Michigan Law Review

Volume 102 | Issue 8

2004

Checks and Balances in Wartime: American British and Israeli Experiences

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CHECKS AND BALANCES IN WARTIME: AMERICAN, BRITISH AND ISRAELI EXPERIENCES

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Three years after an attack that traumatized the nation and prompted massive military and law-enforcement counter-measures, we continue to wrestle with the central dilemma of the rule of law. Which is more to be feared — the danger of unchecked executive and military power, or the danger of terrorist attacks that only an unconstrained executive could prevent?

Posed in varying configurations, the question has already generated extensive litigation since September 11, 2001, and a dozen major appellate rulings.[1] Last Term's Supreme Court trilogy — *Rasul v. Bush*,[2] *Hamdi v. Rumsfeld*[3] and *Rumsfeld v. Padilla*[4] — clarified several important points but deferred decision on most of the significant issues. Ever cautious and understandably daunted, the Court avoided grappling in any final way with the underlying problem of reconciling the benefits and dangers of constraints on executive power. The problem, of course, is inherent in government itself. But in

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This essay is written to honor the achievements and contributions of an extraordinary teacher and colleague, Professor Yale Kamisar. For forty-seven years — almost half a century! — Professor Kamisar has been an eloquent voice for truth and fairness in American criminal justice. He has inspired, and infused with his passion, *several* generations of students, practicing lawyers, judges and scholars. Long before we met, I was indebted to his penetrating scholarship, and for me, as for countless other academics, he has been an always-generous and thoughtful teacher. His instrumental role in paving the way for *Miranda v. Arizona*, 384 U.S. 436 (1966), one of the most significant landmarks in American legal history, can never be too often acknowledged. I congratulate the *Michigan Law Review* for choosing to offer this well-deserved tribute to one of the great legal figures of our times.

I owe thanks to Phillip Alston, Eyal Benvenisti, Olivier DeSchutter, Conor Gearty, Richard Goldstone, Nico Keijzer and Yigal Mersel for comments and help with foreign sources, and to Hallie Goldblatt for resourceful research assistance.

1. In addition to the Supreme Court decisions cited *infra* notes 2-4 and the appellate decisions reviewed therein, see, for example, *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004); *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003); *In re Sealed Case*, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002); *New Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

2. 124 S. Ct. 2686 (2004).

3. 124 S. Ct. 2633 (2004).

4. 124 S. Ct. 2711 (2004).

a national emergency it arises in less familiar settings, with much higher stakes and more difficult choices that will bedevil us, in changing forms, as long as the "war on terrorism" continues.

Beyond the legal specifics of last Term's trilogy (questions of jurisdiction, venue, the reach of prior holdings and the meaning of key statutory phrases), the cases presented a wide range of operational questions. Does the President, acting as Commander in Chief, have the right to hold suspected enemy fighters indefinitely, without providing them any sort of trial? Should he be able to block their access to lawyers, family and friends for lengthy periods, in order to facilitate effective interrogation? If hearings or trials are required, how promptly must they be held? Can the President choose to provide hearings, but only before military commissions subordinate to his authority? Can the public and even the defendants themselves be denied access to crucial but sensitive evidence that military or civilian judges will consider? If such Presidential powers exist, is Congress barred from limiting their exercise? Can Congress and the press be denied access to information about how the Presidential war powers are exercised?

The Court *seemed* to answer the first question in the negative, but the Administration continues to dispute this most elementary point.[5] And even if the Court did mean what it explicitly said — that some kind of hearing is required[6] — it left every one of the remaining questions wide open. To resolve them, of course, will require attention to many legal particulars. But all the questions pose a common normative problem — whether the need to protect public safety and national security in a time of crisis justifies restrictions on liberty that we would not impose under ordinary circumstances. Setting aside the appropriate, but ultimately unsatisfying debate over the true meaning of statutes and precedents, is there any way to resolve this foundational issue as a matter of first principles?

After September 11, 2001, many said that executive abuse was far less likely and less harmful than a devastating attack that unhampered executive officials could prevent. Others said, with equal confidence, that unchecked executive power is always too dangerous, and is inefficient to boot. It seems unlikely that either of these categorical answers could be correct. The dangers of an insufficiently constrained

5. *See* Lyle Denniston, *The Incredible Shrinking* Rasul *Decision*, (July 31, 2004), *at* http://www.goldsteinhowe.com/blog/archive/2004_07_25_SCOTUSblog.cfm; Neil A. Lewis, *New Fight On Guantánamo Rights*, N.Y. TIMES, July 31, 2004, at A18.

6. *See Hamdi*, 124 S. Ct. at 2648-49 (plurality opinion) (discussing hearing rights of U.S. citizens); *cf.* Rasul, 124 U.S. at 2698 n. 15 (noting for non-citizens that their allegations "unquestionably" describe custody in violation of the Constitution, laws or treaties of the United States and therefore, if true, would unquestionably entitle them to release).

executive and the dangers of an overly constrained executive are both real. A central constitutional issue of our time will be to determine which is the more serious — and when.

America's past experience in wartime provides one relevant benchmark. But it cannot be decisive in itself. 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. The focus of this Article, therefore, is an examination of the extent to which two of these nations, Britain and Israel, relaxed their own rule-of-law norms in order to battle terrorism effectively during periods of grave danger. It goes without saying that crisis situations abroad, such as the violence Britain faced in Northern Ireland, are not in all respects comparable to the terrorist threat America faces today. And the value judgments and compromises struck in other nations, even in comparable situations, are not necessarily right for the United States. But the British and Israeli situations, both extending over several decades, 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.

Part I of this Article summarizes recent Administration assertions of executive detention power and the arguments advanced in support of them. Part II briefly outlines the history of executive detention in previous American wars and the often-overlooked pattern of judicial insistence on preserving rule-of-law norms. Part III examines British and Israeli efforts to reconcile those norms with a persistent terrorist threat.

The conclusions, summarized in Part IV, indicate that in both Britain and Israel, executive and military authorities claimed extraordinary powers and sought to dilute normal judicial checks. In both nations, such measures provoked controversy, and other branches reined them in to some extent. In these respects the foreign experience mirrors that of the United States over the past three years.

There is, however, a dramatic difference in the *degree* to which adjustments were made. In the current American "war on terrorism," the Administration has — with considerable support in the courts and even more in public opinion — held suspected terrorists incommunicado for several years, on nothing more than a unilateral Presidential determination of their involvement. The recent Supreme Court decisions, while refusing to condone unlimited Presidential power, set few clear boundaries. In one of the three cases (*Hamdi*), the Court held only that after more than two years, there was *no longer* sufficient justification for continued incommunicado detention;

it found no need to specify whether the rights to counsel and a hearing kick in at any earlier point.[7] In the other two cases, the Court left general principles even less specific. And despite encouraging rhetoric, the Court gave no immediate relief to any of the individual petitioners; their two-year-plus detentions were left undisturbed, and the government insists that even now, most of them have no right of access to counsel.[8]

The counter-terrorism adjustments sought and accepted in other countries differ by many large orders of magnitude. In Northern Ireland, beginning in the early 1970s, rival Catholic and Protestant militants resorted to increasingly lethal bombings and shootings in an effort to terrorize opposing communities; as Britain struggled to cope with a staggering death toll among security forces and civilians, ordinary time limits for bringing detainees to court, varying from twenty-four to thirty-six hours, were extended to *seven days*. Israel has for years confronted persistent suicide bombings and other terror attacks that its citizens consider a grave threat to national survival; in response, Israel raised its normal time limit prior to judicial review of detention from twenty-four hours to *forty-eight hours* for suspected terrorists seized within Israel itself, and to *eighteen days* for unlawful combatants captured in territories under military occupation. These measures, though modest (and arguably trivial) compared to those now imposed in the United States, were nonetheless perceived as draconian. Courts insisted that they be scaled back. In Israel, periods exceeding eight days for combatants seized in occupied territories were held to be an unacceptable impairment of the rule of law. In Britain, detention up to a maximum of seven days was allowed only with assurance that incommunicado conditions would end after forty-eight hours.

Access to counsel was likewise modified, but in ways that again seem almost trivial in comparison to American practice post-September 11th. In Britain, access to counsel in terrorism cases was restricted during the first *forty-eight hours* of detention, but restrictions were subject to judicial review, and there was (and is) an absolute, judicially enforceable right to consult a solicitor after the forty-eight hour point. In Israel, access to counsel (normally immediate) can be deferred in terrorism investigations for up to

7. *See Hamdi*, 124 S.Ct. at 2652 (plurality opinion). Indeed, a grudging reading of *Hamdi* would leave room for the government to argue that incommunicado detention exceeding two years might sometimes be permissible, depending on all the circumstances.

8. Since July 2004, the government has allowed Padilla to have unmonitored meetings with his attorneys. Telephone interview with Andrew Patel, counsel to Padilla, Sept. 28, 2004.

twenty-one days, but only with judicial approval and with some detainee access to family and other outside contact in the interim.

Beyond imposing these basic checks, courts abroad have addressed many of the difficult practical details that the U.S. Supreme Court has yet to confront. Both the British and Israeli terrorism crises required courts to decide how much allowance to make for the need — as part of effective intelligence gathering — for isolation and extended interrogation of terror suspects. In both situations courts assessed the procedural safeguards, structural independence, and limits on confidentiality appropriate in judicial review of detention decisions. They examined the safeguards necessary to prevent abuse of terror suspects in custody and the leeway warranted in light of legitimate national-security concerns. Israeli courts have considered the impact of logistics and administrative resources on the processing of enemy combatants seized in battle. Most fundamentally, both situations prompted extensive assessment of the nature of the judicial role and the appropriate mix of deference and scrutiny when courts face claims of military necessity in the context of the gravest threats to public safety and national survival.

On all these matters, detailed below, courts abroad assumed a large role in reviewing, reassessing and restraining executive and military powers.

These judgments by themselves cannot prove that greater executive power would have been ineffective or too dangerous. It is always possible that with more power, British and Israeli authorities would have prevented more terror attacks, just as it is possible that more power would have backfired in any number of ways. But in one important respect the British and Israeli experiences are unambiguous. They leave us with no illusion that powers currently claimed by the U.S. government are in any sense *normal*, even for a situation of national crisis. Those who urge extraordinary judicial deference to the Commander in Chief and a highly limited role for the courts bear the burden of explaining why we should reject wartime checks and balances that we ourselves, along with other Western democracies, have until now considered essential and entirely workable components of the rule of law.

I. EXECUTIVE DETENTION SINCE SEPTEMBER 11, 2001

The U.S. government has asserted broad powers of executive detention in three contexts. First are the hundreds of foreign nationals seized abroad and held outside U.S. borders. Second are the U.S. citizens seized abroad; the government held one of them (Yaser Hamdi) in military custody in the United States for more than two years without access to any court. Third are those arrested by law-enforcement agents within the United States and subsequently

transferred to military custody. Jose Padilla, a U.S. citizen suspected of plotting to detonate a bomb laced with radioactive material, was arrested at O'Hare Airport in May 2002 and originally held as a material witness. In June 2002, a day before his scheduled appearance in court, President Bush declared Padilla an "enemy combatant" and transferred him to the military, which has held him in a Navy brig ever since. Ali Saleh al-Marri, a citizen of Qatar lawfully studying in the United States, was arrested in Illinois in December 2002 and charged with lying to the FBI. Although the Speedy Trial Act[9] required al Marri's trial to commence promptly after indictment, in June 2003 President Bush designated al-Marri an enemy combatant, and he too was turned over to the military and moved to the same Navy brig.

Though the legal arguments vary for the different groups of detainees, the government claimed the same powers in all three situations — the power to resolve factual questions and determine the person's status by Presidential order, based on intelligence reports, without any hearing or opportunity for the detainee to respond;[10] the power to hold the person indefinitely, with the likelihood that in most cases this will mean detention for many years;[11] the power to deny all access to counsel or the courts; and the power to deny the detainee any contact whatsoever with the outside world, for as long as the military, in its sole discretion, considers advisable.[12]

Government arguments for its position are in part stated simply as a matter of power. The claim (much contested) is that prior precedent and the President's authority as Commander in Chief give the executive the right to take these steps when it judges proper, without need to answer to any other branch of government. The policy considerations advanced in support boil down to three problems allegedly entailed in any sort of outside involvement or adversary hearing. The potential need for testimony from combat commanders could, it is said, impede battlefield operations. The inevitable disclosure of information about the identity of detainees and the basis for the suspicions against them could, it is said, provide our enemies

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9. 18 U.S.C. §§ 3161-74 (2000).

10. At oral argument in *Hamdi*, the government argued that the detainee had the opportunity to respond to the allegations against him by telling his side of the story to his interrogator. *Hamdi*, 124 S. Ct. at 2651 (plurality opinion), dismissing that argument as fatuous ("An interrogation by one's captor, however effective as an intelligence gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.").

11. *See, e.g.*, Neil A. Lewis & Eric Schmitt, *Cuba Detentions May Last Years*, N.Y. TIMES, Feb. 13, 2004, at A1.

12. *See* Linda Greenhouse, *Court Hears Case On U.S. Detainees*, NEW YORK TIMES, Apr. 29, 2004, p. A1; Michael Killian & Lisa Anderson, *U.S. To Let Padilla See Lawyer*, CHICAGO TRIBUNE Feb. 12, 2004, p. 1.

with clues about intelligence methods and the direction of our counter-measures. Finally, questioning of suspected terrorists could, it is said, be impeded unless interrogators are able to keep suspects isolated and make clear to them that they remain completely dependent on their captors.[13]

In *Rumsfeld v. Padilla*,[14] the Court considered these claims in the context where they seem weakest — that of a U.S. citizen arrested within the United States and held in custody on American soil.[15] Yet the Court, dividing 5-4, ordered that Padilla's habeas petition be dismissed. The majority expressed no view on the issues of presidential power or on what rights, if any, Padilla might have. It simply held that he had filed his petition in the wrong jurisdiction. 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 whatever. He was told to start over again in another court.

Rasul v. Bush,[16] at the opposite pole, involved foreign nationals seized during combat operations in Afghanistan and held outside U.S. territory, at the Guantanamo Bay naval base. A World War II precedent, *Johnson v. Eisentrager*,[17] which ruled that German nationals held in an American military prison in occupied Germany had no right to seek habeas corpus relief in the federal courts, posed an especially large obstacle to relief in *Rasul*. Nonetheless, the Court, dividing 6-3, found *Eisentrager* inapplicable and upheld the district court's jurisdiction to hear the foreigners' petitions. The Court did not, however, express any view on what proceedings, if any, would be appropriate on remand.[18]

In *Hamdi v. Rumsfeld*,[19] the detainee, also captured in Afghanistan, was a U.S. citizen now held in the United States, and jurisdiction was undisputed. Here a controlling plurality of the Court

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13. Declaration of Vice Admiral Lowell E. Jacoby at 4, Padilla v. Rumsfeld, 124 S.Ct. 1353 (2004) (No. 03-1027).

