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NOT “BY ALL MEANS NECESSARY”: A COMPARATIVE FRAMEWORK FOR POST-9/11 APPROACHES TO COUNTERTERRORISM

Amos N. Guiora*

Counterterrorism significantly benefits from a comparativist approach. Precisely because no one country has the monopoly on effective operational measures, nation states significantly benefit from analyzing measures applied by other states confronting similar dilemmas and challenges subject to the role of law. To that end, this article examines the policies of targeted killing and administrative detention as applied in Israel and asks whether and how they are applicable to American counterterrorism. In asking this question, it is important to determine whether the two policies are relevant to the U.S. legal framework. An important consideration is how the differences between Israeli and American societies, geographies, constitutions, and strategies condition the counterterrorism policy of each country. As a result of such differences, what works in one country may not work in another. While I am an unequivocal advocate for comparative research and analysis and have sought to bring this approach to my scholarship, I am fully aware of its limitations. That said, I firmly believe that nation states can and must learn from each other. While judicial, constitutional, and societal paradigms are unique and distinct, like-minded civil, democratic states must undertake the critical effort to understand how similar countries address similar issues.

I. INTRODUCTION

The Obama Administration faces the difficult challenge of developing operational counterterrorism models while confronting determined foes on multiple fronts. Doing so requires the Administration to balance the legitimate rights of the individual with the equally legitimate national security rights of the state. In particular, the Obama Administration faces two critical questions (with which the Bush Administration similarly—and unsuccessfully—struggled): (1) creating and implementing a legal and effective detention paradigm for post 9/11 detainees; and (2) articulating the conditions for authorizing a targeting killing. This article will examine both policies—detention and targeted killing—using a comparative approach.

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Specifically, I will examine both policies through the lens of the Israeli experience. This is not to suggest that the Israeli approach is correct or foolproof. Rather, when treading in these difficult waters, it is important to recognize that learning from others is essential to developing a lawful and effective counterterrorism policy. In addition, I will address—and propose the pursuit of—active judicial review in an effort to ensure checks and balances and separation of powers. Justice Jackson’s words regarding an unfettered executive ring as loudly today as they did fifty years ago.¹

Section II will focus on administrative detention—both options for future models and lessons from the Israeli experience. In section III, I offer brief comments on targeted killing. Section IV will address the importance of judicial review in the framework of administrative detention and counterterrorism and section V will offer a perspective on comparativism.

II. ADMINISTRATIVE DETENTION

This discussion addresses current detainees and those who will be detained in the days and years ahead. My fundamental assumption is that the U.S. must replace the existing post 9/11 detention model—frankly, “indefinite detention”—with a paradigm consistent with U.S. constitutional protections and habeas corpus guarantees as the Supreme Court in Boumediene v. Bush² and Judge Bates³ have articulated.

To do so, the Obama Administration must examine and ultimately resolve several fundamental issues regarding detainees arrested since 9/11 and presently held in Guantánamo Bay, Bagram, Abu Ghraib, and elsewhere by or on behalf of the U.S.:

1. Will the post 9/11 paradigm be defined as a traditional criminal law or war paradigm or as a hybrid combining aspects of both?
2. What are the criteria for determining whether a specific detainee poses a particular threat to U.S. national security?
3. What are the standards for judicial review for detainees deemed to pose a threat, after the establishment of a criteria-based vetting process?
4. Are all detainees prosecutable or will some be held in an alternate detention paradigm?
5. Will released detainees be freed to their country of citizenship, in the U.S. or to some third country, and how will this be determined?

For detainees arrested and held in the future, I advocate a model based on the criminal law system but modified to reflect the differences between terrorism and what is understood to be the traditional criminal law paradigm. In a nutshell, I define terrorism as actions seeking to advance a cause (religious, social, political, or economic) by killing or injuring innocent civilians or intimidating the civilian population from conducting its normal activities with no pecuniary benefit accrued to the terrorist. In addition, as I have suggested elsewhere, prosecuting accused terrorists often requires the introduction of classified intelligence information. For this reason, I have previously proposed a hybrid model as an alternative judicial paradigm, often called a national security court.

