UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZIA UR-RAHMAN, *et. al.*,

Petitioners,

v.

ROBERT GATES, *et. al.*

Respondents.

Civil Action No. 10-CV-320 (EGS)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI[1]

In an interdependent world threatened by transnational terrorism and linked by converging rule-of-law norms, all peoples are affected by the process the United States affords to foreign nationals who fall under its control in wartime. The United States and Israel share a strong commitment to the rule of law. Further, as much as any other nation, Israel has a vital stake in assuring that the United States pursues its war against terrorism successfully within the bounds of the law. Israel also has decades of experience that bears directly on the issues posed in this case: Israel guarantees detainees—including unlawful combatants captured in war on foreign soil—unimpeded, fully independent judicial review within fourteen days, access to counsel within thirty-four days, and periodic review of the basis for their detention, in a fully adversarial proceeding, at least once every six months.

As specialists in Israeli military law and constitutional law, *amici* draw on Israel's experience in urging this Court to ensure that Petitioner and other detainees at the United States military base at Bagram Airfield are afforded prompt, independent judicial review of the basis for their detention. *Amici* are:

Amichai Cohen, Senior Lecturer at Ono Academic College – Faculty of Law, Israel; Adjunct Lecturer at Hebrew University, Tel Aviv University, and Bar Ilan University;

Emanuel Gross, Professor of Law at the University of Haifa; Colonel (ret.) Israel Defense Forces, military lawyer and military judge (1967-1970, 1972-1993); President of the Military Tribunal for the Southern Command (Gaza) (1987-1993);

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[1] This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief.

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SUMMARY OF ARGUMENT

Judicial review of executive and military detention, the indispensable core of habeas corpus, need not be sacrificed in a theater of war. Since its inception Israel has grappled with how to handle security detainees and prisoners of war, including alleged unlawful combatants, and has consistently found that even such prisoners must be afforded the opportunity for prompt, independent judicial review of the factual basis for their confinement, regardless of their detention location. Israeli experience demonstrates that judicial review in a theater of war does not present insurmountable "practical obstacles," and that judicial review of detainees at Bagram would not compromise military operations. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

From its founding in 1948 to the present day, Israel has continuously been at war with one or more nations, has faced mortal threats to its national survival, and has been the target of

countless acts of terrorism against its civilian population, with devastating losses of life. As the Israeli Supreme Court has noted, as a "background" to their laws regarding the detention of enemy combatants and terrorists is "the harsh reality of murderous terrorism, which has for many years plagued the inhabitants of the state, harmed the innocent and indiscriminately taken the lives of civilians and servicemen, the young and old, women and children." CrimA 6659/06, 1757/07, 8228/07, 3261/08 *Anonymous v. State of Israel* [2007], ¶ 6, *available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.[2] Yet, in the face of these daunting national security challenges, Israel has maintained its commitment to unimpeded judicial review of detention, recognizing that "human rights are constantly threatened by the war-like situation." Asher Moaz, *Defending Civil Liberties Without a Constitution—The Israeli Experience*, 16 Melb. U. L. Rev. 815, 829 (1988). Israel has ensured that prompt access to its courts extends not only to criminal suspects but also to security detainees and unlawful combatants, regardless of nationality, including those seized in territories under military occupation or captured in a theater of war on foreign soil. All detainees, including unlawful combatants held outside of Israel, have access to counsel within a matter of weeks at most, and all have the right to have their detention reviewed promptly by an independent judicial authority empowered to order release when warranted.

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[2] In this brief, citations to Israeli Supreme Court decisions identify the procedural role played by the Israeli Supreme Court; the case number; the case name; the year of the decision; the volume and part of the official reporter, Piskei Din; the first page of the case; and the page or paragraph cited. The Israeli Supreme Court functions as a Court of Appeals, hearing both civil appeals and criminal appeals from Israel's five district courts, and serves as a High Court of Justice, hearing constitutional and administrative cases in the first instance. Citations to decisions of the Israeli Supreme Court identify whether the Court was hearing a civil appeal ("CA"), a criminal appeal ("CrimA"), an administrative detention appeal ("ADA"), or was acting as the High Court of Justice ("HCJ").

In the midst of ongoing hostilities and warfare, Israel has effectively provided detainees with judicial review and access to counsel without compromising military operations in the occupied territories or abroad. For example, Israeli experience with judicial review of Hezbollah combatants seized in Lebanon demonstrates that these rights may be provided in a theater of war without "hamper[ing] the war effort." *Johnson v. Eisenstrager*, 339 U.S. 763, 779 (1950). Similarly, although the Government argues that hostilities including rocket attacks and suicide bombing attempts at Bagram impose overwhelming "practical obstacles" to judicial review, Motion to Dismiss at 5, quoting *Boumediene*, 553 U.S. at 766 (2008), similar threats have not dissuaded Israel from providing procedural guarantees to detainees in the zone of hostilities. In operations on the West Bank in May of 2002, the Israel Defense Forces ("IDF") seized nearly 7000 suspected enemy combatants, quickly processed and released over 5000, and gave the remaining 1600 suspects access to defense counsel and to independent courts within a matter of weeks.[3] The United States, with vastly greater resources, could surely provide comparable process to the far fewer detainees in Bagram without impairing the conduct of military operations.

ARGUMENT

A. For decades, Israel has faced an unremitting, mortal threat to its survival, with ongoing hostilities in the occupied territories and on foreign soil.

Though well known, Israel's security problems bear emphasis. From its founding in 1948 to the present day, the State has been formally at war with one or more nations on its immediate borders. In addition, it has confronted active insurgencies against its occupation forces in the West Bank and Gaza, and it has been the frequent target of lethal suicide bombings

[3] HCJ 3239/02 *Marab v. IDF Commander in the West Bank* [2003] IsrSC 57(2) 349, ¶ 1.

in the civilian population centers of Israel itself.[4] Such attacks have caused enormous casualties and widespread disruption and fear in civilian life.

For a small country, the scale of these losses remains staggering, even against the background of the attacks of September 11, 2001. Since January 2001, terror attacks have claimed the lives of 1,135 Israelis.[5] On a per capita basis,[6] those casualties and injuries would translate to approximately 47,000 American deaths over the same period.