14. 124 S. Ct. 2711 (2004).

15. The Second Circuit had held that Padilla was entitled to immediate release under the terms of the Anti-Detention Act, 18 U.S.C. § 4001(a) (2000), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

16. 124 S. Ct. 2686 (2004).

17. 339 U.S. 763 (1950).

18. "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now." *Rasul*, 124 S. Ct. at 2699.

19. 124 S. Ct. 2633 (2004).

did reach the merits,[20] and it settled three points. First, it upheld the President's power to hold for an extended period (at least until the end of active combat operations) the so-called enemy combatants — those who have taken up arms against the United States and our allies.[21] Second, rejecting the government's assertion that separation-of-powers principles mandated a "heavily circumscribed role for the courts,"[22] it held that a citizen classified as an enemy combatant has a constitutional right to a hearing before an independent tribunal to resolve any dispute about the facts allegedly supporting that designation.[23] And third, without reaching Hamdi's complaints about earlier government actions denying him access to counsel, it held that "[h]e unquestionably has the right to access to counsel in connection with the proceedings on remand."[24]

The list of issues the Court did *not* resolve is long:

(1) Regarding those who are in fact enemy combatants, the Court did not decide what rights, if any, they might have while in confinement.[25]

(2) It did not decide whether enemy combatants could be confined indefinitely in the event that overseas military operations against terror networks take on a quasi-permanent character.[26]

(3) It did not decide whether enemy combatants could be confined indefinitely on the basis of a diffuse "war on terrorism" not tethered to active combat operations abroad.

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20. Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. Four Justices (Souter, Ginsburg, Scalia and Stevens) would have granted the government far less leeway, but one (Thomas) would have granted the government more. The line-up thus provides majority support (eight votes) for requirements at least as significant as those Justice O'Connor supported but not for anything beyond those. *Hamdi*, 124 S. Ct. 2633 (2004).

21. *Id.* at 2639 (plurality opinion).

22. *Id.* at 2650.

23. More precisely, the Court held that the detainee has (at some unspecified point) the right to notice of the factual basis for his classification as an enemy combatant, and a "fair opportunity" to rebut the government's factual claims before a "neutral decisionmaker"; it rejected as inadequate the government's position that its burden of supporting the enemy-combatant designation could be met merely by producing "some evidence." *Id.* at 2648, 2651.

24. *Hamdi*, 124 S. Ct. at 2652 (plurality opinion).

25. By implication, however, the Court has probably ruled out (at least under existing statutes) the prospect of indefinite confinement incommunicado, as it said that "[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized." *Id.* at 2641.

26. While noting the conventional understanding permitting detention of prisoners of war until the conclusion of hostilities, the Court interestingly observed that "[i]f the practical circumstances of a given conflict [with respect to its duration] are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.* at 2641.

(4) Regarding those who dispute their status as enemy combatants, the Court did not decide what rights, if any, they must be afforded during the period before they are removed from the zone of combat.[27]

(5) It did not decide how soon after removal from the combat zone the right to a hearing arises.

(6) It did not decide what acts, other than participation in armed conflict against U.S. or allied military forces would be sufficient to justify classification as an enemy combatant.[28]

(7) Beyond the three core safeguards that must always be respected in cases of factual dispute (notice, a fair opportunity to rebut factual allegations, and a neutral decisionmaker), the Court did not decide the kind of tribunal, the procedural safeguards, and the burden of proof that due process requires. The plurality, beneath its nominally noncommittal language,[29] did send a strong signal that it would allow hearsay evidence, a rebuttable presumption in favor of the government, and a military tribunal like ones that Army Regulations already contemplate.[30] Yet it remains uncertain whether and under what circumstances the Court as a whole will accept measures of that sort. Four justices rejected such measures explicitly,[31] and the plurality did not focus on their implications in any detail.

(8) The Court did not decide what procedures must be followed in the case of persons seized outside a zone of active combat — and in particular to U.S. citizens seized within the United States. Although such persons undoubtedly are now entitled, at a minimum, to the due process rights available in a case of battlefield seizure (*Hamdi*), the question whether such persons are entitled to more, either as a matter of statute[32] or constitutional due process, was expressly left open.[33]

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27. *Id.* at 2649 ("[I]nitial captures on the battlefield need not receive the process we have discussed here.").

28. The Court addressed only the "narrow category" of "individuals who fought against the United States in Afghanistan as part of the Taliban," *Hamdi*, 124 S. Ct. at 2640, and expressly excluded consideration of other situations that the government might classify as sufficient to support an enemy-combatant designation. *Id.* at 2639.

29. "[T]he exigencies of the circumstances *may demand* that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, *may* need to be accepted . . . ." *Id.* at 2649 (emphasis added).

30. *Id.* at 2651 (referring, as illustrative of an acceptably neutral forum, to the tribunals authorized by Army Regulation 190-8 § 1-6 (1997)). Similarly, with respect to the admissibility of hearsay (and thus the concomitant restriction on the detainee's ability to cross-examine witnesses against him) "a habeas court in a case such as this may accept affidavit evidence . . . ." *See id.* at 2652.

31. *Id.* at 2653 (Souter, J., dissenting); id. at 2660-61 (Scalia, J., dissenting).

32. *See, e.g.*, 18 U.S.C. § 4001 (2000).

33. *Hamdi*, 124 S.Ct. at 2639 (plurality opinion).

On all these matters, the Court evidently remains troubled by arguments suggesting an imperative need for deference to the government, that an overly intrusive judicial process may impede time-sensitive operations, interfere with the interrogation of suspects, compromise sources and methods of intelligence, and disclose important secrets. Arguments of this nature are not incoherent. The problems they suggest, however unlikely in specific contexts, are perfectly plausible in others. The principal objection to such claims is not that they are factually implausible but that the benefits of judicial deference come at a potentially staggering cost — placing individual liberty in the hands of a single person, the Commander in Chief, and dangerously weakening the checks on this form of executive power. If we wish to ask, as a matter of first principles, whether the rule of law really pays its way in this context, the answer cannot come from logic or rigorous empirical proof; we can rely only on practical judgment, guided by the uncertain lessons of past and present experience.

II. THE HISTORY

Contrary to the contemporary conventional wisdom,[34] judges in previous wars did not place the president's powers as Commander in Chief wholly beyond judicial scrutiny. The history has been explored in detail elsewhere,[35] but the highlights should be mentioned. The history includes many instances of unwarranted judicial deference and a frequent pattern of invalidating emergency powers only after the crisis had passed.[36] Some of these episodes we have subsequently acknowledged to be shameful mistakes. Congress did so formally and explicitly in the case of the World War II Japanese internments.[37] But on other occasions, courts reviewed presidential claims of military necessity and held them insufficient to override constitutional rights. In particular, *Ex parte Milligan*,[38] *Ex parte Endo*[39] and *Duncan v. Kahanamoku*[40] all insisted that military power to detain civilians (or

34. *See, e.g.*, Robert H. Bork, *Civil Liberties After 9/11*, COMMENTARY, July-Aug. 2003, at 29-35; Ruth Wedgwood, *The Rule of Law and the War on Terror*, N.Y. TIMES, Dec. 23, 2003, at A27.

35. *See, e.g.*, Brief Amicus Curiae of Fred Korematsu, Rasul v. Bush, 124 S. Ct. 534 (2003) (Mem.) (No. 03-334); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); STEPHEN J. SCHULHOFER, THE ENEMY WITHIN 7-10 (2002).

36. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

37. *See* Brief Amicus Curiae of Fred Korematsu, *supra* note 35, at 18-21.

38. 71 U.S. (4 Wall.) 2 (1866).

39. 323 U.S. 283 (1944).

40. 327 U.S. 304 (1946).

those who claimed to be civilians) within the United States must remain subordinate to the Article III courts and the safeguards of the Bill of Rights. Stressing a powerful presumption against extrajudicial deprivation of liberty, the Court in *Endo* held that legislation and Executive Orders governing the removal of Japanese-Americans from the West Coast — though upheld in *Korematsu v. United States*[41] — authorized *removal only* and could not be interpreted to authorize *detention.*[42] Invoking the same presumption, the Court in *Duncan* held that Congress's approval of "martial law" in Hawaii during World War II could not be read to authorize the trial of civilians in military courts.[43]

Indeed, contemporary rhetoric has drastically distorted the original conception of the Commander in Chief's role. President Bush is sometimes introduced to civilian audiences as "our Commander in Chief," and in cases like *Padilla* the Administration has sought to invoke Commander-in-Chief powers to support presidential authority to detain erstwhile civilians accused of involvement with the enemy. Yet as Justice Jackson put it, "the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants."[44] Article II's Commander-in-Chief clause was unmistakably designed to place the military under civilian control, not to place civilians under military control.

In short, judicial decisions consistently reflected two judgments: that even under wartime conditions, protection against the risk of unjust incarceration required the robust procedural safeguards of the Bill of Rights; and that threats to national security, even when convincing, could be less important than the dangers of overreaching by a well-intentioned but overzealous executive branch. Thus, the unreviewable executive power claimed after September 11 cannot be viewed as the Administration's defenders have often portrayed it, as a routine practice sanctioned by long-standing tradition. The *Hamdi* plurality accurately described the history in reminding us that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," and that even in wartime "unless Congress acts to suspend it, the Great Writ of habeas corpus [assures] an important judicial check on the Executive's discretion in the realm of detentions."[45]

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41. 323 U.S. 214 (1944).

42. *Endo*, 323 U.S. at 300-01.

43. *Duncan*, 327 U.S. at 322-23.

44. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring opinion).

45. *Hamdi*, 124 S.Ct. at 2650, 2648, 2650 (plurality opinion).

Yet even as they were rejected, the Administration's forceful claims for unchecked power decisively shifted the terms of the debate. The *Hamdi* plurality apparently felt it could vindicate traditional due-process norms merely by requiring "some system" for challenging executive judgments;[46] its instinct for seeking a middle ground left the plurality predisposed to compromise. It assumed that ordinary safeguards ought to be diluted simply because interests out of the ordinary were implicated. If that approach ultimately commands a majority of the Court, the outcome will fall far short of one insisting, as did such decisions as *Milligan* and *Kahanamoku*, on complete Fifth and Sixth Amendment guarantees in fully independent Article III courts. Whatever the ground on which one might defend such an approach, it represents a significant departure from the predominant pattern of wartime American courts.

III. CONTEMPORARY COUNTER-TERRORISM MEASURES ABROAD

This Section confronts the principal reason why checks and balances preserved in previous wars might be considered too dangerous to preserve now — the concern that modern terrorists pose significantly different challenges. Since the 1970s many nations have faced persistent problems of terrorism.[47] Some instances, in Germany, Italy and France, were troublesome but never seriously threatened the established regime. In contrast, Basque separatist terrorism in Spain and Kurdish separatist terrorism in Turkey were (and remain) entrenched, serious threats to the public order and territorial integrity of those nations. This section examines the two cases that are probably the most severe and the most relevant to American traditions of due process — the Israeli-Palestinian conflict and the problem of violence in Northern Ireland.

The foreign experience shows a trend that might surprise many Americans. In the mid-1960s due-process requirements proliferated in America, far beyond anything familiar in other countries. Critics of this development often looked to Europe for confirmation that Western nations could respect liberty and democratic values without saddling themselves with the Warren Court's elaborate scheme of

46. *Id.* at 2651.

47. Definitions of terrorism are notoriously difficult and politically charged. For present purposes it is sufficient to accept the decidedly non-neutral perspective of the threatened nation itself. We are concerned with identifying the extent to which officials committed to the political status quo consider independent checks and balances tolerable — and important to preserve — even when facing severe challenges to their authority. For our purposes, therefore, terrorism is any organized effort to kill public officials or civilians for purposes of making a political statement, striking fear in the population, or undermining the authority of the established government.

safeguards.[48] The next three decades saw two seemingly contradictory developments in Europe. First, public order deteriorated dramatically, not only because of rising crime, but also because many European countries experienced persistent terrorism. Second, over the same period when public safety and even the stability of several European states was increasingly threatened, European community institutions began to elaborate restrictive rules to control police power. By the 1990s, the nations of Western Europe found themselves subject, just as we are, to a detailed, constitutionally mandated "code of criminal procedure." Even in the context of emergency counter-terrorism measures, the European nations now accept the enforcement of this code by independent, unelected judges, nearly all of whom are not even nationals of the countries against which they render their decisions.

The Israeli pattern is similar. Courts developed constitutional norms much like those of their European counterparts. Over the period since 1999, in which the Palestinian intifada has grown in intensity, one might expect that Israeli courts would have become increasingly deferential to military and administrative authorities. In fact, the opposite has occurred; in terrorism cases, Israeli courts have become increasingly interventionist.

The resulting European and Israeli norms cannot by themselves establish the meaning of due process in our own constitution. But they seem entitled to considerable weight where, as here, they in no way argue for departure from our own settled standards,[49] but instead suggest that the traditional American commitment to judicial review, largely respected in our previous wars, remains equally applicable to our current circumstances.

A. *Israel*

1. *The Context*

Israel's security problems are well known. From the moment of its founding in 1948, it has been in a formal state of war and often in active military operations against nations on its borders. In addition, it has confronted uprisings against its occupation forces in the West Bank and Gaza (including the intifadas of 1987 and 2000 to present) and has been the frequent target of lethal suicide bombings and other terror attacks against civilian targets in the population centers of Israel

48. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 522 (1966) (Harlan, J., dissenting) (referring to the English "Judges' Rules").

49. Compare *Lawrence v. Texas*, 539 U.S. 558 (2003), where the Court drew on decisions of the European Court of Human Rights to guide the interpretation of our due-process clause and to support its conclusion that one of its own prior decisions was wrong.

itself. Such attacks have caused enormous numbers of casualties and widespread disruption and fear in ordinary civilian life. Most Israelis believe that terrorist organizations responsible for these attacks "have set Israel's annihilation as their goal,"[50] and that national survival requires the strongest possible antiterrorism responses. Nonetheless, Israeli law embodies a strong system of judicial checks in national-security cases. And paradoxically, as suicide attacks in Israel and terrorism worldwide have intensified, those checks have become increasingly robust.

2. *The Legal Framework*

Given the grave threats to Israeli security, it is not surprising that Israeli law-enforcement powers have been supplemented with special tools, and for terrorism investigations, many ordinary safeguards have been suspended from the beginning. Under Israel's Basic Law, all laws restricting personal freedom must "compl[y] with the ethical values of the State of Israel . . . [and] not exceed necessity."[51] When regulations — including military regulations — infringe upon basic liberties in a manner that is "not proportionate," they are deemed unconstitutional.[52]

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50. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. State of Israel, 53(4) P.D. 817.

51. Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8, *in* ISRAEL'S WRITTEN CONSTITUTION (3d ed. 1999). Although Israel has yet to adopt a formal constitution, on many matters of "constitutional significance" its legislature has enacted "Basic Laws" — "enactments, which stand above other Laws and which generally can be adopted, amended or repealed only by a special majority." Aryeh Greenfield, "Introduction," in *id.*, at 4.

