Abstract

In response to the threat of modern terrorism, democratic governments take steps which curtail civil rights, ostensibly to protect national security. Administrative detention is one of the more commonly taken steps. This paper traces the history of civil liberties and administrative detention in Britain, Canada, the United States, and Israel and examines why democracies deem the continued use of this tool necessary in dealing with perceived national security threats. The advantage of the perspective gained from historical distance, and ways in which democracies might learn from each other's experiences will be explored.

The first chapter will examine eras in which administrative detentions have been used, reasons they were deemed necessary, whom they were used against, and the procedures employed in imposing them. This reflection provides insight into what constitutes a true crisis in the life of a democracy, and when it has been considered appropriate to take extraordinary steps to curtail civil liberties in order to protect a nation's democratic way of life.

The second chapter will survey the legal tools used to combat terrorism by the United States following the attacks of September 11, 2001, as these pertain to detention of immigrants, and to the relevant provisions in the Patriot Act. The detention of non-citizens as well as American citizens detained and classified as enemy combatants, raises profoundly important issues central to the meaning of life under constitutional government.
The third chapter will highlight Israel, a unique democracy which has grappled with terrorism from its very inception. The manner in which Israel has used administrative detentions provides valuable lessons regarding methods which work, and methods which should not be sanctioned.

The fourth chapter will address the use of security certificates in Canada. Although Canada's recent Supreme Court ruling that security certificates are unconstitutional should be lauded, solutions to the issues raised in balancing individual rights to procedural fairness and fundamental justice, against public safety, remain largely unexplored. Practical methods used by other Western democracies in order to reach a "middle ground" which would afford the detainee an appropriate measure of due process, while preserving national security, will be discussed.
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Acknowledgements

Two people deserve credit for making this completed thesis possible. Firstly, I would like to thank Prof. Wes Pue for his guidance, support and time and for making the experience of writing this thesis fulfilling. And last but certainly not least I would like to thank my wife Karen who endured me throughout the process of writing this thesis and provided endless hours of support, help and motivation.
Introduction

Administrative detentions, in various forms, are not new; they have a fairly long history. During the Second World War, the British government administratively detained considerable numbers of people under Regulation 18B of the *Emergency Powers (Defence) Act* 1939. Yet even then, in times of great crisis, the British Prime Minister, Winston Churchill, who was, at first, an enthusiast of the extensive use of administrative detention, wrote:

> The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.

To understand why Britain and other democracies deem the continued use of administrative detention necessary in their dealings with threats such as modern terrorism, one must first investigate the origins of administrative detention. How did use of this drastic measure come about?

This paper examines the historical roots of civil liberties and of administrative detention in England, and the modern use of administrative detention and the erosion of civil liberties as tools in the "war on terror" in the United States, Canada and Israel. The advantage of the perspective gained from historical distance will be shown. Ways in which modern democracies might learn from each other’s experiences will be explored.

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The first chapter will examine past occasions on which administrative detentions were used, reasons they were deemed necessary, who they were used against, and the procedures employed in imposing them. The following reflection is based primarily on the use of emergency powers in times of turmoil in the histories of Britain, the United States, and Canada, and provides insight into what constitutes a crisis in the life of a democracy, and when it has been considered appropriate in the past to take extraordinary steps to curtail civil liberties in defence of a nation's democratic way of life.

The Second chapter surveys the tools used to combat terrorism by the United States following the attacks of September 11, 2001. Focus will be given to administrative detentions of immigrants, and on the relevant provisions in the Patriot Act. The detention of non-citizens as well as American citizens detained and classified as enemy combatants, raise profoundly important issues that go to the heart of what it means to live under constitutional government.

The third chapter focuses on Israel, which unlike the United States and Canada, has had to grapple with terrorism from its very inception. With the advantage of hindsight, an understanding of Israel's use of administrative detentions provides valuable lessons regarding both efficacy and methods which should not be sanctioned.

The fourth chapter examines the use of security certificates in Canada. Issues relating to the principles of fundamental justice and procedural fairness are examined as these relate to administrative detention. In this context, the Supreme Court of Canada's landmark decision pertaining to the use of security
certificates in this country will be analyzed. While the decision does much to promote individual rights, this paper will show how the decision's impact will be limited at best. The implementation of a number of methods used by other Western democracies in an attempt to reach a "middle ground" which would on the one hand afford the detainee the right to an appropriately calibrated measure of due process, and at the same time preserve national security, will be suggested. The method most likely to prove the most robust will be one which will alter the burden of proof to that of the "clear and convincing" standard of evidence.
The Development and History of Habeas Corpus

Britain

In early times, the English monarch could detain any subject for any reason. Even the rudimentary civil liberty of protection from arbitrary imprisonment did not exist, until a landmark case in which a handful of individuals fuelled the transformation that produced the legal concept of habeas corpus. In democratic countries today, the writ of habeas corpus reflects the foundational principle that persons cannot be detained at the whim of the government. Nevertheless Western democracies such as England, Canada, and the United States have enacted legislation aimed at curtailing the writ of habeas corpus under specific circumstances.

In 1215, feudal lords forced England's King John to sign the Magna Carta. This document provides the germ of subsequent developments in civil rights in modern democracies. Articles 38 and 39 of the Magna Carta established the foundation for what are known as "habeas corpus" laws, the Fourth through Eighth Amendments of the United States Constitution, and many due process provisions.

According to Articles 38 and 39 of the Magna Carta:

38. In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way,

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2 Thom Hartmann, "First They Came for the Terrorists" (10 January 2005), online: Common Dreams News Center <http://www.commondreams.org/views05/0110-33.htm>.
nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

The Magna Carta protected only feudal lords, barons, and other "free men" from governmental abuses of power. For another four hundred years, until 1628, the average person could be arbitrarily arrested and imprisoned by royal decree, with no recourse to the courts.

In the thirteenth century "habeas corpus" (Latin, meaning "produce the body") was a part of the civil procedure, requiring, simply physically bringing a defendant before the court. At first, the writ was neither used as a means to detain, nor associated with the idea of liberty. It did not involve the court examining the reason for the detention. The transformation of the writ of habeas corpus into a mechanism for the court's scrutiny of the reason for an applicant's detention, began in cases in the fifteenth and sixteenth centuries, whereby detainees by order of the Privy Council used the writ as a means to facilitate their release by posting bail.

*Darnel's Case*

The case of the five knights in 1627 is illustrative. In the words of one of the judges who presided over the case, [it was] "the greatest cause that I ever knew

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3 Ibid.
5 Ibid. at 2-3.
6 Ibid. at 2.
7 Ibid. at 4.
8 Cases collected at Moore K.B. 838 as cited in Sharpe, supra note 4 at 7 footnote 31.
9 *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). Often referred to as *The five Knights' Case* [Darnel's Case].
in this court"¹⁰. "The fact that such a dispute could be raised on habeas corpus demonstrates that it had truly become...the highest remedy in law for any man that is imprisoned"¹¹. Through this case we begin to see an early conceptual change occurring with regard to use of the writ of habeas corpus.

A number of subjects who refused to contribute to a forced loan imposed by Charles I were detained "per speciale mandatum domini regis", the true reason for the detention undisclosed. Among the detainees, five petitioned the court for their release by way of habeas corpus, with the crux of the case being whether or not the lack of statement of the reason for the imprisonment empowered the court to bail the applicants. Was the court simply to trust the monarchy's judgment that continued imprisonment was legally justified, or did non-disclosure of the grounds for detention entitle the court to bail the prisoners until trial? What should the role of the courts of common law be when sovereign power arbitrarily imprisons a subject?¹²

Despite the existence of the Magna Carta and of due process provisions in the law, the court refused to bail the prisoners. However, the judges later said that "a further application from the same prisoners would have been entertained the next day"¹³. In outraged response to the court's ruling, Parliament issued a Petition of Right, re-asserting hitherto unenforced ancient laws regarding forced loans, arbitrary taxation, the imposition of martial law, and the specific prohibition

¹⁰ Ibid at 31, as cited in Sharpe, supra note 4 at 9-10 footnote 43.
¹¹ Ibid at 95, as cited in Sharpe, supra note 4 at 10 footnote 44.
¹² Sharpe, supra note 4 at 10.
¹³ Darnel's Case, supra note 9 at 160-163, as cited in Sharpe, supra note 4 at 12 footnote 57.
of arbitrary imprisonment\textsuperscript{14}. The principles implicit in common law held that the individual had a ‘fundamental propriety in his goods and a fundamental liberty of his person’ and this principle was reconciled with the need for taxation by means of the idea of consent in parliament\textsuperscript{15}.

These events illustrate some of the difficulties that necessarily arise when power is “shared” by two institutions: parliament and the monarchy. The conflicts which arose were critical in shaping both civil liberties and future laws curtailing those liberties. Although Charles I endorsed the Petition of Right, he would not allow his powers to be limited by it, and flagrant abuses of power in the form of arbitrary detentions continued. In 1629 the King instructed the Speaker to refuse the demand of several members of Parliament to raise the issue of the collection of tonnage and poundage for debate, a tax which was not sanctioned by Parliament and was therefore inconsistent with the provisions of the Petition of Right\textsuperscript{16}. The standoff led to the imprisonment of several members of Parliament, who in turn sought habeas corpus. The writ was returned that they were detained "for notable contempts...committed against ourself and our government, and for stirring up sedition against us"\textsuperscript{17}. The King ordered that the prisoners not be brought before the courts and that the opinion of the judges who were to hear the case be sought prior to the hearing.

\textsuperscript{14} Sharpe, \textit{supra} note 4 at 12-13.
\textsuperscript{15} J.W. Gough, \textit{Fundamental Law in English Constitutional History}, 2\textsuperscript{nd} ed. (London: Oxford University Press, 1961) at 70 [Gough].
\textsuperscript{16} David Plant, "King Charles the First and Parliament 1625-29", online: British Civil Wars and Commonwealth website <http://www.british-civil-wars.co.uk/glossary/parliament-1625-29.htm>.
\textsuperscript{17} Darnel's Case, \textit{supra} note 9 at 240, as cited in Sharpe, \textit{supra} note 4 at 14 footnote 65.
The judges, however, were eventually able to convince Charles I that the prisoners should be released on the condition that they post bail. Since the King only agreed on the condition that the prisoners produce sureties for good behavior (a demand refused by several of them as it was seen on their part as an admission of guilt), the imprisonment of several members of Parliament continued for over a decade, until 1640, when Parliament next convened.\(^{18}\)

*The Habeas Corpus Act 1640,* sought to grant any person imprisoned by the King or Council the right to habeas corpus without delay and the right to be told the reason for their imprisonment. The Act also stipulated that a judge would have to rule with regard to the legality of the detention within three days.\(^{19}\)

The reign of Charles I was a time of great constitutional struggle as King and Parliament fought over how ancient "fundamental laws" should be interpreted.\(^{20}\) The King believed in political absolutism based on the doctrine of the divine right of kings\(^{21}\) while Parliament, fearing tyrannical despotism, opposed many of the King's actions. One flashpoint concerned the imposition of taxes, an action for which parliamentary support was required. Parliament argued that "the receiving of tonnage and poundage, and other impositions not granted by Parliament'...was 'a breach of the fundamental liberties of the kingdom' as 'there ought not any imposition to be laid on the goods of merchants...without common consent by Act of Parliament'. This, they told the king was 'the right and inheritance' of his subjects, 'founded...upon the most ancient and original

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\(^{18}\) Sharpe, *supra* note 4 at 15.

\(^{19}\) Sharpe, *supra* note 4 at 16.


\(^{21}\) Gough, *supra* note 15 at 53.
constitution of this kingdom. The power struggle between Parliament and the monarchy resulted in two civil wars, and in the eventual trial and execution of Charles I in 1649. Over the next 30 years, Britain was to see the uneven and inconsistent division of power between Parliament in various forms, the military, and the restored monarchy of Charles II. What eventually emerged from this struggle was the "modern doctrine of legislative sovereignty." The history of habeas corpus is part and parcel of the larger transformations by which the rule of law was established over the whim of the executive.

The Habeas Corpus Act 1640 was not fully effective and was replaced by The Habeas Corpus Act 1679. The new Act, considered among the most important statutes of English constitutional history, sought to ensure that procedural shortcomings would not prevent prisoners from being able to assert their rights under the Act. A prisoner had to be presented with a warrant for his arrest so that he would be informed of the reason for his detention. Furthermore, prisoners could not be jailed where the writ had no standing, and the writ was to be available to the prisoners at any time of year. It could be granted by any court or judge at Westminster. Further, the jailor would have to obey the writ without delay, and judges would have to issue decisions expeditiously. Upon release, a prisoner could not be thrown back into prison. Although other habeas corpus acts were subsequently passed, it is the Act of 1679, described by Blackstone as...
a "second _magna charta_, and stable bulwark of our liberties."\(^{26}\), which bears the
greatest constitutional importance, marking the turning point by which the writ
took on its modern form\(^{27}\).

**Habeas corpus Suspension Acts and Martial Law**

The manner in which administrative detentions have been legally imposed
and reviewed in Britain has changed over the course of time. Among the first
forms of legislation explicitly permitting executive detentions are Habeas Corpus
Suspension Acts. These legalized the incarceration of individuals accused of
treason without either bringing them to trial or enabling their release by posting
bail. In effect, there was no suspension of the right of habeas corpus per se,
rather a suspension of some of the rights afforded by means of the writ of habeas
corpus, such as the right to be tried or released without delay\(^{28}\). The last
recorded use was in Ireland in 1866 and 1867\(^{29}\).

Administrative detentions could also be imposed through the implementation
of martial law. Rarely used, this was last resorted to in Britain in 1780\(^{30}\). Unlike
the suspension of the writ of habeas corpus, actions taken under martial law did
not require specific legislation. However, in certain instances, Parliament passed
laws confirming these actions after the fact. The problem with martial law was

\(^{27}\) Sharpe, _supra_ note 4 at 20; http://www.answers.com/topic/habeas-corpus-act-1679.
\(^{28}\) Sharpe, _supra_ note 4 at 94; Simpson, _supra_ note 1 at 3.
\(^{29}\) Sharpe, _supra_ note 4 at 94; Simpson, _supra_ note 1 at 3.
that it was neither clear what powers it actually accorded, nor when those powers could be used\textsuperscript{31}.

The First World War

Despite Britain's proclaimed commitment to civil liberties and the centrality of individual freedom in national mythologies, protections created and celebrated through centuries of constitutional evolution have proved surprisingly fragile in times of crisis.

Parliament passed The \textit{Defence of the Realm (Consolidation) Act 1914} ("DORA") on August 8, 1914 at the outbreak of World War One\textsuperscript{32}. One critic called it the "most radical parliamentary enactment in the history of England", passed without debate, alteration and or protest\textsuperscript{33}, the DORA declared that: "His Majesty in council has power during the continuance of the present war to issue regulations for securing the public safety and defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council\textsuperscript{34}. In effect, all of the United Kingdom was subjected to martial law and full legislative power was given to the government\textsuperscript{35}. Although Parliament did not grant the executive specific authority to detain or limit the personal freedom of persons thought to be of danger to the realm, the executive secured its own powers in this respect by promulgating regulation 14B under the DORA\textsuperscript{36}, which stipulated:

\begin{footnotesize}
\begin{tabular}{l}
\textsuperscript{31} Simpson, \textit{supra} note 1 at 3. \\
\textsuperscript{32} Rossiter, \textit{supra} note 30 at 153. \\
\textsuperscript{33} Ibid. \\
\textsuperscript{34} \textit{Defence of the Realm (Consolidation) Act 1914} (U.K.), 1914 s.1. \\
\textsuperscript{35} Rossiter, \textit{supra} note 30 at 153. \\
\textsuperscript{36} Sharpe, \textit{supra} note 4 at 96. \\
\end{tabular}
\end{footnotesize}
Where on the recommendation of a competent naval or military authority, or of one of the Advisory Committees hereinafter mentioned, it appears to the Secretary of State that the securing of the public safety or of the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned.

Thus, suspicious individuals could be detained, subjected to restrictions on residence or movement, and/or to mandatory reporting to the police.

The new legislation was born out of fear of a concealed "fifth column" of enemy aliens, or of citizens with enemy alien connections. It also addressed the felt need to remedy the problem of the inevitable weakness of the evidence against such persons, a weakness which would almost certainly preclude their conviction in court. The regulation was designed to cast a net wider than that of the ordinary law.

The executive's broad interpretation of the DORA was challenged in *R. v. Halliday* in which a German-born naturalized British citizen was detained as an enemy alien for eighteen months without either trial or the right to challenge his detention. Halliday argued that the general power to protect the realm could not be used to curtail the liberties of an individual because the internment was ultra vires in the sense that specific provisions for such curtailments were not outlined in the DORA. The argument was rejected by the House of Lords which held that...
the internment was justified given the disproportionate danger to the public safety.\textsuperscript{42} Lord Chancellor Finlay wrote for the majority: “it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council and that Parliament may do so, feeling certain that such powers will be reasonably exercised.”\textsuperscript{43}

In a dissenting opinion Lord Shaw wrote:

There is a constructive repeal which has, so far as I am aware, no parallel in our annals – a getting behind the habeas corpus by an implied but none the less effective repeal of the most famous provisions of Magna Carta itself...If there be any, my Lords, who in this time of storm and stress think these chapters useless reading or their lessons out of date I am not of their number.\textsuperscript{44}

The use of administrative detentions under DORA continued in mainland Britain until August 31, 1921, as the war was prolonged by legislation, with some detention orders executed as late as 1923. Although passed in an attempt to combat the threat of a German “fifth column”, DORA’s provisions were also used to quell the Irish rebellion of 1916.\textsuperscript{45} In all, approximately 30,000 people were detained during the war.\textsuperscript{46} As stated by Simpson:

All this comes to prove that once government is, for one reason, empowered to bypass the tedious requirements of the rule of law, and lock up its citizens without charge, trial, or term set, the temptation to extend the use of so convenient a power seems to be quite irresistible.\textsuperscript{47}

\textsuperscript{42} Sharpe, supra note 4 at 96.
\textsuperscript{43} Halliday, supra note 40 at 268 as cited in supra note 42.
\textsuperscript{44} Halliday, supra note 40 at 294 as cited in supra note 42.
\textsuperscript{45} Simpson, supra note 1 at 17.
\textsuperscript{46} Simpson, supra note 1 at 15.
\textsuperscript{47} Simpson, supra note 1 at 14.
The Second World War

When Europe plunged into World War for the second time, Parliament passed the *Emergency Powers (Defence) Act 1939* ("The 1939 Act"), which legalized the detention of individuals whenever such a course "appears to the Secretary of State to be expedient and in the interests of the public safety or the defence of the realm". Under Regulation 18B (1) of the 1939 Act:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing him to be detained.

