A COMPARATIVE CONSTITUTIONAL ANALYSIS OF THE JUDICIAL TREATMENT OF TORTURE BETWEEN ISRAEL AND THE UNITED STATES: NAVIGATING THE CONTENTIOUS ISSUE OF LEGALITY VS POLICY IN NATIONAL SECURITY MATTERS

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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The United States and Israel: Navigating the Contention Issue of Legality vs. Policy in National
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This comparative legal analysis evaluates the issue of terrorism and how it has been dealt with respectively by the United States and Israeli Supreme Courts. Since the events of 9/11, combating terrorism has become one of the primary concerns of the US government while it is a matter that has pervaded Israeli policy since its birth as a nation-state. The analysis is centered on examining how each state’s Supreme Court has confronted the issue with the Israeli Supreme Court using a “Business as Usual” model and the US taking an “Emergency Powers” approach. It is argued that terrorism is an ongoing issue that cannot be justified as an emergency and the US Court would do better in adopting Israel’s method of adjudication in these matters. It is also
suggested that the US could learn from Israel’s policy towards torture as the US policy has largely been cruel and unsuccessful.
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1. Introduction

In this paper I will conduct a comparative analysis of two states which take different approaches when dealing with terrorism. Israel has dealt with terrorism since its inception and has generally worked within the confines of its constitutional framework. This is known as the “Business As Usual” approach. In contrast, since 9/11, the US adopted an Emergency Powers approach. This approach has been problematic as the US has adopted supposed legal policies which have circumvented human rights by using harsh interrogation methods which essentially amount to torture. I will examine what terrorism is, why torture has become an issue and how the Israeli and US courts have dealt with their respective government’s policies of using harsh interrogation methods. My work will build upon the work of other scholars who have done similar comparative analyses. I wish to narrow my focus to torture and to develop this argument further by assessing the strengths and weakness of the existing works. This will go toward my thesis which is that terrorism is an ongoing issue which cannot be justified as an emergency and that the US Supreme Court would be better able to fulfill its role as the defender of individual rights while balancing the interests of the state if it were to adopt the Israeli Court’s model of adjudicating on these matters. Courts should not defer to government policies which encourage torture and infringe on the rights of individuals for the sake of national security.

1.1 Outline

This essay is concerned with the use of torture by a liberal democracy. While conducting this analysis, I will be referring back to the lessons learned from Nazi Germany as an example of why a strong judiciary can fulfill its institutional role as an important check on the powers of the executive and legislative branches by conducting judicial review on policies which may infringe on constitutional rights. This will lead toward exploring the complexities of terrorism and why torture has been employed by a state which has been a harsh critic of other states which have torture, namely the United States. I will then turn my attention to how torture is treated under international law. This will be followed by some of the supposed justifications for torture. I will expand upon the separation of powers doctrine and what the role of the judiciary is. The main
theme of the essay, the Emergency Powers doctrine and the Business as Usual approach, will be discussed by exploring examples in Israeli and US policies which have included the torture of terrorist suspects and how they have been treated judicially. This will lead into my discussion of why the Israeli approach is more suitable for dealing with terrorism as it strikes a good balance between the rights of the individual and the interests of the state.

2. **The Modern Liberal Democracy: A Lesson Learned**

A liberal democracy is defined as a type of representational government in which people choose their rulers.\(^1\) In Ancient Greece, democracy was seen to be inherently unstable, and could degenerate easily into demagoguery and tyranny.\(^2\) Tyranny was considered the worst form of government, being roughly equivalent to receiving the same scorn that we today would reserve for personal dictatorship.\(^3\) As a result, one of the main purposes of a constitution in a liberal democracy is to limit the authority of the government. After WWII, many modern constitutions were designed to have certain limitations in order to protect individual rights. These constitutions accomplish this by providing certain basic freedoms. If the government wishes to impose any limitations then they must be clearly justified by the government. While democracy is meant to check tyrannical governments by essentially providing the people with the power to rule, there is room for tyranny in a different way; the tyranny of the majority. This term describes when the rule of one class or group dominates by ruling in its own interest at the expense of the interests of minorities.\(^4\) The modern liberal democracy evolved as a means of limiting the oppressive powers a state may have on its citizens and a constitution helps to maintain this balance. The success of democracy in the US in the nineteenth century did much to recommend it to other liberal nations.\(^5\)

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2 IBID P. 298
3 IBID P. 299
4 IBID P. 299
5 IBID P. 300
The suspicious nature of the government has greatly diminished in modern times as governments have become increasingly responsible for providing more services and thus retaining more power. When a state is in a constant state of panic due to a perceived terror threat, the population will be much more accepting of the government taking measures to protect national security. The US response to 9/11 is an example of such an occurrence where citizens were, at least initially, quite accepting of policies which granted the government enormous powers to detain suspects and even torture them in the name of national security. As a result of these policies, certain individuals were tortured, mostly Muslim males who were non-citizens. The majority was generally not concerned with these policies as they only affected a minority of people. This essay seeks to use Israel as a point of comparison as the basic rights which make up its unwritten constitution were drafted at a time when Germany’s descent into tyranny and oppression through the government abusing the constitution was a very fresh experience and their diligence in protecting their constitution has continued.

Nazi Germany serves as an example of why a state needs a strong constitution in order to prohibit a government from infringing on the rights of its citizens. The German people did not set out to destroy their constitution and wreak havoc through tyranny by directly electing Hitler. Furthermore, Hitler did not begin immediately to dismantle the Weimar Constitution as soon as he came to power. Rather, he slowly but incrementally imposed measures to oppress his opponents and to seize more power. Hitler capitalized on the burning of Germany’s Parliament in an event known as the Reichstag fire which was framed as an emergency in order to seize more power. An investigation uncovered that this was the work of Dutch communists and Hitler concluded that the government was being threatened by a communist plot. The government proceeded to declare the Reichstag Fire Decree which suspended many basic rights such as habeas corpus. This permitted Hitler to arrest the communists involved and raid their offices. Hitler managed to maintain this momentum in order to pass the Enabling Act. The Enabling Act gave the Nazi cabinet the authority to pass laws which altered the constitution

6 William Shirer. ”The Rise and Fall of the Third Reich: A History of Nazi Germany”. Simon and Schuster 1960. P. 194 (Shirer)
7 Ibid P. 194
8 Ibid P. 194
without consent from the Reichstag. This essentially gave the Nazis the power to amend the constitution unilaterally.

Subsequently, Hitler also managed to sidestep other important constitutional protections. He established a new court, known as the People’s Court, due to his dissatisfaction with the ruling in the Reichstag fire trial. This Court operated beyond the constitutional framework in order to punish what were viewed as crimes against the government. Essentially, the Court deferred to the executive and handed down numerous death sentences without even observing proper judicial procedures.

The Nazis justified these actions as necessary to protect Germany from an external threat but in reality they were intended to circumvent the constitution in order to acquire more power. Hitler further excused these changes as a temporary response to extraordinary circumstances. The Nazis took advantage of the inherent weaknesses in the Weimar Constitution so they could pass policies which appeared to be legally justified but instead were meant to facilitate their ulterior motives of war and race purification among other things. A strong constitution and an independent judiciary which upheld the rule of law could have given the German citizens a better chance of combating this tyranny. A key historical lesson of the Holocaust is that the people, through their representatives, can destroy democracy and human rights.

Modern liberal democracies are not immune from experiencing the tyranny found in Nazi Germany. Many of the US’ policies which responded to terrorism have an eerie resemblance to the German experience as they ignore the constitution and the rule of law. These policies will be explored throughout the essay. This essay will illustrate how the US Supreme Court has failed to uphold the basic rights found in the US Constitution by not reviewing the Executive’s policies...