The terrorist organizations confronting the United States and Israel pose similar threats to each country. Much as Al Qaeda has expressed that America "has declared war against God" and that "the murder of any American, military or civilian" was a "duty,"[7] Israelis believe that terrorist organizations responsible for the attacks against Israeli civilians and military personnel "have set Israel's annihilation as their goal," literally the complete destruction of the State of

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[4] *See generally* Asher Moaz, *War and Peace—An Israeli Perspective*, 14(2) Const. F. 35 (2005).

[5] *See* State of Israel, Ministry of Foreign Affairs, Victims of Palestinian Violence and Terror since September 2000, http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink") (last visited Mar. 9, 2011) (providing bar graphs and a chronological summary of casualties); *see also* Israel Defense Forces Spokesman, Main Terrorist Attacks Against Israeli Civilians and IDF Soldiers since the Onset of Ebb and Flow, *available at* http://www.mfa.gov.il/MFA (follow "Terrorism: Terror since 2000" hyperlink; then follow "Victims of Palestinian Violence and Terror since September 2000" hyperlink; then follow "Main terrorist attacks against Israeli civilians and IDF soldiers since Sept 2000 (IDF Spokesman)" hyperlink) (chronicling over 120 terrorist attacks since 2000) (last visited Mar. 9, 2011).

[6] Based on an Israeli population of 7.4 million and an American population of 313 million. *See* State of Israel, Ministry of Foreign Affairs, Israel in Brief, http://www.mfa.gov.il/MFA (follow "Facts About Israel: Israel in Brief" hyperlink) (last visited Mar. 9, 2011); U.S. Census Bureau, Population Estimates—National, *available at* http://www.census.gov/popest/states/NST-ann-est.html (follow "Excel" hyperlink) (last visited Mar. 9, 2011).

[7] *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 551 (E.D.Va. 2007) (quoting Feb. 23, 1998 fatwa of Osama Bin Laden).

Israel. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 1. Moreover, the threat to Israel is perceived in highly personal terms. As a former Israeli Attorney General noted, "Israel is much more vulnerable [than other nations]. . . . In our case, the danger extends not only to national existence, but to our very survival as individuals. The Holocaust, which decimated the Jewish people a short time ago, lends an awesome reality to the danger." Itzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375, 376 (1989). For the Justices of the Supreme Court, that threat is very real. As former President of the Israeli Supreme Court Aharon Barak has put it, "Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror." HCJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Israel* [2004] IsrSC 58(5) 807, ¶ 86. From the Israeli perspective, both national and individual survival require the strongest antiterrorism responses compatible with law. The circumstances Israel faces leave little, if any, room for avoidable risks or mistakes.

Amici acknowledge that the D.C. Circuit Court of Appeals held that U.S. Courts did not have subject matter jurisdiction over habeas petitions brought by detainees held at Bagram Airfield in *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). However, the Court of Appeals based its decision in *Al Maqaleh* on its application of the *Boumediene* factors, and the results of such application is necessarily altered by substantial changes that have occurred at Bagram since *Al Maqaleh* was decided. As Petitioners' Opposition to Respondents' Motion to Dismiss establishes, new evidence at Bagram—principally the United States military's hosting of Afghan civilian criminal trials of detainees at Bagram—is in accord with Israeli experience that fundamental rights of detainees can be protected, even in a time of war.

While Bagram has altered its detainee review procedures from those reviewed by the Court of Appeals in *Al Maqaleh*, the new procedures fall short of the safeguards guaranteed by Israeli law and shown by Israeli experience to be practical even in a time of armed conflict. Unlike Israel's procedure, the detainee review procedure at Bagram still, among other inadequacies: (1) does not permit representation of detainees by counsel; (2) utilizes Detainee Review Boards ("DRBs") which are not independent of the Commander in control of detention and correction operations at Bagram; (3) does not permit appeal by the detainees; (4) does not provide the right to challenge the U.S. government's determination that material relevant to the detention decision should remain classified (and, therefore, unavailable to the detainees themselves); (5) does not provide for independent appellate review; and (6) grants the Commander absolute (and unreviewable) discretion to hold detainees even after a DRB determines the detainee should be released .[8]

B. Despite this unremitting terrorist threat, Israeli courts have discerned no practical obstacle to exercising jurisdiction and guaranteeing the rule of law, even during active hostilities in the occupied territories and on foreign soil.

Access to the Israeli courts is never refused simply because of the personal status or geographical location of the petitioner. Alleged unlawful combatants and enemy aliens, even when seized in combat on foreign soil, retain the right to be treated in accordance with the rule of law and are always entitled to access to Israeli courts. *See generally, e.g.*, HCJ 4219/02 *Gussin v. IDF Commander in the Gaza Strip* [2002] IsrSC 56(4) 608 (Heb.) (claims regarding the demolition of homes); HCJ 5591/02 *Yassin v. Commander of Kziot Military Camp* [2002] IsrSC 57(1) 403 (claims of suspected Palestinian terrorists challenging detention conditions at Kziot detention facility). The Israeli Supreme Court applies this principle not only within the occupied

[8] In order to emphasize the significant features of the Israeli regime, we attach as Exhibit 1 a chart contrasting Israeli law, on which the *amici* are experts, with United States law.

territories but also to IDF actions on enemy soil, in Lebanon for example. *See generally, e.g.*, CrimA 8780/06, 8984/06 *Srur v. State of Israel* [2006] IsrSC (unpublished) (Heb.) (claims of Hezbollah fighters captured during IDF 2006 combat operations in southern Lebanon considered and rejected on merits); HCJ 4887/98 *Assaf v. State of Israel* [1998] IsrSC (unpublished) (Heb.) (claims of Lebanese citizens arrested by South Lebanon Army and held on Lebanese soil considered and rejected on merits); HCJ 574/82 *Al Nawar v. Minister of Defense* [1985] IsrSC 39(3) 449 (Heb.) (civil suit by Lebanese national for injuries sustained during IDF combat operations in Lebanon considered and rejected on merits).

For decades, the Israeli Supreme Court's guiding principle has been that, even in combat, "there is no more potent weapon than the rule of law. . . . This court will never accept the contention that while [exercising] power on behalf of the State anywhere in the world, a soldier or civil servant might repudiate these standards . . . ." HCJ 320/80 *Kawasme v. Minister of Defense* [1980] IsrSC 35(3) 113, 127, 132 (Heb.). The Court continues to endorse this approach, as epitomized by its recent holding that segments of the security fence constructed along Israeli-Palestinian borders are unlawful, despite the fact that the fence was designed to prevent terrorist penetration into Israeli territory in a context of armed conflict. *Beit Sourik*, 58(5) ¶¶ 60-62. The Court there ruled that all Israeli soldiers, even when acting outside the State's territory, are exercising State authority and thus must remain within the limits on that authority. *Id.* ¶ 24. As Chief Justice Barak expressed:

> [E]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law. . . . There is no security without law.