The legality of internments under this regulation could not be questioned, as it provided "any person detained in pursuance of these Regulations shall be deemed to be in lawful custody". However, the 1939 Act was not a true habeas corpus suspension act. Although the detainee could not appeal to the court regarding the legality of his arrest and detention, he could petition the court for review of his case in order to determine whether the government's power to detain had been properly exercised. This determination could be based on one of two interpretations. The court could objectively interpret the statute to mean that the proper conditions for internment in a given case, did in fact exist.

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49 *Defence (General) Regulations 1939*, s. 18B(8).
50 Sharpe, supra note 4 at 99.
Alternatively it could apply a subjective interpretation, meaning that it was enough for the Home Secretary to believe these conditions to exist\textsuperscript{51}.

In at least one case an internee was released on grounds of insufficient evidence to support a detention order\textsuperscript{52}. By 1942, at the height of the war however, such reviews were effectively halted as a result of two rulings of the House of Lords. In \textit{Liversidge v. Anderson}\textsuperscript{53}, and \textit{Greene v. The Secretary of State for Home Affairs}\textsuperscript{54}, the House of Lords ruled that a subjective power had been intended according to the 1939 Act. Thus, as long as the presumed good faith of the detention order was not countered by evidence produced by the internee, the validity of the order would not be reviewed. Several arguments combined to produce this result. First, the Crown could claim that the evidence in support of the Minister's decision was privileged and that its disclosure could not be compelled in court. Furthermore, there was no requirement that the Home Secretary base his decision on evidence of a legally admissible standard. Moreover, an advisory committee was in place to review the Minister's decisions. These factors coupled with the fact that the power to detain was given to a Minister and not to a low ranking official led the court to conclude that the Secretary's decision was necessarily a subjective one, as intended by the 1939 Act, and as such, could not be reviewed\textsuperscript{55}.

\textsuperscript{51} Sharpe, \textit{supra} note 4 at 99 - 100.
\textsuperscript{55} Sharpe, \textit{supra} note 4 at 102-104.
Thus, in Britain, the rulings of the judiciary are often reflective of the influence of external circumstances such as war. Whether or not the ruling on the appeal of a detainee falls in his favour may depend less on the merits of his own case than on the prevailing political climate.

The United States

The Civil War

So central is Habeas Corpus to the rule of law, that it is the only common law writ to be explicitly mentioned in the United States Constitution. Article 1, Section 9, clause 2, devoted to the Legislative Branch, states that: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”.

The events of September 11, 2001, however grave, did not threaten the existence of the nation. They led neither to economic collapse nor to civil war. The events of the spring of 1861, however, did, causing a crisis which Paul Finkelman called “the greatest the nation has ever faced”. Perhaps the greatest example of the emergency suspension of civil liberties in American history was that by Abraham Lincoln. On April 27, 1861, with Congress out of session, the government faced a crisis as saboteurs attacked railways in order to prevent Northern regiments from reinforcing Washington. Lincoln responded by

56 Sharpe, supra note 4 at 102.
authorizing the Commanding General of the United States Army, General Winfield Scott, to suspend the writ of habeas corpus "at any point or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington". Among the most famous arrests was that of Lieutenant John Merryman, a wealthy landowner, state legislator, and officer in the Maryland cavalry. Merryman was instrumental in demolishing a bridge in an attempt to inhibit the movement of Union forces. Arrested pursuant to the order of a military officer in Pennsylvania, Merryman was imprisoned at Fort McHenry, whereupon he petitioned for his release by way of a writ of habeas corpus. The commanding officer upon whom the habeas corpus was served, however, responded that by authority of the President, he could suspend the writ of habeas corpus at his discretion, and as such, was not obligated to obey it.

The case, heard by Supreme Court Chief Justice Taney, in his capacity as a Circuit Court Judge for the District of Maryland (at the time it was customary for Justices of the Supreme Court to also serve as Circuit Court Judges when the Supreme Court was not in session), became a landmark ruling. Justice Taney condemned Lincoln's decision to suspend the writ of Habeas corpus stating that the decision was unconstitutional, as the Constitution granted that power only to the Congress. Taney wrote:

These great and fundamental laws...have been disregarded and suspended, like the writ of habeas
corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

Lincoln ignored the ruling. On September 24, 1862, in an attempt to "suppress the insurrection existing in the United States" and combat opponents of the draft laws, he issued a proclamation stating:

The Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any Court Martial or Military Commission.64

Although Congress did ratify the suspension of Habeas Corpus as well as the President's actions following from that suspension, Lincoln saw this as a mere technicality.65 In his view it was his right and duty in an emergency situation, to defend the Union above all else, as without the Union the Constitution would be nothing more than a scrap of paper.66 In his own words:

Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be

64 Proclamation Suspending the Writ of Habeas Corpus issued September 24, 1862; Rossiter, supra note 30 at 235.
65 Rossiter, supra note 30 at 236.
66 Abraham Lincoln First Inagural Address Monday, March 4, 1861; Rossiter, supra note 30 at 224.
overthrown when it was believed to that disregarding
the single law would tend to preserve it?"\(^{67}\)

It was not until the end of the Civil War that the United States Supreme Court
ruled on the suspension of Habeas Corpus in a landmark ruling which overturned
the conviction of Lambdin Milligan. Milligan (and others), accused of traitorous
activities, was arrested, tried and convicted by military court, and sentenced to
death. The war ended before Milligan's execution was carried out. Since it was
likely that Lincoln, had he not been assassinated, would have pardoned Milligan,
Milligan appealed his conviction to the Supreme Court\(^{68}\). In overturning the
conviction and ruling that the suspension of Habeas Corpus by President Lincoln
was unconstitutional, Justice David Davis wrote:

> This nation, as experience has proved, cannot always
> remain at peace, and has no right to expect that it will
> always have wise and humane rulers, sincerely
> attached to the principles of the Constitution. Wicked
> men, ambitious of power, with hatred of liberty and
> contempt of law, may fill the place once occupied by
> Washington and Lincoln; and if this right is conceded,
> and the calamities of war again befall us, the dangers
to human liberty are frightful to contemplate.\(^{69}\)

Ironically, Lincoln, who directed the most extreme constitutional dictatorship
in the United States, is widely regarded as a great man and patriot. The potential
exists, for others to exploit the precedent set by Lincoln, particularly through

\(^{67}\) Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 Works of
Lincoln at 421, 426 as cited in Rossiter, supra note 30 at 229 and supra note 58 at 40.
\(^{68}\) Supra note 58 at 41-2.
\(^{69}\) Ex parte Milligan, 71 U.S. 2 (1866) at 125.
detention without charge or trial\textsuperscript{70}. Justice Davis's words illustrate a concern which is pertinent today perhaps more than ever.

The Second World War

A modern example of extreme civil liberties infringements in American history occurred during the Second World War with the mass internment of some 110,000 persons of Japanese origin. Under Executive Order 9066, issued by President Roosevelt in February, 1942, following the Japanese assault on Pearl Harbour authorized:

\begin{quote}
the Secretary of War and the Military Commanders whom he may from time to time designate...to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion\textsuperscript{71}.
\end{quote}

Public Law 503, passed by Congress on March 21, 1942, confirmed the Order. In \textit{Korematsu v. the United States}\textsuperscript{72}, the Supreme Court found that the President and Congress did not go beyond their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent. In a 6-3 decision the Court ruled that the internment was not unconstitutional. In the words of Justice Black:

\textsuperscript{70} Rossiter, supra note 30 at 239.
\textsuperscript{71} Executive Order No. 9066 February 19, 1942 Authorizing the Secretary of War to Prescribe Military Areas, Rossiter, supra note 30 at 281.
\textsuperscript{72} 323 U.S. 214 (1944).
we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Like the House of Lords in wartime Britain, the US Supreme Court was unwilling to constrain the executive's authority, even in the face of gross violation of the most basic human rights of a large group of American citizens. Under the guise of protection from "threatened danger", these rights can certainly be violated again.

Canada

World War One

With the outbreak of World War One Canada followed the British example. The War Measures Act, 1914, S.C. 1915, c. 2 ("The WMA") passed on August 22 1914, was drafted in about 10 days, and sailed through Parliament with little

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73 Korematsu v. the United States, 323 U.S. 214 (1944) at 219-220.
74 Rossiter, supra note 30 at 283.
opposition or scrutiny\textsuperscript{76}. It gave the government unprecedented power, effectively transferring the role of the legislature to the executive\textsuperscript{77}. Government assumed the authority of censorship, suspended habeas corpus in certain cases, and took on extended powers of arrest\textsuperscript{78}. Unlike the DORA which had a provision stating that it would lapse at the end of the war, the WMA had no such provision and was not limited by time\textsuperscript{79}. It was up to the government, and not a separate body, to officially proclaim the end of the crisis, which in turn was to signify the WMA's official expiration. The dangers posed by this situation to a free society are clear. As Carruthers writes: "When the parliament is eclipsed, the press is censored, and the courts are rendered acquiescent, only the guiding hands of the executive are left to protect the freedom of the individual from its own potential abuses of power"\textsuperscript{80}.

By order in council passed on October 28, 1914 pursuant to the authority granted to the government by the WMA, all aliens of "enemy nationality" were subject to registration. Failure to register, failure to answer questions, or the opinion of the registrar that an enemy alien posed a security threat, all led to detention. Furthermore, an alien was not permitted to leave Canada unless the registrar was satisfied that he would be unable to assist enemy forces

\textsuperscript{77} Supra note 75 at 56; Supra note 76 at 295.
\textsuperscript{78} Supra note 75 at 56.
\textsuperscript{79} Supra note 76 at 295.
\textsuperscript{80} Supra note 75 at 56.
materially. In all, between the years of 1914 and 1920, 8,579 men were interned, most of them of Ukrainian descent. Germans, Poles, Italians, Bulgarians, Croatians, Turks, Serbians, Hungarians, Russians, Jews, and Romanians were also imprisoned. It is noteworthy that of the 8,579 men detained only 3,179 were connected with the war effort, the rest being civilians.

In 1915, Rudolf Beranek, a German-born British subject by naturalization, detained as an enemy alien, petitioned the Ontario Supreme Court for a writ of habeas corpus. In Re Beranek, the Court examined the language of Section 11 of the WMA which states:

No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of justice.

The court then ruled:

It is quite true that...all are amenable to the process of this Court; but it is equally true that, where the law of the land confers upon Court or person any power, this Court has no right to interfere with the exercise, in good faith, of that power; it is only when the power so conferred is exceeded that this Court can interfere; unless some right of appeal to it is also conferred.

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83 Peppin, supra note 81 at 142.
84 Re Beranek, (1915), 24 C.C.C. 252 (Ont. H.C.) [Beranek].
85 Section 11 of the WMA as cited in Peppin, supra note 82 at 147 footnote 72.
86 Beranek, supra note 84 at 253.
In choosing to accord deference to the registrar’s decision to intern, the Court ruled that:

it should be plain to every one that in the stress and danger to the life of any nation in war, the Courts should be exceeding careful not to hamper the action of those especially charged with the safety of the nation; careful, among other things, not to take up the time and attention of those who should be fighting the enemy in the field, in fighting law suits in the law Courts over private rights. It is not a time when the prisoner is to have the benefit of the doubt; it is a time when, in all things great and small, the country must have every possible advantage; a time when it must be the general safety first in all things always; until the final victory is won; even though individuals may suffer meanwhile. Private wrongs can be righted then: while final defeat would not only prevent that but bring untold disaster to all.\(^{87}\)

In other words, a sovereign Parliament granted the Executive power to protect the nation. As such, the court could only intervene in the event that it was convinced that the Executive’s use (or misuse) of that power, was not in good faith.

In *Re Gusetu*\(^{88}\), an Austrian native interned as an enemy alien petitioned the Court requesting the issuance of a writ of habeas corpus so that the cause of his detention could be investigated. The superior Court of Quebec reached a similar conclusion to that reached in *Re Beranek*, stating:

The registrar had jurisdiction to intern the petitioner and his judgment as to the necessity of the interment is not subject to review by the Courts without the consent of the Minister of Justice.\(^{89}\)

\(^{87}\)Ibid.  
\(^{88}\)Re Gusetu, (1915), 24 C.C.C. 427.  
\(^{89}\)Re Gusetu, (1915), 24 C.C.C. 427 at 428.
The concept of habeas corpus was raised indirectly when the Supreme Court of Canada considered *Re Gray*\(^90\) in 1918. The petitioner, Gray, who had originally been exempt from military duty, was ordered to report for service due to removal of the exemptions to the *Military Service Act* that year\(^91\). Upon refusal, he was arrested by military authorities. Gray asked the Court to issue a writ of habeas corpus and order his release from the military authorities. Gray argued that the government could not override the *Military Service Act, 1917*, an act of Parliament, by an order in council. In a majority decision the petition for habeas corpus was denied.

The Court examined section 6 of the WMA which states:

> The Governor-in-Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada\(^92\).

The Court ruled that the orders in council were not ultra vires, in that Parliament did have the power, as well as the intention, under section 6 of the WMA, to confer exceptional powers on the executive. The Court stated that Parliament may delegate its powers within reason to the executive, although it may not abdicate its functions completely.\(^93\). Furthermore, the Court stated that extraordinary times demanded extraordinary measures, and as such:

> At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers

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\(^{90}\) *Re Gray*, (1918), 57 S.C.R. 150.

\(^{91}\) Peppin, *supra* note 81 at 147.

\(^{92}\) Section 11 of the WMA as cited in *Re Gray*, (1918), 57 S.C.R. 150.

\(^{93}\) Peppin, *supra* note 81 at 149.
Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, and, but for the respect which is due to the contrary opinion held by the majority of the learned judges of the Supreme Court of Alberta [Re Lewis (1918), 41 D.L.R. 1], I should add that there is, in my opinion, no room for doubt\(^\text{94}\).

It should however be noted that there were cases where it was ruled that regulations which purported to do away with habeas corpus went beyond the powers of the WMA and thus could not be used\(^\text{95}\). In *Perlman v. Piché*\(^\text{96}\) the Quebec Superior Court found that executive suspension of the recourse to habeas corpus was ultra vires because only Parliament itself was authorized to suspend habeas corpus. In *Blanshay v. Piché*\(^\text{97}\) the Quebec Superior Court found that *Re Gray* addressed only the *Military Service Act* and that Parliament never intended to address the habeas corpus provisions. Moreover, had Parliament intended to suspend habeas corpus, this mandate would be void since only the Imperial Parliament could suspend habeas corpus under the *Colonial Laws Validity Act*\(^\text{98}\), which stipulated that where there was a conflict between British law and the law of a British colony, the imperial legislation would take precedence\(^\text{99}\). However, the precedent set in *Re Gray* continues to be a defining

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\(^{94}\) *Re Gray*, (1918), 57 S.C.R. 150 at 181-2.

\(^{95}\) Peppin, *supra* note 81 at 151.

\(^{96}\) *Perlman v. Piché*, (1918), 57 S.C.R. 150.

\(^{97}\) *Blanshay v. Piché*, (1918), 32 C.C.C. 151 (Que. Sup. Ct.).


case with regard to the executive's ability to amend the law in order to curtail an individual's freedom where Parliament had not specifically given that authority.\(^\text{100}\)

World War Two

The WMA was next invoked on September 1, 1939, with the outbreak of World War Two. On September 3, 1939 the *Defence of Canada Regulations* 1939 ("The Regulations") were enacted pursuant to section 3 of the WMA. As in World War One the Regulations empowered the executive to use preventive detention and to detain enemy aliens in an attempt to protect national security.\(^\text{101}\)

In accordance with Regulation 21:

21(1) The Minister of Justice, if satisfied, that with a view to preventing any particular person, from acting in any manner prejudicial to the public safety or the safety of the State it is necessary so to do, may, notwithstanding anything in these Regulations, make an order:... (c) directing that he be detained in such place, and under such conditions, as the Minister of Justice may from time to time determine; and any person shall, while detained by virtue of an order made under this paragraph, be deemed to be in legal custody.

Regulation 22 set up a process by which a detained individual could appear before an advisory committee in an attempt to convince the Committee to recommend his release. The detainee, however, had no access to the information which led to his internment. Moreover, the burden of proof was reversed, with the the detainee having to prove that he was falsely accused.

\(^{100}\) Peppin, *supra* note 81 at 151.

\(^{101}\) Peppin, *supra* note 81 at 156.
Further, the Minister was under no obligation to accept the Committee's recommendation.\(^{102}\)

Like the United States Supreme Court and the House of Lords in Britain, the Canadian courts were generous in construing the power of the executive to intern and to restrict habeas corpus.\(^{103}\) The question of detention under regulation 21 arose in *Ex parte Sullivan*.\(^{104}\) The applicant, detained under suspicion of being a member of the Communist Party of Canada, petitioned the Court for a writ of habeas corpus and for his release. The petition was denied, since the Minister's decision was in "due form". The Court approved dicta from the judgment in *Ronnfeldt v. Phillips*: "A war could not be carried on according to the principles of Magna Carta.\(^{106}\)

In *Re Carriere*,\(^{107}\) the petitioner was detained in order to prevent him "from acting in any manner prejudicial to the Public safety or the safety of the State". The case is remarkable in that the Court ruled that although the WMA and the Regulations did not abolish the right of the Court to issue a writ of habeas corpus, the Court is not empowered to review the discretion of the Minister of Justice in issuing a detention order. Thus, even though the Court issued a writ of habeas corpus, it did not produce the petitioner's intended result. The court ruled that it "merely examines if the petitioner is detained by a competent

\(^{102}\) Peppin, *supra* note 81 at 159.

\(^{103}\) Sharpe, *supra* note 4 at 106.

\(^{104}\) (1941) 75 C.C.C. 70 (Ont. H.C.).

\(^{105}\) (1941) 75 C.C.C. 70 (Ont. H.C.) at 71.

\(^{106}\) (1918), 35 T.L.R. 46 at 47 as cited in *Ex parte Sullivan*, (1941) 75 C.C.C. 70 (Ont. H.C.).

\(^{107}\) (1942) 79 C.C.C. 329 (Que. S.C.).
authority", and if this is the case then the detention order is valid. The petitioner remained in detention\textsuperscript{108}.

Fearing treason on the Pacific Coast from fishermen of Japanese descent, who had access to boats and the means to gather information, the Canadian Government ordered 23,000 persons of Japanese ancestry to register. Approximately four months later, and one month after the attack on Pearl Harbour in 1942, Order in Council P.C. 365 was passed on January 16, establishing a 100-mile "protected area" along the British Columbia coast. On February 25, 1942, secret Order in Council P.C. 1486, authorized the Minister of Justice to order the removal of all Japanese persons, regardless of citizenship, from the "protected area"\textsuperscript{109}. By January 1, 1943, approximately 12,000 of the 16,500 Japanese residents of British Columbia were interned in camps, their possessions confiscated and sold at fire-sale prices in order to generate the funds used to pay for their detention\textsuperscript{110}.

In 1945, the Government passed three orders in council seeking to deport Japanese persons from Canada\textsuperscript{111}, and designed to include Canadian citizens of Japanese origin. Despite the fact that the war had ended, Japanese Canadians could be deported to Japan, or could agree to a transfer out of British Columbia, east of the Rocky Mountains. Approximately 4,000 Japanese left the country. The orders were contested in \textit{Co-operative Committee on Japanese Canadians}\textsuperscript{112}.