With respect to detention, I propose adoption of a two-tiered model. If the arrest is based on criminal evidence, detention prior to trial in the traditional criminal law paradigm is appropriate. If, however, the arrest is based on classified intelligence information regarding involvement in terrorist acts, administrative detention should be appropriate. My recommendation for the adoption of an administrative detention model in the U.S. is based on the following considerations:

1. A determination that a detainee presents a specific threat to national security;
2. An assessment of the reliability and credibility of the intelligence information;
3. Active and independent judicial review;
4. Source protection subject to independent judicial review, a legitimate consideration in when intelligence information suggests that the prospective detainee is involved in future acts of terrorism.

The process and considerations of applying administrative detention on specific individuals has developed over the course of many years in Israel. The measure is applied in the West Bank by order of the military commander (Israel has never annexed the West Bank) and in Israel by the Minister of Defense. In both, the decision is subject to judicial review: in the West Bank by two military courts and the Israeli Supreme Court, and in Israel by the Tel Aviv District Court and by the Israeli Supreme Court.

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5. See id. at 204–05.
The Israeli Supreme Court, sitting as the High Court of Justice (HCJ), held administrative detention to be lawful in accordance with Clause 85 of the Defense Emergency Regulation Act of 1945, provided that the available intelligence information indicates that the individual in question is involved in a future act of terrorism. Furthermore, the evidence must meet a six-part test of reliability, credibility, validity, viability, time-relevance, and the inability to be presented in open court because of the overarching requirement to protect an intelligence source. An order for administrative detention is subject to three layers of judicial review: first, a hearing before a military judge, akin to an administrative hearing; second, an appeal before a senior military judge; and finally a hearing before the Israeli Supreme Court (sitting as the HCJ). According to the Defense Emergency Regulation Act, an order may authorize detention for a maximum period of six months, with the opportunity to renew for an additional six months. Although an order may be renewed an unlimited number of times, each renewal order requires the same three-step judicial process.

The fundamental premise of the administrative detention model is the individual’s involvement in a future act. That involvement must present a sufficiently real—not just perceived—threat to national security in order to justify a process in which neither the individual nor counsel see the classified information; judicial hearings are held in camera/ex parte. Human rights organizations have been extremely critical of the denial of the right to confront one’s accuser. However, the HCJ has upheld the denial of this right as lawful and necessary in the context of national security, based on a demonstration that the commander (who signs the order) has weighed, balanced, and considered the following:

1. The quality of the intelligence and the reliability of the source;
2. The possibility that the intelligence cannot be declassified (which would enable initiation of the criminal law process);
3. The threat the individual poses to national security;
4. The appropriate length of detention in proportion to the threat posed;
5. For renewal of orders based on information that justified the initial order, as opposed to new information, the continuing severity and nature of the threat, among other factors.

In practice, when the Israel Security Agency (ISA) receives intelligence information suggesting a specific individual’s involvement in terrorism, there are several options “on the table”: arrest for the purpose of inter-

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9 Id.
rogation and trial, administrative detention, or monitoring and surveillance without detention.

If the ISA recommends administrative detention, the military commander will ask his legal advisor to review the intelligence information in order to advise whether to adopt the recommendation. In my postings as senior security advisor to the West Bank Legal Advisor (1990–1992) and Gaza Strip Legal Advisor (1994–1997), I regularly reviewed ISA recommendations to military commanders regarding Palestinian residents of the West Bank and Gaza Strip. My recommendations were either to accept the ISA’s detention recommendation, including the length of the detention, or to reject the ISA’s recommendation and advise the commander either to not detain the individual or to arrest him and initiate a criminal law process.