Id. ¶¶ 24, 86 (internal quotations and citation omitted).

C. As Israel's experience illustrates, providing prompt access to independent judicial review is practical even under the most demanding circumstances.

The regime of prompt, robust, independent judicial review has proved workable even in Israel's distinctively difficult and dangerous situation. As a result, judicial oversight is endorsed not only by Israel's courts, but also by its executive authorities as well. The Israeli Ministry of Justice emphatically supports the principle that "special standards of judicial supervision must apply to ensure that the power to use this measure [of administrative detention] is not abused." State of Israel, Ministry of Justice, Foreign Relations & Int'l Org. Dep't, The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism 2 (March 2003) [hereinafter Ministry of Justice, The Legal Framework].

Israel has not found it impracticable to provide independent judicial review despite the fact that hostilities in the occupied territories and on foreign soil have been active and ongoing in recent years. Terrorist attacks continue to occur in the occupied territories to this day.[9] There were large-scale Israeli military operations in the Gaza Strip in 2004, 2006, 2007, 2008, and 2009, and in Lebanon in 2006.[10] In spite of these ongoing conflicts, the Israeli Supreme Court recently held, in a case in which "the petitions were filed while the hostilities were still taking

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[9] *See, e.g.*, Amos Harel, *IDF increases West Bank presence following Itamar terror attack*, HAARETZ, Mar. 14, 2011, *available at* http://www.haaretz.com/print-edition/news/idf-increases-west-bank-presence-following-itamar-terror-attack-1.349017 (detailing alleged terrorist attack on settlement family, including murder of three-month-old infant).

[10] *See, e.g.*, Chris McGreal, *Sharon vows to step up assault on Gaza strip as death toll rises,* THE GUARDIAN, Oct. 4, 2004, *available at* http://www.guardian.co.uk/world/2004/oct/04/israel; Amos Harel, *Troops, tanks enter ruins of 3 former settlements,* HAARETZ, July 5, 2006, *available at* http://www.haaretz.com/news/troops-tanks-enter-ruins-of-3-former-settlements-1.192231; Nidal al-Mughrabi, *Israel pushes Gaza offensive amid rocket attacks,* REUTERS, May 26, 2007, *available at* http://www.reuters.com/article/2007/05/26/us-palestinians-israel-idUSL1731780720070526; Rory McCarthy, *Israeli troops and Hamas fighters clash in streets of Gaza City,* THE GUARDIAN, Jan. 5, 2009, *available at* http://www.guardian.co.uk/world/2009/jan/05/israel-palestine-gaza-attacks; Kathy Gannon, *Israeli Forces Push Deeper Into Lebanon,* THE WASHINGTON POST, July 24, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/07/24/AR2006072400597.html.

place in the area," that "it is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines – both within the context of Israeli law and within the context of international humanitarian law – is being upheld." HCJ 201/09 *Physicians for Human Rights v. Prime Minister of Israel,* [2009] ¶¶ 12-13, *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

The viability of Israel's regime was demonstrated most strikingly during large-scale military operations on the West Bank in 2002. In an effort (known as "Operation Defensive Wall") to sweep up suspected terrorists hiding amidst the civilian population, the IDF moved heavy armor and thousands of troops into the area beginning in March 2002. Within a few months, the IDF had detained nearly 7000 people. After initial screening, many were released, while others were moved to detention facilities for further investigation. By May 15, 2002, more than 5000 detainees had been released and 1600 remained in detention. *See generally Marab*, 57(2) ¶ 1.

As the IDF was finding it difficult to process all detainees within the then-applicable eight-day limit on detention prior to judicial review, a new regulation, Order 1500, was promulgated to regularize the situation. But the new regulation did not go so far as suspending entirely the right to independent judicial review. Rather, the extraordinary influx of detainees prompted IDF commanders to extend the permissible period of extra-judicial detention only from eight days to eighteen. Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). Moreover, two months later, a new IDF Order reduced the maximum delay prior to a judicial hearing from

eighteen days to twelve. Detention in Time of Warfare (Temporary Order) (Amend. No. 2) (Judea and Samaria) (Number 1505)-2002 (Heb.), *cited in Marab*, 57(2) ¶ 6.

Although these delays in affording access to courts—from eight days to eighteen and later back down to twelve—are insignificant by Bagram standards, they were intensely controversial in Israel. Ultimately, the Israeli Supreme Court held the added delays to be violations of the rule of law, unacceptable even under the unusual combat conditions confronting the IDF in 2002. *Marab*, 57(2) ¶ 36. The Court's central premise was that "judicial review of detention proceedings [is] essential for the protection of individual liberty." *Marab*, 57(2) ¶ 32. The Court found in international law a clear governing principle: "[d]elays must not exceed a few days," as even an alleged unlawful combatant "is to be brought promptly before a judge." *Marab*, 57(2) ¶ 27 (citation omitted).

The Israeli Supreme Court did not ignore the practical constraints of warfare. Noting that "police detention is not the same as detention carried out during warfare in the area," and that it cannot be "demanded that a judge accompany the fighting forces," the Court held that judicial intervention could be postponed, but only "until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly." *Marab*, 57(2) ¶ 30 (internal quotations omitted).

Nor did the Court overlook the obstacles of resources and manpower. The Court acknowledged that factual investigation cannot be performed during military operations, that some time may be required to organize investigations of large numbers of detainees, and that qualified investigators may be in short supply. *Marab*, 57(2) ¶ 33. Nonetheless, the Court held that the military bears an obligation to take the steps necessary to permit investigations to begin promptly:

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

Marab, 57(2) ¶ 48 (quoting HCJ 6055/95 *Tzemach v. Minister of Defense* [1999] IsrSC 53(5) 241, 261). In similar fashion, the Court rejected the suggestion that difficulty in arranging more judges could justify a delay in judicial review:

> The current emergency conditions undoubtedly demanded large-scale deployment of forces . . . . However, by the same standards, effort and resources must be invested into the protection of the detainees' rights, and the scope of judicial review should be broadened.

Marab, 57(2) ¶ 35 (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801, 821).