\textsuperscript{108} Ibid.
\textsuperscript{110} Peppin, \textit{supra} note 81 at 163; Breti, \textit{supra} note 82.
\textsuperscript{111} P.C. 7355, 7356 and 7357 issued on December 15 1945 as cited in Peppin, \textit{supra} note 81 at 164 footnote 142.
v. Attorney General for Canada\textsuperscript{112}. Although the Court ruled that the three orders were intra vires and fell within the powers granted to the executive by means of the WMA, the deportation was never carried out in full as the Government conceded to public opinion\textsuperscript{113}.

The October Crisis

In October 1970, cells of the Front de Libération du Québec ("FLQ") kidnapped the British Trade Commissioner, James Cross, and the Quebec Justice Minister, Pierre Laporte, in an attempt to advance the cause of Quebec independence. The Canadian Government invoked the WMA on October 16, 1970\textsuperscript{114}. The move was supported by a 190-16 vote in the House of Commons on October 19, 1970\textsuperscript{115}. Public Order Regulations 1970, issued under the WMA, declared the FLQ an "unlawful association". Detentions without trial and without bail, for a period no longer than 90 days, were authorized, as were arrests without warrants, and imprisonment without charge for a period no longer than 21 days. As in the past, the Regulations reversed the onus of proof. A person who attended a meeting of the FLQ, spoke publicly in its support, or communicated statements on behalf of the FLQ was considered to be a member of the FLQ, unless he could produce evidence to the contrary\textsuperscript{116}. On November 2, 1970, the

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\textsuperscript{112} (1947) 1 D.L.R. 557.\\
\textsuperscript{113} Stephanie D. Bangarth, "We are not asking you to open wide the gates for Chinese immigration": The Committee for the Repeal of the Chinese Immigration Act and Early Human Rights Activism in Canada (2003) 84:3 Canadian Historical Rev. 395 at 403, 420; Peppin, \textit{supra} note 81 at 164.\\
\textsuperscript{114} Kevin Sneesby, "National Separation: Canada in Context - A Legal Perspective" (1993) 53 L.A. L. Rev. 1357 at 1362 – 1363; Peppin, \textit{supra} note 82 at 177.\\
\textsuperscript{115} Peppin, \textit{supra} note 81 at 181.\\
\textsuperscript{116} Peppin, \textit{supra} note 81 at 182-183.
\end{flushright}
Public Order (Temporary Measures) Act replaced the WMA and the Public Order Regulations 1970. This regime was somewhat less stringent, and was limited by a sunset clause, expiring on April 30, 1971. By March 15, 1971, 465 persons had been arrested under one of either legislated power. 403 were fully released and only 18 were convicted of any offence.

By the time of the final repeal of the War Measures Act in 1988, Canada had been intermittently governed under emergency legislation for more than 20 years.

In 1988 the Emergency Act replaced the War Measures Act. Among the reasons for this was the concern regarding the invocation of the War Measures Act during the October Crisis. The new Act set out four different types of emergencies: public welfare, public order, international emergencies, and war emergency. Specific criteria to be met, for each type of emergency, were outlined. In addition, for the Governor in Council to invoke the Emergency Act, the emergency must be “so serious as to be a national emergency.” The Act stipulates differing orders and regulations which may be invoked by the Governor in Council depending on the type of emergency Canada is confronted with. Unlike the War Measures Act which could be invoked at the discretion of the executive, without any interference by the court, the Emergency Act requires

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117 Peppin, supra note 81 at 181-184.
118 Peppin, supra note 81 at 183.
123 Ibid. at 573.
specific criteria for its invocation, an important element which opens the door to the possibility of judicial review of the decision to invoke it. Further, while the War Measures Act could only be revoked by agreement of both Houses of Parliament, the Emergency Act could be revoked by either house\(^{124}\). With this in mind, the Governor in Council would have to carefully consider his actions, invoking the Emergency Act only under the direst of circumstances.

**Conclusion**

What can this brief reflection of tumultuous times and events in the history of three great democracies teach us about the use of emergency powers in general, and about executive internments in particular? First, it provides some insight into what constitutes an emergency (or at least a perceived emergency) warranting the use of extraordinary powers.

History shows that emergencies threaten national existence less often than decision makers or members of a public swept away in a tide of panic think. When faced with trying to balance national security and civil liberties, governments and citizens should be aware of these patterns of over-reach. Moreover, it is "crucial to distinguish threat assessment from moral repulsion, to separate ethical judgment from actuarial estimation of danger"\(^{125}\).

Second, in all three nations surveyed, legislation originally intended to curtail civil liberties only for the duration of a particular crisis, has been used (or

\(^{124}\) *Ibid.* at 590 - 592.

\(^{125}\) *Supra* note 59 at 52.
misused) long beyond the crisis' duration. It is critically important that the use of such restrictive legislation be limited by sunset clauses.

Third, the resort to emergency powers is often widely supported, and tends to be met with little opposition when brought before legislative bodies or judicial review. Courts have repeatedly accorded great deference to the executive when asked to review the use of emergency powers. The common feature of emergency legislation is that it seeks to limit or curtail civil liberties in an attempt to protect the public at large from perceived threats. Understandably, the courts have proven reluctant to interfere with the executive's agenda. Given all of this, it would be prudent for Western democracies to attempt to predefine, not only what truly constitutes an emergency justifying draconian response, but also what abridgments of civil liberties should be permitted in such an emergency. While the need to administratively detain may arise, for example, the rule of law requires that the executive's decision to detain an individual be subject to judicial review. Further, the detainee should be provided with procedural protections enabling him or her to mount a defence. Appropriate protections might include a statutory right of appeal, review of the case on its merits by the courts, a clear and appropriately defined standard of proof required to detain, and the provision for legal representation for detainees. Applying these protections would ensure that the detainee's petition would not be rejected outright on account of undue deference to executive action on the part of the courts. Rather, the outcome would, with greater likelihood, be based on legal arguments, not on the executive's political requirements.
The American Experience in the Wake of September 11

The horrific events of September 11 profoundly affected the lives of hundreds of millions. The events of that tragic morning continue to resonate for citizens of all Western democracies. The consequences of the attacks on the World Trade Center and the Pentagon continue to influence the lives of most Americans, regardless of their race or religion, as a result of the actions taken by the Executive in its attempts to confront terrorism's threat. That being said, there can be no escaping the fact that measures hastily implemented in the days following the shocking attacks have affected some much more than others.

The Executive responded in much the same way as former administrations had confronted earlier threats. Following patterns established at the outbreak of the civil war, and in the aftermath of the attack on Pearl Harbour, the government swiftly enacted legislation and issued Presidential Orders. The intent, some would say, was to better meet the newly recognized threats. Others are inclined to emphasize the propaganda purpose of such measures, quieting an anxious public and creating a sense, largely false though it may be, that something was and is being done to protect them.

The Guantanamo detainees

A week following the 9/11 attacks Congress passed the Authorization of the Use of Military Force (AUMF), a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist
attacks...or harbored such organizations or persons". On October 7, 2001, acting pursuant to this authorization, the President ordered a military attack against the Taliban rulers of Afghanistan and members of Al Qaeda who were using that country as a safe haven.

As early as January 11, 2002, the United States began to transport prisoners caught in Afghanistan to Camp X-Ray in Guantanamo Bay. Over the following months, more prisoners suspected of ties to the Taliban and/or Al Qaeda, as well as suspected terrorists from other countries, were removed from the "theater of war" and transported to Camp X-Ray. As of June 2004, approximately 640 non-Americans captured abroad were detained there.

In 2002, Guantanamo detainees from various countries petitioned the United States District Court for the District of Columbia, by means of writs of habeas corpus. They challenged the legality of their detention, and claimed that they had not taken part in any terrorist activity against the United States. The detainees also challenged the legality of denial of access to counsel, attempts to prevent their access to any courts and their continuing detention without being charged with any wrongdoing. The detainees claimed that the manner in which they had been detained and their treatment in detention was in clear violation of the US Constitution and of international law. Stunningly, the District Court dismissed all of the petitions on the basis that it lacked jurisdiction over the US naval base at Guantanamo.

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128 Ibid. at 35.
129 Ibid.
Guantanamo Bay as this was not United States soil. The Court of Appeals affirmed the ruling\textsuperscript{132}.

The U.S. Supreme Court granted certiorari, and in April 2004, \textit{Rasul v. Bush}\textsuperscript{133} was argued before the Supreme Court. The question at issue was not the legality of the detentions as such, but the preliminary question of whether or not courts in the United States possess jurisdiction to entertain such petitions at all. The Court rendered its decision in June 2004 ruling by majority that United States Courts do have jurisdiction to hear the petitions. The court rejected the government's position that the precedent set by the Supreme Court ruling in \textit{Johnson v. Eisentrager}\textsuperscript{134} should govern. That case had held that aliens detained outside the United States are not entitled to habeas corpus. \textit{Eisentrager} was distinguished on the basis that the petitioners in \textit{Rasul v Bush}:

- are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States;
- they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing;
- and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control\textsuperscript{135}.

The Court ruled that any detainee held at Guantanamo Bay, regardless of citizenship, was entitled to invoke the federal courts' authority to determine the legality of their detention. The Supreme Court remanded the case for

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\item[\textsuperscript{132}] \textit{Al Odah v. United States}, 355 U.S. App. D.C. 189 (D.C. Cir. 2003); Rasul, supra note 130 at 471 – 473.
\item[\textsuperscript{133}] 542 U.S. 466 (2004).
\item[\textsuperscript{134}] 339 U.S 763 (1950).
\item[\textsuperscript{135}] Rasul, supra note 130 at 476.
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consideration of the merits of the detainees' claims\textsuperscript{136}. In its decision the Court quoted approvingly from its own previous decision of a half-century earlier:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint\textsuperscript{137}.

\textit{Rasul v. Bush} is considered by many legal scholars to be "the most important civil rights case in half a century"\textsuperscript{138}, effectively "opening the courthouse door" so that the courts may determine the legality of each individual detention\textsuperscript{139}. Although the Court ruled that detainees may bring their cases before the Federal Courts, the Deputy Secretary of Defense immediately took measures to forestall this outcome, by issuing an order establishing military combatant status review tribunals\textsuperscript{140} in which detainees can challenge their status as "enemy combatants". While detainees deemed "enemy combatants" by the military tribunals may appeal the designation in District Courts, the government has succeeded in greatly retarding the appeal process\textsuperscript{141}.

\begin{thebibliography}{99}
\item Rasul, supra note 130 at 485.
\item \textit{Shaughnessy v. United States ex rel. Mezei}, 345 U.S. 206 (1953) at 218 - 219 as cited in Rasul, supra note 130 at 474.
\item \textit{Supra} note 127 at 55.
\end{thebibliography}
By sidestepping the Supreme Court’s decision, the government has produced a legal quagmire. The lower courts have reached conflicting verdicts on whether aliens held at Guantanamo Bay may invoke the Due Process clause of the Fifth Amendment to attack the military tribunals to which they are subjected. While in *Khalid v. Bush*¹⁴², the District Court for the District of Columbia accepted the government’s claim that alien detainees “lack judicially enforceable rights”, in *Re Guantanamo Detainee Cases*¹⁴³, the same court ruled that due process protections do indeed extend to Guantanamo Bay prisoners and that the military combatant status review tribunals did not satisfy due process requirements¹⁴⁴.

Even American citizens are afforded no greater due process rights, nor constitutional protections. A landmark decision in the ongoing struggle to find middle ground between civil liberties and national security is the case of *Hamdi v. Rumsfeld*¹⁴⁵. Yaser Hamdi was captured in Afghanistan and subsequently transferred to Guantanamo Bay in January, 2002. In April of that year, upon learning that Hamdi was an American citizen, he was transferred to a military prison in the United States. The government contended that, though an American citizen, Hamdi was an “enemy combatant”, and, thus, that it had the authority to detain him indefinitely with no need to file any formal charges.

In June, 2002, Hamdi’s father petitioned the court on his son’s behalf, for a writ of habeas corpus, stating that his son’s indefinite detention without charge

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¹⁴⁵ 542 U.S. 507 (2004) [Hamdi].
and without access to counsel, violated his rights under the Fifth and Fourteenth Amendments\textsuperscript{146} to the Constitution.

The District Court ordered the government to produce a number of documents relevant to its review of the matter\textsuperscript{147}. The government appealed. The Fourth Circuit Court reversed the order, ruling that as "it was ‘undisputed that Hamdi was captured in a foreign theater of conflict,’ no factual inquiry or evidentiary hearing allowing Hamdi to be heard or rebut the Government’s assertions was necessary or proper"\textsuperscript{148}. The Fourth Circuit Court dismissed the habeas corpus petition determining that it was within the President’s war powers to order Hamdi’s detention based on the AUMF\textsuperscript{149}. The Fourth Circuit Court also rejected Hamdi’s argument that there was no legal foundation for his classification and detention as an enemy combatant and the deprivation of his due process rights to which he is entitled as an American citizen, ruling that "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such"\textsuperscript{150}.

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\item[146] Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”; Fourteenth Amendment: “...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...”.
\item[148] Hamdi v. Rumsfeld, 316 F. 3d 450 (4th Cir. 2003) at 459 as cited in Hamdi, supra note 142 at 514.
\item[149] Ibid. at 467-468.
\item[150] Ibid. at 475 as cited in Hamdi, supra note 145 at 516.
\end{footnotes}
The Supreme Court addressed the question of whether the Executive had the authority to detain citizens labeled as "enemy combatants". Although the government had never provided specific criteria defining "enemy combatant", it had made clear that the individual in question was allegedly "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan "who engaged in armed conflict against the United States". The Court accordingly limited itself to deciding whether or not an individual falling within that definition could be detained, and concluded that the AUMF provided the Executive with the authority necessary to detain such individual "enemy combatants" for the duration of the conflict\textsuperscript{151}.

Considering Hamdi's due process rights, the court ruled, in view of the possibility of his indefinite detention, that he should be afforded a fair opportunity to rebut the government's assertion that he is an "enemy combatant" before a "neutral decision-maker". The Court also stated that the "proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example may need to be accepted as the most reliable available evidence from the Government in such a proceeding"\textsuperscript{152}. Moreover, given the extraordinary circumstances at issue, it held 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"\textsuperscript{153}.

\textsuperscript{151} Hamdi, \textit{supra} note 145 at 517-518.
\textsuperscript{152} \textit{Ibid.} at 533 - 534.
\textsuperscript{153} \textit{Ibid.}
Because the "neutral decision-maker" need not be a Federal Court, the
government could force American citizens, as well as aliens, to petition military
combatant status review tribunals to challenge their "enemy combatant" status\textsuperscript{154}.

The Hamdi case points to the government's fear of attempting to try
suspected terrorists in court. Fearing Hamdi's case would be heard in court, the
government started to negotiate Hamdi's release shortly after the Supreme Court
ruling. In October 2004 Hamdi was released to Saudi Arabia conditioned on
renouncing his U.S. citizenship and certain other travel restrictions\textsuperscript{155}. While it is
possible that the government feared the disclosure of sensitive intelligence
information as a consequence of legal proceedings, others claim that "the
government wanted to avoid a Hamdi trial because of the potential
embarrassment of admitting that its evidence against him was inadequate. Not
only that, but this precedent would undermine its credibility in future cases, such
as those of the Guantanamo prisoners"\textsuperscript{156}. Regardless, the fact remains that, "it's
quite something for the government to declare this person one of the worst of the
worst, hold him for almost three years and then, when they're told by the
Supreme Court to give him a fair hearing, turn around and give up"\textsuperscript{157}.

The only other American citizen to be labeled an "enemy combatant" since
9/11 is Jose Padilla. Padilla was arrested on May 8, 2002, under a material
witness warrant, upon arrival at O'Hare Airport on a flight from India. He was

\textsuperscript{154} Barbara Olshansky, "What Does It Mean To Be An Enemy Combatant" in Rachel Meeropol,
\textsuperscript{155} Phil Hirschkorn and Nic Robertson "Hamdi voices innocence, joy about reunion" Cnn.com (14
\textsuperscript{156} Yonatan Lupu "Missed Trial" The Newrepublic Online (27 September 2004), online: The
\textsuperscript{157} Ibid.
detained for several weeks before his attorney filed a motion seeking his release, arguing that material witnesses could not be lawfully detained. A court ruling on the petition was scheduled for June 11, 2002. On June 9, President Bush declared, based on hearsay evidence, that Padilla was an "enemy combatant" and ordered him detained in a military compound, alleging "Padilla flew to the United States on an al Qaeda scouting mission to detonate a radioactive 'dirty bomb'".158

Padilla petitioned the Supreme Court for a writ of habeas corpus claiming that he was unlawfully detained. Although the Supreme Court agreed to hear the case, it dismissed Padilla's petition, by majority decision, without addressing the merits of the case. It did so, on purely technical grounds, ruling that Padilla had not named the proper authority in his habeas corpus petition.159 The ruling in effect forced Padilla to re-file his petition, delaying the Court's examination of the merits of the case, while Padilla remained in custody.

Finally, on November 22, 2005, three years after his arrest, Attorney General Alberto Gonzales announced that Padilla would be indicted and charged with "providing - and conspiring to provide - material support to terrorists, and conspiring to murder individuals who are overseas".160

Unlike Padilla and Hamdi, John Walker Lindh, an American accused of fighting alongside the Taliban, was not detained in a military installation. Lindh

159 Rumsfeld v. Padilla, 542 U.S. 426.
was charged in a civilian court on criminal charges, with all the due process
rights that involves, and was eventually convicted as a result of a plea bargain
(the government again avoided having to reveal its evidence or investigation
techniques). Why did Hamdi and Lindh, apparently caught in similar
circumstances, receive such differing treatments? Some argue that “the decision
to treat them so differently...indicates the presence not only of wholly unfettered
discretion but also the arbitrary exercise of such discretion”\textsuperscript{161}. Others claim that
“the only factors that seem to distinguish the two cases are race and national
origin”\textsuperscript{162}.

The Patriot Act

The \textit{Uniting and Strengthening America by Providing Appropriate Tools
Required to Intercept and Obstruct Terrorism Act of 2001}\textsuperscript{163}, better known by its
Orwellian acronym, “The Patriot Act” (“The Patriot Act”) was not the first US
attempt to codify anti terrorism legislation in the wake of a terrorist attack.
Following the April 19, 1995 attack on the Alfred P. Murrah Federal Building in
Oklahoma City, the \textit{Antiterrorism and Effective Death Penalty Act of 1996}\textsuperscript{164}
(AEDPA) was signed into law by President Clinton on April 24, 1996. Although
the Oklahoma City attack was carried out by an American citizen, it raised
American public awareness vis-à-vis possible terrorist attacks from outside as

\textsuperscript{161} Supra note 154 at 192.
\textsuperscript{162} John Lichtenthal, “The Patriot Act and Bush’s Military Tribunals: Effective Enforcement or
well as from within. As such, in the same year, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996\textsuperscript{165} (IIRIRA) was passed.

