judges traditionally have issued injunctions to bar continuance of particular actions already begun or to prohibit acts not yet begun—forbidding, for instance, people from trying to dissuade or

[5] See Reading 7.2 for details on the injunction at issue in *Madsen*. The injunction in *Schenck* created a fixed buffer zone requiring anti-abortion protesters to stay at least fifteen feet away from clinic doors and driveways to ensure access to the building. It also imposed a floating buffer zone, banning protesters from coming within fifteen feet of people and vehicles entering and leaving the clinic. The justices upheld the fixed buffer zone as reasonable, but found that the floating buffer zone violated the First Amendment by burdening speech more than necessary to achieve relevant government interests. As in *Madsen*, Justices Scalia, Kennedy, and Thomas dissented, asserting that the fixed buffer zone as well as the floating zone should have been found to violate the First Amendment rights of the demonstrators.

threatening women seeking to obtain abortions. As prohibitions, injunctions are typically negative orders, with the purpose of maintaining the status quo or returning the parties in the suit to the relation that had existed before one of them had taken the injunction action.

In recent years, negative orders have continued, but many of the sorts of decrees involved in operating schools, jails, and hospitals or in redistricting states have required positive action—and not merely in the sense of demanding that officials undo some particular past wrong. These writs have also ordered officials to pursue indefinitely new and complicated public policies that judges think are necessary to achieve the ends of the constitutional system. *Wyatt v. Stickney* provides an example. In a widely publicized instance of judicial involvement, Federal District Judge Frank M. Johnson issued a precedent-setting order asserting the constitutional rights of patients committed to Alabama state hospitals "to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition." His order detailed minimum constitutional standards for treatment and accommodations and required human rights committees to monitor their enforcement. (Reading 7.3)

Such commands relegate vast power to judges and turn high governmental officers into subordinates. The impact of such injunctions on people not directly involved in the litigation also increases markedly. The state legislature, for instance, might be forced to raise taxes to finance the execution of a court's orders or to find the money by reducing the budgets of other agencies or by curtailing certain public services. For example, to comply with *Wyatt*, Alabama increased its spending on mental health from $14 million in 1971 to $58 million in 1973.[6]

One might cogently argue that, in cases that have spawned such sweeping decrees, judges have done no more than mandate policies that elected officials should have been—but were not—carrying out of their own free will. Judge Johnson made precisely that point in defending his orders regarding reform of the "barbaric and shocking" conditions in Alabama's mental hospitals.[7] But many others, including judges and serious scholars, have been troubled by the alleged specter of government by judiciary. As Donald L. Horowitz has put it: "When it comes to framing and modifying programs, administrators are far better situated [than judges] to see things whole, to obtain, process, and interpret complex or specialized data, to secure expert advice, to sense the need to change course, and to monitor performance after decision. Courts can limit the discretion of others, but they find it harder to exercise their own discretion where that involves choosing among multiple, competing alternatives."[8]

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[6] See Alfred M. Mamlet, "Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits," 33 *Emory Law Journal* 685 (1984).

[7] Frank M. Johnson, Jr., "The Role of the Judiciary with Respect to the Other Branches of Government," *John A. Sibley Lecture in Law*, University of Georgia, 1977.

[8] Donald L. Horowitz, "The Hazards of Judicial Guardianship," 37 *Public Administration Review* 148 (1977).

THE CONTEMPT POWER

The contempt power is one of the oldest of judicial weapons. Its purpose is to provide judges with the means to protect the dignity of their courts and to punish disobedience of their orders. There are distinctions between criminal and civil contempt, a distinction that, though often difficult to discern, is nonetheless important. The major difference relates to purpose. The aim of a charge of criminal contempt is to vindicate the dignity of the court, whereas an action for civil contempt tries to protect the rights of one of the litigants. The two types of action also differ as to procedure. In criminal cases, the judge or some other governmental official generally initiates prosecution; the usual presumption of innocence present in a criminal trial applies; and, to convict, the court must find the defendant guilty beyond a reasonable doubt. Civil contempt proceedings are commonly initiated by one of the parties to a suit, and the judge can decide the case on the preponderance of the evidence. Although the president may pardon a person found guilty of criminal contempt of a federal court, it is doubtful that he can pardon for civil contempt, at least when the offended party is a private citizen.