Without setting a specific deadline for judicial review, the Court in *Marab* suspended its ruling for six months to permit the military to implement a more expeditious system. *Marab*, 57(2) ¶ 36. In subsequent regulations, the IDF provided for a judicial hearing within eight days of detention, in effect reinstituting the eight-day period that had been in force before. Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.). Since then, the IDF has managed its detention and judicial review processes within this eight-day limit, without reported difficulty.

D. Despite great danger, active and ongoing hostilities, and pressing needs for intelligence, Israel affords all detainees prompt, independent judicial review of their detention, protected by procedural safeguards and aided by access to counsel.

The Israeli experience demonstrates a democratic society's capacity to develop a practical, workable system of judicial review of detention orders, notwithstanding powerful

countervailing interests of national security, including active hostilities in the occupied territories and on foreign soil. Far from being anomalous, Israel's decision to extend substantive and procedural safeguards to detainees—including alleged enemy combatants—places Israel squarely within the customary practices of the democratic world. *See* HCJ 3514/97 *Anonymous v. State of Israel*, ¶ 9 ("[W]e should do our best to interpret the existing laws in a manner that is consistent with the new realities and the principles of international humanitarian law."); *see also infra* notes 11, 15-18 and accompanying text; *Cf. Boumedienne,* 553 U.S. at 798 ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.").

Under Israeli law, all detainees, regardless of nationality or the circumstances of their seizure, have a right of access to counsel and to independent courts empowered to review the basis for their detention and, when warranted, to order their release. This is true even when such judicial review would be taking place amidst continuing terrorist attacks or large-scale Israeli military operations. In the words of the Ministry of Justice, "[A] detainee always has access to a court empowered to rule without delay on the lawfulness of his detention." Ministry of Justice, The Legal Framework, *supra*, at 4. If the Israeli court finds no basis for detention, or if it concludes that alternative means would suffice to meet the State's security needs, the Israeli court will order the detainee's immediate release.

Israeli law establishes several distinct regimes regarding the treatment of administrative detainees. The regimes that govern within the State of Israel proper are distinct from those which apply in the occupied territories, as these areas (portions of the West Bank and, until recently, Gaza) are under military administration and are juridically distinct from Israel itself. In

both cases, the rules applicable to criminal prosecution can differ from those applicable to administrative detention. In 2002, Israel also enacted a distinct framework for detention of "unlawful combatants," regardless of their place of seizure.

As described below, each of these regimes—even those which govern detentions in the occupied territories, and detentions of unlawful combatants—protects basic rights that the United States Government denies to Bagram detainees. Specifically, individuals detained by Israeli civilian or military authorities always have (1) the right to judicial review of the basis for their detention within no more than fourteen days of their seizure; (2) the right to have that review conducted by a judicial officer independent of the executive who is empowered, when the evidence warrants, to order their release; (3) the benefit of a standard that permits detention only when an individual poses a threat to State security and when no other means are available to neutralize that threat; (4) the right to have the government's evidence subjected to a searching examination by the court; (5) the right to judicial review without having coerced testimony used against them; (6) the right to have a judge independently evaluate any claim that classified information offered to support detention cannot be disclosed to them; (7) the right of access to counsel within no more than thirty-four days; and (8) the right to have the basis for their detention independently reviewed every six months at a fully adversarial hearing. Though the United States affords Bagram detainees none of these safeguards, Israel has proved through experience that each of them is practical and that each of them is essential to maintaining the rule of law. *See* Ex. 1.

1. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review of the basis for their detention within no more than 14 days of their seizure, even in the occupied territories.

Providing access to a judicial forum, to afford an independent check on executive power to incarcerate the individual, is an obligation incumbent on a civilized society and is one of the

most long-standing and fundamental elements of the rule of law.[11] The Israeli Supreme Court, observing that, "[j]udicial intervention stands before arbitrariness; it is essential to the principle of rule of law," *Marab*, 57(2) ¶ 26,[12] has scrupulously and consistently enforced this right. Israel provides this judicial review despite the fact that terrorist attacks, large-scale military operations, and active hostilities have been ongoing in the occupied territories throughout this period.

Criminal suspects and administrative detainees in the occupied territories. In the occupied territories, criminal prosecution and administrative detention are governed by military orders and are supervised by military courts. Under both frameworks, the initial appearance in court and judicial review can be deferred for up to eight days. *Marab*, 57(2) ¶¶ 5, 29, 36.

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[11] *See, e.g.*, Int'l Covenant on Civil & Political Rights ("ICCPR"), art. 9, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added)); Office of the United Nations Treaty Collection, Int'l Covenant on Civil & Political Rights, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 9, 2011) (noting that the United States ratified the ICCPR on June 8, 1992); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 56 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), for the proposition that States must provide a determination of probable cause by a judicial officer either before or promptly after an arrest, and concluding that such determinations, when conducted within forty-eight hours of arrest, generally comply with the U.S. Constitution). This principle is consistent with those set forth by European nations. *See, e.g.*, European Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, arts. 5-3, 5-4, 213 U.N.T.S. 221 ("Everyone arrested or detained . . . shall be brought promptly before a judge [to have] the lawfulness of [their] detention . . . decided speedily by a court."); *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep. 553, ¶¶ 70, 78, 81 (1996) (extra-judicial detention for periods exceeding fourteen days is impermissible even in responding to terrorist threats that constitute a "public emergency threatening the life of the nation"); *Brogan v. United Kingdom*, App. No. 11209/84, 11 Eur. H.R. Rep. 117, ¶ 58 (1988) ("Judicial control of interferences by the executive with the individual's right to liberty is . . . one of the fundamental principles of a democratic society.") (internal quotation marks omitted).

[12] The official English translation of the Israeli Supreme Court's decision in *Marab* has been attached as Exhibit 2.

In the occupied territories, detention orders upheld at the first judicial hearing are subject to appeal to a court of appeals,[13] and the detainee may petition for further review in the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4. At both appellate levels, review is *de novo*: the appellate judges examine the strength of the evidence and determine whether the need for continued detention on balance outweighs the liberty interest of the detainee. *Id.* at 4-5; *see also infra* Sections D.3. & D.4.

Unlawful combatants in the occupied territories. Since 2002, unlawful combatants can be held under a regime that traces its history back to a 2000 Israeli Supreme Court decision spawned by the shooting down of an Israeli aviator over Lebanon in 1986, his seizure by a terrorist group, and the subsequent Israeli government attempt to gain his release in exchange for Lebanese detainees held in administrative detention.