These two acts provided the Executive with the means to introduce secret evidence in deportation hearings against suspected alien terrorists, and to impose mandatory detentions, on a wider range of non-citizen immigrants on various grounds. Furthermore, these two acts significantly curtailed the ability of the courts to review immigration decisions\textsuperscript{166}.

In contrast to what many believe, the Patriot Act was not born as a result of the catastrophic attacks of 9/11, the groundwork having been laid well in advance. Although it was evident that the Patriot Act severely infringed on many civil liberties, the Executive opportunistically seized the opportunity 9/11 provided to push Congress to authorize it, using its Orwellian title to obscure the extent of its deviation from traditional US values. Not wanting to appear less than patriotic, Congress and the Senate passed the bill within six weeks (a good deal less time than Congress spends reviewing legislation with no constitutional implications), with no real deliberative process. There is evidence to suggest that many

legislators did not even have the chance to study the law before its enactment\textsuperscript{167}. On October 26, 2001, the Patriot Act was signed into law\textsuperscript{168}.

The \textit{Patriot Act} dramatically increased the powers of the Executive, and diminished the scope of judicial review of Executive action. The authority of the Executive to use surveillance techniques such as wire tapping and the interception of electronic communications has been expanded. The Patriot Act also enables increased sharing of information between government agencies. Under section 802, the definition of the federal crime of terrorism is expanded to include "domestic terrorism": "acts dangerous to human life that are a violation of the criminal laws" if they "appear intended to influence the policy of a government by intimidation or coercion" and occur, primarily, in the United States. Although intended as a means to give the government greater flexibility in investigation and prosecution of violent political organizations, the definition has been criticized as being so broad as to even include actions of "radical environmentalists"\textsuperscript{169}.

\textbf{Defining Terrorism}

Perhaps one of the most problematic changes brought about by the Act is the manner in which a "terrorist organization" is defined, and the implications of being affiliated with such an organization. Prior to the Act’s enactment, a group


would be classified by the Secretary of State as a "foreign terrorist organization" in accordance with section 219 of the Immigration and Nationality Act (INA)\(^{170}\), if that group engaged in terrorist activity\(^{171}\) or terrorism\(^{172}\) and if the group's actions were thought to threaten the security of United States nationals or the national security of the United States. Section 219 stipulates that notice must be given to congressional leaders seven days prior to making such a designation and designations are required to be published in the Federal Registrar\(^{173}\).

While the US Patriot Act retains the provisions outlined in section 219, it also specifies two more ways in which a group could be categorized as a "terrorist organization", without reference to classification as foreign or domestic. First, the Secretary of State in consultation with, or upon request of the Attorney General or the Secretary of Homeland Security, can make such a designation if they find that the organization commits, or incites to commit an act intended to cause death or serious bodily injury, and/or to prepare or plan terrorist activity, to gather information on potential targets for terrorist activity or to solicit funds for a terrorist organization or activity\(^{174}\). The designation would be effective upon publication in the Federal Registrar\(^{175}\).

Second, the Act determines that any group of two or more individuals, organized or not, who engage in the abovementioned activities may also be

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\(^{171}\) as defined in section 212(a)(3)(B) of the Immigration and Nationality Act, codified as 8 USCS § 1182(a)(3)(B).

\(^{172}\) as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)).


\(^{175}\) Supra note 173 at 1423.
defined as a terrorist organization. The new category carries with it dire consequences. Any non-citizen who is a member of a “terrorist organization”, designated or undesignated, or endorses such an organization is inadmissible and/or deportable\textsuperscript{176}. The creation of the new category of undesignated terrorist organization imposes guilt by association on non-citizens as it greatly increases the pool of potentially deportable “terrorist organization members”. Section 411 of the Patriot Act imposes on the non-citizen who solicited membership or funds for the undesignated organization, the onus of “demonstrat[ing] that he did not know, and should not have reasonably known, that the act would further the organization’s terrorist activity”\textsuperscript{177}.

The Patriot Act also broadens the term “terrorist activity” to include any crime in which a weapon or dangerous device was used (other than for mere personal monetary gain). This definition is particularly problematic, as it encompasses crimes which may or may not be politically motivated. Furthermore, the Patriot Act decrees that its provisions are retroactive, which succeeds in “vastly expanding the class of noncitizens that can be removed on terrorist grounds”\textsuperscript{178}. Moreover, the breadth of the definitions of "terrorist organization" and "terrorist activity" force a direct conflict with a non-citizen’s rights as set out in the Amendments to the US Constitution\textsuperscript{179}. For example, it may be argued that since solicitation of funds for a "terrorist organization" now falls under the rubric of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{176} \textit{Supra} note 173 at 1423 - 1424.
\item \textsuperscript{177} \textit{Fla. J. Int’l L.}, \textit{supra} note 166 at 435.
\item \textsuperscript{178} \textit{Ibid.}
\item \textsuperscript{179} Aliens residing in the United States are protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. See The Harvard Law Review Association 1997, "Foreign Campaign Contributions and the First Amendment" (1997) 110 Harv. L. Rev. 1886 at 1896.
\end{itemize}
\end{footnotesize}
"terrorist activity" punishable by detention and/or deportation, here the *Patriot Act* could infringe on the non-citizen's freedom of expression, previously protected by the First Amendment.\(^{180}\)

Citizens, on the other hand, are treated differently. They have a constitutional right to endorse a terrorist organization's activity, so long as their speech is not intended and is unlikely to produce imminent lawless action.\(^{181}\) Nonetheless, citizens, like non-citizens lose in that the *Patriot Act* diminishes the spirit of public debate and political freedom.\(^{182}\)

**Alien Detentions and The Patriot Act**

Section 412 specifies and expands the ability of the Attorney General to detain non-citizens suspected of terrorism. Under this section the Attorney General may detain a non-citizen without a hearing, if he has "reasonable grounds to believe" that the alien has engaged in terrorist activities or "any other activity that endangers the national security of the United States."\(^{183}\)

Once the Attorney General issues a certificate ordering the detention of a non-citizen, the named individual may be detained for up to seven days without any form of charges being filed. If the continued detention of the alien is deemed necessary, deportation proceedings must be initiated and/or criminal charges be filed. Once removal proceedings are set in motion, the individual must remain in detention pending one of three outcomes. These include removal, decertification,

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by the Attorney General, regardless of whether the named individual is granted relief from removal, or thirdly, a decision that he is unremovable. If it becomes apparent during proceedings that removal is unlikely in the “reasonably foreseeable future”, the grounds for detention must be reviewed, by the Attorney General, every six months. Detention is renewable for an additional six months as long as it is felt that the detainee’s release would “threaten the national security of the United States or the safety of the community or any person”.184

The fact that these detentions are deemed to be civil commitments rather than a punitive action185 has certain constitutional consequences. The Supreme Court has ruled that the executive must at least meet the clear and convincing burden of proof (discussed below) when implementing administrative detentions186. Furthermore, “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed”187. On the other hand, “because deportation is deemed not to be punishment, the constitutional protections guaranteed to all persons in criminal trials do not apply, allowing, among other things, the use of secret evidence”188. The Patriot Act itself affords detainees certain procedural safeguards. These include the right to judicial review, and the right to initiate habeas corpus proceedings. It should, however, be noted that while such

188 Supra note 185.
petitions may be made to any district court having jurisdiction, the Patriot Act specifies that all appeals shall be heard and decided only by the US Court of Appeals for the District of Columbia which has shown a “remarkable tendency toward national security fundamentalism”\(^\text{189}\). Further, the Attorney General himself is required to review the detention of certified non-citizens every six months, and to report to Congress on the number of detainees, their nationality, and the duration of and grounds for detention\(^\text{190}\).

The notion of a requisite “clear and convincing” standard of proof deserves some discussion, as this standard is somewhat unique and innovative and is currently used in other Western democracies\(^\text{191}\) for administrative detention proceedings.

**Clear and Convincing**

Three standards of proof have evolved within the Common Law legal tradition. At one end of the spectrum a minimalistic approach - the “preponderance of the evidence standard” - applies where society has little concern regarding the outcome of the dispute and there is generally no loss of liberty to any individual. This is most commonly applied in civil disputes. At the other end of the spectrum, the defendant’s interests are so great that they have traditionally been protected by the highest standards of proof possible, with society, rather than the individual whose fate is to be determined, assuming


\(^\text{190}\) Fla. J. Int'l L., supra note 166 at 441.

\(^\text{191}\) Among them the United States and Israel.
almost the entire risk of an erroneous judgment. Under the Due Process Clause of the United States Constitution, the state must prove the guilt of an accused beyond a reasonable doubt\textsuperscript{192}. Most, if not all, common law legal systems apply this standard in almost all criminal proceedings.

Between these two standards lies an intermediate standard of proof, also referred to as the "clear and convincing standard". This requires that the facts asserted be highly probable, and based on evidence which is at least seventy percent probable\textsuperscript{193}.

In Addington v. Texas\textsuperscript{194} the United States Supreme Court examined the issue of standard of proof as it relates to the involuntary commitment of a person to a mental institution, emphasizing that "the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication'\textsuperscript{195}. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision\textsuperscript{196}.

The court surveyed the different standards of proof used in various legal fields, on its way to ruling that the standard required to meet the Fourteenth

\textsuperscript{192} Addington v. Texas, 441 U.S. 418 (1979) at 423-424 [Addington].
\textsuperscript{194} Addington, supra note 192.
\textsuperscript{195} In re Winship, 397 U.S. 358 at 370 (1970) cited in Addington, supra note 192 at 423.
\textsuperscript{196} Addington, supra note 192 at 423.
Amendment requirement of due process in cases such as this one, was that of "clear and convincing evidence".

Although somewhat unusual, this standard was not invented in the Addington ruling. In the United States, it is used in matters where the defendant has committed "quasi-criminal wrongdoings" such as fraud, or in civil cases requiring greater protection for particularly important individual interests\textsuperscript{197}. In Woodby v. Immigration & Naturalization Service\textsuperscript{198}, for example, it was ruled that the "clear and convincing" evidence standard should be adopted in cases involving deportation proceedings. In Chaunt v. United States\textsuperscript{199}, it was ruled that in matters in which the state seeks to denaturalize an individual, the evidence supporting the request must meet the "clear and convincing" standard of proof.

In Addington the Court sought to balance the interests of the petitioner to not be involuntarily committed indefinitely against the interest of the state to protect its citizens from people who, because they are mentally ill, might pose a danger to themselves or to society. The court ruled that the state must prove by a "clear and convincing" standard that a person is indeed mentally ill and thus should be involuntarily committed:

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify
confinement by proof more substantial than a mere preponderance of the evidence.  

**Zadvydas v. Davis**

The courts have not to date been called upon to review the question of indefinite administrative detention of an alien suspected of terrorism under the *Patriot Act*. Some guidance may however be found in the earlier case of *Zadvydas v. Davis*. The Supreme Court was there called upon to decide the issue of indefinite detention for aliens who had been convicted of criminal wrongdoings and for whom the possibility of deportation was all but exhausted.

In rendering its decision that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized," the Court ruled that after a six month period "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink." Although this decision might be taken as implying a degree of rigour in approach to the Patriot Act detentions, it was handed down in the different

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200 Addington, supra note 192 at 427.
202 Both aliens were detained pursuant to 8 U.S.C.S. § 1231(a)(6) which stipulates that: "An alien ordered removed who is inadmissible under section 212...removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4)..., (a)(2), or (a)(4)] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)."
203 Supra note 201 at 699.
204 Ibid. at 701.
circumstances that pervaded prior to the attacks of 9/11. Moreover, the court specifically stated that its reasoning could not be assumed to apply automatically in circumstances involving national security: “Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”\textsuperscript{205}.

The PENTTBOM Investigations

In the wake of the 9/11 attacks the Federal Bureau of Investigations launched an extensive investigation –termed “PENTTBOM” - into the attacks. As part of the investigation 762 aliens were detained, the majority of whom were arrested between September 11, 2001, and August 6, 2002\textsuperscript{206}. Although the US Patriot Act was rushed through Congress in a matter of weeks after 9/11, the procedures followed for most of these detentions went far beyond anything authorized in the Patriot Act. The vast majority of individuals detained as part of the PENTTBOM investigation were never truly suspected of involvement in the 9/11 attacks, but were nonetheless detained on suspicion of violating immigration law.

In a report published for the United States Department of Justice in June 2003, the Office of the Inspector General (OIG) wrote: “The FBI...made little

\textsuperscript{205} Ibid. at 696.
attempt to distinguish between aliens who were subjects of the FBI terrorism investigation...and those encountered coincidentally to a PENTTBOM lead.\textsuperscript{207}

Detainees arrested as part of the “PENTTBOM” investigations were subject to an unwritten “held until cleared” policy, which meant that they could be, and in many cases, were detained, under the order of the Justice Department, under deplorable conditions for weeks to months without any possibility of a bond hearing.\textsuperscript{208}

Because so many detainees were held and subject to clearance investigations before they could be released, the authorities were unable to investigate and charge detainees within the 72 hour time frame established by the Immigration & Naturalization Service’s (INS) self imposed, but not legally binding, time frame. Many detainees were, as a result, held for extended periods without knowledge of the reason for their arrest and without any ability to obtain legal representation. The imposed blanket “no bond” policy led to a good deal of internal confusion. Individuals for whom the INS had concluded its investigation and who had either been cleared, or for whom a departure order had been issued, could not be released until the FBI had completed its investigation. However, since the FBI’s clearance process was much slower than the INS’ process, the INS began to raise concerns regarding the Justice Department’s “no bond” policy, particularly in those cases in which the detainee

\textsuperscript{208} Ibid.  
\textsuperscript{209} Ibid.
had received either a final removal order or a voluntary departure order, but continued to be held in detention, subject to investigation by the FBI\textsuperscript{210}.

In October 2001, in the wake of these multiple alien arrests and detentions, several immigrants' rights groups and civil liberties organizations filed Freedom of Information Act (FOIA) requests, in an attempt to force the government to disclose the identities of detainees and their attorneys, the date, location, and reasons for both detention and subsequent release\textsuperscript{211}. Under the FOIA, the government must respond to such requests by providing information that is not classified or otherwise exempt from disclosure under the law.

Since the September 11 attacks, the United States Court of Appeals for the District of Columbia Circuit has handled most of the cases involving conflict between individual liberty and national security. In nearly all of these cases, the court has shown a striking tendency to what has been termed "national security fundamentalism", deferring to the power of the Executive in almost every case\textsuperscript{212}. In the benchmark decision of Center for National Security Studies vs. U.S. Department of Justice\textsuperscript{213}, Judge Gladys Kessler of the Federal Court in D.C. ordered the Justice Department to release the names of the detainees and their lawyers. She ruled, however, that all other information could be withheld. On appeal\textsuperscript{214}, in a majority decision, the District of Columbia Circuit Court, in one of the clearest examples of national security fundamentalism, reversed Judge

\textsuperscript{210} Ibid.


\textsuperscript{212} Geo. Wash L. Rev., supra note 189 at 697.


\textsuperscript{214} Center for National Security Studies v. United States Department of Justice, 331 F.3d 918 (D.C. Cir. 2003) [Nat'l Security Studies].
Kessler's decision, ruling that the government was not required to release even the names of the detainees, since that information fell under the FOIA exemption which allows an agency to withhold "information compiled for law enforcement purposes...to the extent that such...information could reasonably be expected to interfere with enforcement proceedings"\(^2\)\(^{15}\).

In delivering its ruling the Court wrote:

America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore\(^2\)\(^{16}\)... the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role\(^2\)\(^{17}\).

Perhaps even more striking than the Court's outright deference to the Executive is the fact that its decision was rendered only two weeks after the OIG reported that very few of the detainees had been involved in any terrorist activities\(^2\)\(^{18}\). The Court based much of its opinion on declarations made by government officials that:

...many of the detainees have links to terrorism. This comes as no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several detainees have been charged with federal terrorism crimes or held as

\(^{2\text{15}}\) Ibid. at 925 – 926.
\(^{2\text{16}}\) Ibid. at 928.
\(^{2\text{17}}\) Ibid. at 932.
\(^{2\text{18}}\) Supra note 211 at 158 - 159; Nat'l Security Studies, supra note 214 at 941.
enemy combatants. Accordingly, we conclude that the evidence presented in the declarations is sufficient to show a rational link between disclosure and the harms alleged\textsuperscript{219}.

Judge Tatel, in dissent, pointed to the problematic nature of the above logic, stating that the Court may have based its decision on “facts” not supported by the evidence. The plaintiffs appealed to the United States Supreme Court, but their request for review was denied\textsuperscript{220}.

In the events following the 9/11 attacks, we see the erosion of civil liberties in the United States as follows: The OIG report, which emphasized that very few of the detainees had any connection to terrorism, was largely ignored by the D.C. Circuit Court, in a decision which, as pointed out by the dissenting judge, appears not to have been based, in most cases, on solid evidence, but rather on circuitous logic (the detainees were connected to terrorism because they were being investigated for terrorist activities) presented by government officials. Appeal to the Supreme Court for review of the decision by citizen watchdog groups, was denied. This shows that in what is believed to be the greatest of all Western democracies, when the executive declares that the country is at war with “terrorism”, not only do secretly named detainees have no rights, but the right of citizens to scrutinize the actions of the executive, is diminished, due to undue deference on the part of the courts.

\textsuperscript{219} Nat'l Security Studies \textit{supra} note 214 at 931 and 941.
\textsuperscript{220} Ctr. for Nat'l Sec. Studies v. DOJ, 540 U.S. 1104 (2004).
Issues of Secret Evidence

One of the most treacherous ways in which the rights of a detained individual are systematically eroded is through the legalized use of secret evidence in administrative detention proceedings.

Following the Oklahoma City bombings the AEDPA authorized the use of secret evidence in immigrant removal proceedings, particularly in cases involving allegations of terrorism\(^{221}\). The AEDPA also established "alien terrorist removal courts"\(^{222}\) in which the federal rules of evidence do not apply, to deal with such cases\(^{223}\). The AEDPA does stipulate, however, that the removal court shall "provide for the designation of a panel of attorneys each of whom...has a security clearance which affords the attorney access to classified information, and...has agreed to represent permanent resident aliens with respect to classified information"\(^{224}\).