The "Basic Law: Human Dignity and Freedom" was adopted only in 1992, but long before then, the Israel Supreme Court had developed a substantial body of quasi-constitutional law, "fashion[ing] the law of human rights out of whole cloth," and "creat[ing] a *de facto* system of judicial review in Israel that is quite similar to that employed by courts possessing the power to review primary legislation." Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY (M. Gibney & S. Frankowski, eds. 1999) at 55, 60. As early as 1949, the Israel Supreme Court held that "every person is endowed with a natural right [of liberty]," *id.*, at 59, and accordingly that executive regulations (the primary source of law in Israel) cannot restrict individual freedoms, in the absence of specific authorizing legislation. Where such legislation existed, the court held that ambiguous terms should be construed as not restricting individual liberty, *id.*, and that if the legislature intended to restrict liberty "it had to do so *very* explicitly," *id.*, at 61, even in the absence of an applicable Basic Law. Where Basic Laws do apply, moreover, the Israel Supreme Court has "held that these Basic Laws have normative supremacy over ordinary laws and that the Court, therefore, may invalidate ordinary laws that are in conflict with them." *Id.*, at 56.

52. H.C. 3239/02, Marab v. IDF Commander in the West Bank, 57 (2) P.D. 349 para. 26 (Isr.). For cases arising in the occupied territories, ordinary Israeli laws (including Basic Laws) are technically not applicable. But military regulations that infringe on basic liberties can nonetheless be ruled unconstitutional. For the occupied territories, the court applies the same principles that it applied within Israel during the period prior to adoption of the "Basic

In ordinary criminal proceedings, a suspect must be brought to court and a judge must approve the basis for detention within twenty-four hours of arrest.[53] But these requirements are qualified by a formal state of emergency that has been in force continuously since 1948. Indeed, even before independence, the British Mandate adopted special antiterrorism authority — the Defense (Emergency) Regulations (DER) of 1945. The DER granted the British High Commissioner broad, largely unreviewable discretion to demolish the homes of those considered responsible for terrorist attacks and to detain anyone whose detention was judged "necessary or expedient for maintaining public order or securing public safety or state security."[54]

From 1945 to 1948, the British used these powers mainly against the terror tactics of the Jewish underground. But the DER, along with other laws of the British Mandate period, remained in effect after statehood, and for decades it provided the framework for Israeli security measures. When Israeli forces occupied the West Bank and Gaza after 1967, the DER framework was applied there as well.[55] Nonetheless, with its grant of virtually unlimited executive and military powers, the DER was considered incompatible with the rule of law, and in 1979 Israel replaced it with a more limited regime, the Emergency Powers (Detention) Law (EPDL).

The EPDL addresses the principal accountability concerns that arise in connection with detention: the duration of detention, access to counsel, access to the courts, and their role. The U.S. government, as we have seen, claims the legitimacy of, and the need for, unchecked executive power in all these respects; the *Hamdi* plurality, unwilling to go that far, nonetheless was disposed to accept extended detention and a vastly reduced role for judicial review. The EPDL is considerably less sweeping. It allows the Minister of Defense to issue an order of detention whenever he "has reasonable cause to believe that reasons of state Security or public security require that a particular person be detained."[56] A detainee can then be held for a

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Law: Human Dignity and Freedom" in 1992, and these principles are in all practical respects identical to those that the Basic Law requires. *See* note 51, *supra.*

53. *See id.*; Eliahu Harnon & Alex Stein, *Israel*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 217, 221-22, 226 (Craig M. Bradley ed., 1999).

54. Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 755 (2001) [hereinafter *Gross I*].

55. The Israeli military extended the DER provisions to the occupied territories in 1967, but the Israel Supreme Court subsequently ruled that in any event, those provisions (along with other law of the Mandate period) had remained in effect on the West Bank throughout the 1948-1967 period of Jordanian rule. *Gross I*, *supra* note 54, at 756 & n.145.

56. *Gross I*, *supra* note 54, at 725.

maximum of forty-eight hours (double the period allowed in conventional criminal cases), by which time the detention order must be submitted to a judge.[57] If the court finds no reasonable basis for detention, or if the judge concludes that there are alternative means to meet the state's security needs, the detainee must be released. If the detention order is upheld, a judge must review and approve it again every three months. Detainees have the rights to access counsel after forty-eight hours (or in terrorism cases, after a maximum of twenty-one days and subject to judicial review[58]), to know the reason for detention (unless a judge finds that the information would jeopardize security), and to be present in court for all legal proceedings (unless a judge finds that State security requires otherwise).[59]

Occupation authorities operating in the West Bank and Gaza have more flexibility. But even in that context, military authorities and the occupation administration remain subject to judicial oversight. For both suspected terrorists and ordinary criminal defendants, Order 378, adopted in 1970, allowed detention prior to judicial review in occupied territories for up to eighteen days, on the basis of an officer's "reasonable reason [sic] to believe that a crime has been committed."[60] But following the 1988 report of an official commission, the detention period prior to the judicial hearing was shortened to eight days for all categories of suspects detained in the occupied territories.[61] With respect to the right to counsel, terrorism suspects and ordinary defendants face different regimes. Under Order 378, access to counsel for ordinary criminal defendants is normally not impeded.[62] In contrast, for defendants suspected of violating security laws, Order 378

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57. A similar forty-eight-hour limit applies in the case of Israeli soldiers facing the possibility of charges under military law. Israel's Military Justice Law-1955 allowed for detention for up to ninety-six hours before the suspect had to be brought before a military judge. But the Israeli Supreme Court held this period excessive and therefore unconstitutional; subsequently the MJL was amended to provide that a soldier detained under the MJL must be brought before a judge within forty-eight hours. *Gross I*, *supra* note 54, at 726; *see also Marab*, 57 (2) P.D. 349 para. 20.

58. *See* Harnon & Stein, *supra* note 53, at 234.

59. *Gross I*, *supra* note 54, at 756.

60. *Marab*, 57 (2) P.D. 349 para. 29 (citing Order Concerning Security Provisions, No. 378, 5730 — 1970 (Apr. 20, 1970) [hereinafter Order 378]).

61. *See* Symposium, *The Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISRAEL L. REV. (Spring-Summer 1989). Under Order 378, a more restrictive regime applied to "administrative" detention not tied to a conventional criminal investigation. In such cases detention prior to judicial review was limited to ninety-six hours. *See Marab*, 57 (2) P.D. 349 para. 29, for a discussion of Order 378, section 87B(a). But a subsequent provision Military Order 1226, adopted in 1988, extended administrative detention to eight days as well. *See id.* paras. 5, 29.

62. The law makes provision for delaying access to counsel under certain circumstances for a few hours and in exceptional cases, for up to ninety-six hours. *See id.* para. 37.

originally permitted denial of access to counsel for as long as thirty days in the occupied territories.[63]

In 2002, intensive terrorist attacks and large-scale military operations on the West Bank prompted changes in this regime. In March 2002 the Israel Defense Forces ("IDF") launched Operation Defensive Wall ("ODW"), in which Israeli troops and heavy armor moved into areas of the West Bank previously under the administration of the Palestinian Authority. The operation sought to move Israeli troops into West Bank cities where militant terrorist cells were based, to arrest wanted persons hiding there, and more generally to sweep up suspected members of terrorist organizations. By May 2002, the IDF had detained about 7000 persons in connection with Operation Defensive Wall. After initial screening, many of these detainees were quickly released, while others were moved to detention facilities and held for further investigation. By May 15, 2002, more than 5000 of the detainees had been released, and 1600 remained in detention.

The initial detention and screenings were carried out within the framework of Order 378, but it soon became apparent that the IDF was far from complying with its requirements, in particular the requirement that detainees be brought to court within eight days. To regularize the situation, the Israeli military promulgated a new detention regime on April 5, 2002. The new regulation, Order 1500, allowed detention for up to eighteen days of anyone seized in West Bank military operations, based solely 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."[64] Order 1500 allowed the detainee to protest to military authorities within eight days, but made no provision for court appearance or judicial review until the end of the eighteen-day period.[65] In addition, Order 1500 barred all ODW detainees from meeting with a lawyer at any point during the eighteen-day period and allowed for denying access to counsel on a case-by-case basis for an additional fifteen-day period. Isolation from counsel was thus possible for a total of thirty-three days (compared to the maximum thirty-day period allowed under the prior Order 378 regime).

Order 1500 was to remain in effect only for two months, but as IDF operations continued on the West Bank, the special detention

63. Order 378 allowed the head of the investigation to bar access to a lawyer for a period of up to fifteen days, and a reviewing administrator was granted the authority to extend that bar for an additional fifteen days if convinced that the measure is "necessary for the security of the area or for the benefit of the investigation." *See id.*

64. *Marab*, 57 (2) P.D. 349 para. 3.

65. At that point, if the military sought further detention, it was required to seek judicial approval under the Order 378 procedure.

regime was extended twice and remained in effect until January 2003. After the initial two-month period, however, the length of detention prior to judicial review was shortened to twelve days[66], and the period of automatic isolation from counsel was shortened first to four days and later to two. Including the authority to deny access to counsel on a case-by-case basis under Order 378, the maximum period of isolation from counsel varied from thirty-two to thirty-four days.[67] Detainees were not held completely incommunicado, however. As soon as they were removed from the zone of combat to a detention facility, which occurred within forty-eight hours, they had the right to be visited by representatives of the International Red Cross, and their families were informed of their whereabouts.[68]

3. *The Judicial Role*

Prior to adoption of the EPDL, there was little opportunity for judicial review, and for many years following its adoption, Israeli courts proceeded cautiously; they almost invariably deferred to the judgment of the military authorities.[69] Judicial attitudes began to change in the early 1990s, as the Israeli Supreme Court progressively dismantled various doctrinal barriers to judicial review, such as standing and justiciability,[70] and showed itself increasingly willing to question claims of military necessity. The court's current attitude, summarized by its chief justice, is simply that "everything is justiciable."[71]

The judicial role in detention hearings has evolved accordingly. Initially, factual review was highly deferential; it was said that the court should determine only whether the military judgment was reasonable.[72] More recently, virtually all deference has disappeared from the standard of judicial review, at least in theory. In the Israeli

66. See *Marab*, 57 (2) P.D. 349 para. 6, for a discussion of Order 1505.

67. *Id.* para. 6, 39-40.

68. *Id.* para. 46.

69. *Gross I*, *supra* note 54, at 758, 759.

70. Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 55 (Mark Gibney & Stanislaw Frankowski eds., 1999); *Gross I*, *supra* note 54, at 758, 759; *see Marab*, 57 (2) P.D. 349 para. 46 ("[U]nder our approach to the issue of standing, any person or organization interested in the fate of a detainee may [appeal to the High Court of Justice in a petition against their detention].").

71. *Gross I*, *supra* note 54, at 758 (quoting H.C. 1635/90, Zharzhevski v. Prime Minister, 48(1) P.D. 749, 855-57).

72. *Id.* at 759 & n.166 (stating that "a court must examine the reasonableness of the decision to issue the order").

conception, a detention hearing is not a review of an executive decision; rather, detention is seen as a judicial act:

> The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.
>
> . . . Judicial detention is the norm, while detention by one who is not a judge is the exception.[73]

Of course, detainees seized on a battlefield fall squarely within the exception. In such situations, however, the detention must be brought within the normal judicial framework as soon as possible. Hence, even when a detention occurs in the course of a military operation, the judge's role (in theory) remains one of making a de novo decision, not one of reviewing for "reasonableness" the decision of a field commander.[74]

Detention need not be supported by prima facie evidence of guilt; the judge need only find "reasonable suspicion that the detainee committed a security crime and reasonable reason [sic] to presume that his release will disturb security or the investigation."[75] The decisions frame this test as a demanding one. The evidence must show that the detainee would "almost certainly" pose a danger and must indicate a situation "so grave as to leave no choice."[76] In its most recent pronouncements, the Israeli Supreme Court has used language suggesting an especially stringent approach:

> [J]udicial review should [not] be superficial. . . . [A judge must] "ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination. . . . Depriving one of his liberty . . . is a severe step which the law only allows for in circumstances which demand that such be done for overwhelming reasons of security. . . . [The] security needs [must] have no other reasonable solution."[77]

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73. *Marab*, 57 (2) P.D. 349 para. 32.

74. "[Even when] the initial detention is done without a judicial order . . . everything possible should be done to rapidly pass the investigation over to the regular [judicial] track, placing the detention in the hands of a judge and not an investigator." *Id.*

75. *Id.* para. 33.

76. *Gross I*, *supra* note 54, at 763 (emphasis omitted). The law is silent on the burden of proof that must be met to support detention, but the commentators assume that the State must establish the required elements by "clear and convincing evidence." *Gross I*, *supra* note 54, at 773; Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 215 (2001).

77. *Marab*, 57 (2) P.D. 349 para. 33 (quoting H.C. 253/88, Sajadia v. Minister of Defense, 42(3) P.D. 801, 820, 821 (Shamgar, P.)).

Nonetheless, it would be easy to exaggerate the intrusiveness of judicial review and its practical significance. Evidentiary standards are more flexible in detention hearings than in criminal cases; they may be comparable to those that the *Hamdi* plurality seemed prepared to accept for evidence adduced to support battlefield seizures.[78] And where security concerns warrant, judges can withhold evidence from the defense and review it in camera. In such cases, the judge generally will consider only written testimony and therefore will be unable to assess credibility.[79] Commentators have expressed concern that such situations may lead to miscarriages of justice and incarceration of the innocent.[80]

Moreover, judicial detention rulings in terrorism cases are independent in theory but highly deferential in fact; Israeli courts rarely release suspects detained by the IDF or the security services. But judges do review the evidentiary basis for detention and do not function simply as rubber stamps.[81] And in a number of high-visibility decisions, the Israeli Supreme Court, rejecting claims of military necessity, has struck down important security measures as violative of civil liberties. Three of these cases are worth mentioning to give a sense of the judicial role in high-stakes situations. The first two, the interrogation-methods case and the bargaining-chip case, have already received some attention in the United States and can be summarized briefly. The last case, recently decided, is worth extended discussion because it deals directly with a problem now in the forefront of American litigation, the detention of alleged unlawful combatants.

4. *Interrogation*

In a 1999 decision, the Israeli Supreme Court barred the Israeli security services from using certain harsh techniques of interrogation, such as sleep deprivation and "shaking."[82] The court ruled that Israel's

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78. *See supra* Section I. When an Israeli court decides to deviate from the rules of evidence it must state its reasons for doing so; and hearsay can be given weight only if it has "evidentiary value." *Gross I*, *supra* note 54, at 762, 773 & n.181.

79. *Gross I*, *supra* note 54, at 761.

80. *Gross I*, *supra* note 54, at 762 & n.185.