The Lebanese citizens, who had been captured in southern Lebanon, were being held under EPDL administrative detention orders which were about to expire, and to make the offer to exchange these prisoners possible, the Israeli government first had to confirm its right to continue holding them. The government attempted to do so by arguing that "reasons of State security" (EPDL § 2)—namely, the possible negotiation of an exchange for the Israeli aviator—required that the Lebanese citizens be detained. The Israeli Supreme Court ruled, however, that no person (even a former enemy combatant) could be detained under the EPDL unless that person himself posed a security threat, even if his detention was otherwise useful to State security as a means of facilitating a prisoner exchange. CrimA 7048/97 *Anonymous v. Minister of Defense* [2000] IsrSC 54(1) 721, 743 (Heb.), *discussed in* Gross, *Bargaining Chips*, at 727 & n.25. Pursuant to the court's order, the government was required to release the Lebanese

[13] In the occupied territories, the appellate court is a military court of appeals, staffed, as in the case of military trial courts, by judges independent of the executive. *See infra* Section D.2.

prisoners. *Id.*; Emanuel Gross, The Struggle of Democracy Against Terrorism 121 (2006) [hereinafter Gross, The Struggle of Democracy]; Gross, *Bargaining Chips*, *supra*, at 721-36 (summarizing, in English, the decision in *Anonymous v. Minister of Defense*).

In the wake of this decision, the Knesset (the Israeli Parliament) enacted the Incarceration of Unlawful Combatants Law, 5762-2002, (Isr.) [hereinafter "UCL"],[14] to provide a basis for detaining enemy combatants where the EPDL might not apply. Under the UCL, the Chief of General Staff of the Israel Defense Forces may designate as an unlawful combatant "a person [not entitled to prisoner-of-war status] who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel." UCL § 2. When the Chief of General Staff finds that such a person will harm State security, he is authorized to issue a detention order. *Id.* § 3(a). The detainee must be brought before a district court (civilian) judge no later than fourteen days after the order is issued, and the judge must order the person's release unless he finds "reasonable cause to believe that [the detainee] is an unlawful combatant and that his release will harm State security." *Id.* §§ 3(a), 5(a). Each order of detention can be appealed within thirty days to a Justice of the Israeli Supreme Court. *Id.* § 5(d).

As a result of the UCL, unlawful combatants can be denied judicial review for longer periods than other detainees, who are entitled to judicial review within two days (in Israel) or eight days (on the West Bank). The fourteen days of detention prior to judicial review permitted in the case of unlawful combatants is long by Israeli standards and has been controversial.[15] By

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[14] Available at http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish (select document icon next to "Incarceration of Unlawful Combatants Law, 5762-2002").

[15] Indeed, Israel's fourteen-day limit on the denial of judicial review is lengthier than what is permitted by the European Court of Human Rights. That court has held that detentions of seven

comparison, in this case the Petitioner (and others) have been held at Bagram for several years without a judicial hearing on the factual claims underlying their detention. *See Boumedienne*, 553 U.S. at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."); *see also Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) ("Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus.").

2. Unlike the United States, Israel provides suspected unlawful combatants the right to judicial review in a tribunal independent from the executive.

It is not sufficient simply for the detainee to be brought before a judicial officer; rather, the rule of law demands that a judicial officer be independent from the executive and imbued with the power to order release. "Th[e] public officer must be independent of the investigators and prosecutors. He must be free of any bias. He must be authorized to order the release of the detainee." *Marab*, 57(2) ¶ 35. Again, Israel scrupulously respects this right.

Criminal suspects, administrative detainees, and unlawful combatants in the occupied territories. The occupied territories are under military administration and the relevant courts, even for ordinary criminal cases, are military courts. *See generally* Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza (2005). Nonetheless, Israeli military judges are fully independent. Israeli military judges are appointed and promoted by a selection committee headed by the Military Advocate General ("MAG")—a senior officer roughly comparable in status to the Judge Advocate General of the United States Army—or by

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days under a state of emergency are only justifiable when other safeguards are in place, including the remedy of habeas corpus and the right to consult with an attorney after forty-eight hours. *Askoy*, 23 Eur. Ct. H.R. 553, ¶¶ 82-83; *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89, 14554/89, 17 Eur. Ct. H.R. 539, ¶¶ 62-66 (1993).

the Deputy MAG. *See* Hajjar, *supra,* at 254. The selection committee is composed primarily of senior military appeals judges, and it also includes a civilian elected by the Israel Bar Association. Only two of the seven members of the selection committee are Israel Defense Forces staff officers outside the ranks of the civilian or military bar. *See, e.g.*, Detention in Time of Warfare (Temporary Order) (Amend. No. 87) (Judea and Samaria) (Number 1500)-2003, art. 78E1 (Heb.). Reinforcing the independence of the trial and appellate judges in the occupied territories, many of them are reservists satisfying their active duty obligations before returning to private life as civilian lawyers or law professors; at any given time, roughly 80% of the sitting military judges are reservists. Hajjar, *supra*, at 254. As the Israeli Supreme Court has noted, military courts sitting in the occupied territories unquestionably qualify as judicial officers "independent of the investigators and prosecutors." *Marab*, 57(2) ¶ 35.[16] Further, the decisions of military courts are reviewable by other courts, including by the Israeli Supreme Court. *See, e.g.*, HCJ 3514/97 *Anonymous v. State of Israel*, ¶ 2-3 (discussing review by Tel-Aviv District Court of decision regarding detention pursuant to Israel's Internment of Unlawful Combatant's Law by Gaza Military Court, followed by appeal to Israeli Supreme Court).

Unlike Israeli military judges, members of the Detainee Review Boards ("DRB") at Bagram appear to lack such independence. While the DRB Order states that such members must be "neutral," *i.e.*, not involved in the capture or transfer of the detainee in question, the Order

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[16] Again, Israel's insistence on guaranteeing the independence of military judges comports with rule-of-law imperatives recognized throughout the democratic world. The European Court of Human Rights, for example, has held that the kind of tribunal required for review of detention must be "independent . . . of the executive" and must afford "the guarantees of judicial procedure." *De Wilde, Ooms & Versyp v. Belgium*, App Nos. 2832/66, 2835/66, 2899/66, 1 Eur. Ct. H.R. 373, ¶¶ 76, 77 (1971). That court has applied this requirement to military as well as civilian courts and has invalidated countries' courts-martial procedures where they permit trial of soldiers by judges serving within the military chain of command. *De Jong, Baljet & van den Brink v. The Netherlands*, App. Nos.8805/79, 8806/79, 9242/81, 8 Eur. Ct. H.R. 20, ¶ 47 (1984).

does not provide that they must be *independent*, and it does not appear to provide the structural guarantees of independence applicable to courts martial under the Uniform Code of Military Justice. *Compare* Memo. from Vice Admiral Robert S. Harward regarding Detainee Review Board Policy (July 11, 2010) ¶ 9, [hereinafter DRB Order], *with* 10 U.S.C. § 826(c) (2007). To the contrary, members of the DRB are selected by the deputy to the commander in charge of U.S. detention operations in Afghanistan, and all three board members can be line officers rather than judge-advocate lawyers. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 645 (2006) (Kennedy, J., concurring in part) (noting, in reference to military commission members, that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," and further concluding that "any suggestion of Executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness").

