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Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court

Shiri Krebs

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Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court

Shiri Krebs*

ABSTRACT

All around the world, hundreds of individuals are constantly subjected to administrative detentions designed to prevent them from committing future atrocities. Generally, the main protection against arbitrary and unjustified administrative detentions is judicial review. Nonetheless, judicial review of administrative detention proceedings suffers from inherent difficulties and is typically based on ex parte proceedings and secret evidence. In spite of these difficulties and based on a few renowned cases, it is widely accepted in the scholarly debates that the Israeli judicial review model is robust.

* JSD Candidate, Stanford Law School. In the years 2006–2010 the Author served as a legal advisor on international law matters in the chambers of Chief-Justice Dorit Beinisch, President of the Israeli Supreme Court.

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and effective. Therefore, prominent international law scholars often recommend the adoption of this model in various other states, including the United States, and claim that it is best suited to fulfill international human rights law requirements. Nevertheless, as this study reveals, out of the 322 cases that were decided by the Israeli Supreme Court from 2000 to 2010, not even a single case resulted in a release order or in a rejection of the secret evidence.

This research provides, for the first time, a systematic empirical analysis of these 322 cases. Since the judgments in this field are usually short and laconic, providing very little information on the process, the case law analysis is complemented with in-depth interviews with all of the relevant stakeholders: Israeli Supreme Court Justices, defense lawyers, state attorneys, intelligence officers, and Palestinian detainees. The research demonstrates a meaningful gap between the rhetoric of the few renowned cases and actual practice. In particular, it reveals the difficulties courts face in attempting to challenge secret evidence. Furthermore, the research discovers the formation of “bargaining in the shadow of the Court” dynamics and the adoption of alternative dispute resolution methods by the Court, such as mediation and negotiation.

Put together, the inclusive case law analysis and in-depth interviews provide extensive information on the actual practice and inherent weaknesses of judicial review of administrative detention cases; they lift the veil of secrecy that currently overshadows this sensitive and important judicial process; and they cast doubt on arguments that Israel’s detention model is one that should be emulated by other countries.

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*All the world's a stage,
And all the men and women, merely Players.*

William Shakespeare¹

*We examined the secret evidence. The dangerousness
posed by the petitioner is severe, and the petitioner knows
exactly how much he is involved.*

Justices of the Israeli Supreme Court²

*I never knew what the case against me was. My lawyer
never saw the evidence against me. I felt discriminated
against and ignored.*

"Mohamed," Palestinian Detainee³

I. INTRODUCTION

All around the world, hundreds of individuals are constantly subjected to administrative detentions designed to prevent them from committing future atrocities. Generally, the main protection against arbitrary and unjustified administrative detentions is posed by judicial review, which is typically conducted *ex parte* and is largely based on secret evidence.

In the first decade of the twenty-first century, the Israeli Supreme Court had performed judicial review over hundreds of administrative detention cases. In the scholarly debates surrounding this field it is widely accepted—based on the Court's rhetoric in a few renowned cases—that the Israeli Supreme Court's judicial review of administrative detentions is robust and effective. The Israeli judicial review model is often described as "interventionist."⁴ However, there has been little scrutiny of the Court's review beyond a handful of high-profile, oft-quoted cases. Indeed, in a recent joint article characterizing this judicial review as "active," Professors Daphne Barak-Erez and Matthew Waxman opine that in order to draw more meaningful lessons from the Israeli model there is a need for

1. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

2. HCJ 7885/05 Al-Aker v. State of Israel (2005) (unpublished decision) (Isr.).

3. Fictitious name, the real name is saved with the Author. Mohamed was administratively detained by the Israeli authorities, intermittently, for twelve years. At the moment he is released and lives with his family in Beit-Lechem. Interview with "Mohamed," Admin. Detainee. (Jan. 12, 2011).

4. Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1918 (2004); see discussion *infra* Part V.A.

“thorough empirical research of the decisions of the Israeli Supreme Court in this area.”⁵

This research is a response to that challenge. It provides, for the first time, a systematic empirical analysis of the Israeli Supreme Court’s case law regarding administrative detentions from 2000 to 2010. The case law analysis encompasses all of the relevant judgments, including hundreds of short, laconic, and unpublished decisions. The findings are surprising and reveal a meaningful gap between the rhetoric of a few renowned cases and actual practice. On the one hand—and contrary to general review of an interventionist court—this study reveals that out of the 322 cases decided by the Israeli Supreme Court in this period, not a single case resulted in a release order, and in none of the cases did the Court openly reject the secret evidence. On the other hand, more subtle Court dynamics were detected, such as “bargaining in the shadow of Court” dynamics and “mediation” efforts on behalf of the Court; that is, even though the Court did not order releases in any cases, the Court’s involvement had some impact on the parties’ efforts to resolve cases.

In order to suggest explanations for some of the most surprising findings—such as the very high rate of withdrawals by the detainees just before the courtroom hearing—seventeen in-depth interviews, with all of the relevant stakeholders (Supreme Court Justices, defense lawyers, state attorneys, Israeli Security Agency representatives, and former detainees), were conducted. These interviews provide a unique glimpse into the judicial review process and reveal some of the behind the scenes dynamics of that process. In particular, the interviews shed light on two important characteristics of the judicial review process: the difficulties the Court faces in attempting to challenge the secret evidence and play the role of the detainee’s lawyer during the *ex parte* proceedings, and the formation and adoption of alternative dispute resolution methods by the Court, such as mediation and negotiation.

Put together, the comprehensive case law analysis along with the in-depth interviews provide extensive information on the actual practice and the inherent difficulties of the judicial review of administrative detention cases, and unveil the unique methods the Court has developed to confront them. Above all, they shed some light on what is happening behind the closed doors, and lift the veil of secrecy that currently overshadows this sensitive and important judicial process. Fundamentally, they cast doubt on arguments that Israel’s detention model is one that should be emulated by other countries. While the Israeli Supreme Court does the best it can, given the legal framework of secret evidence and *ex parte* proceedings, the

5. Daphne Barak-Erez & Matthew Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3, 43 (2009).

legal framework itself makes independent judicial review of detention exceedingly challenging, if not impossible.

II. ADMINISTRATIVE DETENTIONS: DEFINITIONS AND CURRENT DEBATES

This is not ideal. [Administrative detentions] represent a certain devaluation of our system of values, but there is no other choice.

Justice E, Israeli Supreme Court⁶

Administrative detention is an executive-controlled detention mechanism that may take different forms and be executed in different ways within different contexts, by different authorities, and for different purposes.⁷ A basic and general definition for administrative detentions, which is commonly used in international (particularly United Nations) documents, is “persons arrested or imprisoned without charge.”⁸ This paper focuses, however, on a specific administrative detention regime, also referred to as “executive detention,”⁹ “preventive detention,”¹⁰ or “security detention.”¹¹ This type of detention is a proactive mechanism operated by the Executive or military authorities in order to prevent

6. Interview with Justice E, Supreme Court of Isr. (Dec. 22, 2010).

7. Such administrative detention regimes include, among others, a pretrial detention regime, an immigration-context detention regime and a security detention regime. For an elaborated discussion of the various administrative detention regimes, see Stella Burch, *Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV. 99 (2009).

8. See The First United Nations Conference on the Prevention of Crime and Treatment of Offenders, Aug. 22–Sept. 3, 1955, Geneva, Switz., *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Annex I (Aug. 30, 1955), adopted by E.S.C. Res. 663, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048, at 11 (July 31, 1957), amended by E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1, U.N. Doc. E/5988, at 35 (May 13, 1977). The International Committee of the Red Cross defines administrative detention as “deprivation of liberty of a person that has been initiated/ordered by the executive branch—not the judiciary—without criminal charges being brought against the internee/administrative detainee.” Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 375–76 (2005).

9. Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 961 (2009).

10. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 313 (2000).

11. John McLoughlin, Gregory P. Noone & Diana C. Noone, *Security Detention, Terrorism and the Prevention Imperative*, 40 CASE W. RES. J. INT’L L. 463, 463 (2007).

future harm to national security.¹² In accordance with this mechanism, individuals can be administratively detained although they have never committed any crime; they are being detained in order to prevent them from committing future crimes or offenses.¹³

In spite of the increasing attention given recently to this mechanism, administrative detention is not new.¹⁴ Throughout the years, many states have employed various administrative detention regimes, differing in their scopes, contexts, and procedures used to confront a variety of threats to national security.¹⁵ In the recent decade, however—since the emergence of the global “war on terror”—administrative detention has become an increasingly popular counter-terrorism mechanism.¹⁶ The Guantánamo detainees are perhaps the most infamous detainees held in administrative detention anywhere in the world today,¹⁷ but they are not alone. All

12. Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 905 (2009). For a more elaborated definition of administrative detentions, see Steven Greer, *Preventive Detention and Public Security—Towards a General Model*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 25 (Andrew Harding & John Hatchard eds., 1993); see also INT’L COMM’N OF JURISTS, MEMORANDUM ON INTERNATIONAL LEGAL FRAMEWORK ON ADMINISTRATIVE DETENTION AND COUNTER-TERRORISM 2 (2006).

13. In other incidents, the administrative—rather than the criminal—detention of dangerous persons who committed crimes in the past is justified by the impossibility to hold criminal proceedings against them for various reasons, such as insufficient time, difficulties in gathering evidence, or fears of disclosing classified evidence. Kitai-Sangero, *supra* note 12, at 906; see also Barak-Erez & Waxman, *supra* note 5, at 7.

14. In Israel, for example, administrative detentions originated back in the 1940s, under the British Mandate Defense Regulations. See *infra* Part IV.

15. Including, among others, the United States, the United Kingdom, Israel, India, the Russian Federation, Australia, and Singapore. For a comparative research on the various administrative detention regimes, see Burch, *supra* note 7, at 105–06 (“While there is obvious value in considering the use of terrorism-related detention regimes by these American allies, there is also much to be gained by undertaking a broader analysis and situating any future U.S. policy with a truly global context.”). On administrative detention regime in the United States, see Amos N. Guiora, Quirin to Hamdan: *Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT’L L. 511 (2007); Tung Yin, *Ending the War on Terrorism. One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149 (2005).

16. Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT’L L.J. 455, 474–81 (2007); Jenny Hocking, *Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control*, 49 AUSTL. J. POL. & HIST. 355, 355–71 (2003); Dominic McGoldrick, *Security Detention—United Kingdom Practice*, 40 CASE W. RES. J. INT’L L. 507, 509 (2009). For an analysis of administrative detentions in international law and in armed conflict situations, see Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403 (2009).

17. See Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004) (providing background and analysis on Guantánamo Bay detention center).

around the globe, from India,¹⁸ to Israel,¹⁹ to the Russian Federation,²⁰ to Australia,²¹ states facing terrorist threats are employing some sort of administrative detention regime to cope with these threats. Interestingly, even states such as Israel, which has used administrative detentions for decades, introduced new administrative detention regimes and became more susceptible to the vast use of this mechanism.²²

Nonetheless, despite its vast use—and maybe because of it—administrative detention is a highly contentious mechanism. In recent years, many contradictory scholarly articles, judicial decisions, and policy papers have been written on its legality, theory, and practice. In a nutshell, critics of administrative detention claim that the practice does not meet the basic requirements of international human rights law²³ or national constitutional laws,²⁴ and assert that it is an unjust regime²⁵ that undermines the fundamental principles of democracy,²⁶ including the separation of powers principle.²⁷ Its advocates, however, argue that the use of administrative detentions is necessary to protect democratic societies from the grave security

18. Jinks, *supra* note 10 (discussing the preventative detention regime in India).

19. Itzhak Zamir, *Administrative Detention*, 18 ISR. L. REV. 150 (1983).

20. Todd Foglesong, *Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pre-Trial Detention in Russia*, 14 WIS. INT'L L.J. 541 (1996).

21. Hocking, *supra* note 16; Katherine Nesbitt, *Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B.U. PUB. INT. L.J. 39 (2007).

22. See *infra* Part IV.C (describing the administrative detention regime in Israel since the passage of the Incarceration of Unlawful Combatants Law).

23. See, e.g., Doug Cassel, *International Human Rights Law and Security*, 40 CASE W. RES. J. INT'L L. 383, 401 (2009) ("If security detention is not prohibited altogether, its use must be kept to an absolute minimum, and subjected to rigorous and redundant procedural safeguards.").

24. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007) (analyzing administrative detention in the context of constitutional law); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002) (discussing the Patriot Act in the context of the Constitution and the detention of terrorists).

25. Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terrorism*, 109 PENN. ST. L. REV. 967, 968 (2005) ("The punishment of the guilty, and only the guilty, is one of the important distinctions between the force that a democracy should use to defend itself against terrorists and the force that terrorists themselves use.").

26. See, e.g., Steyn, *supra* note 17, at 1 ("[E]ven liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis.").

27. Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 157-58 (2004).

threats posed by terrorism,²⁸ and that criminal law alone is inadequate to combat transnational terrorism.²⁹ Advocates further argue that there are several different ways in which administrative detention can help prevent terrorism, including incapacitating terrorists, disrupting specific plots, deterring potential terrorists, and gathering information through interrogation.³⁰

This general debate on the legality (and necessity) of administrative detentions is just the tip of the iceberg. Assuming that some sort of administrative detention is (or may be) a legally permissible mechanism under some set of circumstances or conditions,³¹ both critics and advocates differ on a long list of substantive and procedural issues relating to the implementation and limitation (rather than the general legality) of this mechanism. Some of these pressing and yet unresolved debates relate to the applicable normative legal framework for administrative detentions of suspected terrorists (whether international humanitarian law, national constitutional laws, national criminal laws, or merely national administrative laws),³² the scope of application of this mechanism

28. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 260–72 (2007) (analyzing whether the United States should follow laws of war in regards to Al Qaeda); 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, 722 (2001) (discussing the balance between human rights and national security in Israel in the context of Lebanese detainees); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1371 (2008).

29. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 151–82 (2008). Also, Jack Goldsmith and Neal Katyal, for example, call on “Congress to establish a comprehensive system of preventive detention that is overseen by a national security court.” Jack Goldsmith & Neal Katyal, Editorial, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.

30. Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1, 3 (2009).

31. And it seems that most scholars dealing with this issue are willing to acknowledge the legality of such mechanism, at least as a minimal and meaningfully restricted detention regime. Currently, most of the recent debates concerning administrative detentions focus not on the legality of this mechanism in general, but rather on its concrete implementation and limitations.

32. See Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669, 678 (2005) (discussing challenges facing international law); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (discussing post-9/11 criminal law in the context of detention); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE J. INT'L L. 369 (2008) (advocating for clearer standards in the current international detention regime regarding armed conflict and criminal law); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499 (2004); Yin, *supra* note 15 (advocating the use of administrative rather than criminal law in the detention scheme).

(who can be administratively detained?);³³ the relevant scheme of evidence (what rules of evidence apply, and what is the required standard of certainty);³⁴ the potential length of the detention (how long is it permissible to administratively detain an individual without initiating any criminal charges?);³⁵ and various issues concerning democracy, separation of powers and judicial review (what are permissible executive means in a democracy, and is administrative detention solely an executive authority? If not, what method of judicial review is required in order to balance national security and personal liberty?).³⁶

It is this last issue—the judicial review process—that this Article wishes to shed some light on. This is not a random choice. Several characteristics of administrative detentions increase the importance of the judicial review process and the manner in which it is conducted: (a) the inherent imbalance between the state and the detainee and the Court's reliance on the state for secret evidence³⁷ and in *ex parte* proceedings;³⁸ (b) the Court's alleged deference to the state's discretion in issues of national security;³⁹ and (c) the false positive or false negative judicial bias. This bias means that a wrongful judicial decision will only be revealed if the judge falsely releases from custody a dangerous individual who is later involved in a terrorist activity, while a wrongful decision to approve an innocent

33. See, e.g., Waxman, *supra* note 30 (exploring the complex nature of who should be eligible for detainment).

34. See *Medjnoune v. Algeria*, Human Rights Comm. No. 1297/2004, paras. 9–11, U.N. Doc. CCPR/C/87/D/1297/2004 (Aug. 9, 2004) (creating an evidential scheme for oversight of states in the context of detention); Hakimi, *supra* note 32, at 389–95 (discussing the role of the Human Rights Committee in examining administrative detentions under the ICCPR); Waxman, *supra* note 28, at 10–11 (advocating that standard rules of evidence are not sufficient in administrative detention proceedings).

35. See, e.g., Yin, *supra* note 15, at 170–71 (describing the ambiguity of “cessation of active hostilities”).

36. See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568 (2003) (advocating that judicial review has been more adequate than critics have stated in the realm of national security and a further role for the Court moving forward); Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Security in Detentions at Guantanamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127 (2006) (describing the role of secrecy and habeas corpus in Guantánamo detentions); Benjamin J. Priestler, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39 (2005) (exploring the role of judicial review in administrative detentions in the future).

37. Barak-Erez & Waxman, *supra* note 5, at 5; Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"*, 68 ALB. L. REV. 1127, 1132–34 (2005).

38. Barak-Erez & Waxman, *supra* note 5, at 21; Hamish Stewart, *Is Indefinite Detention of Terrorist Suspects Really Constitutional?*, 54 U.N.B. L.J. 235, 245 (2005).

39. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 118 (2002); Kitai-Sangero, *supra* note 12, at 912.

individual's detention will most likely never be acknowledged; due to the detention, the supposed danger will never materialize.⁴⁰ This is substantially different than criminal proceedings, which deal with past offenses. If an offense has already occurred, a defendant *can* materially prove his or her innocence as to that offense.

III. SECRET EVIDENCE, JUDICIAL REVIEW, AND THE ROLE OF THE COURTS

Administrative detention without effective judicial review might cause mistakes of facts or of discretion, which means infringement upon individual liberty without justification.