81. See Goldstein, *supra* note 51 at 62, noting the "increased willingness of the High Court of Justice to challenge the factual and legal correctness of governmental assertions of 'security interests.' " Likewise Gross I, *supra* note 54, at 758-61, notes that Israeli courts no longer refrain from intervening in detention decisions and that judicial review, though "inherently weak," *id.*, at 761, does examine the length of detention and the evidentiary basis for it; Israeli courts sometimes shorten the period of detention, and they have denied military commanders the authority to re-extend a detention once a court has shortened it, *id.*, at 761 & n. 177.

82. *Pub. Comm. Against Torture in Israel*, 53(4) P.D. 817, para. 24.

Basic Law prohibits torture, inhuman treatment, and "any degrading handling whatsoever."[83] Moreover, the court stressed, the prohibition is absolute; no exceptions are permissible, even when — as the security services insisted — such techniques would help elicit information necessary to thwart a terrorist attack. Though acknowledging "the difficult reality in which Israel finds herself securitywise," the court concluded:

> This is the destiny of a democracy, as not all means are acceptable to it and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they [add to] its strength.[84]

5. *Bargaining Chips*

Between 1986 and 1987, a number of Lebanese citizens were captured and convicted of acts of terrorism against Israeli forces. After the Lebanese had served their sentences, many were held under EPDL detention orders. In 1994, when an Israeli aviator was shot down over Lebanon and captured by a local terrorist group, the Israeli government hoped to obtain his release in exchange for the Lebanese prisoners. But first it had to reconfirm its power to hold them, by extending detention orders that were about to expire. In its petition to renew the detentions, the government did not argue that these prisoners posed a direct threat to national security. Rather, it insisted that because the Lebanese could be exchanged for the captured aviator, their detention for purposes of the negotiation met the EPDL standard that "reasons of State security or public security require that a particular person be detained."[85]

The Israeli Supreme Court initially agreed with that view. But after sharp criticism from civil liberties advocates,[86] the court granted rehearing and reversed itself. The chief justice (who had also authored the previous decision ruling the other way) reasoned that although the EPDL standard was "sufficiently broad to embrace events where the danger . . . did not ensue from the particular person himself," that conclusion was merely "the first stage" in the process of statutory construction.[87] The court held that because democratic principles

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83. *Id.* para. 23.

84. *Id.* para. 39.

85. Emergency Powers (Detention) Law § 2, 1979, S.H. 76.

86. *See Gross I*, *supra* note 54, at 729.

87. *See id.* at 726.

guide legal interpretation, the EPDL must be deemed to have dual goals, preservation of both State security and "the basic values of dignity and freedom vested in every person."[88] In striking that balance, the court ruled that a person could be detained only if that person himself posed a threat to the state. The aviator's family, along with a sizeable segment of public opinion, was infuriated, but this time the court rejected petitions for further rehearing and stood by its decision ordering the release of the Lebanese.

6. *Detaining Unlawful Combatants*

The most recent litigation testing Israeli checks and balances involved a challenge to the army's new procedures for detaining alleged "unlawful combatants" during military sweeps that began in March 2002.[89] The new regime (Order 1500) changed the "normal" West Bank regulations (Order 378) in three important respects. The period of detention without judicial review was extended from eight days to eighteen, access to counsel was barred for the entire eighteen-day period, and the army's obligation to initiate its investigation was deferred for eight days.

The Israeli military defended these measures with national-security arguments similar to those advanced to support the enemy-combatant detentions in the United States: the need to defer to military judgments made during combat, the difficulty of establishing crucial facts, the importance of time for a successful interrogation, and the need to protect confidential sources. The IDF insisted that the chaotic military situation in West Bank towns and refugee camps made it impossible investigate suspected PLO and Hamas fighters in the immediate wake of their capture. Terrorists had intermingled with civilians "without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violation of the laws of warfare."[90] Moreover investigation was time consuming because of "lack of cooperation on the part of those being investigated and their attempts to hide their identities"[91]; in many instances the IDF was unable to ascertain even their names. Thus, the IDF argued, "it is pointless to bring detainees before a judge, when they have not yet been identified, and the investigative material against them has not yet undergone the

88. *Gross I*, *supra* note 54, at 726.

89. For discussion of the background of these new procedures, see *supra* text accompanying notes 64-68.

90. *Marab*, 57 (2) P.D. 349 para. 31 (quoting IDF Response Brief para. 51 (May 15, 2002)).

91. *Id.* para. 31 (quoting IDF Response Brief para. 62 (June 11, 2002)).

necessary processing"; a shorter time frame would simply force the release of many dangerous detainees.[92]

The Israeli military did not suggest (as has the U.S. Government) that these conditions justify indefinite confinement with no access to courts at all. The IDF argued only that such circumstances support delay for an additional ten days before bringing enemy combatants to court. The *Hamdi* plurality, confronting similar problems, suggested no time frame for removing detainees from the battlefield or allowing them to contest their classifications.[93] It expressed no impatience and showed no evident discomfort with the two-year-plus periods that detentions had been allowed to remain unreviewed.

The Israeli Supreme Court, in contrast, found the military arguments insufficient to support even a ten-day delay in judicial intervention. The court struck down major parts of the regulations and imposed its normal standards of judicial oversight. The court's central premise was that "[j]udicial intervention . . . is essential to the principle of the rule of law," and that "fundamental human rights require prompt review of detention by a judicial authority independent of the executive."[94] The court acknowledged that "[i]nternational law does not specify the number of days during which a detainee may be held without judicial intervention," but concluded that the applicable principle is clear enough: "delays must not exceed a few days"; even "an 'unlawful combatant' . . . is to be brought promptly before a judge."[95]

The court accepted practical constraints — up to a point. It acknowledged that " '[r]egular' police detention is not the same as detention carried out 'during warfare in the area,' " and that it should not be "demanded that a judge accompany the fighting forces."[96] It agreed that in battlefield seizures, judicial intervention must be postponed, but only "until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly."[97] Once the detainee is moved from the zone of combat, a process that can be completed within forty-eight hours even "during warfare," battlefield realities are no longer relevant, and a judicial hearing must occur promptly.[98]

The court similarly rejected the military claim that the exigencies of warfare required an eight-day delay in initiating the investigation of

92. *Id.* paras. 31-32.

93. *See Hamdi*, 124 S. Ct. 2686 (2004).

94. *Marab*, 57 (2) P.D. 349.

95. *Id.* paras. 26, 27.

96. *Id.* para. 30.

97. *Id.*

98. *Marab*, 57 (2) P.D. 349 para. 46.

detainees. Again, the court accepted several key practical points — that "investigations should not be performed during warfare or during military operations"; that "investigation can only begin when the detainee . . . is brought to a detention facility"; and that "at a location which holds large number of detainees, some time may pass before it is possible to organize for initial investigations." Nonetheless, the court held that the military must "begin the investigation rapidly at this initial stage."[99] The court therefore struck down the eight-day (later four-day) grace period conferred by Order 1500 and its progeny, ruling in effect that the investigation must begin more or less immediately.[100]

One facet of the military-necessity argument is worth particular attention. The IDF insisted that the scale of its operations and the number of detainees made it impossible to process them in the usual time periods. The court was not persuaded:

> Security needs, on the one hand, and the liberty of the individual on the other, all lead to the need to increase the number of investigators . . . . [A]nd even more so when it was expected that the number of detainees would rise due to Operation Defensive Wall . . . .
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> . . . .
>
> "A society is measured, among other things, by the relative weight it attributes to personal liberty. This weight must express itself not only in pleasant remarks and legal literature, but also in the budget . . . . Society must be ready to pay a price to protect human rights."[101]

Similarly, the court said, difficulty in arranging for more judges cannot justify delaying judicial review:

> The current emergency conditions undoubtedly demanded large-scale deployment of forces . . . . However, by the same standards, effort and resources must be invested into the protection of the detainees' rights . . . . Such is the case . . . with regard to prosecutors as well.[102]

The court declined to set a specific deadline for the judicial hearing; instead it suspended the effect of its ruling for six months to give the military an opportunity to implement a more expeditious system.[103] In subsequent regulations, the IDF provided for a judicial

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99. *Id.* para. 48.

100. *Id.* paras. 48-49. In its effort to defend the delays in initiating an investigation and holding the judicial hearing, the IDF sought to present classified information, but the court ruled that it was "neither appropriate nor desirable" for it to consider such information. *Id.* paras. 36, 49.

101. *Marab*, 57 (2) P.D. 349 para. 48 (quoting H.C. 6055/95, Tzemach v. Minister of Defense, 53(5) P.D. 241, 281 (Zamir, J.)).

102. *Id.* para. 35 (quoting H.C. 253/88, Sajadia v. Minister of Defense, 42(3) P.D. 801, 819-20 (Shamgar, P.)).

103. *Id.* paras. 35-36.

hearing within eight days, in effect the same period applicable under normal Order 378 procedures. There has been no effort to overturn the court's decision in the Knesset, and apparently the eight-day time limit is now being respected in practice.[104]

With respect to access to counsel, the court allowed more leeway. It found that the right to counsel is not absolute, and that "significant security considerations" can justify delay, as when "the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility." But, said the court, "advancing the investigation [i.e. facilitating interrogation] is not a sufficient reason to prevent the meeting.... [T]here must be an element of necessity." It allowed the army to deny contact with counsel for up to 34 days, four days longer than the maximum permitted under ordinary occupation regulations.[105]

Under the resulting system for the occupied territory, denial of access to counsel is automatic only for the first two or four days; thereafter access can be denied for two fifteen-day periods, but only after a case-by-case determination of necessity. When necessity is found, however, the detainee will be forced to face his judicial hearing (after the eighth day) without the assistance of counsel. And in such a case, the same security concerns would probably prompt the court to refuse the detainee access to the evidence against him. In effect, the judicial decision on detention would occur entirely ex parte, hardly an ideal arrangement from a civil-liberties perspective. Even so, the regime provides some check on military judgments and some accountability. And the need to dispense with the stronger safeguard of adversary challenge is itself determined by the court, not by the officials whose own actions would be under scrutiny.[106]

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104. E-mail from Lila Margalit, counsel to petitioners in *Marab*, 57(2) P.D. 349, to Eyal Benvenisti, Professor of Law, Tel Aviv University (Nov. 5, 2003) (on file with author).

105. *Marab*, 57 (2) P.D. 349 para. 37, 45 (internal quotations and citations omitted).

106. The resulting regime of judicial review is, of course, rather weak in such exceptional cases — i.e., in eighth-day detention hearings for alleged enemy combatants seized in occupied territory and denied immediate access to counsel. Yet we should note that in the United States, at a roughly comparable stage of the ordinary criminal process — the forty-eight hour hearing to establish the legality of arrest — proceedings are also ex parte, continued detention requires only the minimal evidence necessary to establish probable cause, and as a result American judicial review is similarly weak even in routine, non-terrorism cases. *See* Gerstein v. Pugh, 420 U.S. 103 (1975). Significantly, however, the eighth-day hearing in Israel can result in detention for three months (renewable at that point, but only at a hearing at which the detainee would by then have access to counsel). In contrast, in the United States the ex parte probable-cause hearing can result in detention only until the accused can make bail.

7. *Conclusion*

Regardless of what one might think of Israeli policies vis-à-vis the Palestinians, there is no doubt that from the perspective of the Israelis themselves, the country faces a grave security situation, with ever-present danger to its military forces and civilian population centers, a potentially never-ending threat that challenges its capacity to survive as an independent nation. Nevertheless, Israeli courts have put in place a strong, increasingly robust system of judicial checks. Accountability in national security cases extends not only to law-enforcement actions within Israel proper but also to detentions that result from military operations targeting "unlawful combatants" in territories not juridically part of Israel itself. Military and executive officials seem to accept the court decisions imposing these safeguards. And through more than twenty years of experience, during which the terrorist threat and the judicial checking power have both intensified, there has been no major effort to flout these safeguards openly or to overturn them by legislation.

B. *Great Britain and Northern Ireland*

After the shock of September 11, 2001, it is easy to forget the fear and loss of life occasioned by the intractable troubles in Northern Ireland. It is important to recall the proportions of the crisis.

1. *The Context*[107]

Britain granted independence to the Irish Free State (now the Republic of Ireland) in 1922, but partitioned the island and retained sovereignty over the six northeastern counties (Ulster) where Protestant "Loyalists," roughly two-thirds of the population, preferred to retain ties to the Crown. Britain also granted Northern Ireland a large degree of home rule under a local Parliament in which Protestants held unshakeable control, reinforced by gerrymandering and other electoral maneuvers.[108] In the 1960s a nonviolent civil rights movement began growing in the north, with the aim of combating housing, employment, and electoral discrimination against Catholics. Tensions escalated as militants associated with the Irish Republican Army ("IRA") gained influence within the civil rights movement and

107. For more detailed accounts, from which the discussion in text is drawn, see MARIE-THERESE FAY ET AL., NORTHERN IRELAND'S TROUBLES: THE HUMAN COSTS (1999); CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW (2d ed. 1992); DERMOT P.J. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND (2000).

108. WALSH, *supra* note 107, at 18-22.

as Protestant Loyalists formed their own militant organizations and "declar[ed] war" on the IRA in 1966.[109] By 1969, civil rights demonstrations had turned into violent confrontations between Catholic protesters on one side and local police (the Royal Ulster Constabulary, or "RUC"), joined by angry Protestants, on the other. Protestants who opposed concessions to the Catholic civil rights movement forced the resignation of the reformist Northern Ireland prime minister and sponsored increasingly confrontational demonstrations of their own.[110]

The conflict soon outstripped the RUC's ability to maintain order, and in August 1969 the British Army was called in to restore peace. Nonetheless, the violence grew, and Protestant terror groups launched their own campaign, bombing and burning Catholic-owned property. In 1970 the violence on both sides escalated dramatically. By 1971 the situation had degenerated into a public-order crisis. In the first seven months of 1971 there were 304 bomb explosions; sixteen civilians and fifteen Army and RUC personnel were killed.[111] A major riot followed on August 5, 1971.

Two days later, the Northern Ireland government assumed emergency powers, and at dawn on August 9 it launched "Operation Demetrius," an effort to round up suspected IRA terrorists. Security forces arrested 354 on the first day. Of those, 104 were released within forty-eight hours, and fourteen prime suspects were taken to secret interrogation centers, where questioning continued for days, aided by methods involving severe psychological and physical stress (the so-called "five techniques" — hooding, sleep deprivation, continuous loud noise, deprivation of food and water, and forcing detainees to remain standing in awkward positions). Meanwhile, on August 13, the IRA called a press conference in Belfast to mock the operation and announce that only thirty IRA militants had been caught in the sweep.

