DEFERENCE OR ABDICATION: A COMPARISON OF THE SUPREME COURTS OF ISRAEL AND THE UNITED STATES IN CASES INVOLVING REAL OR PERCEIVED THREATS TO NATIONAL SECURITY

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I. INTRODUCTION

The Supreme Courts of Israel and the United States treat cases involving national security radically differently, or so it appears on the surface. The Israeli Supreme Court, sitting as the High Court of Justice, often hears cases in real time while the cannons are proverbially booming,[1] whereas the United States Supreme Court typically hears cases, if at all, long after the actual event. The Israeli Supreme Court utilizes highly relaxed rules of standing in cases challenging unlawful governmental conduct, whereas the United States Supreme Court applies increasingly restrictive rules of standing, which sometimes permit unlawful governmental practices to go unchallenged. The Israeli Supreme Court summarily rejects the political question doctrine and treats challenges to the legality of military conduct as justiciable, whereas the United States Supreme Court typically declines to hear cases involving ongoing military actions. Additionally, the Israeli Supreme Court rarely utilizes a state secrets privilege, whereas the United States Supreme Court embraces the doctrine, which often immunizes illegal governmental action. The fact that the two courts make very different use of these justiciability doctrines dramatically affects their willingness to decide "war on terrorism" cases that challenge aspects of national security programs as violative of individual rights.

On the surface, the approaches of the two courts thus appear to be radically different, and indeed they are, at least with respect to their willingness to hear and decide cases in "real time" and in terms of their willingness to embrace and apply justiciability doctrines to cases involving national security. However, a more probing analysis of actual decisions and their impact on coordinate branches of government reveals surprising similarities. Despite major rhetorical differences, both courts uniformly employ a rule of reasonableness when it comes to second-guessing decisions of the military or decisions of the executive branch involving national security; both courts steadfastly exhibit considerable deference to coordinate branches of government and, with rare exceptions, both courts carefully craft decisions designed to maintain the status quo, particularly in times of real or perceived crisis. Despite profound differences in

1. The Israeli Supreme Court explicitly rejects the maxim "when the cannons roar, the muses are silent." Rather, according to Justice Barak, "It is when the cannons roar that we especially need the laws." HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*PCATI*) [Dec. 11, 2005] slip op. ¶ 61 (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

threshold justiciability issues, and despite significant differences in articulated philosophies of the judicial role, the divide between the two courts lessens substantially when it comes to analyzing actual decisions. But a real and important difference remains—the greater willingness of the Israeli courts to assert the power of judicial review, even in cases involving ongoing military action. This power serves as an indispensable check on the natural tendency of the political branches to overreact to real or perceived threats to national security and jettison long-valued civil liberties. The availability of judicial review in Israel sets its Supreme Court apart from its US counterpart in ways that ultimately help define the character of the nation.

This Article compares the United States and Israeli Supreme Courts' very different use of justiciability doctrines and then moves beyond those doctrines to explore the impact of actual decisions on policies undertaken in the name of national security. Part II describes the articulated philosophies of the two courts regarding the role of judicial review in cases involving national security. This part explores three justiciability doctrines—the political question doctrine, standing requirements, and the state secrets privilege—and compares the two courts' declared positions with respect to those doctrines in cases dealing with foreign affairs. It also analyzes the two courts' articulated philosophies regarding the scope of judicial review in cases implicating military decisions. Part III of the article moves away from the courts' rhetorical stances on questions of justiciability and judicial review and examines and compares decisions of the two courts in cases that pit national security against individual liberties. This part looks at cases challenging practices including targeted killings, torture, administrative detention, and other actions undertaken in the name of national security. Part IV concludes that (a) the two courts have the institutional capability to resolve challenges to national security policies; (b) adherence to non-justiciability doctrines like the political question doctrine amounts to an abdication of the judicial role; and (c) the availability of judicial review has an actual effect on governmental policy and military practice.

II. RHETORICAL PHILOSOPHIES OF THE SUPREME COURTS OF THE UNITED STATES AND ISRAEL REGARDING JUDICIAL REVIEW OF NATIONAL SECURITY CASES

A. The Political Question Doctrine

The political question doctrine is a doctrine of non-justiciability, whereby the courts refuse to hear a case on the ground that it represents a political question that is not appropriate for judicial review. It is a judicially created rule of self-restraint whereby the court declines to hear a case over which it possesses jurisdiction.[2] The doctrine represents a judgment by the Court that the political branches are better situated to resolve these issues.

The most explicit attempt by the United States Supreme Court to define what qualifies as a political question is found in *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[3]

While this may be the Court's clearest definition, it raises more questions than it resolves.[4] While it purports to create categories of political questions, each category is problematic. For example, the first category includes cases raising an issue that has been committed by the Constitution to another branch of government. But deciding whether an issue has been

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2. The political question doctrine is but one of many self-imposed rules of restraint signifying the court's understanding of its non-democratic character. Other such prudential doctrines are some aspects of standing (rules against third party standing, citizen standing, and taxpayer standing), and ripeness and mootness doctrines. *See generally* Baker v. Carr, 369 U.S. 186 (1962).

3. *Id*.

4. Not surprisingly, the doctrine has been described as an enigma with commentators disagreeing "about its wisdom and validity" and its "scope and rationale." Martin Redish, *Judicial Review and the 'Political Question,'* 79 NW. U. L. REV. 1031, 1031 (1985).

textually committed to a political branch itself requires constitutional interpretation.[5] The second category—cases lacking judicially discoverable and manageable standards—is equally problematic, because the Court often agrees to hear cases that arguably require technical expertise.[6] The remaining categories of political questions all share a common theme—avoiding the merits where there is a particular need for the country to speak in one voice, for example, in cases involving foreign affairs, or even more specifically, national security.[7] But the Court has

5. Powell v. McCormack, 395 U.S. 486, 519 (1969) is a notable example. The case arose when Adam Clayton Powell challenged the House of Representatives' decision not to seat him. *Id.* at 492–93. The question before the Supreme Court was whether his claim presented a nonjusticiable political question because Article I, Section 5 of the Constitution provides that "each House shall be the Judge of the . . . Qualifications of its own members." U.S. Const. art. I, § 5. On its face, that provision seemingly entrusts the issue to the House. However, the Court interpreted the phrase as limited by Article I, Section 2, which sets forth the qualifications of members of the House regarding age, citizenship, and residence. McCormack, 395 U.S. at 548. Since the House's decision not to seat Powell was based on alleged financial irregularities, and not on the basis of age, citizenship or residence, the Court found that the decision was not committed by the Constitution to Congress and was thus not a political question. In fact, the Court has rarely found an issue to be textually committed to another branch. The one issue that has been found to be entrusted to Congress is a claim under the Guaranty Clause, which has been found to preclude judicial review. Luther v. Borden, 48 U.S. 1 (1849). A striking example of the Court seemingly ignoring the political question doctrine is *Bush v. Gore*, 531 U.S. 98 (2000), where an argument certainly could have been made that the Constitution entrusts the issue to Congress. *See, e.g.*, Elizabeth Garrett, *Leaving the Decision to Congress*, *in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 38, 39 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Laurence Tribe, Comment, EROG v. HSUB *and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 178, 276–83 (2001); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 273–300 (2002).

6. Gilligan v. Morgan, 413 U.S. 1 (1973), highlights the problem. Parents of students killed in the Kent State tragedy brought a lawsuit alleging grossly inadequate training of the National Guard, which led to the death of the students. The Court dismissed the action because it posed a political question—a question beyond the Court's competence to resolve. The Court stated: "[Review] would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or authorities . . . [i]t would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed the requisite technical competence to do so." *Id.* at 8. Additionally, the Court held that the case would likely require the court's ongoing monitoring and supervision, which, pursuant to the political question doctrine, constitutes an unwarranted intrusion into the workings of the political branches. This result is hard to square with a multitude of cases involving the court in ongoing supervision, such as prison conditions cases and school desegregation cases. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992); Brown v. Plata, 131 S. Ct. 1910 (2011) (providing examples of prison conditions).

7. "[It] would have been unthinkable for the Supreme Court to intervene in the military strategy of American forces in Iraq or Afghanistan. . . . [A] strong commitment to separation of powers (manifested, in part, through the doctrines of justiciability or political questions), would have made any review of such operations highly improbable." Gabriella Blum, *Judicial Review of Counterterrorism Operations*, 47 JUSTICE, at 17, 19 (Spring 2010), *available at* http://www.intjewishlawyers.org/main/files/Justice_all11_3b-final.pdf (cited in Malvina Haberstam, *Judicial Review, A Comparative Perspective: Israel, Canada and the United States*, 311 CARDOZO L. REV. 2393, 2434 n.69 (2010)).

provided no criteria by which one can meaningfully assess whether the case is one requiring the country to speak in a single voice, and no clarity is provided when one looks at the case law.[8]

What arguments have been offered to justify this seemingly amorphous and ill-defined doctrine? One justification focuses on the institutional legitimacy of the court.[9] This view is associated with Alexander Bickel who argued in favor of the prudential use of the political question doctrine in order to avoid deciding difficult questions that could jeopardize the Court's fragile legitimacy.[10] Because the doctrine is so malleable, however, its use actually invites the very cynicism that its proponents seek to avoid.[11] Other justifications include a variety of separation of power concerns, most notably the classical view espoused by Herbert Wechsler that limits the doctrine to cases involving issues textually committed to another branch.[12] Other justifications include the difficulty of ensuring impartiality in decision-making when there are no legal principles to apply to the question presented[13] and the fact that the executive and legislative branches of government have ample means to protect themselves against encroachment without court involvement.[14]

Not all scholars believe that the doctrine reflects a sensible deference to the political branches of government. Opponents of the political question doctrine argue that it is inconsistent with the judicial role, which is to enforce the constitution and safeguard its guarantees from majority rule.[15] If the judicial role is to enforce the Constitution,[16] it is inappropriate not to

8. For example, in Dames & Moore v. Regan, 453 U.S. 654 (1981), a case involving an executive agreement suspending legal claims by American nationals against Iranian assets as part of the effort to free American hostages, the Court decided on the merits, although one might have thought that the issue would have been treated as a non-justiciable political question. *See* Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453 (2010). And, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court declined to dismiss the case as a nonjusticiable political question although the case certainly implicated weighty issues of foreign affairs.

9. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 69 (2d ed. 1986); Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 640 (1977); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 295–97 (1980).

10. BICKEL, *supra* note 9.

11. *See* Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

12. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6–9 (1959).

13. Lon F. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

14. CHOPER, *supra* note 9, at 275.

15. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 99–100 (1987); Redish, *supra* note 4.

16. Marbury v. Madison, 5 U.S. 137 (1803).

enforce it against the political branches. "Politically accountable bodies should not be entrusted to enforce any part of a document that is meant to restrain them."[17] Thus, opponents of the doctrine argue that its use confuses deference with abdication of the judicial role.[18]

Some scholars, most prominently Louis Henkin, argue that the doctrine has no independent existence and that cases citing the political question doctrine are actually explainable by reference to alternative legal doctrines.[19] Other scholars point to the "fall of the political question doctrine and the rise of judicial supremacy."[20] These scholars point to the infrequency with which the Supreme Court has invoked the doctrine to actually dismiss cases.[21] Yet, the fact remains that the doctrine has unquestionably resulted in the dismissal of countless national security cases in the lower courts, most notably with respect to cases challenging the use of torture, targeted killing, or extraordinary rendition. To date, the Supreme Court has denied certiorari in every one of these cases.[22]

An illustrative use of the political question doctrine in a national security case is *Al-Aulaqi v. Obama*.[23] Al-Aulaqi was a Muslim cleric with dual US-Yemeni citizenship who was in hiding in Yemen. Al-Aulaqi was designated as a Specially Designated Global Terrorist based on evidence that he acted for Al-Qaeda in the Arabian Peninsula ("AQAP") and provided support for acts of terrorism. He reportedly had taken on an increasingly operational role in AQAP, facilitated training camps in support of acts of terrorism, and made several public statements calling for

17. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 133 (3d ed. 2006).

18. *See* Redish, *supra* note 4.

19. Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 600–01 (1976).

20. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 237 (2002).

21. One recent example is Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012), where the Court rejected the argument that the action was barred by the political question doctrine. The case arose when the Secretary of State refused to list Israel as the place of birth on a passport of an American citizen born in Jerusalem. *Id.* at 1425–26. Petitioner's challenge was based on a federal statute, § 214 of the Foreign Relations Authorization Act, which explicitly directs the Secretary of State to record the birthplace as Israel. *Id.* at 1425.The issue in the case was whether that statute impermissibly infringes the President's power to recognize foreign sovereigns. *Id.* at 1428. The federal district court and the DC Court of Appeals had dismissed the case as a non-justiciable political question. *Id.* at 1427. The Supreme Court reversed, finding that the issue for the court was not to determine the political status of Jerusalem but rather to determine whether the legislative branch had impermissibly intruded upon presidential powers under the Constitution. *Id.* at 1428–30. When the constitutionality of federal statutes is at issue, it is "emphatically the province and duty of the judicial department to say what the law is." *Id*. at 1427–28 (citing Marbury v. Madison, 5 U.S. 137 (1803)).

22. *See infra* text accompanying notes 140–46.

23. 727 F. Supp. 2d 1 (D.D.C. 2010).

jihad against the west. Despite these activities, the United States has not charged him with any crime.[24]

The lawsuit was brought by Al-Aulaqi's father who claimed that the United States had authorized the targeted killing of his son by placing his name on a so-called "kill list" that is allegedly maintained by the Central Intelligence Agency ("CIA") and the Joint Special Operations Command. This allegation was supported by a number of media reports, including National Public Radio ("NPR") and The Washington Post, which in turn cited unnamed military officials.[25] Plaintiff's claim was that the US policy of authorizing the targeted killing of US citizens outside of armed conflict in circumstances that do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat violates the Fourth Amendment right to be free from unreasonable seizures and the Fifth Amendment right not to be deprived of life without due process of law.[26]

Unsurprisingly, the district court granted the government's motion to dismiss, finding a non-justiciable political question, because "any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would 'require this court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence.'"[27] However, "there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas."[28] The Court acknowledged the "somewhat unsettling nature of its conclusion—that there are circumstances in which the Executive's unilateral decision to kill a US citizen overseas is 'constitutionally committed to the political branches' and judicially unreviewable."[29] But, so be it. Yet that is precisely the result of the Court's application of the political question doctrine, which insulates a decision as momentous as targeting a US citizen for killing from any judicial review.

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24. *Id.* at 8–9. Anwar Al-Aulaqi was killed in a targeted drone attack in Yemen on September 30, 2011. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N. Y. TIMES, Oct. 1, 2011, at A1.

25. Al-Aulaqi, 727 F. Supp. 2d at 11.

26. *Id.* at 15.

27. *Id.* at 47 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 846 (D.C. Cir. 2010) (en banc).

28. *Id.* at 47.

29. *Id.* at 52.

Although firmly entrenched in US constitutional law, the political question doctrine has not been embraced by all constitutional courts. Israel, for example, has explicitly rejected the doctrine on the ground that it is inconsistent with the judicial role. Beginning in the 1980s, under the leadership of Justice Aharon Barak, the Israeli Supreme Court increasingly adjudicated challenges to military policy in the occupied territories.

Justice Barak has repeatedly distinguished between normative justiciability, which he rejects, and institutional justiciability, which he recognizes but rarely employs.[30] As to normative justiciability, Justice Barak explains:

> A claim of no normative justiciability proposes that there are no legal criteria for deciding a dispute that is before the court. . . . A claim of no normative justiciability has no legal basis in general because there is always a legal norm according to which a dispute may be decided, and the existence of a legal norm gives rise to the existence of legal criteria for it. Sometimes it is easy to recognize the norm and the criteria inherent in it and at other times it is difficult to do so. But ultimately a legal norm will always be found and legal criteria always exist.[31]

In contrast to normative justiciability, Israel does recognize a claim of no institutional justiciability, which asserts "that it is not fitting that a dispute should be decided . . . ."[32] This question asks whether it is desirable for a court to decide a dispute, not whether it is possible to do so. Although recognized in Israel, this doctrine has not been applied to cases alleging a violation of human rights.[33] Thus, the Supreme Court has decided thousands of cases involving claims by inhabitants of the occupied territories[34] including cases challenging the legality of settlements,[35] cases

30. HCJ 910/86 Ressler v. Minister of Defence 42 P.D. (2) 441 [1988] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf; HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. ¶ 48.

