Hastings International and Comparative Law Review

Volume 29
Number 1 *Fall 2005*

Article 3

1-1-2005

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I. Introduction

A critical component of a liberal democracy's counterterrorism efforts is the role of that nation's judiciary. The concept of an unfettered executive, unrestrained by courts and legislatures alike, is detrimental to a nation attempting to balance national security and individual rights.

It is undisputed that a government's executive branch would prefer to conduct its business without judicial "interference." What separates liberal democracies from dictatorships, however, is the accountability of the executive for its decisions. This article will analyze whether, and how, the courts in the United States and Israel truly review executive decisions regarding armed conflict.

In examining the role of the judiciary in these two countries, it is necessary to understand that different political regimes have differing systems. Nevertheless, there is a common thread to this article: an examination of the willingness of a judiciary to actively review and, if need be, criticize and intervene in the decisions and actions of the executive.

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The article analyzes decisions of the two Supreme Courts and writings of the Chief Justice of the U.S. Supreme Court, Chief Justice William Rehnquist,[1] and the President of the Israeli Supreme Court, President Aharon Barak. It is suggested, as a point of reference, that the judicial activism advocated both intellectually and in practice by President Barak represents one end of the judicial review scale while the approach of the late Chief Justice Rehnquist represents, if not the extreme other end, an opposite approach.

President Barak has propounded and implemented judicial activism in his decisions over the past fifteen years. Important for our purposes are Barak's opinions relevant to Israel's counterterrorism efforts. Although the American experience regarding judicial intervention in the executive branch's counterterrorism efforts is more recent than Israel's,[2] the issue of judicial review of executive wartime decisions is not. An attempt will be made to "superimpose" the latter on the former, while examining recent decisions including *Hamdi v. Rumsfeld*[3] and *Rasul v. Bush*.[4]

The proper role of the judiciary in its government's counterterrorism efforts is a subject that elicits much debate and little consensus. Some propose that the executive be allowed to make critical command decisions while enclosed in a bubble; others suggest that such an approach is inherently dangerous.

II. Judicial Activism

A. President Barak

1. Role of the Court

President Barak's seminal article in the Harvard Law Review,[5] written while sitting as President of the Israeli Supreme Court, is a compelling discussion of judicial activism in armed conflict. It presents the theory of advocating active judicial review against the background of Israel's

1. Chief Justice Rehnquist died September 3, 2005, while still sitting as the Chief Justice of the United States Supreme Court.

2. The American perspective on judicial review of counterterrorism efforts is recent, as it reflects the American response to the attacks on September 11, 2001. Prior to that time, the United States had faced only one known act of international terrorism on its soil (the World Trade Center bombing in 1993).

3. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

4. Rasul v. Bush, 124 S. Ct. 2686 (2004).

5. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16 (2002).

ongoing struggle with Palestinian terrorism. The article is crucial to a discussion of judicial activism in that it clearly and strongly articulates ideas regarding what role the judiciary should play in times of terrorism. President Barak's article sends a lucid message to the executive that the judiciary will be watching, monitoring, and if need be, intervening in executive decisions pertaining to armed conflict.

In his article, President Barak discusses the challenges that terrorism presents for democratic countries, arguing that not every effective means of counterterrorism is legal.[6] The Israeli Supreme Court's holding in *Public Committee Against Torture in Israel v. The State of Israel* exemplifies this as the Court, sitting as the High Court of Justice (HCJ),[7] held that even though violent interrogation of a suspected terrorist may save human lives, it is illegal.[8] While terrorists adhere to no rules, "a democracy must fight with one hand tied behind its back."[9] Even though a democracy has to fight in this manner, President Barak argues that it still has the upper hand since it preserves the rule of law and respects individual liberties. President Barak argues that these two factors strengthen democracies in fighting terrorism.[10] A democracy is not unlimited or unencumbered in its fight to protect both the territory of the nation and its citizens. Terrorists abide by no rules and regulations. It is precisely such rules that separate liberal democracies from terrorists. Protecting democracy from "the means the state wants to use to fight terrorism"[11] is necessary in order to preserve democracy. If a state resorts to illegal means to fight terrorism or disregards its own rule of law, then terrorism has won. A democracy that compromises its values and standards in order to fight terrorists allows the terrorists to undermine the very core of the democracy. Laws are most important in times of war. They were created and developed "precisely so that they will be consulted and obeyed, not ignored" during times of crisis.[12]

According to President Barak, there is a basic tension between the

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6. *Id.* at 157.

7. *See* ISR. CONST. art. 15(c) (the High Court is to act as a court of first instance); According to a 1968 legal opinion, Palestinians or those acting on their behalf, may petition the High Court against any action the executive (in the West Bank and Gaza Strip, the Israel Defense Forces) intends to take or has taken that potentially harms a Palestinian.

