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# **Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects**

Stephanie Cooper Blum<sup>1</sup>

*No civilized nation confronting serious danger has ever relied exclusively on criminal convictions for past offenses. Every country has introduced, by one means or another, a system of preventive or administrative detention for persons who are thought to be dangerous but who might not be convictable under the conventional criminal law.*

– Alan Dershowitz<sup>2</sup>

## **INTRODUCTION**

One tool in the current war on terror involves the Bush Administration's labeling of alleged terrorists as "enemy combatants" and detaining them indefinitely, without access to counsel, and without having to file any criminal charges. This enemy combatant policy is really an ad hoc system of preventive detention whereby U.S. citizens or foreign nationals are detained against their will without the filing of criminal charges for the purposes of incapacitation and interrogation. President Bush has justified his unilateral decisions to label individuals as enemy combatants on the exercise of his war power as Commander in Chief under Article II of the Constitution and the Joint Resolution passed by Congress after 9/11 to use all "necessary and appropriate force" against those who "planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."<sup>3</sup> As law professors Samuel Issacharoff and Richard Pildes describe: "The most controversial legal power that the U.S. government has not just asserted but actually deployed at this point in the war on terrorism is probably the power to detain preventatively both citizens and noncitizens who the executive considers are 'enemy combatants.'"<sup>4</sup>

On July 21, 2008 – almost seven years after 9/11 – Attorney General Michael Mukasey argued in a speech before the American Enterprise Institute that preventive detention of terrorist suspects is an essential component of prosecuting this war on terror:

The United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to the battlefield....We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. And this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer. ...

[T]o suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers.<sup>5</sup>

As America approaches a new presidential election and new Administration, one has to wonder whether President Bush's version of preventive detention, e.g. the enemy combatant policy, will ultimately be repudiated as a mistaken experiment that needlessly sacrificed liberty and America's reputation for questionable security gains or whether it or some alternative method of preventive detention will become part of America's legal landscape for the indefinite future.

Israel and Britain, by comparison, have been dealing with terrorist threats for decades, and both countries have created various regimes of preventive detention of terrorist suspects to deal with the recurring reality of terrorism. While no one terrorist attack in either country resulted in 3,000 deaths, as did the 9/11 attack, both countries view terrorism as threats to national security and both countries grapple with the balance between security and liberty in their counterterrorism policies. Hence, in understanding the broader context of America's enemy combatant policy, and analyzing whether preventive detention is needed in the war against terror, it is useful to look at other democracies that have dealt with asymmetric terrorist threats and observe how they have handled incapacitation and interrogation of terrorist suspects. As New York University law professor Stephen Schulhofer notes: "Fighting terrorism poses challenges that are essentially new (or newly recognized) for America. For that reason, it is worth considering the experience of Western democracies that confronted grave terrorist threats over extended periods before September 11, 2001."<sup>6</sup> To this end, he posits that Britain and Israel "offer two of the few available sources of recent experience in attempting to reconcile the demands of national survival and the rule of law in the context of an unremitting terrorist threat."<sup>7</sup>

As this article will illustrate, there are significant differences between the preventive detention regimes of Israel and Britain and America's enemy combatant policy, namely: (1) the manner in which the preventive detention policies were created in the first place and (2) the ensuing substantive rights of the detainees. While America's enemy combatant policy was created unilaterally by executive fiat based on claimed inherent constitutional authority, Israel's and Britain's preventive detention policies – which have changed throughout the decades – have virtually always been enacted by a legislative body and were not just executive usurpations of power. Moreover, both Israel and Britain have almost always had an explicit role for judicial review before subjecting the suspect to prolonged preventive incapacitation whereas President Bush has asserted that the executive branch can alone resolve factual disputes and determine whether an individual is an enemy combatant based on intelligence reports without any opportunity for the detainee to respond. Finally, and most significantly, the breadth and scope of Israel's and the Britain's current preventive detention policies are strikingly more modest than America's. Although Britain is currently trying to increase pre-charge detention to forty-two days (and in July 2005 tried to increase pre-charge detention to ninety days), its current limit is twenty-eight days of preventive detention. While Israel has administratively detained some Palestinians for years, the detainees were allowed judicial review, generally within eight days, and are subject to renewals every six months. Conversely, President Bush has asserted his right to unilaterally label individuals as enemy combatants and detain them indefinitely and incommunicado for a war that may never end.

Although all three countries are democracies dealing with terrorism and all struggle with balancing civil liberties with national security, America's policy of preventive

detention is not just different as a matter of degree – it is grossly different as a matter of kind. An important question that needs to be addressed is to what extent, if any, is the threat America faces from terrorism graver than the threat faced by Israel, which is surrounded by hostile nations and has been in a state of emergency since its founding in 1948, or the threat faced by Britain, which has a larger home-grown Islamic terrorism threat than America. If the threat that America faces is similar or not as severe, then the rationale for its more draconian preventive detention policies loses even more of its persuasiveness.

As this article will demonstrate, historically both Britain's and Israel's preventive detention policies started with less judicial review and more executive discretion. Over the years as each country became more accustomed to its "emergency" situation, it provided more due process rights and judicial review to detainees even though the threat posed by terrorism did not diminish. Perhaps this is the United States' fate, and it too will eventually provide more due process rights to its enemy combatants by involving Congress and the judiciary in creating and monitoring a preventive detention regime. The purpose of this article is to persuade the reader the United States needs to move in that direction.

### **AMERICA'S ENEMY COMBATANT POLICY**

After September 11, 2001, the Administration decided to detain certain individuals suspected of being members or agents of al Qaeda or the Taliban as enemy combatants and hold them indefinitely and incommunicado for the duration of the war on terror. The rationale behind this system of preventive detention is to incapacitate suspected terrorists, facilitate interrogation, and hold them when traditional criminal charges are not feasible for a variety of reasons. By employing an armed-conflict model that treats terrorists as "combatants," the Bush Administration argues it can preventively detain terrorists until the end of hostilities, despite there being no foreseeable ending scenario to an amorphous war on terror. Furthermore, terrorists are automatically "unlawful" or "enemy" combatants and hence not entitled to protections as true prisoners of war; yet, under the Bush Administration's approach, they also are not entitled to the legal protections afforded criminals. As law professor David Luban notes: "By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire."

Designating individuals as enemy combatants and holding them indefinitely for a war on terror that may never end raises serious legal and policy concerns. After 9/11, the Administration determined that the Geneva Conventions did not apply to the conflict with the Taliban and al Qaeda.<sup>8</sup> Hence, all Taliban and al Qaeda operatives were automatically *unlawful* "prisoners of war" and could be subjected to interrogation.<sup>9</sup> In August 2002, Jay Bybee, then-assistant attorney general in the Office of Legal Counsel, sent President Bush a memorandum stating: "As commander-in-chief, the President has constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy."<sup>10</sup> According to John Yoo, former deputy assistant attorney general under the Bush Administration, "Information is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means of

preventing future terrorist attacks upon U.S. territory.”<sup>11</sup> As law professor Howard Ball observes, “the Administration has offered one fundamental rationale for such treatment [designations of enemy combatants]: the acquisition of actionable intelligence.”<sup>12</sup>

In addition to the need for information, the Administration argues that its enemy combatant policy is necessary to incapacitate terrorists so they do not return to the battlefield. During the oral argument in *Hamdi v. Rumsfeld*, then-Deputy Solicitor General Clement argued that incapacitation of Hamdi – a U.S. citizen turned over to U.S. forces by the Northern Alliance in Afghanistan – was a legitimate rationale for designating him an enemy combatant. Clement posited that the Administration needed to detain Hamdi so he would not rejoin the battlefield while the United States had 10,000 American troops in Afghanistan.<sup>13</sup> Yet, if the battlefield includes the whole world and the war is indefinite, the implication of incapacitation as a rationale for prevention detention is staggering. Essentially, under the enemy combatant policy, the executive branch can unilaterally designate any person in the world as an enemy combatant and hold that individual incommunicado, indefinitely, and with no criminal charges for the purposes of coercive interrogation and incapacitation.

The Administration has applied its enemy combatant policy to U.S. citizens and legal residents (hereafter called U.S. persons) as well as foreign nationals captured overseas. With respect to U.S. persons, Jose Padilla (U.S. citizen arrested in Chicago), Yaser Hamdi (U.S. citizen arrested in Afghanistan), and Ali Saleh Kahlah al-Marri (legal resident arrested in Peoria, Illinois) have all been designated at one point as enemy combatants and subjected to this Administration’s preventive detention regime.<sup>14</sup> The cases of Hamdi and Padilla have been resolved. After a plurality of the Supreme Court ruled in *Hamdi v. Rumsfeld* that Hamdi must be allowed to challenge his designation as an enemy combatant in a neutral forum,<sup>15</sup> the Administration released him to Saudi Arabia in 2004 without any kind of adversarial hearing, thereby undermining – to some extent – its rationale of needing to detain this dangerous individual so he did not return to the battlefield.<sup>16</sup> The Administration transferred Padilla to the criminal justice system in 2005, presumably to avoid a show-down at the Supreme Court over its enemy combatant policy.<sup>17</sup> Padilla was subsequently convicted of terrorism-related charges and sentenced to seventeen years in prison in 2007.

As of this writing, it appears that al-Marri is the only U.S. person currently being detained as an enemy combatant. On July 15, 2008, in *al-Marri v. Pucciarelli*, the full Fourth Circuit ruled in a split decision 5-4 that the Administration does have the authority to designate U.S. persons captured in peaceful civilian areas as enemy combatants but that the government needs to submit more than a declaration based on hearsay to support such a designation, or explain why a declaration is the “most reliable available evidence” to support indefinite detention of al-Marri as an enemy combatant.<sup>18</sup> Consequently, the Fourth Circuit remanded the case for further evidentiary proceedings to allow al-Marri to better challenge the underlying evidence. On September 19, 2008, al-Marri requested an interlocutory appeal to the Supreme Court arguing that the Joint Resolution did not authorize his indefinite military detention without criminal charge or trial based on the government’s assertions that he conspired with al Qaeda. It is presently unclear whether the Supreme Court will grant certiorari in the matter or allow the evidentiary hearing to proceed. In sum, as of this writing, the Supreme Court has not ruled on the pivotal constitutional question of whether U.S. citizens, such as Padilla, or legal residents, such as al-Marri – who are captured in peaceful civilian areas away

from a battlefield – can be detained indefinitely as enemy combatants with no criminal charges.

As of June 2008, there are approximately 270 foreign nationals being detained at Guantanamo Bay as enemy combatants.<sup>19</sup> On June 12, 2008, the Supreme Court held in *Boumediene v. Bush* that the detainees must be allowed to challenge their detention in federal court through the writ of habeas corpus.<sup>20</sup> The Supreme Court explicitly stated, however: “We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.”<sup>21</sup> In other words, even after seven years of the enemy combatant policy, the standard of review and substantive standards justifying detention as an enemy combatant remain unclear. Significantly, the legality of the Bush Administration’s enemy combatant policy as applied to both U.S. persons and foreign nationals remains unsettled as of this writing.