31. *PCATI*, slip op. ¶ 48.

32. *Id.*

33. *Id.* ¶ 50.

34. *Id.* ¶ 52.

35. *See, e.g.*, HCJ 606/78 Awib v. Minister of Defence, IsrSC 33(2) 113, 124 [1979] (Isr.) ("I was not impressed by this argument at all. . . . It is clear that in matters of foreign policy, like in several other matters, the decision is made by political authorities and not by the judiciary. But on the assumption . . . that a person's property has been harmed or taken away from him unlawfully, it is difficult to believe that the court will refuse to hear that person because his right may be the subject of political negotiations."); HCJ 390/79 Dawikat v. Gov't of Israel, IsrSC 34(1) 1, 15 [1980] ("A military government that wishes to violate the property rights of the individual should show a legal basis for doing so, and it cannot avoid judicial scrutiny of its actions by claiming non-justiciability").

challenging the legality of the separation fence,[36] cases challenging a policy of targeted killing,[37] cases considering the rights of inhabitants in Gaza to basic necessities during combat activities,[38] and cases determining the rights of local inhabitants when terrorists are arrested.[39] Justice Barak explains:

> [I]t was determined that the Court does not refrain from judicial review merely because the military commander acts outside Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiciable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. "Security considerations" or "military necessity" are not magic words. . . . This is appropriate from the point of view of protection of human rights.[40]

An illustrative example of Justice Barak's refusal to apply institutional non-justiciability to a case alleging human rights violations is the targeted killings case, which stands in sharp contrast to the non-justiciability of this issue in US courts.[41] In *Public Committee against Torture v. Government of Israel*, petitioners argued that the government's policy of targeted killings violated international law. The government argued that the case was not institutionally justiciable because "the predominant character of the matter is not legal and *judicial restraint* requires the court neither to enter the battlefield nor to consider the purely operational activities taking place on the battlefield."[42] Justice Barak rejected the government's argument and described four limitations on the use of the institutional non-justiciability doctrine. First, the doctrine "does not apply where

36. *See, e.g.*, HCJ 7957/04 Mara'abe v. Prime Minister of Israel (2) IsrLR 106 [2005] (Isr.), *available at* http://www.unhcr.org/refworld/pdfid/4374aa674.pdf; HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807 [2004] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf.

37. *PCATI*, slip op. ¶ 50 ("The petition before us seeks to determine what is permitted and what prohibited in military operations that may violate the most basic of human rights, the right to life. The doctrine of institutional non-justiciability cannot prevent an examination of this question.").

38. HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 58(5) PD 385 [2004] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/640/047/A03/04047640.a03.pdf.

39. HCJ 3799/02 Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Cent. Commander (2) IsrLR 206 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/990/037/A32/02037990.a32.pdf.

40. Mara'abe, (2) IsrLR 106, ¶ 31 (internal quotations omitted).

41. *Compare* HCJ 769/02 *PCATI with* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

42. *PCATI*, slip op. ¶ 47.

recognizing it would prevent an examination of a violation of human rights."[43] Second, the doctrine does not apply when the question before the court is predominantly a legal question as opposed to a policy decision, and that remains true even when the decision is likely to have political and military ramifications.[44] Third, the doctrine has no applicability in cases that involve questions that are justiciable in international courts.[45] Finally, the doctrine does not apply to judicial scrutiny of a retrospective investigation of military operations.[46]

The most graphic illustrations of the Court's rejection of the political question doctrine arise when the Court is asked to resolve challenges to military practices in real time. In one case, the Court was asked to order the Israeli Defense Forces ("IDF") to provide water and food to Palestinians during a siege at the Church of the Nativity in Bethlehem while negotiations were underway.[47] In *Almandi v. Minister of Defense*, the Court found the case to be justiciable, declaring that even during battle, the laws of war must be followed:

> The foundation of this approach is not only the pragmatic consequence of a political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the aggression of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law and exploit its violation. The war against terror is also the law's war against those who rise up against it. Moreover, the State of Israel is founded on Jewish and democratic values. We established a state that upholds the law—it fulfills its national goals, long the vision of its generations, while upholding human rights and ensuring human dignity. Between these—the vision and the law—there lies only harmony, not conflict.[48]

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43. *Id.* ¶ 50.
44. *Id.* ¶ 51.
45. *Id.* ¶ 53.
46. *Id.* ¶ 54.
47. HCJ 3451/02 Almandi v. Minister of Defense 56(3) IsrSC 30 [2002] (Isr.). IDF forces entered Bethlehem as part of "Operation Defensive Wall," designed to prevent the recurrence of terror attacks. Between thirty and forty wanted Palestinian terrorists broke into the Church of the Nativity, along with Palestinian security forces and civilians. The IDF surrounded the church and requested the Palestinians to leave. Some did, including the wounded and some clergy. Food and water were provided for the clergy. The sole issue in the case related to food assistance to the remaining Palestinians in the basilica. *Id.* ¶¶ 1–6.
48. *Id.* ¶ 9.

Perhaps the most dramatic illustrations of Israel's rejection of the political question doctrine are cases that challenge the government's decision to release Palestinian prisoners. In *Mishlat v. Prime Minister* and *Almagor v. Government of Israel*, organizations representing families of victims of terrorism sued to prevent the release of hundreds of Palestinian prisoners and detainees.[49] In both cases the Court affirmed the government's decision using a reasonableness standard. However, the very fact that the court would find such a question to be justiciable is remarkable, particularly because the decision to release the prisoners was part of a long range diplomatic strategy aimed at strengthening the legitimacy of the Palestinian Authority and ultimately resolving the Israeli-Palestinian conflict.[50]

These cases demonstrate the willingness of the Israeli Supreme Court to hear national security cases, even in "real time" and even in the midst of ongoing political negotiations. This stands in sharp contrast to the ease with which US courts apply the political question doctrine to find even far less politically sensitive national security cases nonjusticiable.[51]

B. Standing Doctrine

Standing requirements are rooted in Article III of the United States Constitution, which has been interpreted to require the plaintiff to establish an actual or imminent injury, causation, and redressability.[52] Since these are considered a part of the case or controversy requirement in Article III, the parties cannot waive them. In addition to the constitutional standing requirements, the Court has also established prudential rules of self-restraint, which reflect the Court's appreciation of its non-democratic character. Thus, as a general proposition, one party cannot assert the rights of another,[53] a party cannot assert a mere generalized grievance shared by

49. HCJ1539/05 Mishlat—Legal Research Institute for Study of Terror and Aid for its Victims v. Prime Minister of Israel [Feb. 17, 2005] (unpublished decision), *available at* http://www.icrc .org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/424c96854593fd2fc12575bc0042c8d7!OpenDocument ;HCJ 1671/05 Almagor v. Government of Israel 49(5) PD 913 [2005] (Isr.).

50. *Id.*

51. For a discussion of the two courts' use of similar considerations in applying the political question doctrine in the years prior to the mid-1970s, see YAACOV S. ZEMACH, POLITICAL QUESTIONS IN THE COURTS: A JURIDICAL FUNCTION IN DEMOCRACIES ISRAEL AND THE UNITED STATES 175–210 (1976).

52. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737 (1984).

53. Warth v. Seldin, 422 U.S. 490 (1975).

all,[54] and a plaintiff must be within the zone of interest protected by the challenged statute.[55]

These rules often immunize allegedly unlawful governmental activity from judicial scrutiny. In fact, the standing doctrine may mean that no one has standing to challenge governmental action. The Court acknowledged as much in *United States v. Richardson*:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[56]

In other words, the remedy to challenge unlawful governmental activity when judicial review is foreclosed is the political remedy: to vote the offenders out of office.

Once again, the targeted killing case presents a graphic example of how this justiciability doctrine has been used to dismiss national security cases. In *Al-Aulaqi v. Obama*, as previously described, the father of an individual whose name was placed on a "kill list" challenged the proposed targeted killing of his son.[57] The Court considered various bases for standing, rejecting all of them. Specifically, the Court rejected "next friend" standing for two reasons. First, the father had not adequately explained the inability of his son to appear on his own behalf—the fact that he was in hiding under threat of death was insufficient. Second, the father failed to establish that he was acting in accordance with the wishes or intent of his son since he presented no evidence that his son wanted to vindicate his constitutional rights through the US judicial system.[58] The Court also rejected third party standing because the father's assertion that the government's decision to target his son for killing constituted a harm to the father was insufficient to establish an Article III injury.[59]

In sharp contrast to the United States' strict standing requirements, the Israeli Supreme Court has dramatically liberalized its rules of standing. In doing so, Justice Barak has noted that different philosophies regarding

54. *Id.* at 499.
55. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).
56. United States v. Richardson, 418 U.S. 166, 179 (1974).
57. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010).
58. *Id.* at 8–14.
59. *Id.* at 15–25.

standing reflect different philosophies regarding "the role of judicial review in public law, and the role of the judge in a democratic society."[60]

Israel currently recognizes "public petitioner" standing when the case involves a matter of particular public importance.[61] This loosening of the standing requirements has been characterized as revolutionary[62] and effectively abolishing standing.[63] Indeed, in a case challenging the legality of an order issued by the West Bank military commander to detain security suspects, Justice Barak stated, "Not only may the detainee himself appeal to the Court, but his family may also do so. Furthermore, under our approach to the issue of standing, any person or organization interested in the fate of the detainee may also do so."[64] Thus, the vast majority of cases brought to challenge military practices in the occupied territories have been brought by NGOs, oftentimes based on news accounts of military actions. While some have sharply criticized this practice,[65] the Court defends its relaxed standing rules by arguing that "[c]losing this Court's doors before the petitioner without an interest, who sounds the alarm concerning an unlawful government action, does damage to the rule of law. Access to the courts is the cornerstone of the rule of law."[66]

C. State Secrets Privilege

In the US, the state secrets doctrine has two aspects: the Totten bar and the Reynolds privilege.[67] The Totten bar precludes judicial scrutiny entirely, which means its application results in the dismissal of the action at the initial stage of litigation. The Reynolds privilege is an evidentiary privilege that results in the exclusion of specific evidence, which may or may not result in the dismissal of the claim.

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60. HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441 [1988] (Isr.).

61. *Id.* ¶ 22.

62. Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L. & COMP. L. REV. 617, 665 n.154 (1999).

63. Gerald Gunther, *A Model Judicial Biography*, 97 MICH. L. REV. 2117, 2126 n.32 (1999) (reviewing PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY (1997)).

64. HCJ 3239/02 Marab v. IDF Commander in the West Bank slip op. ¶ 46 [July 28, 2002] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/390/032/A04/02032390.A04.pdf.

65. *See, e.g.*, Blum, *supra* note 7, at 2413. Indeed, legislation has been introduced in Israel that would prohibit NGOs from filing petitions in the High Court of Justice unless they are properly registered in Israel with a Certificate of Proper Management and not receiving funding from a foreign government. *Id.* at 2440 n.88.

66. HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441, ¶ 22 [1988].

67. *See* Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1905–06 (2011); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010), *cert denied* 131 S. Ct. 2442 (2011).

The Totten bar is based on an 1876 case, *Totten v United States*,[68] where the estate of a Civil War spy sued the United States for not paying him for his espionage activities. The claim was dismissed because it was based on the existence of a contract for secret services with the government, which was a fact that could not be disclosed. The Totten bar was applied a century later by the Supreme Court in *Weinberger v. Catholic Action of Hawaii*,[69] which was a suit under the National Environmental Act to compel the Navy to prepare an environmental impact statement for a military facility, where the Navy was allegedly planning to store nuclear weapons. The claim was dismissed because "[d]ue to national security reasons . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons" at the facility.[70] The Supreme Court applied the Totten bar in 2005 in *Tenet v. Doe*,[71] where two Cold War spies claimed that the CIA had failed to pay them for espionage services. The claim was dismissed because the government could not even reveal the existence of the relationship between the plaintiffs and the government.[72] Most recently, the Court applied the Totten bar in *General Dynamics Corp. v. United States*, where a government contractor sued the United States for terminating a contract to develop stealth aircraft.[73] In dismissing the case, the Court cautioned, "In *Reynolds*, we warned that the state secrets evidentiary privilege 'is not to be lightly invoked.' Courts should be even more hesitant to declare a Government contract unenforceable because of state secrets. It is the option of last resort, available in a very narrow set of circumstances."[74]

The second aspect or form of the state secrets doctrine is the Reynolds privilege, defined as a well-established principle in the law of evidence that provides "a privilege against revealing military or state secrets."[75] Unlike the Totten bar, the assertion of this privilege removes the privileged evidence from the litigation but does not necessarily bar the lawsuit.

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68. 92 U.S. 105 (1876).
69. 454 U.S. 139 (1981).
70. *Id.* at 146–47.
71. 544 U.S. 1 (2005).
72. *Id.* at 8–10.
73. General Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011).
74. *Id.* at 1910 (internal citations omitted). The Court applied the state secrets doctrine to dismiss the case but explained that "our decision today clarifies the consequences of its use only where it precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment." *Id.*
75. United States v. Reynolds, 345 U.S. 1, 6–7 (1953).

The Reynolds privilege derives its name from a 1953 torts case entitled *United States v. Reynolds*.[76] Plaintiffs were the estates of three civilian observers killed in a crash of a military aircraft carrying secret electronic equipment. Plaintiffs sought production of the Air Force's accident report and the statements of three surviving crewmembers. The Air Force refused to produce the materials, citing national security. The district court ordered the material disclosed for in camera review, and when the government refused, the Court sanctioned the government by establishing the facts on plaintiffs' negligence case in plaintiffs' favor. On appeal, the Supreme Court reversed and sustained the government's assertion of privilege because "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."[77] The Court also said that the district court should not have required production of the documents for in camera inspection.[78]

The state secrets doctrine has been repeatedly invoked in the post 9/11 world and has prevented challenges to various anti-terrorism policies from being heard. Most torture cases and cases challenging extraordinary rendition have been dismissed at the pleading stage due to this doctrine.[79] One example is *Mohamed v. Jeppesen Dataplan, Inc*.[80] As described more fully below, the Ninth Circuit held that permitting a case challenging extraordinary rendition to go forward would create an unjustifiable risk of disclosing state secrets and would unjustifiably harm legitimate national security interests. The Court said "the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable."[81] Ironically, the Court explained that it could not explain that result with more specificity because that too would entail revealing state secrets.[82]

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76. 345 U.S. 1 (1953).

77. *Id.* at 10.

78. *Id.* at 10–11.

79. *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011); *see also* Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010). The *Ashcroft* Court refused to recognize a *Bivens* claim on behalf of a non-citizen because "absent clear congressional authorization, the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country's foreign policy." Ashcroft, 585 F.3d at 576.

80. 614 F.3d 1070 (9th Cir. 2010).

81. *Id.* at 1089.

82. *Id*. The Court did explain that, given the public acknowledgement of the program, it was not holding that the existence of the extraordinary rendition program was a state secret. Rather, the specifics of the program remain a state secret. *Id.* at 1090.