8. Barak, *supra* note 5, at 157 (Referring to H.C. 5100/94, *Pub. Comm. Against Torture in Isr. v. State of Isr.*, 43(4) P.D. 817, but erroneously referring to it as H.C. 4054/95, *Pub. Comm'n Against Torture in Isr. v. Gov't of Israel*, 43(4) P.D. 817).

9. *Id.* at 148.

10. *Id.*

11. *Id.* at 149.

12. *Id.* at 151.

components of democracy. Citizens, through their elected representatives, may expect the government to take all steps necessary in fighting terrorism, regardless of their effect on human rights.[13] However, the human rights component of democracy "may encourage protecting the rights of every individual, including the terrorists, even at the cost of undermining the fight against terrorism."[14] Therefore, the executive of a democracy, according to President Barak, must balance between these fundamentally competing interests so as to protect the rule of law, which is the essence of democracy. Barak wrote that "[t]errorism does not justify the neglect of accepted legal norms."[15]

Both the executive and the legislative branches of a democracy are directly responsive to the desires and needs of the public.[16] However, justices are the ultimate protectors of democracy.[17] Actions taken by the executive and the legislature must be able to withstand judicial scrutiny. Justices are not accountable to the public; they enjoy an independence that the executive and legislature do not.[18] This independence and lack of public accountability allows justices to do what is necessary to uphold democracy, even when citizens and the State are willing to sacrifice individual rights. The role of the court is to "ensure the constitutionality and legality of the fight,"[19] regardless of whether the decisions of the court are popular with the executive or the public.

The role of a justice in protecting democracy and individual human rights is "a much more formidable duty in times of war and terrorism than in times of peace and security."[20] It is during times of war and terrorism that citizens often think it permissible to compromise rights and protections in order to help maintain security. Justices cannot allow themselves to compromise citizens' rights, regardless of whether it is a time of war or peace. Justices cannot have different procedures or standards for wartime[21] without eroding peacetime protections as well. Judicial decisions during times of crisis "remain with the democracy when the threat of terrorism passes . . . entrenched in the case law of the court as a magnet for the

13. *Id.* at 148.
14. *Id.*
15. *Id.* at 151.
16. *Id.* at 148.
17. *Id.* at 149.
18. *Id.* at 150.
19. *Id.* at 160.
20. *Id.* at 149.
21. *Id.*

development of new and problematic laws."[22] It is much easier for the executive to change directions or policy, or for the legislature to revoke, amend, or pass new laws to amend existing legislation, than for the judiciary to reverse itself. Mistakes made by the judiciary live on even after they have been overruled. The logic, reasoning, and basis for a decision are recorded in judicial history to be used in the future for other cases, whereas overturned executive or legislative actions are generally ignored.[23]

2. President Barak's Theory

President Barak argues that the Israeli Supreme Court's willingness to review executive actions is not improper interference.[24] He sees a crucial distinction between intervening in military considerations and intervening in equality of treatment questions that may arise from military actions.[25] President Barak views the role of the Supreme Court as ensuring that the military acts "within the framework of the 'zone of reasonableness'" in its actions and measures, not as ruling on the efficiency of counterterrorism efforts.[26]

Judicial review of executive actions pertaining to counter-terrorism must not be delayed until the crisis passes. President Barak believes it is imperative for the judiciary to ensure that executive actions comport with principles of democracy. Accordingly, they must be evaluated in real time. As Barak has said, "[t]he protection of human rights would be bankrupt if, during armed conflict, the courts—consciously or unconsciously—decided to review the executive branch's behavior only after the period of emergency has ended."[27] If a court postpones reviewing executive actions until the period of emergency or time of crisis has passed, then any ruling issued by the court would not contribute to the rule of law. Rights must be protected when the executive seeks to impinge upon them. Barak notes that, "[j]udicial review of the legality of the war on terrorism may make this war harder in the short term, but it also fortifies and strengthens the

22. *Id.*

23. *Id.*

24. *Id.* at 151.

25. *Id.* (discussing H.C. 168/91, Morcos v. Minister of Def., 45(1) P.D. 467, 470-71, in which a citizen claimed that gas masks were handed out discriminatorily by a military commander, Barak said that the Court addressed only the equality of the distribution of the gas masks, not whether or not the masks should be distributed).

26. *Id.* at 157.

27. *Id.* at 156.

people in the long term."[28]

As will be discussed in section three of this article, President Barak's theory is not an abstraction; rather, it reflects the activist approach adopted by the High Court of Justice. Whether this approach will continue after President Barak's retirement[29] is an issue beyond the scope of this article. The intervention, what others would define as interference, of the High Court of Justice will be examined by analyzing a number of seminal decisions handed down over the past few years.