Violence continued, as did repressive actions in response. In December 1971, Loyalists bombed a Belfast bar, killing fifteen Catholics. In January 1972, British soldiers assigned to maintain order shot and killed thirteen Catholic demonstrators in Londonderry. IRA reprisals and other attacks, as many as five to ten each day, took a huge toll. In the seven months following Operation Demetrius, there were 1130 explosions, 2000 shootings, and a total of 233 fatalities, 158 of them civilian. At that point, in March 1972, the United Kingdom

109. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25, 33 (1978) (Court judgment).

110. *Id.* at 34-35.

111. *Id.* at 34-36.

Parliament displaced the local Northern Ireland government and assumed direct rule.[112]

The violence did not abate. On "Bloody Friday" in July 1972, the IRA detonated twenty bombs in the center of Belfast, killing eleven and seriously wounding 100 others. Terrorism by IRA and Loyalist factions occurred regularly throughout the 1970s. The IRA attacked in Britain as well. An October 1974 bombing in Guildford, England, killed five and injured 54.[113] A month later, the IRA bombed two pubs in Birmingham, claiming twenty-one lives and injuring 184 in an attack that *The Times of London* described as an act of war.[114] During the 1970s, several prominent British politicians were assassinated, and in March 1979 a member of the House of Commons was killed by a car bomb on the grounds of Parliament. In 1982 an IRA attack against an army unit on parade in London killed eleven and injured thirty. On Christmas 1983 a car bomb exploded at Harrod's in London, killing six and injuring 93.[115]

For the twenty-year period from the start of the troubles through 1990, the casualty figures for Northern Ireland alone total more than 2750 killed (2000 of them civilians) and more than 31,900 seriously injured, all in a territory with a population of only 1.5 million.[116] For a city the size of New York, such figures would represent the equivalent of 11,000 civilian fatalities, the killing of 4300 law enforcement officers, and over 170,000 serious injuries attributable to terrorism. The public demand for firm counter-measures is easy to imagine.

2. *The UK Legal Framework*

The law governing arrest and detention in Northern Ireland is multi-layered and has been in constant flux. In addition to the ordinary rules of criminal procedure, a regime of emergency powers enacted in 1922 was still in place when the troubles began. That regime was replaced by new emergency legislation for Northern

112. *Id.* at 38-41; FAY, *supra* note 107, at 27-28.

113. FAY, *supra* note 107, at 30.

114. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 22.

115. WALKER, *supra* note 107, at 245.

116. *See* Fox, Campbell & Hartley v. United Kingdom, 13 Eur. H.R. Rep. 157, ¶15 (1991). During the mid-1980s, a series of temporary truces had reduced the fatality rate, but terrorism persisted on a wide scale until the early 1990s. In the context of peace negotiations, the IRA announced an end to its military operations in August 1994, British army patrols were reduced or suspended, and in April 1998 the Good Friday Accords began an era of relative peace. Even then, terrorist actions by splinter groups continued. In July 1998, a Loyalist bomb killed three children in their home, and a month later, a dissident faction of the IRA detonated a car bomb in a small market town, killing 29 and injuring over 200. FAY, *supra* note 107, at 43-49.

Ireland enacted on a "temporary" basis in 1972 and renewed at frequent intervals thereafter. Additional emergency powers were available in legislation applicable throughout the UK. Courts interpreted these enactments against the background of common law principles, World War II precedents and, most recently, the European Convention on Human Rights. From a beginning marked by virtually unrestricted military/executive powers, brutally implemented, the legislation and practice evolved to reflect a growing view that such harsh measures were unjust and counterproductive.

a. Ordinary criminal investigation. The scope of executive power to detain, a sore point in British history for centuries, gave us Magna Carta's most famous passage: "No Freeman shall be taken or imprisoned . . . but by lawful judgment of his peers, or by the law of the land."[117] And continued struggle over royal efforts to evade this restriction fueled development of the writ of habeas corpus, to guarantee availability of a judicial check upon all forms of executive detention.[118]

By the late twentieth century, these principles had evolved into rules governing arrest now codified in the Police and Criminal Evidence Act 1984 ("PACE"). PACE requires "reasonable grounds for suspecting" to support an arrest[119] and tightly regulates detention prior to lodging a formal charge. Normally, arrestees must be released or charged within twenty-four hours.[120] A supervising police officer can extend the period of initial detention, but only for an additional twelve hours. Further detention without charge must be authorized by a judge and cannot exceed a total of ninety-six hours from the initial moment of arrest.[121] Once a formal charge is lodged (no later than ninety-six hours after arrest), the accused has a right to bail (subject to

117. Magna Carta, 1215, 9 Hen. 3, c. 29 (Eng.).

118. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting).

119. Police and Criminal Evidence Act, 1984 § 25(1) (Eng.) [hereinafter PACE]; *see* David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91, 95-98 (Craig M. Bradley ed., 1999).

120. The twenty-four-hour period begins to run from the moment of arrest or the moment when the individual arrived at the police station, whichever occurred first. PACE, *supra* note 119, § 41; Feldman, *supra* note 119, at 100.

121. PACE, *supra* note 119, §§ 43, 44; Feldman, *supra* note 119, at 100-01; *see* ANTONIO VERCHER, TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS 30 (Oxford Univ. Press 1992). The standard for extended detention is a showing that continued detention is "necessary to enable evidence of a 'serious arrestable offence' to be secured (usually by questioning) or preserved, and that the investigation is being conducted 'diligently and expeditiously.' " Feldman, *supra* note 119, at 100 (quoting PACE, *supra* note 119, § 42). By comparison, a suspect arrested without a warrant in the United States cannot be held for more than forty-eight hours prior to a judicial determination of probable cause. County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

exceptions), and the case must be brought to trial expeditiously, though specific time limits are not fixed by law.[122]

b. Emergency powers: the World Wars. During both world wars, despite the almost religious prestige of habeas corpus, the government assumed detention powers that were essentially unchecked. Regulation 14B, promulgated in 1915, allowed the Home Secretary to order the internment of any person, if it appeared to him "that for securing the public safety or the defence of the realm [detention] is expedient in view of the [person's] hostile origin or association."[123] The only remedy available to an internee was to petition a government committee which could only recommend, not order his release. Internees failed in their attempt to use habeas corpus as a check on this scheme. The House of Lords said it was "necessary in a time of great public danger to entrust great powers to [the executive]" and accepted on faith that "such powers will be reasonably exercised."[124]

The World War II powers were similar. Regulation 18B, promulgated on the first day of the war, gave the Home Secretary power to detain any person if satisfied that detention was necessary to prevent actions "prejudicial to the public safety or the defence of the realm."[125] Shortly thereafter, when members of Parliament expressed concern that the broadly worded Regulation could permit abuse, it was amended to require that the Home Secretary have "reasonable cause to believe."[126] As before, detainees were allowed to appeal to a committee which could only recommend release.

During the war, almost 2000 individuals were detained without trial under Regulation 18B. Many were British citizens, including prominent leaders of right-wing, fascist organizations and even a sitting member of Parliament.[127] Far from scrutinizing these cases, the courts held that "reasonable cause" set an entirely subjective standard and that a detention order could be challenged only by establishing bad faith or mistaken identity,[128] a showing that was virtually impossible to make.[129]

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122. *See* Feldman, *supra* note 119, at 116-17.

123. VERCHER, *supra* note 121, at 10.

124. Rex v. Halliday, [1917] A.C. 260, 268-69.

125. *See* A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS 65 (1992).

126. *Id.* (quoting Emergency Powers (Defence) General Regulations, 1939, Stat. R. & O., No. 1681, 18B (Detention Orders)).

127. DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 45 (1997); SIMPSON, *supra* note 125, at 133-14, 174-79, 222.

128. *E.g.*, Liversidge v. Anderson, [1942] A.C. 206, 206.

129. SIMPSON, *supra* note 125, at 362; *see* JACKSON, *supra* note 127, at 46-47.

Regulation 18B left a mixed legacy. As a signal of the government's determination to fight on at all cost in the dark days of June 1940, it probably helped build morale (though other means might have served as well), and it may have prevented a few pro-German sympathizers from acts of sabotage or espionage. Yet even during the war, it became clear that the great majority of 18B detainees were harmless, that genuine spies were captured by other means, and that more limited methods almost certainly would have sufficed to address whatever danger the 18B detainees posed.[130] Churchill supported 18B during the crisis of 1940 but later came to consider it abhorrent. Though his Cabinet did not revoke it until the European fighting ended, Churchill's assessment in 1943 was not equivocal: "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 judgement of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist."[131]

c. Emergency powers in Northern Ireland. A regime granting similar emergency authority (the Special Powers Act, 1922) was on the books from the moment of the Irish partition. Regulations promulgated under the Act recognized four forms of extrajudicial detention: (1) warrantless arrest for interrogation, allowed for forty-eight hours with no need for any suspicion at all;[132] (2) arrest for seventy-two hours on suspicion that the arrestee had committed or was about to commit an offense; (3) detention for up to twenty-eight days to enable police to complete an investigation; and (4) "internment" for an indefinite period on an executive determination that "internment was expedient in the interests of the preservation of peace."[133] Internees were afforded only a narrow avenue of redress, an appeal to an administrative committee with power to recommend (but not order) release. The internee had no right to appear before the committee, no right to be represented by counsel, and no right to call, confront or cross-examine witnesses.

These were the powers that came into force when the home-rule government declared a state of emergency and launched Operation Demetrius on August 9, 1971. Eight months later, as soon as home rule was suspended, the U.K. government began releasing prisoners and announced its intention to phase out executive detention and

130. For detailed and more nuanced elaboration of these points, see SIMPSON, *supra* note 125, at 409-13.

131. *Id.* at frontispiece; *see also id.* at vii, 408.

132. It was RUC practice to use this provision to arrest eyewitnesses and others *not* suspected of wrongdoing, who, they believed, could not or would not speak freely unless questioned in private.

133. *Ireland*, 2 Eur. H.R. Rep. 25, ¶¶ 81-84; JACKSON, *supra* note 127, at 35; VERCHER, *supra* note 121, at 19.

internment, not because violence was declining (the opposite had occurred) but as a means to ease tension and pave the way for a negotiated peace.[134]

In November 1972 the U.K. government rescinded the detention and internment regulations but replaced them with a new regime for Northern Ireland that was only mildly more protective of the suspect. It preserved the forty-eight-hour and seventy-two-hour arrest provisions, and it preserved the essence of the detention and internment powers, adding only a largely symbolic new safeguard — the right, in the existing administrative appeal against internment, to a limited adversary hearing before a quasi-independent commissioner.[135]

From 1972 through the 1990s the U.K. Parliament renewed the Northern Ireland emergency legislation annually. But in response to a series of independent assessments of the legislation and its practice, Parliament gradually introduced significant restrictions. It allowed the internment power to lapse in 1980. In 1984, an independent judicial inquiry questioned the fairness and need for arrest powers that required no more than subjective suspicion; in response, the special arrest powers for Northern Ireland were eliminated in 1987,[136] leaving available only the emergency powers applicable throughout the U.K. (discussed below), which required *reasonable* suspicion testable in court.

d. Emergency powers in Britain. The Guilford and Birmingham bombings of October-November 1974 triggered irresistible demand for deploying emergency powers within Britain itself. One member of Parliament described the situation as "the greatest threat since the end of the Second World War."[137] The Home Secretary introduced a bill that he characterized as "Draconian" but "fully justified to meet the clear and present danger."[138] A mere eight days after the Birmingham attacks, Parliament had enacted the Prevention of Terrorism (Temporary Provisions) Act of 1974 ("PTA"). The "temporary" part of the title proved to be a mirage; the Act was renewed at six-month and one-year intervals, with little substantive change, for decades.

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134. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 50; VERCHER, *supra* note 121, at 17. By November 1972 there had been no new detentions or internments and the majority of the existing prisoners had been released. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 64.

135. *See Ireland*, 2 Eur. H.R. Rep. 25, ¶¶ 86, 87. Detainees and their counsel were granted a limited right to attend the hearing but no right to call or cross-examine witnesses. VERCHER, *supra* note 121, at 20-21, concludes that the attempt to judicialize the procedure broke down because of reliance on hearsay evidence and because the power of the Secretary of State to intervene made the proceeding "essentially executive [in] character."

136. *See Fox, Campbell & Hartley*, 13 Eur. H.R. Rep. 157, ¶ 19.

137. WALKER, *supra* note107, at 22.

138. *Id.* at 22.

In addition to its provisions relating to detention, the PTA prohibited support for proscribed organizations "concerned in terrorism," modestly relaxed the rules governing searches, and authorized the exclusion from Britain of U.K. citizens ordinarily resident in Northern Ireland (and vice versa) when the person appears to be a person "concerned in the commission, preparation or instigation of acts of terrorism."[139]

The PTA granted new powers of arrest and detention but retained many safeguards that had become standard in British law enforcement. Unlike the emergency regulations for Northern Ireland, it required an arresting officer to have "reasonable grounds." The most important departure from ordinary safeguards was the provision extending the period of detention without judicial control. In contrast to the British benchmark for ordinary cases (twenty-four or at most thirty-six hours from arrest to first judicial appearance), the Act gave forty-eight hours and allowed a cabinet-rank official to prolong that period for five more days, for a total of up to seven days' detention prior to judicial review.[140]

The principal goal of the new detention power was to afford more time for interrogation without outside interference:

> [M]any of those . . . detain[ed] under the Act adopt an attitude during interview which is quite different from that of most other suspected criminals; some of them, for example, show an indifference to their own personal future and a refusal to co-operate in any way. This . . . makes the task of the police in interviewing [the suspect] more difficult.[141]

The maximum period of pre-charge detention (seven days) was only three days longer than the ninety-six-hour maximum permitted under PACE.[142] Nonetheless, the system drew criticism because no criteria were specified for the decision to extend detention and no judge participated in approving it.[143]

At the outset there were few safeguards to guarantee proper treatment of detainees. But abuses brought to light by periodic

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139. The Prevention of Terrorism (Temporary Provisions) Act, 1974, §§ 1(1), 4(1), 5(1) (Eng.) [hereinafter PTA]; WALKER, *supra* note 107, at 139-42. Exclusion orders were described as "largely preventative in conception, but punitive in execution." W. L. Twining, *Emergency Powers and Criminal Process: The Diplock Report*, 1973 CRIM. L. REV. 406, 415.

140. Additional emergency legislation applicable only in Northern Ireland partially overlaps with the PTA, but generally grants fewer special powers than the PTA. WALKER, *supra* note 107, at 129-31.

141. WALKER, *supra* note 107, at 126 (quoting LORD SHACKLETON, REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACTS 1974 AND 1976, Cmnd. 7324, para. 72 (1978)).

142. Under PACE, an arrestee can be detained a maximum of thirty-six hours prior to his first judicial appearance, and the court can approve detention for an additional sixty hours, prior to charge. *See supra* text accompanying notes 120-121.