Israel approaches the state secrets doctrine differently. Its so-called national security privilege does not work as an absolute privilege, but rather requires balancing.[83] Israel's rejection of an absolute privilege reflects Israel's starting point, which is that cases challenging the infringement of human rights are justiciable, even when the government asserts national security interests. So the Israeli courts are more likely to use in camera review to assess the validity of an asserted national security interest.[84] One example is *Public Committee against Torture in Israel v. Israel*,[85] where the Supreme Court heard the challenge to Israel's use of coercive interrogation techniques despite the government's claim of national security concerns. The Court said it would not allow the privilege to "consign [Israel's] fight against terrorism to the twilight shadows of the law."[86]

D. Scope of Judicial Review

In those rare cases where the United States Supreme Court has not invoked one of the justiciability doctrines to preclude judicial review of national security cases, the scope of that review is typically quite deferential. Consider, for example, *Holder v. Humanitarian Law*,[87] the Court's first post 9/11 First Amendment case, where the Court exhibited unprecedented deference to the government, despite purporting to apply strict scrutiny to a content-based speech restriction.[88] The case concerned the constitutionality, as applied, of a statute that prohibited providing

83. Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOKLYN L. REV. 201, 245 (2009).

84. *Id.* at 248.

85. HCJ 5100/94 Public Committee Against Torture v. Government of Israel 53(4) PD 817 [1999] (Isr.), *available at* http://www.law.yale.edu/documents/pdf/Public_Committee_Against_Torture.pdf (unofficial version).

86. *Id.* ¶ 40.

87. 130 S. Ct. 2705 (2010).

88. *Id.* at 2711. The Holder court's willingness to defer to the political branches in a case involving a content-based speech restriction stands in sharp contrast to the Court's vigorous review of a prior restraint in the Vietnam War era. In *New York Times v. United States*, 403 U.S. 713 (1971), the Court employed a heavy presumption against the constitutional validity of a prior restraint, placing a heavy burden of justification on the government. Six members of the court, each writing separately, found that the government had failed to meet its burden despite claims that the release of the Pentagon Papers would jeopardize national security, undermine alliances abroad, impair the ability of diplomats to negotiate, prolong the war, and endanger the lives of soldiers. *Id.* at 762–63. Justice Black wrote "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Id.* at 719. One way to reconcile *Holder* and the Pentagon Papers case is to note that in *Holder*, the Court was reviewing not just executive action but legislative authorization, whereas in *New York Times*, the court was reviewing executive power that had not been authorized by Congress.

material support to a terrorist organization. The question in the case focused on the statute's applicability to lawful, non-violent forms of assistance, such as training members of the organization to use humanitarian and international law to resolve disputes and teaching members to petition bodies like the United Nations for relief. In upholding the statute's applicability to those forms of assistance, the majority accepted at face value the government's assertion that legal, non-violent support actually assists terrorist activities because money is fungible and because such activities add legitimacy to the organization. "That evaluation of the facts by the Executive, like Congress' assessment, is entitled to deference."[89] Although the Court paid lip service to the notion that "concerns of national security and foreign relations do not warrant abdication of the judicial role,"[90] it nevertheless concluded that "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked' and respect for the Government's conclusions is appropriate."[91] The Court elaborated:

> One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.[92]
>
> . . . .
>
> The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.[93]

In the Guantanamo cases, however, the Court was less willing to permit the political branches to paint with such a broad brush. In each case,[94] the Court rejected the government's call for sweeping, unchecked authority, asserting the power of judicial review to evaluate the detainee's constitutional claims:

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89. Holder, 130 S. Ct. at 2727.

90. *Id.*

91. *Id.* (citing Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

92. *Id*.

93. *Id*. at 2728. The Holder court cites Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations, . . . Congress . . . must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

94. Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[95]

Yet, despite handing stunning defeats to the administration in each of the Guantanamo cases, the Court nevertheless exhibited restraint in proscribing the circumstances attendant to indefinite detention and the procedures that must be afforded detainees challenging their enemy combatant status. The Court acknowledged that "[in] considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."[96] However, "[s]ecurity 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."[97]

An example of the Court refusing to grant carte blanche to the government while also exhibiting considerable deference to the government is *Hamdi v. Rumsfeld*, where the Court held that an American citizen apprehended abroad must be afforded due process. But the Court did not detail precisely what due process requires beyond notice and an opportunity to rebut before a neutral fact finder.[98] Instead, the Court deferred to the executive branch and stated that "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[99]

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95. Hamdi v. Rumsfeld, 542 U.S. at 536.
96. Boumediene v. Bush, 553 U.S. at 796.
97. *Id.* at 797.
98. Hamdi v. Rumsfeld, 542 U.S. at 533.
99. *Id.* Thus, the executive branch could permit the use of hearsay or rebuttable presumptions or burden shifting. The Court stated:

> Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

Id. at 533–34.

Similarly, in *Boumediene v. Bush*, the Court held that detainees at Guantanamo have the constitutional right to petition for habeas relief and that the procedures contained in the Detainee Treatment Act of 2005 do not constitute an adequate substitute for habeas corpus.[100] The Court refused, however, to delineate what procedures habeas demands: "We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus."[101]

Thus, the Guantanamo cases illustrate the Court's willingness to assert the power of judicial review to issues of detention of suspected terrorists but to simultaneously decline to be prescriptive in terms of what the Constitution demands.

The level of deference exhibited by the United States Supreme Court is roughly comparable or somewhat higher than the deference extended by the Israeli Supreme Court. Justice Barak repeatedly distinguishes legal questions, over which the Court has preeminent expertise, from military questions, over which the executive branch has the professional security expertise. Thus, the Court determines whether the executive understood the law correctly, not whether the executive understood the law in a reasonable manner.[102] But having determined what the law is, the Court then asks whether "the decision of the military commander falls within the zone of reasonable activity on the part of the military commander. If the answer is yes, the Court will not exchange the military commander's security discretion with the security discretion of the court."[103]

A study of cases brought by Palestinians against the Military Commander in the period 1990–2005 reveals a dramatic decline in the level of deference shown to the military commander.[104] The authors of that study posit that this is due to the prolonged nature of the conflict. "The longer the armed conflict lasts, the more the Court is exposed to cases of poor judgment and unnecessary infringement of rights by the commander, which leads to a deterioration of trust, and as a result, diminished

100. Although *Boumediene* was seen as a serious setback for the Bush administration, it actually left many important issues unresolved including whether the holding would apply at Bagram, what procedures would constitute an adequate substitute for habeas, and the reach of the writ to claims of unlawful treatment or confinement.

101. Boumediene v. Bush, 553 U.S. at 779.

102. HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. ¶ 56.

103. *Id.* ¶ 57.

104. *See* Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 LAW & SOC. INQUIRY 919 (2010).

deference."[105] A second possible explanation may be the "ascent of human rights discourse" and proportionality analysis within the Israeli legal system.[106]

In virtually all of the national security cases it has heard, the Court consistently explained:

> The mere fact that the action is called for on the military level does not mean that it is lawful on the legal level. Indeed, we do not substitute the discretion of the military commander, regarding military considerations. That is his expertise. We examine their results on the humanitarian law level. That is our expertise.[107]

Thus, in a case questioning the route of the separation fence, Justice Barak stated:

> The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise.[108]

Similarly, in a case involving the forced relocation of individuals from the West Bank to the Gaza Strip, the Court stated:

> In exercising judicial review, we do not turn ourselves into experts in security affairs. We do not substitute the security considerations

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105. *Id.* at 948–49. The authors go on to explain:

> This is not to suggest that the Court necessarily developed mistrust in the integrity of the military personnel, but rather that the Court has been willing to look closer at cases it would, under acute emergencies, have only given short shrift, and upon such closer look, the balance of security considerations and the protection of human rights reached by the commander appears off kilter enough to warrant judicial pressure for a settlement more favorable to the petitioner. The data appear to be more consistent with this hypothesis than with any other.

Id. at 949.

106. *Id.* at 953.

107. HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 58(5) PD 385, 393 [2004].

108. HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807, ¶ 48 [2004]. The Court further stated:

> We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours—to the extent that we have an opinion regarding the military character of the route. So we act in all questions which are matters of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander would have set out the route as this military commander did.

Id. ¶ 46.

> of the military commander with our own security considerations. We take no position regarding the way security affairs are run. Our task is to guard the borders and to maintain the boundaries of the military commander's discretion. . . . It is true, that "the security of the state" is not a "magic word" which makes judicial review disappear. Thus, we shall not be deterred from reviewing the decisions of the military commander . . . simply because of the important security considerations anchoring his decision. However, we shall not substitute the discretion of the commander with our own discretion. We shall check the legality of the discretion of the military commander and ensure that his decisions fall within the "zone of reasonableness."[109]

The Israeli Supreme Court displays considerable deference when reviewing the constitutionality of an act of the Knesset, although this reflects concerns about separation of powers as much as about relative levels of expertise. Thus, in *Iyyad v. State of Israel*, where members of Hezbollah operating in the Gaza Strip challenged the constitutionality of the Internment of Unlawful Combatants Law, the Court determined that the law fell within the margins of proportionality. The Court stated:

> The court will not be quick to intervene and set aside a provision of statute enacted by the legislature. The court should uphold the law as an expression of the will of the people. This is an expression of the principle of separation of powers: the legislative authority determines the measures that should be taken in order to achieve public goals, whereas the judicial authority examines whether those measures violate basic rights in contravention of the conditions provided for this purpose in the Basic Law. It is the legislature that determines national policy and formulates it in statute, whereas the court scrutinizes the constitutionality of the legislation to discover to what extent it violates constitutional human rights. It has therefore been held in the case law of this court that when we examine the legislation from the Knesset from the perspective of the limitations clause, the court will act "with judicial restraint, caution

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109. HCJ 7015/02 Ajuri v. IDF Commander in West Bank [Sept. 3, 2002] slip op. ¶ 30 (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf. The same approach was taken in the targeted killing case. Justice Barak stated "The question is not what I would decide in the given circumstances, rather whether the decision that the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security." HCJ 769/02 *PCATI* [Dec. 11, 2005] slip op. ¶ 57.

> and moderation." The court will not refrain from constitutional scrutiny of legislation, but it will act with care and exercise its constitutional scrutiny in order to protect human rights within the restrictions of the limitations clause, while refraining from reformulating the policy that the legislature saw fit to adopt. Thus the delicate balance between majority rule and the principle of the separation of powers on the one hand and the protection of the basic values of the legal system and human rights on the other will be maintained.[110]

As this brief survey indicates, both courts exhibit considerable deference to the political branches and display a real reticence when it comes to straightjacketing the executive. As the next section indicates, even when the court rules against the government, it does so in ways that show respect for the coordinate branches of government and that permit those branches to fine tune their policies within the broad parameters set forth by the court.

III. "WAR ON TERRORISM" CASES OF THE SUPREME COURTS OF THE UNITED STATES AND ISRAEL

A. Targeted Killing

The targeted killing cases present the clearest example of how the two court systems differ. In the United States, the issue of targeted killing has been found to be non-justiciable, whereas in Israel, the challenge was heard and resolved on the merits.

As described in Part I above, the United States' targeted killing policy was challenged in *Al-Aulaqi v. Obama*.[111] The father of an American citizen on the targeted killing list argued that the US policy of authorizing the targeted killing of US citizens outside of armed conflict in circumstances that do not present concrete, specific and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat violates his Fourth and Fifth Amendment rights.[112] Plaintiff's attorney explained, "the central proposition of [this challenge] was that the courts have a role

110. CrimA (TA) 6659/06 A v. State of Israel, 47 I.L.M. 768, 771 [2008] (Isr.).

111. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

112. *Id.* at 12. Anwar al-Aulaqi was killed in a targeted drone attack in Yemen on September 30, 2011. Mark Mazzetti et al., *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N. Y. TIMES, Oct. 1, 2011, at A1.

to play in articulating the standards under which lethal force is used and in ensuring that the government actually complies with those standards."[113] The Court rejected this proposition and granted the government's motion to dismiss because the case presented a non-justiciable political question and because petitioner lacked standing.

In contrast, the Israeli Supreme Court found the issue to be justiciable and addressed the merits of the lawfulness of Israel's targeted killing policy. The government adopted the policy after the outbreak of the second intifada in 2000, which resulted in 1000 Israelis being killed and thousands more injured, with the Palestinians suffering the same rate of casualties and injuries.[114] Pursuant to the policy, Israeli defense forces targeted those who planned, ordered, or carried out terrorist activities against Israel. The articulated purpose of the policy was to prevent terrorist activities before they occurred. The policy resulted in the deaths of approximately 300 operatives and 150 civilians near the locations of the targets, plus injuries to hundreds of others.[115]

The legality of the targeted killings policy was challenged in *Public Committee against Torture in Israel v. Government of Israel*.[116] Finding the case justiciable and utilizing international law, the Court concluded that targeted killings are neither always permitted nor always prohibited. International customary law establishes the governing rule structure: civilians are not protected from being attacked for such time as they are taking a direct part in hostilities.[117] But that principle itself requires interpretation. What does "take part in hostilities" mean? How do we distinguish taking a direct part from taking an indirect part? What does "at that time" mean?

The Court defined the term "take part in hostilities" to mean all those acts that by their nature and purpose are intended to cause harm to armed forces or civilians.[118] This includes using weapons, collecting intelligence, and preparing for hostilities.[119]

The Court next attempted to distinguish taking a "direct part" from taking an "indirect part" and conceded that the difference is rather murky. Examples of the former include collecting information about the armed

113. Jameel Jaffer, *Targeted Killing and the Courts: A Response to Alan Dershowitz*, 37 WM. MITCHELL L. REV. 5315, 5317 (2011).
114. *PCATI*, slip op. ¶ 1.
115. *Id.*
116. *Id.* ¶ 60.
117. *Id.* ¶ 19.
118. *Id.* ¶ 33.
119. *Id.*

forces, leading unlawful combatants to where the hostilities are being carried out, or operating weapons being used by unlawful combatants or supervising their operation.[120] Examples of the latter include supplying food or medicine, providing general strategic analysis, supplying logistical support such as money, and disseminating propaganda.[121] What about the driver of a vehicle carrying ammunition? The Court concludes that that activity would be treated as taking a direct part in hostilities if the ammunition was being transported to the place where it will be used to carry out the hostilities. What about those who act as a human shield? They would be treated as taking a direct part in hostilities so long as they were acting voluntarily. What about the higher-ups who plan the attack or send others to carry it out? They would clearly be included.[122]

Next, the Court explored the meaning of the term "for such time." The civilian loses protection from being attacked only "for such time" as he/she is taking a part in hostilities.[123] This too is a murky area requiring case-by-case resolution, unless the case falls within one of two extremes. At one extreme is a civilian who takes a direct part in hostilities once and then severs all ties. Such a civilian is easily entitled to protection.[124] On the opposite end of the spectrum is a civilian who joins a terrorist organization and carries out a series of attacks. The civilian is not entitled to protection in between operations.[125] In between these extremes "lie the grey areas" which require case-by-case decision-making.[126]

In order to resolve cases falling within this grey area, the court announced four conditions that must be met to establish the legality of a targeted killing.[127] First, there must be reliable information that the civilian is taking a direct part in hostilities with a heavy burden of proof resting on the government. Second, if capture and arrest is possible, it is required because a trial is clearly preferable to the use of force. Third, after the attack, the government must conduct a thorough and independent investigation to verify the identity of the person attacked and to verify the circumstances of the attack. Fourth, any harm to innocent civilians must satisfy the principle of proportionality.[128]

120. *Id.* ¶¶ 34, 35.
121. *Id.*
122. *Id.* ¶¶ 35–37.
123. *Id.* ¶ 39.
124. *Id.* ¶ 40.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

Proportionality is determined using an ethical test that seeks a balance between military advantage and harm to civilians:

> A balance should be struck between the duty of the state to protect the lives of its soldiers and civilians and its duty to protect the lives of innocent civilians who are harmed when targeting terrorists. This balance is a difficult one, because it concerns human life. It gives rise to moral and ethical problems. But despite the difficulty, the balance must be struck.[129]

Proportionality presents a legal question, although one without precise criteria. The court's task is to determine whether the executive branch has acted within the limits of the margin of proportionality. While the executive has discretion when acting within those limits, it is the court's duty to act as the guardian of those limits.[130]

Thus, the upshot of the decision is to permit targeted killings when the civilian is taking a direct part in hostilities, provided that there is no less harmful alternative, and provided further that innocents in the vicinity are not harmed or, if they are, that the principle of proportionality is satisfied.