B. Chief Justice Rehnquist

Whereas President Barak strongly believes in the responsibility of the Supreme Court to review actions of the executive in a timely fashion, the late Chief Justice Rehnquist's approach was markedly different. Chief Justice Rehnquist advocated a hands-off approach unlike President Barak's very hands-on theory. In those rare instances where the judiciary does review the legality of executive actions related to armed conflict, Chief Justice Rehnquist believed the examination should wait until the time of crisis has passed.

Chief Justice Rehnquist neither propounded *inter arma silent leges* (in time of war laws are silent), nor did he believe that the law plays the same role in war as in peace. Unlike President Barak, who forcefully argues that the judiciary should interpret the laws in the same manner regardless of whether it is a time of war, Chief Justice Rehnquist stated that the laws "will speak with a somewhat different voice" during a time of war.[30]

Distinct from the direction taken by the Israeli Supreme Court under President Barak's direction, the U.S. Supreme Court has never interpreted laws equally during times of war and peace. Chief Justice Rehnquist points out that the Supreme Court traditionally gave the executive branch more leeway during war or crisis, particularly World War II.[31] Though recognizing that "the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war,"[32] Chief Justice Rehnquist argued that not all executive actions should be reviewed by the

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28. *Id.* at 158.

29. Mandatory retirement age for judges in Israel is 70, *e.g.*, <elyon1.court.gov.il/eng/judges/judges.html> (visited November 28, 2005); despite various efforts by right-wing members of the Knesset to raise the age to 75, as a means to prevent the appointment of Justice Dorit Benesh to the Presidency, Barak will retire in 2006.

30. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME 225 (Patricia Hass ed., Alfred Knopf, Inc. 1998).

31. *Id.* at 221.

32. *Id.* at 218.

judiciary, especially during a crisis.

Even if a court examines the actions of the executive, the timing of the examination is critical. Courts have a general reluctance "to decide a case against the government on an issue of national security during a war."[33] While President Barak strongly believes an essential duty of the judiciary is to interpret the law identically during war and peace, Chief Justice Rehnquist argued for recognition of "the human factor that inevitably enters into even the most careful judicial decision."[34] Therefore, he implied that postponing decisions until the crisis has passed may be the best option. As an example, Chief Justice Rehnquist referred to *Duncan v. Kahanamoku*, in which the Supreme Court voted to uphold civil liberties *after* World War II ended.[35] By waiting until the completion of World War II to rule on *Duncan*, the Supreme Court was able to uphold civil liberties on record. Similarly, the Supreme Court ruling that Japanese internment was illegal came well after martial law had already ended and American citizens were no longer living in internment camps.[36] Chief Justice Rehnquist questioned whether it may "actually be desirable to avoid decision on" civil liberties during a war or time of crisis.[37]

The difference between the two approaches is palpable. President Barak advocates and practices active judicial review; the late Chief Justice Rehnquist's approach was a much more hesitant, deferential one. They differ not only to the *extent* of judicial review for executive actions, but also the *timing* for when the judiciary should review. The decisions of their respective courts reflect their differing approaches.

III. Comparative Analysis of Theories

A. Israel Introduction

In developing a counterterrorism strategy, Israel's policy and decision makers are confronted by a critical reality—the doors of the High Court of Justice are literally and figuratively open twenty-four hours a day to hear the petitions of aggrieved Palestinians, or those acting on their behalf.[38] A junior military commander intent on conducting a particular operation, a

33. *Id.* at 221.

34. *Id.* at 222.

35. *Id.* at 221 (citing Duncan v. Kahanamoku, 327 U.S. 304 (1946)).

36. *Id.* (citing *Ex Parte* Misuye Endo, 323 U.S. 283 (1944)).

37. *Id.* at 222.

38. See *supra* note 7, regarding the Supreme Court functioning as the High Court of Justice.

senior officer determined to order that an area be a closed military zone, and a noncommissioned officer's decision not to allow someone to pass through a roadblock are all "petitionable" to the Court as they occur. The American standard of standing and justiciability are irrelevant; anyone may petition the Court on behalf of a potentially aggrieved party.

To emphasize the diametric difference between the American and Israeli systems, a petition filed against the Presidential Order establishing military commissions[39] would have, in all probability, been upheld in Israel. Furthermore, Israeli human rights organizations would petition against the alleged human rights abuses in Guantanamo[40] on a regular basis. The Court would likely not only hear the petition, it would issue restraining orders against the Government.

The principle of judicial activism in Israel will be examined by analyzing two petitions filed with the High Court of Justice. The two cases are representative and indicative of the interplay between the executive (which in the West Bank is the IDF),[41] the aggrieved (either a Palestinian who directly petitions or a human rights group petitioning on his behalf), and the Court.

These petitions were filed during the course of the past five years at the height of Palestinian terrorism and Israeli counterterrorism.[42] The Court hearings are not taking place in a vacuum; while the Court adjudicates, the IDF is either planning or engaged in military operations against Palestinian terrorists who similarly are planning their next attack.[43] The three decisions have been chosen because they represent three very different issues that the Court chose to address.