Justices of the Israeli Supreme Court⁴¹

Administrative detentions often reveal stresses in the majoritarian decision making process.⁴² In times of national crisis people become more deferential to the demands of their rulers, and societies are more susceptible to abridgment of rights targeted at "others" (often political-opposition groups, ethnic minorities, immigrants, or foreigners).⁴³ Indeed, current administrative detention regimes most often target some form of "others": Muslims in the post 9/11 context,⁴⁴ Palestinians in the Israeli context,⁴⁵ aliens in the UK and U.S. administrative detention contexts,⁴⁶ or simply "terrorists."⁴⁷ This trend is increasingly powerful due to the relatively

40. Kitai-Sangero, *supra* note 12, at 909.

41. HCJ 253/88 Sajdiya v. Minister of Def. 42(3) PD 801 [1988] (Isr.).

42. Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495, 498 (2006); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005); *see also* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 10–11 (1995) (describing problems with the majoritarian political process).

43. Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 191 (2003).

44. MUZAFFER A. CHISHTI ET AL., MIGRATION POLICY INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003); Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. & CULTURE 1, 25 (2002).

45. HAMOKED CTR. FOR THE DEF. OF THE INDIVIDUAL & B'TSELEM, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INCARCERATION OF UNLAWFUL COMBATANTS LAW 12–13 (2009), available at http://www.btselem.org/Download/200910_Without_Trial_Eng.pdf.

46. Moeckli, *supra* note 42, at 500–01.

47. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 718 (2009).

weak separation of powers between the Executive and Legislative Branches in times of national security crisis, thus damaging an important counter-majoritarian mechanism.⁴⁸

A. *Judicial Review as a Counter-Majoritarian
Check on Executive Power*

Judicial review executed by independent and impartial courts is a traditional mechanism to impose meaningful counter-majoritarian checks on the Executive.⁴⁹ It is commonly accepted—and it is indeed the baseline premise of this paper—that courts, and especially the highest court or the constitutional court in each democratic state, have an important role: to protect democracy and the constitution (or the constitutional regime).⁵⁰ In this regard, it is also the role of the courts to balance the security needs of the state with the individual rights of those threatening the state.⁵¹ And indeed, many prominent legal scholars are strong advocates for the counter-majoritarian power of the judiciary on the grounds that such a power will prevent panic-stricken attacks by popular majorities on basic individual rights.⁵² Furthermore, judicial review that increases the

48. In the U.S. political system, for example—so it is argued—when the government is unified, in the sense that the President and Congress are in the hands of the same party, and that party is itself more unified than ever, Congress will probably authorize anything for which the President asks. Tushnet, *supra* note 42, at 2679.

49. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006) (describing the history of judicial review and its role in American political society); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 446–47 (2004).

50. See, e.g., AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 20–22 (2008); KRAMER, *supra* note 49, at 212; Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, HOMELAND SECURITY AFF., Oct. 2008, at 1, 3, 8–11 (“Perhaps this is the United States’ fate, and it too will eventually provide more due process rights to its enemy combatants by involving Congress and the judiciary in creating and monitoring a preventive detention regime.”); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 755 (2001). But see MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–32 (2000) (arguing that judicial power should be limited in order to protect the Constitution).

51. Aharon Barak, *Human Rights in Times of Terror—A Judicial Point of View*, 28 LEGAL STUD. 493, 493 (2008). For a comprehensive analysis of this issue, see BARAK, *supra* note 50, at 20.

52. See, e.g., Michael P. Allen, *George W. Bush and the Nature of Executive Authority*, 72 BROOK. L. REV. 871 (2007) (describing the role of the judiciary in countering executive unilateralism with regards to enemy combatants); Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 N.Y.U. J. INT’L L. & POL. 67 (2006) (using the Israeli Supreme Court’s adjudication of counter-terrorism activities as a case study for arguing for a strong role for the Supreme Court despite the unique characteristics of the “Terror Era”); Gerald L. Neuman, Comment, *Counter-Terrorist Operations and the Rule of Law*, 15 EUR. J. INT’L L. 1019 (2004) (discussing European states’ use of

accountability of the political branches of government is considered “preferable to the unbridled discretion sought by the executive branch.”⁵³ As stated by the former President of the Israeli Supreme Court, Professor Aharon Barak:

Democracy ensures us, as judges, independence. It strengthens us, because of our political non-accountability against the fluctuations of public opinion. The real test of this independence comes in situations of war and terrorism. The significance of our non-accountability becomes clear in these situations when public opinion is more likely to be near-unanimous. Precisely in these times of war and terrorism, we must embrace our supreme responsibility to protect democracy and the constitution.⁵⁴

Nonetheless, the role of the courts in national security crises in general, and the strength or extent of their judicial review in these situations in particular, remains an unresolved legal and political question.⁵⁵ With regard to national security matters, the process of judicial review faces various difficulties, which burden its ability to serve as an effective check on the Executive.⁵⁶ Therefore, in contrast to the view articulated above by Professor Barak, other scholars claim that the judiciary is not immune from popular panic and that there

military trials and judicial oversight in their efforts to combat terrorism); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1360–61 (2004) (arguing that in a post-9/11 world legal restraints, both domestic and international, should not be abandoned); Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375 (1989) (advocating that the Israeli judiciary is capable of striking a proper balance between national security interests and human rights).

53. Jenny S. Martinez, *Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 787 (2004).

54. Barak, *supra* note 51, at 494. A similar approach is manifested in Justice Black's dissent in *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950). A more refined theory of judicial review is developed by William N. Eskridge, Jr. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005) (describing a theory of judicial review that adheres to principles of democratic pluralism).

55. It is beyond the scope of this paper to adequately analyze the long-lasting debate, framed by Ely, Dworkin, and other prominent scholars, concerning the scope and limits of judicial review. For an account of two of the opposing views, see R. M. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1999); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

56. See Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995) (discussing whether judicial review, by the fact that it displaces decision made by political majorities, is undemocratic); Waldron, *supra* note 43, at 191 (noting that in times of war or war-like emergency, the courts have not been strong in opposing reductions in civil liberties).

are powerful pressures for judicial deference during emergencies.⁵⁷ In times of emergency, so it is argued, the judiciary may sometimes prove itself “more executive-minded than the executive.”⁵⁸ Others assert that judges can do no better than the government in striking the balance between security and liberty simply due to their lack of information or expertise.⁵⁹ Otherwise activist and strong supreme courts, such as the U.S. Supreme Court or the Israeli Supreme Court,⁶⁰ have been accused of being reluctant to oppose reductions in civil liberties in times of emergency, national security crises, war, or war-like situations.⁶¹ The other side of this coin is strong criticism of activist courts based on, among other reasons, the counter-majoritarian difficulty that their decision making process poses.⁶²

Under these circumstances, the use of secret evidence imposes an additional burden on the Court. Since one of the basic characteristics of administrative detentions is the reliance on privileged intelligence information provided by undisclosed sources, and collected, secretly, by state security agencies, the Court’s judicial review in these cases becomes even more challenging.⁶³

57. POSNER & VERMEULE, *supra* note 28, at 257; see Vladeck, *supra* note 27, 182 (discussing the Fourth Circuit’s decision in *Hamdi v. Rumsfeld* (*Hamdi III*), 316 F.3d 450 (4th Cir. 2003) and its broad judicial deference claim).

58. Waldron, *supra* note 43, at 191; see also Cole, *supra* note 36, at 2568; Tushnet, *supra* note 42, at 2679.

59. POSNER & VERMEULE, *supra* note 28, at 256; see also John C. Yoo, *Judicial Review and the War on Terror* 13 (Bepress Legal Series, Paper No. 1975, 2007), available at <http://law.bepress.com/expresso/eps/1975> (“In light of [the] gap in information, a functionalist ought to defer to the institutional choice of the political branches.”).

60. The Israeli model of judicial review with regard to national security matters is recommended by some commentators as a favorable method to balance security and liberty. See, e.g., Fergal F. Davis, *Internment Without Trial: The Lessons from the United States, Northern Ireland & Israel 22–24* (Aug. 2004) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=575481 (“Israeli model of Judicial Review is recommended since it provides a clear, independent review of the Executive’s actions.”); see also Blum, *supra* note 50, at 3 (arguing that the United States should follow the direction of Israel and Britain and “provided more due process rights and judicial review to detainees even though the threat posed by terrorism [does] not diminish”).

61. David Kretzmer, *Human Rights, in ISRAELI DEMOCRACY AT THE CROSSROADS* 39, 54 (Raphael Cohen-Almagor ed., 2005) (analyzing human rights in Israel, including a section on the Israeli Supreme Court).

62. See, e.g., RORY LEISHMAN, *AGAINST JUDICIAL ACTIVISM: THE DECLINE OF FREEDOM AND DEMOCRACY IN CANADA* 163 (2006); Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1094 (2005) (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004)) (“It is very troubling in a democracy to have so many important decisions made by unelected judges.”).

63. Van Harten elaborates on three different weaknesses in this regard: (1) the judge is precluded from hearing additional information that the individual could have supplied had he known the Executive’s claims; (2) courts are uniquely reliant on the Executive to be fair and forthcoming about confidential information; and (3) the

B. Judicial Management Model vs. Special Advocate Model

Within this context, and in order to confront the difficulties posed by relying on secret evidence, two distinct models of judicial review emerged in administrative detention cases: the “judicial management” model and the “special advocate” model. The former rests on *ex parte* proceedings, in which the court plays a cardinal role in executing an independent, inquisitorial scrutiny of the secret evidence.⁶⁴ Throughout this process, the Justices have an active role as both inquisitorial judge and as the *de facto* lawyer for the detainee during the *ex parte* proceedings.⁶⁵ The later model introduces “special advocates” or government attorneys, approved by state authorities, whose role is to represent the detainee’s interests with respect to the secret evidence.⁶⁶ The special advocate communicates with the detainee, but cannot provide him or her with information on the secret evidence.⁶⁷ While the judicial management model is employed in the Israeli administrative detention regime, the special advocate system was adopted in the United Kingdom and Canada.⁶⁸

Comparing and analyzing these two models, Barak-Erez and Waxman recently opined that, roughly speaking, the special advocate model enhances participation, while the judicial management model is designed to enhance accuracy (i.e., truth), and can better regulate the detention system across many cases.⁶⁹ They hypothesized that judges who conduct a close review of detention decisions on a regular basis can contribute to effective review of the system over time, and that this could be the most significant advantage of the judicial management model.⁷⁰

dynamic or atmosphere of closed proceedings may condition a judge to favor unduly the security interest over priorities of accuracy and fairness. Gus Van Harten, *Weaknesses of Adjudication in the Face of Secret Evidence*, 13 INT’L J. EVID. & PROOF 1, 1 (2009).

64. See Barak-Erez & Waxman, *supra* note 5, at 21–22 (“In view of the problems inherent in submitting privileged evidence *ex parte*, the court that carries out a judicial review of an administrative detention is required to act with caution and great care when examining the material that is brought before it for its inspection alone.”).

65. For a comprehensive description of this model, see Barak-Erez & Waxman, *supra* note 5, at 18.

66. See *id.* at 27–31 (describing the special advocate model).

67. *Id.*

68. See *id.* at 18–24 (describing the Israeli judicial management model); Maureen T. Duffy & Rene Provosi, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 CASE W. RES. J. INT’L L. 531, 541–43 (2007) (describing the Canadian special advocacy system in administrative detention cases); Derek McGhee, *Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK*, 29 LIVERPOOL L. REV. 99, 105 (2008) (describing the special advocacy system used in the United Kingdom).

69. Barak-Erez & Waxman, *supra* note 5, at 36–46.

70. *Id.* at 42.

After describing the Israeli administrative detention regimes, this paper will assess the validity of this hypothesis by analyzing, both empirically and comprehensively, the Israeli Supreme Court judicial review of administrative detentions. Based on both “law in the books” and “law in action,” this paper will suggest possible refinements of the assumptions that currently surround this judicial review process.

IV. ADMINISTRATIVE DETENTIONS IN ISRAEL

Since its founding in 1948, the State of Israel has used several administrative detention regimes to cope with various national security threats. Over the years, Israel held thousands of individuals—mostly Palestinians from the West Bank and Gaza—in administrative detention for periods ranging from several months to several years.⁷¹ The highest number of administrative detainees was documented during the first intifada. In November 1989, Israel was holding 1,794 Palestinians in administrative detention.⁷² During the 1990s, the number of administrative detainees dramatically decreased, and at the end of the decade there were no more than a few dozen administrative detainees.⁷³ In December 2000, ten weeks after the second intifada had erupted, Israel held twelve Palestinians in administrative detention.⁷⁴ However, in April 2002, during Operation Defensive Shield, Israel administratively detained hundreds of Palestinians in the West Bank.⁷⁵ By the end of the year, more than 900 Palestinians were administratively detained.⁷⁶ Since then, the number of administrative detainees has constantly decreased, and only 204 detainees remained in December 2010.⁷⁷ Over the years, Israel has also held a few Israeli citizens in administrative detention, both Arabs and Jews.⁷⁸ However, these

71. These numbers were provided to the Israeli NGO ‘B’Tselem’ by the Israeli Prison Service (IPS), according to their obligations under the Freedom of Information Act of 1998. HAMOKED CTR. FOR THE DEF. OF THE INDIVIDUAL & B’TSELEM, *supra* note 45, at 13.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Statistics on Administrative Detention*, B’TSELEM (Feb. 7, 2011), http://www.btselem.org/english/administrative_detention/Statistics.asp (collecting detailed and updated numbers on administrative detention in Israel, as provided by IPS to B’Tselem under the Freedom of Information Act).

78. HAMOKED CTR. FOR THE DEF. OF THE INDIVIDUAL & B’TSELEM, *supra* note 45, at 66.

cases were scarce and most of the Israeli detainees were held for short periods.⁷⁹

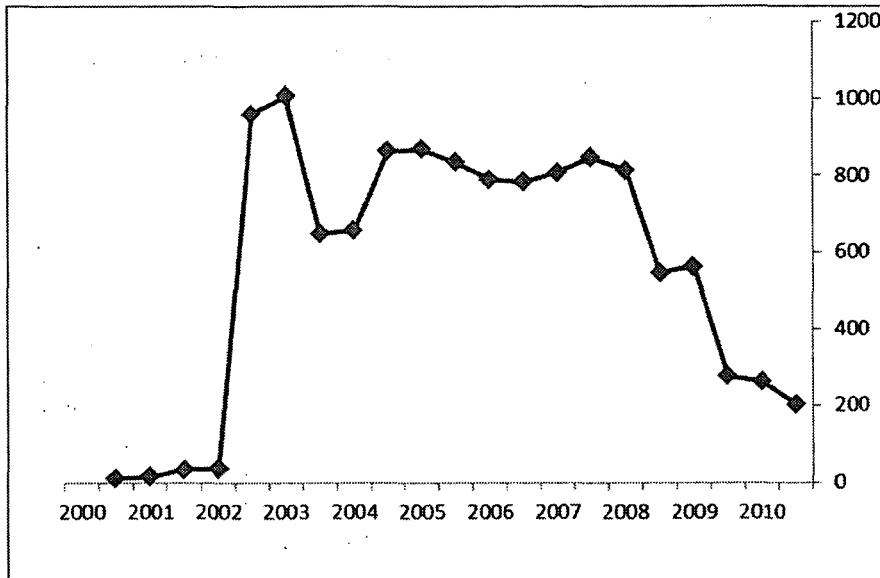


Figure 1: Number of Detainees by Year

The resort to such an expansive administrative detention regime was justified by Israel as a “state of emergency” necessity.⁸⁰ “Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.⁸¹ These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to many of its citizens.”⁸² Therefore, at its founding in 1948, Israel applied a “state of emergency” legal regime in its territory, a state of affairs that is valid and implemented in Israel to this day.⁸³

In 1991, when Israel joined the International Convention on Civil and Political Rights of 1966, it informed the Secretary General of the United Nations that a state of emergency existed within the state, and accordingly declared derogation from the right to personal

79. *Id.*

80. *Status: International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsgno=IV-4&chapter=4&lang=en> (last updated Mar. 1, 2012) (stating Israel’s reservations to the Covenant).

81. *Id.*

82. *Id.*

83. *Id.*

liberty, as enshrined in the Convention.⁸⁴ In its declaration dated October 3, 1991, Israel stated that:

[T]he State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.⁸⁵

This legal regime enables the state, under certain conditions, to derogate from the right to personal liberty.⁸⁶ Arguably, under this derogation regime, the state is not limited to the use of criminal detentions, but can also confront individual “dangerousness” by the use of administrative detentions, if criminal proceedings are not feasible, for various reasons.⁸⁷

Currently Israel employs three different administrative detention regimes to detain Israelis, Palestinians from the West Bank, and foreign “unlawful combatants.” The next sections will describe important legal developments in these detention regimes with emphasis on their judicial review procedures. The main differences between these legal regimes relate to the maximum length of each individual detention order, the authority that issues the detention order, the courts that review them, and the promptness and frequency of the judicial review. As will be explained, the detention regime least harmful to individual freedom is the regime that applies in the Israeli territory, a more harmful regime is the one employed by the Israeli military regime in the West Bank, and the most harmful is the detention regime that applies to alien unlawful combatants.

84. *Id.*

85. *Id.*

86. International Covenant on Civil and Political Rights art. 4(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976).