Assuming there is a genuine need for preventive detention as a tool in the war on terror, and assuming a regime can be created that is lawful, there remains the underlying question of sound policy: to what extent can the United States create a system of preventive detention that is perceived as fair, applied consistently, and narrowly-tailored to meet its objectives. A significant negative repercussion to the enemy combatant policy is that other democratic countries may be hesitant to cooperate with the United States in pursuing terrorist suspects due to displeasure at the United States’ preventive detention policies. Not surprisingly, the enemy combatant policy has sparked criticism from individuals across the political spectrum.<sup>22</sup>

Given that the war on terror is unlikely to end soon and given the inevitable change in administration that will occur in 2008, it is an opportune time to think through the complex legal and policy issues now and be ready to propose a better solution to the new Administration. Analyzing how Israel and Britain have dealt with incapacitation and interrogation of terrorist suspects can help with this endeavor. Professor Thomas Powers notes: “The policies of Britain and Israel each moved in the same direction: toward greater legal clarity and toward more extensive due process protections. The United States should take advantage of those countries’ experiences to find ways to build due process into preventive detention.”<sup>23</sup>

## ISRAEL’S PREVENTIVE DETENTION POLICIES

In Israel, preventive detention is called “administrative detention” and is distinct from criminal detention. Administrative detention is defined as detention without charges or trial and is authorized by administrative order rather than by judicial decree.<sup>24</sup> It can be used solely for prevention.<sup>25</sup> According to Haifa University law professor Emanuel Gross, administrative detention is based on the danger to state or public security posed by a particular person whose release would likely threaten the security of the state and the ordinary course of life.<sup>26</sup> The goals of administrative detention are not arrest, trial, conviction, and punishment but rather prevention. Although difficulty in convicting a person in ordinary criminal proceedings is not a reason for employing administrative detention, if evidence is classified and cannot be disclosed, administrative detention becomes an option.<sup>27</sup>

Significantly, Israel has *separate* administrative detention policies for Israel proper versus the Palestinian Territories, much like America’s enemy combatant policy as

applied to U.S. persons, Hamdi, al-Marri, and Padilla, who were/are detained in America versus aliens captured overseas and held at Guantanamo Bay or Bagram airbase in Afghanistan. While Israel's detention laws provide for judicial review and considerably more due process for its detainees than America's enemy combatant policy, Israel's administrative detention policies nonetheless invoke criticism from civil rights groups within Israel.

## I. Israel Proper

In 1948, when Israel achieved its independence, Israel adopted the British Mandate's Defense (Emergency) Regulations of 1945, which empowered the High Commissioner and Military Commander to detain any person it deemed necessary for maintaining public order or securing public safety or state security. In 1979, Israel reformed its detention laws and enacted a new statute: the Emergency Powers (Detentions) Law of 1979 (EPDL of 1979), which provided more rights to detainees than the prior regulations, such as requiring that a detainee be brought before the president of the district court within forty-eight hours after arrest for judicial review of the detention, allowing appeals to the Supreme Court, and mandating periodic reviews by the president of the district court every three months.<sup>28</sup> While the EPDL of 1979 only applies once a state of emergency has been proclaimed by the Israeli Knesset (Israel's legislature), Israel has been in such a state of emergency since its inception in 1948.

Under the EPDL of 1979, Israeli citizens and non-citizens within Israel can be detained if the defense minister has "reasonable cause to believe that reasons of state security or public security" requires it, although "state security" and "public security" have never been expressly defined.<sup>29</sup> The district court in reviewing the detention order must vacate the order if it does not find "objective reasons of state security or public security" that require the detention or if the detention "was made in bad faith or from irrelevant considerations."<sup>30</sup> A detainee may appeal the district court's decision directly to the Israeli Supreme Court, which requires that the danger to the State must be "*so grave* as to leave no choice but to hold the suspect in administrative detention" or that the detainee "*would almost certainly* pose a danger to public or State security."<sup>31</sup> Unlike America where an enemy combatant can be held indefinitely, the detention order in Israel is limited to six months, although it can be indefinitely renewed.<sup>32</sup> Hence, this six-month distinction may be more form than substance. Matti Friedman of the *Jerusalem Post* notes that "in theory, someone could be held *ad infinitum*" under Israel's administrative detention policies and in practice some Palestinians have been held for years in administrative detention.<sup>33</sup>

During the detention proceedings, the judge sees all the evidence, even if it is classified, and the judge decides what evidence may be disclosed to the detainee and his/her counsel.<sup>34</sup> Therefore, some detainees are held without knowledge of the specific allegations against them and without a meaningful opportunity to rebut the charges.<sup>35</sup> Such a practice has caused B'Tselem, an Israeli human rights group, to decry that "Israel has therefore made a charade out of the entire system of procedural safeguards in both domestic and international law regarding the right to liberty and due process."<sup>36</sup> It further argues that Israel has used administrative detention to detain Palestinians for their political opinions and non-violent political activity.<sup>37</sup>

Similar to some of the rationales for America's enemy combatant policy,<sup>38</sup> one rationale for Israel's administrative detention is to protect sources and methods and

allow otherwise inadmissible evidence such as hearsay into evidence.<sup>39</sup> Prolonged incapacitation for purposes of interrogation, however, does not seem to be a primary rationale in Israel, which stands in stark contrast to America's principal rationale for its enemy combatant policy.<sup>40</sup> Unlike America (at least so far), Israel has also detained terrorists under administrative detention who have completed their criminal sentences if there is a fear they might engage in subsequent terrorist activities against Israel.<sup>41</sup> Such a rationale B'Tselem argues means that Israel has totally blurred the "distinction between preventive and punitive detention."<sup>42</sup>

## II. Palestinian Territories

In the West Bank and Gaza Strip, administrative detentions are generally enforced pursuant to various military orders. The military orders allow a senior military commander to detain an individual for up to six months, although it can be indefinitely renewed as in Israel proper, if the commander has "reasonable grounds to presume that the security of the area or public security require the detention."<sup>43</sup> As in Israel proper, the terms "security of the area" and "public security" are not defined and their respective interpretations have been left to the military commanders.<sup>44</sup> The detainees are allowed to appeal the military orders to the Israeli Supreme Court, which sits in these cases as a High Court of Justice. As the High Court of Justice, the Court may hear "matters in which it deems it necessary to grant relief for the sake of justice."<sup>45</sup>

Unlike America's detainees at Guantanamo Bay who receive *no* access to a lawyer for their initial status determination or review hearings<sup>46</sup> (although this may change based on the Supreme Court's recent June 2008 decision in *Boumediene*), a detainee in the Palestinian Territories is entitled to a lawyer, and an appearance before a judge is generally required within *eight* days of arrest (by comparison to forty-eight hours in Israel proper).<sup>47</sup> Throughout the decades, however, different military orders have changed the number of days a detainee can be held without seeing an attorney and the number of days before judicial review. For instance, in 1970, Military Order 378 allowed military authorities to impede access to counsel for thirty days for individuals suspected of violating security laws.<sup>48</sup> Specifically, Order 378 allowed the head of the investigation to bar access to a lawyer for fifteen days, and a reviewing administrator could extend the bar for an additional fifteen days if convinced that the measure was "necessary for the security of the area or for the benefit of the investigation."<sup>49</sup> In 2002, a military order gave the commanding officer the authority to prevent a detainee from meeting with a lawyer for up to thirty-four days if the officer believed that such a meeting with the lawyer would impede the effectiveness of the interrogation.<sup>50</sup> The Israeli Supreme Court upheld this provision finding that, on balance, the risk of damage to the investigation or national security outweighed the immediate right to an attorney.<sup>51</sup> The detention, however, was not incommunicado; after forty-eight hours, the detainees had the right to be visited by the International Red Cross (IRC) and their families were informed of their whereabouts.<sup>52</sup> By contrast, in America, the Bush Administration barred al-Marri from seeing his attorneys or the IRC until after he had been in incommunicado detention for sixteen months.<sup>53</sup>

Israel uses administrative detention more aggressively against Palestinians than against Israeli citizens. According to Amnesty International, between 2000 and 2005, thousands of Palestinians were held in administrative detention, some of them for more than three years, while during that same time period only four Israelis were placed in



administrative detention for periods ranging from six weeks to six months.<sup>54</sup> Israel's use of administrative detention has also increased since the second intifada. Before the start of the first intifada in 1987, Israel had about 200 administrative detainees.<sup>55</sup> According to B'Tselem, by 2007, Israel held a monthly average of 830 Palestinians in administration detention, which was one hundred higher than in 2006.<sup>56</sup> As of February 2008, Israel is holding 780 Palestinians in administration detention<sup>57</sup> (at its height, Guantanamo Bay held about 750 prisoners).<sup>58</sup> By comparison, over the years, only nine Israeli citizens residing in settlements in the West Bank have been administratively detained for periods up to six months.<sup>59</sup> Similarly, in America, most of its enemy combatants are held overseas and there appear to have been only three enemy combatants who were U.S. persons.

Although Israel's administrative detention regimes in both the territories and Israel proper provide more due process and substantive rights to its detainees than America's enemy combatant policy, many civil libertarians in Israel deride administrative detention as inhumane and undemocratic. Hebrew University law professor David Kretzmer argues that the main problem with administrative detention is the "temptation to use it even when it's not necessary."<sup>60</sup> He argues that it is overused in the territories instead of employing the criminal justice system and that Israel fails to recognize the "distinction between legitimate political activity and unlawful conduct that endangers security."<sup>61</sup>

### **III. Role of Israel's Judiciary**

Unlike America where the Supreme Court has been largely (but not entirely) deferential to the executive branch on matters of preventive detention, the Israeli Supreme Court has been extremely activist and attentive to due process and human rights issues raised by administrative detention. In fact, the Knesset has often criticized the activist nature of the Israeli Supreme Court, arguing that it oversteps its bounds and second guesses the will of the people as expressed by their elected representatives.