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9 Shirer supra note 6 P. 198
10 IBID p.194
11 IBID p.194
with regard to torture and has also permitted the tyranny of the majority to affect the rights of minorities; specifically those who are suspected of being terrorists.

3. What Is Terrorism And Why Is Torture “Necessary”? 

The term terrorism has been used to describe virtually any abhorrent act of violence perceived as directed against society whether it involves the acts of anti-government dissidents or governments themselves, organized crime syndicates, common criminals, rioting mobs, people engaged in militant protests and individual psychotics.\textsuperscript{13} There is no single agreed upon definition either in criminal law or in the international community. Criminal law finds the term difficult to define as terrorism tends to incite strong emotions which can prejudice a terrorist suspect. At its core, terrorism is the use of violence used and directed in pursuit of or in service of a political aim.\textsuperscript{14} It is planned, calculated and systematic.\textsuperscript{15} The most neutral definition can be found in a UN Declaration in 1994: Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.\textsuperscript{16} Subsequent definitions, specifically after 9/11 have tended to be broadly defined and not of much use as they can potentially incorporate too many parties who are not necessarily involved in terrorist activities.

Regardless of the definition, the destruction terrorism causes can be enormous. Between 2000 and 2007, 8342 Israelis were wounded in terrorist attacks.\textsuperscript{17} The 9/11 attacks alone killed 2976

\begin{itemize}
\item \textsuperscript{13} Bruce Hoffman. “Inside Terrorism” Columbia University Press 2006, p. 1 (Hoffman)
\item \textsuperscript{14} IBID p. 3
\item \textsuperscript{15} IBID p. 131
\item \textsuperscript{16} United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60, “Measures to Eliminate International Terrorism,” of December 9, 1994, UN Doc. A/Res/60/49
\item \textsuperscript{17} Israel Minister of Foreign Affairs. “Victims of Palestinian Violence and Terrorism since September 2000” Internet: "http://www.mfa.gov.il/MFA/Terrorism-Obstacle-to-Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+since.htm"
\end{itemize}
people and wounded or injured over 6000. While these numbers are significant, there are far reaching effects which cannot be represented by numbers alone. The effects of terrorism can extend as far as the economy, government policies as well as the general psyche of a population. The terror which results cannot be easily quantified.

Furthermore, states are not always adequately prepared to prevent attacks or even combat terrorism as they have traditionally fought other states. This means that there is usually some warning of the attack, either through a declaration of war or through intelligence gathering. The state which is attacked can strike back against the aggressor state in order to defend itself. With terrorism, there is no particular state or specific individuals which the victim can strike back against and this creates uncertainty. Terrorists are considered non-state actors as they do not necessarily wear uniforms which identify them as soldiers and they operate amongst civilians which makes them extremely difficult to detect. Terrorists are even willing to die during an attack in order to ensure it is a success. They are generally motivated by a near fanatical belief in their religious or political purpose and death can even be considered honourable according to this line of thinking. Terrorists are not necessarily deterred by traditional legal means. Even if legal means were a deterrent and a terrorist receives a harsh sentence, the damage will have already been done. This poses a dilemma for states as they must find ways to prevent attacks since many terrorists are extremely difficult to deter through legal means and a traditional military attack may not be coercive enough as terrorists do not necessarily represent a specific state. US national security policy has been based on deterrence since 1945 yet deterrence simply does not work with terrorists.

As a consequence, the state must place more emphasis on thwarting attacks before they occur and this is accomplished through intelligence gathering. However, the means of acquiring the

19 Hoffman supra note 13. p. 73
20 IBID p. 131
22 IBID.
information needed to detect when an attack may take place poses profound difficulties. Some argue that this necessitates the use of harsh interrogation methods and even torture in order to coerce otherwise unwilling suspects to divulge information because traditional means are not as expedient or effective. The US government specifically distanced itself from promoting torture as a government policy before 9/11. However, the destruction and sense of entering in to a state of emergency caused by 9/11 precipitated the government to rethink this strategy as the structure of terrorist networks made them extremely difficult to penetrate. Terrorist networks are very secretive and essentially closed off from society and thus are not easily infiltrated and intelligence is extremely difficult to accumulate. More traditional, and less coercive, methods of intelligence gathering tend to take long periods of time. The sense of urgency to prevent catastrophic attacks is used as a justification for employing harsh interrogation methods because they are thought to get much faster results. As the statistics mentioned earlier demonstrate, terrorists usually seek to inflict as much damage as possible in order to strike fear in the public and this has horrendous effects on a country’s population and their economic and political system.

Therefore, one can argue that the infringement of the rights of a few against potentially saving the lives of many can be justified. However, this tyranny of the majority cannot be justified, especially by a liberal democracy.

3.1 Harsh Interrogation or Torture?

The use of harsh interrogation methods can amount to torture and this is something which a liberal democracy cannot justify if it wishes to uphold its constitution and the rule of law. Torture is immoral because it violates a person’s dignity. Furthermore, many liberal democratic constitutions contain prohibitions against cruel and unusual punishment. One can only attempt to morally justify torture even when it is measured against a competing result. Many authors explain that democracies must do anything they can to defend their democracy and this may involve a trade-off between rights and security. This trade-off results in certain individual rights being curtailed in the name of security. A liberal democracy is capable of limiting certain rights such as that of habeas corpus when there is an urgent need such to temporarily hold a terrorist

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23 Hoffman supra note 13 p. 131
24 IBID
based on secret evidence which cannot be revealed in a Court of law. However, a liberal democracy must have demonstrable justifications which should only narrowly limit rights and cannot use security as a blanket justification in order to circumvent this requirement. The use of torture in extracting information from terrorists denies a fundamental right of human dignity and cannot be justified in the name of security alone. The liberal democracy developed to protect the rights of the individual. These rights are not merely formal shackles which can be thrown off whenever a competing interest arises.

Furthermore, torture is difficult to define. Any human activity is probably torture to someone and a word that potentially characterizes every human experience is likely to be very slippery indeed.\(^{25}\) For the purposes of this essay, we will employ the definition found in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\(^{26}\)

This definition has been widely accepted and ratified by many countries, including the US and Israel. It is unique because it distinguishes between when a state official tortures as opposed to private individuals. When a public official detains and tortures someone, they do so using the authority and instruments with which the public entrust him.\(^{27}\) This is another reason why a liberal democracy cannot endorse torture. Whether the torture occurs on the soil of the state which endorses it or through rendition to other states for them to conduct it, torture is not morally


\(^{26}\) United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Article 1.

\(^{27}\) Rejali Supra note 25. p. 39
justifiable. The principles on which a liberal democracy is based do not permit public officials from carrying out torture on behalf of the state.