87. See H CJ 3239/02 Marab v. IDF Commander in the W. Bank 57(2) PD 349, paras. 21–24 [2002] (Isr.) (discussing the boundaries of criminal and administrative detention, holding that a person may be detained administratively when the circumstances “raise the suspicion” that the person “presents a danger to security”); H CJ 7/48 Al-Karbuteli v. Minister of Def. 2(1) PD 5, 97 [1949–50] (Isr.) (emphasizing the severity of this measure, which harms basic human rights, while accepting its necessity during states of emergency, para 13); see also H CJ 5784/03 Salama v. IDF Commander in Judea and Samaria 57(6) PD 721, para. 7 [2003] (Isr.) (“The [detention] order did indeed come to protect the public’s safety and the security of the area, as per section 1(a) of the order. However, it is clear that the administrative detention severely violates the detainees’ freedom. The purpose of the order is to ensure that this violation is within legal and constitutional boundaries.”).

A. Administrative Detentions in Israeli Territory

Historically, the administrative authority to detain dangerous individuals in Israel was drawn from the (Emergency) Defense Regulations of 1945 (Defense Regulations)⁸⁸—British Mandatory regulations that were adopted by the State of Israel upon its establishment.⁸⁹ Regulation 111 enabled the state to administratively detain people that posed a severe security threat to the young state and its citizens.⁹⁰ When applying this regulation in 1949, the President of the Israeli Supreme Court at the time, Justice Olshen, tied the legal foundations of administrative detention to the state of emergency that existed (and still exists) in the country.⁹¹ However, he emphasized that this security measure infringes severely upon the right to personal liberty, and can therefore be tolerated only while a state of emergency exists and necessitates such radical means.⁹² In 1951, the Knesset—the Israeli parliament—condemned the regulations as “unsuitable for a democratic society.”⁹³ It took almost thirty years before the Knesset replaced Regulation 111 with an Israeli creation.⁹⁴ Other regulations are still in force to this day.⁹⁵

88. Defense (Emergency) Regulations, 1945, PALESTINE GAZETTE No. 1442 (Sept. 27, 1945).

89. Interestingly, prior to the Declaration of Independence of the State of Israel, the government used Regulations 108 and 111 primarily against members of Jewish underground organizations. Harold Rudolf, *The Judicial Review of Administrative Detention Orders in Israel*, 14 ISRAELI Y.B. ON HUM. RTS. 148, 149 (1984).

90. Defense (Emergency) Regulations, 1945, PALESTINE GAZETTE No. 1442, reg. 111 (Sept. 27, 1945).

91. HCJ 7/48 *Al-Karbuteli* 2(1) PD 5, 97 [1949–50].

92. *Id.*; see also HCJ 95/49 *Al-Khoury v. Chief of Staff* 4 PD 34 [1950] (Isr.) (determining that administrative detention is intended for prevention of future atrocities against the state, as long as a “state of emergency” continues. p. 47). It should be noticed that while upholding the state’s authority to administratively detain individuals, the Court released the detainees in these two early cases and invalidated the detention orders: in the first case the Court had invalidated the detention order due to the state’s failure to establish an advisory committee, mandated to hear the detainee’s objections to the detention order; and in the second case the Court had invalidated the detention order due to the state’s failure to specify the place of arrest.

93. Baruch Bracha, *Restrictions of Personal Freedom Without Due Process of Law According to the Defense (Emergency) Regulations, 1945*, 8 ISRAELI Y.B. ON HUM. RTS. 296, 318 & n.97 (1978) (citing DK (1951) 1828, 1831 (Isr.)).

94. For an elaborated discussion on the historical developments of the defense regulations, see Mara Rudman & Mazen Qudus, *The Emergency Powers (Detention) Law: Israel’s Courts Have a Mission – Should They Choose to Accept It?*, 21 COLUM. HUM. RTS. L. REV. 469, 472–76 (1989).

95. Cf. Military Order Regarding Administrative Detention (Judea and Samaria) (No. 1591), 5767-2007 (Isr.), available at http://www.btselem.org/sites/default/files/administrative_detention_military_order_1591_eng.pdf (replacing an older 1988 IDF regulation to allow current administrative detention).

It was only in 1979 that Israel adopted the Emergency Powers (Detentions) Law of 1979 (IDL),⁹⁶ which cancelled Regulation 111.⁹⁷ This new legislation, however, did not squash the legality of administrative detentions. On the contrary, it incorporated this administrative measure into independent Israeli legislation. The main innovation of the IDL was civilian control over administrative detentions (instead of military control, as was the case with the British Defense Regulations), as well as mandatory judicial review by the civilian court system.⁹⁸ Other important innovations concerned, primarily, the obligation to execute judicial review within forty-eight hours from the time of arrest,⁹⁹ and the frequency of judicial review (every three months).¹⁰⁰ Moreover, unlike the Defense Regulations, the application of the IDL was explicitly restricted to "state of emergency" situations only.¹⁰¹

Under the IDL regime, the Minister of Defense is vested with the authority to order a person's detention without trial for the protection of state security and public safety for a period of up to six months.¹⁰² This power is not delegable,¹⁰³ and the Minister of Defense may extend the detention by issuing new detention orders (up to six months each).¹⁰⁴ The IDL does not specify a maximum cumulative period for administratively detaining a person, thus enabling the detention to be extended repeatedly. Moreover, detention orders are often based on secret evidence, which is not revealed to the detainee or the detainee's lawyer, and while assessing the secret evidence, the reviewing judge is not bound by the regular rules of evidence.¹⁰⁵ In particular, the judge may "admit evidence not in the presence of the detainee or his representative, or without revealing it to them," if he is convinced that disclosure of the evidence is liable to "harm the security of the region or public security."¹⁰⁶

One of the Court's landmark cases construing the boundaries of administrative detentions and interpreting the IDL is *Kawasma v. Minister of Defence*.¹⁰⁷ In *Kawasma*, the Minister of Defense issued an administrative detention order against Kawasma, who had been

96. Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1979) (Isr.).

97. *Id.* § 12.

98. Rudman & Qupty, *supra* note 94, at 470-71; see also Zamir, *supra* note 52, at 153 (describing judicial review of administrative detention as the law's "main innovation").

99. Emergency Powers (Detention) Law § 4(a).

100. *Id.* § 5.

101. *Id.* § 1.

102. *Id.* § 2(a).

103. *Id.* § 11.

104. *Id.* § 2(b).

105. *Id.* § 6. For discussion on secret evidence in Israeli administrative detention proceedings, see Barak-Erez & Waxman, *supra* note 5, at 19.

106. Emergency Powers (Detention) Law § 6(c).

107. CrimA 1/82 *Kawasma v. Minister of Def.* 36(1) PD 666, 668-69 [1982] (Isr.).

acquitted in a criminal trial.¹⁰⁸ The appeal by the state against that acquittal had not been heard, and in order to keep Kawasma behind bars until the appeal was heard, the state issued an administrative detention order against him.¹⁰⁹ After the detention order was approved by the district court, Kawasma appealed to the Israeli Supreme Court.¹¹⁰ In its decision on this case, the Supreme Court emphasized that the power of administrative detention must be exercised with great care, and only in cases where the danger to security is grave and when administrative detention is the only way to avert the danger.¹¹¹ This was not the case regarding the unique circumstances of the *Kawasma* detention order, and therefore the Court annulled the detention order and ordered the immediate release of the detainee.¹¹²

A more recent cornerstone in the judicial review of IDL detentions is the decision of the Israeli Supreme Court, sitting as High Court of Justice HCJ in *Anonymous Persons v. Minister of Defence*.¹¹³ The petitioners were Lebanese citizens held by Israeli authorities as bargaining chips in an attempt to release an Israeli navigator from captivity.¹¹⁴ In its decision—reversing its previous judgment on the matter—the Supreme Court held that the desire to release Israelis from captivity does not justify administrative detention.¹¹⁵ The Court explained that the only legal way to administratively detain the petitioners was under the IDL regime, which only allows for detention that is justified by individual dangerousness.¹¹⁶ Therefore, the Court determined that without individual dangerousness there is no legal basis to continue detaining the petitioners.¹¹⁷ This judgment motivated the Knesset to introduce a new administrative detention regime, which will be discussed in subpart C below.

B. Administrative Detentions of Palestinians in the Occupied Territories

While the IDL primarily governs detentions of Israelis or detentions within the Israeli territory in the West Bank (and until recently also in Gaza)—an area regarded by Israeli courts as subject

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. CrimFH 7048/97 *Anonymous Persons v. Minister of Def.* 54(1) PD 721, 743 [2000] (Isr.).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

to belligerent occupation—military law applies.¹¹⁸ When Israel occupied the West Bank and Gaza as a result of the 1967 war, it extended the British Mandate law to the occupied territories through military orders.¹¹⁹ During the years, military officials in the West Bank have issued military orders on administrative detentions, which enabled military commanders to administratively detain Palestinians who threatened the public security of the area.¹²⁰ The most recent military order that currently governs administrative detentions in the West Bank is Administrative Detentions Order No. 1591 (which replaced an order dating from 1988) (MDO).¹²¹

The MDO authorizes IDF's military commanders to detain a person for a maximum period of six months when there is "a reasonable basis to believe that the security of the region or public security" requires it.¹²² Here, too, the detention may be extended indefinitely, six months at a time.¹²³ Furthermore, the MDO establishes an apparatus for judicial review. Within eight days of the day the person is detained, or of the day the detention order is extended, the detainee must be brought before a military judge holding the rank of at least major to determine whether the detention

118. See, e.g., HCJ 7957/04 Mara'abe v. Prime Minister of Isr., 45 I.L.M. 202, 207 (2006) (Isr.) ("The Judea and Samaria areas are held by the State of Israel in belligerent occupation . . . the legal regime which applies in these areas is determined by public international law regarding belligerent occupation . . .") (citations omitted); HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807, para. 23 [2005] (Isr.) ("In the areas relevant to this petition, military administration, headed by the military commander, continues to apply."); HCJ 3799/02 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. GOC Cent. Command, 45 I.L.M. 491, 498 (2006) (Isr.) ("An army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security." (citations omitted)); see also Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148–60 (2002) (discussing generally the role of law in regions threatened by terrorist attacks); Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540, 542–48 (2006) (discussing the decisions cited above).

119. EMMA PLAYFAIR, *ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK* 1–3 (1986).

120. For an elaborated historical account, see Cheryl C. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515, 537–39 (1987), Harold Rudolph, *The Judicial Review of Administrative Detention Orders*, 14 ISRAELI Y.B. ON HUM. RTS. 148 (1984) (giving a brief history of the use of administrative detention to secure the public safety, maintain order, and suppress rebellion), and Dov Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories: A Survey and Evaluation*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS* (Meir Shamgar ed., 1982) (defending administrative detention as "necessary for security reasons").

121. Military Order Regarding Administrative Detention (Judea and Samaria) (No. 1591), 5767-2007, § 1 (Isr.), available at http://www.btselem.org/sites/default/files/administrative_detention_military_order_1591_eng.pdf.

122. *Id.* § 1(a).

123. *Id.* § 1(b).

is justified.¹²⁴ The judge may approve the order, cancel it, or shorten the period of detention specified in it.¹²⁵ Similar to the IDL regime, the MDO includes a provision permitting the use of secret evidence that is not revealed to the detainee or his (or her) representative, and permits deviations from the regular rules of evidence.¹²⁶ The military court's decision may be appealed to the Military Court of Appeals by either the detainee or the military commander.¹²⁷

Although according to the MDO the decision of the Military Court of Appeals should be the last instance of review for the military commander's decision, a practice developed over the years of submitting habeas corpus petitions to the Israeli Supreme Court, sitting as High Court of Justice, against the decisions of the Military Court of Appeals.¹²⁸ Unlike U.S. courts, which have held that they do not have jurisdiction to accept suits from certain nonresident aliens challenging extraterritorial acts of the U.S. military,¹²⁹ soon after the occupation of the Palestinian territories, the Israeli Supreme Court opened its doors to Palestinians from the West Bank and Gaza, enabling them to submit petitions challenging the military authorities' actions and decisions.¹³⁰ In fact, most of the administrative detention cases reviewed by the Israeli Supreme Court throughout the years are such cases.¹³¹

While dealing with these cases, the Supreme Court has held that administrative detention, like every other executive action, is subject to the principle of proportionality.¹³² Consequently, such detention cannot be used if it is possible to prevent the danger by using less

124. *Id.* § 4(a).

125. *Id.*

126. *Id.* §§ 7–8.

127. *Id.* § 5.

128. Esther Rosalind Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 471 (1986).

129. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 768–77 (1950) (“But the nonresident enemy alien . . . does not have even . . . qualified access to our courts.”); *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 213–14, 235 (D.D.C. 2009) (citing *Boumediene v. Bush*, 553 U.S. 723 (2008)) (denying habeas review to detained Afghan citizen in light of his alien status); *Yoo*, *supra* note 59, at 12 (noting a decision by the D.C. Circuit, which “concluded that no court could exercise jurisdiction over [alien] detainees, even if they have not been adjudicated enemies of the United States, simply because they were aliens held outside the territorial United States” (internal quotation marks omitted)); see also KRETZMER, *supra* note 39, at 118 (suggesting that the United States' federal judiciary, along with other branches, prefers the “general interest” over personal rights in times of crisis).

130. Kretzmer, *supra* note 61, at 54.

131. See *infra* Figure 3: The Research Population.

132. HCJ 7015/02 *Ajuri v. IDF Commander in Judea & Samaria* 56(6) PD 352, para. 25 [2002] (Isr.) (quoting HCJ 5667/91 *Jabarin v. Commander of Military Forces in the W. Bank* 46(1) PD 858, 860 [1991] (Isr.)) (“There must be an objective relationship—a proper relativity or proportionality—between the forbidden act of the individual and the measures adopted by the Government.”).

harmful alternatives, including criminal proceedings; nor can it be used if the restriction of the detainee's liberty is disproportionate to the danger he or she poses.¹³³

One of the Court's landmark decisions in this regard is *Marab v. IDF Commander in the West Bank*. In this decision, given during Operation Defensive Shield in 2002 (an IDF military operation in the West Bank), the Court nullified detention orders that allowed for twelve and eighteen day detentions with no judicial review.¹³⁴ In its decision, the Court held that according to both Israeli and international humanitarian and human rights law, a detainee must be brought before a judge "promptly."¹³⁵ Therefore, it ruled that the detention orders, designed to enable the IDF to detain hundreds of Palestinians during the combat operations, were void.¹³⁶ Nonetheless, the Court suspended its judgment for a period of six months in order to give the state enough time to reorganize in accordance with the judgment.¹³⁷

C. Administrative Detentions of Aliens

In 2002, as a direct response to the Supreme Court's decision in *Anonymous Persons* (the *Bargaining Chips* case),¹³⁸ the Israeli parliament introduced a new administrative detentions law: the Incarceration of Unlawful Combatants Law of 2002 (UCL).¹³⁹ Although its original purpose was to enable the state to hold Lebanese citizens in administrative detention, during legislative proceedings the initial draft was meaningfully changed.¹⁴⁰ Article 1 of the UCL explicitly declares that the purpose of this law is to regulate the internment of unlawful combatants "in a manner that is consistent with the commitments of the State of Israel under the

133. *Id.* (citing HCJ 253/88 Sajdiya v. Minister of Def. 42(3) PD 801, 821 [1988] (Isr.)).

134. HCJ 3239/02 Marab v. IDF Commander in the W. Bank 57(2) PD 349 [2002] (Isr.).

135. *Id.* para 48.

136. *Id.* para 49.

137. *Id.*

138. Hilly Moodrik Even-Khen, *Unlawful Combatants or Unlawful Legislation? An Analysis of the Imprisonment of Unlawful Combatants Law (2002)*, INT'L L.F. 1, 5-6 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902934.

139. Incarceration of Unlawful Combatants Law, 5762-2002, SH No. 1834 p. 192, reprinted in 32 ISRAELI Y.B. ON HUM. RTS. 389 (Yoram Dinstein & Fania Domb eds., 2003).

140. CrimA 6659/06 A v. State of Israel, 47 I.L.M. 768, 771 (2008) (Isr.); Fania Domb, *Judicial Decisions: Judgments of the Supreme Court of Israel*, in 38 ISRAELI Y.B. ON HUM. RTS. 271, 297 (Yoram Dinstein & Fania Domb eds., 2008).

provisions of international humanitarian law.”¹⁴¹ The premise in this context is that an international armed conflict prevails between Israel and the terrorist organizations that operate outside of Israel.¹⁴²

The UCL gives state authorities the power to detain unlawful combatants, who are as defined in § 2 of the law as persons who have taken part in hostilities against the State of Israel, directly or indirectly, or who are members of a force carrying out hostilities against Israel, and who do not satisfy the conditions of prisoner of war status under international humanitarian law.¹⁴³ According to the UCL, persons identified as unlawful combatants may be subject to administrative detention for an unlimited period of time if the Chief of Staff (or an officer holding the rank of major general delegated by the Chief of Staff) believes that their release will harm state security.¹⁴⁴

Article 3(c) of the UCL ensures that the detainee shall be given an opportunity to state his case before an officer with the rank of at least lieutenant colonel who will be appointed by the Chief of Staff.¹⁴⁵ The detention ends when the Chief of Staff believes that the detainee can no longer be defined as an unlawful combatant or that his release will not harm state security.¹⁴⁶ Article 3(b) further asserts that an internment order may be given without the detainee’s presence.¹⁴⁷ However, the detainee should be informed of this fact as soon as possible.¹⁴⁸

Article 5(a) determines that within fourteen days from the date of arrest, the detainee must be brought before a district court judge to determine if the detention is justified.¹⁴⁹ Later on, judicial review must be held before a district court judge every six months.¹⁵⁰ In these hearings, the state may rely on two legal presumptions specified in the UCL: (1) release of a person who is a member of a

141. Incarceration of Unlawful Combatants Law, 5762-2002, SH No. 1834 p. 192, art. 1 (Isr.), *unofficial translation available at* <http://www.jewishvirtuallibrary.org/jsourc/Politics/IncarcerationLaw.pdf>.