3. Unlike the United States, Israel limits detention to only those circumstances in which it is judicially determined that the suspected unlawful combatant poses a threat to State security *and* when no other means are available to neutralize the threat.

Each of the Israeli detention regimes requires a judicial determination that the detainee poses a threat to State security and that no other means are available to neutralize the threat. In the occupied territories, the applicable military order requires a "suspicion that [the detainee] endangers or may be a danger to the security of the area, the IDF, or the public." Detention in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500)-2002, § 2(a) (Heb.), *quoted in Marab*, 57(2) ¶ 3 (English translation). For unlawful combatants, the UCL requires the

judge to find "reasonable cause to believe that [the detainee's] . . . release will harm State security." UCL §§ 3(a), 5(a).[17]

Israeli courts have interpreted these standards to require that the detainee would "almost certainly" pose a danger and that the situation is "so grave as to leave no choice." *See* Gross, *Bargaining Chips*, *supra*, at 763 (emphasis omitted) (citing ADA 1-2/88 *Agbariyya v. State of Israel* [1988] IsrSC 42(1) 840, 844-45 (Heb.) and Eyal Nun, *Administrative Detention in Israel*, 3 Plilim (Israel Journal of Criminal Justice) 168, 178-79 (1992) (Heb.), respectively). Applying these criteria in the context of a military detention, a military judge explained that he would have to be satisfied that there existed "evidence, which shows as a near certainty, that failure to detain[] would lead to substantial harm to the security of the area or its inhabitants." *See* Ministry of Justice, The Legal Framework, *supra*, at 3 (quoting ADA 48/97).

The need to show strict necessity for detention also requires that there be no other way to meet the security threat. Thus, if criminal proceedings could be filed, administrative detention is no longer appropriate. *See* Ministry of Justice, The Legal Framework, *supra*, at 2-3; HCJ 7015/02 *Ajuri v. Commander of Israel Defense Force (IDF) in West Bank* [2002] IsrSC 56(6) 352, ¶¶ 26, 32 ; HCJ 5784/03, 6024/03, 6025/03 *Salama v. IDF Commander in Judea and Samaria* [2003] IsrSC ¶ 6, *available at* http://elyon1.court.gov.il/files_eng/03/840/057/a05/03057840.a05.pdf (last visited Mar. 9, 2011) ("Administrative detention is not meant to be a tool used to punish previous acts, or to be used in

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[17] Similarly, the European Court of Human Rights also requires that a judge find reasonable suspicion. *Fox, Campbell, & Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86, 12383/86, 13 Eur. Ct. H.R. 157, ¶ 32 (1990) ("The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1(c) (art. 5-1-c) [of the Convention]. . . . [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1(c) (art. 5-1-c) is impaired . . . .").

place of criminal proceedings."). In the same vein, the Court has stressed "[t]he necessity of finding the right balance between the security of the state and the protection of the detainee's human rights." *Salama*, *supra*, ¶ 8. Thus:

> [T]he decision on the detention [must] reflect[] in each concrete case the appropriate balance between a security necessity for which no other reasonable solution can be found, and the fundamental principle according to which a person's liberty must be respected.

Ministry of Justice, The Legal Framework, *supra*, at 5 (English translation) (quoting HCJ 253/88 *Sajadia v. Minister of Defense* [1988] IsrSC 42(3) 801 (Heb.)).

It was this requirement—that detention be justified by a threat from the detainee himself and not by other national security objectives—that led to the Israeli Supreme Court's decision mandating the release of the Lebanese detainees when the Israeli government sought to use them as bargaining chips. *See supra* Section D.1. (discussing *Anonymous v. Minister of Defense*).

By contrast, the DRB Order allows for the commander to label a detainee as an "Enduring Security Threat" ("EST"), the very definition of which remains classified. *See* Memo. from Dep. Sec'y of Def. regarding Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (July 2, 2009). If a detainee is so designated, the DRB apparently has no authority to authorize the detainee's release. In fact, authority for release of such a detainee is taken "outside of theater." *Id.* A Bagram detainee could be held as an EST with no access to the basic definition of that designation, let alone an avenue for appeal of such a designation. In Israel, all detainees have the right to have any threat determination made by a judge, in a robust review, with subsequent access to appellate judicial review, as discussed below.

4. Unlike the United States, Israel subjects the evidence and judgments supporting the detention of suspected unlawful combatants to searching judicial review and a heightened evidentiary standard.

Judicial review of detention in Israel is not perfunctory. Rather, the Israeli Supreme Court has determined that the rule of law requires an independent judge to perform a sweeping review of the record to "balance security needs, on the one hand, and individual liberty, on the other." *Marab*, 57(2) ¶ 33.[18]

In Israel, each of the elements necessary to support detention must be the subject of a *judicial* finding. Security officials make the initial assessment, but when the case reaches a court for review, the crucial judgments—the weight of the evidence, the seriousness of the security threat, and the appropriate balance between security needs and liberty interests—are all matters for the judge to determine.

Accordingly, Israeli judges are required to undertake a searching examination of the record. The judge must "ensure that every piece of evidence connected to the matter at hand be submitted to him. Judges should never allow quantity to affect either quality or the extent of the judicial examination." *Sajadia*, 42(3) at 820 (Heb.), *quoted in Marab*, 57(2) ¶ 33 (English translation). The evidence and information presented by the security forces must be "carefully and meticulously" examined. ADA 4/94 *Ben Horin v. State of Israel* [1994] IsrSC 48(5) 329, 335 (Heb.), *quoted in Salama, supra*, ¶ 7; *accord Salama, supra*, ¶ 7 ("The Military Court and the Military Appeals Court can question the reliability of the evidence, and not merely decide what a reasonable authority might be expected to decide, on the basis of the evidence presented.").