One case which hinged on secret evidence was that of Nasser Ahmed. The INS claimed that he was associated with a terrorist organization and, as such, was a threat to national security. Ahmed was detained for almost three and a half years. He resisted deportation, he said, out of fear of torture if he were to be returned to Egypt. The INS at one point produced a one-line summary of the evidence which stated that it had information regarding the respondent's association with a terrorist organization, but it did not even name the

\(^{221}\) 8 U.S.C. 1534 (e).
\(^{222}\) 8 U.S.C. 1532; Clev. St. L. Rev., supra note 185 at 575.
\(^{223}\) 8 U.S.C. 1532 (h).
\(^{224}\) 8 U.S.C. 1532 (e).
organization\textsuperscript{225}. When the INS was finally forced to disclose its secret evidence, it was revealed that the information was unsubstantiated "double or triple hearsay". In the result, a district judge ordered Ahmed's release. It turned out that "the FBI and INS [had been] attempting to make good on their threat to deport him for refusing to inform on Sheik Abdel Rahman, who was on trial for conspiracy in connection with the 1993 World Trade Center bombing"\textsuperscript{226}.

Perhaps the best known case involving the use of secret evidence is that of \textit{Kiareldeen v. Reno}\textsuperscript{227}. Kiareldeen, an Israeli citizen who had been a United States resident since 1990, was detained in 1998 on suspicion of being a terrorist. It was alleged that he had plotted to kill Attorney General Janet Reno and that he had met with Nidal Ayyad (convicted in connection with the 1993 World Trade Centre bombings) a week prior to the WTC attack. The respondent filed an application for habeas corpus, and was eventually released in 1999 when it was discovered that the "evidence" had been entirely fabricated by his ex-wife. The court declared that "the petitioner's case is an example of the dangers of secret evidence"\textsuperscript{228}.

These cases illustrate the pragmatic and prudential reasons why law abhors secret evidence. They point to constitutional concerns regarding the use of secret evidence. So serious are those issues that Kiareldeen and Ahmed resulted in two failed attempts to pass secret evidence repeals acts. The first of these (1999)

\textsuperscript{225} Clev. St. L. Rev., \textit{supra} note 185 at 575.
\textsuperscript{227} 71 F. Supp. 2d 402 (D.N.J. 1999).
\textsuperscript{228} Ibid. at 413.
never passed despite the heavy support of both the House of Representatives and the Attorney General herself. The second, proposed in 2001, would have entitled the detainee to non-federally provided counsel, an ability to examine all the evidence, to provide his own witnesses and cross-examine witnesses. The attacks of September 11 of that year, however, changed the priorities of Congress dramatically, and this act too, failed to pass\textsuperscript{229}.

**Military Tribunals**

Since the 9/11 attacks, the U.S. federal government has sought to act in secret in a wide range of its activities. This is shown particularly in the establishment, by Presidential Order, of military tribunals\textsuperscript{230} in which suspected terrorist non-citizens, may be tried for alleged terrorist connections and/or activities, by a panel of military officers, without application of "the principles of law or the rules of evidence"\textsuperscript{231}. This applies equally to foreigners captured overseas and to resident aliens in the USA. Specifically, the President or the Secretary of Defense may identify the persons to be tried, appoint the judges, name the prosecutors, and select the defense lawyers. The proceedings may be held in secret, and the President may decide all appeals\textsuperscript{232}. As of March 2002, however, certain procedural amendments were put in place. Unrepresented defendants are now provided with appointed military defence lawyers, and are

\textsuperscript{229} Clev. St. L. Rev., supra note 185 at 577 – 578.
\textsuperscript{231} Section 1(f) of the Military Order, supra note 229.
\textsuperscript{232} Steven W. Becker "'Mirror, Mirror on the Wall...': Assessing the Aftermath of September 11\textsuperscript{th} (2003) 37 Val. U.L. Rev. 563 at 581.
presumed innocent until proven guilty beyond a reasonable doubt (as seen by a two-thirds majority of the tribunal). These amendments may, however, have little practical value, because should the amendments conflict with the original Presidential Order, "the President's military order shall govern." This process has been called "the greatest array of legal powers to be exercised in the justice system that has ever been vested in a single person, office, or branch of government since the birth of this nation."

Nearly three years after the Military Order was issued, a military commission was to hear the case filed against Osama bin Laden's alleged driver and bodyguard, Salim Ahmed Hamdan, in July, 2004. Hamdan petitioned the Federal Court in Washington for a writ of habeas corpus, contesting the authority of the military commission to hear the charges filed against him. The Court granted the petition in part and ruled that: "unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged." Although the national security fundamentalists of the Court of Appeals for the District of Columbia reversed the ruling, the United

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234 Ibid at Section 7B.
States Supreme Court, granted certiorari in November, 2005, after having been urged in a letter by 450 law professors to review the case.\footnote{238}

In June 2006, the Supreme Court held in a 5-3 verdict that it had jurisdiction to hear the case of the accused combatant, and that the military commission that had been set up could not proceed, because it violated both the Uniform Code of Military Justice, as well as Common Article 3 of the Third Geneva Convention. Since Hamdan was apprehended in the territory of a Geneva Conventions signatory (Afghanistan), he was entitled to some protections under Common Article 3, specifically, judgment pronounced by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."\footnote{239} The Court also ruled that:

> the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need"...and for that reason, at least, fail to afford the requisite guarantees...Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.\footnote{240}

**Novel Approaches, New Legal Problems: the Zaccarias Moussaoui Case**

While section 412 of the *Patriot Act* allows for detention of non-citizens suspected of terrorist activity (similar to Security Certificate legislation in

\footnotetext{238}{Hamdan v. Rumsfeld, 126 S. Ct. 622 (U.S. 2005); Tung Yin, "Ending the War on Terrorism Bone Terrorist at a Time a Noncriminal Detention Model For Holding and Releasing Guantanamo Bay Detainees" (2005) 29 Harv. J.L. & Pub. Pol'y 149 at 182 footnote 160.}
\footnotetext{239}{Article 3(1)(d) of *The Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, 6 U.S.T. 3316, T.I.A.s. No. 3364.}
\footnotetext{240}{Hamdan v. Rumsfeld 546 U.S. (2006).}
Canada), criminal or deportation proceedings must be initiated in a timely fashion. Because the United States views terrorism as a borderless threat, it has established a two-pronged mechanism by which to try suspected terrorists. The operation of this mechanism is best demonstrated by the case of Zaccarias Moussaoui, a French citizen, detained and awaiting deportation for remaining in the United States illegally. While in the United States, Moussaoui had participated in various flying courses, during which time he showed undue interest in features such as the door-operating mechanisms of certain aircrafts. In addition, large sums of money, the origins of which he could not properly account for, appeared in his bank account, all around the time of the September 11 attacks. Due to the suspicious nature of his activities, he was indicted rather than deported. The criminal charges included, among others, conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to murder United States employees, and conspiracy to commit aircraft piracy.  

Moussaoui, representing himself, petitioned the court for permission to question Ramzi Binalshibh, held overseas for allegedly having financed the aircraft hijackers of the September 11 attacks. Binalshibh, Moussaoui claimed, could help him prove that, although he was an Al Qaeda member, he was not involved in the September 11 attacks. The court ruled that Moussaoui could question Binalshibh. The government appealed the decision, arguing that allowing Moussaoui to question Binalshibh would cause irreparable harm to

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national security, and would "imperil the prosecution of other terror suspects". The Fourth Circuit Court of Appeals upheld the lower court's decision.

Despite statements by the Justice Department that it is confident that Moussaoui's case can be tried in civilian court, it had also stated that it had the option of moving the case to a military court, with all the due process implications that would entail. In May, 2006, almost four and a half years after his trial begun, Moussaoui was sentenced by the U.S. District Court for the Eastern District of Virginia to life in prison without the possibility of parole.

Although the intentions of the United States in attempting to prosecute suspected terrorists are commendable, the Moussaoui case illustrates the inherent difficulty in achieving the intended goals. While deporting a suspected terrorist would accomplish nothing, trying him in a criminal or military court necessarily leads to a long, drawn out process of detention, secrecy and appeals, with no end in sight.

Conclusions

The "global war on terrorism" has been raging on for almost 5 years and, in all likelihood, will not end in the near future. Speaking just three days after the 9/11 attacks President Bush declared that while "Americans do not yet have the distance of history... our responsibility to history is already clear: to answer these

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244 United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); Clev. St. L. Rev., supra note 185 at 587 – 591.
245 Clev. St. L. Rev., supra note 185 at 590 footnote 188.
attacks and rid the world of evil. The cost of this mission must be considered carefully. What amount of collateral constitutional damage to their own liberty-loving traditions are citizens of a democratic society willing to sustain in order to achieve a goal which is, in fact, unattainable?

It is no secret that “people’s respect for human and civil liberties is very often fragile when they are frightened”, but the attacks of 9/11 were not the first time the American people have had to confront a threat to their nation. Moreover, as horrendous as those attacks were, one would be hard pressed to say that they actually threatened the existence of the United States.

Previous times of turmoil reveal abundant examples of the Court’s deference to actions taken by the Executive in curtailing civil liberties, tolerance of anti-sedition laws, and administrative detentions. Hindsight allows us to judge some decisions, such as upholding racist state action in *Korematsu v. the United States*, as stains on the Court’s record. The fact that such conclusions are more easily reached when the fear subsides gives cause for sober reflection in times of perceived crisis. Whether “lawful” or not, much that is done in the name of fear, is not morally just.

There is no doubt that the “war on terror” poses many new legal challenges. It may indeed require use of new and extraordinary methods to capture and convict those who hide among us and wish to harm us. There is no doubt that the

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United States government is deeply committed to waging the war on terror, by both military and legal means. The US Patriot Act and the Military Order signed by President Bush are two key components in the Executive’s arsenal. The great powers so conferred on the Executive, import, in equal measure, great burdens of responsibility to both decency and fairness. The broad definitions of “terrorism” and “terrorist organization” place an enormous burden on the wisdom of government officials to take great care not to infringe unduly upon long standing and cherished legal rights. Using such broad definitions, however, “amounts to an invitation to place unquestioning trust in the discretion (a polite term denoting biases, gut instincts, upbringing, and socialization) of officialdom...The collateral damage done by misdirected antiterrorist fire will register as irreparable harm to innocent people.”

The discrepant procedures used in the cases of Hamdi and Lindh highlight the sometimes arbitrary nature in which the Executive uses new legal tools at its disposal. These tools must be used in a manner which appears just, fair, and unbiased. The attempt to try detainees in civilian courts, and the provision of counsel who can review secret evidence, are commendable steps. The USA also attempts to preserve liberty values through its approach to standard of proof. Both the standard of proof required to administratively detain, (clear and convincing evidence) and that used by military tribunals (beyond reasonable doubt in the view of a two thirds majority) are higher standards than those required by the Canadian Courts.

The very real possibility of indefinite detention, remains, however. After the Patriot Act was passed, even with this powerful mechanism in hand, the Executive went well beyond its authority in the manner in which it detained aliens in the PENTTBOM investigation. While administrative detentions may be necessary, every effort should be made to minimize the length of the detention and to afford the detainee all of the due process rights usually afforded to individuals by the criminal justice system. In these cases, utter deference to the Executive on the part of the court is not what is needed. An honest, informed critique of the government's actions would enhance not only the concept of separation of powers, but ultimately, democracy itself. Indeed, as the United States Supreme Court noted in Hamdi, "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."
Administrative Detention in Israel

A Historical Review

Unlike the United States and Canada which have only sporadically had to cope with terrorist threats and only in recent years, Israel has had to grapple with terrorism since its very conception. A look at Israel’s methods of dealing with terrorism from the legal perspective sheds much light on this complicated issue. The lessons learned from methods which work, to those which might work but should not be sanctioned, to those which do not work, are all valuable as they come with the advantage of the hindsight of decades.

During the British mandate of Palestine, in the face of violent insurrection by Jewish underground movements such as the Irgun Zva'i Leumi and the Lohamei Heruth Israel, the British introduced a set of emergency regulations enabling them to detain individuals without trial, to deport and to order curfews. These actions were taken under the Defence (Emergency) Regulations of 1945 (Regulations), regulations which Israel inherited in 1948 when it gained independence. Since these regulations were used to detain without trial, and to deport thousands of members of Jewish underground movements, their adaptation into law by the newly formed state provoked much criticism and pressure on the government to amend them. Although the Regulations were rarely used, the government contended that they were required, as Israel was

under constant threat which necessitated special measures to protect the newborn state and its public\textsuperscript{254}.

Reform came in 1979, thirty-one years following Israel's independence. The regulations were replaced by a new statute, the \textit{Emergency Powers (Detention) Law of 1979}\textsuperscript{255} (Administration Detention Law). The Administration Detention Law was a response to the criticism that a law was needed with more due process rights, more in tune with Israel's democratic values\textsuperscript{256}.

\textbf{The \textit{Emergency Powers (Detention) Law of 1979}}

The Administration Detention Law provisions made a number of substantial fundamental changes to the original British regulations. The regulations authorized the Chief of Staff of the Israeli Defence Forces (IDF) or an IDF region commander to order that a person be detained. The Administration Detention Law only bestowed this power on the Minister of Defence, the only exception being that the IDF Chief of Staff may order such a detention, but for a period no longer than 48 hours, which he may not extend\textsuperscript{257}. It should be noted that the Minister of Defence's authority under this law can not be delegated\textsuperscript{258}.

The Minister of Defence may order an individual to be administratively detained if he has a "reasonable foundation to assume that for the reasons of the State's security or the public safety an individual should be held in detention"\textsuperscript{259}.

\textsuperscript{254} Weiss, \textit{supra} note 253 at 4 - 5.
\textsuperscript{255} Bargaining Chips, \textit{supra} note 252 at 756.
\textsuperscript{256} Weiss, \textit{supra} note 253 at 5.
\textsuperscript{257} Section 2(c) \textit{Emergency Powers (Detention) Law, 1979}.
\textsuperscript{258} Section 11 \textit{Emergency Powers (Detention) Law, 1979}.
\textsuperscript{259} Section 2(a) \textit{Emergency Powers (Detention) Law, 1979} as cited in\textit{Appropriate Evidentiary Standards}, \textit{supra} note 193 at 222.
Whereas the Regulations did not limit the duration of the detention, the Administration Detention Law limited the duration of detention for a period no longer than six months\textsuperscript{260}. However, the Minister could extend the detention for additional periods of six months if he believes that an individual continues to pose a threat to national security or the public safety\textsuperscript{261}.

Under the regulations an individual who was detained could appeal to an advisory committee, which only had the authority to make recommendations. Alternatively, he could petition the Israeli High Court of Justice for a writ of habeas corpus\textsuperscript{262}. The Administration Detention Law expanded the judicial review process beyond that of the British Colonial Law, by specifically incorporating the process into the law, stipulating that a detention order must be brought before the Chief Justice of the District Court for review within 48 hours of detention. Failure to do so mandated the detainee's immediate release\textsuperscript{263}. Furthermore, any decision rendered by the District Court may be automatically appealed to the Supreme Court of Israel\textsuperscript{264}.

Section 4(a) of the Administration Detention Law also empowers the District Court's Chief Justice to approve, shorten, or repeal the detention order. Section 4(c) of the law authorizes the judge to repeal the order when there is evidence to support the contention that the order was issued for reasons other than the

\textsuperscript{260} Section 2(a) Emergency Powers (Detention) Law, 1979.
\textsuperscript{261} Section 2(b) Emergency Powers (Detention) Law, 1979.
\textsuperscript{262} Weiss, supra note 253 at 5; Eyal Nun, “Administrative Detention in Israel” (1992) 3 Plilim 168 at 190 [Nun].
\textsuperscript{263} Section 4(a) Emergency Powers (Detention) Law, 1979.
\textsuperscript{264} Section 7 Emergency Powers (Detention) Law, 1979; Weiss, supra note 253 at 5.
protection of national security or public safety, or if the detention order was issued either in bad faith, or based on irrelevant factors.

The Administration Detention Law provides several significant procedural safeguards. The detainee has the right to know the reasons which led to his detention, as well as the right to legal representation, although this right may be limited to state-approved lawyers\textsuperscript{265}. Moreover, the detainee and his counsel may be present at all court proceedings unless the Chief Justice of the District Court rules that the detainee's and/or his counsel's presence could endanger national security or public safety\textsuperscript{266}.

Once detained, the District Court's Chief Justice is required by law to re-examine the detention order every three months. Failure to do so leads to the detainee's immediate release\textsuperscript{267}.

The Administration Detention Law stipulates that when reviewing a detention order the judge is not required to adhere to the normal rules of evidence if he is convinced that not doing so will better lead to elucidation of the facts and to the proper carriage of justice\textsuperscript{268}. Moreover, evidence may be reviewed without revealing it to the detainee and/or the detainee's counsel if the District Court judge is convinced that disclosing the evidence would endanger national security or the public safety\textsuperscript{269}. When choosing to deviate from the normal rules of

\begin{footnotesize}
\begin{itemize}
  \item Section 8(b) \textit{Emergency Powers (Detention) Law, 1979}; Bargaining Chips, \textit{supra} note 252 at 757.
  \item Section 8(a) \textit{Emergency Powers (Detention) Law, 1979}.
  \item Section 5 \textit{Emergency Powers (Detention) Law, 1979}; Bargaining Chips, \textit{supra} note 252 at 757.
  \item Section 6(a) \textit{Emergency Powers (Detention) Law, 1979}.
  \item Section 6(c) \textit{Emergency Powers (Detention) Law, 1979}.
\end{itemize}
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evidence the District Court judge must specifically state the considerations which led him to do so.270

It is noteworthy that Section 1 of the Administration Detention Law specifies that the Law will only be in effect "when Israel faces a state of emergency, declared in accordance with section 49 of Basic Law: the Government. However, this precondition has no substantive implications since Israel has been in a state of emergency since its establishment in 1948".271

As the Administration Detention Law has been in force for over 25 years, it is interesting to examine the transformation in the manner in which the courts interpret the law with regard to such issues as the credibility of the evidence used to support the Minister's decision to detain, the standard of proof required in reaching the decision to detain, and the scope of judicial review implemented when reviewing the Minister's decision. A brief survey of key court rulings which set precedents with regard to these issues follows.

Evidence, Ministerial discretion and the Standard of Proof

Section 2 authorizes the Minister to issue a detention order when there are reasonable grounds to assume that the individual in question poses a threat to national security or public safety. These grounds must be based upon adequate evidence and must satisfy a certain standard of proof. The evidence may be drawn from the individual's past actions which point to a general pattern of behavior indicative of a likelihood of committing similar offenses in the future. It

270 Section 6(b) Emergency Powers (Detention) Law, 1979.
271 Bargaining Chips, supra note 252 at 757.
may also be based on intelligence regarding an individual's future intentions surrounding a specific, planned offense272.

In Shahin v. Military Commander of the Gaza Region the Supreme Court ruled that “the evidence to support an administrative authority's decision need not be of the character of admissible evidence required in proceedings before courts”273. The Court did, however, emphasize that “a rumor or unchecked assumption” are not enough to justify the issuance of a detention order274.