142. This premise follows the Supreme Court’s decisions on the nature of the conflict, and as a result, the applicable law. See H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. 57(6) PD 285, para. 18 [2006] (Isr.) (“The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict.”).

143. Incarceration of Unlawful Combatants Law art. 2.

144. See *id.* art. 3(a) (placing no time limits on how long an unlawful combatant may be held in custody).

145. *Id.* art. 3(c).

146. *Id.* art. 4.

147. *Id.* art. 3(b).

148. *Id.*

149. *Id.* art. 5(a).

150. *Id.* art. 5(c).

force carrying out hostilities against Israel will harm state security¹⁵¹ and (2) a determination by the Minister of Defence that the force to which such a person belongs is carrying out hostilities against Israel will be valid and binding in any legal process.¹⁵²

Moreover, with regard to secret evidence, Article 5(e) permits the court to depart from the rules of evidence (for reasons that will be recorded); allows the court to admit evidence without the presence of the detainee or the detainee's lawyer; and permits the court to admit such evidence without disclosure if the court is persuaded that disclosure of the evidence to the detainee or his counsel is likely to harm state security or the public.¹⁵³ Article 6 further determines that the detainee's meeting with his (or her) lawyer may be delayed for up to seven days from the day of the arrest, or for up to ten days with the permission of an officer holding the rank of colonel.¹⁵⁴ A district court judge is authorized to delay the detainee's meeting with his lawyer for a total period of twenty-one days.¹⁵⁵

Finally, Article 9 permits the court to conduct a criminal proceeding against an unlawful combatant under any law and authorizes the Chief of Staff to order the detention of an unlawful combatant under the UCL even after the initiation of criminal proceedings against him.¹⁵⁶ Various human rights organizations and scholars criticized this law, claiming that it is unconstitutional and contradicts basic human rights.¹⁵⁷

In June 2008, the Israeli Supreme Court ruled on several appeals that attacked the constitutionality of the UCL based on both Israeli constitutional law and on international humanitarian law.¹⁵⁸ In short, the Court upheld the law and dismissed the appeals.¹⁵⁹ It also upheld the specific detention orders against the petitioners.¹⁶⁰ Nonetheless, the Court interpreted the law narrowly, thus minimizing its scope of application and its consequent infringement

151. *Id.* art. 7.

152. *Id.* art. 8.

153. *Id.* art. 5(e).

154. *Id.* art. 6(a).

155. Incarceration of Unlawful Combatants Law (Temporary Provision), 5762-2002, SH No. 1834 p. 192, art. 6(3) (as amended 5768-2008) (Isr.) (extending the permissible holding period from seven to twenty-one days as compared to the 2002 preamendment law).

156. Incarceration of Unlawful Combatants Law (Temporary Provision) art. 9.

157. AMNESTY INT'L, ISRAEL AND THE OCCUPIED PALESTINIAN TERRITORIES (OPT): BRIEFING TO THE COMMITTEE AGAINST TORTURE 13-17 (2008), available at <http://www.amnesty.org/en/library/asset/MDE15/040/2008/en/62bc2dd7-93bb-11dd-8293-ff015cefb49a/mde150402008en.html>; HAMOKED CTR. FOR THE DEF. OF THE INDIVIDUAL & B'TSELEM, *supra* note 45, at 19-20; Even-Khen, *supra* note 138, at 15.

158. CrimA 6659/06 A v. State of Israel, 47 I.L.M. 768, para. 3 (2008) (Isr.).

159. *Id.* para. 53.

160. *Id.*

upon the right to personal liberty.¹⁶¹ The Court determined—against the plain language of the law—that a detention order will only be valid if the state can prove, with clear and convincing evidence, that the detainee poses a real threat to the security of the state.¹⁶²

The Court went on to hold that mere association with a terrorist organization is not enough to be considered an unlawful combatant under the UCL and that a detention will only be justified if the detainee's own actions pose a security threat.¹⁶³ In this regard, the Court clearly deviated from the purpose of UCL's framers, whose goal was to empower the Israeli officials to detain any terror organization member, regardless of his actual actions or the depth of his involvement.¹⁶⁴ Moreover, the Court narrowed the UCL's scope of application by determining that the law cannot apply to citizens and residents of the State of Israel, but only to *foreign* parties who endanger the security of the state, again disregarding the clear and broadly applicable language of the law.¹⁶⁵

Since the enactment of the UCL, the Supreme Court has provided almost twenty judgments reviewing specific detention orders. Most of them upheld the detention orders that were scrutinized. Nonetheless, in *A. v. State of Israel*, Justice Jubran quashed a detention order after finding that the detainee did not

161. *Id.* para. 21.

162. *Id.*

163. *Id.* para. 18.

164. The Incarceration of Unlawful Combatants Law was originally denominated "Incarceration of Members of Enemy Forces Who Are Not Entitled POW Status" when introduced in 2000. Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 379, 399 (2005). The bill was a legislative response to the Israeli Court's decision to release the Lebanese detainees in *Anonymous Persons v. Minister of Defense*. *Id.* Although both human rights groups and various Israeli jurists criticized the bill, Prime Minister Ehud Barak vigorously claimed that "due to the special reality in our region, Israel should have a legal instrument enabling it to hold captive members of enemy forces which in reality could not be held as POWs." *Id.* Therefore, the bill was transformed into the Incarceration of Unlawful Combatants law. *Id.* As originally written, the mere membership in a "force perpetrating hostile acts," even to a level that does not pose a threat to national security, was enough for a person to be deemed and "unlawful combatant." *Id.* at 401.

165. CrimA 6659/06 A v. Israel, 47 I.L.M. 768, para. 11 (2008) (Isr.). A few months after the release of the Supreme Court's judgment, the Knesset amended the UCL. The most important modifications enabled sweeping and swift detentions of a large numbers of individual for a prolonged period if the government declares the existence of "wide-scale hostilities." In such a case, the UCL now permits the Minister of Justice to transfer the judicial review authority from the district court to a special military court. Also, in such circumstances the law authorizes an officer holding the rank of at least captain to temporarily order the detention of a person (for a period that will not exceed seven days) if the officer has reasonable basis to believe the person to be an unlawful combatant. Incarceration of Unlawful Combatants Law (Temporary Provision), 5762-2002, SH No. 1834 p. 192, art. 7 (as amended 5768-2008) (Isr.). Nonetheless, this article was only valid for two years, and expired in July 2010, before it was implemented.

qualify as “a member of a force carrying out hostilities against the State of Israel.”¹⁶⁶ In his judgment, Justice Jubran determined that in order to be a “member of a force carrying out hostilities against Israel,” it is not enough that the detainee be a member of any hostile organization. Rather, the detainee must belong to an active and organized terror organization that consistently carries out terrorist attacks against the State of Israel.¹⁶⁷ Nonetheless, the Court gave the State twenty-one days to consider whether it would be justified in issuing an alternative detention order under to the IDL.¹⁶⁸

To summarize, Israel uses three different detention regimes for suspected terrorists: regarding Israeli citizens, it applies the IDL, and regarding the administrative detentions of non-Israeli citizens, two different legal regimes exist: (a) administrative detentions under the MDO regime, which applies in the West Bank, and (b) administrative detentions under the UCL regime, which mainly applies to foreigners, but whose exact scope of application is yet to be determined. The development of the MDO detention regime was part of the establishment of the military regime in the Occupied Palestinian Territories. The creation of the UCL regime was part of the “war on terror” movement, and was motivated by an executive desire to employ long-term detentions for suspected terrorists. Each of these mechanisms also includes some sort of judicial review process before the Israeli Supreme Court—whether a statutory appeal process (as to administrative detentions law and internment of unlawful combatants law) or a habeas corpus petition (as to military detention orders).

V. THE JUDICIAL REVIEW PROCESS

A. Act I: The Reasoned and Renowned Judgments

Judicial review is the line of defense for liberty, and it must be preserved beyond all else.

Justices of the Israeli Supreme Court¹⁶⁹

166. ADA 7750/08 A. v. State of Israel [2008] (unpublished decision) (Isr.). For a discussion of the judgment, see Ron Avital, Ido Rosenzweig & Yuval Shany, *The Israeli Democracy Inst., A.D.A. [Administrative Detention Appeal] 7750/08 Anon. v. State of Israel* (Jan. 2009), http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/1st%20Newsletter/2/first_2.aspx.

167. *Id.*

168. *Id.*

169. HCJ 3239/02 Marab v. IDF Commander in the W. Bank 57(2) PD 349, para. 26 [2002] (Isr.) (quoting HCJ 2320/98 El-Amla v. IDF Commander in Judea & Samaria 52(3) PD 346, 350 [1998] (Isr.)).

Judicial review of administrative detention cases in the Israeli Supreme Court are being held in a unique manner. Due to the importance of the right to personal liberty, and unlike other appeal proceedings, the Court examines the case *de novo*, assessing all of the relevant information and analyzing all of the relevant evidence, in spite of the fact that it is either an appeal to reverse the district court's decision (under the IDL and UCL regimes) or a petition to reverse the Military Court of Appeals decision (under the MDO regime).¹⁷⁰ Whether the case is being heard by a sole Justice (IDL and UCL) or by a panel of three Justices (MDO), both the state and the detainee are allowed to plead their case before the Court and to present the Court with all of the relevant materials.¹⁷¹ They are not restricted to legal matters or to appellate claims.

After both parties plead their case, the Court then conducts, in most cases, an *ex parte* hearing in which the state attorney presents the secret evidence that allegedly justifies the detention.¹⁷² In the absence of the detainee or his attorney, the Court is the one to independently examine the secret evidence and to investigate the Israeli Security Agency (ISA) representatives who collected and assessed the secret evidence.¹⁷³ This process has crucial significance in these cases, since in most instances the Court's decision is based on these twenty minutes of *ex parte* hearing, and on the credibility, variety, and strength of the secret evidence presented.¹⁷⁴

In spite of the common criticism that *ex parte* judicial proceedings contradict basic requirements of fairness and due process,¹⁷⁵ since neither the detainee nor his attorney are exposed to the evidence against him or her, the Israeli Supreme Court has been praised for developing "an activist approach in its review role of the

170. This description of the process is based on both interviews with Supreme Court Justices, state attorneys, and defense lawyers, and on personal observation of dozens of such Court hearings.

171. *See supra* note 170.

172. *See supra* note 170.

173. *See supra* note 170.

174. The data was provided to me by the Registrar of the Israel Supreme Court.

175. The Ninth Circuit, for example, stated that "democracy implies respect for the elementary rights of men . . . and must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)); *see Cole, supra* note 36, at 2592-93 (recollecting personal experience defending individuals who had no opportunity to confront or rebut classified evidence used against them); Tracy L. Conn, *The Use of Secret Evidence by Government Lawyers: Balancing Defendants' Rights with National Security Concerns*, 52 CLEV. ST. L. REV. 571, 571 (2004) ("The ability to use secret evidence in trials involving national security matters is an extremely controversial power of the government lawyer.").

non-disclosed evidence.”¹⁷⁶ Moreover, it is widely accepted by both Israeli and international scholars that the Israeli Supreme Court’s judicial review of administrative detention cases is robust and effective.¹⁷⁷ The Israeli judicial review model is characterized as “interventionist,”¹⁷⁸ and the Israeli Supreme Court was commended for asserting judicial review over government actions that affect Palestinians, both within Israel and the West Bank and Gaza, even in the midst of the Palestinian uprising.¹⁷⁹

Indeed, some of the Court’s landmark cases in this regard created meaningful legal constraints on the Executive. The extraordinary decision in the *Bargaining Chips* case, for example, was undoubtedly a brave judicial decision that was not easily received by both state authorities and the Israeli public.¹⁸⁰ Moreover, in its reasoned and renowned decisions on administrative detentions, the Court has repeatedly emphasized the importance of judicial review and the role of the courts as defender of personal liberty and due process.¹⁸¹ In the *Marab* case discussed above, the Court stated that:

Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention. . . .

[J]udicial review is an integral part of the detention process. Judicial review is not “external” to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not “appeal” his detention before a judge. Appearing before a judge is an “internal” part of the detention [sic] process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself

176. Barak-Erez & Waxman, *supra* note 5, at 202. The authors observe that “while the security services in Israel may be granted more latitude in excluding the individual affected from the relevant evidence against him, courts reviewing these decisions try to compensate for this handicap through their heightened scrutiny of the evidence.” *Id.* at 23–24.

177. Barak, *supra* note 51, at 500–01; Barak-Erez & Waxman, *supra* note 5, at 20–21; Blum, *supra* note 50, at 8; Mersel, *supra* note 52, at 110–113; Zamir, *supra* note 52, at 391.

178. Schulhofer, *supra* note 4, at 1918.

179. PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 95–96 (2004).

180. As explained earlier, this was the trigger for the enactment of the Incarceration of Unlawful Combatants Law. *See supra* note 164.

181. *See* HCJ 3239/02 *Marab v. IDF Commander in the W. Bank* 57(2) PD 349, para. 32 [2002] (Isr.) (“Judicial review is not ‘external’ to the detention. It is an inseparable part of the development of the detention itself.”); HCJ 2320/98 *El-Amla v. IDF Commander in Judea & Samaria* 52(3) PD 346, 350 [1998] (Isr.) (“Judicial review is the line of defense for liberty, and it must be preserved beyond all else.”); HCJ 253/88 *Sajdiya v. Minister of Def.* 42(3) PD 801, 820 [1988] (Isr.) (“[I]t is highly significant that a judge thoroughly examine the material, and ensure that every piece of evidence connected to the matter at hand be submitted to him.”).

whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.¹⁸²

In other well-known cases, the Court stressed the significance that a judge thoroughly examines the materials, ensures that every piece of evidence connected to the matter at hand is submitted to him, and never allows quantity to affect either the quality or the extent of the judicial examination.¹⁸³ In this regard, the Court emphasized that:

[T]he fact that certain “material” constitutes valid administrative evidence, does not exempt the judge from examining its degree of credibility against the background of the other pieces of evidence, and the entirety of the case’s circumstances. As such, the “administrative evidence” label does not exempt the judge from the need to demand and receive explanations from the bodies that are able to provide them. To say otherwise, would mean to greatly weaken the process of judicial review and to allow for the elimination of liberty for extended periods of time, on the basis of poor and inadequate material.¹⁸⁴

In a more recent case, the Court dealt specifically with the problem of secret evidence, and with its own practical solutions for this problem, stating that:

The administrative detention entails, more than once, a deviation from the rules of evidence, among other reasons, since the materials raised against the detainee are not subjected to his review. This deviation imposes on the court a special duty to take extra care in the reviewing of the confidential material, and to act as the detainee’s “mouth” where he is not exposed to the adverse materials, and cannot defend himself.¹⁸⁵

In still another case, the Court openly declared that in these cases the Court itself must become a “temporary defense attorney.”¹⁸⁶ Regarding the delicate balance between national security and individual liberty, the Court repeatedly stated that this balance would change over time in favor of individual liberty.¹⁸⁷ Additionally, and in spite of the differences between the three administrative detention regimes—the MDO, IDL, and UCL—the Court declared

182. *Marab* 57(2) PD paras. 26, 32 (citations omitted). In the *Marab* case, the Court had invalidated a military order allowing for eighteen and twelve day detention period without judicial oversight. *Id.* para. 49. However, the Court gave the state a period of six months to fix the detention orders. *Id.*

183. *Id.* para. 33 (quoting *Sajadiya* 42(3) PD at 821).

184. Barak-Erez & Waxman, *supra* note 5, at 22 (quoting H CJ 4400/98 Barham v. Shefi 52(5) PD 337, 346 [1998] (Isr.)).

185. *Id.* at 23 (quoting H CJ 11006/04 Khadri v. IDF Commander in Judea & Samaria para. 6 [2004] (unpublished decision) (Isr.)).

186. *Id.* at 23 (quoting H CJ 9441/07 Agbar v. IDF Commander in Judea & Samaria para. 8 [2007] (unpublished decision) (Isr.)).

187. CrimA 6659/06 A v. Israel, 47 I.L.M. 768, para. 46 (2008) (Isr.) (citing H CJ 5784/03 Salama v. IDF Commander in Judea & Samaria 57(6) PD 721, para. 8 [2003] (Isr.); CrimFH 7048/97 Anonymous Persons v. Minister of Def. 54(1) PD 721, 744 [2000] (Isr.)).

that it treats the various cases similarly, and conducts the same scrutiny, by using equivalent procedures and standards.¹⁸⁸

In addition to the Court's strong and activist reasoning, in six different cases throughout the years the Court had released administrative detainees from detention. In a unique case from 1990—the only recorded case in which the Israeli Supreme Court ordered the release of an MDO detainee—the Court laconically determined that the secret evidence did not justify the continuation of the detention and therefore ordered the release of the detainee.¹⁸⁹ With regard to Israeli detainees, the published cases record four releases during the years: the first and second came as early as 1949¹⁹⁰ and 1950,¹⁹¹ due to procedural flaws, such as a failure to specify in the detentions order the detainee's place of arrest. (Interestingly, in contrast to these decisions, in the recent UCL case, the Court counted four different procedural flaws before upholding the detention order.¹⁹²) The remaining two releasing decisions of Israeli detainees were given in the 80s,¹⁹³ and the two decisions were based on both procedural and substantial reasons (in *Kawasma* the Court stated that “the minister of defense should not be a rubber stamp of the ISA”).¹⁹⁴ Additionally, in the *Bargaining Chips* case discussed earlier, the Court ordered the release of Lebanese detainees that were detained under the IDL as “bargaining chips.”¹⁹⁵

These and similar high profile decisions have been studied and quoted by legal scholars both in Israel and in other countries as demonstrating a rigorous and activist judicial approach to administrative detention cases and as an example of the balancing of security needs and human rights in general.¹⁹⁶ Professor Mersel, a constitutional law professor and an Israeli district court judge, concluded that:

188. *A v. Israel*, 47 I.L.M. para. 45 (noting that when examining the need to extend the detention under the UCL, the Court should take into account the rulings and standards in cases concerning the IDL).