The eighth amendment of the US Constitution effectively bans torture. It states:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”\textsuperscript{28}

Torture has been considered banned under the statement that cruel and unusual punishment shall not be inflicted. Furthermore, 18 U.S.C. § 2340 gives further guidance on what constitutes torture:

1. torture means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

2. “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from- (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.\textsuperscript{29}

The domestic law of prohibiting torture in the US is echoed in international law as well. International treaties such as the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment have banned torture.\textsuperscript{30} As Sanford Levinson suggests in his introduction to Torture: A Collection, "banned" is probably too weak of a term to describe the requirements imposed by

\textsuperscript{28} US Const., 8th Amend.
\textsuperscript{29} 18 U.S.C. § 2340
these treaties: the prohibition on torture is absolute.\textsuperscript{31} This ban is appropriate as torture interrogation has a certain nature (severe physical or mental pain and suffering inflicted upon its victim), is accomplished by certain perpetrators (public officials), and has a certain aim (obtaining information or confessions).\textsuperscript{32} As John Parry discusses, international tribunals have pinpointed specific acts as torture: beatings, deprivation of food, electric shocks, being submerged in water to the brink of asphyxiation and the like.\textsuperscript{33}

Moreover, these acts are banned for many reasons. Torture has been used for various purposes by rulers and dictators, intent on terrorizing people in to submission.\textsuperscript{34} Torture has been used as criminal punishment and as a means of deterring future crimes.\textsuperscript{35} Some of the more troubling uses of torture involve causing victims pain in order to extract confessions. This practice became less accepted when the criminal justice system began to focus on the use of various types of evidence including facts rather than mere confessions.\textsuperscript{36} However, the concern of this essay is with interrogational torture. This can be distinguished from torturing for confessions because it is forward-looking as it aims to gain information and forestall future evils like terrorist attacks rather than for the purposes of retribution.\textsuperscript{37}

As a result, there are various interrogational methods which one can employ but may not constitute torture in an obvious sense such as causing direct pain such as whipping, beatings, and sexual assault. These interrogational methods are purposely categorized as harsh interrogation methods so they do not attract the stigma attached to being called torture. They essentially fall within a gray area as they do not necessarily cause direct and immediate harm. Some of these techniques include slapping one’s face, sleep deprivation and waterboarding. These techniques were employed by US interrogators specifically after 9/11. These methods are not widely

\begin{itemize}
\item \textsuperscript{31} Forcense supra note 30.
\item \textsuperscript{32} William D. Casebeer. “Torture Interrogation of Terrorists: A Theory of Exceptions” http://www.usafa.edu/isme/JSCOPE03/Casebeer03.html#_ftnref6
\item \textsuperscript{33} Forcense Supra note 30 at 39
\item \textsuperscript{34} David Luban. “Liberalism, Torture and the Ticking Bomb” 91 Va. L. Rev. 1425 (2005) at 18
\item \textsuperscript{35} IBID at 18
\item \textsuperscript{36} IBID at 18
\item \textsuperscript{37} IBID at 18
\end{itemize}
accepted as constituting anything less than torture and in fact are classified as such by Israeli courts.

Acts which amount to torture are prohibited because torture has a self-conscious aim of turning the victim into someone who is isolated, overwhelmed, terrorized and humiliated.\textsuperscript{38} Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes.\textsuperscript{39} Furthermore, the effectiveness of torture is questionable. While the US government’s answer to the question of does torture work appears to be yes in practice, there is currently no official report which confirms if torture works.\textsuperscript{40} In some cases, torture is less accurate than flipping a coin and the key success in gathering information in known cases come from other methods, most notably cultivating public cooperation and informants.\textsuperscript{41} This is one reason why states keep knowledge of torture classified and hidden from public assessment.\textsuperscript{42}

Moreover, there are theoretical justifications for using torture. Utilitarians use the ticking bomb scenario which describes a scenario where a person is in custody that has direct knowledge of the location of a bomb in a highly populated area.\textsuperscript{43} The officials must weigh the consequences of torturing this suspect as they possess information which could save a significant number of lives.\textsuperscript{44} The balancing between infringing on this one individual’s rights against the potential for saving lives is going to result in a morally wrong act being committed regardless of which decision is made so the lesser of two evils should prevail.\textsuperscript{45} This justification is fraught with issues and is more fictitious than realistic.\textsuperscript{46} Torture is only justified once it achieves a result. Interrogators may believe a suspect has information but they do not know for sure until it is

\textsuperscript{38} Luban supra note 34 at 18
\textsuperscript{39} IBID at 18
\textsuperscript{40} Rejali Supra note 25. p. 23
\textsuperscript{41} IBID p. 24
\textsuperscript{42} IBID p. 26
\textsuperscript{43} Forcese Supra note 30
\textsuperscript{44} IBID
\textsuperscript{45} IBID
\textsuperscript{46} IBID
If this person does not divulge the information then there is a question of how far the interrogators can go. If the person does not know anything then the state is guilty of torturing an innocent person. Individuals can be trained to withstand torture long enough that a ticking bomb can be moved anyway. Regardless, the ticking bomb scenario does not exist in practice. It should be noted that the GSS has cited the case of Nasim Za’stari in 2003 as an example of a real world ticking bomb situation. Despite this one example, the ticking bomb scenario is not even remotely common enough to justify the use of torture.

Regardless, the use of the ticking bomb scenario in argument comes with an ulterior motive which is used to put liberal supporters of banning torture into a precarious position. It is meant to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation. This means that the prohibitionist admits that they are not opposed to torture in principle but rather that their “principles” have a price and one must only haggle on how high the price is. It is difficult to take torture off of the table when scenarios like the ticking bomb scenario could arise but one must be aware that the possibility is mostly theoretical and does nothing to vindicate torture from violating the human dignity of those who experience it.

Nevertheless, the dilemma still remains; there are situations where some information can only be extracted from the terrorists themselves and they are not easily coerced in to revealing what they know. Thus, the state may argue that the prohibition on torture is an unnecessary constraint which hinders their need to compel terrorists in custody to divulge pertinent information. Indeed, in the aftermath of the 9/11 attacks, the Bush administration signalled that a profound

47 Forcese Supra note 30
48 Reem Bahdi, Torture, tort and Terror: the Non-Delegable Duty to Protect Nationals From torture in the Context of Anti-terrorism [forthcoming, Supreme Court Law and Review and Critical Torts, edited by Sandra Rogers.] p. 284
49 Forcese Supra note 30
50 Rejali supra note 25. p. 517
51 Luban supra note 34
52 IBID
change in US policy towards terrorism would take place.\textsuperscript{53} This approach consisted of being open to the use of interrogations using techniques which essentially amount to torture such as waterboarding. While torture has been used for many purposes throughout history the type of torture discussed here is interrogational torture. That is torture employed strictly to extract the critical information from the terrorist bomber and designed to save millions of innocent lives.\textsuperscript{54} These techniques consist of harsh interrogation methods such as sleep deprivation or waterboarding.

\textbf{5. Separation of Powers}

This section will discuss the roles of the different branches of government and explain why a court is institutionally justified in conducting judicial review. A liberal democracy can uphold the constitution and the rule of law through a main principle behind a liberal democracy: by having a separation of powers. The separation of powers doctrine imposes a system of checks and balances by dividing the government into three branches: the legislature, the judiciary and the executive. Each branch has specific institutional roles. This design is meant to prevent any one branch from gaining power at the expense of the others.\textsuperscript{55}

Further the main responsibility for confronting the danger of terrorism falls to the Executive branch, and, to a lesser extent, the legislative branch.\textsuperscript{56} Both are accountable to voters and directly responsible for guaranteeing both public safety and democracy.\textsuperscript{57} These branches are meant to have the necessary knowledge of how to best approach the issue with the implied consent of the people in order to make such decisions. At the end of the day, counter-terrorism activity is mostly a combined effort of the Executive and the legislature.\textsuperscript{58}

\textsuperscript{53} Hoffman supra note 13 at p. 20
\textsuperscript{54} Forcexe Supra note 30 at 12
\textsuperscript{55} Larry Johnson. “Politics: An Introduction to the Modern Democratic State”. Broadview Press Limited 2001. pg 206
\textsuperscript{56} Mersel. “Judicial Review of Counter-Terrorism Measures: The Israeli Model For the Role the Judiciary During The Terror Era”. International Law and Politics [Vol. 38:67] p 67
\textsuperscript{57} IBID p 67
\textsuperscript{58} IBID p 67
Article II of the Constitution states that "[t]he executive Power [of the United States] shall be vested in a President of the United States of America." The President controls the entire executive branch. Under the unitary executive theory, the other branches of government are not permitted to interfere with the President’s authority. While the unitary theory is debatable, President Bush’s administration was composed of strong proponents of expanding the executive’s powers and having them go unchallenged. As we will see throughout this essay, the Executive has usurped the role of the judiciary through its policies on torture as it has set the standard upon which suspects are judged to be potentially guilty and thus merit being tortured in order to extract information from them.