Israel has been in a state of war since its founding in 1948 – with frequent uprisings in the West Bank and Gaza Strip. Moreover, terrorist organizations such as Hamas, the Popular Front for the Liberation of Palestine, and the Palestinian Islamic Jihad have directly targeted Israeli civilians, largely with suicidal attacks in Israeli cities. Terrorism against Israel increased dramatically after the second intifada, beginning in September 2000 and continuing to this day. According to Israel's Ministry of Foreign Affairs, 960 Israeli citizens have been killed by terrorists between 2000 and 2006 and 6,596 have been wounded.<sup>62</sup> In 2002 alone, there were 60 separate suicide attacks against Israeli targets<sup>63</sup> – more than during the previous eight years combined.<sup>64</sup> Yet, as Professor Schulhofer notes, although the Palestinian intifada has grown in intensity since 1999, "Israeli courts have become increasingly interventionist" and not increasingly deferential to military authorities.<sup>65</sup> Harvard Professor Philip Heymann expresses a similar sentiment: "The contrast with Israel is revealing. Even in the midst of the intifada, the Israeli Supreme Court has asserted some level of judicial review over government actions that affect Palestinians, both within Israel and also within the West Bank and Gaza."<sup>66</sup>

For instance, in 2002, the Israeli Defense Forces (IDF) undertook a military operation known as Defensive Shield (or Defensive Wall) in response to an extremely bloody month of terrorist attacks in Israel which culminated in a suicide bomber killing

dozens of Israelis during a Passover dinner at a hotel. As a result, IDF arrested thousands of Palestinians and, pursuant to a new military order,<sup>67</sup> detained them for eighteen days (and then twelve days) without judicial review based on an IDF officer's determination that the "circumstances of [the person's] detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public."<sup>68</sup> In *Marab v. IDF Commander in the West Bank*, the Israeli Supreme Court invalidated the military order that allowed investigative detention of Palestinians in the West Bank for twelve days without a judicial hearing for purposes of interrogation.<sup>69</sup> Rejecting the government's claim that effective interrogation and security merited the delay, the Court held that prompt judicial review of detention is an inherent part of the legality of the detention measure because the detainee is still presumed innocent.<sup>70</sup> The Court found that detaining Palestinians twelve days without judicial review was "in conflict with the fundamentals of both international and Israeli law," which view "judicial review of detention proceedings essential for the protection of individual liberty."<sup>71</sup> Significantly – and in stark contrast to America – the Israeli Supreme Court ruled that even "an 'unlawful combatant' . . . is to be brought *promptly* before a judge."<sup>72</sup> The Israeli Supreme Court, however, deferred its ruling for six months to allow the IDF to create a new regime of detention and arrest.<sup>73</sup> Israel went back to allowing eight days before judicial review.

Interestingly, while the Israeli Supreme Court in *Marab* did not allow twelve days before judicial review, it did allow the IDF to postpone access to counsel for up to *thirty-four* days, meaning that some detainees would attend their judicial review hearing without the benefit of counsel. The Court based this determination on "significant security considerations."<sup>74</sup> Importantly, the Court explicitly noted that "advancing the investigation [e.g., facilitating interrogation] is not a sufficient reason to prevent the meeting . . . there must be an element of necessity."<sup>75</sup> This, of course, stands in stark contrast to America where the main rationale for years of incommunicado detention is to facilitate interrogation without interference posed by attorneys.

While the Israeli Supreme Court does not hesitate to involve itself in the minutia of administrative detention (e.g., discussing the exact number of days before judicial review and access to counsel), the U.S. Supreme Court by contrast has largely avoided the substantive details concerning preventive detention and focused more on narrow jurisdictional issues. For instance, in *Rasul v. Bush*, the U.S. Supreme Court held that the foreign nationals (similar to Israel's detainees in the Palestinian Territories) held at Guantanamo Bay had a right to challenge their detentions in federal court with a writ of habeas corpus.<sup>76</sup> Yet the Court failed to provide *any* details on what proceedings, if any, would be appropriate. Therefore, there was no discussion of the time limits for incommunicado detention or judicial review and no discussion of what standards merited preventive detention in the first place. After *Rasul*, at the Bush Administration's urging, Congress passed the Detainee Treatment Act (DTA) of 2005,<sup>77</sup> which stripped the foreign nationals at Guantanamo Bay of their limited victory in *Rasul* and held that the federal courts did not have jurisdiction to hear habeas appeals challenging their detention.

In June 2006, however, in *Hamdan v. Rumsfeld*, the Supreme Court interpreted the DTA restrictively, holding that it only applied *prospectively* from the date of enactment and did not remove jurisdiction from the federal courts in habeas proceedings pending on that date.<sup>78</sup> Congress responded by passing the Military Commissions Act (MCA) of

2006 which stated that the DTA applied to all pending cases – not just those that occurred prospectively.<sup>79</sup> On June 12, 2008, the Supreme Court held 5-4 in *Boumediene v. Bush* that the foreign nationals at Guantanamo have a right to challenge their detentions in U.S. civilian courts and that the MCA is unconstitutional to the extent that it precludes the jurisdiction of federal courts to entertain habeas petitions brought by them.<sup>80</sup> Yet, *Boumediene* does not concern the substantive rights detainees have on the merits and what claims will be cognizable before federal courts. In fact, ironically, after six years of litigation, the aliens at Guantanamo have the same rights – or lack thereof – that Padilla, Hamdi, and al-Marri have: they all can bring habeas petitions before federal courts. As commentator George Will notes of *Boumediene*, “None [of the detainees] will be released *by* the court’s decision, which does not even guarantee a right to a hearing. Rather, it guarantees only a right to request a hearing.”<sup>81</sup> In other words, while the Israeli Supreme Court has intervened and addressed substantive details of preventive detention (e.g., arguing that twelve days is too long before judicial review), the U.S. Supreme Court – six years later – is still standing on the sidelines.

The same pattern has occurred with the enemy combatant cases involving U.S. persons detained in America. In *Hamdi*, the plurality of the U.S. Supreme Court merely held that after two years of incommunicado detention as an enemy combatant, Hamdi must be allowed a meaningful opportunity to challenge the designation of an enemy combatant in a neutral forum – something Israel’s 1979 law had already provided after a mere *forty-eight* hours for detainees arrested within Israel. Disappointingly, as in *Rasul*, *Hamdi* did not specify how long an enemy combatant could be held incommunicado or how long he could be held before being brought for judicial review. As Professor Schulhofer laments, the Supreme Court “expressed no impatience and showed no evident discomfort with the two-year-plus periods that detentions had been allowed to remain unreviewed.”<sup>82</sup>

Similarly, in *Padilla v. Rumsfeld*, the U.S. Supreme Court rejected Padilla’s appeal on jurisdictional grounds – finding 5-4 that Padilla filed his habeas petition in the wrong jurisdiction – and did not reach any of the substantive issues concerning his indefinite and incommunicado detention. As Professor Schulhofer observes: “After more than two years of detention, virtually all of it incommunicado, and after persistent, unsuccessful efforts to secure the rights to counsel and to a hearing on the allegations against him, Padilla obtained no relief whatsoever. He was told to start again in another court.”<sup>83</sup> When Padilla’s case was about to reach the Supreme Court for a second time, the Administration switched course and transferred him to the criminal justice system where he was subsequently convicted and sentenced to seventeen years for terrorism-related charges. In sum, the Supreme Court in Israel is exceedingly more proactive in scrutinizing the details of administrative detention to guarantee basic human rights while the U.S. Supreme Court is much more reticent and deferential to the executive branch.

Some of these differences between the Israeli and U.S. Supreme Courts can be attributed to their divergent views on standing and justiciability. While in America the Supreme Court tends to be deferential to the executive branch during times of war, in Israel, which has been in a perpetual state of war, the Israeli Supreme Court believes that it can review virtually all activities conducted by the executive branch whether in Israel proper or the Palestinian Territories. In fact, there is almost no standing requirement for the Israeli Supreme Court – almost any person directly affected by state

action can petition the Court that the action was unlawful, although the Court will not substitute its own discretion for the executive's decisions on operational issues or counter-terrorism measures.<sup>84</sup> In fact, even organizations interested in the fate of a detainee can appeal to the Israeli Supreme Court.<sup>85</sup> As Israeli Supreme Court Registrar Yigal Mersel notes: "The approach of the [Israeli] Court is to balance human rights and national security on a case-by-case basis; this approach manifests itself in an almost total willingness to hear any case challenging any counter-terrorism activity, without reservations of standing or justiciability."<sup>86</sup> According to Chief Justice Barak, "everything is justiciable."<sup>87</sup> In other words, if a petitioner argues that the military is acting unlawfully, the petition will not normally be rejected on the grounds that the petitioner is not an Israeli citizen or inhabitant.<sup>88</sup>

Conversely, the U.S. Supreme Court has strict standing and jurisdictional requirements as demonstrated by the years of litigation just concerning whether the detainees at Guantanamo Bay could bring habeas petitions challenging their detentions in federal court. A fundamental difference between the Israeli and U.S. Supreme Courts is that the U.S. Supreme Court is restricted to ruling on specific cases that have been previously adjudicated and hence cannot opine on broader policy issues as can the Israeli Supreme Court. Given the U.S. Supreme Court's greater standing and jurisdictional restrictions, it could be argued that Congress needs to take the initiative to protect the procedural and substantive rights of detainees more than does the Supreme Court. Stated differently, while the Israeli Supreme Court is activist (much to the chagrin of the Knesset) and often protects substantive human rights, the U.S.'s differing system of government leads to the conclusion that Congress needs to play this role.

#### **IV. Israel's 2002 Unlawful Combatants Act**

In 2000, the Israeli Supreme Court held that the EPDL of 1979 did not allow Israel to detain individuals who are not themselves terrorist threats for "bargaining chips."<sup>89</sup> The Court held that the particular terrorist had to pose a risk and could not be held simply as a negotiating tool despite the fact that his detention might be crucial to state security and the release of Israeli soldiers. Rather, the Court found that an individual's detention had to ensue from the dangers posed by his release.<sup>90</sup>

As a result of this decision, the Knesset enacted the 2002 Incarceration of Unlawful Combatants Law, which allows Israel to detain "members of a force perpetrating hostile acts against Israel" even *without* a showing of immediate threat or *individual* involvement in terrorist acts.<sup>91</sup> Although this law provides for access of counsel within seven days of detention, judicial review within fourteen days of detention, and a right of appeal to the Supreme Court within thirty days,<sup>92</sup> this law would theoretically allow Israel to detain terrorist members based on mere association. The detainee can be held until the Minister of Defense determines that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee's release would not threaten state security.<sup>93</sup> Significantly, if the Minister of Defense determines in writing that a force engages in hostile acts, this finding is presumed correct unless the detainee can prove otherwise.<sup>94</sup> After the initial detention hearing, the detention must be reviewed by the district court every six months (in contrast to every three months under the 1979 law).<sup>95</sup> It appears that Israel has used this law only a few times, against high-profile terrorists from abroad. Most recently, Israel used it to detain Hezbollah fighters during the summer of 2006.<sup>96</sup>

By comparison, in 2005, Rep. Adam Schiff (D-CA) introduced the Detention of Enemy Combatants Act (DECA) (HR 1076) to the House of Representatives but it never became law.<sup>97</sup> The purpose of DECA was to “authorize the President to detain an enemy combatant who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda, to guarantee timely access to judicial review to challenge the basis for a detention, to permit the detainee access to counsel, and for other purposes.”<sup>98</sup> Significantly, DECA explicitly stated that “Congress has a responsibility for maintaining vigorous oversight of detention of United States citizens and lawful residents to assure that such detentions are consistent with due process.”<sup>99</sup> Furthermore, in order to detain an “enemy combatant” under DECA, the President would need to certify that (A) “the United States Armed Forces are engaged in a state of armed conflict with al Qaeda and an investigation with a view toward prosecution, a prosecution, or a post-trial proceeding in the case of such person or resident is ongoing; or (B) detention is warranted in order to prevent such person or resident from aiding persons attempting to commit terrorist acts against the United States.”<sup>100</sup> Importantly, like Israel, the certifications would be effective for 180 days but able to be renewed with successive certifications.<sup>101</sup> Judicial review would occur at the United States District Court for the District of Columbia where detainees could challenge – with the assistance of counsel – the basis of the detention.<sup>102</sup> Yet, DECA did not proscribe any particular time frame that a detainee could be held incommunicado or otherwise brought for judicial review, instead relying on vague generalities about future rules that shall “guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel.”<sup>103</sup> Significantly, had DECA been enacted, it would have been similar to Israel’s law that passed in 2002, although Israel’s Act did specifically provide strict time frames for judicial review and access to counsel.