143. WALKER, *supra* note 107, at 125-26.

independent reviews[144] prompted the adoption of administrative safeguards applicable only to terrorism suspects (greater supervision by senior officers, "meticulous documentation," greater medical supervision, and a code of conduct for interrogators).[145] In certain respects, however, terrorism suspects were accorded fewer rights than other detainees. Interrogations were not routinely recorded, as they are in the case of other suspects, and access to outside assistance was restricted. Under PACE an arrestee must be permitted access to a solicitor within thirty-six hours. But for terrorism suspects, the PTA allowed an additional twelve hours' delay and authorized police to monitor meetings between the detainee and his lawyer. Although the power to monitor consultations was not widely used, police routinely chose to isolate terrorism suspects from counsel for the maximum forty-eight-hour period.[146]

The added power to detain suspects incommunicado might seem trivial compared to that now claimed in the U.S. (twelve additional hours in Britain — for a total of forty-eight hours — versus two years or longer in the United States). Nonetheless, the British measures were controversial. Many argued that the forty-eight-hour delay was excessive, even in the context of the acute terrorist threat, and that the power to overhear lawyer-client conversations, though available only to a police inspector not connected to the investigation, transformed access to counsel "into either a trap or a hollow ritual."[147]

The special powers were extensively used. For the decade 1974-84, the PTA was invoked to support nearly 6000 detentions in Britain, with half of them concentrated in the years 1975-77. Yet less than ten percent of the detentions in Britain extended beyond the initial forty-eight-hour period. In two of the busiest years, 1976-77, there were more than 1900 detentions, but only eighty-eight exceeded forty-eight hours.[148] The pattern in Northern Ireland was different. For the same decade, there were 4360 PTA detentions, a number vastly larger (relative to population) than the detention figure for Britain. RUC use of PTA detentions powers became especially common in the early 1980s, with nearly 1000 detentions in each of the years 1982-84. And unlike the pattern for detentions in Britain, nearly three-quarters of the detentions in Northern Ireland exceeded forty-eight hours.[149]

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144. Semi-independent government reports on the implementation of the emergency legislation were produced, inter alia, in 1978 (the Shackleton Report), 1979 (the Bennett Report), and 1982 (the Jellicoe Report). WALKER, *supra* note 107, at 24-27, 126-27.

145. *Id.* at 127.

146. *Id.* at 129.

147. *Id.*

148. WALKER, *supra* note 107, at 133.

149. *Id.* at 135.

3. *The U.K. Courts*

Judges sitting in Northern Ireland initially showed little inclination to restrict the detention effort. Prisoners had an unquestioned right to file habeas petitions and get hearings. Only on rare occasions did they succeed in winning release.

As a practical matter, it was difficult to get a case heard before the three-day or seven-day limits at which the police had to charge or release the arrestee in any event.[150] To that extent, habeas corpus was often, in practice, a meaningless remedy.[151] Nonetheless, some detainees succeeded in getting habeas petitions heard almost immediately;[152] others sought to vindicate their rights by suits for false imprisonment.

Judicial remedies, though far from perfect, were increasingly effective in setting standards that executive authorities felt compelled to respect. The judges had insisted from the beginning that some access to courts must remain a reality.[153] And over time, with varying degrees of legislative support or acquiescence, the courts played a key role in compelling respect for three substantive rights — notification of the grounds for arrest; prompt access to counsel; and judicial review of the reasonableness of the arresting officer's suspicions.

a. Notification. From the earliest cases growing out of Operation Demetrius, courts made clear that although the emergency regulations left judges no room to consider *reasonableness*,[154] they would intervene in cases of proven bad faith or failure to follow formal requirements.[155] And they read into the regulations a requirement, drawn from the common-law notification rule,[156] that an arrestee be informed "in unambiguous terms" of the reasons for his arrest. Thus, if the arresting officer could not remember what he had said at the time of arrest, the arrest was invalid, and the affected detainee was granted an order to "be discharged forthwith."[157]

The government challenged the notification rule head-on, arguing that it "ought not to be applied to an arrest under the Special Powers Act [in a] national emergency when the overriding considerations ought to be the safety of the State and the speed and efficiency of the

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150. *See id.* at 123.

151. *See Ireland*, 2 Eur. H.R. Rep. 25, ¶¶ 82-84.

152. *E.g.*, *Ex parte* Lynch, N. Ir. L.R. 126 (Q.B. 1980).

153. *See Ireland*, 2 Eur. H.R. Rep. 25, ¶¶ 219-220 (noting in 1978 the availability of "valuable, if limited, review effected by the courts").

154. McKee v. Chief Constable, 1 W.L.R. 1358 (H.L. 1984).

155. *See Ireland*, 2 Eur. H.R. Rep. 25, ¶¶ 82-84.

156. Christie v. Leachinsky, A.C. 573 (H.L. 1947).

157. *E.g.*, *In re* McElduff, N. Ir. L.R. 1, 26 (Q.B. 1972).

arrest." The courts were unpersuaded: "No such exigency has been proved as would involve the abandonment of [this] elementary requirement of the common law . . . ."[158]

b. Reasonableness. During the years 1971-87, terrorism suspects arrested in Northern Ireland could be held for seventy-two hours on the basis of entirely subjective suspicion. During those years, therefore, courts had no occasion to review the substantive basis for arrest, at least during the initial seventy-two-hour period. Nonetheless, judicial review of reasonableness remained available for all arrests in Britain and for arrests in Northern Ireland that law enforcement officers chose to effect under the PTA, which was applicable throughout the UK. And despite the PTA's reasonableness requirement, the RUC frequently relied upon it, rather than the legislation limited to Northern Ireland, because it permitted four days' additional detention (seven rather than three) and because RUC officers reportedly felt confident that courts would consider their honestly held suspicions to be reasonable.[159]

Beginning in 1987, as a result of legislation, *all* arrests (including those in Northern Ireland) had to be founded on reasonable grounds subject to scrutiny in court.[160] No doubt judicial review was typically deferential, and it was hampered in any event by the police privilege to protect confidential sources.[161] Nonetheless courts sometimes did hold arrests void on the ground that the underlying suspicions were unreasonable, and significant damages were awarded for false imprisonment.[162]

c. Access to counsel and others. Under PACE suspects in ordinary criminal investigations normally have access to counsel from the moment of arrest, a right to have a relative or friend notified immediately, and the right to have counsel present during interrogation.[163] The emergency provisions modified these rights in four significant respects. They permitted police to deny terrorism suspects access to counsel for forty-eight hours after arrest; they permitted a forty-eight-hour delay in notifying the suspect's relatives; after an initial consultation with counsel, they guaranteed a right to

158. Kelly v. Faulkner, N. Ir. L.R. 31, 36 (Q.B. 1973); *see also* VERCHER, *supra* note 121, at 57-59.

159. *See Fox, Campbell & Hartley*, 13 Eur. H.R. Rep. 157, ¶ 19.

160. *See* text accompanying note 136, *supra*.

161. As a result of the privilege of confidentiality, Vercher concluded in 1992 that "arrests are *de facto* unchallengeable in court." VERCHER, *supra* note 121, at 60-61.

162. *E.g.*, Van Hout v. Chief Constable, N. Ir. (1984 Q.B.) (awarding £ 2500 for 12 days of detention).

163. PACE, *supra* note 119, § 65; Averill v. United Kingdom, 31 Eur. H.R. Rep. 36, ¶ 36 (2000).

further consultation only at forty-eight-hour intervals; and they denied the right to have counsel present at the police interview itself.[164] Detainees nonetheless retained "an absolute and legally enforceable right to consult a solicitor after 48 hours from the time of arrest."[165]

Though delayed access to counsel became commonplace, significant checks on arbitrary police action remained. Counter-terrorism investigators kept precise time sheets, and in the reported cases, suspects typically did gain access to counsel at the forty-eight-hour point — or at most a few hours later — even when they were still successfully resisting interrogation.[166] Many suspects were allowed access to their solicitors sooner, even in important cases.[167] Access to a doctor of the detainee's choice and the right to inform a relative or friend about the arrest were preserved on a similar basis.[168]

A judicial check was also operative — even during the first forty-eight hours. Because access to counsel could be denied only on "reasonable grounds" to believe counsel would impede the investigation, delay could be challenged in court and was, at least in theory, subject to judicial scrutiny.[169] The burden to establish "reasonable grounds" was (in theory) on the prosecution.[170] At least one independent assessment concluded that these checks were not purely theoretical: "[J]udicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld."[171] In many cases, British courts found delayed access to counsel unreasonable, even within the initial forty-eight-hour period, and granted immediate access to a solicitor.[172]

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164. See *Averill*, 31 Eur. H.R. Rep. 36, ¶ 35.

165. Brannigan & McBride v. United Kingdom, 17 Eur. H.R. Rep. 539, ¶ 64 (1994); *see also* WALKER, *supra* note 107, at 127 (finding an "unconditional right of access to a lawyer after each forty-eight hours of detention").

166. Suspect Brannigan was granted access to his solicitor at the forty-eight hour point, though his interrogation had not borne fruit. *Brannigan*, 17 Eur. H.R. Rep. 539, ¶ 10. John Murray, who also refused to speak, was allowed access to his solicitor after 49 hours. Murray v. United Kingdom, 22 Eur. H.R. Rep. 29, ¶ 11 (1996). Gerard Magee confessed after about thirty-six hours in custody, but was not allowed to meet his solicitor until fifty-five hours after arrest. Magee v. United Kingdom, 31 Eur. H.R. Rep. 822, ¶¶ 8, 12 (2000).

167. Liam Averill, suspected (and ultimately convicted) in a multiple assassination, was allowed access to his solicitor after an unfruitful interrogation and a total of twenty-four hours in custody. *Averill*, 31 Eur. H.R. Rep. 36, ¶ 11. Patrick McBride, an uncooperative suspect, was allowed to see his solicitor on the day of his arrest and again forty-eight hours later. *Brannigan*, 17 Eur. H.R. Rep. 539, ¶ 11.

168. *Brannigan*, 17 Eur. H.R. Rep. 539, ¶ 24. In addition, it was standard practice, at least after 1979, to conduct a medical examination before interviewing a suspect and at frequent intervals thereafter. *Id.*

169. *Id.* ¶ 24.

170. *Id.* ¶ 64.

171. *Id.* ¶ 64.

172. *Id.* ¶ 24.

Overall, on matters of national security the U.K. courts made only modest efforts to control executive action. But the scope of judicial review gradually expanded over time, and the mere possibility of judicial intervention did restrain to some degree the rather wide discretion that executive authorities enjoyed in practice.[173] Judicial remedies in the U.K. courts were soon reinforced, moreover, by the oversight functions of the European Court of Human Rights.

4. *International Constraints: The European Convention on Human Rights*

Britain's obligations as a signatory of the European Convention on Human Rights are not just theoretical. Unlike many international human-rights documents, the European Convention not only defines basic rights but provides institutions to enforce them. The European Convention created an international court with jurisdiction to hear citizens' complaints against their own governments and to order states to provide remedies to injured individuals. The European Court of Human Rights (ECHR) cannot reverse the judgment of a national court, but it can grant money damages to injured parties, and after its decisions are rendered, the Committee of Ministers of the Council of Europe is charged with verifying that offending laws and practices of member nations are corrected.[174] For readers unfamiliar with the context in which U.K. actions came under scrutiny at the European level, the Appendix to this Article describes the structure of the European Convention, its overall system of criminal procedure guarantees, and the ECHR's role in enforcing them.

The ECHR has played an increasingly active role in enforcing Convention requirements not only in the U.K. but in other European nations, including Germany and Turkey, where persistent terrorism has put human-rights norms under pressure. In connection with U.K. counter-terrorism efforts, the European Court has been especially active in helping guarantee respect for three components of due process, the requirements that detainees be brought to court promptly; that detentions be supported by reasonable suspicion; and that the "courts" entrusted with implementing these checks be independent bodies of a judicial character.

a. Independence and judicial character. Throughout the European Convention are rules requiring action or approval by "a court," "a judge," or an official entrusted with "judicial power." The ECHR case

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173. *See generally Ireland*, 2 Eur. H.R. Rep. 25, ¶ 220; VERCHER, *supra* note 121, at 65-73, 85.

174. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 46, 213 U.N.T.S. 221, 246 [hereinafter European Convention on Human Rights].

law has drawn from these terms a series of demanding requirements. For a tribunal to qualify as a court, it must be "independen[t] of the executive" and must afford "the guarantees of judicial procedure."[175]

The court has applied the requirement of independence not only to civil and criminal courts but also to military tribunals, a focal point of current controversies in the United States. The ECHR ruled that courts-martial, as traditionally structured in European armies, were unacceptable because they permitted trial of soldiers by judges serving within the military chain of command.[176] In British army procedure (similar to our own) court-martial judges were "subordinate in rank" to the convening officer and were "directly or ultimately under his command."[177] Moreover, a court-martial ruling "was not effective until ratified by [the convening officer], and he had the power to vary the sentence imposed."[178] Such a body could not be a "court" within the meaning of the Convention: The subordinate status of court-martial members created "doubts about the tribunal's independence and impartiality"; moreover, "the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' . . . ."[179] As required by these rulings, court-martial procedure was extensively revised in British and other European armies.[180] And the safeguards available to active-duty soldiers carried over to issues affecting suspected IRA or civilian terrorists.

To qualify as a "court," a tribunal also must afford "the guarantees of judicial procedure," which means "guarantees appropriate to the kind of deprivation of liberty in question."[181] In civil commitment, for example, the stakes are analogous to criminal punishment, and therefore, the ECHR reasoned, the procedures must be analogous to those of a criminal trial. An adversarial hearing before an independent

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175. De Wilde, Ooms & Versyp v. Belgium, 1 Eur. H.R. Rep. 373, ¶ 78 (1971).

176. De Jong, Baljet & van den Brink v. The Netherlands, 8 Eur. H.R. Rep. 20, ¶ 47 (1984); Schiesser v. Switzerland, 2 Eur. H.R. Rep. 414, ¶ 31 (1979). In related rulings, the Court held that a military judge could not satisfy Convention requirements if he could not *order* release but only recommend it to higher military authority, *De Jong*, 8 Eur. H.R. Rep. 20, ¶ 48; or if he could later become involved as a prosecuting officer, and thereby lose the required "independen[ce] of the parties." *Id.* ¶ 49.

177. Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221, ¶¶ 75-76 (1997). With respect to courts-martial in the United States, 10 U.S.C. § 825(d)(2) (1998), confers on the convening officer the authority to select subordinate officers as courts-martial members.

178. *Id.* ¶ 77.

179. *Id.* ¶¶ 76-77.

180. For Britain, see Armed Forces Act, 1996, c. 16 (Eng.), discussed in *Findlay*, 24 Eur. H.R. Rep. 221, ¶¶ 52-57, 60, and in *Cooper v. United Kingdom*, 39 Eur. H.R. Rep. 171, ¶¶ 105-134 (2003). For the Netherlands, see E-mail from the Nico Keijzer, retired Justice, Netherlands Supreme Court, to the author (Aug. 24 & Aug. 25, 2003) (on file with author). *See generally* EUROPEAN MILITARY LAW SYSTEMS (Georg Nolte ed., 2003).