[18] In this respect again, the Israeli Supreme Court endorses the view, shared across all Western democracies, that where judicial review is required by the rule of law, that review must be sufficiently wide in scope to permit the judge to make an independent judgment on the weight of the evidence. *See, e.g., Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25, ¶ 200 (1978).

The searching review of the record demanded by Israeli law is a byproduct of its belief that administrative detention is an exception to the customary procedures for deprivation of liberty:

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

Marab, 57(2) ¶ 32. Even a detainee seized on a battlefield—whose detention, at the outset, is a military rather than a judicial act—must be brought within the judicial system's framework for evaluating the basis for detention as soon as possible. Referring to the detention of unlawful combatants seized during military operations on the West Bank, the Israeli Supreme Court has insisted that even when "the initial detention is done without a judicial order . . . . everything possible should be done to rapidly pass the investigation over to the regular track, placing the detention in the hands of a judge and not an investigator." *Marab*, 57(2) ¶ 32.

Not only are administrative detentions of suspected unlawful combatants subject to judicial review, the government is held to a heightened evidentiary standard. The Israeli Supreme Court held that under the UCL, the government must prove by "clear and convincing evidence" both that the detainee is an unlawful combatant and "of the need to continue the detention." HCJ 3514/97 *Anonymous v. State of Israel*, ¶ 22.

In practice, judicial oversight of administrative detentions in Israel has been neither disruptive nor toothless. The Ministry of Justice reports that "on many occasions the courts have either reduced the period of detention or cancelled the order where there was a question about the necessity for such a measure." Ministry of Justice, The Legal Framework, *supra*, at 5; *see also* Gross, *Bargaining Chips*, *supra*, at 758-61 (describing trends in judicial review of administrative

detention in Israel). HaMoked, an advocacy organization representing administrative detainees, reported that in 2004 it appeared in 142 military court hearings and secured release for 11 detainees. HaMoked, Activity Report 2004, at 40, *available at* http://www.hamoked.org.il/items/12902_eng.pdf (last visited Mar. 9, 2011). In the great majority of cases, courts have upheld the detention orders under review, to the disappointment of Israeli civil rights groups. *See, e.g.*, HaMoked, *supra*, at 39-40. For present purposes, however, the decisive point is that Israeli courts monitor the exercise of administrative detention powers, even in areas in which active hostilities are ongoing, by conducting a searching, independent judicial check on the factual justification for holding each and every detainee.

5. Unlike the United States, Israel prohibits all inhumane methods of interrogation and places robust limits on the use of coerced testimony against suspected unlawful combatants when assessing the basis for their detention.

Although at one time the Israeli security services argued that harsh techniques of interrogation should be permitted when necessary to elicit information to thwart a terrorist attack, the Israeli Supreme Court squarely rejected this position. HCJ 5100/94 *Pub. Comm. Against Torture in Israel v. State of Israel* [1999] IsrSC 53(4) 817, ¶ 36. The Court held that Israel's Basic Law[19] prohibits not only outright torture but also other forms of inhumane treatment, and "any degrading conduct whatsoever," specifically including such techniques as sleep deprivation, stress positions, and "shaking." *Pub. Comm. Against Torture*, 53(4) ¶ 23.

Moreover, evidence obtained by techniques that violate such fundamental rights is subject to exclusion in both criminal trials and administrative proceedings. Evidence Ordinance

[19] Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8, *in* Israel's Written Constitution (3d ed. 1999). Although Israel has yet to adopt a complete formal constitution, on many matters of "constitutional significance" the Knesset has enacted "Basic Laws," which stand above regular parliamentary statutes. *See* Ariel L. Bendor, *Is It a Duck? On the Israeli Written Constitution*, 6 Yale Isr. J. 53, 53-59 (Spring 2005); Aryeh Greenfield, *Introduction, in* Israel's Written Constitution, *supra*, at 4.

(New Version) 5731-1971, 2 LSI 198 (1968-72) (Isr.), § 12; CrimA 5121/98 *Isacharov v. State of Israel* (unpublished) (Heb.). Thus in Israel the prohibition on the use of such evidence is necessarily intertwined with the detainee's robust rights to counsel and to confront the evidence against him. *See infra* Sections D.6 and D.7. However, the right to challenge the use of such evidence would be weakened if, as in the United States, the detainee lacked access to counsel or any resources with which to test if the statements offered to the DRB were obtained through coercion. It would be weakened further if, as in the United States, the detainee was unable to object to hearsay evidence or to evidence offered during closed portions of the proceeding.

As the Israeli Supreme Court has declared:

> This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

Pub. Comm. Against Torture, 53(4) ¶ 39.

6. Unlike the United States, Israel requires judicial approval before limiting a suspected unlawful combatant's access to classified information offered in support of detention.

At several stages of a detention proceeding, Israel's need to protect classified information can conflict with the detainee's need to confront such information in order to challenge the State's evidence effectively. Classified information is protected whenever its disclosure could harm State security; but the decision to limit a detainee's access to such information must be made by the judge. UCL § 5(e); Zamir, *supra*, at 398. Thus, detainees have the right to know the reason for their detention unless a judge finds that the information would jeopardize security. Gross, *Bargaining Chips*, at 757. Detainees have the right to be present in court for all legal

proceedings unless a judge finds that State security requires otherwise. *Id.* Where security concerns warrant, judges can withhold evidence from a detainee and elect to review it *in camera* and *ex parte* instead. Zamir, *supra*, at 399 (describing the development of the practice permitting *ex parte* review).

In determining whether classified information should be withheld from a detainee, the Israeli Supreme Court has articulated the following test: "Does the material need to remain confidential because revealing it would harm state security? If not, then it should be revealed wholly or partially to the petitioner." Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting HCJ 3514/97 *Anonymous v. State of Israel*).

When a court does limit a detainee's opportunity to review certain evidence, it must assume a concomitant obligation to conduct an especially comprehensive and thorough examination of the record. *See generally, e.g.*, ADA 8788/03 *Federman v. Minister of Defense* [2003] IsrSC 58(1) 176 (Heb.); ADA 8607/04 *Fahima v. State of Israel* [2004] IsrSC 59(3) 258 (Heb.). On the other hand, if the court concludes that evidence was improperly classified, or that portions of it need not be withheld, the court will order the State to reveal such evidence. Evidence Ordinance (New Version) 1971, § 44; UCL § 5(a); *see also* Ministry of Justice, The Legal Framework, *supra*, at 5 (quoting *Anonymous v. State of Israel*). In such a case, the State still can refuse to disclose the evidence, but only if it is willing instead to free the detainee.