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39. Military commissions are separate from the ordinary court system. They are run by the military and do not follow the principles of law and rules of evidence generally recognized in criminal cases in U.S. federal district courts. For further discussion, see section III(b).

40. As will be discussed later in the article, Guantanamo Bay is where the United States is detaining individuals to be tried by military commissions.

41. This is written post-disengagement from the Gaza Strip and four settlements in the West Bank. Prior to disengagement, the IDF was the executive for the Gaza Strip as well.

42. *See* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319 (2004) (an account of the conflict since October, 2000).

43. *Id.* at 326 (during April, 2002, at the peak of the IDF's "Ebb and Flow" military operation against Palestinian terrorism in Jenin, 42 petitions were filed against the IDF on a wide variety of humanitarian issues including the right of Palestinians to receive their medication, the burial of dead Palestinian terrorists, water and food supplies to the civilian population, house demolitions).

B. United States Introduction

The history of U.S. Supreme Court decisions in wartime is not distinguished.[44] The Supreme Court under the late Chief Justice Rehnquist continued the historical deference given to executive actions in recent terrorism related rulings. Even though the Supreme Court has recently held against the executive in terrorism related cases, it showed continued deference in the tone used in its opinions.

On November 13, 2001, President Bush issued a Military Order establishing military commissions for enemy combatants.[45] The U.S. government chose Guantanamo Bay in Cuba as the site where detainees would be held.[46] Over the course of the next four months, three hundred detainees were transported to Guantanamo Bay[47] for purposes of interrogation and hearings before the military commissions. According to Section Four of the Military Order, a detainee convicted on any charge could appeal only to the President of the United States or the Secretary of Defense.[48] The U.S. government thereby detained hundreds of detainees in Guantanamo Bay[49] while denying them independent judicial review of their status and the danger—if any—they presented to the national security of the United States. Whether the Supreme Court took notice of these developments is unknown; what is clear is that the Court was a non-player in one of the burning issues of the post-9/11 world, namely what legal

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44. *See, e.g.,* Korematsu v. U.S., 323 U.S. 214 (1944) (upholding internment of Japanese-American citizens by deferring to the knowledge and experience of the executive as to what is right during a time of war).

45. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

46. *See* Jim Garamone, *Secretary Defends Guantanamo Bay Detention Center*, Am. Forces Info. Serv., June 14, 2005 (Defense Secretary Donald H. Rumsfeld stated "The detention facility at Guantanamo Bay was established for the simple reason that the United States needed a safe and secure location to detain and interrogate enemy combatants.") at <www.defenselink.mil/news/jun2005/20050614_1726.html> (visited Nov. 6, 2005).

47. Jim Garamone, *Tension Eases at Guantanamo Holding Facility*, Am. Forces Info. Serv., Mar. 1, 2002, at <www.defenselink.mil/news/Mar2002/n03012002_200203012.html> (visited Nov. 6, 2005).

48. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 4(c)(8) (Nov. 16, 2001) ("submission of the record of the trial, including any conviction or sentence, for review and final decision by [the President] or by the Secretary of Defense if so designated by me for that purpose"); *See also* § 7(b)(2) ("the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.").

49. *Rasul*, 124 S. Ct. at 2690.

paradigm would be applied to terrorists.[50] Although the U.S. Supreme Court does not function as a High Court of Justice (unlike the Israeli Supreme Court),[51] the question is whether Chief Justice Rehnquist's philosophy allowed the Administration to know that they could "get away with it."[52] When the Chief Justice writes "there remains a sense that there is some truth to the maxim *inter arma silent leges* at least in the purely descriptive sense,"[53] does the Administration assume that the Court will, if it hears a case on a related matter, issue a ruling in line with the late Chief Justice Rehnquist's philosophy?

If the Israeli model represents one end of the spectrum of judicial activism and the Rehnquist position the other, then it is arguable that the violations of basic detainee rights in Guantanamo Bay were a natural result of judicial acquiescence. The question to be discussed is whether Guantanamo Bay was yet another example of an unfettered executive erring in policy, assisted unwittingly by a judicial philosophy of *inter arma silent leges.*

C. Detainees

The U.S. Supreme Court and the Israeli Supreme Court have both addressed the issue of executive ordered detentions. Both Courts have held the executive detentions problematic, but they have done so using dramatically different methods.

1. Marab v. IDF Commander in the West Bank

With the advent of operation "Ebb and Flow,"[54] the IDF arrested

50. One of the critical issues confronting decision makers, policy makers, and jurists alike is what paradigm should be applied to terrorists; are they to be granted full POW rights, are they to be treated as criminals, or is there a need to develop a third paradigm that is based on the first two?