181. *De Wilde*, 1 Eur. H.R. Rep. 373, ¶ 76 (1971).

magistrate did not qualify as "judicial," the court reasoned, because the proceeding did not provide for the full panoply of criminal trial safeguards.[182] Though the ECHR has not yet had occasion to consider a process for detaining an "enemy combatant," that situation would seem to pose a similar problem of ostensibly non-punitive but potentially lifetime confinement. In contrast to the apparent position of the *Hamdi* plurality,[183] the European Court seems prepared to insist that such a process afford safeguards fully comparable to those of the criminal trial.

The requirements of independence and appropriate procedure posed one of many Convention problems for the Northern Ireland emergency laws. Under regulations in force from 1971-80, suspects interned were granted an appeal to a review committee, but this body was not independent of the executive branch, its decisions were advisory only, and it denied many traditional procedural guarantees.[184] On all three grounds, the ECHR held, the review committee could not qualify as the "court" that the Convention required.[185] The U.K. government argued that the availability of habeas corpus offered an answer to this problem. Habeas courts were "independent," followed traditional judicial procedure, could order release, and actually *had* ordered the release some detained terror suspects.[186] But because the emergency regime blocked habeas courts from granting bail or determining whether the basis for detention was "reasonable," the ECHR ruled that their powers were "not sufficiently wide in scope, taking into account the purpose [of the judicial inquiry required by] the Convention."[187]

b. Prompt access to courts: the initial approach. Less than four months after the launching of Operation Demetrius, the Irish Republic invoked the Convention to challenge the treatment of suspected IRA detainees.[188] After extensive factual investigation, the

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182. *Id.* ¶¶ 79-80.

183. *See supra* text accompanying notes 29-30. It should be noted, however, that the *Hamdi* plurality's apparent approval of diluted safeguards was limited to the context of battlefield seizures, a context that the ECHR (unlike the Israeli Supreme Court, see *supra* Part III.A.6) has yet to consider. The *Hamdi* plurality expressed no view on the procedures required for alleged "enemy combatants" seized outside a zone of active military operations. *See supra* text accompanying notes 32-33.

184. *See supra* text accompanying notes 133-135.

185. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 200.

186. *See, e.g.*, *In re* McElduff, N. Ir. L.R. 1 (Q.B. 1972).

187. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 200.

188. The complaint encompassed those arrested in the initial sweep and others detained while the case remained under investigation: nearly 3000 individuals detained from August 1971 through March 1972, and over 200 individuals allegedly subjected to severe abuse while in custody. *Id.* ¶¶ 81, 93.

ECHR rendered its decision in December 1977. The "troubles" had by no means receded. For Northern Ireland alone, the death toll then stood at well over 1000.[189] Lethal violence was still occurring daily.[190]

The Irish complaint focused on brutality in interrogations and on the practice of extended detention without judicial review. The court's decision in *Ireland v. United Kingdom* is widely known for its unequivocal condemnation of the so-called "five techniques" of stressful interrogation (hooding, sleep deprivation, continuous loud noise, deprivation of food and water, and forcing detainees to remain standing in awkward positions). These, the court ruled, constitute inhuman and degrading treatment, in violation of Article 3 of the Convention. They can never be permitted, even in the gravest national-security emergency.[191]

With respect to extrajudicial detention, the court ruled that practices in Northern Ireland violated numerous Convention requirements. Mere witnesses and bystanders could be held for up to forty-eight hours, solely for interrogation (an impermissible purpose); suspected offenders were not brought to court "promptly" or at all; they were not afforded the right to have "the lawfulness of [their] detention . . . decided speedily by a court"; and the advisory committee's review of internment "did not afford the fundamental guarantees inherent in the notion of 'court.' "[192]

But within days of launching Operation Demetrius, the U.K. had filed a formal notice of derogation with respect to all these Convention requirements.[193] Under the European Convention system, signatory states can suspend their obligation to comply with certain (not all) of the Convention's requirements — but only when there is a "public emergency threatening the life of the nation," and even then, only "to the extent strictly required by the exigencies of the situation."[194] Given the circumstances prevailing in Northern Ireland, the existence of a "public emergency threatening the life of the nation" — in particular, its territorial integrity — was beyond dispute.

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189. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 12.

190. The court noted, for example, that from January through June 1976, there had been 173 murders (virtually one every day) and 770 other persons had been injured in acts of terrorism in Northern Ireland. *Id.* ¶ 76.

191. *See Ireland*, 2 Eur. H.R. Rep. 25, ¶ 96. Before the court, the British did not attempt to defend the five techniques. Although a 1972 government commission had concluded that with sufficient safeguards, the techniques need not be prohibited, the government accepted the dissenting commissioner's view that the techniques were never morally justifiable, even in emergency conditions. As a result, the government had renounced the use of the five techniques and committed never to re-introduce them. *See id.* ¶¶ 100-02.

192. *Id.* ¶ 200 (citation omitted because of vagueness in the original source).

193. *Id.* ¶ 79.

194. European Convention on Human Rights art. 15(1), *supra* note 174, 213 U.N.T.S. at 232. For discussion of this power of "derogation," see the Appendix, *infra*.

The Irish complaint centered on whether the means adopted were "strictly required by the exigencies of the situation." The issue, therefore, touched the central dilemma of checks and balances in a national emergency: to what extent is it appropriate for courts to "second guess" judgments of national security and military necessity made by the executive at times of crisis.

The ECHR's answer was nuanced, but in this early confrontation with executive emergency measures, its conclusions were ultimately deferential. The court noted that national authorities were in a better position to judge the circumstances; that they were accordingly entitled to a wide berth; but that:

> the States do not enjoy an unlimited power in this respect. The Court, [being] responsible for ensuring the observance of the States' engagements . . . , is empowered to rule on whether the States have gone beyond the 'extent strictly required. . . .' The domestic margin of appreciation [the State's claim to deference] is thus accompanied by a European supervision.[195]

In the end the court accepted that all the detention measures were strictly necessary. It stressed the extraordinary character of the security situation, the strictly limited periods allowed for detention in most circumstances, the "valuable, if limited, review effected by the courts," and above all, that legislation and practice have:

> evolved in the direction of increasing respect for individual liberty. . . . When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once . . . . The interpretation of [derogation requirements] must leave a place for progressive adaptations.[196]

c. Prompt access to courts: the evolving standard. Over the next twenty years the ECHR frequently revisited the requirement of prompt judicial review, and it grew increasingly willing to question the U.K. emergency detention practices. During the early 1980s, when a series of temporary truces reduced the fatality rate to some degree, the U.K. withdrew its derogation and announced that henceforth it would fully respect Convention requirements.[197] It was quickly charged with non-compliance. Terence Brogan was arrested in September 1984. The day after his arrest, authorities invoked the PTA emergency power to extend detention for an additional five days. Brogan remained silent throughout his interrogation and was allowed to see his solicitor on the second and fourth days after arrest. He was never taken to court and was released without charges after five and a

195. *Ireland*, 2 Eur. H.R. Rep. 25, ¶ 207.

196. *Id.* ¶¶ 219-220.

197. See Brogan and Others v. United Kingdom, 11 Eur. H.R. Rep. 117, ¶ 48 (1988).

half days of detention. Together with three others detained under similar circumstances,[198] Brogan brought suit in the European Court.

The issue again was whether U.K. practice met the requirement that detainees "be brought promptly before a judge" in order to have "the lawfulness of [their] detention . . . decided speedily by a court."[199] None of the *Brogan* complainants had been brought to court at all; they had been released first. If their release was "prompt," they would have no cause to complain, but "[i]f the arrested person is not released promptly, he is entitled to a prompt appearance before a judge . . . ."[200] The question in *Brogan* therefore was whether release within four to six days could be considered "prompt."

The court ruled that it could not — that even the shortest of the four periods of detention (four days) was excessive. Its analysis, dramatically at odds with the arguments for incommunicado detention now pressed in the United States, is worth quoting at length:[201]

> [Article 5] enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 . . . . Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society" . . . .
>
> [Special circumstances] can never be taken to the point of . . . effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority . . . .
>
> The investigation of terrorist offences undoubtedly presents the authorities with special problems . . . . [T]he context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may . . . keep a person suspected of serious terrorist offences in custody before bringing him before a judge . . . . However, they cannot justify . . . dispensing altogether with "prompt" judicial control. [In the present case,] even the shortest of the four periods of detention . . . falls outside the strict constraints as to time permitted by the [Convention]. To attach such importance to the special features of this case as to justify so lengthy a period of detention [*four days*] without appearance before a judge or other judicial officer would . . . impair[] the very essence of the right . . . . The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of

198. All four detainees were allowed to see their solicitors after forty-eight hours, and all refused to answer questions. The periods of detention for the other three totaled six-and-a-half, four-and-a-half, and four days, respectively. *Id.* ¶¶ 11-24.

199. European Convention on Human Rights arts. 5-1(c), *supra* note 174, 213 U.N.T.S. at 5-3, 5-4.

200. *Brogan*, 11 Eur. H.R. Rep. 117, ¶ 58.

201. *Id.* ¶¶ 58-62.

protecting the community as a whole from terrorism is not on its own sufficient . . . .

Within days of the *Brogan* decision, the U.K. announced its hope to comply with the ECHR judgment by establishing a procedure for detention to be reviewed and (where appropriate) authorized by a judge. But the government quickly concluded against involving the courts. Its stated rationale was that detention was often based on confidential information that could not be revealed to the suspect or his counsel, and that allowing a court to consider information not presented to the detainee "would represent a radical departure from the principles which govern judicial proceedings in this country and could seriously affect public trust and confidence in the independence of the judiciary."[202] Paradoxically, the government in effect concluded that public trust was best furthered by maintaining a judiciary with unvarnished independence but virtually no power to use it in this context. It chose to respond to *Brogan* not by conforming to the court's conception of "promptness" but instead by once again invoking its derogation power.[203]

That step, however, simply triggered another level of ECHR scrutiny. Two suspects arrested soon after the derogation brought suit against the U.K. One saw his lawyer on the day of arrest and again two days later; the other saw his solicitor only once, having been denied access to a solicitor for the first forty-eight hours. Both were interrogated persistently, and both were released before making any incriminating statement — one after six and a half days, the other after four days, six hours, and twenty-five minutes.[204] Even the shorter detention exceeded (by twenty-five minutes) a detention period held impermissible in *Brogan*.

Given *Brogan*, the detentions obviously violated Article 5. But in *Ireland v. United Kingdom*, sixteen years before, the ECHR had upheld a far more sweeping derogation from Article 5. There was no doubt that the Northern Ireland situation continued to represent a "public emergency threatening the life of the nation."[205] And since the broad detention powers and slender safeguards of the earlier case were found to be "strictly required by the exigencies of the situation,"[206] the far milder powers asserted after *Brogan* might have seemed a simple matter to uphold.

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202. *Brannigan*, 17 Eur. H.R. Rep. 539, ¶ 32.

203. *Id.* at 552. The U.K. derogation was formally communicated on December 23, 1988, approximately three weeks after *Brogan* had been decided. *Id.* ¶ 31.

204. *Id.* ¶¶ 10-11.

205. European Convention on Human Rights art. 15(1), *supra* note 174, 213 U.N.TS. at 232.

206. *Id.*

Instead, by the early 1990s, the ECHR conceptions of necessity and judicial deference had changed. The court viewed the U.K. regime of extra-judicial detention for seven days (a fraction of the twenty-eight-day detentions upheld in 1977) as a highly suspect departure from rule-of-law norms, requiring the strictest scrutiny. After close examination, the court found that the more recent and relatively narrow U.K. detention practices, even when coupled with extensive safeguards, just barely passed muster. It accepted that some power of extended detention was necessary in combating terrorism. And it was willing to defer to the U.K. government's view that in the common-law adversarial system, the appearance of judicial independence would be compromised if judges were in effect making decisions of an executive nature (detention) and considering confidential information when doing so. Finally, and decisively, the court concluded that the U.K. derogation was tolerable only because the promptness requirement was exceeded only by a few days and was accompanied by strong safeguards to prevent incommunicado detention or other abuse.

The court has made clear that boundaries of this sort cannot be stretched very far. In cases involving the Turkish government's attempt to combat high levels of lethal terrorism in its Kurdish region, the court held that Turkey's derogation — invoked to support a regime of fourteen days' extra-judicial detention — was impermissible. There was "no speedy remedy of habeas corpus," and safeguards against incommunicado detention were insufficient because there were "no legally enforceable rights of access to a lawyer, doctor, friend or relative."[207] Moreover, the duration of extra-judicial detention (fourteen days) was enough in itself to defeat the attempted derogation and was therefore impermissible even during a "public emergency threatening the life of the nation."[208] That "exceptionally long" period, the court held, left the suspect unacceptably vulnerable to arbitrary deprivation of liberty and more serious abuse.[209]

In contrast, the U.K. derogation passed the test of strict necessity because extra-judicial detention could not exceed seven days and was well insulated against the risk of abuse. Specifically, the court found six significant safeguards:[210]

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207. Aksoy v. Turkey, 23 Eur. H.R. Rep. 553, ¶ 81 (1996).

208. European Convention on Human Rights art. 15(1), *supra* note 174, 213 U.N.TS. at 232.

209. Aksoy v. Turkey, 23 Eur. H.R. Rep. 553, ¶¶ 78, 81 (1996); *see also* Sakik v. Turkey, 26 Eur. H.R. Rep. 662, ¶¶ 41-46 (1997).

210. *Brannigan*, 17 Eur. H.R. Rep. 539, ¶¶ 62-64. Though it did not stress the point explicitly, the Court was almost certainly influenced by the fact that authorities kept detailed (apparently accurate) records relating to the treatment of each detainee and their compliance with the safeguards that the court enumerated.

— habeas corpus was available to test to lawfulness of the original arrest;
— "detainees have an absolute and legally enforceable right to consult a solicitor after 48 hours";
— detainees had the right to inform a friend or relative about their detention;
— detainees had frequent access to a doctor;
— even within the first forty-eight hours, there were limits on government power to block access to counsel; and
— in practice as well as in theory, "judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld" during the first forty-eight hours.

d. Reasonable suspicion. Even when an arrestee is released within forty-eight hours, the arrest itself is a significant deprivation of liberty. Under the European Convention, the arrest is invalid from the outset unless based on reasonable suspicion, and the arrestee must be afforded the right to have "the lawfulness of his detention . . . decided speedily by a court."[211] As interpreted by the ECHR, the reasonableness requirement "forms an essential part of the safeguard against arbitrary arrest and detention . . . . [A] 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[212]

Until 1987, the U.K. emergency powers permitted arrest on subjective suspicion, a clear violation of the European Convention. As a result, suspects arrested under the emergency laws were able to claim violations of the Convention even when they had been released within forty-eight hours. Because no U.K. court had passed on "reasonableness" in such cases, the ECHR had to consider that issue de novo, and in several cases it held arrests illegal for lack of reasonable suspicion.[213] After 1987, reasonableness became a requirement under U.K. law, but the European Court's conception of reasonableness continued to set a standard that U.K. courts were in effect encouraged to respect.