In each case, I based my recommendations to the commander on the following specific considerations:

1. Quality of intelligence and source reliability (this required an expert opinion from an ISA official);
2. Timeliness of the intelligence information (this required an expert opinion from an ISA case agent);
3. An individual’s previous activities (this required review of the ISA intelligence dossier);
4. Impact of detention on the individual’s immediate community; which is particularly relevant if the individual was a highly regarded or a respected leader (this required an expert opinion from an ISA official);
5. NGO response to the particular detention (Israeli and international human rights organizations were unanimous in their criticism of the administrative detention measure; in addition, we faced additional sensitivity with respect to certain categories including women, “people of prominence,” and attorneys);
6. Severity of the danger the individual posed (this required an expert opinion from an ISA official);
7. Possibility for declassification of the intelligence information and for the interrogation of the individual, thus enabling initiation of the criminal law process;
8. Danger to the source were the information to be declassified (this required an expert opinion from an ISA official);
9. Likelihood that the Israel Supreme Court (sitting as the HCJ) would intervene in the commander’s decision.

If I affirmed the ISA’s recommendation, the intelligence dossier and my recommendations went to the commander. If the commander accepted my recommendation, the individual would be detained in accordance with the signed order, which included a short description of the order’s justification, largely a general statement regarding the individual’s activity. As
I shall discuss later, these orders are subject to judicial review by the military court and Israel Supreme Court.  

Administrative detention is “necessary and vital” for national security. However, the legal, moral, and policy dilemmas pose significant questions that demand attention. Two fundamental realities are particularly troublesome. First, the detainee cannot confront his accuser and therefore fails to enjoy a fundamental right guaranteed in the criminal law paradigm. Second, the individual is detained—predicated on intelligence information exclusively—prior to carrying out what is believed to be a future act of terrorism. Balancing these two realities is essential to the lawful implementation of an administrative detention measure; by its very nature the administrative detention places the individual at an extraordinary disadvantage. When I was asked to review a file—whether as legal advisor or judge—the dilemma was the same: is the measure truly necessary or is there another available mechanism that balances the legitimate rights of the individual with the equally legitimate rights of the state? While the preferred answer—provided I was convinced of the danger posed by the individual—was to initiate the criminal law process, operational counterterrorism’s reliance on intelligence information often forecloses this option. In a nutshell, protecting the source is of the fundamental essence, because otherwise the state cannot gather the intelligence information that is the heart and soul of operational counterterrorism.

That said, it is important to recall the criteria for applying administrative detention: individuals who were involved to varying degrees in planning future acts of terrorism or had indicated their intention to commit future acts. In planning with others, the individual—by analogy—was engaged in a conspiracy; for example, by indicating to others an intention to throw Molotov cocktails the next time a Israel Defense Force (IDF) patrol passed through his village, the individual clearly expressed an intent to commit a crime. Administrative detention is preventive detention. In this situation, the ISA would recommend administratively detaining the individual. My decision (and this is critical to the discussion) would be based—in large part—on the two factors addressed earlier: reliability and relevance of the intelligence information and whether the information could be declassified.

By analogy, if terrorism depends on resources and motivation, then counterterrorism depends on intelligence information based on sources. My dilemma, then, was whether the severity of the planned action justified denying the individual his day in court in order to protect the source. As a lawyer trained to respect the principle of enabling the accused to confront his accuser, I consistently grappled with that issue. In many ways the di-
lemma is “lose-lose”; the denial of otherwise-guaranteed privileges and protections raises fundamental legal and moral questions regarding society and the limits to which it will go to protect itself. I have, throughout my career, recoiled at phrases such as “by all means necessary.” I have always believed that a seat at the counterterrorism table, which I had, brings with it the requirement of understanding the limits of power. That is, one must be extraordinarily sensitive to both the rule of law and the dangers inherent in the slippery slope—as exemplified by government excess not subject to independent judicial review.