51. See *supra* note 7, regarding the Israeli Supreme Court functioning as the High Court of Justice.

52. According to confidential sources, President Barak implored the Justices of the U.S. Supreme Court, in particular Chief Justice Rehnquist, to adopt a philosophy of judicial activism. According to these reports, Barak argued that judicial acquiescence in misbegotten executive decisions is more harmful than problematic legislation for legislation can be more easily repealed than the Court would reverse itself.

53. REHNQUIST, *supra* note 32, at 221.

54. Israel Ministry of Foreign Affairs, Statements by Prime Minister Ariel Sharon and Defense Minister Binyamin Ben-Eliezer at Press Conference (Mar. 29, 2002), at <www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2002/Statements+by+PM+Sharon+and+DM+Ben-Eliezer+at+pres.htm> (visited Nov. 28, 2005). After the Passover eve massacre at the Park Hotel in Netanya the IDF undertook a massive operation into the West Bank in order to break up terrorist infrastructures. The operation which

thousands of Palestinians suspected of involvement in terrorism. It was a response to a particularly heinous act of terrorism that resulted in the deaths of thirty Israelis, many of them elderly, who had come to celebrate the Passover meal together.[55] As the military operation had not been planned thoroughly in advance, critical non-combat issues were literally resolved "on the fly." As a result, a wide variety of important issues had not been considered and the issues were left to individual initiative.[56]

One of the issues that had not been properly planned was where to detain the thousands of Palestinians who were being arrested daily. As the detention process developed, the initial screening of detainees was conducted at brigade headquarters;[57] a process which required a significant amount of time, in sometimes questionable conditions.

According to Military Order 378, as amended in 1997, a Palestinian may be held for eight days before seeing a judge.[58] When the IDF realized that the number of detainees who needed to be processed would require a violation of the order, the military commander signed Order 1500 to extend

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included mass calls up of reserve units (the response was reported as 100%) was the largest such IDF operation in years.

55. Israel Ministry of Foreign Affairs, *Passover Suicide Bombing at Park Hotel in Netanya,* Mar. 27, 2002, at <www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Passover%20suicide%20bombing%20at%20Park%20Hotel%20in%20Netanya> (visited Oct. 31, 2005).

56. As an example, this writer was serving as the Commander of the IDF School of Military Law ("SML"); based on a number of hurried phone calls and, at the initiative of a few commanders, the officers of the SML lectured literally around the clock to reserve and obligatory service units alike as they were being deployed into the West Bank on an eleven point code of conduct concerning their conduct vis-à-vis the Palestinian civilian population. This code, based on international law, Israeli law, and the IDF ethical code was later taught via an interactive video developed by the School's officers. This writer was appointed by the Judge Advocate General to be responsible for the JAG's lessons learned and to draft a report that would be the basis for significant internal changes, including the preparation of the "JAG in the box" approach developed by the U.S. Air Force JAG.

57. The military commander of the West Bank is a Brigadier General (in the United States, a one-star) who commands a division. The West Bank is divided by the IDF into a number of brigades, under the command of a colonel.

58. In Israel, according to section 9.3.3 of the Penal Code, a detainee must be brought before a judge within 24 hours. Leslie Sebba, et al., European Institute for Crime Prevention and Control Affiliated with the United Nations, *Israel, Criminal Justice Systems in Europe and North America,* (2003) available at <www.heuni.fi/uploads/j6hs3o3ru64zn5.pdf>. The West Bank and the Gaza Strip have never been annexed to the State of Israel which is why the government is a military government; in addition, the laws of the State do not apply to the two areas. The legislation of the areas is drafted by the officers of the Judge Advocate General Corps and signed into being by the Commander of the Central Command or by the Commander of the Southern Command (both are Major Generals; the equivalent to two-star generals).

the period of time.[59] As a result of this Order, detainees could be held up to eighteen days without seeing a military judge.[60]

A petition was filed against this Order by Iad Ashak Mahmud Marab, a detainee.[61] In the petition and oral arguments, counsel argued that the Order leads to collective detention without judicial review and to prolonged mass detention rather than individual review. Counsel therefore argued the Order was neither preventive nor administrative and violated the principles of proportionality and due process.[62]

The State responded to the petition by arguing that the standard detention law was not suitable for combat situations and the screening of detainees is a time-consuming process. The State argued that keeping detainees from meeting with counsel prevents the passing of messages that endanger soldiers. The State also argued that the detentions were individualized rather than collective, and that they were unique in the context of special circumstances of armed conflict. The State asserted that the standards were proportional and reasonable.[63]

In ruling that the Order was illegal, the Court made a number of arguments. The Court ruled that holding individuals for twelve or eighteen days without bringing them before a judge conflicted with "fundamentals of both international and Israeli law."[64] The Court also held that judicial review is not separate from detention but rather is "an integral part of the detention process" and as such cannot legally be separated.[65] The Court's insistence that judicial review is integral to executive detentions reflects President Barak's belief that the judiciary *can* and *must* review executive actions.