Similarly, Israel has a very strong legislature and a very powerful Executive. The Israeli government is specifically charged with actively seeking to fortify the national security and bestow personal security on its citizens while vigorously and determinedly fighting against violence and terror. It is generally up to the Executive to deal with terrorism but this obligation is not without limits.

5.1 An Institutional Check on the Executive: the Judiciary’s Role

An independent judiciary is a vital component of the separation of powers. The US Constitution does not expressly provide a machinery for settling disputes about the distribution of legislative power, and there is controversy as to what the framers of the constitution intended. Israel’s Basic Laws do not have expressed provisions for judicial review either. Judicial review is the doctrine whereby the courts act as a check on the legislature and the executive branches of the government by ruling on the legality of both legislative and executive activities. The Courts can strike down laws which violate parts of the constitution. Consequently, the legislature can amend the law and pass it again so that it is in accordance with the constitution. The Courts are

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59 U.S. Constitution: Article II
60 John Dean. Broken Government, (Viking 2007). p. 102
62 Peter Hogg. “Constitutional law of Canada”. Toronto, Ont.: Carswell, c2010. 5-24 (Hogg)
63 IBID p. 5-24
meant to defend the rights of individuals in the face of government policies which infringe upon these rights. Francis Bacon wrote that “[A]bove all things, integrity is . . . [a judge’s] portion and proper virtue . . . The principal duty of the judge is, to suppress force and fraud”. Judges are appointed for a specific term in order to guarantee their independence from the other branches of government. This also means that judges must remain as politically neutral as possible. Their legal decisions are meant to be well reasoned and rooted in precedent. These two factors help to maintain consistency and predictability between judgments and to have them based on legal principles rather than other more arbitrary reasons. While precedents can be overturned, judges cannot simply make a ruling because they think it is time for social change or because they want to express their own opinion. A judge who develops the law does not perform an individual act, isolated from an existing normative system. The judge acts within the context of the system, and his ruling must integrate into it.

Regardless, a Court’s power flows from the legitimacy which the people assign to it. A court has no army or means of actually enforcing their rulings. A Court must be mindful of maintaining its legitimacy in order for its rulings to be accepted. From an institutional perspective, judges are not considered to have a mandate from the electorate as a politician does. Therefore, a Court should be selective in the cases it chooses to hear because it needs to preserve its legitimacy by not getting overly involved in making decisions which are too political.

Furthermore, since judges are not at the mercy of the electorate, they do not have to be overly preoccupied with any political repercussions with making unpopular decisions especially when faced with defending minority rights. While they may be susceptible to fear, they are not concerned with making popular decisions and can better protect the rights of those who may be the victims of coercive policies such as torture. Unfortunately, governments and many critics argue that the judiciary should not review government policies, especially in the area of national

64 Hogg supra note 62 p. 5-24
66 Barak supra note 12
67 IBID
security. They argue that judges are not able to understand the threat and are not privileged to the same top secret information as the government. There is some validity to this statement as the judiciary does suffer from certain institutional limitations. Judges are not well-suited to the policy-making which is inevitably involved. Their background is not broadly representative of the population: they are recruited exclusively from the small class of successful, middle-aged lawyers; they do not necessarily have much knowledge of or experience in public affairs and after appointment they are expected to remain aloof from most public issues. Furthermore, judges are limited by what is presented in Court and to the fact that they are not able to appoint inquiries to aid them in their decisions. The legal system is more focused on looking backward (adjudicative facts), and providing a (partial) answer to the question of "what happened." Judges usually do not look forward (legislative facts), and do not provide an answer to the question of "what should happen." Therefore, Courts should refrain from attempting to formulate alternatives policies to torture or advising on how to deal with national security issues in general.

However, despite these institutional limitations, the judiciary’s role is to review government policies and legislation and to ensure that the constitution and the rule of law are being upheld. If the judiciary restricts its review to the legality of national security issues, it does not have to defer to the government on these matters simply due to the judiciary’s institutional weaknesses or alleged lack of expertise in national security matters because it is upholding the constitution which is higher than any branch of the government. Judicial review permits, and indeed requires non-elected judges to make decisions of great political significance. National security issues fall into a gray area between being political because there are strong policy elements but also judicial if the rights of the individual are infringed by these policies. Some may argue that these individual protections are too restrictive with regard to terrorism and hold the government back.

69 Hogg supra note 62 at 5-28
70 IBID
71 Hogg supra note 62 at 5-28
72 Barak supra note 12 p. 9
73 IBID at p. 9
74 Hogg supra note 62 at 5-29
from implementing adequate security measures. However, the “alleviation” of these protections has infringed on the rights of many individuals. Thus far, the US has focused its efforts in fighting terrorism primarily on Muslims and those who have been tortured have been non-citizens. As mentioned earlier, Muslims are in fact a minority in the US and the majority is not generally concerned that they may be tortured one day because they will likely not be caught in the web of acquiring terrorists. Therefore, the majority are more willing to stand by while the government employs torture as it is supposedly limited to a few cases which involved a minority of people. I will argue that a democracy which sacrifices its own values is not a democracy at all. In general, the Courts are better able to balance the rights of individuals in the face of national security because judges are in fact insulated from the electorate and thus can act as a check on the potential tyranny of the majority.

5.2 Nothing in the Constitution: Comparing the Institutional Histories of the US and Israeli Supreme Courts

The Courts must find a balance between the policy objectives of the government and the rights of the individual and this is especially difficult when evaluating matters of national security. Furthermore, the Israeli and US Supreme Courts are both in a unique position as their judicial review powers are not entrenched in the constitution. They must especially be concerned with treading a fine line between judicial activism and conservatism. This line is created by the different approaches a court can take in its role. Strict constructionists argue that the role of the Court is to administer the law as it is written in the constitution and in statutes. This is thought to avoid any impartiality on the part of judges. At the broadest level, judicial activism occurs on any occasion where a court intervenes and strikes down a piece of duly enacted legislation.75 This definition is too broad and ignores the fact that the constitution and laws in general are somewhat vague as they are designed to require some interpretation so that they are not necessarily limited by very precise requirements. It is the role of a judge to interpret the law and to apply it to the specific facts of the case in front of them. Even a strict constructionist would admit that some evaluation on the part of judges occurs when applying the law. To be more precise, an argument can be made that a Court is engaging in judicial activism when it reaches

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beyond the clear mandates of the Constitution to restrict the handiwork of the other government branches.\textsuperscript{76} Since neither Israel nor the US has specific constitutional sources for judicial review, the argument regarding judicial activism is very prominent in both countries. The awareness of this debate and a judge’s approach to judicial interpretation can have vast repercussions on the composition of the bench. In particular, the US Supreme Court is shaped by the executive. President George W. Bush has stated that “We want people to interpret the law, not try to make law and write law.”\textsuperscript{77} This strict constructionist approach to the judiciary has shaped many of his policies dealing with terrorism which has purposely excluded the judiciary from reviewing them. Until recently, the Court seems to have been following a strict constructionist approach as the judiciary has been deferring to the US government on national security issues.