This case is a good example of the Israeli Supreme Court's willingness to address the legality of a military policy on the merits while at the same time crafting a decision that leaves the executive branch with considerable discretion.

B. Torture

The torture cases present another good example of the differences between the two Supreme Courts. In the United States, no torture case has been found to be justiciable.[131] Instead, the courts have relied on the state secrets privilege to dismiss challenges to the use of torture and have thus refused to address the merits of the legality of torture under either domestic or international law.

The United States admits to the use of "extraordinary rendition" described as "outsourcing torture"[132] whereby terrorism suspects are sent to a foreign state for the purpose of subjecting them to methods of interrogation that are illegal in the United States. Extraordinary rendition

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129. *Id.* ¶ 46.
130. *Id.* ¶ 58.
131. *Supra* note 146.
132. Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14, 2005, at 106.

started in the mid 90s, but after 9/11 "went out of control."[133] Although it is impossible to know the actual number of individuals subject to extraordinary rendition, 150 people have been thought to be rendered since 9/11.[134]

One of those people was Binyam Mohamed, who was arrested in Pakistan, flown to Morocco, transferred to American custody and flown to Afghanistan where he was detained in a CIA "dark prison."[135] He and four others who had also been subject to extraordinary rendition sued Jeppesen Dataplan, a US company, which allegedly "played an integral role in the forced abduction" by providing flight planning and logistical support services to the aircraft and crew.[136] The complaint alleged that the plaintiffs suffered horrific torture in "black site prisons" in Afghanistan, Egypt and Morocco.[137] The district court dismissed the suit finding that "at the core of Plaintiffs' case against Defendant Jeppesen are 'allegations' of covert US military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret."[138] A three judge panel of the 9th Circuit reversed, calling into question the use of the state secret doctrine to cover the entire subject matter of the litigation. The Court explained:

> At base, the government argues here that state secrets form the subject matter of a lawsuit, and therefore require dismissal, any time a complaint contains allegations, the truth or falsity of which has been classified as secret by a government official. The district court agreed, dismissing the case exclusively because it "involves 'allegations' about [secret] conduct by the CIA." This sweeping characterization of the "very subject matter" bar has no logical limit-it would apply equally to suits by U.S. citizens, not just foreign nationals; and to secret conduct committed on U.S. soil, not just abroad. According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law.

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133. *Id.* at 145.
134. *Id.* at 138.
135. Mohamed v. Jeppeson Dataplan, Inc., 614 F.3d 1070, 1074 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).
136. *Id.* at 1075.
137. *Id.* at 1074–75.
138. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008).

> We reject this interpretation of the "very subject matter" concept, not only because it is unsupported by the case law, but because it forces an unnecessary zero-sum decision between the Judiciary's constitutional duty "to say what the law is," and the Executive's constitutional duty "to preserve the national security." We simply need not place the "co-equal branches of the Government" on an all-or-nothing "collision course."[139]

The Ninth Circuit, sitting en banc, reversed, finding that the state secrets doctrine required dismissal of the action, and the Supreme Court denied cert.[140]

This is not the first time the federal courts have declined to address the merits of allegations of torture. The Supreme Court denied cert in the highly publicized case involving Maher Arar, an innocent Canadian who was sent to Syria to be tortured,[141] and again in the case of Khaled El-Masri, a German citizen of Lebanese descent sent to an Afghanistan prison to be tortured.[142] The Second Circuit had dismissed Arar's case, rejecting a Bivens claim in the context of extraordinary rendition because "it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation."[143] The Fourth Circuit had dismissed El-Masri's claim, based on the state secrets doctrine, explaining that even though there has been public disclosure of the practice of extraordinary rendition, "the public information does not include the facts that are central to litigating his action. Rather, those central facts—the CIA means and methods that form the subject matter of El-Masri's claim—remain state secrets."[144] The Court rejected El-Masri's request for in camera viewing of the secret information in lieu of dismissal finding that the Supreme Court had expressly foreclosed that remedy in *United States v. Reynolds*. The Court explained, "*Reynolds* plainly held that when 'the occasion for the privilege is appropriate . . . the court should not jeopardize the security

139. Mohamed v. Dataplan, Inc., 579 F.3d 943, 955 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010) (internal quotations omitted).

140. Mohamed v, Jeppeson Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

141. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

142. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

143. Ashcroft, 585 F.3d at 565.

144. El-Masri, 479 F.3d at 311.

which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'"[145] Thus, in cases alleging torture, the federal courts have refused to address the merits and the Supreme Court has denied cert.[146]

In sharp contrast, the Supreme Court of Israel has ruled that torture is illegal under both Israeli domestic law and international law.[147] In reaching this result, the Court noted that "the interrogation practices of the police in a given regime are indicative of a regime's very character."[148]

In *Public Committee against Torture in Israel v. State of Israel*, the Supreme Court was confronted with the question of the legality of specific interrogation methods including shaking, use of the Shabach method,[149] requiring detainees to crouch on their toes for five minutes, painful cuffing, covering the detainee's head, intentional sleep deprivation, and loud music. The Court concluded that each of these methods was prohibited under international and domestic law, both of which prohibit torture, cruel and inhuman treatment, and degrading conduct. These are absolute prohibitions, permitting no balancing or exceptions.[150]

In concluding that each of the challenged methods of interrogation was unlawful, the Court noted the tension between two competing values: the need to uncover the truth in order to protect society and the need to protect the dignity and liberty of individuals. Balancing those conflicting values produces "rules for a reasonable interrogation."[151]

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145. *Id.* at 311 (citing United States v. Reynolds, 345 U.S. 1, 10 (1053)). This aspect of Reynolds has come under criticism. At a March 24, 2011 conference at Fordham Law School entitled "The State Secrets Privilege and Access to Justice: What is the Proper Balance," the two judges on the panel expressed the view that the judicial role cannot be fully exercised without judicial review of the allegedly privileged material. Both judges took the position that there must be careful in camera review in order to evaluate the government's contention that the specified materials contain sensitive state secrets. Hon. Robert D Sack & Hon. John D. Bates, Panel Discussion, *The State Secrets Privilege and Access to Justice: What is the Proper Balance?*, 80 FORDHAM L. REV. 1 (2011), *available at* http://fordhamlawreview.org/assets/pdfs/Vol_80/Reed_October.pdf.

146. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009), *cert denied*, 130 S.Ct. 3409 (2010); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007). For cases refusing to recognize a cause of action for damages against soldiers or others in the chain of command for abusive interrogation, see Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2011) (en banc); Lebron v. Runsfeld, 670 F3d. 540 (4th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.D.C. 2012); Ali v. Rumsfeld, 649 F.3d 762 (D.D.C. 2011).

147. HCJ 5100/94 Pub. Comm. Against Torture v. Gov't of Israel 53(4) PD 817 [1999], *available at* http://www.law.yale.edu/documents/pdf/Public_Committee_Against_Torture.pdf (unofficial version).

148. *Id.* ¶ 22.

149. The Shabach method means cuffing the prisoner to a low chair, covering his head with a sack, and playing loud music. *Id.* ¶ 21.

150. *Id.* ¶ 23.

151. *Id.* ¶ 22.

The State relied on the ticking bomb argument, contending that the justification and necessity defense authorizes the interrogation practices. The Court rejected that argument, distinguishing between the offensive and defensive use of the doctrine. GSS officers may avail themselves of the defense if they are criminally prosecuted. But, the issue in this case did not involve the defensive use of the doctrine. Rather, the issue before the Court was whether the necessity defense ex ante authorizes the methods. The Court explicitly held that the doctrine does not define a code of normative behavior and that the principle of necessity cannot serve as a basis of authority.[152] Authorization must come from the legislature. The Court did not decide whether the legislature could or should authorize physical means of interrogation, but it did point out that if such legislation is passed, it must "befit the values of the State of Israel, [be] enacted for a proper purpose, and infringe the suspect's liberty to an extent no greater than required."[153]

As to how the Court's decision would affect the state's ability to prevent acts of terrorism, the Court said:

> We are aware that this decision does not make it easier to deal with [the difficult reality in which Israel finds herself]. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.[154]

The decision is explicitly self-conscious and reveals the Court's appreciation of the tension between national security and individual rights:

> Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that

152. *Id.* ¶¶ 33–38.

153. HCJ 5100/94 Pub. Comm. Against Torture, ¶ 39 (citing Basic Law: Human Dignity & Liberty).

154. *Id.* ¶ 39.

> this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us. We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. Therefore, in deciding the law, we must act according to our purest conscience.[155]

While this decision unquestionably declares the challenged interrogation practices unlawful, it stops short of saying that the state could not authorize the practices. No such legislation has been enacted, which is not surprising given the Court's strong indication that both international and domestic law prohibits such methods.

C. Detention

The United States Supreme Court has heard several cases in the post 9/11 world, raising questions concerning the constitutionality of the executive's indefinite detention of enemy combatants, the constitutionality of military tribunals, and the constitutionality of the suspension of habeas corpus. As described in Part I, the Court has found these cases to be justiciable and has addressed the merits, ruling in each case against the government but stopping short of detailing the procedures that must be followed.

The first of the Guantanamo cases was *Rasul v. Bush*, where the Court ruled, on statutory grounds, that Guantanamo detainees had the right to challenge their detention in federal court.[156] That same year, in *Hamdi v. Rumsfeld*, the Court held that Congress had authorized the detention of enemy combatants when it passed the Authorization for the Use of Military Force, but that individuals so detained in the United States must be afforded due process.[157] In determining how much process is due, the Court rejected the government's argument that, given the extraordinary interests at stake, the Court should defer to the military. The Court responded as follows:

> We necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot

155. *Id.* ¶ 40.
156. Rasul v. Bush, 542 U.S. 466 (2004).
157. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

> be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[158]

In order to determine how much process is due, the Court used the familiar *Mathews v. Eldridge* three part balancing test, which weighs the plaintiff's interests, the government's interests, and the risk of erroneous deprivations.[159] The Court found that the plaintiff's interests were substantial—"the most elemental of liberty interests—the interest of being free from physical detention;" the government's interests were weighty; and the risk of erroneous determinations was substantial and real.[160] The Court stated:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[161]

The Court thus held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker."[162] But the Court stopped short of prescribing the details of the hearing. Indeed, the Court noted that the proceedings "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[163] Thus, "exigencies of the circumstances" may warrant the

158. *Id.* at 535–36.
159. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
160. Hamdi, 542 U.S. at 529.
161. *Id.* at 532.
162. *Id.* at 533.
163. *Id.*

admissibility of hearsay and the use of presumptions in favor of the government's evidence so long as the detainee retained the opportunity to rebut that evidence.[164]

Among the most historic of the Guantanamo cases was the Court's decision in *Hamdan v. Rumsfeld*, which challenged the constitutionality of military tribunals.[165] In a decision that has been compared to Nixon's defeat in the Watergate tapes case and Truman's defeat in the steel seizure case,[166] the Court held that the military tribunals created by presidential order were not authorized by Congress and violated the Uniform Code of Military Justice and the Geneva Conventions.[167] Article 3 of the Geneva Conventions requires humane treatment of captured combatants and prohibits trials except by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."[168] The military tribunals were inconsistent with Article 3 because the detainee was not entitled to see the evidence; hearsay evidence and evidence obtained through coercion was admissible; and a two-thirds vote was sufficient for conviction.[169]

The Court also held that the Detainee Treatment Act, which purported to strip the federal courts of jurisdiction to entertain habeas corpus petitions by Guantanamo detainees, applied only prospectively and thus did not prevent the Court from hearing Hamdan's challenge.[170] In response, Congress enacted the Military Commissions Act of 2006, which denies habeas to all non-citizens held as enemy combatants.[171] The constitutionality of that Act was challenged in *Boumediene v. Bush*.[172] The Supreme Court originally denied certiorari, leaving the D.C. Circuit's decision upholding the Military Commissions Act intact. But after

164. *Id.* at 534.

165. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

166. *See* Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 20, 2006, at A1 (comparing *Hamdan* to United States v. Richard M. Nixon, 418 U.S. 683 (1974) and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). Ms. Greenhouse described *Hamdan* "as a sweeping and categorical defeat for the administration" and "a defining moment in the ever-shifting balance of power among branches of government." Walter Dellinger, a former Solicitor General, characterized *Hamdan* as "simply the most important decision on presidential power and the rule of law ever. Ever." Walter Dellinger, *The Most Important decision on Presidential Power Ever*, SLATE (June 29, 2006), http://www.slate.com/id/2144476/entry/2144825/.

167. Hamdan, 548 U.S. at 594, 613–24.

168. *Id.* at 631–32.

169. *Id.* at 634.

170. *See id.* at 576–84.

171. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

172. Boumediene v. Bush, 553 U.S. 723 (2008).

revelations about the tribunals operating as kangaroo courts, the Court took the unusual step of reconsidering and agreed to decide the question of whether Section 7 of the Military Commissions Act is an unconstitutional suspension of habeas corpus.[173]

The Court rejected the government's argument that the case presented a non-justiciable political question. Citing *Marbury v. Madison*,[174] the Court forcefully stated:

> Our basic charter cannot be contracted away like this. . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."[175]

Turning to the merits, the Court first decided that constitutional rights extend to those held in Guantanamo and rejected the government's argument that the Constitution stops where de jure sovereignty ends, finding that the United States has complete jurisdiction and control over Guantanamo and thus exercises de facto sovereignty. A sovereignty-based test would create serious separation of powers problems because "surrendering formal sovereignty over an unincorporated territory" while retaining total control over the territory would permit "the political branches to govern without legal constraint."[176]

The Court next decided that the Suspension Clause of Article I, Section 9, Clause 2, which prohibits the suspension of habeas corpus except "in cases of rebellion or invasion," has full effect at Guantanamo[177] and that

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173. Benjamin Wittes & Hannah Neprash, *The Story of the Guantanamo Cases: Habeas Corpus, the Reach of the Court, and the War on Terror*, *in* CONSTITUTIONAL LAW STORIES 513, 548 (Michael C. Dorf ed., 2d ed. 2009).

174. Marbury v. Madison, 5 U.S. 137, 177 (1803).

175. Boumediene, 553 U.S. at 765.

176. *Id.* at 764–65.

177. *Id.* at 771, 832. The Court analyzed three factors in reaching this decision: "(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." *Id.* at 766. Applying those factors, the Court found: (1) the detainees' status is in dispute and they are only able to contest via a Combatant Status Review Tribunal offering very limited protections; (2) the site of detention is technically outside US sovereignty but within US control; and (3) while habeas proceedings "may require an expenditure of funds" and "may divert the attention of military

the alternative procedures contained in the Detainee Treatment Act do not provide an adequate substitute for habeas corpus.[178] The defects in the alternative procedure included lack of assistance of counsel, constraints upon the detainee's ability to rebut the factual basis for the government's assertion that he is an enemy combatant, the admission of hearsay evidence, and the limited scope of circuit court review.[179] In reaching this result, the Court stopped short of prescribing what due process requires but was quite clear in rejecting the government's argument about the need to defer to the political branches when it comes to determining the availability of habeas corpus:

> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.[180]

The Court concluded its opinion by noting, "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."[181] In other words, the Constitution must be complied with, even during the war on terrorism.

Cases challenging the detention of terrorism suspects have also reached the Israeli Supreme Court. Two of those cases resulted from Operation Defensive Wall, which began in March 2002 in response to a dramatic escalation of terrorist activities originating in the West Bank.[182] Israeli

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personnel," "the Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claim." *Id.* at 766–69.

178. *Id.* at 792.

179. *Id.* at 783–92.

180. *Id.* at 797.

181. *Id.* at 798.