The ECHR decisions on "reasonableness" acknowledge several factors placing terrorist crime in "a special category": large numbers of lives are at risk, and police often have to use information that cannot be revealed without putting an informant's life in jeopardy.

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211. European Convention on Human Rights arts. 5-4, *supra* note 174, 213 U.N.T.S. at 232.

212. *Fox, Campbell & Hartley*, 13 Eur. H.R. Rep. 157, ¶ 32.

213. *E.g.*, *Fox, Campbell & Hartley*, 13 Eur. H.R. Rep. 157.

Nonetheless, the European Court has largely rejected significant departures from conventional criminal justice processes and standards — unlike the *Hamdi* plurality, which seems willing to countenance significant burden-shifting devices, proof by affidavit and military decisionmakers.[214] The European court has stressed that "the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by [the Convention] is impaired."[215]

Several ECHR decisions give content to this standard. Bernard Fox, Maire Campbell and Samuel Hartley were arrested in February and August 1986, questioned, and released after detentions lasting forty-four hours in two cases and thirty hours in the third. Police suspected Fox and Campbell of gathering intelligence for the IRA and suspected Hartley of involvement in an IRA kidnapping. In the European Court, the U.K. government noted that both Fox and Campbell had previous convictions for explosives offenses, but beyond those facts, the government insisted that the suspicions against all three rested on "acutely sensitive material" that if disclosed, could endanger informants.[216]

The case accordingly turned on whether hearsay and confidential affidavits can provide a sufficient basis for "reasonable" suspicion. The court acknowledged that police cannot be expected to identify their informants; on the other hand:

> [T]he Court must be enabled to ascertain whether the essence of the safeguard afforded by [the Convention] has been secured. Consequently the respondent Government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.

Moreover,

> [t]he fact that Mr Fox and Ms Campbell both have previous convictions for acts of terrorism connected with the IRA, although it could reinforce a suspicion linking them to the commission of terrorist-type offences, cannot form the sole basis of a suspicion justifying their arrest in 1986, some seven years later.[217]

Accordingly, the court concluded, all three arrests were illegal.

Four years later, a small difference in facts produced a different result. Margaret Murray was arrested on suspicion of raising funds for the IRA. She was questioned and released after a total of two hours,

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214. *See supra* text accompanying notes 29-30. Again, however, it should be noted that the *Hamdi* plurality's apparent approval of diluted safeguards was limited to the context of battlefield seizures. *See supra* text accompanying notes 32-33.

215. *Fox, Campbell & Hartley*, 13 Eur. H.R. Rep. 157, ¶ 32.

216. *Id.* ¶ 33.

217. *Id.* ¶¶ 34, 35.

forty-five minutes of detention. She brought suit in the ECHR, alleging that her arrest was not based on reasonable suspicion. As in *Fox*, the U.K. government maintained that the suspicions against Murray rested primarily on confidential information and could not be disclosed without risking lives. But the government also relied on the fact that a month before Murray's arrest, two of her brothers had been convicted in the United States of purchasing weapons for the IRA, she had visited the brothers there, and the circumstances of their offense implied collaboration with "trustworthy" persons residing in Northern Ireland.[218]

To frame its analysis, the court again acknowledged two competing concerns: "the use of confidential information is essential in combating terrorist violence," but "investigating authorities [cannot] have *carte blanche* . . . free from effective control . . . whenever they choose to assert that terrorism is involved."[219] Though the court gave "some credence"[220] to the government's claim to have reliable information, it insisted that it must be furnished "at least some facts . . . capable of satisfying the Court."[221] For a majority of the court, the very brief duration of the detention lowered the level of suspicion required, and the circumstances of the recent conviction of Murray's brothers were sufficient to supply "a plausible and objective basis" for suspicion that Murray may have been involved.[222]

The ECHR approach to confidential information is simultaneously more skeptical and more permissive than that of American courts. The European Court apparently gives confidential information, however solid, only minimal weight and will never consider such information sufficient by itself. But whatever weight such information does get comes with no further probing into its nature. U.S. law is different on both points. Under the Fourth Amendment, the weight attributed to a confidential tip always depends on what police reveal about how the informant acquired his information and the grounds police may have for believing him.[223] But a confidential tip backed by information about the reliability of the informant and the basis of his knowledge can be sufficient by itself to establish probable cause, without any "objective" corroboration to support it.[224]

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218. *Murray*, 19 Eur. H.R. Rep. 193, ¶ 62.

219. *Id.* ¶ 58.

220. *Id.*

221. *Id.* ¶ 60.

222. *Id.* ¶ 63. Four dissenting judges found the case indistinguishable from *Fox, Campbell & Hartley* and would have ruled the arrest illegal for lack of reasonable suspicion.

223. Illinois v. Gates, 462 U.S. 213, 230, 233-34 (1983).

224. *Id.* at 232 n.7; *see* Spinelli v. United States, 393 U.S. 410, 412-13, 415 (1969).

e. The ECHR Jurisprudence of Emergency Powers. In the 1970s, at the outset of its confrontation with the U.K. measures, the ECHR proceeded cautiously, as might be expected for a newly minted supranational jurisdiction of uncertain authority and legitimacy. Its early decisions were deferential and delivered long after the fact.[225] It declared that internment was unacceptable in the absence of substantial safeguards, but then found adequate the U.K.'s early regime of paltry protections. The European court apparently was content to combine strong rhetoric with wishful thinking about realities "on the ground."

Over time the court gained greater confidence, both generally and in national-security matters. The threat of terrorism had scarcely receded. It remained acute in Northern Ireland and had spread (for unrelated reasons) to other countries throughout Europe. If anything, the passage of time may have convinced the court that a "state of emergency" had become permanent, and that unbounded judicial deference would leave European governments with carte blanche to suspend at will the core principles of democracy and the rule of law. Whatever the reason, decisions from the late 1980s onward have been increasingly bold. The court has interpreted many Convention requirements strictly and become much less willing to take reassurance from substitute safeguards that sound impressive on paper but offer little in practice. As a result, the court set limits of real significance, adding important safeguards to measures that had already been tempered by legislative and judicial action at the national level.

For the ECHR, no less than for the U.S. Supreme Court, it is hazardous to attempt generalizations about the impact of judicial precedent on practices on the ground. No doubt some ECHR rulings were occasionally honored in the breach. On at least some of the issues it addressed, however, the ECHR clearly did prompt real change in the sweep of U.K. emergency powers.[226] In other instances, the availability of judicial review at the European level, with attendant possibilities for fact-gathering and public exposure, served in itself as some check on executive power and became an important source of pressure to limit departures from due-process norms.

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225. For example, its forceful condemnation of the "five techniques" of interrogation came many years after the UK government permanently renounced the use of them.

226. See, for example, *Averill*, 31 Eur. H.R. Rep. 839, 851, describing U.K. government actions to cure violations of Convention right-to-counsel requirements. *See generally* CONOR A. GEARTY, *The United Kingdom*, *in* EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMPARATIVE STUDY, 53, 85-86, 101-103 (Conor A. Gearty ed., 1997) (discussing substantive legal change implemented in twenty out of the twenty-two instances in which the Committee of Ministers had concluded that such change was required).

IV. CONCLUSION

In previous national emergencies, U.S. courts diluted normal judicial checks to a considerable degree. Nonetheless, they refused to condone executive action supplanting the essence of judicial review on matters pertaining to detention, particularly the detention of civilians and those claiming to be civilians.[227] Confronted by acute contemporary threats of terrorism, both Britain and Israel likewise granted executive and military authorities some extraordinary powers but preserved a system of effective checks on the executive and the assurance of *prompt, fully independen*t judicial review.

In the current "war on terrorism," however, the U.S. government has claimed emergency powers that exceed by very large margins — indeed, by light years — the executive powers accepted as necessary and legitimate in Britain and Israel. Addressing measures far more cautious than those deployed by our own government, courts nonetheless struck down the executive and military actions as unacceptable erosions of necessary checks and balances.

The fact that other nations reached such conclusions, and indeed that our own courts did so in previous national emergencies, cannot by itself refute empirical claims about the supposed effectiveness of greater executive power and the supposed need for fewer judicial checks. We can be confident, however, that contrary to conventional wisdom, the emergency powers the U.S. government now claims — and that the *Hamdi* plurality seems prepared to accept — are not *normal*, even for a situation of national crisis. The question which remains unanswered, and which defenders of present U.S. policy have considered unnecessary even to address, is why there would be sufficient reason to abandon the wartime checks and balances that we ourselves, along with other Western democracies, have until now considered an essential component of the rule of law.

227. *See supra* text accompanying notes 38-44. Even the Court's infamous, now-discredited *Korematsu* decision authorized only *removal* of Japanese-Americans from designated areas on the West Coast, while the Court simultaneously — the same day — held that holding them in detention was illegal. *See supra* text accompanying note 42.

APPENDIX: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention addresses the central criminal procedure concerns of the American Bill of Rights, often in similar language. Several clauses are less protective than their American counterparts; others are more protective.[228] But a crucial difference from the U.S. Constitution is the Convention system for accommodating law-enforcement and national-security needs. Our requirement of "due process" invites some balancing of interests, as does our Fourth Amendment, which prohibits only "unreasonable" searches and seizures. Most other commands of the U.S. Constitution are nominally absolute.

In contrast, the European Convention elaborately defines the allowable domain of what we call "balancing." It uses two distinct mechanisms — necessity exceptions and formal derogations. Necessity can limit the right to privacy and the freedoms of speech, religion and assembly.[229] Exceptions for necessity are precluded — but formal derogations remain available — for the right to fair trial and the protections against unjust arrest and detention.

The room for derogation is hardly surprising; it is exactly what we would expect to find, directly or indirectly, in any bill of rights. The novelty of the European Convention's derogation mechanism is twofold. First, Article 15(2) *prohibits* derogation from certain especially fundamental obligations, e.g. the prohibitions on torture, inhuman or degrading treatment, ex post facto laws, double jeopardy, and the death penalty. Contrary to what we might expect, law-enforcement and national-security emergencies *cannot* qualify or limit the scope of these prohibitions.[230] Second, even in areas where the

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228. For example, the Convention grants no right to a jury trial, and indigents have a right to free counsel only "when the interests of justice so require," European Convention on Human Rights arts. 6-3(c), *supra* note 174, 213 U.N.T.S. 221, but unlike our Eighth Amendment, the Convention expressly prohibits the death penalty in peacetime. Protocol 6 to the European Convention on Human Rights, Apr. 28, 1983, arts. 1-2, 1496 U.N.T.S. 281.

229. For example, the right to privacy can be impaired only when "necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention or disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention on Human Rights art. 8, *supra* note 174, 213 U.N.T.S. at 230. As interpreted by the ECHR, "democratic" is not equivalent to "majoritarian"; a "democratic" society means one in which the majority proceeds with care whenever its actions may affect personal rights that the Convention identifies as central to the dignity and flourishing of the individual. *E.g.*, Incal v. Turkey, 29 Eur. H.R. Rep. 449, 480 (1998). Viewing democracy in this way, the ECHR will consider a restriction "necessary in a democratic society" only if it meets a "pressing" need and is "proportionate to the legitimate aim pursued." *Id.* at 481.

230. European Convention on Human Rights art. 15(2), *supra* note 174, 213 U.N.T.S. at 232; Protocol 6 to the European Convention on Human Rights art. 3, *supra* note 228, 1496 U.N.T.S. at 281; Protocol 7 to the European Convention on Human Rights, Nov. 22, 1984, art. 4(3), 1525 U.N.T.S. 195, 196; Protocol 13 to the European Convention

European Convention permits derogation, Article 15 circumscribes that power and subjects it to oversight by the European Court:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from the obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. . . .
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. . . .

Multiple restrictions are packed into this language. The requirement of formal notification and explanation to the Council of Europe provides a procedural and political check. And the substantive limits are significant. First, even serious law-enforcement exigencies are insufficient to trigger the derogation power; the emergency must be sufficiently grave to threaten the life of the nation. Second, even an overwhelming emergency of this sort *does not* by itself suspend Convention obligations. Nor does such an emergency — one that threatens the life of the nation — require automatic deference to the necessity judgments of military or executive authorities. When the life of a nation is threatened, the European Convention still preserves a judicial checking function to assure that steps taken are "strictly required" in the judgment of the independent officials (mostly nationals of other countries) who sit as judges of the European Court.[231]

Absent a valid derogation, the Convention requires detention and trial to meet detailed requirements. In both civil and criminal cases, Article 6 grants the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal." In criminal cases Article 6 adds a presumption of innocence and grants the accused the rights to notice of the charges, assistance of counsel, and the ability to call and cross-examine witnesses.[232]

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on Human Rights, May 3, 2002, art. 2, *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf.

231. Each signatory state in effect nominates one judge. *See* European Convention on Human Rights art. 22, *supra* note 174, 213 U.N.T.S. at 236.

232. Specifically, Article 6 grants the accused the rights:

> . . . [to] be presumed innocent until proved guilty. . . .
>
> . . . to be informed promptly . . . and in detail, of the nature and cause of the accusation . . . ; to have adequate time and facilities for the preparation of his defence; to defend himself in person or through [counsel] of his own choosing or, if he has not sufficient means . . . , to be given [legal assistance] free when the interests of justice so require; to examine and have examined witnesses against him and to obtain . . . witnesses on his behalf under the same conditions as witnesses against him . . . .

Id. at 228.

Article 5 limits the purposes for which detention may be ordered. The allowable purposes are broad but, unlike our Constitution, do not include *any* potentially legitimate state interest. Detention is permissible to prevent the spread of infectious diseases; "for the purpose of bringing [a person] before the competent legal authority on reasonable suspicion of committing an offense . . ."; to permit deportation or extradition; and "when it is reasonably considered necessary to prevent [the person from] committing an offense." The list of valid purposes is constrained by the prerequisite of judicially testable "reasonableness," and it has one significant omission: detention is not permissible simply for purposes of interrogation.[233]

Detention for a valid purpose must respect a detainee's rights to be informed promptly of the reasons for detention; to have the lawfulness of the detention decided speedily by a court; and to have release ordered if the detention is unlawful. Individuals detained as suspected offenders or for preventive detention have the additional right to be tried within a reasonable time or released pending trial. These norms, and the existence of a supra-national jurisdiction to enforce them, imposed an additional layer of constraints on British counter-terrorism measures in Northern Ireland.

233. Investigators seeking to interrogate of course can invoke one of the allowed purposes as the basis for detaining their target. But an allowable purpose will in turn trigger its own requirements. Thus, if the detention is ostensibly based on suspicion of having committed an offense, Article 5(1) requires that the suspicion be reasonable and subject to prompt review by a court. *Id.* at 228.