In many cases the Minister bases his decision on hearsay, and in some instances double and triple hearsay. The Court in such cases is unable to hear the source of the information, and, thus, has to rely on the security services which gathered the information. Moreover, in most instances the testimony and/or evidence presented by the security services is heard in camera. When evaluating such evidence, the court should probe into the identity of the sources and their connection, if any, to the suspected individual. Furthermore, the court should also enquire regarding the number of sources implicating the individual, in an attempt to corroborate evidence by cross-referencing it with information obtained from other sources275. "When evaluating the admission of hearsay evidence the Israeli Supreme Court has applied a standard that requires the anticipated danger to public safety be severe enough to make it essential to deprive the detainee of the right to a proper defence. A possible but remote and

272 Nun, supra note 262 at 169.
273 H.C.J.159/84, 39(1) P.D. 309 at 327 – 328 as cited in Appropriate Evidentiary Standards, supra note 193 at 223 footnote 57.
274 H.C.J.159/84, 39(1) P.D. 309 at 327 – 328.
275 Weiss, supra note 253 at 15.
marginal danger to the State's security is not sufficient to keep the evidence confidential\(^{276}\).

The Supreme Court has ruled that the evidence needed to permit an administrative authority to infringe upon the basic human rights of an individual need be credible and convincing, not leaving any room for doubt\(^{277}\). When trying to ascertain whether or not the evidence meets this burden of proof the test to be implemented is an objective one, the test of the "reasonable man". The question is whether a "reasonable man" presented with this evidence, cognizant of the source of the information, come to the conclusion that the evidence supports the detention of an individual\(^{278}\).

In *Agabriya v. State of Israel*\(^{279}\) the Supreme Court ruled that the test to be implemented by the administrative authority when reviewing the evidence and applying its discretion to detain is that the evidence must indicate the "existence of a real and serious danger, and proof that not issuing the detention order may lead to action that involves danger to the safety of the State and the public"\(^{280}\). In *Federman v. Military Commander of Judea and Samaria Region*\(^{281}\) and *Rabbi Ginzburg v. Minister of Defence and Prime Minister*\(^{282}\) the Supreme Court ruled


\(^{277}\) H.C.J. 56/76 Berman v. Minister of Police, 31(2) P.D. 687 at 692.

\(^{278}\) H.C.J. 159/84, 39(1) P.D. 309 at 327 – 328.

\(^{279}\) A.D.A. 1-2/88, 42(1) P.D. 840.


\(^{281}\) H.C.J. 3280/94, Takdin 94(2) 2298.

\(^{282}\) A.D.A. 4/96, 50(2) P.D. 221.
that the “Minister of Defence must establish the degree of probability to a “close certainty” evidence standard before he can exercise his detention authority”\textsuperscript{283}.

“The judicial supervision that has become a part of the procedure limits the discretion of the administrative authority. Although uncertainty still exists as to the exact level of evidence required, the Israeli Supreme Court has progressed by adopting a “close certainty” evidence standard for detentions”\textsuperscript{284}

\textbf{Administrative Detention and Judicial Review}

In 1980 in the case of \textit{Kahane v. Minister of Defence}\textsuperscript{285}, Rabbi Meir Kahane was detained for a period of six months. The Minister of Defence argued that he had reasonable foundation to assume the state’s national security required the issuance of the detention order. When bringing the detention order before the Chief Justice of the District Court for review, the only fact which was revealed to the petitioner and his counsel was that he was suspected of “planning terrorist attacks against Arabs”\textsuperscript{286}. The supporting evidence and testimony which led to the issuance of the detention order was presented to the Court in camera at the request of the Minister of Defence, the Court having ruled that its disclosure would threaten national security\textsuperscript{287}. The District Court approved the detention order, leading to an appeal to the Israeli Supreme Court.

\textsuperscript{283} H.C.J. 3280/94, Takdin 94(2) 2298 at 2300 and A.D.A. 4/96, 50(2) P.D. 221 at 223 - 224 as cited in Appropriate Evidentiary Standards, \textit{supra} note 193 at 225.
\textsuperscript{284} Appropriate Evidentiary Standards, \textit{supra} note 193 at 225.
\textsuperscript{285} A.D.A. 1/80, 35(2) P.D. 253.
\textsuperscript{286} A.D.A. 1/80, 35(2) P.D. 253.
\textsuperscript{287} A.D.A. 1/80, 35(2) P.D. 253 at 255-256.
In upholding the District Court's decision, the Supreme Court ruled that when reviewing the Minister's decision the Court must take into account, on the one hand the amount of information revealed to the detainee and consider the procedural and substantive limitations imposed on him in his attempt to mount a defence, and on the other hand, the potential danger to national security or public safety thwarted by the detention. The detention should only be upheld if the Court is convinced that the danger to national security or the public safety is so substantial that it warrants such an infringement on the detainee's rights. It should however be noted that in Kahane, the Court chose a minimalist approach, specifically indicating that there is no place to compare its function in reviewing a detention order under the Administration Detention Law to its function when rendering a judgment in a criminal case. The Court specifically stated that its responsibility is to examine the legality of the Minister's decision, as the law did not intend for the court to review the merits of the case or to replace the Minister's considerations with its own.

In 1986 in the case of Ploni v. Minister of Defence the Supreme Court implemented a much more expansive approach. The petitioner was alleged to be the region commander of Force 17, a unit of the Palestinian Fatah movement, and had been originally administratively detained for a period of three months. The detention was prolonged 3 times, each time for an additional period of three months. In upholding the Minister's decision to detain, the District Court ruled that

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288 A.D.A. 1/80, 35(2) P.D. 253 at 261.
289 A.D.A. 1/80, 35(2) P.D. 253 at 258-259; Appropriate Evidentiary Standards, supra note 193 at 224.
290 A.D.A. 2/86, 41(2) P.D. 508.
291 Appropriate Evidentiary Standards, supra note 193 at 224.
the evidence on which the detention order was based could not be revealed to
the petitioner and/or his counsel as this could endanger national security and
compromise crucial intelligence sources. The Supreme Court was called upon to
review the decision of the District Court which upheld the Minister of Defence's
order to prolong the administrative detention of the petitioner for the third time.

The Supreme Court dismissed the petitioner's appeal, rejecting his lawyer's
argument that the length of the detention and the failure to bring criminal charges
against his client were indicative of the fact that the decision to detain his client
was ultra vires as it was not based on a reasonable foundation that the petitioner
was a danger to national security or public safety, but rather it was fueled by the
Minister of Defence's desire to use the petitioner as a "bargaining chip" in
negotiations with terrorist organizations holding Israeli civilians. The Supreme
Court stated that since the petitioner's counsel did not have access to the
information on which the detention order was based, this argument was
speculative. Furthermore, the Court reviewed the information on which the
detention order was based and decided that national security concerns did
indeed warrant the petitioner's detention.

The Supreme Court also ruled that as the Minister's discretion to detain
under section 2 of the Administrative Detention Law is extraordinary and very
broad, and as the actual detention is not punitive in nature, but intended to avert
a possible future threat, the use of such a power must be exercised with great
cautions.

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292 A.D.A. 2/86, 41(2) P.D. 508 at 514 – 515.
293 A.D.A. 2/86, 41(2) P.D. 514 – 515.
"The detention order must be the sole available means of achieving the desired result. If alternative means beside a detention order are available, the judge must declare the order invalid. Administrative detention is intended only for situations where no alternatives exist for achieving the desired objective. Difficulty in convicting a person in ordinary criminal proceedings is not a reason for favoring administrative detention. However, if evidence is privileged and cannot be disclosed, administrative detention becomes an option."

In what is perhaps the most important part of the ruling, the Supreme Court interpreted sections 4(a) and 4(c) of the Administration Detention Law and discussed the role of the District Court Chief Justice in the detention process. The Supreme Court adopted the position of Professor Klinghoffer, a prominent Israeli Public Law scholar, that an administrative detention order is a result of a "composite organ" as it "draws its effect from the Minister of Defence and the President of the District Court. In other words, an order is valid only when the two confirm it. Professor Klinghoffer's theory is based on the requirement that the detainee be brought before a judge within forty-eight hours for confirmation of the detention order. The theory also finds support from the progression in the law benefiting the detainee. Although an order is confirmed and becomes valid by virtue of the Minister of Defence and the President of the District Court, in contrast, rescission of it requires a decision only of one of the two authorities. Therefore, a court must exercise its discretion when it decides whether to confirm or rescind an order. Professor Klinghoffer also bases his theory on the discretion

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294 Bargaining Chips, supra note 252 at 757.
295 Nun, supra note 262 at 191.
of the President of the District Court to shorten the period of time prescribed in the order".

The Supreme Court went on to state that interpreting the wording of the law, and examining the spirit in which it was codified as well as its goal of enhancing judicial review, led the Court to conclude that the legislator did not intend for the District Court to merely examine the legality of the detention order, rather the Court should consider the merits of the case in deciding whether the detention and its length are crucial to achieve the objectives stipulated in section 2 of the statute. This was a significant change in clarification of the law, which up until the point had been interpreted by the courts as a call to examine only the legality of the detention order.

In 1988 in the case of Agabriya v. State of Israel, two petitioners appealed administrative detention orders. Petitioners One and Two were suspected of being the leader and a member of a group involved in incitement, and organizing violent demonstrations against the State of Israel. The Court ruled that the Minister of Defence based the decision to issue the orders on intelligence information which led him to believe that, if not detained, the two petitioners would to a degree amounting to "almost certainty" organize and take part in violent demonstrations on upcoming Palestinian commemoration days.

The Supreme Court ruled that the Minister of Defence is not limited by the Administration Detention Law to issue a detention order only when an individual

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296 Bargaining Chips, supra note 252 at 759.
297 A.D.A. 2/86, 41(2) P.D. 508 at 516 – 517.
298 A.D.A. 1-2/88, 42(1) P.D. 840.
299 A.D.A. 1-2/88, 42(1) P.D. 840 at 842-843.
poses a physical threat to national security or public safety. There may be circumstances in which the potential threat emanating from an individual's rhetoric or incitement would pose more of a threat than physical actions\textsuperscript{300}.

The Court also affirmed, albeit by way of obiter dictum, its previous ruling in \textit{Ploni}\textsuperscript{301}, reiterating that the discretion of the District Court Chief Justice is very broad, enabling him to review not only the legality of the detention but also its merits and necessity\textsuperscript{302}.

In 1997 in the case of \textit{Anon v. Minister of Defence}\textsuperscript{303} the Supreme Court exhibited the most drastic judicial activism to date. The petitioners, all of whom were Lebanese citizens, were brought by the IDF to Israel between 1986 and 1987. They were subsequently tried and convicted for their association with terrorist organizations and involvement in terrorist attacks. Upon completing their sentences, the petitioners were held in custody initially by means of deportation orders, and later by means of executive detention orders. After being detained for periods ranging between two and three years, they appealed the District Court's decision to renew the detention orders\textsuperscript{304}.

The petitioners argued that they were no longer a threat to national security and that the only reason for their continued detention was so that they could be used as "bargaining chips" in future negotiations with terrorist organizations supposedly holding Israeli soldiers as hostages, most notably Israel's most famous prisoner-of-war, air force navigator Ron Arad, shot down over Lebanon in

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\textsuperscript{300} A.D.A. 1-2/88, 42(1) P.D. 840 at 844-845.
\textsuperscript{301} A.D.A. 2/86, 41(2) P.D. 508.
\textsuperscript{302} A.D.A. 1-2/88, 42(1) P.D. 840 at 845-846.
\textsuperscript{303} F.H. 7048/97, 54(1) P.D. 721.
\textsuperscript{304} A.D.A. 10/94 \textit{Anon v. Minister of Defence}, 53(1) P.D. 97.
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1986. In a majority decision the Supreme Court rejected the petitions for release. The matter was not closed, however. The case brought to the surface many complex legal and moral issues, the most notable of them being the question of what constitutes "national security" and when it should trump basic human rights. As such, the Supreme Court conducted a "further hearing" on the matter, a special procedure by which the Supreme Court revisits a ruling it has already made with an expanded panel of justices. The further ruling in Anon$^{305}$ was handed down in April, 2000, and is considered by some to be "a cornerstone in the legal field of human rights in Israeli constitutional law"$^{306}$.

As the Court wrote: "There is no choice – in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. Human rights cannot become a pretext for denying public and State security. A balance is needed – a sensitive and difficult balance – between the freedom and dignity of the individual and State and public safety$^{307}$.

In the beginning of the ruling, the Court emphasized that the petitioners indeed no longer posed a threat to national security and that they were in fact being held so that they may be used to elicit pressure on terrorist organizations to "breach the wall of silence"$^{308}$ with regard to the fate of missing and captured Israeli soldiers. The Court set out to determine whether or not such detention could be legally justified under the Administration Detention Law.

$^{305}$ F.H. 7048/97, 54(1) P.D. 721.
$^{306}$ Bargaining Chips, supra note 252 at 721.
$^{307}$ F.H. 7048/97, 54(1) P.D. 721 at 743 as cited in Bargaining Chips, supra note 252 at 721.
$^{308}$ F.H. 7048/97, 54(1) P.D. 721 at 761-762.
When the case first came before the Supreme Court, Chief Justice Barak wrote the majority opinion ruling that the decision of the District Court Chief Justice authorizing the petitioners' detention should be upheld. Barak wrote that "the detention of individuals for the purpose of the release of our missing and captured [soldiers] for the purpose of the protection of this interest in this manner is conferred on the respondent [the State] within the framework of the Detention Law." The Chief Justice based the decision on secret evidence which led him to conclude that if the petitioners were released, the negotiations for the release of the captured and missing Israeli soldiers would be undermined.

When the case was considered again in the context of the further hearing, Chief Justice Barak again wrote for the majority. His opinion had changed. Barak wrote that since the first ruling he had reconsidered his decision, writing that he did not believe that a ruling's finality guarantees its correctness. When forced to choose between truth and steadfastness, he must choose truth. Barak wrote:

Administrative detention violates the freedom of the individual. When the detention is carried out in circumstances in which the detainee provides a 'bargaining chip', this comprises a serious infringement of human dignity, as the detainee is perceived as a means of achieving an objective and not as an objective in himself. In these circumstances, the detention infringes the autonomy of will, and the concept that a person is the master of himself and responsible for the outcome of his actions. The detention of the appellants is nothing other than a situation in which the key to a person's prison is not held by him but by others.

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310 Bargaining Chips, supra note 252 at 728.
311 F.H. 7048/97, 54(1) P.D. 721 at 744 – 745.
312 F.H. 7048/97, 54(1) P.D. 721 at 743 –744 as cited in Bargaining Chips, supra note 252 at 727.
In a 6 to 3 majority decision the Court ruled that when balancing the state’s security needs with an individual’s basic human rights of liberty and dignity, the individual’s rights must govern unless he poses a direct threat to the state’s security. Thus in Anon this balance cannot support the continued detention of the petitioners\(^\text{313}\). As a result of the decision, Israel released the Lebanese detainees.

As Harold Rudolph writes:

> "Ultimately the decision is one of policy and not one of pure law. The advantages to be derived from an 'inquisitive' court, a court that is not prepared meekly to accept the dictates of the executive, but is prepared on a totally objective and independent basis to balance such dictates against the equally important principles of individual liberty and freedom, by far outweigh the possible disadvantages inherent in such activity."\(^\text{314}\)

The rulings examined above illustrate the expanded role of the Israeli courts in reviewing administrative decisions with national security implications. For many years, in all likelihood, wary of the public outcry which might ensue should it err, the Court demonstrated great deference to the will of the executive, refusing to review cases on their merits or substitute the Minister’s considerations with those of its own\(^\text{315}\). The last three decisions canvassed above demonstrate that this is no longer true. The Court has taken what has been called by some judicial activism to new frontiers in interpreting the Administrative Detention Law according to Klinghoffer’s position, that when reviewing the Minister’s decision

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\(^{313}\) F.H. 7048/97, 54(1) P.D. 727 at 743.


\(^{315}\) Bargaining Chips, supra note 252 at 758.
the Court has a duty to not only review the legality of the case but also its merits. Although in Anon\textsuperscript{316} the Court may have reached an unpopular decision as Israel received nothing in return for the prisoners' release, there can be little doubt that the decision demonstrates great courage on the part of the Justices and speaks to the democratic system and values underlying Israeli society.

\textsuperscript{316} F.H. 7048/97, 54(1) P.D. 721.
Security Certificates in Canada: Balancing civil rights and national security

In the previous section, it was shown that the rights of an individual detained in Israel are outlined in the *Emergency Powers (Detention) Law* of 1979, and are subject to the court's interpretation of the law on a case by case basis. Israel, unlike Canada, has only a set of Basic Laws, without a clearly defined constitution. These laws will eventually form Israel's constitution. Section 5 of the Basic Law concerning human rights in Israel (*Basic Law: Human Dignity and Liberty, 1992*) stipulates that: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise". However, this section can be circumvented by section 8, which states that: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required". It should be noted that while there are differences of opinion regarding the superiority of the Basic Laws over other Israeli laws, *Anon v. Minister of Defence* (see above) is one example in which individuals detained on suspicion of posing a threat to national security successfully challenged their detention as a violation of the Human Dignity and Liberty Law.

Canada's "basic laws" include The *Canadian Charter of Rights and Freedoms*[^318], which was incorporated into the *Constitution Act, 1982*[^319]. This document sets out to guarantee rights and freedoms deemed essential in the

preservation of a free and democratic society. The Charter stipulates that: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”; “Everyone has the right not to be arbitrarily detained or imprisoned”, once detained to be informed promptly of the reasons therefor and to be tried within a reasonable time.

Yet, despite guaranteeing basic human rights by constitutional documents and ratified international treaties, Canadian governments occasionally violate their entrenched commitment to due process values, loosely interpreting “reasonable limits” on individual rights and freedoms as outlined in section 1 of the Charter. The use of security certificates has been, perhaps, the most blatant recent example of this infringement. Herein, I will examine the use of security certificates up until the Supreme Court of Canada's 2007 ruling of such certificates as unconstitutional. While the ruling and the Court's suggested amendments to the law including measures such as a move closer to the "correctness" standard of review, and use of special counsel are a major step forward for individual rights and freedoms in Canada, they do not go quite far enough. Additional steps, such as a shift in the burden of proof, and consequently an alternative standard of proof, are necessary.

320 Charter, supra note 318 s. 7.
321 Charter, supra note 318 s. 9.
322 Charter, supra note 318 s. 10(a).
323 Charter, supra note 318 s. 11(b).
325 Charter, supra note 318 s. 1.
Implementation of greater procedural protections, such as a statutory right of appeal coupled with the adaptation of an alternative standard of proof - the "clear and convincing evidence standard" - for use in determining whether sufficient credible evidence exists to warrant issuance of a security certificate, would better serve the causes of justice and security in the Canadian context. To this end much can be learned from the experiences of the United States and Israel.