The most tangible difference between the two types of contempt action lies in the punishment meted out. Within limits set by legislatures, judges may impose fines or prison sentences for criminal contempt as in other criminal cases. Judges have the same option in civil cases, again within limits set by legislatures; but here their power is far more extensive. Because the object of a civil contempt action is to secure the rights of one of the parties, the sentence is normally conditional. The judge may, for example, sentence recalcitrants to be imprisoned until they agree to comply with the court's orders, a decision that, of course, could mean life imprisonment, a possibility that judges have recognized. The usual judicial response is that such prisoners carry the keys to their cells in their own pockets; they will be released as soon as they agree to obey the judge. Such an indeterminate sentence is usually more persuasive than a specific fine or short jail term.

The simplest kind of contempt issue is presented when an individual is disrespectful or disorderly in the courtroom. In this situation, the judge has traditionally had the power immediately and summarily, without notice, hearing, or representation by counsel, to charge, try, convict, and sentence the contemnor to jail for a specified term. If it is the defendant who is in contempt, his removal to jail would normally bring the trial to a halt. To prevent aborting the proceedings, judges have in some cases dealt with obstreperous defendants by chaining or gagging them in court and continuing the trial. In *Illinois v. Allen* (1970) the Supreme Court reluctantly approved such a practice. The justices, however, expressed preference for trial judges' using their traditional contempt power to punish disruptions. Furthermore, the Court held that, under extreme provocation, the judge could continue the trial after jailing the defendants without violating their constitutional rights. (Reading 7.4.) On the other hand, some judges have waited until after a trial, then charged, convicted, and sentenced offenders for contempt.

Judges may also hold in civil contempt those who refuse to testify or otherwise obstruct proceedings before a grand jury, if the prosecutor has obtained a judicial order requiring them to give evidence. Although imprisonment is

limited to the term of the grand jury, a determined prosecutor can repeat the process before the next grand jury and so keep recalcitrant witnesses in jail for long periods. The two most famous cases in recent memory both involved President William Jefferson Clinton, though only the first resulted in a jailing. Special Prosecutor Kenneth Starr repeatedly tried to get Susan McDougal, an old friend of the Clintons, to answer questions before a grand jury about the First Family's financial dealings in Arkansas. Just as doggedly she refused and spent eighteen months in prison for these refusals. Eventually she was tried and acquitted on charges of criminal contempt and obstruction of justice.

In the other case, the president himself was the contemnor. In August 1999, he gave oral testimony that was televised nationally and video taped for a grand jury. There, under oath, he denied having had sexual relations with a young White House aide, Monica Lewinsky, despite conclusive evidence in the form of semen stains, identified by DNA testing as his. Federal District Judge Susan Weber, one of the president's former students, found his denials to constitute perjury, held him guilty of civil contempt, and fined him. Nothing would have been gained by a jail sentence because the perjury was an accomplished fact. Besides, an order from a federal judge to imprison the president of the United States would have presented constitutional and practical problems as fascinating as they are complex. For instance, who could carry out the order? Federal marshals fall under the command of the executive department.

The contempt power raises similarly serious, if less salacious, problems when used to require journalists, subpoenaed by a grand jury, to give information concerning stories they have written. In *Branzburg v. Hayes* (1972), three reporters, one from Kentucky, one from Massachusetts, and one from New York, refused to testify on the ground that the First Amendment gives them immunity from being forced to reveal the sources of their stories or details of actions they had been allowed to witness under the condition that they would not make public the names of identities of participants. By a five-to-four vote the Supreme Court sustained the convictions. The majority saw no First Amendment problem and declined "to grant newsmen a testimonial privilege that other citizens do not enjoy." The dissenters were distraught: Justice Potter Stewart, who in his youth had worked as a reporter for a Cincinnati newspaper and also edited the *Yale Daily News* while in college, condemned the "Court's crabbed view of the First Amendment."