Yet, because DECA was *not* passed into law – and no alternative legislation has been enacted – the executive branch still argues it retains the right to unilaterally label a U.S. person caught in a civilian area as an enemy combatant and hold that person indefinitely, although pursuant to *Hamdi* that individual must be allowed to challenge that designation in a neutral forum. On the other hand, Israel’s 2002 Incarceration of Unlawful Combatants Law effectively allows Israel to “take hostages” to secure the release of Israeli prisoners. Thus, an argument could be made that such a rationale is more draconian than the U.S. enemy combatant policy where at least the enemy combatants are themselves (alleged) unsavory characters. Neither policy is refreshing.

## V. Summary of Analysis: Israel versus United States

While Israel’s administrative detention used primarily against Palestinians has several problems (namely, that secret evidence can be used to detain individuals for indefinite renewals of six months), it nonetheless provides more transparency and due process than America’s form of preventive detention employed in its enemy combatant policy. Although Israel has not suffered a catastrophic terrorist attack on the scale of 9/11, between 2000 and 2006 Israel suffered 152 attacks in a country with a population of close to seven million.<sup>104</sup> Unlike America, however, it has always allowed judicial review of its administrative detention of individuals and allowed access to counsel. Although the number of days has changed throughout the decades, the maximum number of days a detainee can be held without access to counsel in Israel is thirty-four days and the maximum number of days before judicial review is eight days compared to America’s

indefinite and largely incommunicado detention. While pursuant to *Hamdi*, America's enemy combatants must now be given a meaningful opportunity to challenge the designation presumably with counsel, the details of that review and how long the person initially can be held without judicial review and access to counsel are still unresolved. As Heymann observes, "though our danger is far less than the danger that Israel faces, our willingness to abandon the most fundamental judicial protections of personal security has been far greater."<sup>105</sup>

Significantly, the rationales for preventive detention are also different between the two countries. While both countries attest they need preventive detention when evidence is classified or inadmissible – or when they do not want to compromise methods and sources – America further asserts that it needs preventive detention to gain actionable intelligence from the detainees, and that access to counsel will thwart that purpose. By contrast, Israel's Supreme Court refused to allow incommunicado detention for a mere thirty-four days based on such a rationale. Israel, however, uses administrative detention to continue to detain individuals that are dangerous to Israel's security after the completion of their criminal sentences. America has not yet articulated this rationale but it may be too soon to tell since all of America's convicted terrorists are still serving their sentences such as Jose Padilla, Richard Reid, and John Walker Lindh.

Finally, Israel has never claimed that its executive branch or military could unilaterally create a system of administrative detention without input from the legislative or judicial branches. In fact, even at the height of suicidal terrorist attacks in 2002, the IDF only authorized detention of eighteen days (then dropped it to twelve days) without judicial review (which was struck down by the Israeli Supreme Court). It is telling that Israel's military only *tried* to obtain preventive detention for *weeks* compared to President Bush's claim of *indefinite* detention without judicial review.

Although Israel's administrative detention policies highlight some substantial flaws in America's system of preventive detention, it is also useful to look at how Britain has dealt with its various terrorism threats throughout the decades. As will be shown, while Israel and America view the conflict with terrorism more as a "war" using terms such as "unlawful" or "enemy" combatants, Britain treats terrorists more as criminals, and its preventive detention regime reflects a need for additional time to investigate potential terrorist acts as crimes.

## **BRITAIN'S PREVENTIVE DETENTION POLICIES**

In Britain, preventive detention is presently called "pre-charge detention" and is used to increase the time for investigation of a potential crime before charging the suspect. Unlike the Israeli model, pre-charge detention in Britain cannot be used to detain an individual after completion of a criminal sentence because he/she is a threat to security, and unlike the practice in the United States, pre-charge detention does not appear to be used solely for interrogation to gain useful intelligence, although this can be part of the rationale. Britain's form of preventive detention is really in support of its criminal justice system. There is no argument that terrorists are unlawful or enemy combatants and no discussion of how to create a regime outside of criminal law. As a British government committee noted in April 2002: "Terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism."<sup>106</sup>

## I. Britain's Emergency Executive Powers

While Britain's current preventive detention regime is framed as pre-charge detention under its criminal justice system, this was not always the case. During both World Wars, Britain used virtually unchecked executive power to detain individuals suspected of being spies or otherwise hostile to the nation. Regulation 14B, enacted in 1915, allowed the home secretary (responsible for internal affairs in Britain and Wales) to order the internment of any person "for securing the public safety or the defense of the realm."<sup>107</sup> Detainees could not use habeas corpus to challenge the detentions in court; rather, a government committee could recommend, but not order, release. The House of Lords ruled that it was "necessary in a time of great public danger to entrust great powers to [the executive]" and assumed that "such powers will be reasonably exercised."<sup>108</sup> Similar powers were enacted during World War II with Regulation 18B, under which 2,000 individuals were detained without trial.<sup>109</sup> Many were British citizens, including leaders of right-wing fascist organizations. Although Winston Churchill initially supported Regulation 18B during World War II, he ultimately condemned it, and it was abolished after the war. He stated: "The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist."<sup>110</sup>

Emergency executive power to detain generally ended after World War II. Britain then promulgated a series of emergency regulations that were constantly renewed to deal with the threat posed by Irish Republicans and later al Qaeda.<sup>111</sup> Instead of unfettered executive detention, the focus changed to pre-charge detention periods (the current maximum is twenty-eight days) with judicial review at varying intervals. While America also detained individuals during World War II (e.g., Japanese internment camps), Britain's Regulations 14B and 18B during the World Wars seem similar to President's Bush *current* claim of executive war powers to unilaterally detain terrorist suspects as enemy combatants. In other words, although Britain faced a serious terrorist threat with its conflict in Northern Ireland (between 1966 and 1999 a total of 3,636 individuals lost their lives in violence related to the Northern Ireland conflict),<sup>112</sup> it did not resort to executive detentions as it had during the World Wars but instead issued a series of regulations that, while controversial, at least allowed for judicial review of pre-charge detention. Similar to Israel, as the terrorist threat increased, it could be argued that the Britain responded overall with more due process for terrorist suspects.

## II. Britain's Emergency Regulations Pre 9/11

While a detailed recounting of Britain's conflict with Northern Ireland and its ensuing legal instruments to fight terrorism before 9/11 is beyond the scope of this article, with respect to pre-charge detention, there are some useful regulations to discuss. The 1939 Prevention of Violence (Temporary Provisions) Act (PVA) empowered the home secretary to arrest and detain individuals without warrant for an initial period of forty-eight hours and, with the authorization from the secretary of state, for an additional period of five days, making the total number seven days for pre-charge detention.<sup>113</sup> The PVA was supposed to be temporary and only last two years; however, it was not until 1952 that it was allowed to expire and not until 1973 that it was formally repealed.<sup>114</sup> Yet, in 1974, after IRA bombings of two pubs in Birmingham left twenty-one people dead

and 160 injured, the PVA was reintroduced again in 1974 as the Prevention of Terrorism (Temporary Provisions) Act of 1974 (PTA).<sup>115</sup> Section 12 (1b) of the PTA allowed the British police to arrest and detain anyone they reasonably suspected “to be or have been involved in acts of terrorism” for seven days without charge with the approval of the secretary of state. For the first forty-eight hours, the suspects could be held without access to attorneys.<sup>116</sup> Under general criminal law, by comparison, pre-charge detention could not and presently cannot exceed ninety-six hours (four days) and the suspect is entitled to see an attorney within the first thirty-six hours.<sup>117</sup> It is interesting to note that, when faced with a serious terrorist threat, Britain increased incommunicado detention a mere twelve hours (from thirty-six hours to forty-eight hours) while incommunicado detention has been *more than two years* for America’s enemy combatants with no prescribed statutory limit at all.

The PTA was rewritten in 1976, 1984, and again in 1989, but continued to stay as emergency “temporary” powers that had to be renewed each year until the 2000 Terrorism Act, discussed below. The seven days of pre-charge detention stayed the same throughout the PTA’s existence. From 1974 until 1996, 27,000 people were arrested under the PTA alone. Although fewer than 15 percent were subsequently charged with a crime, according to terrorism expert and Professor Linda Donahue, the information gained during questioning most likely decreased the level of violence.<sup>118</sup>

In 1972, as the conflict and violence in Northern Ireland escalated, the British government appointed Lord Diplock to head an inquiry into needed emergency powers to deal with the growing terrorist threat in Northern Ireland. The resulting 1973 Northern Ireland (Emergency Provisions) Act (EPA) empowered the government to intern terrorist suspects for seventy-two hours without charges based on mere subjective suspicion (reasonableness was not even required). In 1987, these special arrest powers for Northern Ireland were suspended and instead the PTA provision requiring “reasonable grounds” before detainment was employed.<sup>119</sup> While the EPA (like the PTA) was supposed to be temporary, it lasted twenty-six years until the 2000 Terrorism Act (discussed below).<sup>120</sup> Although Britain had a tendency to enact restrictive legislation under the guise of being “emergency” legislation, the laws were continued because they proved effective.<sup>121</sup> Donahue points out, however, that the effectiveness of security had a corresponding negative effect on civil liberties, including increased friction within Northern Ireland and unwelcome international attention on British domestic affairs.<sup>122</sup>

After the peace process with Northern Ireland in 1999, Britain began to focus more on international terrorism, including al Qaeda.<sup>123</sup> In 2000, Britain passed permanent counterterrorism legislation (no more discussions of “temporary” measures) with the 2000 Terrorism Act (TA). While originally the TA only allowed seven days for pre-charge detention, it was amended in 2003 to increase the total possible period of detention without charge to fourteen days for any individual reasonably suspected of being a terrorist.<sup>124</sup> Between the date of the amendment and September 4, 2005, 357 people were arrested of whom thirty-six were held in excess of seven days.<sup>125</sup> In other words, although the police had the ability to hold suspects for fourteen days in pre-charge detention, they exercised that power infrequently.



### III. Britain's Regulations Post 9/11

Like Israel and America, Britain proposed different preventive detention or pre-charge detention policies for its citizens compared to aliens residing within its borders. While Britain has never held an individual outside its borders as the United States has at Guantanamo Bay or Israel has in the Palestinian Territories, Britain's preventive detention policy towards its foreign nationals after 9/11 was more draconian than the procedures applied to its own citizens, causing much uproar and the policy's eventual demise.