The Court's decision addressed a number of important dilemmas as they were unfolding, that were highly relevant to the rule of law during armed conflict.

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59. Special order: Detention in Time of Warfare (Temporary Order) (Judean and Samaria) (Number 1500)-2002).

60. Palestinians are brought to trial before the Military Court of the West Bank and the Gaza Strip; the judges are career officers in the Military Court unit or lawyers in reserve duty. The prosecutors are officers in the Judge Advocate General Corps. The defense attorneys are civilians (unlike in Guantanamo where detainees are represented by attorneys from the service JAG's).

61. H.C. 3239/02, Marab v. IDF Commander in the West Bank, (2002), available at <elyon1.court.gov.il/files_eng/02/390/032/a04/02032390.a04.pdf>.

62. *Id.* at ¶¶ 8-10.

63. *Id.* at ¶¶ 11-14.

64. *Id.* at ¶ 32.

65. *Id.*

2. Hamdi v. Rumsfeld

Hamdi was an American citizen captured in Afghanistan during the American military campaign.[66] Hamdi was initially placed in detention in Afghanistan and then transferred to Guantanamo Bay. When the United States learned that Hamdi may not have renounced his American citizenship, he was transferred to the Norfolk Naval Station Brig.[67] A petition for writ of habeas corpus was filed on his behalf, challenging the legality of the Government's decision to detain him on U.S. soil as an enemy combatant.[68] Furthermore, Hamdi demanded that he be provided the opportunity to challenge the government's decision to so define him.[69]

The majority opinion in *Hamdi v. Rumsfeld*, written by Justice O'Connor, reviews both international law and constitutional dilemmas.[70] In examining whether the Supreme Court will limit the executive's power, Justice O'Connor's analysis highlights the significantly different approaches of the U.S. Supreme Court and the Israeli Supreme Court, even when similar conclusions are reached. Justice O'Connor writes that the Constitution "assuredly envisions a role for all three branches when individual liberties are at stake."[71] The real issue, of course, is the particular role of the judiciary: when and how should the judiciary be involved?

In *Hamdi*, the government argued for strong separation of powers in which the judiciary would have very limited ability to review executive actions.[72] Furthermore, if the judiciary did review the executive, it must employ a very deferential standard of review.[73] The government's arguments reflected the late Chief Justice Rehnquist's view that the Supreme Court should interpret laws differently in times of war and in times of peace.

Justice O'Connor's opinion highlights the tension between national security considerations and individual civil rights. In balancing the government's and the petitioner's concerns, the judiciary weighs "'the private interest that will be affected by the official action' against the

66. Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003), *rev'd*, 124 U.S. 2633 (2004).

67. *Id.*

68. *Id.*

69. *Id.*

70. Hamdi v. Rumsfeld, 524 U.S. 507 (2004).

71. *Hamdi*, 124 S. Ct. at 2650.

72. *Id.* at 2645.

73. *Id.*

government's asserted interest, 'including the function involved' and the burdens the government would face in providing greater process."[74] Justice O'Connor's opinion analyzes, step by step, the balancing between national security and "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[75]

Unlike President Barak's uncompromising and unapologetic opinions, Justice O'Connor's opinion is diplomatic and tentative. Though the Court limits executive action, Justice O'Connor apologetically details the reasons for ruling in favor of Hamdi, even as she pays respect to the government's arguments and position. Justice O'Connor carefully tries not to diminish the role of the executive branch or discount the executive's national security interests by clearly stating that the government's interest is critical.[76] Justice O'Connor's opinion never explicitly says that the executive is wrong, even as it states that "an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present" an immediate national security threat. Rather, the opinion frames the issue as the executive misbalanced between national security and individual liberties.

While Justice O'Connor states that it is of "great importance"[77] to strike a proper constitutional balance, she never explicitly details that it is the judiciary's duty to make sure that the balance is proper. She states that the court's current analysis of whether balance was achieved must give due weight to concerns of national security and civil liberties, but does not explicitly state, as President Barak would, that the court has a *duty* to check the actions of the executive. Justice O'Connor argues that "we must preserve our commitment at home to the principles for which we fight abroad" without saying exactly what role the courts and the judiciary should play in making sure that commitment is indeed preserved.[78] Compared to Justice O'Connor's language in *Hamdi*, President Barak in *Marab* unequivocally addresses the Court's importance and obligation to ensure the rights of detainees.

Justice O'Connor's opinion also compromises with the executive in a manner that President Barak, as indicated in his writings, would not. While President Barak strongly believes that the Court should analyze the

74. *Id.* at 2646.

75. *Id.*

76. *Id.* at 2647.

77. *Id.* at 2648.