189. HCJ 907/90 *Zayad v. Military Commander in the W. Bank* [1990] (unpublished decision) (Isr.).

190. Ilan Saban, *Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948–1978)*, 25 EMORY INT'L L. REV. 299, 335 (2011) (citing HCJ 7/48 *Al-Karbuteli v. Minister of Def.* 2(1) PD 5, paras. 14–15 [1949–50] (Isr.)).

191. *Id.* (citing HCJ 95/49 *Al-Khouri v. Chief of Staff* 4(1) PD 34, 41, 48 [1949] (Isr.)).

192. ADA 1949/09 *Salach v. State of Israel* [2009] (unpublished decision) (Isr.).

193. ADA 7/88 *A v. Minister of Def.* 42(3) PD 133 [1988] (Isr.); ADA 1/82 *Kawasma v. Minister of Def.* 36(1) PD 666 [1982] (Isr.).

194. *Kawasma* 36(1) PD at 668–69.

195. CrimFH 7048/97 *Anonymous Persons v. Minister of Def.* 54(1) P.D. 721, 743 [2002] (Isr.).

196. See, e.g., Barak-Erez & Waxman, *supra* note 5; Blum, *supra* note 50; Mersel, *supra* note 52.

The Israeli Supreme Court's model of counter-terrorism adjudication should therefore be seen, in my view, as one of the major guarantees for human rights. It is a useful and powerful tool for properly balancing state security and human rights. The fine tuning of the model might be criticized, like any other ruling; it is only natural that not everyone is in accordance with every judgment. Nevertheless, it can generally be argued that taken as a whole, this model provides a firm framework for human right protection.¹⁹⁷

In a comparative study of checks and balances over security measures, including administrative detentions, Professor Schulhofer stated that:

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.¹⁹⁸

Therefore, according to the renowned, high-profile cases, as well as their understanding and perception by legal scholars, the Supreme Court Justices play a dual role: they function as both inquisitorial judges and as the detainees' lawyers during the *ex parte* hearings. Based on these (and similar) decisions, Professors Barak-Erez and Waxman described the Israeli Supreme Court's "judicial management model" as "emphasizing robust court scrutiny of secret evidence," functioning as an "accuracy-enhancing" model, and an "effective form of systemic control."¹⁹⁹

As appealing as this image may be, the reasoning of these few renowned and oft-cited cases is far from an adequate description of the actual judicial review practice and its outcomes. Indeed, while finding the Israeli Supreme Court approach "robust" and "active," Professors Barak-Erez and Waxman opined that in order to draw more meaningful lessons from the Israeli experience, there is a need for "thorough empirical research of the decisions of the Israeli Supreme Court in this area."²⁰⁰ The next sections will provide the results as well as the analysis of the empirical research that was conducted. As surprisingly revealed, the full picture is not quite as robust as most scholars assume.

197. Mersel, *supra* note 52, at 119–20.

198. Schulhofer, *supra* note 4, at 1931.

199. Barak-Erez & Waxman, *supra* note 5, at 6, 42.

200. *Id.* at 43.

B. Act II: The Actual Practice of the Court—All of the
Relevant Decisions

We examined the secret evidence, ex parte. It is not possible to reveal it. Considering the materials that we saw, we cannot say that there is a reason to intervene in the military commander's decision to prolong the administrative detention.

Justices of the Israeli Supreme Court²⁰¹

In the first decade of the twenty-first century, the Israeli Supreme Court performed judicial review of over 322 administrative detention cases. Out of these, not even a single case resulted in a judicial decision to release the detainee,²⁰² and only 14 percent received an elaborated and reasoned judgment. Ninety-five percent of the Court judgments were based on secret evidence that was presented by the state during ex parte hearings.²⁰³ Surprisingly, in spite of a striking decrease in the number of administrative detainees during these years²⁰⁴ and despite the poor record of intervening decisions—the number of petitions and appeals submitted to the Supreme Court against administrative detention orders has persistently increased.²⁰⁵ Other surprising findings relate to a startling rate of withdrawals (36 percent); significant differences between the three detention regimes; and various deviations between

201. The entire wording of the decision in HCJ 2021/10 Abu-Sneina v. Military Court of Appeals [2010] (unpublished decision) (Isr.).

202. With the exception of the Lebanese *Bargaining Chips* case, which originated in 1994 in an appeal that was denied. In 1997, the Court agreed to rehear the case, and in April 2000 determined that the Administrative Detentions Law does not authorize the state to detain non-dangerous aliens as “bargaining chips” for purposes of future negotiations. CrimFH 7048/97 Anonymous Persons v. Minister of Def. (*Bargaining Chips*) 54(1) PD 721 [2002] (Isr.). As a result of this decision, some of the Lebanese detainees were released, while two of them remained under administrative detention until Israel and Hezbollah reached an agreement in 2004. I did not include this case in the quantitative analysis since it did not involve any individual dangerousness assessment and so the Court only dealt with the legal question of the state authority to detain civilians as ‘bargaining chips.’

203. This detail relates to the 220 cases that were heard in Court (as will be explained hereinafter, 102 of the cases were withdrawn from before the Court’s hearing). In the remaining 5 percent the Court did not conduct ex parte proceedings since the case concerned only legal questions, was dismissed *in limine* or due to the objection of the detainee.

204. See *supra* Figure 1: Number of Detainees by Year.

205. With one reservation—in 2010 there was a meaningful decrease in the number of cases, compared with 2009, which was an unusual year with a dramatic and unexplained increase of the number of cases.

the rhetoric of the renowned decisions and the everyday practice. The next paragraphs will explore and analyze these findings.²⁰⁶

1. The Outcomes of the Cases

One of the most interesting and surprising findings relates to the results of the cases, and to the striking gap between the robust language of the published cases and the complete absence of actual intervention regarding individual detention orders. In the 282 MDO cases, only two of the petitions (less than 1 percent) were granted by the Court; the first being the state's petition to reverse the Military Court of Appeals to release the detainee.²⁰⁷ The only successful petition submitted by detainees against specific military detention orders is the *Marab* case discussed above, in which the Court invalidated military detention orders that authorized IDF officers in the West Bank to order the detention of a detainee for a period of twelve days (under one order) and eighteen days (under another order), without any judicial involvement.²⁰⁸ The petition was granted in part in the sense that the Court declared the relevant provision to be void. However, this declaration of nullification was suspended for a six month period for reorganization purposes.²⁰⁹ The Court did not release any of the individual detainees who submitted the petitions.²¹⁰

Regarding the thirteen IDL appeals, four (31 percent) were partly successful: in two of these cases, the Supreme Court shortened the length of the detention orders;²¹¹ in the other two cases the Court reversed part of the district court's legal analysis, thus setting out a binding legal framework for the lower court in accordance with the detainees' legal arguments.²¹² Nonetheless, the detention orders were not invalidated and the detainees remained under administrative

206. This section is based on an empirical analysis of the entire universe of judicial review cases from 2000 until 2010. The starting date is 2000 since the Supreme Court cases are only available in the Court's online database from 2000 onward. SUP. CT. ISR., <http://elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx> (last visited Mar. 1, 2012).

207. HCJ 1389/07 Commander of IDF Forces in the Judea & Samaria Area v. Military Court of Appeals [2007] (Isr.).

208. Military Commander in the W. Bank v. Military Court of Appeals [2007] (unpublished decision) (Isr.); HCJ 3239/02 *Marab* v. IDF Commander in the W. Bank 57(2) PD 349 [2002] (Isr.).

209. *Id.* para. 36.

210. *Id.*

211. ADA 10198/09 Anonymous v. State of Israel [2010] (unpublished decision) (Isr.); ADA 2627/09 Osama Rashek v. State of Israel [2009] (unpublished decision) (Isr.).

212. ADA 4794/05 Ufan v. Minister of Def. para. 41 [2005] (unpublished decision) (Isr.); ADA 4414/02 Anonymous v. State of Israel 57(3) PD 673, 677 [2002] (Isr.).

detention.²¹³ In one of these cases, the Court's decision not to release the detainee and invalidate the detention order—in spite of accepting some of the detainee's legal arguments—was based on the detainee's danger to state security (as the confidential intelligence information suggested).²¹⁴ In the second case, the appeal became theoretical after the state issued a new detention order according to the UCL Law that was enacted during the proceedings.²¹⁵

Moving to the twenty-seven UCL appeals, only one was partly successful: in *A v. State of Israel*,²¹⁶ the Court accepted the detainee's argument that he does not fall under the UCL's definition of "unlawful combatant," but instead of ordering his immediate release, it suspended its judgment for twenty-one days to enable the state to consider its various options suggested by the Court.²¹⁷ Those options included issuing a detention order according to the IDL, or finding new evidence that proves the detainee to be an unlawful combatant.²¹⁸ Among the appeals that were formally dismissed by the Court is the landmark case dealing with the constitutionality of the internment of unlawful combatants law, which dealt with the constitutionality of the UCL.²¹⁹ As previously mentioned, although the appeal was dismissed and the detention orders were upheld, the Court in fact accepted some of the detainees' legal arguments, and accordingly narrowed the UCL scope of application.²²⁰ Additionally, in five of the cases, the Court—although dismissing the appeal—shortened the time periods between judicial reviews, emphasizing the importance of judicial review of administrative detentions.²²¹

213. *Ufan*, para. 41; *Anonymous v. State of Israel* 57(3) PD.

214. *Ufan*, at para. 22.

215. *Anonymous v. State of Israel* 57(3) PD.

216. Avital, Rosenzweig & Yuval, *supra* note 166.

217. *Id.*

218. *Id.*

219. *CrimA 6659/06 A v. State of Israel*, 47 I.L.M. 768, para. 3 (2008) (Isr.); see *supra* text accompanying notes 158–165.

220. *Id.* paras. 19–36.

221. ADA 2595/09 *Sofi v. State of Israel* para. 27 [2009] (unpublished decision) (Isr.) (ordering to hold the next judicial review process within three months); ADA 6409/10 *Al-Amudi v. State of Israel* para. 5 [2010] (unpublished decision) (Isr.); ADA 6406/10 *Sarski v. State of Israel* para. 5 [2010] (unpublished decision) (Isr.); ADA 2156/10 *Anonymous v. State of Israel* para. 13 [2010] (unpublished decision) (Isr.); ADA 9257/09 *Anonymous v. State of Israel* para. 6 [2009] (unpublished decision) (Isr.). In the last four cases the Court did not intervene in the timing of the judicial review process per se, but ordered the state security authorities to review the necessity of the detention every month.

Detention Procedure \ Outcome of the Case	MDO (N = 282 cases)	IDL (N = 13 cases)	UCL (N = 27 cases)
Withdrawn by detainee before the hearing	102 (36%)	0	0
Withdrawn by detainee after the hearing	53 (19%)	0	0
Dismissed by the Court	125 (44%)	9 (69%)	26 (96%)
Petition granted / Appeal allowed	2 (less than 1%)	4 (30%)	1 (4%)

Table 1: The Outcomes of the Cases

2. Rate of Withdrawals

In addition to the differences in the outcomes of the cases, the research identified some other interesting disparities, including the significant rate of withdrawals: 36 percent of the MDO cases were withdrawn by the petitioners a short period of time before the court hearing.²²² Moreover, in 19 percent of the MDO cases, the petitions were withdrawn after the Court had examined the secret evidence *ex parte*.²²³ No such pattern exists with regard to IDL or UCL appeals. Under these detention regimes, all cases were heard by the Court and ended in a judicial decision.²²⁴

3. The Length of the Decisions

Out of the remaining 127 MDO cases (which were not withdrawn by the detainees, but were heard by the Court and resulted in a judgment), only fifteen (12 percent) ended in a detailed and reasoned judgment (of more than three pages), while eighty-nine (70 percent) resulted in very short (one to six lines) and laconic decisions.²²⁵ In fact, out of the 282 MDO petitions overall that were submitted to the

222. See *supra* Table 1: The Outcomes of the Cases.

223. The interesting question of why almost half of the cases were withdrawn by the detainees was one of the triggers to conduct in-depth interviews to complement the content analysis. The answer to this mystery will be dealt with in the following section.

224. An additional interesting pattern in this regard is the recent tendency of Palestinian detainees to request Court exemption from attending the hearing—a request that is routinely granted. In 28 percent of the MDO cases that were handled by the Court between 2006 and 2010 (including cases that were eventually withdrawn from), the detainees requested exemption from attending the Court hearing. Such a request was never recorded with regard to UCL or IDL detainees.

225. The remaining 18 percent ended in short (one to three page) decisions.

H CJ during the period of the research, only 5 percent ended in somewhat reasoned and detailed judgments.²²⁶

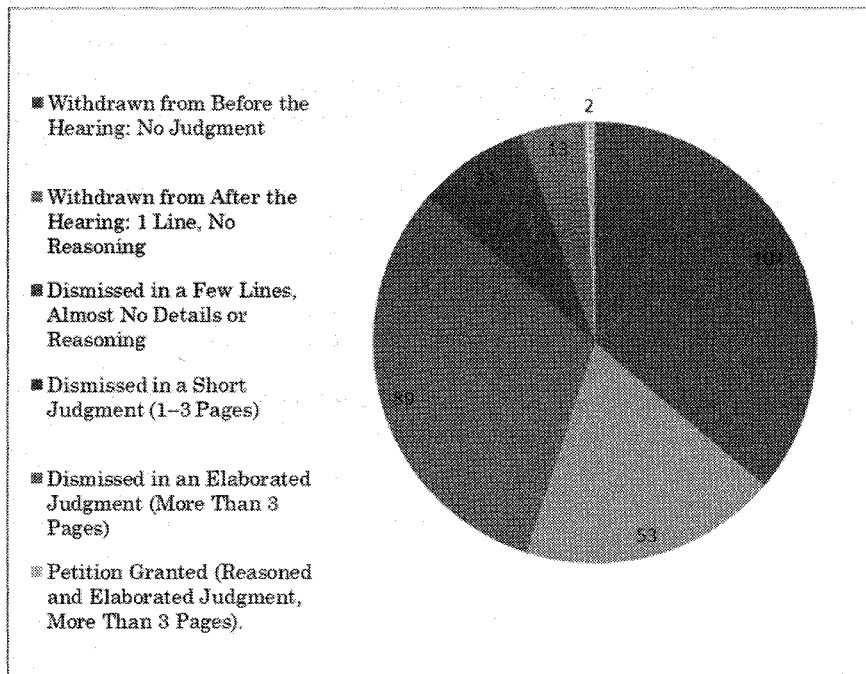


Figure 2: Result and Length of the Judgments (MDO Cases)

In contrast, IDL and UCL appeals never resulted in such short judgments; most resulted in a detailed, reasoned and elaborated decision of more than three pages (85 percent in the UCL appeals and 69 percent in the IDL appeals), while the remaining cases resulted in short (one to three page) decisions.²²⁷

4. The Length of the Detention

The length of the decisions is not merely a quantitative figure. Rather, it is inevitably linked with the elaboration of the essential details in each case, including the length of the detention, the age of the detainee, and the reasons justifying the detention.²²⁸ Although being one of the most crucial and relevant factors for judicial review, in 66 percent of its MDO decisions the Court never mentions the length of the detention it is reviewing.²²⁹ In contrast, in the UCL

226. See *infra* Figure 2: Result and Length of the Judgments (MDO Cases).

227. See *supra* Figure 2: Result and Length of the Judgments (MDO Cases).

228. See *infra* Table 2: The Length of the Detentions.

229. See *infra* Table 2: The Length of the Detentions.

cases, all the decisions included the length of the detention, and in IDL cases only once (8 percent) did the Court omit this important detail from the decision.²³⁰ More importantly, regarding the cases that did include reference to the detention's length—in thirty-two cases the administrative detention was longer than two years.²³¹ All of these cases concerned non-Israeli detainees, either Palestinians or Lebanese citizens.²³²

Detention Procedure \ Length of the Detention	MDO (N = 180 cases)	IDL (N = 13 cases)	UCL (N = 27 cases)
Not Specified	120 (66%)	1 (8%)	0 (0%)
Less than a Year	13 (7%)	9 (69%)	12 (44%)
1–2 Years	25 (14%)	1 (8%) (Lebanese)	7 (26%)
More than 2 Years	22 (12%)	2 (15%) (all Lebanese)	8 (30%)

Table 2: The Length of the Detentions

5. The Nationality of the Detainees

It is perhaps not very surprising to find out that 95 percent of the cases concerned Palestinian detainees from the West Bank and Gaza, with the remaining 5 percent divided almost equally between Israeli Palestinians, Israeli Jews, and Lebanese nationals.²³³ It was equally unsurprising to find that 88 percent of the cases concerned MDO detentions, while only 8 percent concerned UCL detentions and 4 percent dealt with IDL detentions.²³⁴ However, it is quite puzzling—considering that the Court has not released a single detainee in the last ten years—that the numbers of Palestinian who chose to submit petitions to the Israeli Supreme Court kept rising, while the number of detainees was persistently decreasing.²³⁵

230. See *infra* Table 2: The Length of the Detentions.

231. *Id.*

232. Since in 66 percent of the MDO cases the length of the detention is not specified, this number may, in fact, be much higher. *Supra* Figure 2: Result and Length of the Judgments (MDO Cases).