#### A. Foreign Nationals in Britain

After 9/11, Britain adopted additional legal measures with the 2001 Anti-Terrorism, Crime, and Security Act (ATCSA) which provided stronger powers to allow the police to investigate and prevent terrorist activity and other serious crime. Sixty-seven British citizens died in the 9/11 attacks, and eleven of the nineteen suspected 9/11 hijackers had British links.<sup>126</sup> The attack highlighted that terrorist organizations were using Britain to plan attacks.<sup>127</sup>

While the ATCSA did not increase pre-charge detention for British citizens from the 2000 TA's seven days – that happened later in 2003 and again after the July 2005 bombings – it did allow for the removal or indefinite detention of foreign nationals suspected of terrorist activity (albeit this part of ATCSA was limited to fifteen months, unless renewed by Parliament).<sup>128</sup> Upon certification by the home secretary that the individual was an international terrorist whose presence in Britain created a risk to national security, that individual could be deported. If deportation could not occur because of Britain's international obligation to prevent torture or other inhumane treatment, or because of national security concerns, then ATCSA provided the individual could be indefinitely detained – without trial – in Britain, unless the suspect agreed to go to another country and that country agreed to accept him.<sup>129</sup>

Yet, ATCSA did provide some measure of review: a person detained or deported could appeal – with the assistance of counsel – the certification to the Special Immigration Appeals Commission (SIAC), which had the power to cancel the certification if it concluded there were not grounds for the home secretary's certification.<sup>130</sup> Significantly, the appeal included two stages: an “open” one where the home secretary disclosed information and a “closed” one where classified information was made available to a security-cleared special advocate.<sup>131</sup> Once receiving classified information, the special advocate was precluded from further communication with the suspect or his attorney. Unlike in Israel where a judge could prohibit both the suspect and his attorney from seeing classified information during the judicial proceeding for administrative detention, British law allows for a special advocate to access the information against the suspect and provide some measure of review.

Nonetheless, ATCSA's provisions regarding indefinite detention of foreign nationals did not survive scrutiny. The government ultimately repealed the provisions of ATCSA dealing with indefinite detention based on a House of Lords Judicial Committee December 2004 ruling that such powers were incompatible with articles of the European Commission on Human Rights relating to the right to liberty and the right to freedom from discrimination. The Committee found the indefinite detention powers to be discriminatory as they only applied to foreign nationals, not to British citizens, and that they were not proportionate to the threat Britain faced from terrorism.<sup>132</sup>

During the relatively short-life of ATCSA, Britain held seventeen foreign nationals, some more than two years.<sup>133</sup> Of the seventeen, two men voluntarily left Britain and one individual was released under ATCSA and detained on other grounds.<sup>134</sup> In October 2003, the SIAC rejected appeals of ten of the remaining fourteen detainees.<sup>135</sup> In other words, while the indefinite detention of foreign nationals under ATCSA was short-lived, it does not appear that the SIAC rejected many of the detentions on substantive grounds. Yet, even the indefinite detention provision of ATCSA – which was controversial and only lasted approximately three years – provided at the outset for some level of judicial review of the indefinite detention of foreign nationals.

By contrast, the United States did not provide any review of the foreign nationals held at Guantanamo Bay until after the Supreme Court ruled in *Hamdi* and *Rasul* that enemy combatants must be allowed to challenge the designation in a neutral forum. As a result, the Bush Administration created Combatant Status Review Tribunals (CSRTs) where a three-panel board of military officers from the Department of Defense (not the judiciary) decides the detainees' status based on the current threat assessment and intelligence value of each detainee. The detainees are not allowed attorneys; they cannot see evidence used that is considered classified; and there is a rebuttable presumption in favor of the government.<sup>136</sup>

For aliens detained *within* the United States, the USA Patriot Act allowed detention by the attorney general without charge for seven days, after which the person needed to either be charged or removal proceedings commenced.<sup>137</sup> If a detainee could not be otherwise deported and the “release of the alien was found to threaten the national security of the United States or the safety of the community or any person” the attorney general could hold the individual for renewable periods of six months.<sup>138</sup> According to the inspector general of the Department of Justice, 762 aliens were arrested in connection with investigating 9/11 and the majority of these individuals were charged with immigration violations (such as overstaying visas).<sup>139</sup> Ironically, foreign nationals under the USA Patriot Act have more due process rights than U.S. persons detained as enemy combatants. After all, the Administration detained Padilla as an enemy combatant for three and one-half years before bringing criminal charges, which seems to be in contrast to Britain and Israel where non-citizens are (or were in the case of Britain) treated in a harsher manner.

## **B. British Citizens**

After terrorist bombs murdered fifty-two people in London on July 7, 2005, the Home Office (similar in some respects to the U.S. Department of Homeland Security) tried to increase pre-charge detention for British citizens from the fourteen days provided in the TA of 2000, as amended in 2003, to ninety days. Then-Prime Minister Tony Blair addressed Parliament by stating: “I have to try to do my best to protect people in this country and to make sure their safety and their civil liberty to life come first. Let us have a debate about the strength or otherwise of those proposals but for myself I find it a convincing case.”<sup>140</sup> Although Parliament refused to extend pre-charge detention to ninety days in what was Mr. Blair's first parliamentary defeat, it is significant to note that Mr. Blair presented his recommendation to Parliament and encouraged debate about the issue. This, of course, contrasts to President Bush's unilateral decisions – without any debate or input from Congress – on the identity of enemy combatants and how long they can be held without access to counsel.

On July 3, 2006, the House of Commons Home Affairs Committee<sup>141</sup> published a report entitled *Terrorism Detention Powers, Fourth Report of Session 2005-06*, which evaluated whether there was a legitimate justification to extend pre-charge detention to ninety days. The report articulated reasons to extend pre-charge detention beyond fourteen days: the international nature of terrorism; difficulties in establishing the identity of terrorist suspects; the need to find interpreters; the need to decrypt computer files; the length of time needed for scene examination and analysis; the length of time needed to obtain and analyze data from mobile phones; the need to allow for religious observance by detainees; and delays arising from solicitors' consultations with multiple clients.<sup>142</sup> Significantly, unlike in America, interrogation to gain intelligence was not one of the rationales listed as a justification for extending preventive detention, although certainly the detainees are allowed to be questioned during the pre-charge detention period. Yet, the report notes that "In general it cannot be expected that interviews of suspects during extended detention will lead to significant additional information that can be used in court."<sup>143</sup> According to the police, "the detention process is not about interviewing alone as many people do not answer questions in any event" and that "in the majority of suspect interviews, terrorist suspects are advised, and exercise, their right to remain silent."<sup>144</sup> By comparison, in America, enemy combatants are not allowed to meet with attorneys expressly because it would interfere with interrogation and questioning of terrorist suspects.<sup>145</sup> The report concluded that ninety days of pre-charge detention may be useful in some cases but that it was not essential.<sup>146</sup>

While ninety days of pre-charge detention did not pass, as a compromise, in the Terrorism Act of 2006, twenty-eight days for pre-charge detention became the new limit.<sup>147</sup> According to the TA of 2006, those arrested can be detained for forty-eight hours, after which the police or Crown Prosecution Service may apply to a judicial authority for an extension of the detention warrant.<sup>148</sup> In other words, judicial review begins after forty-eight hours. Detention can only be authorized if it is necessary to (1) obtain relevant evidence by questioning the suspect; (2) preserve evidence or (3) to make a decision about the deportation or charging of the suspect.<sup>149</sup> Applications to extend the detention period may be made for seven days at successive intervals up to a maximum of twenty-eight days.<sup>150</sup> For the first fourteen days, the application for detention is made to a designated magistrate judge. Between days fourteen and twenty-eight, the application must be made to a High Court judge.<sup>151</sup> At each proceeding, the detainee can be represented by special counsel who has been cleared to handle classified information.<sup>152</sup> This judicial review at week-long intervals stands in stark contrast to the Bush Administration's claim of inherent constitutional authority to detain enemy combatants indefinitely and without access to counsel. Finally, in Britain, the home secretary appoints an independent reviewer to examine the operation of the detention laws and to review each individual case of detention.<sup>153</sup> Significantly, there is no such equivalent review function in the United States for its enemy combatants.

According to the Home Office, the judicial review proceedings have been rigorous, with applications for detentions being strenuously contested by the defense attorneys and lasting several hours. Not all detention orders have been granted and some have been granted for less time than requested.<sup>154</sup> Between July 26, 2006, when pre-charge detention was increased to twenty-eight days, and October 2007, there were 204 arrests under the TA. Only eleven suspects were detained for more than fourteen days (eight of them were charged and three were released without charge).<sup>155</sup> In other words,

although Britain can detain suspects up to twenty-eight days, it appears to be using its authority sparingly.

During the summer of 2007, the Home Office tried to increase the twenty-eight day limit to fifty-six days of pre-charge detention. A government report issued by the Home Office in July 2007 argued that the police were investigating around 2,000 individuals for terrorist-related offenses and that the complexity of the investigations was escalating due to an increase in use of false identifies and international links which necessitated the cooperation of foreign governments.<sup>156</sup> The report concluded:

The Government is clear that it will only be necessary to go beyond twenty-eight days in exceptional circumstances – where there are multiple plots, or links with multiple countries, or exceptional levels of complexity. To ensure that any new limit is indeed used only in exceptional cases, we believe that any increase in the limit should be balanced by strengthening the accompanying judicial oversight and Parliamentary accountability.<sup>157</sup>

Although the Home Office proposed four options to implement the extension to fifty-six days of pre-charge detention – with each option offering different varieties of judicial review and oversight – Parliament refused to extend pre-charge detention beyond twenty-eight days. Alternatively, the Home Office proposed civil emergency legislation that would allow for an additional thirty days' detention (for a total of fifty-eight days) if Parliament declared an emergency.<sup>158</sup> This option was also defeated by Parliament.

By comparison, in America, Congress has utterly failed to involve itself in the details of preventive detention of U.S. persons, although it has passed the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 to deal with the foreign nationals at Guantanamo Bay. As explored earlier, while Congress did debate the DECA in 2005, which would have provided a statute to deal with preventive detention of U.S. persons as enemy combatants, it failed to pass and it does not appear that any alternatives are being proposed. While the Senate Judiciary Committee did hold hearings in June 2008 concerning its terrorist detention policy at Guantanamo Bay, it has not yet enacted any legislation concerning the preventive detention of U.S. persons. In other words, while Britain's and Israel's respective legislatures have played an active role in their respective preventive detention regimes (whether called pre-charge detention or administration detention), Congress has been remarkably silent and deferential to the executive branch.