As mentioned above, the US Court is in a particularly precarious position as its judicial review power is not found in the constitution. Rather, the Court inferred this power in the case of Marbury v. Madison.\textsuperscript{78} The significant constitutional issue in this case was with regard to the issue of original jurisdiction. Marbury was slated to receive a judicial appointment by the outgoing President but Madison ordered his Secretary of State not to deliver the appointments. Marbury petitioned the Court for a writ of Mandamus in order to compel Madison to show cause as to why he should not receive his appointment.\textsuperscript{79} The Chief Justice ruled that the Court could not grant the writ because Section 13 of the Judiciary Act of 1789, which granted it the right to do so, was unconstitutional insofar as it extended to cases of original jurisdiction.\textsuperscript{80} In fact, the only issue which was dealt with in the Constitution regarding the Court was the subject of original jurisdiction.\textsuperscript{81} The Court reached the momentous decision that an Act of Congress was invalid as unconstitutional.\textsuperscript{82} The Supreme Court said that it was its duty as a Court to say what the law was.\textsuperscript{83} As a consequence, when a statute is in conflict with the Constitution, the

\textsuperscript{76} Kmioc supra note 75
\textsuperscript{77} IBID
\textsuperscript{78} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marbury)
\textsuperscript{80} IBID
\textsuperscript{81} IBID
\textsuperscript{82} Hogg supra note 62 at 5-24
\textsuperscript{83} IBID at 5-24
Constitution should prevail because it is superior to the statute.\textsuperscript{84} “The people”, who had established the Constitution, had “supreme” authority: they could seldom act; and they intended the Constitution to be permanent.\textsuperscript{85} Thus, the US Supreme Court defined its own parameters for conducting judicial review.

However, the Court was also careful not to usurp the powers of the other branches, specifically on political issues. The ruling in Marbury v. Madison provided for judicial restraint from political questions since Congress could, at least theoretically, limit the Court’s powers as there is no constitutionally entrenched provision for judicial review. Marshall acknowledged that the Court’s remedial power did not extend to every question which came in front of the Court. Marshall wrote “questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”\textsuperscript{86} However, the Court cannot refuse all political questions but rather, it has to be in a special sense, since most of the constitutional questions that a court answers are political in a general sense.\textsuperscript{87} For example, Marshall cited the need for judicial restraint when the judiciary lacked competence in a decision that involves an area such as extradition which requires executive expertise such as it could have an effect on a state’s foreign policy.\textsuperscript{88} As a result, the US Supreme Court has a tradition of being minimalist in order to avoid the criticism of being overly activist and hijacking the political process because they do not have constitutional authority to conduct judicial review.\textsuperscript{89}

Similarly, the Israeli Supreme Court does not benefit from specific laws which outline the scope of its power for judicial review.\textsuperscript{90} The Court sits as the High Court of Justice as well as the Supreme Court.\textsuperscript{91} Article 15 of Basic Law: The Judiciary, outlines the judicial powers of the

\textsuperscript{84} Hogg supra note 62 at 5-24
\textsuperscript{85} Ibid at 5-24
\textsuperscript{86} Marbury supra note 79 at 24
\textsuperscript{89} Cass Sunstein, “Order Without Law” (2001) p. 75
\textsuperscript{90} The following section is taken from an essay which was submitted to Professor Weinrib’s Constitutional Courts and Constitutional Rights course. Elliott Willschick. “Fighting with One Hand Behind their Back: How Israel’s Supreme Court Manages Terrorism. 2009.
\textsuperscript{91} The Judiciary: The Court System 30 Dec 2003 [http://www.court.gov.il (Judiciary)
Supreme Court when it sits as the High Court of Justice. This is unique as the Supreme Court acts as both the court of first and last instance. 92 While the source of the power is contentious, the High Court of Justice exercises judicial review over the other branches of government, and has powers "in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." 93 The Court maintains that its proper role in a democracy is to protect the formal and substantive rule of law. 94 It should enforce the law against all state actors, be they legislative or executive, and it should maintain the proper protection of human rights. 95 While the Court has tried to follow this with regard to policies dealing with terrorism, it has been increasingly scrutinized as an overly activist court which has seized democratic powers meant for the legislature.

A major source of this conflict arises from the fact that Israel has an unwritten constitution. At the time of its independence, Israel intended to adopt a formal written constitution but was unable to complete this due to various conflicts and disagreements. Instead, Israel has to rely on the Basic Laws. These address the various state institutions in principle and how they relate to each other. The Basic Laws are addressed, first and foremost, to the legislature and they must enact laws which are consistent with them. 96 While they protect some civil rights, they are not considered a formal constitution, except by the judiciary who has treated them as such in their rulings.

The Israeli Court developed this approach during the 1990s, when Israel experienced what has been called a Constitutional Revolution. 97 In 1992, two Basic Laws were passed. The first was with regard to Human Dignity and Liberty and the other dealt with Freedom of Occupation. 98 These laws were meant to enumerate rights which had always existed in the common law.

92 Judiciary supra note 91
93 Ibid.
94 Barak supra note 12 page 9
95 Ibid
96 Basic Laws Introduction http://www.knesset.gov.il/description/eng/mimshals_yesod.htm
98 Ibid P 8
However, the full ramifications of passing these laws were not fully understood by the legislature at the time of their enactment. The Court, through the Mizrachi ruling, interpreted the meaning of these human rights as being supra-constitutional status which gave legitimacy for the Court to engage in judicial review. The Court has interpreted them as a means to review decisions by the executive and legislative branches. 8 out of 9 judges recognized the possibility of invalidating any law adopted by the Knesset, if it infringed basic rights stipulated in a Basic Law and did not satisfy the condition of the limitation clause. Essentially the Court regards the Basic Laws as a formal constitution. The Court recognized that it was within their legal tradition to have a body which was external to the Knesset which could conduct judicial review. As a result, the Knesset has been prudent in passing laws which may contradict the Basic Laws although there is disagreement regarding the use of the Basic Laws in this way. Nevertheless, the Court’s ruling in Mizrachi recognized that the Knesset had constituent authority in addition to legislative authority but that all legislation is subordinate to the protections found in the Basic Laws. The Court’s interpretation of these Basic Laws and the resulting constitutional revolution which began with Mizrachi has continued with subsequent court rulings.

Both the Israeli and the US Supreme Courts find themselves in similar institutional situations. Neither has a specific outline of its constitutional powers, but rather had to infer the power of judicial review while limiting the scope so as to not overstep its institutional role. Finally, both Courts face accusations of judicial activism and they must always be cognisant of preserving their legitimacy due in part to not having specific constitutional provisions for their role in carrying out judicial review.