233. See *infra* Figure 4: Administrative Detainees by Nationality.

234. See *infra* Figure 3: The Research Population.

235. See *infra* Figure 6: Correlation Between Numbers of Detainees and Cases, by Years.

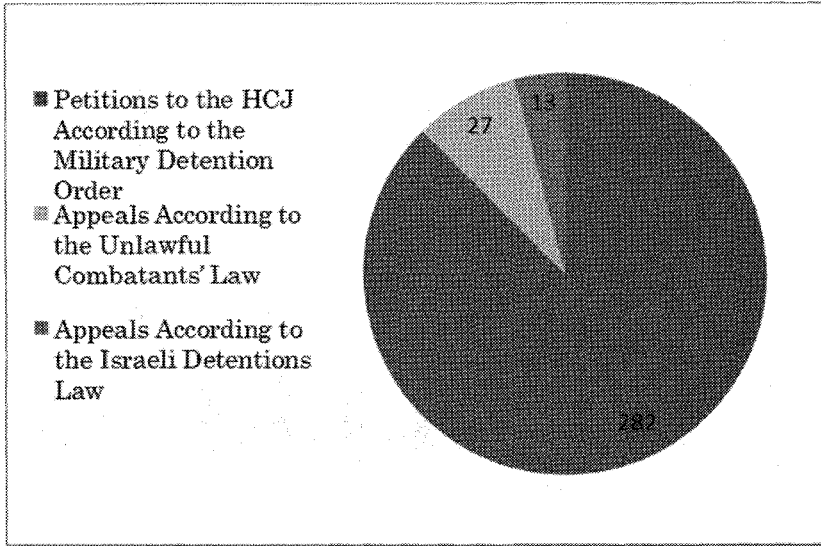


Figure 3: The Research Population

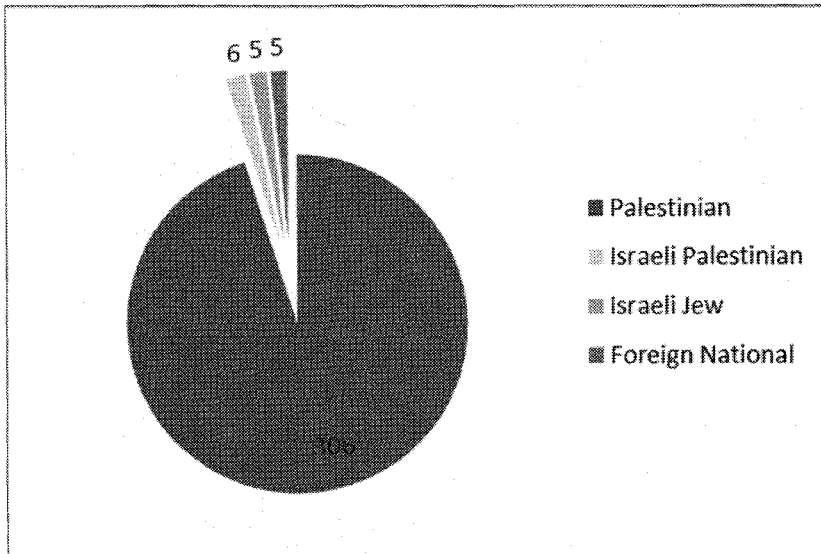


Figure 4: Administrative Detainees by Nationality

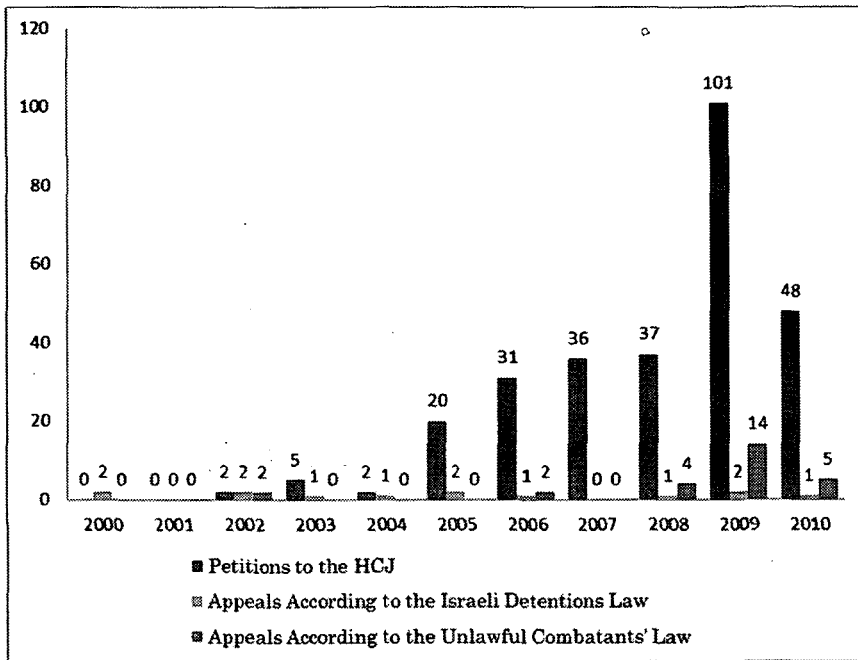


Figure 5: Number of Cases by Year

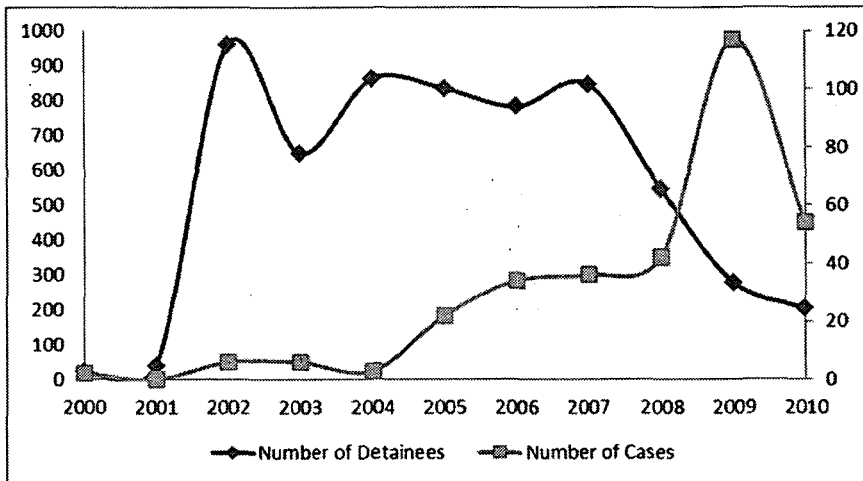


Figure 6: Correlation Between Numbers of Detentions and Supreme Court Cases, 2000–2010

6. The Court’s “Recommendations” to the Parties

One way to suggest some possible answers to this puzzle is to take into consideration not only the formal outcomes of the Court’s

decisions, but the Court's "suggestions" or "recommendations" to the parties. In 15 percent of the cases heard by the Court, the Court included in its decision specific instructions, recommendations, or suggestions regarding the case. These included requests for the state to reconsider its position, recommendations not to prolong the detention in the future, or statements that in order to issue future detention orders, new and updated materials would be required. Additionally, a unique pattern, most prevalent in the MDO cases, was the recorded attempts by the Court to mediate between the parties. Indeed, in 9 percent of the MDO cases the Court successfully mediated between the parties and wrote down their agreement or the state's concessions.²³⁶

In other cases, although upholding the concrete detention order, the Court's judgment included general future legal instructions on administrative detentions, such as instructing the state to interrogate the administrative detainees immediately after their arrest (invalidating the state's practice to hold Palestinians in administrative detention for long periods of time without conducting any sort of interrogation throughout this period).²³⁷

Detention Procedure / Court's Recommendations	MDO (N = 180 cases)	IDL (N = 13 cases)	UCL (N = 27 cases)
None	124 (69%)	5 (38.5%)	12 (44%)
Successfully Negotiated Between the Parties	17 (9%)	0 (0%)	0 (0%)
Specific Recommendations Concerning the Case	23 (13%)	2 (15.5%)	8 (30%)
General Legal Instructions	16 (9%)	6 (46%)	7 (26%)

Table 3: Negotiation, Mediation, Recommendations

236. See *infra* Table 3: Negotiation, Mediation, Recommendations.

237. See, e.g., HCJ 1546/06 Gazawi v. Military Commander in the W. Bank para. 6(3) [2006] (unpublished decision) (Isr.) (determining the duty to investigate any detainee immediately after his or her arrest, while presenting them any non-confidential information that was gathered against them); HCJ 6068/06 El-Afifi v. Military Commander in the W. Bank para. 6(5) [2006] (unpublished decision) (Isr.) (emphasizing that the benefits stemming from this petition are clarifying and sharpening the duty to investigate, as well as the quality and characteristics of such investigations); HCJ 9015/06 Taweel v. Military Commander in the W. Bank para. 4(2) [2006] (unpublished decision) (Isr.) (holding that the duty to investigate necessitates meaningful and concrete questioning, and emphasizing the need to consider in this regard the possibility of initiating criminal proceedings).

G. *The Correlation Between Criminal and Administrative Detentions*

Rhetorically, in many opportunities the Supreme Court determined that administrative detention should not be authorized if criminal proceedings are feasible, and that “administrative detention after a long period of criminal imprisonment should be rare and be reviewed under a high level of scrutiny.”²³⁸ Nonetheless, the surprising findings are that in 55 percent of the MDO cases and 26 percent of the UCL cases, the resort to administrative detentions was soon after the detainee completed a long period of imprisonment, after being convicted in criminal proceedings.²³⁹ No such pattern was detected with regard to Israeli nationals, detained under the IDL.

To conclude, the analysis of the entire universe of the Court’s decisions in administrative detention cases between 2000 and 2010 portrays a radically different picture than the one illustrated by the rhetoric of the few renowned cases. The comprehensive case law analysis identified several interesting findings, the most surprising of which relate to the substantial gap between the robust and active legal analysis of the renowned cases and the actual outcomes regarding hundreds of specific detention orders. Given the language regarding robust review, one would expect to find that the Court ordered the release of at least some detainees. The research also reveals significant variations between the three detention regimes. Additional surprising findings relate to:

1. Unexplained rate of withdrawals (36 percent of the cases);
2. Significant record of mediation and negotiation efforts by the Court, as well as future suggestions and recommendations to the state. This may help explain the low rate of release, in the sense that the Court has chosen these alternative means of communicating its skepticism about weak cases;

238. HCJ 4237/09 Sa’adi v. Military Commander in the W. Bank [2009] (unpublished decision) (Isr.); *see also* HCJ 10740/07 Rashid v. Military Commander in the W. Bank [2007] (unpublished decision) (Isr.) (in this interesting case, the military court shortened the detainee’s detention order after being informed that there would be no criminal charges. In response, the state indicted the detainee with criminal charges, and then issued another administrative detention order, rather than pursuing detention under the criminal proceedings. The High Court of Justice held that a military commander is not authorized to issue a new administrative detention order after a military court has shortened an existing order unless there is a change in the relevant circumstances. However, the Court did not release the detainee, it referred it to the military court to reconsider the original decision to shorten the detention order.).

239. This figure is probably even higher, since as described earlier, many of the decisions are short and laconic, thus not specifying many of the relevant details. *See supra* Figure 2: Result and Length of the Judgments (MDO Cases).

3. Substantial rate of unreasoned decisions; and
4. Correlation between criminal and administrative detentions.

These findings raise many questions that are not answered by delving deeper into the language of the judicial decisions. Therefore, providing possible explanations to these questions required further investigation in the form of in-depth interviews with all of the relevant stakeholders. The next section of the research is therefore designed to complement the case law analysis with qualitative information and to suggest possible explanations for some of the surprising and unexplained findings in the case law.

VI. LIFTING THE VEIL OF SECRECY: "BEHIND THE SCENES" OF THE JUDICIAL REVIEW PROCESS

I feel responsibility There is a war going on . . . the phrase that a democracy fights with one hand tied behind its back is a nice metaphor . . . is a nice phrase to frame on the wall, but it is not suited for real everyday life.

Justice B, Israeli Supreme Court²⁴⁰

The previous section revealed some interesting and surprising findings regarding the judicial review process, including an unexplained high rate of withdrawals (especially before, but also after the hearing), and a surprising increase in the number of petitions and appeals to a court that has not released a detainee from administrative detention in the last ten years. In order to suggest some possible explanations for these surprising findings, as well as to trace the dynamics of the ex parte proceedings and the relationships between the various stakeholders, the author conducted seventeen in-depth interviews with the various stakeholders that participate in the judicial review process, namely: Supreme Court Justices, state attorneys, defense lawyers, ISA representatives and Palestinian (former) detainees.²⁴¹ Due to the sensitivity of the discussed issues and the very little information afforded by the relevant judgments, these interviews provide a unique and rare opportunity to witness the actual dynamics of the judicial review process.

240. Interview with Justice B, Supreme Court of Isr. (Dec. 21, 2010).

241. For detailed description of the interview methods and protocols, see *infra* Appendix I: Methodology.

A. *Secret Evidence, Ex Parte Proceedings, and the Judicial Management Model*

You have a feeling of discomfort. I never enjoyed sitting in administrative detention cases. No one enjoys it. Judges don't like these cases, because we are trained to criminal proceedings, with witnesses, cross-examination

Justice B, Israeli Supreme Court²⁴²

The analysis of the Court's decisions revealed an almost absolute reliance on ex parte proceedings and on secret evidence during the administrative detention hearings.²⁴³ In its renowned decisions, elaborated above, the Court emphasized its expertise in handling and assessing secret evidence.²⁴⁴ Nonetheless, as this study reveals, in the past ten years the Court did not openly disagree with the ISA assessment of the secret evidence. As the interviews suggest, the reliance on secret evidence leads to two meaningful problems with the conduct of the judicial review: first, the Court relies on one-sided information, and it is almost impossible for the detainee to disprove the state's allegations against him (or her); second, the secret evidence creates a special dynamic and trust between the Court and the state representatives, which makes it even harder for the Court to reject the secret evidence or disagree with the state representatives on their significance.

In the interviews, almost all of the former Supreme Court Justices expressed at least some level of discomfort with the practice of secret evidence, as well as with the Court's ability to question the ISA position. One of the Justices emphasized the difficulty and the feeling of unease that accompanied handling these cases,²⁴⁵ and explained that these hearings are extremely difficult due to their unique ex parte and administrative character.²⁴⁶ He further clarified that for a judge, who is trained in due process, it is very difficult to send someone to prison without trial, and therefore the judges just have to do the best they can.²⁴⁷ Justice B added a similar description:

It is not pleasant. You want to run away from it as fast as you can, but you know that it is necessary for the sake of your people and country.

More specifically, regarding the ability of the judge to differ with the ISA assessment of the secret evidence, Justice D stated:

242. Interview with Justice B, Supreme Court, *supra* note 240.

243. *See supra* note 174.

244. *See supra* Part V.A.

245. Interview with Justice A, Supreme Court of Isr. (Dec. 20, 2010).

246. *Id.*

247. *Id.*

The judges cannot differ with the ISA story. How can I? I don't have the defense lawyer jumping to say "it never happened," "this is not true." My ethos, as a judge, is that I have two parties. Of course, I can think by myself, but I need tools, which are missing . . . to the most I have very limited tools.²⁴⁸

Indeed, as this research suggests, the judicial management model leads, at least in some of the cases, to the prevalence of one-sided information, which is not challenged by cross examination or by conflicting versions.

While the Justices were somewhat uncomfortable with the role they were asked to assume in the *ex parte* proceedings and the way it differed from the normal adversarial process, the defense lawyers considered the hearings wholly inadequate. In Defense Lawyer A's opinion, the *ex parte* hearing is a *sham*, an appearance of justice and nothing more.²⁴⁹ "How can substantive justice be achieved, given that the detainee cannot disprove the evidence against him?"²⁵⁰ Defense Lawyer C further demonstrated the dynamics of such proceedings, stating that:

The state attorneys should also come to the hearing nervous and tense—but they are always very relaxed. They know that no matter what they say or do, they will always win.²⁵¹

All of the defense lawyers that participated in the research have expressed frustration in the way that the reliance on secret evidence and *ex parte* proceedings influenced their ability to "fight back" and to challenge the ISA narrative. "I feel like a blind defense lawyer," and "I represent my client with two hands tied behind my back" were common metaphors during the interviews.²⁵² "The ISA determines the facts,"²⁵³ said Defense Lawyer B. He then continued:

There is no judicial discretion here, since the Justices do not know the facts. They don't have the tools to decide what the level of dangerousness is . . . in one of the cases in which I served as defense lawyer, it took the ISA two years to tell him [the detainee S.K.] what the allegations against him were. Then, when I asked my client about it, it turned out that it was a murder case that happened near his house, in which he had no involvement with whatsoever. When I brought this to Court and asked the ISA representatives about it—I could tell that the Justices knew nothing about it. I could see their surprise. It then took two more detention orders until he was finally released.²⁵⁴

248. Interview with Justice D, Supreme Court of Isr. (Dec. 22, 2010).

249. Interview with Defense Lawyer A (Dec. 19, 2010).

250. Interview with Defense Lawyer B (Dec. 20, 2010).

251. Interview with Defense Lawyer C (Dec. 22, 2010).

252. Interview with Defense Lawyer A, *supra* note 249; Interview with Defense Lawyer B, *supra* note 250.

253. Interview with Defense Lawyer D, *supra* note 248.

254. *Id.*

The detainees themselves expressed similar views. “The ISA determines everything,”²⁵⁵ Detainee B explained. He then further stated:

I turned to the Supreme Court only after I gave up any hope with regard to the military courts. Unfortunately, here, too, it was all about the secret evidence and I did not have any chance.