As the legal advisor tasked with recommending to the commander whether and for how long to administratively detain a Palestinian resident of either the West Bank or Gaza Strip, I viewed it as my responsibility to be a buffer between competing interests. On the one hand, the security agency had very specific interests that generally aligned with the commander’s; on the other hand, the potential detainee had rights and freedom that were also deserving of protection. While the courts (both military and Israeli Supreme Court sitting as the HCJ) exercised independent review of each detention order, both with respect to necessity and length of detention, I endeavored to minimize the cases in which the HCJ would intervene in the commander’s decision. To that end, my responsibility was to review the intelligence information carefully to ensure that only cases in which administrative detention was required were brought before the commander. The two step process—(1) whether to detain; and (2) if yes, for what period of time—required the balancing of powerful and competing interests.

I have repeatedly argued that the most difficult part of the process was determining what detention period to recommend to the commander. I found this decision more difficult than sentencing a defendant represented by counsel, precisely because the detainee did not have the right to confront his accuser. It would be fair to state that determinations regarding how many months in detention were appropriate for a given individual represent some of my most difficult internal struggles. While a mathematical formula does not exist, I used the principles of proportionality and necessity as a guide to balancing equally legitimate rights, coupled with the understanding, frankly, that the process is inherently problematic because the detainee cannot confront his accuser.

I have advocated elsewhere for the creation of an alternative judicial paradigm for bringing post 9/11 detainees to trial.11 That same court would also be the most appropriate forum for administrative detention. The alternative paradigm is fundamentally predicated on the understanding that terrorist trials often require the introduction of classified information. This would be particularly true should the U.S. decide to bring detainees held for

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11 See Guiora, supra note 4.
a number of years in Guantánamo Bay, Abu Ghraib, and Bagram to trial. Both trials of suspected terrorists and administrative detention hearings involve review of intelligence information. I would therefore suggest that the proposed alternative judicial model is appropriate for both paradigms. Critics have, correctly, identified the fundamental flaw in the proposal: the alternative paradigm denies the individual the right to confront some or all of his accusers.  

That criticism is both valid and correct. However, the unfortunate reality of operational counterterrorism is a reliance on classified intelligence information. An alternative judicial paradigm (whether trial or administrative detention) seeks to strike a balance by guaranteeing process through judicial review rather than allowing detention by executive fiat not subject to independent judicial review. The latter model is clearly unconstitutional and has, in large part, been struck down by the U.S. Supreme Court. The question going forward is what process should the Obama Administration establish for the thousands of detainees presently held? I would suggest that the proposed administrative detention model in conjunction with the alternative judicial model reflects a balanced approach in an extraordinarily complicated and complex paradigm.

III. TARGETED KILLINGS

Israel’s policies on administrative detention and judicial review provide useful frameworks for assessing options for a U.S. model. In light of the recent revelations regarding CIA plans to conduct secret targeted killings of al-Qaeda operatives, Israel’s targeted killing policy may prove helpful. As I suggested in a Foreign Policy article, License to Kill, these revelations are sure to set off a renewed debate in the U.S. over the legality, utility, and morality of killing terrorists. In the article, I wrote:

Targeted killings are indeed legal, under certain conditions. The decision to use targeted killing of terrorists is based on an expansive articulation of the concept of pre-emptive self-defense, intelligence information, and an analysis regarding policy effectiveness. According to Article 51 of the U.N. Charter, a nation state can respond to an armed attack. Targeted killing, however, is somewhat different because the state acts before the attack occurs. In addition to self-defense principles, the four critical principles of

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international law—alternatives, military necessity, proportionality, and collateral damage—are critical to the decision-maker’s analysis.

The basis for the attack is intelligence information that meets a four-part test: Is it reliable, credible, valid, and viable? Given the stakes, corrobated information is significantly preferable to information that comes from a single source.