Currently, the British government is trying to increase the twenty-eight day pre-charge limit to forty-two days. In April 2008, Home Secretary Jacqui Smith introduced a new anti-terrorism package that would allow for pre-charge detention of up to forty-two days and post-charge questioning of terrorist suspects.<sup>159</sup> According to Smith, forty-two days would only be used in exceptional cases such as those that require the cooperation of a foreign government.<sup>160</sup> In June 2008, the House of Commons passed the measure by an extremely narrow margin, vote was 315 to 306, but it is not likely to pass the House of Lords when it comes up for debate in the Fall.<sup>161</sup>

Although forty-two days of pre-charge detention is not nearly as severe as years of incommunicado and indefinite detention as advocated by the Bush Administration, the forty-two day proposal has sparked harsh criticism from civil liberties group within Britain. For instance, civil rights group Liberty has called the proposal unjust, arguing that “[t]he UK already has the longest period of pre-charge detention in the Western world, and there is no evidence that a further extension will make us any safer.”<sup>162</sup> Human Rights Watch has argued that the government could enact “rolling periods of

42-day pre-charge detention” by proposing new charges against terrorist suspects.<sup>163</sup> According to Ben Ward, Associate Europe and Central Asia Director at Human Rights Watch, increasing the pre-charge detention period more than twenty-eight days “denies the basic right to liberty” and is counterproductive as it is “a recipe for alienating communities vital to defeating terrorism.” He explains that the proposals to increase pre-charge detention evoke the experience of internment in Northern Ireland: “Internment was deeply counterproductive in the fight against terrorism in Northern Ireland, and these proposals carry similar risks.”<sup>164</sup> Amnesty International also argues the extending pre-charge detention risks “alienat[ing] affected communities, leading people to mistrust the authorities and mak[ing] them less likely to want to cooperate with the police.”<sup>165</sup>

Critics contend that other measures should be used before increasing pre-charge detention, such as allowing suspects to be interviewed after they have been charged (and allowing refusals to answer to be held against them) and using telephone intercept material as evidence.<sup>166</sup> Liberty Director Shami Chakrabarti maintains that she would support measures allowing for a suspect to be charged with a lesser offence, such as possessing explosive material or attending a terror camp, while investigations continued for more serious or related offences such as conspiracy to murder.<sup>167</sup>

Curiously, some critics of Britain’s attempts to increase pre-charge detention beyond twenty-eight days argue that America compares *favorably* to Britain. In November 2007, Liberty published an article entitled *Terrorism Pre-Charge Detention Comparative Law Study*, in which it compares Britain’s pre-charge detention to other countries, including America but not Israel. In this report, author Jago Russell argues that America only detains criminals for forty-eight hours under its criminal justice system while Britain’s twenty-eight days is excessive:

Despite being a major terrorist target the United States, for example, allows only two days’ of pre-charge detention. . . . How can our Government sustain the argument that the UK police need over a month when so many other countries manage with pre-charge detention periods of less than a week?<sup>168</sup>

In this war on terror, however, America has often *bypassed* its criminal justice system, arguing that terrorist suspects are enemy combatants who can be held incommunicado pursuant to the laws of war and released at the end of hostilities that may never end. While Russell acknowledges that America has detained individuals due to the executive’s “war powers” privilege, he argues such powers are not equivalent to pre-charge detention in Britain as they are not part of the criminal justice system.<sup>169</sup> Nevertheless, while Britain’s twenty-eight days of pre-charge detention may be excessive, when it comes to preventive detention as a concept, it is hardly prudent to compare Britain’s twenty-eight days of pre-charge detention, which was passed by Parliament and has weekly judicial review incorporated within its provisions, to America’s enemy combatant policy where the executive branch has unilaterally decided to detain individuals for years of incommunicado detention. Russell notes: “If UK law is significantly more repressive than the law in other countries, some will use the disparity to question Britain’s moral authority.”<sup>170</sup> Such a statement only applies *a fortiori* to the United States.

#### **IV. Summary of Analysis: Britain versus United States**

Since 2000, Britain's preventive detention regime has moved from seven days of pre-charge detention to twenty-eight days of pre-charge detention with access to counsel after forty-eight hours and judicial review every seven days. While there has been debate about extending pre-charge detention to ninety, fifty-six, or currently forty-two days, there never has been an argument that pre-charge detention should be indefinite and without access to counsel. In fact, on June 2, 2008, in arguing that Britain should extend pre-charge detention from twenty-eight to forty-two days, Prime Minister Gordon Brown specifically stated in *The Times* that "our first principle is that there should always be a maximum limit on pre-charge detention. It is fundamental to our civil liberties that no one should be held arbitrarily for an unspecified period."<sup>171</sup> In other words, unlike President Bush who has argued for indefinite detention of enemy combatants with no judicial review, the executive branch in Britain has never asserted such authority in the war on terror. Furthermore, Parliament has not abdicated its responsibilities to its citizens: it has and continues to openly debate the issue. There is no executive usurpation of power as there was during the World Wars.

By contrast, in the United States, Hamdi, Padilla and al-Marri – all U.S. persons – were locked up for years with no access to counsel. Al-Marri appears to be the only U.S. person currently detained as an enemy combatant, although he now has met with attorneys and, as of this writing, his case is pending an interlocutory appeal to the Supreme Court. Padilla was convicted of terrorism-related charges in August 2007 after serving over three years as an enemy combatant and is serving a seventeen year sentence, and Hamdi was released to Saudi Arabia in 2004 after the Supreme Court held that he must be provided a meaningful opportunity to rebut the designation as an enemy combatant. Yet, the precedent of unilateral executive war powers to detain American citizens as enemy combatants and hold them indefinitely is on the books. As Yale law professor Bruce Ackerman notes: "These cases [Padilla and Hamdi] present a unique threat to the survival of the republic. If the president can throw citizens into solitary confinement for years on end, our democracy is in very deep trouble."<sup>172</sup> While the Supreme Court has ruled that enemy combatants must be allowed a modicum of judicial review to challenge the factual assertion that they are enemy combatants, there is no prescribed timeframe for when it must occur and no timeframe for how long an enemy combatant can be denied counsel for purposes of enhancing interrogation potential. Even the proposed DECA did not contain such particulars. These details are apparently not significant enough to motivate Congress to legislate or move the Supreme Court to provide more than minimalist holdings in its decisions.

While approximately 3,000 people died on September 11, Britain like Israel has faced decades of terrorist threats. For the worst twenty years of the conflict in Northern Ireland, 2,750 individuals were killed, 2,000 of them civilians, and more than 31,900 seriously injured, all in a territory of 1.5 million people.<sup>173</sup> Furthermore, between 1976 and November 1998, ninety-four incidents of international terrorism took place in Britain, including the bomb planted on Pan Am Flight 103 that exploded over Lockerbie in 1988 killing 270 people.<sup>174</sup> Moreover, al Qaeda killed fifty-two and injured 700 people in July 2005 by bombing public transportation in London, and in 2006, eight men tried to smuggle explosives in liquids onto airliners leaving Heathrow airport for the United States. Furthermore, it is well known that Britain has a substantial home-grown Islamic terrorist threat exacerbated by its class system and the radicalization of poor Muslims.

As of June 2008, according to Prime Minister Brown, there are at least 2,000 terrorist suspects, 200 networks or cells, and thirty active plots in Britain.<sup>175</sup> It is simply not a credible argument that America's harsher preventive detention policy is based on a larger threat posed by al Qaeda. As does Israel, Britain provides more due process and rights to its detainees than America, and the other branches of government do not appear to be so feeble. As Professor Schulhofer aptly notes: "In one important respect the British and Israeli experiences are unambiguous. They leave us with no illusion that the powers currently claimed by the U.S. government are in any sense *normal*, even for a situation of national crisis."<sup>176</sup>

Malaysia and Singapore have preventive detention regimes in which they can hold suspects for two-year periods without charge or meaningful court appearances based on mere suspicion that they might endanger national security.<sup>177</sup> Considering the United States held Padilla as an enemy combatant for three and one-half years before charging him with a crime, and al-Marri has been held without charges since 2003, it seems as though the United States is more in the company of authoritarian regimes than of democracies such as Israel and Britain. It is questionable whether the threat posed by terrorism merits such a sacrifice of our democratic principles.

## CONCLUSION

The United States was completely unprepared on 9/11 and the resulting enemy combatant policy seems to be an ad hoc response to insecurity. In comparing other countries' approaches to preventive detention, the question should not be how does the United States create a perfect regime, because that cannot happen; the question is how does the United States create a regime that can at least provide some meaningful judicial review, some access to counsel, some congressional oversight, and some balance to unilateral executive discretion. While Britain's and Israel's approaches to preventive detention are not perfect – and frequently lambasted by their own human rights groups – they do demonstrate that democracies facing serious and long-term terrorist threats can provide more overall due process and substantive rights to detainees than America's years of incommunicado and indefinite executive detention. Israel and Britain had the advantage (if it can be called that) of decades of dealing with terrorism before 9/11. It only makes sense that the United States should look to their experiences to see if any of their principles can be applied to the United States' unique kind of government.

Tom Malinowski of Human Rights Watch told Congress in June 2008 that "the U.S. Congress has never in its history formally established a system of preventive detention without trial to deal with national security threats."<sup>178</sup> The time is ripe for Congress to enact a preventive detention regime. As did the legislatures in Israel and Britain, Congress should address the substantive details concerning preventive detention such as how long an individual can be detained without access to counsel for purposes of interrogation and how long overall an individual can be detained before release or criminal charges. Israel and Britain have shown that democracies facing comparable terrorist threats can implement preventive detention policies that are not based on unilateral executive usurpation of power and that can provide more due process overall to detainees. Congress should take heed and legislate.

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<sup>2</sup> Stuart Taylor, "Rights, Liberties, and Security: Recalibrating the Balance after September 11," *Brookings* (Winter 2003), [www.brookings.edu/articles/2003/winter\\_terrorism\\_taylor.aspx?p=1](http://www.brookings.edu/articles/2003/winter_terrorism_taylor.aspx?p=1).

<sup>3</sup> *Authorization to Use Military Force (AUMF)*, Public Law 107-40, 115 Stat. 224 (2001).

<sup>4</sup> Samuel Issacharoff and Richard Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime," in *The Constitution in Wartime*, ed. Mark Tushnet (Durham and London: Duke University Press, 2005), 181.

<sup>5</sup> Michael Mukasey, "Text of Prepared Remarks, by Attorney General Michael B. Mukasey," *American Enterprise Institute*, July 21, 2008, [www.scotusblog.com/wp/wp-content/uploads/2008/07/ag-speech-at-aei-july-21-2008.doc](http://www.scotusblog.com/wp/wp-content/uploads/2008/07/ag-speech-at-aei-july-21-2008.doc).

<sup>6</sup> Stephen Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," *Michigan Law Review* 102 (August 2004): 1908.

<sup>7</sup> *Ibid.*

<sup>8</sup> On February 7, 2002, President Bush issued an executive order determining that members of al Qaeda and the Taliban are unlawful enemy combatants who are not entitled to the protections of the Third Geneva Convention. The full text of the executive order can be seen at: [http://lawofwar.org/Bush\\_torture\\_memo.htm](http://lawofwar.org/Bush_torture_memo.htm).