99 Carmi supra note 97 P 8
100 United Mizrachi Bank v. Migdal Cooperative Village 49(4) PD 221. (Mizrachi)
102 IBID p. 50
103 IBID p. 50

As mentioned above, judicial review of policies involving national security is precarious because it involves the need to balance between potential security threats intertwined with political issues as well as individual rights. Nevertheless, judicial review can be justified given the importance of respecting human and minority rights when combating terrorism.\textsuperscript{104} It can also be justified on the basis that respect of human rights including principles of non-discrimination can help democracies maintain the moral high ground in their struggles with terrorists who are prepared to violate human rights and kill innocent people because of their race or religion or nationality.\textsuperscript{105} The general approach of a Court when reviewing policies or legislation which has to do with national security is to focus on the proportionality of the legislation. The first question is whether the objectives of laws that infringe rights are important enough to justify limits on rights.\textsuperscript{106} The second question in proportionality analysis is whether a law or activity that limits rights is rationally connected to the objective.\textsuperscript{107} Some have suggested that courts should review legislation with a focus on the rights of actual and potential victims of terrorism and not only with a focus on the rights of those accused of terrorism.\textsuperscript{108} This serves as a reminder that the Court cannot simply trump any government policy merely because it affects the rights of an accused. Alternatively, a Court should also not defer to the government merely because an issue involves national security. A Court must balance all of the issues and attempt to determine what a reasonable government would do under the circumstances. This can be accomplished by appealing to the principles inherent in the state’s constitution, and with a concern for upholding the rule of law while protecting the democracy from significant external threats like terrorism. This is essentially what the Israeli Court has achieved when adjudicating on issues involving terrorism and individual rights.

\textsuperscript{104} Kent Roach. “Judicial Review of the State’s Anti-terrorism Activities” A summary of the full article in 2008 3 Indian Journal of Constitutional Law. (Roach)
\textsuperscript{105} Roach supra note 105
\textsuperscript{106} IBID.
\textsuperscript{107} IBID.
\textsuperscript{108} IBID
7. Terrorism: Extraordinary Circumstances or Just the New Norm?

In the previous sections the similarities between the Israeli and US Supreme Courts with regard to judicial review were discussed and a general approach for adjudicating on national security matters was established. In this section I will begin classifying the approaches which can be used to combat terrorism. While the US was familiar with dealing with terrorism before 9/11, the sheer magnitude of the attack on the Twin Towers, as well as the Pentagon and United Flight 77 created a sense of urgency and panic. The President declared a national emergency by reason of certain terrorist attacks on September 14th, 2001. This sense of panic was amplified by Bush himself who set the foundation for US policy when he told then Attorney General John Ashcroft on September 12, 2001 “Don’t ever let this happen again”. This implied that future attacks should be stopped at any cost. There was a profound fear that more terrorist attacks were to follow. As mentioned earlier, this fear was not entirely irrational as terrorism is a difficult issue for a state to deal with. The full extent of the threat was arguably not fully understood.

Moreover, this feeling of vulnerability is captured in the Bush administration’s conceptualization of terrorism. The “war on terror” thus became a crusade against evil as it was an unwavering reaction to the multiplicity of new security threats confronting the nation. One should not underestimate the power of this policy as the Bush administration justified the Patriot Act, the Iraq War as well as the policies which permitted torture as a necessary part of the war on terror. The mere possibility of the state known for being a beacon of human rights and freedoms of being open to the use of torture was a paradigm shift in the way liberal democracies could operate. This is precisely why a constitution exists: it serves as a guide through both peaceful and turbulent times and thus can mitigate the potential damages of creating policies which may infringe on individual rights and are more reactionary than necessary.

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111 IBID p. 75
112 Hoffman supra note 13 at p. 20
113 IBID p. 20
Indeed, such an overreaction and the declaration of an emergency is not unprecedented. The Japanese interment during WWII is an example of such a situation. Governments are able to make determinations as to when an emergency is occurring but it must be in accordance with the ground of legality which requires that when the legislative and executive make such a determination, they make it in a way that respects the requirements of the rule of law or legality. The US government made this determination with very little real concern for these legal boundaries. Subsequently, they have shown little concern for the effects of their policies and this is why it is now up to the courts to ask what the legal limits are on the power of parliament and government, whatever the nature of the emergency.\(^{114}\)

The US government’s reaction to 9/11 can be classified under the Emergency Powers model. Under this theory, the government can temporarily sidestep the constitution in order to suspend certain constitutional protections or even pass temporary legislation which permits the government to deal with this immediate threat. In the US such powers may be stated explicitly or implied by the Constitution, assumed by the Chief Executive to be permissible constitutionally, or inferred from or specified by statute.\(^{115}\) Through legislation, Congress has made a great many delegations of authority in this regard over the past 200 years.\(^{116}\) However, with the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of any of its provisions during a national emergency.\(^{117}\)

Furthermore, the Emergency power doctrine is based on Locke’s theory of the prerogative power. He wrote that the prerogative power permits the executive to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.\(^{118}\) This permits the government to deal with situations when strict and rigid observation of the laws may

\(^{114}\) Sajo, Andras, Militant Democracy. Eleven International Publishing 2004 p. 25

\(^{115}\) Relya supra note 110 at p. 2

\(^{116}\) IBID p. 2

\(^{117}\) IBID p. 2

lead to grave social harm. The Emergency power doctrine acknowledges that the constitution cannot possibly anticipate every possible circumstance a state may face. The Emergency Powers doctrine is in fact justified in Article I, section 8 of the Constitution which grants the authority to

“provide for the common Defense and general Welfare,” the commerce clause, its war, armed forces, and militia powers, and the “necessary and proper” clause empowering it to make such laws as are required to fulfill the executions of “the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The decision to declare an emergency or to classify an event as an emergency falls within the purview of the government but it is still somewhat arbitrary. The Emergency Powers doctrine is based on a substantial degree of trust in government and particularly in times of emergency. In the current American "war on terrorism," primarily the Bush administration has - with considerable support in the courts and even more in public opinion - held suspected terrorists incommunicado for several years while using torture to extract information from them, on nothing more than a unilateral Presidential determination of their involvement. As shall be seem when examining torture both in Israel and the US, the public’s trust and the judiciary’s deference has been mostly unwarranted as the government has abused this trust.

Israel’s current approach to terrorism and torture stands in stark contrast to that of the US. Since its birth as a state, Israel has been involved in wars and constant threats to domestic security. Examples of such attacks include suicide bombings of buses, malls, and other public facilities, and deadly ambushes on cars especially since September 2000. Many Israeli citizens have been wounded or injured in these attacks. If Israel had followed the US approach to combating terrorism then they could still justify operating in a state of emergency and war to this day. The government has tried many different policy approaches to dealing with it, including torture.

119 Gross supra note 118. P. 5
121 Gross supra note 118 at pp. 1906-1958
123 Mersel supra note 56 p 68
124 IBID p 68
125 IBID p 68
As a result, the Israeli Supreme Court has been instrumental in the government not devolving in to implementing policies which are created in a state of panic as they have maintained a steadfast ideology that the Constitution must always be respected by balancing the rights of the individual against the interests of the state. This approach has been very influential in maintaining a balance between the government’s interests and those of the individual. While the specific policy of torture will be discussed later, the constant threat of terrorism and the balancing efforts of the rights of the individual against the interests of the state by the Israeli Supreme Court has led to the state being classified as adopting a Business as Usual approach.

Under the Business as Usual model, a state of emergency does not justify a deviation from the “‘normal’” legal system.\textsuperscript{126} The occurrence of any particular emergency cannot excuse or justify a suspension, in whole or in part, of any existing piece of the ordinary legal order.\textsuperscript{127} While some deviation from the constitution has occurred, the Israeli government has generally worked to combat terrorism within the parameters of the constitution. It is important to understand that the Israeli Supreme Court’s approach is not fully accepted even in Israel. The Court has been very active, especially in the realm of national security, even making orders regarding military operations which were ongoing.\textsuperscript{128} While there is significant criticism, the Court’s rulings are respected and generally followed. The Court’s rulings reflect one of caution and enforcing the separation of powers.\textsuperscript{129}

The argument for following the constitution stems from a type of constitutional absolutism and is often joined by an argument about constitutional perfection, namely that the constitution anticipates any future emergency and incorporates, within its framework, all the powers that may be necessary to respond to such a crisis.\textsuperscript{130} There is an enormous body of evidence which suggests that the Business as Usual approach is prudent as emergencies create fear and panic.