Israel instituted its targeted killing policy in large part in response to Palestinian suicide-bombing attacks. But it’s not just the bombers themselves that are a threat. Four actors—the bomber, the planner, the driver/logistics person, and the financier—form the basis of the suicide bombing infrastructure. Determining which of the four is a legitimate target, and when, is the critical question decision-makers face. As not all four are legitimate targets at all times, the commander is limited against whom he can act; that reality reflects the limits of self-defense.

This rearticulation of expansive self-defense is insufficient on its own, however, because the decision to authorize the “hit” is not made in a vacuum. Implementing the four international law principles referenced above requires the commander to ascertain that the “hit” is essential to national security and therefore proportional to the risk the individual presents. Furthermore, the commander must determine that any alternatives, such as capturing and detaining the individual, are not operationally possible. The commander must also seek to minimize the collateral damage—harm to innocent civilians—that is all but inevitable in such attacks.

When asked by a particular commander to authorize a targeted killing, I would ask the following factual questions:

a. Who is the source?
b. How reliable is the source?
c. How timely is the information?
d. What is the relationship between the source and the potential target?
e. How precise is the information? (I was once told, for example, “he is wearing a blue shirt and blue jeans,” but it was nighttime and the commander had night-vision equipment)
f. When was the last time the unit conducted a nighttime ambush?
g. How confident was the commander in his unit’s capabilities?
h. Did the commander receive the intelligence directly from the intelligence community and had he discussed the issue with a case officer?

Although I have advocated the effectiveness of targeted killings from an operational counterterrorism perspective and supported its legality as an expansive articulation of self-defense, in the case of the blue jeans I did not authorize the requested attack. The information about the individual unequivocally indicated that the danger posed to Israeli national security was palpable. I was also convinced that detaining him was operationally
unfeasible. However—and this is the core of the issue—I was not convinced that the individual in the commander’s scope was the right man.

Aggressive operational counterterrorism is lawful, but that is not enough. It must also be effective and moral. Understanding and implementing the limits of power is an essential aspect of aggressive self-defense; uncertainty is a fact of life in the counterterrorism business. Precisely for that reason, the four pillars of counterterrorism must include the applicable law, but also morality, policy effectiveness, and careful and cautious operational decisions.

Targeted killings decisions are among the most complicated and complex aspects of operational counterterrorism. The decision-maker literally faces an overwhelming amount of information. Before authorizing and firing, the commander must ascertain who the target is; otherwise, the policy is illegal, ineffective, and immoral. But if you’re sure you’ve got the right guy, and you have no other viable options, fire away. The nation’s safety may depend on it.  

IV. JUDICIAL REVIEW

Once any counterterrorism policy or operation is implemented, judicial review becomes paramount. After all, the limits of power are essential to the rule of law. While, perhaps, this is an obvious motto or slogan, its application in times of crisis is no mean feat. Franklin D. Roosevelt’s decision to intern Japanese-Americans in the aftermath of Pearl Harbor and the Supreme Court’s decision in Korematsu v. United States 16 are clear examples of what I define as panic responses. The Palmer Raids, Prize Cases and the Presidential Order establishing the Military Commissions are similar examples. 17 What is disheartening in all four is that while the executive engaged in excess, neither Congress nor the Supreme Court engaged or challenged the President. Checks and balances fell by the wayside; Justice Jackson’s famous warning of an unfettered executive 18 went unheeded.

As the three branches of government move into the post-Bush era, they would do well to recall not only Justice Jackson’s words but also those of the former President (Chief Justice) of the Israeli Supreme Court, Aharon Barak: “‘Security considerations’ are not magic words.” 19 These two articu-

15 Id.
16 323 U.S. 214 (1944).
lations of the same concept are essential to understanding how judicial review is critical to the implementation of counterterrorism policies.