<sup>9</sup> Under the Third Geneva Convention of 1949, prisoners of war cannot be interrogated. Rather, they are required to provide only "surname, first names and rank, date of birth, and army, regimental, personal or serial number." In fact, "[n]o physical or mental torture, **nor any other form of coercion**, may be inflicted on prisoners of war to **secure from them information of any kind whatsoever**." *Geneva Convention*, Part III.A.17. (Emphasis added.)

<sup>10</sup> Howard Ball, *Bush, the Detainees and the Constitution* (Kansas: University Press of Kansas, 2007), 47.

<sup>11</sup> John Yoo, "Enemy Combatants and Judicial Competence," in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press Publication, 2005), 84.

<sup>12</sup> Ball, *Bush, the Detainees and the Constitution*, 54.

<sup>13</sup> *Ibid.*, 109.

<sup>14</sup> While it appears there have only been three U.S. persons subjected to such treatment, the government threatened to designate others such as John Walker Lindh (American Taliban), Iyman Faris (who was planning to destroy the Brooklyn Bridge) and the Lackawanna Six (Buffalo terrorist cell) as enemy combatants if they did not plead guilty to a variety of criminal charges and cooperate with authorities. Not surprisingly, they all pled guilty. See Jesselyn Radack, "The Government's Opportunistic Use of the



'Enemy Combatant' Label: How This Category Is Being Used as a Prosecution Tactic," *Findlaw*, October 11, 2004, [http://writ.news.findlaw.com/commentary/20041011\\_radack.html](http://writ.news.findlaw.com/commentary/20041011_radack.html).

<sup>15</sup> *Ibid.*, 538, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality). The neutral forum, however, can be an "authorized and properly constituted military tribunal.

<sup>16</sup> Michael Isikoff and Mark Hosenball, "Out of the Brig: 'Enemy Combatant' Yaser Hamdi Will Soon be Released from a Military Prison without Facing Any Charges," *Newsweek*, September 15, 2004, <http://www.msnbc.msn.com/id/6012286/site/newsweek/>.

<sup>17</sup> "Court Overrules Bush's 'Enemy Combatant' Policy," *MSNBC*, June 11, 2007, <http://www.msnbc.msn.com/id/19172214/>.

<sup>18</sup> *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). This 216-page decision resulted in seven different opinions. Significantly, four judges found that the president did have authority – based on Congress' passing of the Joint Resolution after 9/11 – to designate legal residents caught in a civilian area as enemy combatants and that the Administration had submitted sufficient evidence through a declaration to justify such treatment. Judge William Traxler Jr. held that, while the president did have the authority to detain legal residents as enemy combatants, the government's declaration based on hearsay was **not** necessarily sufficient evidence to justify such treatment. The remaining four judges found that the Joint Resolution did not enable the president to detain legal residents caught in America as enemy combatants. These four judges, however, reluctantly joined Judge Traxler in his opinion to give "practical effect" and order a remand on the "terms closest" they would impose. (Page 253) In other words, five out of nine judges held that the government may hold al-Marri in military detention as an enemy combatant if the allegations against him can be adequately demonstrated, but five out of nine maintained that those allegations had **not** been tested by a sufficient due process, hence requiring a remand for evidentiary purposes. Judge Traxler was the only judge agreeing on both points.

<sup>19</sup> George F. Will, "Contempt of Courts, McCain's Posturing on Guantanamo," *Washington Post*, A17, June 17, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602041.html>.

<sup>20</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct. 2229 (2008).

<sup>21</sup> *Ibid.*, 128 S.Ct. at 2240.

<sup>22</sup> See, e.g., Paul Rosenzweig and Jay Carafano, "Preventive Detention and Actionable Intelligence," *Legal Memorandum Published by the Heritage Foundation* 5, no. 13 (September 2004), [www.heritage.org/Research/HomelandSecurity/upload/68849\\_1.pdf](http://www.heritage.org/Research/HomelandSecurity/upload/68849_1.pdf); Benjamin Wittes and Mark Gitenstein, "A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights," *Brookings, Opportunity* 08 (2008), [http://www.brookings.edu/papers/2007/1115\\_terrorism\\_wittes\\_oppo8.aspx](http://www.brookings.edu/papers/2007/1115_terrorism_wittes_oppo8.aspx); Association of the Bar of the City of New York, Committee on Federal Courts, "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror" (New York: Association of the Bar of the City of New York, 2004), 111, [www.abcny.org/pdf/1C\\_WLo6!.pdf](http://www.abcny.org/pdf/1C_WLo6!.pdf); Thomas Powers, "WHEN TO HOLD 'EM, The U.S. Should Detain Suspected Terrorists—Even if it Can't Make a Case Against Them in Court," *Legal Affairs* (September/October 2004), [http://www.legalaffairs.org/issues/September-October-2004/argument\\_powers\\_sepoct04.msp](http://www.legalaffairs.org/issues/September-October-2004/argument_powers_sepoct04.msp); Andrew McCarthy, "Abu Ghraib and Enemy Combatants: An Opportunity to Draw Good Out of Evil," *National Review*, May 11, 2004; <http://www.nationalreview.com/mccarthy/mccarthy200405110832.asp>; Jack Goldsmith and Neal Katyal, "The Terrorists' Court," *New York Times*, July 11, 2007, Opinion section, <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>; Harvey Rishikof, "A Federal Terrorism Court," *Progressive Policy Institute* (November 2007), [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=124&subsecID=307&contentID=254507](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=124&subsecID=307&contentID=254507).

<sup>23</sup> Powers, "WHEN TO HOLD 'EM."

<sup>24</sup> B'Tselem, "Administrative Detention in Occupied Territories," [www.btselem.org/english/Administrative\\_Detention/Index.asp](http://www.btselem.org/english/Administrative_Detention/Index.asp).

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<sup>25</sup> Yigal Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” *NYU Journal of International Law and Politics* 38 (November 2006): 73.

<sup>26</sup> Emanuel Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?” *Arizona Journal of International and Comparative Law* 18, no. 3 (2001): 752.

<sup>27</sup> *Ibid.*, 757.

<sup>28</sup> *Emergency Powers (Detention) Law (EPDL)*, 5739-1979, S.H. 76, 33 L.S.I. 89-92, §§ 4(a)-7(a), 5 (Isr. 1979).

<sup>29</sup> Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel,” 725.

<sup>30</sup> *EPDL*, § 4(c).

<sup>31</sup> Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel,” 763. (Emphasis in original).

<sup>32</sup> *EPDL*, § 2(b).

<sup>33</sup> Matti Friedman, “Not an Alternative to Criminal Justice,” *Jerusalem Post*, November 14, 2005.

<sup>34</sup> *EPDL*, §§ 8(a) and 6(c).

<sup>35</sup> Friedman, “Not an Alternative to Criminal Justice.”

<sup>36</sup> B’Tselem, “Administrative Detention in Occupied Territories,” [www.btselem.org/english/Administrative\\_Detention/Index.asp](http://www.btselem.org/english/Administrative_Detention/Index.asp).

<sup>37</sup> *Ibid.*

<sup>38</sup> Adam Liptak, “In Terror Cases, Administration Sets Its Own Rules,” *New York Times*, November 27, 2005, <http://www.nytimes.com/2005/11/27/national/nationalspecial3/27enemy.html#>.

<sup>39</sup> Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel,” 762.

<sup>40</sup> John Yoo, *War by Other Means, An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), 151; Warren Richey, “Beyond Padilla Terror Case, Huge Legal Issues,” *Christian Science Monitor*, August 15, 2007, <http://www.csmonitor.com/2007/0815/p01s08-usju.html>.

<sup>41</sup> Gross, “Democracy in the War against Terrorism – the Israeli Experience,” 1193.

<sup>42</sup> B’Tselem, “Administrative Detention in Occupied Territories.”

<sup>43</sup> B’Tselem, “Legal basis for Administrative Detention,” [www.btselem.org/english/Administrative\\_Detention/Index.asp](http://www.btselem.org/english/Administrative_Detention/Index.asp).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Basic Law: Judicature of 1984*, 38 L.S.I. 101, § 15(c) (1983-1984).

<sup>46</sup> While the detainees are allowed a non-legal personal representative, the attorney client privilege does not apply. After the Supreme Court’s recent June 2008 decision in *Boumediene*, however, the detainees at Guantanamo Bay will presumably be allowed counsel to contest their detention in federal court. It is also unclear to what extent, if any, the annual combat status review tribunals will continue given the *Boumediene* decision.

<sup>47</sup> B’Tselem, “The Legal Basis for Administrative Detention,” [http://www.btselem.org/english/Administrative\\_Detention/Israeli\\_Law.asp](http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp).

<sup>48</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1921-22.

<sup>49</sup> *Ibid.*, 1922, n. 63.

<sup>50</sup> Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model,” 84.