182. *See* HCJ 3278/02 The Center for Defense of the Individual v. Commander of the IDF Forces

defense forces arrested and detained 6000 Palestinians in the West Bank.[183] The detainees were originally held in temporary detention facilities with those suspected of more serious offenses transferred to Ofer Camp for more intensive interrogation. Their detention resulted in two judgments of the Supreme Court: one relating to conditions at the detention facilities and the other addressing the length of detention without interrogation, court hearing, or access to legal counsel.[184]

In *The Center for Defense of the Individual v. Commander of the IDF Forces in the West Bank*, petitioners challenged the conditions at the two camps.[185] At the temporary camp, detainees were forced to sit on the ground in uncomfortable positions for long periods of time with their hands roughly handcuffed and their eyes covered. The detainees were exposed to the weather and unable to sleep, deprived of sustenance, not regularly allowed to go to the bathroom, and subject to physical and verbal abuse if they moved.[186] The state conceded that these temporary facilities were inadequate to handle the number of detainees and that the use of handcuffs and abuse constituted prohibited conduct.[187]

Detainees suspected of serious offenses were brought to Camp Ofer after interrogation at the temporary camp. Conditions at Camp Ofer included overcrowding, tents that did not protect against the weather, insufficient mattresses and blankets, inadequate food and clothing, inadequate bathroom facilities, no hot water, and no medical treatment except painkillers.[188] The state conceded that the conditions at Camp Ofer were inadequate but argued that all the problems had been resolved by the construction of new shelters and detention centers.[189]

The Court applied the humanitarian principles of customary international law[190] and the Fourth Geneva Convention,[191] as well as the

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in the West Bank [2002] slip op. (Isr.), *available at* http://www.hamoked.org/items/1030_eng.pdf (unofficial version). "Approximately one hundred and twenty Israeli civilians were killed and hundreds were wounded." *Id.* ¶ 1.

183. *Id.* ¶ 2.

184. *Id.*

185. *Id.* ¶¶ 2, 3.

186. *Id.* ¶ 3.

187. *Id.* ¶¶ 6, 7.

188. *Id.* ¶ 4.

189. *Id.* ¶¶ 9–11.

190. *See id.* ¶ 23. The Court also relied on Article 10 of the 1966 International Covenant on Civil and Political Rights, which reflects customary international law, and which requires that detainees be treated humanely and in recognition of their human dignity, a requirement followed by Israel. *Id.* ¶ 24.

191. *See id.* ¶ 23. The Fourth Geneva Convention contains both general directives regarding humane treatment and specific directives regarding conditions of confinement applicable to detainees. The Convention requires that "detention conditions must preserve the health and personal hygiene of

principles of domestic administrative law, which require the army to act reasonably and proportionately. The principles of international law that require treating prisoners with human dignity and with respect apply to Israel's treatment of detainees:

> Any person in Israel who has been sentenced to imprisonment, or lawfully detained, is entitled to be held under humane and civilized conditions. It is not significant that this right has yet to be explicitly stated in legislation; this is one of the fundamental human rights, and in a law-abiding democratic state it is so self-evident that it needs not be written or legislated.[192]

Although "the nature of detention necessitates the denial of liberty" it "does not justify the violation of human dignity":

> Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody? Such is the duty of the commander of the area under international law, and such is his duty under our administrative law. Such is the duty of the Israeli government, in accord with its fundamental character: Jewish, democratic and humane.[193]

The Court ultimately concluded that the conditions at the temporary camp failed to meet the minimal standards required by both international law and domestic administrative law.[194] The violations included: rough handcuffing, keeping detainees outside and exposed to weather, inadequate access to bathrooms, and not documenting confiscated possessions.[195] The Court found that these conditions were not justified by exigencies since the operation was planned well in advance. The Court reached the same conclusion with respect to conditions at Camp Ofer. The

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detainees," protect them from weather, be properly lit and heated, provide sufficiently spacious and ventilated sleeping areas (one detainee to a bed), have clean and hygienic bathrooms with soap and water and access to showers, provide daily nourishment and drinking water, allow detainees to prepare their own food, provide clothing, provide unlimited access to medical care and "medical inspections at least once a month," offer at least one hour of physical exercise, and provide for the return of all belongings taken. *Id.* ¶ 25 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28 [hereinafter Geneva Convention]).

192. HCJ 3278/02 The Center for Defense of the Individual slip op., ¶ 24.

193. *Id.* ¶ 24.

194. *Id.* ¶ 26.

195. *Id.*

level of overcrowding at this facility was violative of the minimal standards required by law.[196] It was only at the third stage of detention that the Court found the conditions not only met but exceeded legal requirements with two minor exceptions. The first failure related to the lack of tables for meals ("detainees are not animals and should not be forced to eat on the ground")[197] and the second related to the failure to provide books, newspapers, and games.[198]

Despite these findings, the Court denied the petitions. A reader of the judgment cannot help but be struck by the seeming anomaly of finding violations of law yet denying relief. Apparently, the explanation is that by the time of the judgment, conditions had improved substantially; thus, relief was no longer warranted. As Part IV of this Article argues, this may well be an example of the usefulness and importance of judicial review. In other words, the willingness of the Court to hear the case may well prompt remedial action that would not otherwise occur.

The second of the two detention cases involving Operation Defensive Wall, *Marab v. IDF Commander in the West Bank*, challenged the order by which thousands of detainees were held without judicial proceedings.[199] Order 1500 authorized detention for up to eighteen days without a judicial order and without the opportunity to see a lawyer.[200] Even after the expiration of the eighteen day period, a detainee could be denied a lawyer upon a determination that "such is necessary for the security of the area or for the benefit of the investigation."[201]

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196. *Id.*

197. *Id.* ¶ 28.

198. *Id.* The Court renewed a recommendation made in a previous case for the establishment of a permanent advisory committee to conduct regular inspections. The committee would be chaired by a senior military judge and consist of experts in medicine, psychology, and prison management. The Court requests "that this recommendation be brought to the attention of the military's Chief of Staff. We are confident that he will act to ensure its implementation." *Id.* ¶ 29 (alteration in original) (citation omitted). The creation of this tribunal, however, would not obviate the necessity for judicial review. "[C]onstant supervision and inspection are not substitutes for detainee petitions and judicial review. These other options are available to detainees in Israel." *Id.* However, creation of a tribunal could provide a mechanism for alternative relief "which would justify limiting the judicial review of this Court to those cases where the situation has not been resolved through these other methods." *Id.* ¶ 30.

199. HCJ 3239/02 Marab v. IDF Commander in the West Bank slip op. [July 28, 2002] (Isr.). Prior to Operation Defensive Wall, existing military law allowed for a person to be detained for up to eight days without appearing before a judge. *Id.* ¶ 29.

200. *Id.* ¶ 3.

201. *Id.* Order 1500 was extended by Order 1505, which shortened the period of detention from eighteen to twelve days and shortened the period in which the detainee cold be prevented from seeing a lawyer from eighteen days to four, although the head of investigation could approve extensions of fifteen days. *Id.* ¶ 6. Many detainees were not brought before a judge even after the expiration of the eighteen day period. An additional order was issued, Order 1502, providing that such detainees should be brought before a judge as soon as possible and no later than May 10, and any detainee not brought

Petitioner argued that the challenged order violated both domestic and international law. The order was inconsistent with Basic Law, Human Dignity and Liberty because it permitted "mass detentions without the individual examination," without clear grounds, and without judicial review.[202] The order was inconsistent with international humanitarian and human rights law because, although the Covenant on Civil and Political Rights and the Geneva Convention recognize regular criminal and preventive detention, they do not recognize "prolonged mass detention for the purpose of screening the detainees."[203]

The state argued that its military operation had been planned in great haste and that the General Security Service could not have been prepared for the overwhelming number of detainees resulting from Operation Defensive Wall. The state pointed to the difficulty in distinguishing terrorists from civilians and of the need to prohibit meetings with lawyers in order to prevent messages from being passed.[204] The state urged the Court to withhold any decision until it could hear classified data describing the objective constraints that led to the issuance of the challenged orders.[205]

The Court separately analyzed four distinct issues, ruling for the state on two claims and for petitioner on the remaining claims, but staying its order for six months on the claims on which petitioner prevailed.

The first issue concerned the authority to detain. The Court concluded that both domestic and international law recognize the authority to detain so long as the detention is for investigative purposes, the detaining authority has an evidentiary basis to believe the detainee endangers public security, and the detention represents a balance between national security and the liberty of the individual.[206] Finding these requirements satisfied, primarily because the challenged orders require cause before an individual can be detained, the Court rejected petitioner's claim that the military commander had no authority to detain. [207]

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before a judge by that time would be released. *Id.* ¶ 4. Order 1518 further shortened the period during which meetings with lawyers could be prevented from four to two days and provided the detainee an "opportunity to voice his claims 'no later than within four days of his detention.'" *Id.* ¶ 17.

202. *Id.* ¶ 8.

203. *Id.* ¶¶ 8–9.

204. *Id.* ¶¶ 11–12.

205. *Id.* ¶ 17.

206. *Id.* ¶¶ 18–21. Article 9.1 of the International Covenant on Civil and Political Rights provides "No one shall be subjected to arbitrary arrest or detention." Israeli law is consistent with international law on this issue: "Man's inherent liberty is at the foundation of the Jewish and democratic values of the State of Israel." *Id.* ¶¶ 19–20.

207. *Id.* ¶ 23

The Court also ruled against the petitioners on their challenge to being prevented from meeting with their lawyers for periods of up to thirty-four days.[208] This result is hard to square with the Court's analysis of the "normative framework" provided under both domestic and international law, which supports the principle that detainees and attorneys should be able to meet, a principle that "stems from every person's right to personal liberty."[209] While the right is not absolute, it can only be prevented when required by "significant security considerations," and "advancing the investigation is not a sufficient reason to prevent the meeting."[210] Rather, "'[t]he focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented'" as, for example, where "there is suspicion that 'the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility.'"[211] Without explanation, the Court nevertheless concludes that "there are no flaws" in the challenged orders, preventing detainees from meeting with lawyers for over a month.[212]

Petitioners fared better on their claim relating to detention without judicial intervention. Under the challenged orders, some detainees had been held for forty-two days without being brought before a judge. "Judicial review is the line of defense for liberty, and it must be preserved beyond all else."[213] "Judicial intervention . . . is essential to the principle of rule of law. It guarantees the preservation of the delicate balance between individual liberty and public safety . . . ."[214] The Court relied on customary international law, which establishes the general principle that detainees should promptly be brought before a judge.[215]

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208. *See id.* ¶¶ 39–40. Order 1500 imposed an eighteen-day waiting period which could be extended for fifteen days, thus totaling delays of up to thirty-three days. Order 1505 shortened the original waiting period to four days but permitted two extensions for fifteen days each, thus totaling delays of up to thirty-four days. Order 1518 reduced the initial period to two days but permitted two extensions of fifteen days each, thus totaling delays of thirty-two days. *Id.* ¶¶ 38–40.

209. *Id.* ¶ 43. The Covenant on Civil and Political Rights does not contain an explicit provision, but Principle 18.1 requires a detainee to be able to communicate and consult with legal counsel subject to exceptional circumstances "to maintain security and good order." *Id.* ¶ 41. The Fourth Geneva Convention also does not explicitly deal with meetings with a lawyer although Article 113 talks about the detaining authority permitting execution of documents by allowing detainees to consult with a lawyer subject to security needs. *Id.* ¶ 42.

210. *Id.* ¶ 45.

211. *Id.* (quoting HCJ 4965/94 Kahalani v. Minister of Police (unreported decision) (Isr.)).

212. *Id.* ¶ 45.

213. *Id.* ¶ 26 (quoting HCJ 2320/98 El-Amla v. IDF Commander in Judea and Samaria 52(3) PD 346, 350 [1998] (Isr.)).

214. *Id.* ¶ 26.

215. *Id.* ¶ 27.

In determining whether a detention without judicial intervention for eighteen (or twelve) days is legal, "the special circumstances of the detention must be taken into account."[216] The question is "where a detainee is in a detention facility which allows for carrying out the initial investigation, what is the timeframe available to investigators for carrying out the initial investigation without judicial intervention?"[217] The Court concluded that eighteen (and twelve) days is too long and fails to comport with both international and domestic law:

> The accepted approach is that judicial review is an integral part of the detention process. Judicial review is not "external" to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not "appeal" his detention before a judge. Appearing before a judge is an "internal" part of the detention process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.[218]

Having found that the challenged orders providing for an eighteen or twelve day detention period without judicial review are unlawful, the Court nevertheless refuses to proscribe a substitute time. Instead, exhibiting its consistent pattern of not substituting its judgment for that of the ground commanders, the Court calls on the military commander to establish a substitute period and stays its decision for six months to permit "the reorganization required by both international and internal law."[219]

Petitioners met the same fate with respect to the last claim challenging detentions without investigations. Order 1500 authorized detention without investigation for eight days, although a subsequent order shortened this period to four days. The Court rejected the state's argument that given the number of detainees, it simply did not have enough investigators to do this more quickly. "A society which desires both security and individual liberty must pay the price. The mere lack of

216. *Id.* ¶ 30.
217. *Id.*
218. *Id.* ¶ 32.
219. *Id.* ¶ 36.

investigators cannot justify neglecting to investigate."[220] However, this portion of the decision was also stayed for six months to enable the state to make substitute arrangements in conformity with international and Israeli law.[221]

This decision reflects a recurring pattern in a surprising number of Israeli Supreme Court terrorism decisions. The opinion, like many others, emphasizes the importance of judicial review and contains almost reverential reference to the dictates of international law, which require protection of human rights and which correspond to the basic values of Israel's democracy. That language, however, is typically followed by either "petition denied" or, when the petition is granted, a stay of the decision for a substantial period of time. Upon closer examination, the "petition denied" cases are often cases where the party has already received most of the requested relief. This practice of denying the petition after ensuring that relief has been granted has been referred to as "favorable dismissals."[222]

The Supreme Court has also heard challenges to the administrative detention of specific individuals. In *A v. Commander of IDF Forces in Judea and Samaria*, a member of Hamas who had been arrested on his way to commit a suicide bombing was detained for four years.[223] He petitioned the Supreme Court for release and argued that his continued detention was based on dated intelligence information.[224] The Court emphasized that administrative detention is preventive, not punitive; that administrative detention cannot continue indefinitely; and that the longer the period of detention, the weightier the burden on the state.[225] Despite that framework, the Court upheld petitioner's continued detention, finding that the military commander had properly balanced the infringement of liberty against the danger to the public and that releasing him would be equivalent to releasing a "'tickingbomb.'"[226] In reaching this result, the Court exhibited considerable deference to the military commander and noted that the art of striking the proper balance is not easy, but "[t]his art is the responsibility of the military commander. The discretion on the

220. *Id.* ¶¶ 47–48.
221. *Id.* ¶ 49.
222. Davidov & Reichman, *supra* note 104, at 946–47.
223. *See* HCJ 11026/05 A v. Commander of IDF Forces in Judea and Samaria [Dec. 5, 2005] (Isr.).
224. *Id.* ¶ 4.
225. *Id.* ¶¶ 6–7.
226. *Id.* ¶¶ 5–9.

subject is his."[227] What might change warranting his release? Either a change in the present security situation or a change in his intentions, although it is unclear from the opinion what evidence the Military Commander would credit as establishing a change in intentions.[228]

A more recent detention case challenged the Internment of Unlawful Combatants Law, which authorized administrative detention. Petitioners in *A. v. State of Israel* were members of Hezbollah operating in the Gaza Strip who challenged their own confinement and the overall legality of administrative detention.[229] In a lengthy opinion that relied, in part, on *Hamdi v. Rumsfeld*,[230] the Court upheld the Internment of Unlawful Combatants Law, finding it consistent with international law and with Israel's Basic Law: Human Dignity and Liberty. The Court's decision emphasized that the law provided for periodic judicial review of all internment decisions.[231]

D. Other

1. House Demolitions

In *Janimat v. IDF Military Commander*,[232] the Israeli Supreme Court upheld the use of a house demolition order following the suicide bombing of Tel Aviv's Apropro Café, which killed three and wounded dozens. The bomber's house, located in the West Bank near Hebron, was currently occupied by the bomber's wife and four children who lived on the second floor of the apartment building.[233]

In a surprisingly short opinion, the Court upheld the demolition order, finding that demolition is not a punitive measure but rather a deterrent. Moreover, the power to order demolition derives from legislation during the period of the British mandate which was integrated into Israeli law[234] and which has repeatedly been upheld.