Detainee A felt the same:

I never knew what the case against me was, or what the evidence against me was. I had no information, and therefore had nothing to say for my defense.²⁵⁶

Their adversaries—the state attorneys—did not differ with this description. On the contrary, they, too, felt that the judicial review of administrative detentions is “handicapped”²⁵⁷ due to the total reliance by Court on the secret evidence presented during the ex parte hearing. “In some cases even I felt that it was too easy,”²⁵⁸ said State Attorney A. State Attorney B further clarified:

With all the good will on the part of everybody, there is no way to conduct a fair ex parte hearing. The human nature and the dynamic of the process prevent fair hearing of the case.²⁵⁹

As revealed by the interviews, the absence of the defense lawyer and the detainee from the hearing is problematic not only due to the difficulty in disproving the ISA evidence, but also by its contribution to the development of a unique courtroom dynamic. Both state attorneys and ISA representatives expressed their feelings that the unique atmosphere and dynamics of the ex parte proceedings created a trust-based relationship between the Justices and themselves. As explained by State Attorney C:

The ex parte proceedings create intimacy between the state representatives and the Justices.²⁶⁰

State Attorney A described this as a “secret dialogue” between the state attorneys and the Court.²⁶¹ ISA Representative A added his impression that the closed doors and the repeated interaction created a “shared language” used by the ISA representatives, the state attorneys, and the Supreme Court Justices.²⁶² “After all,” he added, “we all know each other and work together.”²⁶³

255. Interview with “Mohamed,” Palestinian Detainee, *supra* note 3.

256. Interview with “Yusuf,” Palestinian Detainee (Jan. 12, 2011).

257. Interview with State Att’y B, (Dec. 23, 2010).

258. Interview with State Att’y A, (Dec. 21, 2010).

259. Interview with State Att’y B, (Dec. 23, 2010).

260. Interview with State Att’y C, (Jan. 26, 2011).

261. Interview with State Att’y A, , *supra* note 258.

262. Interview with ISA Legal Advisor A, Isr. Sec. Agency (Feb. 14, 2011).

263. *Id.*

Surprisingly, and in stark contrast to the robust and activist image of these proceedings, almost all of the relevant stakeholders that actually participate in the proceedings (among those who participated in the research)—including the Justices themselves—agreed that the judicial management model suffers from inherent weaknesses that prevent, at least in some of the cases, meaningful and independent judicial assessment of the secret evidence.

1. Judicial Management vs. Special Advocates

As previously discussed, one possible alternative to the dominance of the Court in assessing the secret evidence is the appointment of special advocates, approved by the state to represent the detainees in these hearings.²⁶⁴ While Barak-Erez and Waxman conclude that each of the administrative detention models entail different advantages and disadvantages, they opine that the judicial management model, at least as it functions in Israel, is better designed to reveal the “actual truth” and to regulate the detention system across many cases.²⁶⁵ The special advocate model, so they assess, may better enhance the detainee’s formal participation in the process.²⁶⁶

Surprisingly, almost all of the Supreme Court’s Justices who participated in the research (four out of five) expressed enthusiastic support for the special advocate model. In the interviews, each of the Justices individually explained that using a special advocate—although not an ideal solution—would help reduce the problematic one-sided nature of *ex parte* proceedings.²⁶⁷ Not even one of the Justices felt pleased or satisfied with the actual functioning of his or her active role as “the detainee’s lawyer,” and although being aware of the shortcomings of special advocates, they felt that system could

264. While this research does not pretend to provide any systematic assessment of the advantages and disadvantages of the special advocate model, the opinions of the stakeholders—mainly, the Justices—on the use of it, will be used here to shed more light on the judicial management model, rather than assessing this model independently. For elaborated analysis of the ‘special advocates’ model, see generally Kent Roach, *The Three Year Review of Canada’s Anti-Terrorism Act: The Need for Greater Restraint and Fairness, Non-Discrimination, and Special Advocates*, 54 U.N.B. L.J. 308 (2005).

265. Barak-Erez & Waxman, *supra* note 5, at 43–46.

266. *Id.* at 40–42.

267. Interview with Justice A, Supreme Court, *supra* note 245; Interview with Justice B, Supreme Court, *supra* note 240; Interview with Justice C, Supreme Court of Isr. (Dec. 20, 2010); Interview with Justice D, Supreme Court, *supra* note 248.

only improve the current situation.²⁶⁸ As articulated by Justice D: “[A special advocate] is better than nothing. Now we have nothing.”²⁶⁹

Even more surprising was the absolute support of all of the state attorneys for the special advocate model. Nonetheless, while some of them felt that “having a special advocate is necessary,”²⁷⁰ others were less optimistic, stating that it will probably not change the outcome in these cases, but only make the process “look better.”²⁷¹

This is exactly why some of the defense lawyers strongly opposed the special advocate mechanism. As stated by Defense Lawyer C:

I’m against the use of special advocates. We don’t need to make this process look better—we need to reduce its use.²⁷²

Defense Lawyer D agreed that as to mass administrative detentions, the special advocate model does not have the potential to improve the fairness of the *ex parte* hearings:

Special advocates can only help in a very minimal detention regime, when only few people are detained. When there is a massive use of administrative detentions no one will be able to deeply investigate the evidence and the allegations.²⁷³

Interestingly, the Justices and the state attorneys, who would have been expected to reject the special advocate model and to support the judicial management model, strongly supported the special advocate model and its implementation in the Israeli system. Together with the finding that throughout the ten years covered by this research the Court never rejected the secret evidence or released a detainee based on the insufficiency of the secret evidence, the interviews suggest that the judicial management model may be less robust and effective than is currently perceived, at least as to the Court’s ability to reject the ISA assessment of the secret evidence. As revealed by the interviews with the various stakeholders, the judicial management model’s ability to discover the “actual truth” and to challenge the secret evidence is somewhat limited.

268. Interview with Justice A, Supreme Court, *supra* note 245; Interview with Justice B, Supreme Court, *supra* note 240; Interview with Justice C, Supreme Court, *supra* note 267; Interview with Justice D, Supreme Court, *supra* note 248.

269. Interview with Justice D, Supreme Court, *supra* note 248.

270. Interview with State Att’y B, *supra* note 257.

271. Interview with State Att’y C, *supra* note 260.

272. Interview with Defense Lawyer C, *supra* note 251.

273. Interview with Defense Lawyer D, (Dec. 23, 2010).

B. Bargaining in the Shadow of the Court²⁷⁴

Why have you decided to submit a petition to the HCJ?

I didn't. My lawyer decided to submit the petition.

“Yusuf,” Palestinian Detainee²⁷⁵

So why do I keep submitting petitions to the Supreme Court? Well, a part of it is the hope to reach an agreement with the state. Another part is the desire to change the Court's attitude; the hope that with time, the Court will replace its laconic decisions with more meaningful ones.

Defense Lawyer C²⁷⁶

Two of the most interesting and surprising findings previously discussed are the increasing number of petitions to the Court, despite the high withdrawal rate and the fact that the Court has not released one individual in the past ten years.²⁷⁷ The interviews shed some light on these findings and suggest possible explanations that link both these issues together.

Regarding the prehearing dynamics, it appeared that many of the MDO petitions were not submitted to initiate a judicial review process, but rather to instigate some sort of negotiations with the state's representatives and promote a settlement. As one of the defense lawyers stated:

The only way in which I was able to bring the release of some of my clients was by way of negotiations with the state.²⁷⁸

Therefore, the high withdrawals rate is explained by the fact that many of these cases are settled before the hearing. Apparently, as is evident from the interviews with state attorneys and ISA members, the submission of a petition to the HCJ instigates an internal state process, in which the ISA reassess the necessity of the detention.²⁷⁹

274. While not directly leaning on Mnookin and Kornhauser's monumental work that coined this phrase back in the 1970s, this section is greatly inspired by their ideas, as were further developed throughout the years in general, and with regard to the Israeli High Court of Justice in particular. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); see, e.g., KRETZMER, *supra* note 39, at 190.

275. Interview with “Yusuf,” Palestinian Detainee *supra* note 256.

276. Interview with Defense Lawyer C, *supra* note 251.

277. See *supra* Figure 6: Correlation Between Numbers of Detainees and Cases and Part V.B.1.

278. Interview with Defense Lawyer B, *supra* note 250.

279. Interview with ISA Legal Advisor A, *supra* note 262; Interview with State Att'y A, *supra* note 258.

If, at the end of this process, the ISA insists on the necessity of the detention, a specific state attorney is assigned to examine the strength of the case, and in some cases pressures the ISA to reach a settlement.²⁸⁰ As was stated by State Attorney A:

The impact of the Supreme Court is not by intervening in the state's decisions, but rather by what is happening behind the scenes.²⁸¹

The relevant attorneys—both state attorneys and defense lawyers—described at length this process of “bargaining in the shadow of the Court,” and explained the “behind the scenes” impact of the Court on the state's position.²⁸² As was revealed by the interviews, this “bargaining” process is intended not only for the actual reach of settlement, but also for acquiring some information regarding the strength and nature of the secret evidence.²⁸³ The high withdrawal rate—36 percent of the cases—is therefore explained by either the a settlement ending the detention (usually not immediately but within a couple of months), or an “understanding” on the detainee's part that the secret evidence is strong, and it is therefore useless, and maybe even harmful, to continue with the judicial review process and present the secret evidence to the Court.²⁸⁴

Without ignoring the advantages of this practice—mainly the state's internal inspection that sometimes leads to ending the detention—there are some inherent deficiencies. First, there is a meaningful imbalance between the state and the detainee. The detainee and his or her lawyer come to the negotiation table knowing nothing at all on the quality, reliability, and quantity of the state's information, and are therefore pressured to agree to poor settlements. Secondly, the Court is not aware of the majority of these cases, does not scrutinize them, and therefore cannot exercise its relative advantage in regulating the detention system. Moreover, it is precisely in these cases—in which the ISA prefers not to go to Court—that this function would have been most necessary and useful. As was stated by Defense Lawyer D:

The negotiation with the ISA is bad, because it is blind on the detainee's part. If the ISA agrees, in the negotiation with the detainee's lawyer, to issue only one more detention order, or even to release him at the end of the current detention order, it means that the case is weak, and therefore the detainee should have been released immediately. In addition, maybe without this practice the difficult

280. Interview with State Att'y A, *supra* note 258.

281. *Id.*

282. Interview with Defense Lawyer A, *supra* note 249; Interview with Defense Lawyer B, *supra* note 250; Interview with Defense Lawyer C, *supra* note 251; Interview with State Att'y A, *supra* note 258; Interview with State Att'y B, *supra* note 257; Interview with State Att'y C, *supra* note 260.

283. Interview with Defense Lawyer B, *supra* note 250.

284. *Id.*

cases were being heard in Court, and the legal decisions would have been more meaningful.²⁸⁵

This assessment of the bargaining process is further strengthened by the ISA representatives, who affirmed that in many of the cases, the “settlement” that was concluded during these bargaining processes did not reflect any compromise on their part, but was rather based on the ISA’s original intentions.²⁸⁶

The dynamic of “bargaining in the shadow of the Court” is not restricted to the prehearing stage of the process. As revealed by the case law analysis, in many MDO cases the Court itself was engaged in a bargaining process in which it suggested to both the detainee and the state various alternatives for the continuation of the detention (including deporting the detainee).²⁸⁷ Not all these bargaining efforts were successful, but 9 percent of the MDO cases ended at the hearing with a recorded settlement approved by the Court.²⁸⁸ Additionally, in 13 percent of the MDO cases the Court stated specific recommendations for the state (including recommending that the state not issue a prolonged detention order or demanding that a senior ISA officer be involved in such a decision).²⁸⁹ While the state does not automatically implement such recommendations, they can potentially influence the military courts’ judicial review. Accordingly, ISA Representative A emphasized the restraining effect of the Court, and the desire of the ISA to avoid “bad decisions.”²⁹⁰

Whether before or after the hearing, many of the interviewees emphasized the shift of judicial review from the main stage—the courtroom—to the behind the scenes actions: the internal state

285. Interview with Defense Lawyer D, *supra* note 273.

286. Interview with ISA Legal Advisor A, *supra* note 262; Interview with ISA Legal Advisor B, *Isr. Sec. Agency* (Feb. 14, 2011).

287. *See, e.g.*, HCJ 8142/10 Ayad Dudin v. Military Commander in the W. Bank [2010] (unpublished decision) (Isr.) (suggesting that the detainee, who lives with his family in Hebron, will relocate to the Gaza Strip); HCJ 9456/05 Tsubach v. Military Judge [2005] (unpublished decision) (Isr.) (suggesting that the detainee be “sent away” for a period of three years); *supra* Table 3: Negotiation, Mediation, Recommendations.

288. *See supra* Table 3: Negotiation, Mediation, Recommendations.

289. *See supra* Table 3: Negotiation, Mediation, Recommendations; *see also* HCJ 1564/10 Al-Haleem v. Military Prosecutor [2010] (unpublished decision) (Isr.) (mentioning that a prolonged detention order, if issued, should be reviewed and considered by a high ranking officer); HCJ 7657/09 Jabri v. Military Commander in the W. Bank [2009] (unpublished decision) (Isr.) (noting the State’s obligation to consider releasing the detainee at the end of this detentions period, and in any case not to issue a prolonged detention order longer than this current one); HCJ 7097/09 Taha v. Military Commander in the W. Bank [2009] (unpublished decision) (Isr.) (writing down the State’s obligation to release the detainee at the end of this detention period, as long as no new evidence against him will be found during this time period. It should be mentioned that at the time of the hearing the detainee has been administratively detained for two years and two months already, and the Court stated that “the hourglass of administrative detention is running out.”)

290. Interview with ISA Legal Advisor A, *supra* note 262.

proceedings and the negotiations with the defense lawyers. In this regard, State Attorney B expressed discomfort with having to play this dual role:

A part of the judicial review is transferred from the Court to the state attorneys, and since they represent the ISA—they are under conflict of interests.²⁹¹

State Attorney C added his own impression, explaining that this duality does not produce a robust state scrutiny of the detention's necessity:

The state attorney's power should not be overstated or idealized. We represent the ISA even in borderline cases, especially when we are dealing with masses of cases, and the idea that we are conducting a meaningful review is not more than a myth. In most of the cases in which the detention is shortened, the ISA decisions are made independently, after the submission of a petition to the Supreme Court.²⁹²

ISA representatives affirmed this assertion, stating that the ISA conducts an independent assessment when a petition is submitted to the Supreme Court, and offers a settlement only if it coincides with its own agenda.²⁹³ As stated by ISA Representative A:

In most cases it is our decision to reach some sort of agreement, from our own considerations. . . . There are only few cases in which we feel pressured by the state attorneys.²⁹⁴

To conclude this section, it is evident from the combination of the case law analysis and the interviews that the increasing number of MDO petitions to the ICJ is greatly motivated by the desire to instigate an internal state scrutiny and to promote some sort of "bargaining in the shadow of the Court." Although this bargaining process may sometimes lead to future release of the relevant detainee, its effect should not be overly praised. As the interviews suggest, this bargaining process is not necessarily desirable due to its several weaknesses, which include the inherent imbalance of the process, the blindness of the detainee regarding the secret evidence and its strength, and the finding that indeed, in many of the cases, the settlement represents ISA interests alone.

C. The Differences Between the Three Detention Regimes

Interestingly, the bargaining in the shadow of the Court dynamic exists only in MDO cases and not in any of the other administrative

291. Interview with State Att'y B, *supra* note 257.

292. Interview with State Att'y C, *supra* note 260.

293. Interview with ISA Legal Advisor A, *supra* note 262.

294. *Id.*

detention regimes.²⁹⁵ The interviews suggest some possible explanations for this. First, as evident from the interviews with ISA representatives and with state attorneys, the state treats detention orders under these regimes (IDL and UCL regimes) with greater care and caution.²⁹⁶ This cautiousness is motivated by the uniqueness of these detentions, which relates to Israeli citizens, under the IDL regime, or to the unlimited and debated new UCL detention regime.²⁹⁷ While most of the Justice-interviewees stated that they scrutinize all administrative cases in a similar way,²⁹⁸ both state attorneys and defense lawyers felt that the judicial review is indeed tighter with regard to detentions of Israelis, than with regard to unlawful combatants (UCL detentions), and in turn, the scrutiny of UCL detentions is somewhat more meaningful than MDO detentions.²⁹⁹ As stated by State Attorney C:

The judicial review is less intense with regard to administrative detentions in the territories.³⁰⁰

ISA Representative A agreed with this finding, and explained that “with regard to Israeli detainees the carefulness and the precision are different.”³⁰¹

Secondly, the greater sensitivity and caution displayed in IDL and UCL cases is made possible by the overwhelming disparity in the quantity of the cases: there are more than 300 MDO cases, compared to thirteen IDL cases and twenty-seven UCL cases.³⁰² As both ISA representatives and state attorneys testified, when dealing with masses of cases, the scrutiny of the secret evidence—both internally at the state level and externally at the judicial level—is less meaningful.³⁰³ In this regard, ISA Representative B was concerned about the effect of the mass use of administrative detentions on ISA professionalism, stating that:

295. *Id.*

296. Interview with ISA Legal Advisor B, *supra* note 286; Interview with State Attorney A, *supra* note 258; Interview with State Att’y C, *supra* note 260.

297. Interview with ISA Legal Advisor B, *supra* note 286; Interview with State Attorney A, *supra* note 258; Interview with State Att’y C, *supra* note 260.

298. Except for Justice D, Supreme Court, who stated that the judicial review of Jewish detainees is tighter, since in general, they pose smaller danger than Palestinians. Interview with Justice A, Supreme Court, *supra* note 245; Interview with Justice B, Supreme Court, *supra* note 240; Interview with Justice C, Supreme Court, *supra* note 267; Interview with Justice D, Supreme Court, *supra* note 248.

299. Interview with Defense Lawyer A, *supra* note 249; Interview with State Att’y A, *supra* note 258; Interview with State Att’y C, *supra* note 260.