78. *Id.* Justice O'Connor does state the courts have a "time-honored and constitutionally mandated" role in "reviewing and resolving claims like those presented." *Id.* at 2649-2650.

executive in the same manner during a time of crisis as it would in a time of peace, Justice O'Connor reflects the late Chief Justice Rehnquist's idea that the Court should give more deference to the executive in a time of crisis. She writes that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."[79] President Barak's writing clearly supports a belief that the Constitution would and should be offended by a presumption in favor of the executive. President Barak's belief that the judiciary is a guardian of democracy would not comport with Justice O'Connor's rebuttable presumption compromise. Even though the presumption is rebuttable, President Barak's belief would be unlikely to allow any sort of presumption on behalf of the executive.

Justice O'Connor's opinion, while reaching the conclusion that the Supreme Court may indeed engage in judicial activism, does so in a manner that could be described as apologetic or deferential. Unlike the Israeli High Court of Justice, which literally *assumes* that it may intervene in the decisions of the military commander, *Hamdi* suggests that the U.S. Supreme Court is extremely *uncomfortable* in this matter. The Rehnquist Court in *Hamdi* debated whether or not the Court had the power to review the detentions. Barak's Court refuses to entertain the idea that they would *not* have the right. Though the majority in *Hamdi* held that the actions of the executive are indeed subject to judicial review, the style and manner very much suggest otherwise. The philosophical approach advocated by the late Chief Justice Rehnquist is very apparent in the opinion's language, although the result is arguably different from what Chief Justice Rehnquist's writings suggest. He dissented in *Hamdi*, but did not write a separate opinion.

D. Timeliness of the Court's Action

1. Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip[80]

The second issue to be analyzed is an example of the Israeli Supreme Court's immediate response to petitions filed during combat regarding the IDF's responsibility to honor international humanitarian law obligations.

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79. *Id.* at 2649.

80. H.C. 4764/04, Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip, (2004), available at <elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf>.

In response to widespread smuggling of arms and ammunition through an intricate series of tunnels dug between Egypt and the city of Rafah (located in the southern part of the Gaza Strip), the IDF conducted a military operation intended to locate and destroy the tunnels and to weaken the terrorist infrastructure in Rafah.

During the course of the fighting, civilians were injured and the water supply was affected. Complaints were lodged that the IDF was not allowing basic supplies, such as medication, to enter the city.

A petition was filed by Physicians for Human Rights, Association for Civil Rights in Israel, the Center for the Defense of the Individual, and B'Tselem, asking the Court to order the IDF to enable critical humanitarian supplies to be received by the local population and to ensure that the water supply was adequate.[81] Similar to *Marab*, the Court heard the case during the course of the armed conflict. Furthermore, it is important to note that a senior IDF Commander was present in the courtroom so as to be able to respond directly to the Court's questions.

The petition was filed on a Thursday and the hearing was held the following day. An additional question presented—whether the Court should directly intervene in IDF combat operations while IDF soldiers are at risk—must be weighed against the danger to a civilian population similarly at risk.

In response, the State argued that the Court should exercise judicial restraint. The State declared that the operation's goals were to prevent additional arms smuggling and to break up the terrorist infrastructure.[82] The State also argued that humanitarian measures were taking place within the confines of a military operation and that the IDF was attempting to minimize danger to innocent civilians while Palestinian terrorists were using civilians as "human shields."[83]

How did the Court review these issues in the context of combat while attempting to balance between national security and individual rights? The Court stated that it would not rule on the manner in which combat is conducted, as that is the responsibility of military commanders when "soldiers' lives are in danger."[84] The decision of whether or not to take military action is not a judicial question. Rather, the judicial question is whether the operation meets international humanitarian legal obligations.

81. *Id.* at ¶ 7.
82. *Id.* at ¶ 9.
83. *Id.* at ¶ 22.
84. *Id.* at ¶ 16.

The Court assumed that the operations are a military necessity.[85]

In granting a majority of the petitioners' requests, the Court held that rules of conduct must be taught to and internalized by all combat soldiers, regardless of their rank.[86] The Court also required that "procedures be drawn up that allow implementation of these rules, and which allow them to be put into practice during combat."[87] The Court confirms that the military commander has a duty to prevent his troops from "harming lives and dignity of the local residents."[88]

In this case, the Court demonstrates not only its willingness to review executive actions but also the importance of timing. Unlike the late Chief Justice Rehnquist's doubt as to whether a court should necessarily hear a case while the emergency is ongoing, *Physicians for Human Rights* demonstrates Barak's view that contemporaneous review is imperative. Timing was literally a matter of life and death in this case, as the water supply and humanitarian supplies were crucial to the survival of those living in Rafah.

Barak's decision that the case be heard and supplies be allowed into Rafah while IDF soldiers were still involved in combat upholds his belief that laws should be applied equally in times of war and peace. In contrast to the Rehnquist Court's hesitation and deference, Barak unhesitatingly required that supplies be brought into the city, even though the crisis was ongoing and soldiers' lives were at risk.