7. Unlike the United States, Israel provides access to counsel within no more than 34 days.

Honoring the rule of law, the Israeli Supreme Court recognizes that, as a general principle, detainees should be permitted to meet with an attorney within days of being detained. "This stems from every person's right to personal liberty." *Marab*, 57(2) ¶ 43.[20]

Criminal suspects and administrative detainees in the occupied territories. For criminal defendants in the occupied territories, access to counsel is ordinarily unimpeded. But for administrative detainees in the occupied territories (and criminal defendants suspected of violating security laws), certain military orders permit access to counsel of the detainee's choice to be denied for periods totaling thirty to thirty-four days, depending on the circumstances.[21] *See Marab*, 57(2) ¶¶ 37-39; Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 Mich. L. Rev. 1906, 1930 (2004).

Unlawful combatants. Under the UCL, an alleged unlawful combatant must be permitted to meet with a lawyer no later than twenty-one days after the beginning of detention. UCL (Amendment and Temporary Provision), 5768-2008 § 5.

Thus, with respect to the right to counsel, the most restrictive regime applies to detainees in the occupied territories. Reflecting the importance of affording the security services an adequate opportunity for interrogation, *see Marab*, 57(2) ¶ 39, those detainees can be denied

[20] Courts in other democracies throughout the world likewise recognize that prompt access to counsel is an essential requirement of the rule of law. *See, e.g.*, *Aksoy*, 23 Eur. H.R. Rep. 553, ¶ 81.

[21] Because of the potential for a delay of up to thirty-four days in affording access to counsel, a fully adversarial hearing may not occur at the first judicial hearing, which must be conducted within fourteen days of the detainee's seizure. *See supra* Section D.1. The first judicial hearing nonetheless affords an occasion for independent review, and a hearing with the assistance of counsel will occur, at the latest, at the first renewal hearing, which must occur within no more than three months for detentions within Israel and within no more than six months for detentions in the occupied territories. *See infra* Section D.8.

access to counsel for up to thirty-four days. By comparison, the United States government argues that many years of complete isolation are a necessary tool for effectively combating modern terrorism. In Israel, thirty-four days is the maximum period permitted for detention without access to counsel, and even that period of delayed access is considered long by Israeli and international-law standards.[22]

8. Unlike the United States, Israel requires periodic judicial review of detention at least once every six months, permitting the continuation of detention only upon a fresh judicial finding of dangerousness following a fully adversarial hearing.

In the occupied territories, detention orders must be reviewed every six months and can be renewed only if the court finds continued detention necessary to protect the security of the area. *See* Ministry of Justice, The Legal Framework, *supra*, at 4; Administrative Detentions Order (Temporary Order) (Judea and Samaria) (Number 1226)-1988, *cited in Marab*, 57(2) ¶¶ 5, 21, 22, 29.

The renewal hearing is held in the same independent courts where initial detention hearings occur and is a fully adversarial proceeding. The detainee has a right to representation by counsel of his choosing, can offer any evidence in his favor, and can confront all evidence against him, subject to any restrictions on access to classified information that are approved by the judge. *See supra* Section D.6. Any order renewing the detention is subject to appeal in the same way as an initial order of detention: to military courts of appeal in the case of detention in the occupied territories and to ordinary civil courts in all other cases. *See supra* Section D.2. And all detainees—regardless of whether they are held in Israel proper, in the occupied territories, or on foreign soil, and regardless of whether they are the subjects of general

[22] The European Court of Human Rights has applied a far more strict framework for the right to counsel than the Israeli Supreme Court, mandating an absolute right to counsel within forty-eight hours of detention. *See Aksoy*, 23 Eur. H.R. Rep. 553, ¶¶ 81, 83.

administrative detention or are held as alleged unlawful combatants—can seek review of the renewal of their detention before the Israeli Supreme Court. Ministry of Justice, The Legal Framework, *supra*, at 4.[23]

In short, suspected unlawful combatants detained by Israeli authorities are entitled to judicial review of the basis for their detention within fourteen days (and thereafter periodically, at least every six months) by an independent judicial officer empowered to order their release, who must conduct a careful and meticulous review of the government's evidence to determine whether they pose a threat to State security and whether other means are available to neutralize the threat. Throughout these adversarial judicial proceedings, the government can withhold from detainees classified information proffered in support of their detention only with the court's approval, and they are provided access to counsel within no more than thirty-four days of their seizure.

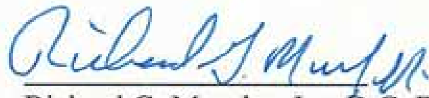
CONCLUSION

In the midst of more than a decade of unrelenting terrorist attacks, large-scale military operations, and active and ongoing hostilities, Israel has provided detainees with robust judicial review without compromising military operations in the occupied territories or abroad. Israel has found it practicable to provide all of its detainees, even those held in areas of active hostilities, with access to counsel within a matter of weeks, prompt, independent judicial review of their

[23] Under the DRB Order applicable at Bagram, (1) detainees are not entitled to any prompt reconsideration of the initial classification; (2) the reconsideration is carried out by a board of officers who are appointed by the deputy to the commander in charge of U.S. detention operations in Afghanistan, and who are not guaranteed independence; (3) the detainee has no right to be represented by counsel; (4) the convening authority has discretion to approve, modify, or reject the DRB's recommendation; and (5) the DRB's decision is not subject to judicial review. The DRB's lack of independence and limited role as an advisory body within the executive branch mean that after the initial DRB determination, a detainee can be held indefinitely with no further right of access to counsel or to the courts.

detentions, and the right to subsequent appellate judicial review. The United States, with vastly greater resources and the same obligation to reconcile liberty and security, can surely provide comparable process to the detainees in Bagram.

Respectfully submitted, this 24th day of March 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2011, I have hand delivered the foregoing **Brief of Amici Curiae in Support of Petitioners** to the Clerk of the United States District Court for the District of Columbia. I have also delivered copies, via email and US mail first class to:

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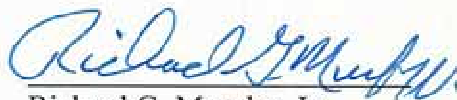

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