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227. *Id.* ¶ 5.
228. *Id.* ¶ 9.
229. CrimA (TA) 6659/06 A v. State of Israel, 47 I.L.M. 768, 771 [2008] (Isr.).
230. 542 U.S. 507 (2004).
231. HCJ 11026/05 A v. Commander of IDF Forces in Judea and Samaria, ¶ 47.
232. HCJ 2006/97 Janimat v. Cent. Commander, IsrSC 51(2) 651 [1997] (Isr.), *available at* http://www.hamoked.org/images/4980_eng.pdf (unofficial version).
233. The bomber's brother lived in the adjacent apartment. The Court determined that the planned demolition would not damage the adjacent apartment or the other floors in the building. *Id.* ¶ 3.
234. Defense (Emergency) Regulations, 1945, Palestine Gazette (No. 1442), Reg. 119(2), at 1089 (Supp. II Sept. 27, 1945).

Justice Cheshin filed a dissenting opinion in which he relied on the Torah to conclude that demolishing the house is punishing the innocent family:

> Every man must pay for his own crimes. In the words of the Prophets:
>
> "The soul that sins, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him. (Ezekial 18:20)
>
> One should punish only cautiously, and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses:
>
> "The fathers shall not be put to death for their children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." (II Kings 14:6)[235]

Justice Cheshin emphasized that no one disputed that the wife and children of the suicide bomber played no role in the attack and indeed did not even know of the planned attack. In concluding that the petition should be granted preventing the house demolition, Justice Cheshin states: "I deliberated long and hard until I reached this conclusion. This is the Torah that I learned from my teachers, and this is the doctrine of law that I have in my hands. I can rule no other way."[236]

Following the decision, the government conducted hundreds of house demolitions, which did not succeed in stopping terrorist attacks. A 2005 Commission concluded that house demolitions had not acted as a deterrent and recommended that the practice be discontinued. Prime Minister Ariel Sharron accepted the recommendation.[237]

Upon retirement, Justice Barak, who had authored the majority opinion, expressed regret for the decision saying that house demolitions "are unworthy and of no use."[238]

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235. Janimat, IsrSC 51(2) 651 (Chesin, M., dissenting).

236. *Id.* ¶ 23.

237. Greg Myer, *Israel Halts Decades-Old Practice of Demolishing Militants' Homes*, N.Y. TIMES (Feb. 14, 2005), http://www.nytimes.com/2005/02/18/international/middleeast/18mideast.html?pagewanted=print&position=.

238. Tomer Zarchin, *Former Chief Justice Barak Regrets House Demolitions*, HAARETZ (May 27, 2009), http://www.haaretz.com/print-edition/news/former-chief-justice-barak-regrets-house-demolitions-1.276763.

2. Separation Fence

The Court has heard and decided many challenges to various aspects of the highly controversial separation fence, but the case establishing the Court's analytic framework to these challenges is *Beit Sourik Village Council v. Gov't of Israel*.[239] In fact, the Court put on hold all of "The Fence Cases" pending resolution of *Beit Sourik*.[240]

The separation fence, alternatively called a wall or barrier or seam line obstacle, was built to prevent the penetration of terrorists into Israel and the escalating violence that followed the failure of the Camp David talks in 2000.[241] The Commander of IDF forces issued an order for land in the West Bank to be seized to erect the separation fence.[242] The order required compensation to the landowner whose land was seized.[243] The order also required notice to the public, a survey conducted with input from local residents, and an opportunity for appeal to the military commander followed by appeal to the High Court of Justice.[244]

The question before the Court in *Beit Sourik* was whether the seizure was unlawful, given the hardships it created on local residents.[245] The hardships included loss of livelihood because the fence made cultivation of agricultural land impossible, restriction of freedom of movement affecting access to medical care and access to schools, restriction of access to water wells affecting crops and shepherding, and uprooting of tens of thousands of olive and fruit trees.[246]

Petitioners argued that the seizure was contrary to Israeli administrative law and international public law for three distinct reasons. First, petitioners argued that military necessity did not justify the seizure whose real objective was annexation of land in violation of international law.[247] Second, petitioners argued that the procedures used to determine the location of the fence were themselves illegal because the landowners were not given a meaningful opportunity to participate in the process.[248] Third, petitioners argued that the location of the fence violated the fundamental

239. HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807 [2004] (Isr.).
240. *Id.* ¶ 3.
241. *Id*. ¶ 1–3. From September 2000 through April 2004, there were reportedly 780 attacks, killing 900 and injuring over 6000 Israelis. *Id.*
242. *Id.* ¶ 8.
243. *Id.*
244. *Id.*
245. *Id.* ¶ 11.
246. *Id.*
247. *Id.* ¶ 10.
248. *Id.*

rights of local inhabitants, including the right to property, freedom of movement, livelihood, freedom of occupation, educational opportunities, and freedom of religion.[249] Petitioners argued that given these harms, the route of the fence violated the proportionality requirement and constituted collective punishment.[250]

The state argued that the fence was justified by compelling security needs in order to protect the lives of Israelis, and that efforts had been made to minimize hardship to local residents.[251] Thus, wherever possible, trees and buildings were moved and not destroyed and where damage could not be avoided, compensation was paid. Second, the state argued that the process of seizure was lawful because all orders of seizure were brought to the attention of petitioners who were given the opportunity to participate in the surveys and, if dissatisfied, appeal.[252] Finally, the state justified its seizure orders based on the natural right of the state to defend itself against threats from outside the state's borders. Security officers have power to seize land for combat purposes by the laws of belligerent occupation and these seizures were carried out with due regard for minimizing unnecessary injury to local inhabitants.[253]

The Court held hearings, sometimes on a daily basis, in an unsuccessful race to get the decision out before the International Court of Justice rendered its judgment in a case being simultaneously heard that challenged the overall legality of the fence. The hearings resulted in several modifications and changes to the route.[254]

Before addressing the specific issues, the Court provided the framework for its decision: that Israel holds the area in belligerent occupation, meaning that the area is subject to the control of the military commander whose authority is subject to the humanitarian rules of the Fourth Geneva Convention regarding the protection of civilians in time of war.[255] Principles of Israeli administrative law also apply to the military commander, including the norms of substantive and procedural fairness and the norm of proportionality. "Every Israeli soldier carries, in his pack,

249. *Id.* ¶ 11.
250. *Id.*
251. *Id.* ¶¶ 12–13.
252. *Id.* ¶ 14.
253. *Id.* ¶ 15.
254. The Council for Peace and Security, a nonpartisan organization that had been an early champion of the fence, raised security questions about some aspects of the route and suggested alterations. The state accepted some but rejected others. *Id.* ¶¶ 16–22.
255. *Id.* ¶ 23.

the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law."[256]

The three issues the Court analyzed were whether the military commander in the West Bank was authorized to construct the separation fence, whether the procedures used to seize the land were lawful, and whether the location and route of the fence were legal. With respect to the first issue, the Court acknowledged that the separation fence would be illegal if it were motivated by a desire to annex territory or to draw a political border.[257] The military commander has no authority to act generally for the good of Israel; his authority is limited to acting for military, not political, reasons.[258] The Court concluded that the fence was motivated by security concerns, not political objectives; it was designed to prevent terrorist attacks, not to set a border.[259] The Court also found no defect in the process for seizing the land.[260]

As to the route of the separation fence, the Court concluded that the military commander had failed to satisfy the proportionality requirement. The military commander's authority to maintain security in the area and to protect the security of the country must be balanced against the rights, needs and interests of the local population.[261] "The law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other."[262] This balancing is reflected in the Fourth Geneva Convention, which imposes both negative and positive obligations: that the military commander "refrain from actions that injure local inhabitants" ("negative obligation"), and that the military commander "take action to ensure that local inhabitants shall not be injured" ("positive obligation").[263]

The Court explained that proportionality is a fundamental principle of international law and Israeli administrative law.[264] The liberty of the local population can be restricted only on condition that the restriction is

256. *Id.* ¶ 24. (internal citation omitted).

257. *Id.* ¶ 27 (citing HCJ 390/79 Duikat v. The Government of Israel 34(1) PD 25 [1979] (Isr.)). The Duikat case had rejected the legality of seizing land based on the Zionist perspective of settling the entire land of Israel.

258. *Id*. ¶¶ 26–27. The military commander is authorized by international law applicable to belligerent occupation to take possession of land if necessary for the needs of the army, assuming compensation is paid. *Id.* ¶ 32.

259. *Id.* ¶ 28.

260. *Id.* ¶ 32.

261. *Id.* ¶ 34.

262. *Id.* (internal citation omitted).

263. *Id.* ¶ 35.

264. Proportionality is a constitutional principle found in Article 8 of Basic Law: Human Dignity and Freedom and represents one of the basic values of Israeli administrative law. *Id.* ¶ 38.

proportionate. This principle of proportionality applies to every act of Israeli administrative authorities including the military commander's authority pursuant to the law of belligerent occupation.[265] In order to satisfy the principle of proportionality, three elements must be met. First, the objective must be rationally related to the means.[266] In other words, there must be a rational connection between the route of the fence and the goal of security. Second, the means used must injure the individual to the least extent possible.[267] In other words, among the various routes that would achieve the goal, the chosen one must be the least injurious. Third, the damage caused to the individual by the means used must be of proper proportion to the gain brought about by that means.[268] In other words, the route cannot injure the local inhabitants to such an extent that it is disproportionate to the security benefit. Proportionality will not be met if there is an alternate route that creates a smaller security advantage than the chosen route but causes significantly less damage.[269]

The Court then proceeded to determine whether the chosen route for the fence satisfied the three-part proportionality test. In applying that test, the Court applied an objective standard, not based on the military commander's belief or whether or not he acted in good faith. Rather, the question is a legal issue, "the expertise for which is held by the Court."[270]

Because proportionality varies according to local conditions, the Court separately analyzed each challenged portion of the route, although consistently deferred to the military commander in the face of conflicting military opinions regarding security objectives.[271] Applying the three-part test to a ten kilometer portion of the fence in a mountain area just west of Jerusalem, the Court concluded that: (1) there is a rational connection between the security objective and the route; (2) although the proposed alternative route would be less injurious, it would not serve security objectives as well; but (3) utilizing a cost/benefit analysis, the damage caused to the local population is disproportionate to the security benefits.[272] The route "injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law."[273]

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265. *Id.* ¶ 38. The Court cited extensive case law establishing that proportionality limits the power of the military commander. *Id.* ¶ 39.
266. *Id.* ¶ 41.
267. *Id.*
268. *Id.*
269. *Id.* ¶¶ 41–44.
270. *Id.* ¶ 48.
271. *Id.* ¶ 49.
272. *Id.* ¶¶ 59–61.
273. *Id.* ¶ 60. The Court found that the fence severely violates the local inhabitants' right of

Other portions of the fence were analyzed in the same way: the first two subparts of the proportionality test were satisfied with the Court showing deference to the military commander's views, but the third part of the test was not met.[274] The Court's overview of the issue was that the 40 kilometers of the fence affected 35,000 local inhabitants, took up 4000 dunams (10,000 square feet) of their lands, caused thousands of olive trees to be uprooted, and separated 8 villages from 30,000 dunams of their land, causing individual harm and harm to the fabric of life.[275] Despite the military commander's good faith, the balance struck failed the proportionality test, therefore necessitating a renewed examination of the route of the fence.[276]

Justice Barak ends the decision with an epilogue where he acknowledges, as he did in the torture case, that the Court's judgment will not make it easier for the state to fight terrorism. But, he concludes:

> There is no security without law. Satisfying the provisions of the law is an aspect of national security. . . . Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law will lead the state to the security so yearned for.[277]

A few months later, the Court decided another fence case in which the Court attempted to explain why its conclusion differed from the ICJ's Advisory Opinion, which had concluded that the fence was illegal. In *Mara'be v. Prime Minister of Israel*, the Court explained that the two courts agreed on the normative framework, but the ICJ did not have the necessary facts in front of it regarding military security needs.[278] In particular, the Court pointed to errors in the data relied on by the ICJ regarding harm to Palestinians and to the fact that the ICJ lacked the data to do a proper proportionality analysis which requires balancing security needs against impingement of rights of local inhabitants.[279] Since the ICJ's conclusion was based on an inadequate factual record, it was not *res*

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property and freedom of movement and severely impairs their livelihood. More than 1300 farmers were cut off from their land and trees which constituted their livelihood. No effort was made to offer the local inhabitants substitute land. The licensing scheme to use two gates was unnecessarily onerous. The injuries could be substantially reduced by an alternate route without sacrificing the security advantage.

274. *Id.* ¶¶ 71, 76, 80.
275. *Id.* ¶ 82.
276. *Id.* ¶ 85.
277. *Id.* ¶ 86.
278. HCJ 7957/04 Mara'abe v. Prime Minister of Israel (2) IsrLR 106, ¶¶ 57, 61 [2005] (Isr.).
279. *Id.* ¶¶ 59–72.

judicata and did "not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law."[280]

The fence that was challenged in *Mara'be v. Prime Minister of Israel* enclosed a Jewish settlement, Alfei Menashe, with a population of 5,650, and five Palestinian villages with a combined population of 1,200.[281] The construction of the fence was defended by the need to protect Israeli settlers in the West Bank.[282] Thus, the case seemingly presented a question as to the legality of the Jewish settlement. The Court declined to address that question, concluding that it could decide the legality of the fence without determining the legality of the settlement because the duty of the Military Commander is to preserve the safety of every person in the belligerent occupation, including the lives of settlers, whether the settlement is legal or not.[283]

The Court applied the three-part proportionality test and found that the second part, which requires the least injurious means, was not satisfied because the security goals could be achieved as well by encircling the Jewish settlement without including the Palestinian villages.[284] Thus, the Military Commander was ordered to reconsider the route so that the Palestinian villages would be outside of the fence.[285]

A similar result was reached in a case where petitioners challenged a concrete barricade built in the south of Hebron for the ostensible purpose of protecting persons traveling on the adjacent road. In *Mayor of Ad-Dhahiriya v. IDF Commander in West Bank*, the Court concluded that the least injurious means test was not satisfied because a metal barricade would serve the security purpose as well and would cause less harm to local residents because they could more easily climb over the fence and their livestock could pass underneath.[286] The Military Commander was directed to dismantle the concrete barricade within six months of the Court's decision.[287] This decision was followed by a contempt of court

280. *Id.* ¶ 74.
281. *Id.* ¶ 75.
282. *Id.* ¶¶ 86–91.
283. *Id.* ¶¶ 19–23. The Court rejected an "assumption of risk" argument, which did not, in the Court's opinion, override the settlers' rights to life, dignity, and honor guaranteed in the Basic Laws. *Id.* ¶ 21.
284. *Id.* ¶¶ 113–14.
285. *Id.*
286. HCJ 1748/06 Mayor of Ad-Dhahiriya v. IDF Commander 3 PD 1, 163, ¶¶ 19–21 [2006] (Isr.), *available at* http://www.mfa.gov.il/NR/rdonlyres/8B21780B-ED25-4998-AEBF-06011A59D528/0/FightingTerrorismwithintheLaw3.pdf (unofficial version).
287. *Id.* ¶ 22.

order when the state failed to comply.[288] At the end of the six-month period, the state asked for a four month extension, but its submissions revealed that it intended to leave the concrete barricade in place and simply create more openings. The Court said: "We cannot accept conduct of this kind" and ordered the state to remove the barricade within 14 days and pay 30,000 shekels in legal fees.[289]

Perhaps the best-known example of non-compliance by the state concerns a portion of the separation fence near the town of Bilin, just west of Ramallah, designed to protect a nearby Jewish settlement. In 2007, the Supreme Court ordered that the fence be re-routed to allow Palestinian villagers access to their farming land, yet four years passed before that order was implemented.[290] In the intervening four years, protests were held every Friday, some of which escalated into violence between Palestinians and Israeli soldiers.[291]

3. Early Warning Procedure

The issue in *Adalah v. GOC Central Command* was the legality of an "early warning" procedure for soliciting the assistance of local residents in order to arrest suspected terrorists.[292] The Early Warning Directive states:

> "Early Warning" is an operational procedure, employed in operations to arrest wanted persons, allowing solicitation of a local Palestinian resident's assistance in order to minimize the danger of wounding innocent civilians and the wanted persons themselves (allowing their arrest without bloodshed). Assistance by a local resident is intended to grant an early warning to the residents of the house, in order to allow the innocent to leave the building and the wanted persons to turn themselves in, before it becomes necessary to use force, which is liable to endanger human life.[293]

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288. *Id.*

289. *Id.* ¶ 5.