\textsuperscript{126} Gross supra note 118
\textsuperscript{127} IBID
\textsuperscript{128} Navot supra note 122 p. 111
\textsuperscript{129} IBID p. 111
\textsuperscript{130} Gross supra note 118
which can lead to extreme reactions which may not be well measured. When a threat becomes increasingly dreaded and unknown there is a demand for action, regardless of the probability of their occurrence, the costs of avoiding the risk or the benefits of declining to avoid the risk.\(^\text{131}\)

Within the Business as Usual model there is a “soft” interpretation which argues that constitutional rules and norms must not be relaxed during an emergency although their outcomes may change.\(^\text{132}\) A standard of reasonableness can be applied to government powers and measures under this version and the standard may change leading to different outcomes about the constitutionality of a law or certain measures in times of crisis.\(^\text{133}\) In contrast the hard interpretation states that the constitution ought not to change in times of emergency.\(^\text{134}\)

While the Israeli judiciary has done an admirable job of adhering to the Business as Usual approach, it should be noted that it is out of the ordinary for the US Supreme Court to have not followed suit. Deference to the Executive and the use of the Emergency Model deviates from US jurisprudence especially from the ruling in Ex Parte Milligan\(^\text{135}\). During the Civil War, the US government suspended habeas corpus and attempted to try suspects who they apprehended under a military tribunal. The Court ruled that the suspension of habeas corpus was lawful under the circumstances but that the pre-existing Court system could not be sidestepped with the use of military tribunals. The Court ruled that the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.\(^\text{136}\) The Court acknowledged that the founders of the Constitution would have been able to foresee that the country would face wars and drafted the constitution to accommodate when this occurred.\(^\text{137}\) We do not have to resort to Nazi Germany to illustrate the grave injustices which have resulted from ignoring the constitution in

\(^\text{131}\) Gross supra note 118  
\(^\text{132}\) IBID  
\(^\text{133}\) IBID  
\(^\text{134}\) IBID  
\(^\text{135}\) Ex parte Milligan, 71 U.S. 2 (1866)  
\(^\text{136}\) IBID  
\(^\text{137}\) IBID
times of crisis as the importance of this ruling has been lost numerous times, specifically throughout US history.\textsuperscript{138} Some of these episodes have subsequently been acknowledged as shameful mistakes.\textsuperscript{139} Congress did so formally and explicitly in the case of the World War II Japanese internment camps.

However, the US Supreme Court has yet to make any rulings with regard to torture since 9/11. In fact, the US government has gone out of its way to pass legislation which keeps potential litigants out of the domestic court system. The policy of declaring individuals enemy combatants and trying them in military tribunals not only runs contrary to the ruling in Ex Parte Milligan but it also has meant that the US Supreme Court has not had a chance to hear many cases which concern torture. To complicate matters further, it has turned down or failed to even make significant remarks on cases which may have involved torture and it appears that they have been using laws which exclude certain suspects from the legal system as a way to defer to the executive in what is perceived as a time of war.

8. The Israeli Experience

As early as 1949, the Israel Supreme Court held that "every person is endowed with a natural right [of liberty]," and accordingly that executive regulations (the primary source of law in Israel) cannot restrict individual freedoms, in the absence of specific authorizing legislation.\textsuperscript{140} Where such legislation existed, the court held that ambiguous terms should be construed as not restricting individual liberty, and that if the legislature intended to restrict liberty "it had to do so very explicitly," even in the absence of an applicable Basic Law.\textsuperscript{141} Essentially, the Basic Laws supersede all other legislation in Israel.\textsuperscript{142} The Israeli Court applied this framework to the issue

\begin{footnotes}
\textsuperscript{139} IBID at pp. 1096-1958
\textsuperscript{140} IBID at pp. 1096-1958
\textsuperscript{141} IBID at pp. 1096-1958
\textsuperscript{142} IBID at pp. 1096-1958
\end{footnotes}
of torture in the following case. It is an example of the Court’s policy that it will refrain from making policy decisions but that it will still decide issues of legality.

8.1 Public Committee Against Torture in Israel v. The State of Israel, 1999

Israel’s primary agency which deals with terrorism is the General Security Service (GSS) which investigates individuals suspected of engaging in terrorist activities. On May 31st, 1987 the government of Israel decided to establish a commission of inquiry to examine the methods used by the GSS to investigate terrorist activity. Their investigation was based on two cases; the first involved Isat Nafsu, a lieutenant in the Israeli Defence Forces who was accused of treason and espionage and was convicted on the basis of a confession obtained by torture. The second case was with regard to the Bus 300 affair. GSS agents gained control of a bus hijacked by terrorists and were seen escorting two terrorist alive who later turned up dead. Both of these cases aroused suspicion of the state’s practices. The commission conducted an in-depth investigation and approved the use of a moderate degree of physical pressure during interrogations. These methods were to be used with various stringent conditions including directives that were set out in the second (and secret) part of the Report, and with the supervision of various elements both internal and external to the GSS. They determined that even if the interrogation methods of the GSS entailed torture, those interrogators could avail themselves of the criminal law defence of necessity.

As a result of this investigation the GSS continued to use these interrogation methods. In the case at hand, two public applicants and five individuals applied to the Court on the basis of these interrogation methods. Some of the applicants submitted that the GSS is not authorized to

143 The following case summary is from: Elliott Willchick. “Fighting with One Hand Behind their Back: How Israel’s Supreme Court Manages Terrorism. 2009.
144 Public Committee Against Torture in Israel v. The State of Israel, 1999 [Torture]
145 Samuel Issacharoff Democracy and collective decision making Oxford Journals Law Int. Jnl. of Constitutional Law Volume 6, Number 2 p. 69 [Issacharoff]
146 Ibid p. 69
147 Ibid p. 69
148 Torture supra note 144
149 Issacharoff supra note 145 p. 69
conduct these investigations in the first place and that they are not permitted to employ such pressure methods. Some of these pressure methods included violently shaking the suspects, sleep deprivation and putting them in stressful positions (such as the Shabach or frog positions) for extended periods of time.\textsuperscript{150} The decision to utilize physical means in a particular instance is based on internal regulations which were developed as a result of the report mentioned earlier, which requires obtaining permission from various ranks of the GSS hierarchy.\textsuperscript{151} The GSS claimed to be very selective with the use of these interrogation techniques in order to determine which will be best suited to the situation and the circumstances which may surround it.\textsuperscript{152}

Consequently, the Court discussed various legislative justifications for the GSS’ ability to conduct investigations. The Court determined that the GSS constitutes an integral part of the Executive branch.\textsuperscript{153} GSS investigators are tantamount to police officers in the eyes of the law and that the state is authorized to conduct police investigations.\textsuperscript{154} The Court clearly understood the pressures which the GSS faces when investigating terrorists. The GSS investigations are not aimed solely at gathering evidence in order to prosecute those responsible for past terrorist activities, but also, even primarily, at the prevention of future terrorist acts.\textsuperscript{155} In an effort to further this delicate but extremely important goal, the GSS attempts to form a consensus based on information from a multitude of sources, including from suspected terrorists or terrorist accomplices held in Israeli custody so that they do use these methods on someone who they did not believe merited it.\textsuperscript{156}