300. Interview with State Att’y C, *supra* note 260.

301. Interview with ISA Legal Advisor B, *supra* note 286.

302. *See supra* Figure 3: The Research Population.

303. Interview with ISA Legal Advisor B, *supra* note 286; Interview with State Att’y A, *supra* note 258; Interview with State Att’y C, *supra* note 260.

The mass use of this tool infringes upon the professionalism of the ISA and its methods. It harms the quality of the ISA work.³⁰⁴

D. “*Law in the Books*” vs. “*Law in Action*”

The case law analysis revealed a significant gap between the reasoning of the few renowned cases and actual practice; between legal reasoning and meaningful interpretation of—and sometimes even intervention in—the normative framework of the detention regimes; and the overall acceptance of the secret evidence and avoidance of intervention with regard to concrete detention orders. Moreover, as the case law analysis revealed, most of the decisions concerning concrete detention orders are short and laconic, ignoring most of the unique circumstances and specific details of the case.³⁰⁵ In the interviews, both defense lawyers and former detainees expressed their frustration with this practice, which ignores the individual characteristics of the detainees and tends to neglect crucial details, such as the detention’s length:

There is no human being in the case: not where he is from, not how old he is, not even how long his detention is; nothing.³⁰⁶

The state attorneys shared this feeling of discomfort and opined that the entire process of administrative detentions, from the detention order, to the appeal to the military court, to the petition to the HCJ, is merely “a copy-paste from the beginning to the end.”³⁰⁷ This description was strengthened by ISA Representative A, who characterized the process as an “assembly line,” and expressed discomfort with the effects of this process on the ISA methods:

I am not a fan of administrative detentions not because it infringes the right to liberty, but rather because of its effect on the ISA work. . . . This is, of course, a very convenient tool, but when you use it too much it becomes dull.³⁰⁸

These statements can explain why, in many of the cases, the detainees requested to not be present in their own hearings, and preferred to remain locked up in their prison cells rather than participate in the judicial review process.³⁰⁹ Defense Lawyer B, who represented the detainee in one of the few cases that received a reasoned legal decision, did not feel any joy of success. On the

304. Interview with ISA Legal Advisor B, *supra* note 286.

305. See *supra* Part V.B–D.

306. Interview with Defense Lawyer A, *supra* note 249.

307. Interview with State Att’y A, *supra* note 258.

308. Interview with ISA Legal Advisor A, *supra* note 262.

309. The database I created recorded fifty-nine such requests, all MDO cases, which are about 30 percent of the MDO cases that reached the stage of a courtroom hearing.

contrary, she felt even more frustrated, being unable to share this partial success with her client:

My client was very much disappointed, since the decision wasn't at all about him.³¹⁰

Moreover, the gap between the rhetoric of the few reasoned cases and the everyday practice in hundreds of short, laconic decisions, casts a shadow over the reasoning and legal instructions articulated in some of the more reasoned decisions:

The more reasoned judicial decisions are no more than a bunch of clichés, since they are not implemented . . . the Justices talk highly about being the "detainee's mouth," but they can't. How can they be his mouth, when they know nothing at all about his side of the story?³¹¹

This emphasizes the gap between the legal reasoning of the Court and its ability to implement the normative framework on concrete administrative detention cases. While the Court's expertise is evident regarding setting the relevant rules and limitations and striking the general balance between liberty and security, the implementation of these rules as to specific secret evidence is much more difficult under the current judicial review model. Moreover, without individualization of the decisions and concrete determinations on the merits, the ability to regulate the detention regime is necessarily weaker.

E. *Transparency and Procedural Justice*

Finally, the interviews revealed a more subtle weakness of this complicated and sensitive judicial process: an ambiguity regarding the actual certainty, activism, and feelings of the various stakeholders participating in this process. While during the courtroom hearing both state representatives and Justices expressed confidence, decisiveness, and assertiveness, it was almost a consensus amongst them that in fact, despite doing "the best they can," they are very much limited in their ability to challenge the secret evidence, and are therefore filled with doubts rather than certainty.³¹² Although making incredible efforts, the Supreme Court Justices expressed discomfort with their role as the detainee's lawyer, and admitted that these are indeed very difficult cases to deal with. "We try to add a criminal process aroma to the proceedings,"³¹³ explained Justice B, acknowledging that it is merely an "aroma." State Attorney

310. Interview with Defense Lawyer B, *supra* note 250.

311. *Id.*

312. Interview with Justice A, Supreme Court, *supra* note 245; Interview with Justice B, Supreme Court, *supra* note 240; Interview with Justice C, Supreme Court, *supra* note 267; Interview with Justice D, Supreme Court, *supra* note 248.

313. Interview with Justice B, Supreme Court, *supra* note 240.

B described his own feelings regarding the dynamics surrounding the secret evidence regime, confessing that:

To the detainees, the Justices demonstrate a facet of effective review, while deep down they are not fully convinced. Even we, the state attorneys, do that: I always felt a stomachache that was never transferred to the detainee's lawyer.³¹⁴

VII. CONCLUSION

The combination of secret evidence, administrative detentions, and security crisis creates a unique challenge to judicial proceedings and to due process. The inquisitorial judicial management model has emerged to confront this challenge and to provide strong judicial guarantees against arbitrary and unjustified detentions. The Israeli model of judicial management—widely discussed as a model to be emulated—has been praised for achieving the desired balance between individual liberty and national security. It was commended for its robust scrutiny of secret evidence and for safeguarding individual liberty at times of national emergencies.

Nonetheless, as this research reveals, the actual practice is much more complex and much less optimistic. The Court systematically avoids issuing release orders, and demonstrates minimal intervention with regard to the assessment of the secret evidence. As both the case law analysis and the interviews demonstrate, the Court refrains from openly and blatantly opposing the ISA assessment of the secret evidence, and prefers to either focus on general legal argumentations or to be satisfied with nonbinding recommendations or other, more subtle interventions in the Executive's decisions. These include mediation efforts, recommendations, and suggestions for the state, as well as general legal interpretations and instructions. At the same time, a "bargaining in the shadow of the Court" phenomenon emerges: negotiations occur between the defense lawyers, ISA representatives, and state attorneys, which leads to the withdrawal of 36 percent of administrative detention cases before they reach the courtroom hearing stage. Unfortunately, these mediation or negotiation efforts suffer from significant weaknesses—such as the inherent imbalance of the process and the blindness of the detainee regarding the secret evidence and its strength—which lead to "bad settlements" that, in fact, represent the state's security interests alone.

The conclusion must therefore be that one should doubt the well-hypothesized advantages of the judicial management model, which include revealing the actual truth and regulating the detention

314. Interview with State Att'y B, *supra* note 257.

systems. Regarding the regulating scheme, the empirical analysis suggests that the Court's ability to regulate the detention system is much more meaningful as to the legal interpretation of the statutory regime, state regulations, and other disclosed materials, rather than as to the assessment of the secret evidence and the individual circumstances of the case. The findings demonstrate that, indeed, the Court's main impact in these cases is through crafting the legal limitations and interpretations, and not by analyzing the credibility and strength of the secret evidence. This finding can also explain the significant gap that was found between the renowned cases (the law in the books), and the actual practice (the law in action). Moreover, as revealed by this research, most of the borderline cases are withdrawn before the courtroom hearing, after the conclusion of settlements between the detainee and the state, and thus the Court's regulating capacity is prevented as to the cases that could have potentially instigated such a regulatory intervention.

Second, regarding inquisitorial fact-finding, this research identified the materialization of the "bargaining in the shadow of the Court" phenomenon through the emergence of alternative dispute resolution mechanisms, such as mediation and negotiation. These mechanisms advance other interests over the actual truth, and promote practical solutions rather than an inquisitorial drive to reveal the truth.

Finally, the research findings are implicated in a much broader context that concerns the vulnerability of democracies under stress to intolerant and illiberal mechanisms.³¹⁵ The research reveals the weaknesses of judicial protections against prolonged and arbitrary detentions, and highlights the unique challenges posed by secret evidence to fair judicial proceedings. Unfortunately, detention proceedings become an "assembly line" in which "enemies", "terrorists" or just "others" are constantly losing one of their most basic and valued human assets: their freedom. It is my hope that the contribution of this research will not be limited to the Israeli detention regimes, but would extend to other administrative detention policies in other countries and provide an understanding of the dear price democracies pay to uphold schemes of secrecy and confidentiality.

315. Including political science, conflict resolution, and socio-psychological theories. With regard to this last area, it is interesting to note that even publics that normally endorse democratic norms and observance of human rights can be induced by leaders and discourse emphasizing out-group threat and out-group dehumanization to support and legitimize aggression against vulnerable out-groups. Ifat Maoz & Clark McCauley, *Threat, Dehumanization, and Support for Retaliatory Aggressive Policies in Asymmetric Conflict*, 52 J. CONFLICT RESOL. 93, 113-14 (2008).

APPENDIX I: METHODOLOGY

The research is based on a twofold methodology: content analysis and in-depth interviews.

A. Phase I: Content Analysis

The first layer of the empirical research in this study is a comprehensive content analysis of the entire universe of Supreme Court judgments in administrative detention cases from January 2000 to December 2010 (a total of 322 cases). This timeline was not selected arbitrarily, but was based on both practical and substantive reasons. The practical reason was that the online Supreme Court database includes all of the relevant cases (including short and laconic decisions, of no more than few sentences) only from 2000 onward.³¹⁶ Substantively, this is a significant decade for the purposes of this research: within this period of time, the State of Israel introduced a new administrative detention mechanism (the UCL), and reacted to a large-scale Palestinian uprising—the Al-Aqsa intifada—which began in September 2000 and intensified Palestinian–Israeli violence.³¹⁷

Moreover, in 2002, Israel initiated Operation Defense-Shield, during which it regained control in many “A areas” that were previously controlled by the Palestinian Authority and administratively detained hundreds of Palestinians.³¹⁸ Additionally, this decade can be referred to as the “war on terror” decade, in which other states, such as the United States, have been struggling to deal with terrorism, thus introducing various security measures that infringe upon individual rights. During this period of time, the debate on the legality of these various security mechanisms—including administrative detentions—was developed and reached high peaks. This research aims to participate in and contribute to this debate.

316. Before that year (from 1948 to 1999) only published decisions are available online, while minor decisions, that were not officially published, can be found only at the state’s national archive, and most of these decisions cannot be accessed without a court order.

317. Michal Shamir & Tammy Sagiv-Schifter, *Conflict, Identity, and Tolerance: Israel in the Al-Aqsa Intifada*, 27 POL. PSYCHOL. 569, 570 (2006). See generally Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, J. PALESTINE STUD., Winter 2005, at 85 (using studies conducted between 2000 and 2002 to analyze the impact of the Al-Aqsa intifada on the Israeli public); David A. Jaeger & M. Daniele Paserman, *The Cycle of Violence? An Empirical Analysis of Fatalities in the Palestinian–Israeli Conflict*, 98 AM. ECON. REV. 1591 (2008) (using empirical data collected between 2000 and 2005 to examine “whether violence against Israelis and Palestinians affects the incidence and intensity of each side’s reaction”).

318. Esposito, *supra* note 317, at 91–92.

The coding scheme: the research's coding scheme was comprised of fifteen criteria, including the following: (a) the length of the decisions; (b) the nationality of the detainee (Israeli citizen, Palestinian, or foreigner) and his place of arrest; (c) the length of the detention (if known); (d) the nature of the allegations against the detainee (if known); (e) whether the Court relied on secret evidence and on ex parte proceedings; (f) the result of the case (whether the case was dismissed, withdrawn, or accepted); (g) future instructions by the Court;³¹⁹ and (h) special circumstances mentioned (such as a need for medical treatment).

B. Phase II: In-Depth Interviews

I used interviews to provide a richer qualitative understanding of judicial review of administrative detentions, in a way that helps explain the findings of the content analysis described above. Since the judicial review process in administrative detention cases is usually highly classified, the judicial decisions are silent on many of the most interesting and important questions and provide only little information. Additionally, this method enriched the formal judicial narrative exhibited in Court rulings with the personal perspectives of the participants in the process, and gave voice to Palestinian detainees, who are usually unheard.

The interviewees included five retired Supreme Court Justices that served in the Israeli Supreme Court during the period examined in this research; four state attorneys (three former and one current), all of whom were representing the State in Supreme Court hearings on administrative detention cases until recently; four defense lawyers—two Israeli Jews and two Israeli Palestinians (each of these groups included one private lawyer and one NGO lawyer); two ISA representatives (one former and one current); and two Palestinians who were administratively detained in the past for long periods of time.

The recruitment methods: For the Supreme Court Justices, I interviewed five of the retired Justices that served on the Court during the period of time covered by this research (2000–2010). These five were selected based on their personal expertise and involvement in administrative detentions. Regarding the state attorneys and the ISA representatives, I used a snowball technique. As to the private and NGO defense lawyers, I used both my database (which included the names of the repeat players in these cases) and in addition, I

319. Such as “the length of the detention must be taken in mind if future detention orders will be considered” or “if within the current detention period no new evidence will be found, the state will not be able to further prolong the detainee’s detention.”

contacted human rights organizations that deal with administrative detentions issues, using a similar snowball technique. Lastly, the Palestinian defense lawyers who participated in the research helped me contact the Palestinians who were administratively detained in the past.

The decision to interview retired Justices and some former state attorneys and ISA legal advisors was not forced due to accessibility difficulties, but was a deliberate choice, designed to achieve maximum authenticity of the replies, free of institutional obligations and loyalties. Since this research deals with very sensitive issues, the fact that the interviewees no longer work for the state had a cardinal importance. All interviewees were selected to participate in the research based on their vast experience as participators in the judicial review administrative detention cases. Some of them were contacted using snowball techniques, and some were contacted simply because they were important players in this field, as evident from the Court decisions (the coding scheme included the names of the relevant stakeholders to detect repeat players).

Almost all of the individuals who were invited to participate in the research agreed to do so: eventually, I interviewed seventeen out of the twenty people who were contacted (one refused to participate and the other two were not interviewed due to coordination difficulties. Most of these interviews were conducted face to face in private meetings, but some were held via telephone. Each interview lasted between 40 and 120 minutes. While the research could have benefitted from a more comprehensive number of interviews, as well as from a more systematic interviewee selection system, the difficulties in recruiting participants for such sensitive research, as well as some time constraints, made this impossible. Nonetheless, for the qualitative purposes of this research, seventeen in-depth, profound, and intimate interviews, with a variety of relevant stakeholders, was more than enough to suggest some explanations for some of the surprising and previously unexplained findings.

C. Interview Protocols

I. Questions for All of the Research Populations:

1. Tell me a bit about your personal experience with the process of administrative detention.
2. Can you elaborate about the judicial review process in the Supreme Court?
3. What is your personal impression regarding this process?

4. From your viewpoint, how does the existence of *ex parte* proceedings and reliance on confidential evidence influence the judicial review of administrative detentions?
5. From the judicial review perspective, is there any difference between the three administrative detention's mechanisms? Did you experience any difference between mandatory appeal and a habeas corpus petition processes?
6. If so, which of those do you consider as "better?" In what ways, and why?
7. Do you consider those to be "fair" processes?
8. If you could design the perfect judicial review process, would you change anything in the current mechanisms?

II. Interviews with Retired Justices of the Supreme Court:

1. From your experience, what can you tell me about the ways in which the Court handles administrative detention cases?
2. How did the detention's mechanism (military order, unlawful combatant law or administrative detentions law) influence your judicial review of the case? In what ways did the differences between these mechanisms influence your ability to decide on the case?
3. Do you feel any difference in the Court's judicial review over administrative detention cases throughout the years?
4. How difficult is it to decide these cases? What are the most useful criteria that you use in order to reach your conclusions?
5. How did you deal with *ex parte* proceedings, and the fact that the detainee is not exposed to the evidence that was gathered against him?
6. Why in many of these cases does the Court try to convince the detainee to withdraw his petition? Are there any differences between cases that are being withdrawn or being dismissed by the Court?

III. Interviews with State's Representatives:

1. How does the state decide which detainee is detained according to which of the three administrative detentions mechanisms?
2. Does the state prefer any of these mechanisms? Why?

3. From your personal experience, how hard is it to refute the state's position?
4. Are there any negotiations between the state and the detainees regarding the length of the detention?
5. Does the existence of a habeas corpus petition to the Supreme Court (or a mandatory appeal process) affect the state's policy towards continuous detention of a detainee?
6. Why are many of the habeas corpus petitions being withdrawn, with the mutual consent of the parties, one day before the actual hearing of the case?

IV. Interviews with Defense Lawyers:

1. How do the detainees that you represent contact you?
2. Who initiates the judicial review process at the Supreme Court?
3. Who pays the court fees and the lawyer's fees?
4. Did you feel that you were able to represent your client in the best way and to bring his claims before the Justices?
5. As X's lawyer, did you agree to conduct ex parte proceedings before the Supreme Court, and if so, why?
6. What was the purpose of the petition?
7. Were you involved in former judicial proceedings that preceded the judicial review process in the Supreme Court (the judicial review processes before the district court or the military courts)?
8. Can you explain, from your experience, why many of the habeas corpus petitions are being withdrawn, by the consent of both parties, just a day before the hearing?

VI. Interviews with Former Detainees:

1. When were you detained? Can you tell me a bit about the judicial process—how much time did it take before you reached the Supreme Court, and how was the judicial review in your case conducted?
2. In your opinion, were given the chance to plead your case?
3. Were you aware of the allegations made against you and of the evidence that was gathered against you?
4. Why did you choose to apply to the Supreme Court?
5. How did you contact your lawyer?

6. Did he represent you also before the military or district court?
7. Did the judicial review process before the Supreme Court change your detention conditions or length in any way?

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