290. Batsheva Sobelman, *Babylon & Beyond: Observations From Iraq, Iran, Israel, The Arab World And Beyond*, L.A. TIMES (June 26, 2011), http://latimesblogs.latimes.com/babylonbeyond/2011/06/israel-west-bank-controversial-fence-section-re-routed-near-biliin.html.

291. *Israel Reroutes West Bank Narrier at Bilin*, ALJAZEERA (June 26, 2011), http://english.aljazeera.net/news/middleeast/2011/06/20116261674490276.html.

292. HCJ 3799/02 Adalah Legal Centre for Arab Minority Rights in Israel v. IDF Cent. Commander (2) IsrLR 206 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/990/037/A32/02037990.a32.pdf .

293. *Id.* ¶ 5.

Petitioners argued that the policy violates international humanitarian law and is the equivalent of using local residents as human shields, a practice that all parties agreed was forbidden by international law.[294] The state argued that civilians were not being forced but merely solicited to issue the warning and that the policy helped to secure the arrest of terrorists while protecting innocent civilians.[295] The Court recognized the competing tensions: on the one hand, the policy is designed to protect local inhabitants which is "a central value in the humanitarian law applicable to belligerent occupation."[296] But on the other hand, the policy makes use of local civilians in a manner that can expose them to danger, potentially under circumstances where consent is the result of overt or subtle pressure.[297]

Ultimately, the Court concluded that the Early Warning procedure violates international law, which precludes the use of local civilians in the war effort, because a civilian's consent cannot be assumed to reflect free will.[298] Judge Cheshin concurred in the result but said the case posed an issue so difficult that a judge might ask why he ever chose to be a judge.[299] He posited a scenario where a terrorist is hiding in a house and just as the military is about to storm the house, the father returns.[300] Inside the house is his wife and eight children.[301] The father agrees to call his family to leave the house.[302] Yet the Court's decision prohibits the army from allowing the father to act to protect his family. "We thus stand before the following choice: being aided by the father, who will warn his family, or storming the house, involving mortal danger to the residents of the house and to the soldiers. Non-recognition of the procedure in such circumstances is by no means simple."[303] Yet Justice Cheshin concurs because in difficult situations like these, the temptation to deviate from the prescribed procedure may be too great, risking turning a unique exception into routine practice.[304]

Justice Beinisch also wrote separately and emphasized that the Early Warning procedure comes much too close to what is clearly prohibited.

294. *Id.* ¶¶ 13–15.
295. *Id.* ¶¶ 16–19.
296. *Id.* ¶ 23.
297. *Id.*
298. *Id.* ¶ 24.
299. *Id.* ¶ 1 (Cheshin, J., concurring).
300. *Id.* ¶ 3 (Cheshin, J., concurring).
301. *Id.*
302. *Id.*
303. *Id.* ¶ 4 (Cheshin, J., concurring).
304. *Id.* ¶ 7 (Cheshin, J., concurring).

She refers to "the danger of sliding into the forbidden practice" of using civilians as human shields.[305] She also agrees with Justice Barak that there is no way to ensure voluntary consent. "When a local resident is asked by a military commander, accompanied by armed army forces, to assist in an act performed against the population to which he belongs, even if the request is made for a desirable objective, the resident has no real option of refusing the request, and therefore his consent—is not consent."[306]

Adalah v. GOC Central Command is an example of the Court refusing to defer to the state's assertion of what the realities of conflict require. The case stands apart from those cases where, even when the Court accepted the petitioner's argument, it refused to impose categorical restrictions on military commanders, instead giving them time to formulate new procedures consistent with the Court's holding. Here, in contrast, perhaps because of the military's previous practice of using civilians as human shields, the Court issued a blanket order forbidding any use of the Early Warning procedure.

4. Deportation

Israel's security forces adopted a policy of "assigned residence," whereby the families of suicide bombers in the West Bank were relocated to Gaza.[307] This policy was part of a larger military campaign reportedly designed to destroy the Palestinian terrorism infrastructure and prevent suicide bombings.[308] Pursuant to the policy, deportations could only be carried out after serious terrorist incidents and only when the family itself was involved in terrorist activities.[309] The legality of the policy was addressed in three cases combined as *Ajuri v. Commander of IDF Forces in West Bank* and heard by an expanded panel of nine justices.[310]

The speed with which the Court heard these cases is itself notable. The order directing petitioners to be sent to Gaza was signed on August 1, 2002. Petitioners appealed to an Appeals Board, which, after several days of hearings, approved the validity of the orders on August 12, 2002. On August 13, 2002, petitioners brought their challenge to the Supreme Court sitting as the High Court of Justice, which immediately issued an order

305. *Id.* ¶ 4 (Beinisch, J., concurring).
306. *Id.* ¶ 5 (Beinisch, J., concurring).
307. HCJ 7015/02 Ajuri v. IDF Commander in West Bank [Sept. 3, 2002] slip op. (Isr.).
308. *Id.* ¶ 3.
309. *Id.* ¶ 5.
310. *Id.* ¶ 30.

preventing the forcible relocation of the petitioners to Gaza pending further deliberations. A hearing was held within about a week.[311]

The Court focused on the legality of the policy under international law, particularly Article 78 of the Fourth Geneva Convention, which authorizes assigned residence and creates rights for those persons relocated.[312] Article 78 applies to forced relocations within the territory subject to belligerent occupation. Thus, an initial question for the court was whether Article 78 applied when the deportation was from the West Bank to Gaza. Petitioners argued that the West Bank was conquered from Jordan, whereas the Gaza Strip was conquered from Egypt, and thus the two territories are subject to separate belligerent occupations by two different military commanders.[313] The Court rejected the argument, finding that both areas "are part of mandatory Palestine . . . subject to a belligerent occupation by the State of Israel."[314]

The Court then upheld the area commander's authority to deport a person to Gaza, but only when that person constitutes a current danger and when relocating that person will aid in averting the danger. The relocation must be necessary "for imperative reasons of security."[315] The Court thus rejected assigned residence used solely as a deterrent.[316] This result derives from the Fourth Geneva Convention and from the Jewish value that a father's sins may not be visited on the son. "The character of the State of Israel as a democratic, freedom-seeking and liberty-seeking State implies that one may not assign the place of residence of a person unless that

311. *Id.* ¶¶ 7–8.

312. Article 78 provides:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Geneva Convention, *supra* note 191, art. 78.

313. Ajuri, slip op. ¶ 21.

314. *Id.* ¶ 22. The Court justified this result, in part, by pointing to the fact that "the Palestinian side also regards the two areas as on entity, and the leadership of these two areas is a combined one." *Id*. Query, whether the Court would reach the same result after Hamas defeated Fatah in Gaza.

315. *Id.* ¶¶ 24–28.

316. *Id.* ¶¶ 24, 27.

person himself, by his own deeds, constitutes a danger to the security of the State."[317]

With respect to the specific orders of relocation, the Court upheld two and reversed one. The deportation of the 34-year-old sister of a terrorist responsible for sending suicide bombers to Tel Aviv was upheld based on testimony that she had sewn the explosive belts used by the suicide bombers.[318] The deportation of the 38-year-old brother of that same terrorist was also upheld based on testimony that he was aware of his brother's activities and on one occasion acted as a lookout when explosives were moved.[319] The Court, however, reversed the order of deportation of the 35-year-old brother of a wanted terrorist, finding that the mere fact that he was aware that his brother was wanted by Israeli security forces and gave him food and clean clothes was insufficient to constitute a real danger to the security of the area.[320]

The Court concluded by emphasizing that no matter what challenges Israel faces, it must always act within the framework of the law: "[N]ot every effective measure is also a lawful measure. . . . The well-known saying that 'In battle laws are silent' does not reflect the law as it is, nor as it should be."[321] Consistent with its view of the justiciability of national security cases, the Court limited the authority of the military commander to what it found to be lawful under international and domestic law.

5. Restrictions on Fuel & Electricity Supply to Gaza

Israel launched a military operation in Gaza known as "Cast Lead" in December 2008 to retaliate for rocket attacks from Gaza. The war resulted in massive destruction and caused over one thousand Palestinian casualties and thirteen Israeli casualties.[322] During the 22 day war, the Israeli Supreme Court decided two cases, revealing its willingness to hear cases in real-time. The two cases, *Physicians for Human Rights v. Prime*

317. *Id.* ¶ 24.

318. *Id.* ¶¶ 31–32. She was not criminally prosecuted because, as the Court noted, the evidence against her "is privileged and cannot be presented in a criminal trial." *Id.* ¶ 32.

319. *Id.* ¶¶ 33–36.

320. *Id.* ¶¶ 37–39.

321. *Id.* ¶ 41.

322. Gaza was captured by Israel during the 1967 war. In 1993, pursuant to the Oslo Accord, the Palestinian authority took over the administrative governance of Gaza. In 2005, Israel unilaterally withdrew from Gaza and evicted the Israeli settlers living in Gaza. Elections in 2006 resulted in Hamas assuming power and serious violence erupted between Hamas and Fatah. Ultimately, Gaza was left in the complete control of Hamas. Israel continued to control Gaza's airspace and sea and all borders except for the southern border with Egypt. *Profile: Gaza Strip*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/5122404.stm (last updated Jan. 6, 2009).

Minister of Israel, and *Gisha Legal Centre for Freedom of Movement v. Minister of Defence*, were combined and decided together.[323] The first case involved a challenge to delays in evacuating the wounded to hospitals, and attacks on ambulances and medical personnel.[324] The second case involved a challenge to reductions in fuel and electricity to the Gaza Strip.[325]

The petitions for both cases were filed on January 7, 2009, four days after Israeli troops entered Gaza. The Supreme Court held hearings on January 9 and 15 and rendered its decision before the ceasefire on January 19.[326] The government argued that both cases were nonjusticiable, and should not be addressed while hostilities are taking place.[327] Not surprisingly, the Court rejected that argument, pointing out that it has heard thousands of cases regarding the rights of inhabitants of the territories, including the legality of military operations in real-time.[328]

As to the merits of the first petition, the court noted that while the classification of the conflict between Israel and Hamas is complicated, both sides agree that Israel's combat operations are subject to international humanitarian law, which requires that medical personnel are protected, the wounded are evacuated, and the basic rights of civilians are protected.[329] The real dispute became a factual one, requiring the Court to try to determine what was actually happening in Gaza during actual conflict when the facts and circumstances were changing on a daily basis.[330] Ultimately, the Court declined to enter an order, relying instead on governmental assurances that humanitarian mechanisms had already been enhanced, that a serious effort would be made to improve the evacuation and treatment of the wounded, and that a clinic had been established at a crossing between Gaza and Israel.[331]

As to the second petition, the Court denied the claim that Israel had unlawfully caused a severe electricity shortage in Gaza. Citing detailed reports from the field, the Court found that adequate steps were being

323. HCJ 201/09 Physicians for Human Rights v. Prime Minister of Israel, IsrLR 1 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf; HCJ 248/09 Gisha Legal Centre for Freedom of Movement v. Minister of Defence, IsrLR 1 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

324. HCJ 201/09 Physicians for Human Rights, IsrLR 1.

325. HCJ 248/09 Gisha Legal Centre for Freedom of Movement, IsrLR 1.

326. *Id.* ¶ 4.

327. *Id.* ¶ 7.

328. HCJ 201/09 Physicians for Human Rights, IsrLR 1, ¶ 11.

329. *Id.* ¶ 17.

330. *Id.* ¶ 13.

331. *Id.* ¶ 23.

taken to repair damaged electricity lines and to supply fuel so that the local electricity station could be operated.[332]

Yet, while the Court denied the requested relief, it exhorted the IDF to make strenuous efforts to discharge the state's humanitarian obligations:

> As long as Israel controls the transfer of essentials and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations enshrined in international humanitarian law, which require it to allow the civilian population access, to—inter alia—medical facilities, food and water, as well as additional humanitarian items that are necessary for the maintenance of civilian life.[333]

The Supreme Court heard another case involving the supply of fuel and electricity to Gaza, but this case preceded Operation Cast Lead. In *Jaber Al-Bassiouni Ahmed v. Prime Minister*, petitioners challenged the decision to reduce or limit the supply of fuel and electricity to Gaza.[334] More specifically, petitioners alleged that restricting electricity was causing power outages in hospitals and preventing the pumping of clean water to the civilian population.[335] The government justified the restriction of electricity by asserting the purpose of preventing the electricity's use in workshops manufacturing rockets.[336] The parties agreed that international law requires combatants to ensure the welfare and basic rights of civilian populations.[337] Thus, the state has humanitarian duties, which include allowing the passage of essential humanitarian goods and refraining from intentional harm to humanitarian facilities.[338] What was in dispute is whether that humanitarian duty extends to the unrestricted supply of electricity.[339]

The Court determined that the restriction of electricity did not breach Israel's humanitarian duties. In reaching this conclusion, the Court relied heavily on the government's representations that it was carrying out weekly assessments that included conversations with the Palestinian authorities and international organizations and was carefully monitoring whether the restrictions were impacting humanitarian needs and adjusting

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332. HCJ 248/09 Gisha Legal Centre for Freedom of Movement, IsrLR 1, ¶ 24.

333. *Id.* ¶ 27.

334. HCJ 9132/07 Jaber Al-Bassiouni Ahmed v. Prime Minister [2008] (Isr.) (unpublished), *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

335. *Id.* ¶ 5.

336. *Id.* ¶ 6.

337. *Id.* ¶ 14.

338. *Id.* ¶¶ 13–15.

339. *Id.* ¶ 15. The state agreed to allow the supply of industrial diesel at the same level as before the restrictions. *Id.* ¶ 17.

the supply when necessary.[340] The Court was persuaded that the rules of domestic and international law were being "scrupulously observed."[341] The Court concluded:

> [T]he Gaza Strip is controlled by a murderous terrorist organization, which acts relentlessly to inflict harm on the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately at civilians—men, women and children. Despite this, . . . the State of Israel is committed to fighting the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from intentional harm to the civilian population in the Gaza Strip. In view of all the information presented to us with regard to the supply of electricity to the Gaza Strip, we are of the opinion that the amount of industrial diesel that the State said it intends to supply, as well as the electricity that is continually supplied through the power lines from Israel, are capable of satisfying the essential humanitarian needs of the Gaza Strip at the present.[342]

The Gaza cases provide another example of the Court denying relief seemingly only because the government was involved in constant monitoring which itself was likely prompted by the prospect of judicial oversight. As the next Part argues, the major accomplishment of the Israeli Supreme Court is the effect its rulings have had on the formulation and execution of governmental policy.