Security certificates - issued jointly by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness under the Immigration and Refugee Protection Act, S.C. 2001, c. I-2 (IRPA) - differ from other recent measures encroaching on civil liberties in that they were not conceived in the wake of the World Trade Centre attacks. The current provisions of the IRPA governing these matters are nearly identical to those of the previous Immigration Act, the Immigration Act, R.S.C. 1985, c. I-2. Simply put, they enable the government to deport any non-citizen who is deemed a security risk to Canada, without substantive judicial review. The consequences may include indefinite administrative detention as well as deportation to face torture.\(^{327}\)

One central matter concerns the standard of judicial review of the Ministerial decision to detain. In *Suresh v. Canada (Minister of Citizenship and Immigration)*\(^{328}\), the Supreme Court ruled that the court should "set aside the Ministers' discretionary decision" only:


\(^{328}\) *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [Suresh].
if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion\textsuperscript{329}.

The appellant, \textit{Suresh}, was the subject of deportation hearings commenced against him on suspicion that he was a member of and fundraiser for the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka. Members of the Tamil Tigers are subject to torture in that country. \textit{Suresh}, in an appeal to the Supreme Court of Canada, challenged the constitutional validity of the procedures for deportation, specifically whether the \textit{Immigration Act} permits deportation to torture, contrary to the Charter, and the vagueness of terms such as “danger to the security of Canada” and “terrorism”. Despite the severe consequences involved, the Supreme Court of Canada in effect sanctioned reliance on the least stringent standard of judicial review. This, despite the fact that in addition to the potentially extreme infringement of the detainee’s basic human rights (torture overseas), the result would be reached following procedures in which the detainee enjoys very few safeguards.

\textbf{Procedural Process in the Issuance of Security Certificates}

The process by which visitors to Canada, refugees and permanent residents may be deported from Canada when deemed a risk to national security or to the

\textsuperscript{329} \textit{Ibid.} at 23-24.
safety of any person is set out in the IRPA. The procedure established in the IRPA is intended to balance two opposing interests: "the interest of the state in protecting national security, and the interest of the individual [the subject] in being able to assert, in his defence, all the rights normally available to him" 330.

The process consists of partially overlapping stages 331:

1. Investigation and gathering of evidence against a permanent resident or a foreign national.
2. Signing of a security certificate and filing it with the Federal Court.
3. Detention
4. Application by the detainee to the Minister of Immigration for protection.
5. Determination by Federal Court as to whether the security certificate is reasonable and whether the decision on the application for protection (if requested) is lawfully made.

Stage 1

What leads to the issuance of a security certificate?

"Due to the serious implications attributed to the issuance of a security certificate", Canada's Security Intelligence Service (CSIS), reports that it follows a "carefully considered and rigorous process" when it comes to their issuance, culminating in the preparation of the security intelligence report (SIR) upon which

331 Supra note 327 at 67.
the Minister's decision to issue (or not issue) the certificate is based\(^3\)\(^{32}\). Several conditions must be met before CSIS considers preparing a SIR. First, the individual must be identified as posing a significant threat to Canada's security. This assessment is contingent upon the CSIS' possession of sufficient threat-related information and intelligence. The information must be reliable and corroborated by multiple sources. Second, the individual's removal must be of strategic value. Third, CSIS must have "sufficient releasable open-source information to support an unclassified summary document"\(^3\)\(^{33}\).

**Stage 2**

The factors considered in determining whether or not an individual poses a threat which warrants inadmissibility are set out in subsections 34 - 37 of the IRPA. These include alleged acts of espionage, terrorism, violence, subversion, and membership in any organization engaging in these activities (subsection 34 of the IRPA). If the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness determine that there are reasonable grounds to believe that an individual poses a security threat, subsection 77(1) stipulates that the Ministers shall both sign a certificate stating that the foreign national or permanent resident is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. The signing by both ministers is an absolute requisite which can not be delegated.

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\(^{33}\) Ibid.
The certificate is then referred to a Federal Court judge who must "on the basis of the information and evidence available, determine whether the certificate is reasonable...[T]he judge shall quash a certificate if the judge is of the opinion that it is not reasonable" (subsections 80(1) and 80(2) of the IRPA). At this time, any refugee or immigration proceedings concerning the person named, other than an application for protection under subsection 112(1) of the IRPA, are adjourned until a determination on the certificate is made.\footnote{IRPA, S.C. 2001, c. I-2, s. 77(2) [IRPA].}

Stage 3

Detention of a permanent resident named in a security certificate requires the issuance of a warrant for arrest by the Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness\footnote{IRPA, \textit{ibid.} s. 82(1).}. Detention of a foreign national does not require such a warrant and is effectively mandatory upon signing a security certificate\footnote{IRPA, \textit{ibid.} s. 82(2).}. Judicial review of the reasons for continued detention of a permanent resident shall commence within 48 hours of the beginning of the detention, and the detainee must be brought before a judge at least every six months for further reviews, at which time the judge shall order the detention continued if satisfied that the detainee poses continuing danger to national security or to the safety of any person, or is unlikely to appear at a

\footnotetext[334] {Immigration and Refugee Protection Act, S.C. 2001, c. I-2, s. 77(2) [IRPA].}
\footnotetext[335] {IRPA, \textit{ibid.} s. 82(1).}
\footnotetext[336] {IRPA, \textit{ibid.} s. 82(2).}
proceeding, or for removal\textsuperscript{337}. It is noteworthy that the decision to detain the subject of a security certificate is not open for judicial appeal\textsuperscript{338}.

The IRPA enables the Minister to order the subject's release to permit their departure from Canada\textsuperscript{339}. Similarly, a foreign national may be released from detention after 120 days if they have not been removed from Canada and if the judge is satisfied that the subject will not be removed from Canada within a reasonable time and that the release will not pose a danger to national security or to the safety of any person\textsuperscript{340}.

\textbf{Stage 4}

Subsection 112(1) of the IRPA enables the named individual, if eligible, to appeal to the Minister of Citizenship and Immigration for protection. A subject would be considered in need of protection if he can provide satisfactory evidence to the Minister that upon return to his country of nationality he would face substantial risk of death, torture or cruel and unusual treatment or punishment. Once such an appeal has been filed, and on the request of the Minister of Citizenship and Immigration or the subject himself, the court shall suspend the proceedings with respect to reasonableness of the certificate in order for the Minister to make a decision on the application for protection\textsuperscript{341}.

In \textit{Suresh} the Supreme Court ruled that:

\begin{itemize}
\item \textsuperscript{337} IRPA, \textit{ibid.} ss. 83(1), 83(2), 83(3).
\item \textsuperscript{338} Supra note 327 at 69.
\item \textsuperscript{339} IRPA, \textit{supra} note 334 s. 84(1).
\item \textsuperscript{340} IRPA, \textit{supra} note 334 s. 84(2).
\item \textsuperscript{341} IRPA, \textit{supra} note 334 s. 79(1).
\end{itemize}
It is for the refugee to establish a threshold showing that a risk of torture or similar abuse exists before the minister is obliged to consider fully the possibility. This showing need not be proof of the risk of torture to that person, but a prima facie case that there may be a risk of torture upon deportation. If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the Charter.

The IRPA stipulates that even if the Minister of Citizenship and Immigration determines that the subject is at risk of suffering torture, upon returning to his country of nationality, the application for protection may be refused on account of: “the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada”\(^{342}\).

In the words of the Court in *Suresh*:

We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the Charter’s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*\(^{343}\).

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\(^{342}\) *IRPA*, *supra* note 334 s. 113(d)(ii).

\(^{343}\) *Suresh*, *supra* note 328 at 68.
It is the duty of the designated judge to determine solely whether the Minister's decision regarding the application for protection was lawfully made. It should be noted that the process of filing an application for protection can be quite lengthy and subject to administrative delays, usually while the subject is detained.

Stage 5

The final stage is the Federal Court, Trial Division's determination with regard to the reasonableness of the certificate. Under subsection 78 of the IRPA, at the request of either of the signing ministers, the judge shall hear all or part of the evidence on which the security certificate is based in private proceedings, in the absence of the subject and his lawyer, within seven days of referral. The judge may receive into evidence anything that in his opinion is appropriate, regardless of its admissibility in a court of law, and may base his opinion on that evidence. The judge may refuse disclosure of information to the subject and to his lawyer if in his opinion its disclosure would be injurious to national security or to the safety of any person. The subject is afforded a hearing and the judge must provide the subject with a summary of the information or evidence, enabling him to be "reasonably informed" of the circumstances giving rise to the certificate. The IRPA stipulates, however, that the judge must ensure the confidentiality of the information on which the certificate is based, and any other evidence the disclosure of which, in the opinion of the judge, would be injurious to national

344 IRPA, supra note 334 s. 80(1).
345 Supra note 328 at 70.
security or to the safety of any person. "Information that would be withheld from the subject of the certificate could include, but is not limited to, details concerning human or technical sources, intelligence-gathering techniques and methods or information communicated in confidence from a foreign agency. The IRPA also stipulates that the same evidentiary proceedings which regulate the divulgence of information with regard to the reasonableness of the security certificate also regulate the hearing regarding the subject’s detention, thus the subject may and will in all likelihood be detained, unaware of all or part of the evidence which led to his detention.

Should the certificate be found reasonable, it is deemed conclusive proof that the subject is inadmissible. The ruling thus becomes a removal order which may not be appealed or judicially reviewed. Given the seriousness of the matter and the finality of the judge’s decision, judicial review of the Ministers’ decision is a task of some consequence. An understanding of the various standards of review applicable to administrative decisions is critical.

Standards of Review

The standard of review refers to the "degree of intensity with which the courts will examine the decision of a statutory delegate, whether on an appeal or on an application for judicial review." Unfortunately, the legislature often does not specifically articulate what powers it intends to confer on the statutory delegate,

346 Supra note 332.
347 IRPA, supra note 334 s. 83(1).
348 IRPA, supra note 334 s. 81.
or the relationship between the statutory delegate and the court's power. Consequently, courts most often have to determine what powers the legislature intended to give the statutory delegate and the court itself from a series of inferences taken from statutory language. This determination dictates the standard of review the court should apply, and ultimately, to what extent the court will defer to the decision of the statutory delegate\textsuperscript{350}.

The most stringent standard of judicial review was articulated in the English case of \textit{Anisminic Ltd. V. Foreign Compensation Commission (1968)}\textsuperscript{351}. The House of Lords outlined the conditions under which the court has or does not have jurisdiction to review a statutory delegate's decision, allowing "the courts to use a microscopic examination of a delegate's actions in order to find jurisdictional defects which the courts can correct"\textsuperscript{352}. While this approach has been used by the Supreme Court of Canada in some cases, the English courts have in effect "extended \textit{Anisminic} to the point where it is now simply assumed that all errors of law can be reviewed and corrected by the courts"\textsuperscript{353}. This implies, by consequence, that there is only one correct interpretation of the law\textsuperscript{354}. Thus, the standard for judicial review in England in so far as matters of law are concerned is closest to "correctness", "allowing the court to determine whether it agrees with the decision of the statutory delegate; and, if not, to substitute its own view of the correct outcome"\textsuperscript{355}.

\textsuperscript{350} \textit{Ibid.} at 455 – 456.
\textsuperscript{351} [1969] 2 A.C. 147 (U.K.H.L.).
\textsuperscript{352} Principles of Administrative Law, \textit{supra} note 349 at 456 – 457.
\textsuperscript{353} \textit{Ibid.} at 457.
\textsuperscript{354} \textit{Ibid.} at 458.
\textsuperscript{355} \textit{Ibid.} at 483.
The least stringent standard for judicial review in Canada, outlined in the benchmark ruling Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp. is the “not patently unreasonable” test. According to this standard, the correctness of the statutory delegate’s or lower tribunal’s decision is, effectively, irrelevant. If the lower judicial body served its purpose in rendering a decision which was not unreasonable on its face, the higher court should exercise judicial restraint, and not intervene. It should be noted that this standard has “no application to constitutional questions or jurisdictional givens.”

The concept of various standards of review bookmarked by “correctness” at one end, and “patent unreasonableness” at the other, and the articulation of the intermediate standard of review (“reasonableness simpliciter”), as well as the determination of when each standard should be utilized, is a result of three landmark decisions of the Supreme Court of Canada: Pezim v. British Columbia (Superintendent of Brokers); Canada (Director of Investigations & Research) v. Southam Inc.; and Pushpanathan v. Canada (Minister of Employment & Immigration).

According to the “reasonableness simpliciter” standard, the court must determine “whether ‘after a somewhat probing examination, can the reasons

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357 Principles of Administrative Law, supra note 349 at 459.
358 Principles of Administrative Law, supra note 349 at 469.
359 Principles of Administrative Law, supra note 349 at 462.
360 Principles of Administrative Law, supra note 349 at 471.
given, when taken as a whole, support the decision?". If the delegate's or lower judicial body's decision may be supported by a "tenable" explanation based on the evidence, that decision may satisfy the reasonableness standard. This does not imply correctness, nor does it imply that the higher court would have reached the same decision. Thus, the reasonableness simpliciter standard of review is more stringent than the patent unreasonableness standard, but less stringent than the correctness standard.

According to the rulings in *Law Society of New Brunswick v. Ryan* and *Q v. College of Physicians & Surgeons (British Columbia)*, determining the standard of review "is all a matter of applying a pragmatic and functional approach to determine how much deference the legislators intended the courts to apply in a particular case".

The "functional and pragmatic approach for determining the applicable standard of review" takes into account four factors:

1. Existence of a privative clause (suggesting the adoption of a more deferential standard);
2. The level of expertise of the statutory delegate relative to that of the court on the matter in question (the higher the expertise imbalance in favour of the statutory body, the more deference should be accorded);
3. The purpose of the Act as a whole, and the provision at issue in particular;

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365 *Principles of Administrative Law*, supra note 349 at 483 - 484.
367 *Principles of Administrative Law*, supra note 349 at 477.
369 *Principles of Administrative Law*, supra note 349 at 476.
4. Whether the problem is one of law or of fact (question of law, being the special preserve of the courts, resulting in bodies being accorded less deference).

Applying the functional and pragmatic approach to determining the standard of review appropriate to ministerial decisions to detain, the courts have ruled out the “correctness” standard, mainly on account of the strong language of the IRPA. The court must, thus, determine whether the Ministers acted within their discretion, and if so, whether their discretion was exercised in an unreasonable manner or a patently unreasonable manner\(^{370}\).

In reviewing the Ministers’ decision with respect to whether Suresh’s presence in Canada constituted a danger to national security, the court deferred to the Ministers’ decision, having concluded that the appropriate standard of review is “patent unreasonableness” in such cases. Applying the functional and pragmatic approach, the court found that the language of the IRPA which limited the right of appeal, the relative expertise of the Ministers compared with the court, and the highly contextual and fact-based nature of the case, all left little room for judicial intervention\(^{371}\).

**Diagnosing the Problem and Suggested Solutions**

In *Suresh* the court ruled that: “The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness, and the requirements of fundamental justice

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under s. 7 of the Charter\textsuperscript{372}. This statement demonstrates a view ostensibly adopted by the Canadian Supreme Court. The gap between principle and outcome in Suresh illustrates the Immigration Act's (and the IRPA's) problematic nature. In security certificate hearings, the adversarial procedures used for all other types of cases are circumvented. The subject is not afforded any meaningful due process, as the evidence presented in support of the Crown's case in issuing the certificate (and in the continued detention of the subject), need not be divulged either to the subject or to his lawyer. Hearings can be held in camera, at the request of one of the Ministers. Thus, even if substantive justice is served, the procedures used give little assurance of actual justice being served. The Federal Court Trial Division hearing occurs ex post facto and examines only the reasonableness of the Minister's decision, not the matter's merits\textsuperscript{373}. This amounts to a sham judicial proceeding, giving "cover" to Ministerial actions that are, for all practical purposes, unreviewable.

Further, the Supreme Court of Canada has ruled that in reviewing ministerial decisions to deport [and detain] under the Act the:

Courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts should not reweigh them. Provided the...decision is not patently unreasonable – unreasonable on its face, unsupported by the evidence, or vitiated by failure to consider the proper factors or apply the proper procedures – it should be upheld\textsuperscript{374}.

\textsuperscript{372} Suresh, supra note 328 at 63.

\textsuperscript{373} Canada, Canadian Muslim Lawyers Association, Justice, Human Rights, Public Safety & Emergency Preparedness, (Canada: Canadian Muslim Lawyers Association, September 2005) at 8.

\textsuperscript{374} Suresh, supra note 328 at 29.
Stunningly, the decisions of the Federal Court Trial Division, hemmed in on all sides as they are, cannot be reviewed or appealed. Thus, in contradistinction to the Supreme Court's recognition of a "greater need for procedural protection", the court adopts a deferential approach when assessing the Minister's decision with regard to both the detention and the issuance of the certificate, and intervenes only when the decision is deemed "patently unreasonable". The absurdity of the court calling for procedural safeguards on one hand, yet deferring, carte blanche, to decisions by ministers applying a statute where very few such safeguards exist, highlights the fundamental difficulty of addressing the terrorist threat within a framework of the Rule of Law.

While it could be argued that the procedure as outlined in the IRPA strikes an "acceptable balance" between the State's interest and the subject's rights, a case could also be made that the procedure violates the principles of fundamental justice given constitutional force under the Charter. In Charkaoui375 (a Permanent Resident of Canada of Moroccan descent suspected of membership in the Bin Laden network) the Federal Court ruled that the balance was indeed acceptable and that the procedure set out in the IRPA is consistent with the principles of fundamental justice. Mr. Charkaoui's counsel submitted, however, that:

The procedure...violates the principles of fundamental justice...the role of the designated judge, the exclusion of information on grounds of national security, the hearings held in the absence of the person concerned and his counsel, as well as the standards of "reasonableness" for the certificate and "reasonable grounds to believe" that a danger to

national security exists, are clearly in breach of the principles of fundamental justice.\textsuperscript{376}

The most problematic aspects of the statute, are the standard of proof required to issue the certificate (further discussed below), and the standard of review used by the court to review the Ministers' decision. Section 82(1) of the IRPA stipulates that an individual named in a security certificate may be detained if the Ministers have "reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal". According to section 80(1) of the IRPA, the judge reviewing the Ministers' decision must determine whether the decision is "reasonable". In Charkaoui the Federal Court ruled that "national security is such an important interest that its protection warrants the use of standards other than the preponderance of evidence standard."\textsuperscript{377} Having said that, the court also determined that "the 'reasonableness' and 'reasonable grounds to believe' standards comport requirements that come close to the preponderance of evidence standard."\textsuperscript{378}

Up until the February 2007 Canadian Supreme Court ruling in Charkaoui, Almrei and Harkat, Canadian courts had ruled that the IRPA "fulfills the minimum requirements of the principles of fundamental justice."\textsuperscript{379} that using "the reasonableness" and "reasonable grounds to believe" standards is necessary in order to avert catastrophe, and that it strikes a proper balance between individual

\textsuperscript{376} Ibid. at 69.
\textsuperscript{377} Ibid. at 38.
\textsuperscript{378} Ibid. at 87 – 88.
rights and national security. Application of the "reasonableness" standard, however, in the face of reduced procedural protections, including reliance upon secret hearings where neither the detainee nor his lawyer are present, lack of access to evidence, and denial of a right of appeal, opens the door to error. The consequences are enormous for individuals who may be wrongfully suspected, detained over protracted periods and eventually deported. Canada's record of wrongful conviction is shameful enough even in the criminal courts where full procedural protections are respected\textsuperscript{380}. Moreover, since the statute applies only to non-citizens, systemic bias will result: the "risks of wrongful accusations...are not distributed equally in society but fall disproportionately on various religious, racial and political minorities"\textsuperscript{381}.