Predictably, the media reacted even more vehemently, with outpourings of condemnation of *Branzburg* and calls for federal and state statutes that would excuse reporters from revealing their sources or information they had promised not to publish. As a result of this pressure, twenty-six states (but not Congress) enacted "shield laws" allowing journalists to refuse to divulge information about certain news-gathering activities. But because these laws often limit protections to specific circumstances, they are not always particularly effective. Branzburg was from Kentucky, which already had a shield law on the books at the time of his conviction. Unfortunately for him, it covered only sources of information and not personal observation. In many states as well as in the federal system, journalists still face the threat of imprisonment if they refuse to answer questions pertaining to their stories.

THE WRIT OF HABEAS CORPUS

Another major instrument of judicial power is the writ of habeas corpus. Called by Blackstone "the great writ of liberty," it is an order from a judge directing a jailer or other official who has custody of a prisoner to bring that person to court so that the judge can determine the legality of his or her detention. Originally the purpose of habeas corpus was to protect the jurisdiction of the English common-law courts against encroachments by courts of chancery or by the Crown. Gradually, however, the purpose of the writ shifted to become the classic means of protecting individuals against unlawful imprisonment. The Habeas Corpus Act of 1679 established the writ as one of the fundamental rights of Englishmen, and American colonial practice generally accorded habeas corpus the same high standing. Article I of the constitutional text provides that the privilege of the writ may not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it."

As we saw in Chapter 3, modern American practice, while retaining habeas corpus as protection against executive authority, has also made it a means of tighter federal judicial control over state courts, usually through state prisoners' seeking another forum in which to challenge their convictions ("collateral review"). During the last few decades, however, the justices, in keeping with their efforts to curb access to federal courts, have limited the ability of state prisoners to use the writ to challenge their convictions.[9] In the Antiterrorism and Effective Death Penalty Act of 1996, Congress tried to further narrow the doors of federal courthouses to these prisoners as well as to immigrants subject to deportation. Somewhat surprisingly, given earlier attitudes, the justices have so far treated this statute rather warily, perhaps looking on it as an unwanted congressional intrusion into judicial business. And, as of late 2000, the total number of filings for habeas corpus in federal district courts had not dropped dramatically.

As a potential judicial weapon against executive power, habeas corpus poses a threat of intragovernmental conflict. On occasion the conflict has become a reality. In 1861, for instance, Chief Justice Roger Brooke Taney, sitting as a circuit court judge as the justices then did, ruled in *Ex parte Merryman* that only Congress, and not the president, could suspend the writ and ordered that a civilian prisoner, John Merryman, who had been arrested by the army, be brought into court. Lincoln met this challenge to his war power by ignoring the Chief Justice's order. Shortly thereafter, the president put a federal judge in the District of Columbia under virtual house arrest to prevent his hearing a different petition for habeas corpus. After the war, the full Supreme Court sustained Taney's doctrine in *Ex parte Milligan* (1866), but this decision could not undo the military rule that Lincoln had for years imposed on the border states. This experience was repeated almost exactly in World War II, when the Court invalidated the executive's suspension of habeas corpus in Hawaii only after the war

[9] Laurence H. Tribe summarizes the cases in *American Constitutional Law*, 3rd ed. (New York: Foundation Press, 2000), I, 501–518.

was over. It would thus appear, as Clinton Rossiter put it, that the fate of habeas corpus in times of emergency depends on what executives do and not on what judges say.[10]

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[10] Clinton Rossiter, *The Supreme Court and the Commander-in-Chief*. Expanded edition, with an introductory note and additional text by Richard P. Longaker (Ithaca, NY: Cornell University Press, 1976), 39.

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