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- <sup>51</sup> *Marab v. IDF Commander in the West Bank*, 57 (2) P.D. 349, ¶¶ 39, 45 (Isr. H.C.J. 2003).
- <sup>52</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1923, citing *Marab*, ¶ 46.
- <sup>53</sup> Reply Brief of Appellants, *al-Marri v. Wright*, No. 06-7427, \*9 (filed January 17, 2007) (available on Westlaw at 2007 WL 261569).
- <sup>54</sup> Amnesty International, “Israel/Occupied Territories: Administrative detention cannot replace proper administration of justice,” *News Service No: 219*, August 2005, <http://asiapacific.amnesty.org/library/Index/ENGMDE15oforty-five2005?openandof=ENG-ISR>.
- <sup>55</sup> Judge Amnon Straschnov, “Israel's Commitment to Domestic and International Law in Times of War,” *Jerusalem Center for Public Affairs* 4, no. 5 (October 2004), <http://www.jcpa.org/brief/brief4-5.htm>.
- <sup>56</sup> B’Tselem, “Administrative Detention in Occupied Territories.”
- <sup>57</sup> B’Tselem, “Statistics on Administrative Detention,” [www.btselem.org/english/Administrative\\_Detention/Statistics.asp](http://www.btselem.org/english/Administrative_Detention/Statistics.asp).
- <sup>58</sup> Jackie Northam, “Q and A about Guantanamo Bay and the Detainees.”
- <sup>59</sup> B’Tselem, “Statistics on Administrative Detention.”
- <sup>60</sup> Friedman, “Not an Alternative to Criminal Justice.”
- <sup>61</sup> *Ibid.*
- <sup>62</sup> Israel Ministry of Foreign Affairs, “Victims of Palestinian Violence and Terrorism since September 2000,” <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm>.
- <sup>63</sup> *Ibid.*
- <sup>64</sup> Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1998), 153.
- <sup>65</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1918.
- <sup>66</sup> Heymann, *Terrorism, Freedom and Security, Winning Without War*, 95-96.
- <sup>67</sup> Israel Defense Force, *Order Number 1504: Detentions in Time of Warfare (Temporary Order)*, Amend. 2, (June 4, 2002).
- <sup>68</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1922-23, citing *Marab*, ¶ 3.
- <sup>69</sup> *Marab*, ¶ 6.
- <sup>70</sup> *Ibid.*, ¶¶ 26-27, 36.
- <sup>71</sup> *Ibid.*, ¶¶ 32-36.
- <sup>72</sup> *Ibid.*, ¶¶ 26, 27. (Emphasis added).
- <sup>73</sup> *Ibid.*, 49.
- <sup>74</sup> *Ibid.*, ¶ 45.
- <sup>75</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1930 citing *Marab* ¶ 45 (internal quotations and citations omitted).
- <sup>76</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).
- <sup>77</sup> *Detainee Treatment Act of 2005*, Public law 109-148, *U.S. Statutes at Large* 119 (2005): 2680.
- <sup>78</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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- <sup>79</sup> *Military Commissions Act of 2006*, Public law 109-366, *U.S. Statutes at Large* 120 (2006): 2600.
- <sup>80</sup> *Boumediene*, 128 S.Ct. at 2273-74.
- <sup>81</sup> George F. Will, "Contempt of Courts, McCain's Posturing on Guantanamo," *Washington Post*, June 17, 2008, A17, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602041.html>. (Emphasis in original).
- <sup>82</sup> Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1906.
- <sup>83</sup> *Ibid.*, 1912.
- <sup>84</sup> Mersel, "Judicial Review of Counter-terrorism Measures: the Israeli Model," 106.
- <sup>85</sup> Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1923, citing *Marab*, ¶ 46.
- <sup>86</sup> Mersel, "Judicial Review of Counter-terrorism Measures: the Israeli Model," 110.
- <sup>87</sup> Gross, "Human Rights, Terrorism and the Problem of Administrative Detention in Israel" 758.
- <sup>88</sup> Mersel, "Judicial Review of Counter-terrorism Measures: the Israeli Model," 95.
- <sup>89</sup> *Anonymous Persons v. Minister of Defense*, 54(1) P.D. 721 (Isr. 2000).
- <sup>90</sup> Mersel, "Judicial Review of Counter-terrorism Measures: the Israeli Model," 74.
- <sup>91</sup> *Incarceration of Unlawful Combatants Law*, 5762-2002, §§ 2 and 3(a) (Isr. 2002).
- <sup>92</sup> *Ibid.*, §§ 5 and 6(a).
- <sup>93</sup> *Ibid.*, §§ 3, 8.
- <sup>94</sup> *Ibid.*, § 8.
- <sup>95</sup> *Ibid.*, § 5(c).
- <sup>96</sup> Dvorah Chen, "Prosecuting Terrorists: A Look at the Israeli and American Experiences," *The Washington Institute for Near East Policy*, Policy Watch # 1162, November 14, 2006, <http://www.washingtoninstitute.org/templateCo5.php?CID=2531>.
- <sup>97</sup> GovTrack.us. H.R. 1076--109th Congress (2005): *Detention of Enemy Combatants Act (DECA)*, <http://www.govtrack.us/congress/bill.xpd?bill=h109-1076>. DECA was also proposed in 2002 and 2003 but it died in committee.
- <sup>98</sup> *Detention of Enemy Combatants Act (DECA)*, H.R. 1076, 109<sup>th</sup> Cong., 2005.
- <sup>99</sup> *Ibid.*, §2(16).
- <sup>100</sup> *Ibid.*, §5(a)(1).
- <sup>101</sup> *Ibid.*, §5(a)(2).
- <sup>102</sup> *Ibid.*, §5(b).
- <sup>103</sup> *Ibid.*, § 4.
- <sup>104</sup> Israel Ministry of Foreign Affairs, "Victims of Palestinian Violence and Terrorism since September 2000."
- <sup>105</sup> Heymann, *Terrorism, Freedom and Security, Winning Without War*, 96.
- <sup>106</sup> Privy Counselor Review Committee, *Anti-Terrorism, Crime and Security Act of 2001 Review: Report*, 8 quoted in Donohue, "Britain's Counterterrorism Policy," 39.
- <sup>107</sup> Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1935.
- <sup>108</sup> *Ibid.*

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid., 1936.

<sup>111</sup> Until 1972, Britain retained emergency powers in Northern Ireland to detain suspects for twenty-eight days to complete an investigation or seventy-two hours on suspicion that the detainee had or was about to commit a crime. Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1936-37.

<sup>112</sup> Donohue, "Britain's Counterterrorism Policy," 18-19.

<sup>113</sup> Ibid., 20.

<sup>114</sup> Laura Donohue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," BCSIA Discussion Paper 2000-05, ESDP Discussion Paper ESDP-2000-01, John F. Kennedy School of Government, Harvard University, August 2000, 5.

<sup>115</sup> Ibid.

<sup>116</sup> Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1939.

<sup>117</sup> *Police and Criminal Evidence Act*, 1984 § 25(1) (Eng.).

<sup>118</sup> Donohue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," 7.

<sup>119</sup> Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1937.

<sup>120</sup> Donohue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," 5.

<sup>121</sup> Ibid., 7.

<sup>122</sup> Donohue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," 40.

<sup>123</sup> Donohue, "Britain's Counterterrorism Policy," 18.

<sup>124</sup> *Terrorism Act 2000*, Schedule 8, ¶ 36(3A), inserted by the Criminal Justice Act of 2003 § 306(1)(4).

<sup>125</sup> House of Commons Home Affairs Committee, Terrorism Detention Powers, *Fourth Report of Session 2005-06*, 1, July 3, 2006, ¶ 133.

<sup>126</sup> Donohue, "Britain's Counterterrorism Policy," 22.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Home Office, *Anti-terrorism, Crime and Security Act of 2001*  
<http://www.homeoffice.gov.uk/security/terrorism-and-the-law/anti-terrorism-crime-security-ac/>.

<sup>133</sup> Donohue, "Britain's Counterterrorism Policy," 24.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Paul Wolfowitz, Deputy Secretary of Defense, "Order Establishing Combatant Status Review Tribunal," July 7, 2004, [www.defenselink.mil/news/Jul2004/d20040707review.pdf](http://www.defenselink.mil/news/Jul2004/d20040707review.pdf).

<sup>137</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act)*, Public Law 107-56, *U.S. Statutes at Large* 115 (2001): 272, codified at *U.S. Code* 8, § 1226(a) (5).

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<sup>138</sup> *Ibid.*, § (6).

<sup>139</sup> Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 5.

<sup>140</sup> Privacy International, “UK Introduces another Terrorism Bill for Unprecedented Powers,” December 10, 2005, [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-388487](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-388487).

<sup>141</sup> The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies.

<sup>142</sup> House of Commons Home Affairs Committee, Terrorism Detention Powers, *Fourth Report of Session 2005-06*, July 3, 2006, 1.

<sup>143</sup> House of Commons Home Affairs Committee, Terrorism Detention Powers, ¶ 90.

<sup>144</sup> *Ibid.*, ¶ 87.

<sup>145</sup> According to former White House Counsel Alberto Gonzales (later the former attorney general), “[t]he stream of intelligence would quickly dry up if the enemy combatants were allowed contact with outsiders during the course of an ongoing debriefing.” Warren Richey, “Beyond Padilla Terror Case, Huge Legal Issues,” *Christian Science Monitor*, August 15, 2007, <http://www.csmonitor.com/2007/0815/p01s08-usju.html>. Yoo also explains that introducing a lawyer immediately after capture of an enemy combatant would disrupt interrogation as any competent defense counsel would tell his/her client to remain silent. Yoo, *War by Other Means*, 151.

<sup>146</sup> House of Commons Home Affairs Committee, Terrorism Detention Powers, ¶ 36 in conclusions.

<sup>147</sup> *Terrorism Act 2000* (TA), Schedule 8, ¶ 36(3)(b)(ii) as amended by *Terrorism Act 2006*, S. 23.

<sup>148</sup> TA, S. 41(3).

<sup>149</sup> TA, Schedule 8, ¶ 23.

<sup>150</sup> *Ibid.*, ¶ 29(3).

<sup>151</sup> *Ibid.*

<sup>152</sup> TA, Schedule 8, ¶ 28.

<sup>153</sup> Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 8.

<sup>154</sup> Home Office, “Options for Pre-Charge Detention in Terrorist Cases,” July 25, 2007, 6.

<sup>155</sup> Jago Russell, “Terrorism Pre-Charge Detention Comparative Law Study,” *Liberty* (November 2007): 17, citing Oral Evidence to Home Affairs Select Committee, October 19, 2007, Q 7 (Mr. Peter Clarke CVO OBE QPM).

<sup>156</sup> Home Office, “Options for Pre-Charge Detention in Terrorist Cases,” 2-3.

<sup>157</sup> *Ibid.*, 9.

<sup>158</sup> “UK: Extended Pre-Charge Detention Violates Rights,” *Human Rights Watch*, July 26, 2007, <http://hrw.org/english/docs/2007/07/26/uk16491.htm>.

<sup>159</sup> “Critics Slam New UK Anti-Terrorism Plan,” *CNN*, January 25, 2008, <http://www.cnn.com/2008/WORLD/europe/01/25/britain.terror/index.html>.

<sup>160</sup> *Ibid.*

<sup>161</sup> John Burns, “Vote Favors Terrorism Bill and Premier in Britain,” *New York Times*, June 12, 2008, A6.

<sup>162</sup> “Critics Slam New UK Anti-Terrorism Plan.”

<sup>163</sup> *Ibid.*

<sup>164</sup> “UK: Extended Pre-Charge Detention Violates Rights,” *Human Rights Watch*.

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- <sup>165</sup> “UK: Extension of Pre-Charge Detention Amounts to Internment,” *Amnesty International*, July 25, 2007, <http://www.amnestyusa.org/document.php?lang=e&id=ENGEURforty-five0122007>.
- <sup>166</sup> Sally Gainsbury, “Anti-Terror Measures ‘Need 56-Day’ Detention Period,” *Public Finance*, July 27, 2007.
- <sup>167</sup> “Terrorist Detention ‘Longest’ in UK,” *BBC News*, November 12, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7090105.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7090105.stm).
- <sup>168</sup> Russell, “Terrorism Pre-Charge Detention Comparative Law Study,” 13.
- <sup>169</sup> *Ibid.*, 19.
- <sup>170</sup> *Ibid.*, 7.
- <sup>171</sup> Gordon Brown, “42-Day Detention; A Fair Solution,” *The Times*, June 2, 2008.
- <sup>172</sup> Bruce Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism* (New Haven and London: Yale University Press, 2006), 35.
- <sup>173</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1933.
- <sup>174</sup> “Legislation against Terrorism, a Consultation Paper,” *Stationery Office*, (December 1998), <http://www.archive.official-documents.co.uk/document/cm41/4178/chap-02.htm>.
- <sup>175</sup> Brown, “42-Day Detention; A Fair Solution.”
- <sup>176</sup> Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1910. (Emphasis in original).
- <sup>177</sup> Roth, “After Guantanamo, The Case against Preventive Detention.”
- <sup>178</sup> Tom Malinowski, “Testimony on Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System,” *Before the US Senate Judiciary Committee*, June 4, 2008. <http://hrw.org/english/docs/2008/06/04/usint19024.htm>.