2. Rasul v. Bush

In *Shafiq Rasul et al. v. George Bush*,[89] the Court was asked to address, "whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."[90] Petitioners were two Australians and twelve Kuwaitis who had been captured in Afghanistan during hostilities with the Taliban and held in military custody at Guantanamo Bay.[91]

Justice Stevens, writing the majority opinion, stated that "[w]hat is presently at stake is only whether the federal courts have jurisdiction to

85. *Id.* at ¶ 17.
86. *Id.* at ¶ 66.
87. *Id.*
88. *Id.*
89. *Rasul*, 124 S.Ct. at 2686.
90. *Id.* at 2690.
91. *Id.*

determine the legality of the Executive's potentially indefinite detention of individuals . . . ."[92] The very narrow question that the Court addresses demonstrates deference to the executive. Such an approach enabled the Rehnquist Court to rule against the executive without limiting executive actions as much as the HCJ limits the Israeli executive. Even though the Court ultimately held against the executive in *Rasul*, it did so in a narrow manner.

Justice Stevens' opinion starts with a brief description of the September 11th attacks on the United States.[93] By including details about the attacks and the damage caused by them, Justice Stevens subtly acknowledges the national security concerns of the executive. Unlike Justice O'Connor's direct acknowledgement of the concerns and arguments of the executive, Justice Stevens only implies the strength of the executive's argument, stating that the President acted pursuant to Congressional authorization.[94]

Justice Stevens explicitly states that the federal judiciary does indeed have the jurisdiction to decide the legality of executive actions. He neither states it apologetically nor does he place emphasis on the government's arguments. Unlike Justice O'Connor, who repeatedly emphasized the executive's legitimate concerns, Justice Stevens focuses on why the judiciary has jurisdiction without giving undue credence to the arguments of the government. Justice Stevens' opinion shows more deference to the executive than President Barak would have, and yet much less deference than Justice O'Connor did in *Hamdi*. The tone of Justice Stevens' opinion shows that the Court seems to have started moving away from strict adherence to Chief Justice Rehnquist's views. However, the timing of *Rasul* conforms with the late Chief Justice's views on when judicial review should occur.

As discussed earlier, Chief Justice Rehnquist questioned whether it may "actually be desirable to avoid decision on" civil liberties cases during a war or time of crisis, precisely because he believed courts were more likely to rule favorably on civil liberty issues after the war is over.[95] Perhaps most indicative of Rehnquist's views are the cases that are not brought before the Court. Out of the hundreds of detainees held at Guantanamo Bay, very few cases have reached the Supreme Court. Chief Justice Rehnquist "believed that the court should reserve its time and effort

92. *Id.* at 2699.
93. *Id.* at 2690.
94. *Id.*
95. REHNQUIST, *supra* note 30, at 222.

for cases of national importance that absolutely require its attention."[96]

Unlike the U.S. Supreme Court, which heard Guantanamo Bay cases, such as *Rasul*, three years after the military commissions were implemented, the HCJ heard *Marab* while the IDF was continuing to detain Palestinian terrorists and heard *Physicians for Human Rights* while the conflict was ongoing. Therefore, solutions needed to be developed and implemented while the Court heard arguments. The U.S. Supreme Court, as illustrated through both *Rasul* and *Hamdi*, demonstrates the seeming unwillingness of the Court to respond contemporaneously, and directly reflects Chief Justice Rehnquist's idea that some cases should not be heard during the time of crisis. Decisions of the Court in response to ongoing counterterrorism actions by the executive are the essence of judicial activism.

IV. Conclusion

As described above, President Barak and the late Chief Justice Rehnquist had very different views on judicial review of executive actions and these views were reflected in the opinions of their Courts. Even though they may have agreed on some of the outcomes in the above cases, President Barak and Chief Justice Rehnquist had different means of reaching those ends. It will be most interesting to see what directions the Israeli Supreme Court and U.S. Supreme Court take in the future. Within the next year, both Courts will be under new leadership. The key question for both Courts is whether they will adhere to the theories of their former leaders or whether changes and adjustments will be made. The U.S. Supreme Court has already begun this process as a new Chief Justice, John Roberts, has been confirmed. It is unknown at this time what this will mean for the U.S. Supreme Court's continued deference to the executive on issues of national security—will the Court continue as when Rehnquist was the Chief Justice or will Chief Justice Roberts assume a role more similar to that of President Barak? President Barak himself will retire next year and the Israeli Supreme Court will then face a similar question—will the Israel Supreme Court continue to be as willing to review executive actions regarding armed conflict as they occur? The issue of judicial review on issues regarding armed conflict, whether review should exist and when it should take place, will thus have to be addressed by the new leadership of each court.

96. Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court*, WASH. POST, Sept. 5, 2005, at A8.