The fundamental requirements for such policies, including administrative detention and targeted killings, are caution and skepticism; caution by the executive and skepticism by Congress and the courts. Both are essential to the rule of law and ensuring that “by all means necessary” will be relegated to Hollywood rather than adopted by the Administration as a viable counterterrorism policy. As a direct participant in decision-making in the immediate aftermath of a terrorist attack, I know it is easier said than done. The decision-maker is truly put to the test: the public and media are clamoring for a response and politicians in opposition parties demand action to assure voters that if they were in office either the attack would not have occurred or their response would be so powerful and effective as to literally guarantee no future attacks. Precisely because of these pressures, the Supreme Court must engage in active judicial review.

The administrative detention paradigm, with its inherent prejudice against the detainee, requires rigorous judicial review, perhaps more than other operational counterterrorism measures. When recommending to commanders whether to administratively detain Palestinians, I considered the HCJ’s future review of the recommendation to be a critical component of my decision-making process. After all, the court would often ask why a particular recommendation was made and would intervene if it was not convinced that the decision met a reasonableness standard. While reasonableness may seem broad, it was sufficiently contoured to provide decision-makers guidelines regarding the range of what measures could be implemented. Active judicial review of administrative detention orders means that the court is consistently examining whether the executive correctly applies the reasonableness test to operational decisions. That is, the review is not vague; rather, it is concrete because the court wants to be satisfied that the executive understands that reasonableness is not an abstract concept, but rather has clear parameters and judicially imposed limits.

In Israel, judicial review is used not only to check the actions of commanders in implementing administrative detention against an individual, but at all levels of executive power. For example, in my recent article in the Jurist, Judicial Review and the Executive: Lessons from Israel,20 I addressed a case in which the HCJ held that the IDF’s Judge Advocate General’s Corps decision to not order a court martial for a commander was not reasonable.21 In that article I wrote:

The executive, regardless of rank and post, is not immune from judicial review. Deference does not benefit the state or the individual petitioner. If the Israeli Supreme Court had taken the track of judicial deference, in all probability the JAG’s decision would have been upheld, thereby minimizing the gravity of the commander’s decision. Only by directly engaging the executive in active strict scrutiny could the Court hold that the JAG had fundamentally erred.

Nothing is more dangerous to a democracy than an “unfettered executive”. Justice Jackson was both prescient and correct in Youngstown Sheet and Tube Co. v. Sawyer. His concern was also timeless. This principle must be applied across the board. Encouraging judicial review of some executive branches but not others will do no more than ensure unequal justice under law. The JAG’s decision must be subject to review in the same vein as that of any other executive decision maker. The essence of active judicial review is to protect the unprotected and to ensure that the executive acts within reasonable boundaries as broadly defined.

By ruling that the JAG did not act within these boundaries, the Court is sending a loud and clear message: the executive is subject to strict judicial review and it cannot hide behind the cloak of executive decision making. That powerful and compelling message should be adopted by the U.S. Supreme Court, particularly when striking a balance between the legitimate rights of the individual and the equally legitimate national security rights of the State. The free pass that the Supreme Court has historically granted the executive in national security cases (Korematsu v. United States being the poster child) has, in the long-run, harmed the individual and the state alike.  

In his book, All the Laws but One: Civil Liberties in War Time, the Late Chief Justice Rehnquist articulated that “reticence” should be the Supreme Court’s role in times of armed conflict; in contrast, Barak’s model was a fundamental lack of deference to the executive (IDF). Although IDF commanders felt the HCJ intervened in their natural bailiwick, Barak was convinced of the need to ensure that operational counterterrorism measures were reasonable. The only way to do so was to engage the executive through judicial review, because without it judicial deference would create an inevitable disregard for the rule of law.