Charkaoui, Harkat and Almrei challenged the constitutionality of the IRPA's certificate scheme, under which they were detained. While Charkauoui had permanent resident status in Canada, Harkat and Almrei were foreign nationals recognized as Convention refugees. All three were suspected of terrorist activities\textsuperscript{382}. The appellants argued that the issuance of security certificates under the IRPA violated "five provisions of the Charter: the s. 7 guarantee of life, liberty and security of the person; the s. 9 guarantee against arbitrary detention; the s. 10(c) guarantee of prompt review of detention; the s. 12 guarantee against cruel and unusual treatment; and the s. 15 guarantee of equal protection and

\textsuperscript{380} Government of Canada, Philip Rosen "Wrongful Convictions in the Criminal Justice System", online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp285-e.htm#INTRODUCTION>.

\textsuperscript{381} Kent Roach & Gary Trotter, "Miscarriages of Justice in the War Against Terror", (2005) 109 Penn St. L. Rev. 967 at 1033.

\textsuperscript{382} Charkoui SCC, supra note 326 at 21-22.
equal benefit of the law. In 2007, the Supreme Court ruled that the security certificate proceedings are indeed unconstitutional. The most critical basis for the decision was that these proceedings fundamentally infringe on s. 7 of the Charter in ways which cannot be justified under s. 1. The Court stated that:

"In the IRPA an attempt has been made to meet the requirements of fundamental justice essentially through one mechanism – the designated judge charged with reviewing the certificate of inadmissibility and the detention...despite the best efforts of judges of the Federal Court, to breathe judicial life into the IRPA procedure, it fails to assure the fair hearing that s. 7 of the Charter requires before the state deprives a person of life, liberty, or security of the person."

One of the sticking points included issues surrounding the independence and impartiality of the designated judge, specifically that he or she may appear to be an agent of the government, that he or she may be forced to take on the role of investigator, and that he or she may identify with the named person in proceedings where the named person is absent and/or may not have access to the material relevant to his case.

The main sticking point, however, speaks to the use of secret evidence in security certificate hearings. Limited disclosure and ex parte hearings make it nearly impossible for a detainee to mount a meaningful defense. As the Court stated:

"In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, make it difficult, if not impossible, to find substitute procedures that will satisfy s. 7...The fairness of the IRPA

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383 Charkoui SCC, supra note 326 at 22.
384 Charkoui SCC, supra note 326 at 47.
procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts in law, and reflects the named person’s knowledge of the case to meet. The judge, working under the constraints imposed by the IRPA, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing...”

The Court left Parliament with the task of developing specific mechanisms of procedural fairness, and a deadline of one year to accomplish the task. At the same time, the ruling surveyed a number of methods which would allow for minimal impairment of detainee rights without compromising national security. These included use of special counsel such as in the Arar Inquiry, and use of the Security Intelligence Review Committee (SIRC) and the special advocate system employed by the Special Immigration Appeals Commission (SIAC) in the United Kingdom, as models for emulation. Some of these will be discussed, as will additional methods not included in the ruling.

In the Court’s 2007 decision, the standard of review to be used when the court comes to consider the Ministers’ decision is considered. As shown above, the functional and pragmatic approach presently precludes application of the “correctness” standard on review, primarily because of the lack of right of appeal in the IRPA and to the relative lack of expertise on the part of the courts in national security matters. Changing the IRPA so as to create a statutory right of appeal (as exists both in Israel and in the United States) would immediately shift

385 Charkoui SCC, supra note 326 at 44-46.
the standard of review away from the patent unreasonableness standard. The Court states: "The certificate provisions of the IRPA do not violate ss. 7 and 12 of the Charter if accompanied by a process that provides regular opportunities for review of detention, taking into account all relevant factors"\textsuperscript{386} including reasons for detention, length of detention, reasons for delay in deportation, anticipated future length of detention, and the availability of alternatives to detention. Since the same body would review and re-review its own decision, however, this procedure does not count as an appeal (the most desirable option) in the strict sense. However, as designated judges gain expertise in reviewing administrative detention decisions, their inclination to take a deferential approach may diminish over time. Under these conditions, in applying the functional and pragmatic approach to determining the required standard of review, the courts would presumably move closer to the correctness standard. It has been noted that it is not unheard of for standards of review to change given "superventing events"\textsuperscript{387}.

**Amicus Curiae and special counsel**

The Court points to one serious defect in current security certificate procedures - the denial of full rights of representation by counsel. An additional innovation that would better balance security needs against subject's interests, would be to permit the appointment of an amicus curiae. It has been seen that this is done in the United States and Israel. It is also permitted in Britain. This idea was previously raised in Canada in the McDonald Commission Report

\textsuperscript{386} Charkoui SCC, supra note 326 at 68.

\textsuperscript{387} See Principles of Administrative Law, supra note 349 at 517 - 518.
published in 1981\textsuperscript{388}. The Commission was the first to suggest the idea of appointing designated judges from the Trial Division of the Federal Court to issue secret warrants in ex parte hearings. In considering whether to recommend procedures permitting the appointment of a “friend of the court”, the commission wrote:

This officer would appear before the judge and point out possible weaknesses or inadequacies in the applications. While we think such a proposal has considerable merit and have considered it carefully, we have concluded that, on balance, it would not be advisable to adopt such a mechanism. The adversarial element afforded by such a procedure might be rather artificial and would make the process of approving applications unduly complex. Further, we think that an experienced judge is capable of giving adequate consideration to all relevant aspects of an application without the assistance of an adversarial procedure\textsuperscript{389}.

In December, 2004 the issue came before the Federal Court\textsuperscript{390} while examining the reasonableness of a security certificate issued against Mohamed Harkat (an alleged terrorist from Algeria). Harkat asked the court to appoint an \textit{amicus curiae} to assist the court with regard to matters which could not be disclosed to himself or his lawyer. He argued that his case was more complicated in its history and circumstances than those of previous security certificate detainees [such as \textit{Ahani v. Canada}].


\textsuperscript{389} \textit{McDonald Commission, supra} note 372 at paragraphs 104 and 106 of part V (vol. 1 pages 557-558); also see \textit{supra} note 330 at 56.

\textsuperscript{390} \textit{Harkat (Re)(F.C.).} [2005] 2 F.C.R. 416.
Mr. Harkat’s lawyers provided the Court with the names of two eminent members of the Law Society of Upper Canada, each of whom had previously been granted “top secret” security clearance and each of whom had agreed to take on the case if the Court were to appoint them. Mr. Harkat’s lawyers argued that:

An *amicus curiae* would allow the Court to benefit from hearing representations of counsel which would not otherwise be put forward, while preserving the government’s claim to national security interest. Considering the type of issues the Court will be called upon to decide, the assistance or input of an *amicus curiae* could prove invaluable so that Mr. Harkat’s interest will be more completely protected. The appointment of an *amicus curiae* is said to strike a just balance between the competing interests inherent in the case.391

His lawyers acknowledged that the power to appoint an *amicus curiae* was not specifically granted to the Court on the terms of the legislation but asserted that the Court had jurisdiction to make such an appointment both at common law and under subsection 24(1) of the Charter, which provides that: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”392. Moreover, it was argued that such an appointment was necessary to “prevent a breach of Mr. Harkats’s rights guaranteed under section 7 of the Charter”393.

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392 Charter, *supra* note 318 s. 24(1).
393 *Supra* note 390 at 424-425.
While the Court declined to decide whether or not it had the jurisdiction to appoint an amicus, it noted that it would assume that it did. Despite this, the Court ruled that such an appointment was “not in accordance with the intent of Parliament as expressed in the legislation”\(^{394}\) and that “the standard for finding an implied power is a stringent one; a power is not to be implied where it is simply logical or desirable”\(^{395}\).

Further, the Court did not accept Mr. Harkat’s argument that his matter was more complicated than that of any other security certificate detainee and, as such the Court would not accede to a procedure deviating from that which afforded the subject the right to be heard as outlined in the IRPA.

The Court pointed to two additional factors which influenced its decision to deny Mr. Harkat’s petition. First, his request was made late in the proceedings, such that appointing an *amicus curiae* would result in further delay. Second, the IRPA itself provides the designated judge with the necessary tools to balance the subject’s rights with national security, while inquiring into the reasonableness of the certificate\(^{396}\).

In *Harkat*, the Court ruled that: “designated judges are the cornerstone of the review procedure”\(^{397}\), and that they are fully capable of balancing the rights of the detainee on the one hand and the needs of the state on the other. However, as Lord Hewart wrote already in 1923 “justice should not only be done, but should

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\(^{394}\) *Supra* note 390 at 441.

\(^{395}\) *Supra* note 390 at 437.

\(^{396}\) *Ibid.*

\(^{397}\) *Supra* note 390 at 431.
manifestly and undoubtedly be seen to be done\textsuperscript{398}. The capabilities of the designated judges notwithstanding, a process which entails in camera hearings and non-disclosure of evidence, poses a real threat of the appearance of bias. This appearance is magnified when the individuals involved are overwhelmingly drawn from minority groups. The problematic nature of the IRPA's procedure was identified by Federal Court Justice Hugessen in comments regarding in camera hearings:

> This is not a happy posture for a judge, and you are in fact looking at an unhappy camper when I tell you about this function...we do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try and figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how the witnesses that appear before us ought to be cross-examined...we greatly miss, in short, our security blanket which is the adversary system...the real warranty that the outcome of what we do is going to be fair and just\textsuperscript{399}.

In its 2007 ruling, the Supreme Court of Canada contended that the IRPA in fact does not provide the designated judge with the necessary tools required to balance national security with individual rights. One of the mechanisms suggested to remedy this短coming, is that of \textit{amicus curiae}. The Court stated that "the use of special advocates has received widespread support in Canadian

\textsuperscript{398} {\textit{Rex v. Sussex Justices}} (1923), [1924] 1 K.B. 256 at 259.
academic commentary. Further, the Court quoted Professor Roach, stating that "special advocates constitute one approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible.

It is noteworthy that other common law countries have adopted a similar approach. The Court draws on the United Kingdom's Special Immigration Appeals Commission Act (U.K.), 1997, c.68 (SIAC Act), which regulates the hearing of appeals of persons issued with deportation certificates and detained once they are suspected of posing a threat to national security or being a "terrorist". This Act resembles the Canadian SIRC model. Section 6 of the SIAC Act stipulates that the Attorney General of England may "appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded".

In the case of Secretary of State for the Home Department v. "M" the Secretary of State applied for permission to appeal a decision rendered by the Special Immigration Appeals Commission ("SIAC") to cancel a certificate issued against a Libyan national whom the Secretary of State deemed to be a terrorist. The Court of Appeal refused to grant the Secretary of State permission to appeal stating that SIAC was within its mandate to cancel the certificate.

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400 Charkoui SCC, supra note 326 at 55.
This decision is a case in point with regard to the usefulness of an amicus curiae, as exemplified by SIAC's ruling:

As a result of Mr. McCullough's [the amicus curiae] rigorous cross examination in the closed session it was revealed that the assertions made in the statements provided by the respondent [the Home Secretary] are not supported by the evidence...we are concerned that too often assessments have been based on material which does not on analysis support them\textsuperscript{403}.

Adopting the procedural safeguard of amicus curiae, as a mechanism employed under the British legal system, would in no way endanger national security, since secret information would only be handed over to state sanctioned lawyers with appropriate security clearance. The possibility that the procedure may become more complex and time consuming because of the introduction of a lawyer acting in the interest of the person whose rights are affected is a factor of little relevance. The stakes for the person concerned are immense. Furthermore, since the time security certificates were first introduced in the early 1990s, only about 27 of these have been signed\textsuperscript{404}, the implementation of procedures which include an amicus curiae would be unlikely to impose an undue burden on the judiciary.

The opposite is more likely the case – an amicus curiae with top level security clearance and intelligence-gathering knowledge and experience, would, if anything, accelerate the process by easing the burden hitherto handled by judges alone. As it stands now, the judges' task of examining evidence based

\textsuperscript{403} Ibid.
\textsuperscript{404} Supra note 381 at 1003.
largely on intelligence information, at times without first hand access to witnesses, is daunting and intricate, particularly when the evidence is only being gathered and presented by CSIS representatives, who necessarily represent only the state's interest. This, coupled with the fact that most judges do not possess sufficient expertise in professional and meticulous examination of intelligence information, makes the system inherently error-prone since most judges would rather be safe than sorry where national security is involved, thus consistently running the risk of erring on the side of caution more than they ought.

**Standard of Proof**

All of this gives the question of standard of proof heightened importance. The United States Supreme Court has ruled that "in cases involving individual rights...[the] standard of proof [at a minimum] reflects the value society places on individual liberty". Given that few procedural safeguards exist in Canada's security certificate determinations, it may be that raising the bar with regard to the standard of proof to be met by the Ministers prior to issuing a certificate, and, hence, that at play when the courts review the Ministers' decision, might lead to a more appropriate balance between national security and the subject's rights. What then, should the standard of proof be?

It has already been seen that both the United States and Israel have adopted higher standards of proof to be met in order to administratively detain an individual. In Israel it was determined that the evidence must be credible and

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convincing, not leaving any room for doubt. In the United States, as was shown above in Addington v. Texas, in order to meet the requirements of the due process clause of the Fourteenth amendment, in cases concerning involuntary detention in the interest of public safety and security, the facts underlying the evidence must be at least 70\% probable. This is referred to as the "clear and convincing" standard of proof. The question that arises, then, is whether the analysis and outcome of the United States Supreme Court in Addington (see above), should inform the treatment of security certificate proceedings in Canada. Are the situations sufficiently analogous? If so, then an individual suspect's loss of liberty through detention must be seen as a harm at least as great as any possible harm which might come to the state should it err by setting a would-be terrorist free, and as such, the evidence to detain him must be of a clear and convincing standard.

The view that the potential risk to the state by not detaining and deporting the subject named in a security certificate far outweighs any error which might be imposed on that subject in the event of wrongful detention and deportation might justify reliance on only a "reasonableness" standard in such cases. As Professor Tribe remarked, "it may be right, in more normal times, to allow a hundred guilty defendants to go free rather than convict one innocent one, but we must reconsider that arithmetic when one of the guilty may blow up the rest of Manhattan." 407

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406 H.C.J. 56/76 Berman v. Minister of Police, 31(2) P.D. 687 at 692.
While this claim has been argued with considerable persuasiveness it is in effect contrary to the basic values which underpin Western constitutional structures. Denying one class of suspect rights that are treated as essential for others is unjustified, particularly when the class denied is politically vulnerable, or is selected in whole or in part by criteria relying on race, religion, or ethnicity. As Dworkin writes, "It makes no sense to say that people accused of more serious crimes are entitled to less protection for that reason. If they are innocent, the injustice of convicting and punishing them is at least as great as the injustice in convicting some other innocent person for a less serious crime."\(^\text{408}\)

Further, Dworkin argues that a balance between risk and rights can never truly be achieved, that it is an idea which is used more or less as a tool by democratic governments striving to protect their own national security without admitting to acting unjustly toward those whose individual rights are violated. In this situation, societies run the risk of the loss of political freedom, of a weakened constitution, and of decay of the rule of law in the long run.

It is doubtless true that justice would ideally require that all individuals be equal in the eyes of the law. If this could be done, those facing security certificate determinations should enjoy the benefit of protection under the criminal standard of proof: proof beyond reasonable doubt. We do not however, live in an ideal world. The adaptation of such a standard would thwart the ability of the state to detain anyone, as meeting this burden of proof would be virtually impossible in the peculiar sphere of security intelligence and antiterrorism policing.

Since prudence requires approaches to risk management which dictate the unjust treatment of certain individuals, lawmakers and the judiciary are indeed left with the unsavoury task of trying to balance national safety with the subject's rights. Combating modern terrorism poses real challenges for security agencies worldwide. Infiltrating small close-knit terrorist cells, gathering reliable intelligence, acquiring credible informants and piecing the evidence together so that it can be presented in court without endangering national security are enormous challenges. Since the criminal burden of proof would be too great for successful detention of a justly accused subject, while the "reasonableness" and "preponderance of the evidence" standards pose a real danger of wrongful detention and deportation, a more balanced approach to security certificate determinations would require that a "clear and convincing" standard of proof be required of the Ministers in issuing the certificate.

Since security certificates have been delegitimized, other issues have arisen in anti-terrorist proceedings in Canada. One case in point involves Canadian citizen, Mohammed Momin Khawaja, who in December 2005 became the first person charged under Canada's 2001 Anti-Terrorism Act. Khawaja, a software developer, was charged with 7 offences under the Anti-Terrorism Act. It is contended that Khawaja played a key role in the plan to carry out terrorist attacks in London. In October 2006, Superior Court Justice Douglas Rutherford ruled that the Act violates Charter-guaranteed rights on the basis that the Act defines terrorism based on motives rather than on actions. Further, a Federal Court ruled that the government hand over a summary of 400 documents and full or

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partial access to 73 other documents to Khawaja’s defence lawyers. In so doing the Federal Court rejected the government’s contention that national security interests should outweigh Khawaja’s right to make full answer to and defend against the charges.

As in the United States (Hamdi v. Rumsfeld), when the government is faced with the dilemma of revealing its evidence in a terrorism case in order to secure a conviction of a citizen, many times it backs down. Facing the choice between tabling its evidence (which may entail vast collateral damage), and non-disclosure which may end in the individual’s release without trial, is undoubtedly difficult for any government trying to protect its national security interests. It is yet to be determined how Canada will react if forced to reveal sensitive intelligence in the Khawaja case.

**Thesis Conclusion**

While the recent ruling of the Supreme Court of Canada goes a long way in an attempt to find a more appropriate balance between civil liberties and protecting national security, more can be done. The Court left Parliament with the task of developing specific mechanisms of procedural fairness.

For society to maintain faith in its judicial system in turbulent times, and for judges in the system to believe they are truly being fair and just, a fundamentally altered IRPA is required. Security certificate proceedings in Canada, and the effort that goes into preparing them, could greatly benefit from mechanisms

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implemented in other countries to afford the subject greater procedural protection. These mechanisms may positively affect the fact-finding side before the certificate's issuance, by raising the standard of proof required of the Ministers to the clear and convincing evidence standard. Alternatively, they may affect the stage of determination by the designated judge, through use of amicus curiae for the subject, the option of assessing a subject's case on its merits through a correctness standard of review, or a combination of the two. Hopefully Parliament will adopt a variation of these safeguards in planning future legislation. It behooves legislators in any democracy to recognize that there is no getting away from the need to balance national security with basic civil rights, if justice in a democratic society is truly to be served.
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