IV. WISDOM AND EFFICACY OF JUDICIAL REVIEW OF CASES IMPLICATING NATIONAL SECURITY

What is the proper role for the judicial branch in cases challenging executive action undertaken to prevent terrorism? The classic argument made by the executive branch in both Israel and the United States is that the judicial branch lacks the institutional competence to resolve challenges to national security policies and that the courts should not second-guess decisions made by those charged with protecting the nation. Treating these

340. *Id.* ¶¶ 18–19.
341. *Id.* ¶ 20.
342. *Id.* ¶ 22.

cases as non-justiciable is thought to promote separation of powers and reinforce the democratic nature of the political branches of government.[343]

As Parts II and III demonstrate, the Israeli Supreme Court is far more likely than its US counterpart to treat national security cases as justiciable. The Israeli Supreme Court's response to the argument that the judiciary lacks institutional competence is simple and straightforward: the military has expertise over military matters; the judiciary has expertise over legal matters. As to the former, deference is warranted; as to the latter, deference is inappropriate.[344] In contrast, the US Supreme Court has historically been more likely to invoke one of the justiciability doctrines to deny review. What accounts for this difference? Possible answers include: geo-political considerations, which have led the Israeli Supreme Court to seek to improve Israel's credibility in the world community by referencing international legal norms;[345] "Jewish values," which explicitly play a role in Israeli judicial decision-making;[346] disillusionment with the infallibility

343. *See supra* text accompanying notes 2–29.

344. *See supra* text accompanying notes 30–51, 107.

345. *See, e.g.*, Pnina Lahav, *Israel's Supreme Court*, *in* CONTEMPORARY ISRAEL: DOMESTIC POLITICS, FOREIGN POLICY, AND SECURITY CHALLENGES 135, 143–44 (Robert Freedman ed., 2009). Lahav points to the fact that the Court's terrorism decisions are immediately translated into English as evidence of the government's view that the Court's decisions are "useful in its international relations." *Id.* at n.47.

346. Basic Law: Human Dignity and Liberty provides that human rights can be limited only "by a law befitting the values of the State of Israel." The values include "recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391, §§ 1(a), 8 (Isr.). The Declaration of the Establishment of the State of Israel includes: a guarantee of liberty, justice and peace; social and political equality irrespective of religion, race or sex; freedom of conscience, worship, education and culture; and faithfulness to the charter of the United Nations. Declaration of the Establishment of the State of Israel, May 14, 1948. Most of the decisions cited in Part III of this article make explicit reference to the Jewish values upon which the country was established. *See, e.g.*, HCJ 3451/02 Almandi v. Minister of Defense 56(3) IsrSC 30, ¶ 54 [2002] (Isr.); HCJ 3239/02 Marab v. IDF Commander in the West Bank slip op. ¶ 20 [July 28, 2002] (Isr.); HCJ 7015/02 Ajuri v. IDF Commander in West Bank [Sept. 3, 2002] slip op. ¶ 24 (Isr.).

For a discussion of competing views of the meaning of "Jewish state," see MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL (2011). Mautner describes how Justice Barak finessed the tension between "Jewish state" and "democratic state" by interpreting "Jewish state" at a high level of abstraction, whereas other jurists, notably Justice Elon, interpreted "Jewish state" as more specifically invoking Jewish law. *Id.* at 50–51.

For a discussion of contrasting views as to how Jewish law approaches human rights, see David Wermuth, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L. ECON. L. 1101 (2011). According to Wermuth, some Israeli rabbis continue to cling to a xenophobic view reflecting a history of Jewish persecution and refuse to embrace human rights protections for non-Jews. Other Israeli rabbis highlight the importance of tolerance in Jewish law, which they argue supports modern human rights values. In contrast to the rabbis, the Court is free to read "Jewish law through a universal lens." Wermuth concludes that "Jewish law in the hands of

of the defense forces;[347] and service in the IDF by every young Israeli, which brings an immediacy to military issues that may not be as pronounced in the United States, which maintains an all-volunteer military.[348] No one explanation likely provides the full answer and it may be that no factor is more significant than the sheer forcefulness and persuasiveness of Justice Barak's convictions and personality.

As to the argument that deferring to the political branches promotes and reinforces separation of powers, the Israeli Supreme Court has repeatedly held that it is inappropriate to defer to the political branches when human rights are at stake.[349] At times, even the US Supreme Court has rejected the argument that democratic legitimacy and separation of powers justifies deference to the executive branch in national security cases.[350] The US Supreme Court has acknowledged: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[351]

Exploring the proper role of the courts in cases of national security is far more than a philosophical, jurisprudential exercise. In this author's opinion, the availability of judicial review has an actual effect on governmental policy and military practice, and thus plays a major role in reining in governmental excesses in times of war. The Israeli Supreme Court's willingness to hear virtually all challenges to military conduct, even while conflict is ongoing, has undoubtedly affected both the formulation and the execution of policy.

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modern Israeli rabbis and jurists has moved and continues to move towards the modern, tolerant, and universal approach to human rights." *Id.* at 1132.

347. DAVID KRETZMER, THE OCCUPATION OF JUSTICE (2002). "[T]he trauma of the Yom Kippur War, in which the myth that the Israeli Defense Forces are infallible was tragically shattered, may well have encouraged the Court that blind faith in the decisions of the security establishment could no longer be maintained in any sphere." *Id.* at 120.

348. *Israel*, ENCYCLOPEDIA OF THE NATIONS (Dec. 1988), http://www.country-data.com/cgi-bin/query/r-6841.html.

349. *See supra* text accompanying note 43.

350. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

351. *Id.* at 536. And in *Boumediene*, the Court stated:

> Our basic charter cannot be contracted away like this. . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

Boumediene v. Bush, 553 U.S. 723, 765 (2008) (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

In discussions about military policy in the occupied territories, the question always asked is "will it withstand High Court of Justice scrutiny?"[352] When military policy is being formulated, policy-makers anticipate that it will be challenged in the Supreme Court. As a consequence, policy-makers include legal advisors from MAG (Military Advocates General) in all operational planning, including tactics and the legality of weapons, starting at the early developmental stage. Since 2006, a legal advisor has functioned at the commander level. During Operation Cast Lead (the 2008 war in Gaza), MAG legal advisors were stationed at the headquarters level and the commanders level.[353] So, perhaps the most important way in which the High Court of Justice has had an impact on the ground is that it has led to an increasing role of legal advisors in the formulation of policy.

The military legal advisors are also responsible for communicating Supreme Court judgments to soldiers on the ground. When the Israeli Supreme Court renders a judgment, MAG prepares a report summarizing the decision and sends it to all relevant sections of the Army and the Ministry of Defence. The report is signed by the Military Advocate General himself if the case is particularly important.

The mere filing of a petition with the Supreme Court itself has an effect on actual practice. It starts a process of reconsideration that often results in adjustments prior to actual judgment by the Court.[354] Indeed, even prior to filing a petition, many NGOS utilize a pre-petition procedure by sending a letter to the Israeli Ministry of the Justice with a copy of the complaint. The letter asks the Ministry of Justice to look into the matter or else the complaint will be filed in the High Court of Justice. When that happens,

352. Interview with Pnina Sharut-Baruch, retired Colonel and former head of IDF International Law Department, in Tel Aviv, Isr. (June 29, 2011). In Hebrew, this is expressed as "Lo Bagitz"? Colonel Sharut-Baruch said that when she joined the International Law department, she was handed a copy of the Geneva Conventions, which she said was treated as the Bible. *See, e.g.*, ASSAF MEYDANI, THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION 163 (2011) ("Given that it gradually became clear that almost any decision made by the government or the parliament was likely to be brought to the HCJ by some dissatisfied group, politicians started to consider the possible position of the HCJ in any decision-making process."); KRETZMER, *supra* note 347, at 120 (describing the "potential inhibitive impact on decision-making within the executive"); *id.* at 191 (describing government lawyers using the threat of judicial review "as a way of restraining the military authorities").

353. *Id.* In contrast, during the first Lebanon War, no one asked the lawyers anything in advance. That changed in 2000 with the deterioration of conditions in the occupied territories.

354. *See, e.g.*, HCJ 7862/04 Abu-Dahar v. IDF Military Commander in Judea and Samaria 59(5) PD 368 [2005] (Isr.) (involving a challenge to the Military Commander's decision to cut down trees in petitioner's orchard for security purposes. From the time of the filing of the petition to the time that the case was heard, the Military Commander decided to cut down only 60–70% of the trees originally destined for destruction.).

the Ministry of Justice sends the letter and proposed complaint to MAG and again, the question arises, will this withstand High Court scrutiny?[355]

Even in cases where the High Court of Justice hears and denies the petition, the availability of judicial review makes a difference. For example, where petitioners challenged the IDF's failure to protect medical personnel and assist in the evacuation of the wounded during the war in the Gaza Strip, the Court's oversight resulted in constant monitoring and detailed responses from the government demonstrating that it was meeting its humanitarian obligations.[356] And, where petitioners challenged the conditions of confinement during Operation Defensive Wall, where 6,000 Palestinians were arrested and detained in makeshift camps, the Court held hearings over six months, during which time conditions improved substantially.[357] And, in the accompanying case challenging the separation fence, several portions of the route were adjusted even before the Court's final judgment.[358] In all these cases, the Court has denied relief only "after ensuring that the petitioner has received (or will receive) some of the requested remedy (or all of it)."[359] The willingness of the Court to hear a case thus prompts remedial action that might not otherwise occur.

Studies reveal that this has been the Court's "modus operandi" in dealing with governmental action in the occupied territories:

> [T]he Court has often forced the authorities to reconsider planned action or to compromise with the petitioner. Sometimes pressure on the authorities is the direct result of remarks made by judges during a hearing. . . . In other cases issuance of an interim injunction by the Court pending a final decision in the case, has allowed time for public opinion to force the authorities to reconsider their opinion. The authorities frequently back down or compromise before the matter reaches court. The system of "settlement in the Court's shadow" has meant that the restraining influence of the Court has been far greater than can be gleaned from its actual decisions. In fact, when out-of-court settlement is taken into account, the rate of actual success of Palestinian petitioners from the Occupied

355. Sharut-Baruch, *supra* note 352; *see also* KRETZMER, *supra* note 347, at 246 n.8.

356. HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 58(5) PD 385, ¶ 28 [2004] (Isr.).

357. HCJ 3278/02 The Center for Defense of the Individual v. Commander of the IDF Forces in the West Bank [2002] slip op. (Isr.).

358. *Id*. ¶¶ 16–22.

359. Davidov & Reichman, *supra* note 104, at 947 (citation omitted).

> Territories is higher than the overall success rate of petitioners to the Supreme Court.[360]

Despite the effectiveness of Israel's Supreme Court in cases pitting national security against human rights, there have been problems of non-compliance. The fact that it took four years to comply with the Court's order to remove the separation fence in Bilin[361] is the mostone blatant but noy the only illustration of non-compliance. In *Mayor of Ad-Dhahiriya v. IDF Commander*, the government was held in contempt for failing to comply with a clear directive to remove a concrete barricade that limited the movement of local residents.[362]

Whether or not the Court's torture decision has had an effect on actual practice is a matter of dispute.[363] When the decision was announced, Ami Ayalon, Israel's security chief, immediately announced that the decision would be obeyed.[364] According to the Public Committee against Torture in Israel, Mr. Ayalon's pledge evaporated after the outbreak of the second Intifada. According to that NGO, "the large number of complaints received since the ruling show that the GSS interrogators have continued to use torture in the interrogation rooms. They also continue to enjoy complete immunity thanks to a system that abuses and extends the loopholes created by the HJC ruling."[365] The loophole referred to is the

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360. KRETZMER, *supra* note 347, at 189–90 (citing M. NEGBI, JUSTICE UNDER OCCUPATION: THE ISRAELI SUPREME COURT VERSUS THE MILITARY ADMINISTRATION IN THE OCCUPIED TERRITORIES (1981); Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 LAW & SOC. REV. 319 (1999)).

361. *See supra* text accompanying notes 292–93.

362. HCJ 1748/06 Mayor of Ad-Dhahiriya v. IDF Commander 3 PD 1, 163 [2006]. There have apparently been very few contempt cases, although threats of contempt are more commonplace. *See* Sharut-Baruch, *supra* note 352.

363. Indeed, the very question of whether the Court has served as the protector of human rights is itself subject to fierce debate. Some argue that the Court has legitimized governmental policy while purporting to uphold human rights. *See, e.g.*, Nimer Sultany, *The Legacy of Justice Aharon Barak: A Critical Review*, 48 HARVARD INT'L L.J. ONLINE 83 (2007); KRETZMER, *supra* note 347, at 3 (The exercise of judicial review of governmental action in the Occupied Territories has served two purposes: "that of imprinting governmental action with the stamp of legitimacy, and that of checking the political branches of government."). One example is the litigation surrounding the separation fence. Although the Court granted relief in the form of requiring a re-routing of various portions of the fence, it nevertheless upheld the legality of the wall. *See* HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807 [2004] (Isr.). Others see the Court, particularly under the leadership of Justice Barak, as the major guarantor of civil rights. *See, e.g.*, Pnina Lahav, *Israel's Supreme Court*, *supra* note 345, at 1325.

364. Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG. (June 12, 2005), *available at* http://www.nytimes.com/2005/06/12/magazine/12TORTURE.html?pagewanted=all.

365. PCATI, DECEMBER 2009 PERIODIC REPORT, ACCOUNTABILITY DENIED: THE ABSENCE OF INVESTIGATION AND PUNISHMENT OF TORTURE IN ISRAEL 8–9 (2009), *available at* http://www.stop torture.org.il/files/Accountability_Denied_Eng.pdf.

fact that although the Court held that domestic and international law prohibit torture without exceptions, it also recognized the possibility of asserting the necessity defense after the fact. Thus the report concludes that the decision "paved the way for the approval of torture" through the back door.[366]

Other NGOs disagree. B'Tselem, an Israeli human rights organization, reports a dramatic reduction in the number of Palestinians subjected to what is now called "special methods" of interrogation.[367] The Executive Director of B'Tselem said there was "a new restraint in Israel since the Supreme Court's ruling."[368] The Palestinian Human Rights Monitoring group agrees. A spokesperson of that organization said that while twenty Palestinians died in Israeli prisons during the first Intifada, there were no such deaths in the second Intifada.[369]

Whichever side is right, it seems clear that a system that encompasses judicial review of practices alleged to violate human rights is far more likely to stem abuses by the political branches. In Israel, security forces and military commanders know that their every action can and likely will be scrutinized by the Israeli Supreme Court. This stands in sharp contrast to the United States where the greater likelihood is that cases regarding practices such as torture and targeted killing will never be heard by the Supreme Court.

V. CONCLUSION

A study of the Supreme Courts of Israel and the United States offers a fascinating contrast when it comes to how they handle "war on terrorism" cases. The Israeli High Court of Justice will permit an NGO to bring a case, will hear the case in real time while the conflict is ongoing, and will consider it justiciable even if it raises a sensitive issue of national security. In the United States, comparable cases are often treated as non-justiciable, based on doctrines including standing, the political question doctrine, and the state secrets privilege.

The experience in Israel, while far from perfect, demonstrates that the judicial branch has the institutional capability to resolve challenges to national security policies, and that the availability of judicial review has an

366. *Id.* at 17.
367. Joseph Lelyveld, *supra* note 364.
368. *Id.*
369. *Id.*

actual effect on governmental policy and military practice and thus plays a major role in reining in governmental excesses in times of war.

The norm that has developed in Israel in even the most sensitive cases is that there is always a legal framework for the courts to use. This has reinforced the rule of law as a bedrock principle in Israeli society, which is due in large measure to the phenomenon of legal oversight by the Israeli Supreme Court. In the aftermath of 9/11, when the US executive branch asserted unbridled power and argued that the courts had no role to play, the Israeli approach—an approach that says that there is always a legal framework to apply—might have played a moderating role. In this author's opinion, failing to treat these cases as justiciable amounts to an abdication of the judicial role, as envisioned by Marbury v. Madison.[370]

370. Marbury v. Madison, 5 U.S. 137 (1803).