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22 Guiora, supra note 20.
23 See William Rehnquist, All the Laws but One: Civil Liberties in Wartime 225 (1998).
V. COMPARATIVISM IN PERSPECTIVE

In determining if and how the various Israeli policies of administrative detention, targeted killings, and judicial review can be useful in creating the U.S. legal framework, an important consideration is how the differences between Israeli and American societies, geographies, constitutions, and strategies condition the counterterrorism policy of each country. As a result of such differences, what works in one country may not work in another.\(^{25}\)

While I am an unequivocal advocate for comparative research and analysis and have sought to bring this approach to my scholarship, I am fully aware of its limitations. That said, I firmly believe that nation states can and must learn from each other. While judicial, constitutional, and societal paradigms are unique and distinct, like-minded civil, democratic states must undertake the critical effort to understand how similar countries address similar issues. In the field of counterterrorism (like others), no single nation state has “all the answers,” making learning from others essential.

Under former President (Chief Justice) Meir Shamgar, and particularly under former President (Chief Justice) Aharon Barak, the Israeli Supreme Court was the nation’s dominant institution, matched—perhaps—only by the IDF. Barak’s extraordinarily broad definition of standing and justiciability meant that literally every alleged grievance committed by the State (including future proposed action) was petitionable to the Court sitting as the HCJ. As discussed above, beginning in the nineteen nineties, military commanders were increasingly forced to take into consideration the Court’s real-time intervention. The dilemma of the decision-maker—complicated enough in operational counterterrorism without external intervention—was indeed made more complicated precisely because the Court imposed its “reasonableness” test on commanders.\(^{26}\) The burden was on the commander to show that a particular operational decision met that test; if not, the Court would not hesitate to rule that the commander’s decision violated the rights of the petitioner.

I have advocated in my scholarship the absolute importance of active judicial review.\(^{27}\) The basis for this deeply held belief is the seat that I had at the counterterrorism table. That is, I have been a direct participant (not witness) to extraordinarily complicated dilemmas and understand the tension between excess of power and limits of power. That tension and the


\(^{26}\) See supra Part IV.

need to respond justify active judicial review. The legislative branches in any country, including the U.S. and Israel—as historically documented—are either incapable of or unwilling to restrain the executive. Therefore, the only operational response to Justice Jackson’s unfettered executive concern is an active, interventionist Court.

However, the Israeli paradigm is not a mirror image of the American paradigm. Barak’s theory of an unlimited scope of judicial review stands in direct contrast to the “cases and controversies” clause of Article III of the U.S. Constitution. As a result of Chief Justice Marshall’s decision in Marbury v. Madison, the Supreme Court became an equal partner in the government. In the Israeli paradigm according to Barak’s theory, I suggest that the Court (particularly when sitting as the HCJ) is first among equals.

Is this system translatable into the U.S. paradigm? According to Marbury and a narrow reading of “cases and controversies,” the majority of scholars would suggest it is not. On the other hand, the historical U.S. overreaction to perceived or actual threats suggests that the U.S. Supreme Court (in the absence of a Congress that genuinely engages in “checks and balances”) could adopt a fundamentally different approach than it has historically. Perhaps Boumediene and Hamlily are a sign of things to come; needless to say, I fully agree with Judge John Bates and only hope that future decisions will reflect his holding.

It is clear that there are fundamental differences between Israel and America—size and immediacy of the threat are but prime examples. However, precisely because both are vibrant democracies the principles of checks and balances and separation of powers must be more than empty platitudes. They are what protect us from executive excess in both cultures. The role of the Court is to constantly and unblinkingly engage the executive. Whether Barak’s theory is too interventionist is a matter of lively academic debate; while I would suggest it was a proper response in reining in the executive, I well understand those who are critical. On the other hand, former Chief Justice Rehnquist’s theory regarding the role of the Court in times of armed conflict is, I respectfully suggest, deeply flawed and ultimately harmful to U.S. principles and values.

The ultimate role, I believe, of a “comparativist” is to examine different regimes—recognizing that profound differences exist—with the intention of identifying strengths from distinct paradigms and cobbling to-

29 5 U.S. (1 Cranch) 137 (1803).
gether a functional model for addressing similar issues. With respect to counterterrorism, the Israeli model (albeit problematic as I have argued) is adaptable in the U.S., if based on legislation and subject to active judicial review.