The Court summarized that “On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it and on the other hand, is the

\textsuperscript{150} Torture supra note 144
\textsuperscript{151} Issacharoff supra note 145 at 8
\textsuperscript{152} IBID at 8
\textsuperscript{153} IBID at 9
\textsuperscript{154} IBID at 20
\textsuperscript{156} IBID at 3
wish to protect the dignity and liberty of the individual being interrogated."\(^{157}\) A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever.\(^{158}\) However, a reasonable investigation is likely to cause discomfort and it may result in insufficient sleep.\(^{159}\) The Court showed a significant amount of concern for balancing the interests of the state against the rights of the individual. This was most evident in the analysis of sleep deprivation. The judges determined that sleep deprivation is an unfortunate result of spending long hours interrogating a suspect and thus an acceptable part of the process, especially since the interrogator is also deprived of sleep. The Court distinguished that sleep deprivation should not be permitted if the goal is to deprive the person of sleep in order to break their will.\(^{160}\) Similarly, the Court concluded that the Shabach position was unnecessarily coercive as it forced a suspect to stay in an extremely uncomfortable position with their head covered while listening to loud music. The judges did not accept the GSS’ assertion that this technique was necessary as a result of needing to protect the investigator and the loud music was not just to prevent the suspect from communicating with other suspects. They concluded that it harmed the suspect’s human dignity.

Likewise, the Court went through each of the other interrogation methods which were in question and determined that they were not part of the general power to conduct investigations and thus, the court declared the practices employed by the GSS to be unlawful. Without explicitly stating whether these practices amounted to torture, the Court held that any infringement of human dignity, and especially of the physical integrity of a detainee, must be proscribed by law and this was not the case with these methods.\(^{161}\) The Court evaluated this case through a legal prism which included an interpretation of the constitutional system, domestic legislation, and principles of international law.\(^{162}\) The Court added, however, that there might be circumstances where an interrogator would act illegally using such methods but would nevertheless have the opportunity to employ a “necessity” defense which, if successful, would

\(^{157}\) Torture supra note 144 at 22
\(^{158}\) IBID at 23
\(^{159}\) IBID at 23
\(^{160}\) IBID at 23
\(^{161}\) Mersel supra note 56 p 83
\(^{162}\) Dorner supra note 155 p 5
excuse his or her actions and avoid the imposition of criminal liability.\textsuperscript{163} This ruling means that while interrogations are limited to methods which will not harm the dignity of the suspect, the state can still employ certain coercive methods if there is the possibility of a defence of necessity or in the event of a ticking bomb. The fact that the Court left the door open for interrogators to employ such a defence in the event that a specific situations arises, demonstrates that the Court will rarely deal in absolutes with regard to the interests of the state when dealing with national security.

8.2 The Court’s Adjudication: Legality vs. Policy

This Israeli case was chosen because it involved a contentious balance between very legitimate state interests and the human rights of a minority which would likely find no respect among the majority—terrorists. It is representative of the general policy the Israeli Court has adopted with regard to national security issues. The general consensus from a large majority of these cases show that the Court will rule on national security issues when there is a question of infringement on human rights. Since 1999, terrorism has increased substantially and one would expect the Court to have become more deferential but in fact, the opposite has occurred; in terrorism cases, Israeli courts have become increasingly interventionist.\textsuperscript{164} It has been decided that the Court has jurisdiction over these matters because Israeli security forces, the army, and other agencies all operate as part of the Executive branch and are thus subject to judicial review.\textsuperscript{165} Under this approach, there is no activity conducted by the Executive that is precluded from the Court’s jurisdiction, despite the fact that it might be manifested even during war.\textsuperscript{166} However, this justiciability does not grant the Court unlimited power to intervene in every executive or legislative decision. They must be careful to maintain the separation of powers and not make policy rulings but rather focus on the legality of policy implications. This is somewhat complicated to maintain because access to the Court is quite liberal. For example, many of the Israeli counter-terrorist activities are challenged in the court by NGO’s like the Civil Rights Association, the Public Committee Against Torture, the Center for the Defense of the Individual,

\textsuperscript{163} Mersel supra note 56 p 83
\textsuperscript{164} Issacharoff supra note 145 p. 69
\textsuperscript{165} Mersel supra note 56 p 95
\textsuperscript{166} IBID p 95
and Physicians for Human Rights.\textsuperscript{167} The Court will always investigate whether a case can be heard and this opens the door to potentially unnecessary conflicts between the judiciary and the other branches if the Court is not careful.

Nevertheless, if the Court chooses to hear the case, then their focus shifts to maintaining a proper balance between security and human rights and this balance cannot be decided in advance but on a case by case basis. Judges must make their rulings within a much larger framework including the constitution as well as the security risk which the government is responding to. The judiciary cannot arbitrarily make decisions which do not take all of these factors into account, especially when they are not directly responsible to the people. For this reason, judges must ensure that the change is organic and the development gradual and natural.\textsuperscript{168}

While the Court tries to limit itself to ruling on the legality of these issues, the Court is not always able to limit the scope of its review to procedural aspects; instead, it rules on delicate issues like interrogation conditions.\textsuperscript{169} While this may transcend the requirement to restrict their rulings to the legality of policies but interrogation issues fall within the realm of human rights issues when the dignity of the person being interrogated is affected and this is within the Court’s mandate. This is why, as a general rule, it is extremely important for the Court not to misconstrue the state’s position. This is especially demonstrated in the Torture case when the Court acknowledges that there may be opportunities when investigators need information from a terrorist who potentially has information which could save lives and they do not necessarily prohibit coercive methods. The Court mentions many times that it is aware of the constant attacks Israel and its citizens must endure and does not try to limit the government unless there is a clear violation of human rights. The Court even goes so far as to leave the door open for such an infringement to take place if it is well warranted such as in the Torture Case. Both the need to rule on the legality of issues and to restrict the government in the least possible way is

\textsuperscript{167} Mersel supra note 56 p 95
\textsuperscript{168} Barak supra note 12
\textsuperscript{169} Mersel supra note 56 p 91
accomplished in the Torture case. This is accomplished through the rational connection test which is discussed below.

Furthermore, it is important for the Court to not automatically defer on security issues because claims of Executive and legislative expertise in combating terrorism can easily be exaggerated in the wake of a sorry string of state failures to prevent terrorism.\(^\text{170}\) It is even possible that judicial intervention in the name of human rights could encourage the state to take actions that may be more rational and more effective in preventing terrorism.\(^\text{171}\) These decisions can have ramifications which last for many years after the initial terror has subsided. Therefore, both the government and the Courts should assume that whatever they decide when terror is threatening our security will linger many years after the terror is over and make rational choices.\(^\text{172}\)

Likewise, the Court seems to be very aware of the long lasting effects of its rulings and the judges are very well versed at applying a consistent framework. This framework consists of attempting to determine whether the state has chosen a proportional means of combating terrorism. It is very similar to the general framework which was established above. The first question is whether the objectives of laws that infringe rights are important enough to justify limits on rights.\(^\text{173}\) The court does not ask itself if it would have adopted the same security measures if it were responsible for security.\(^\text{174}\) Instead, the court asks if a reasonable person responsible for security would be prudent to adopt the security measures that were adopted.\(^\text{175}\) This helps to ensure that the policy is rationally connected to the objective. This is where the Court must carefully present the state’s position when determining proportionality as it risks placing too much of an emphasis on human rights. In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete

\(^{170}\) Roach supra note 6  
\(^{171}\) IBID  
\(^{172}\) Issacharoff supra note 145 p. 255  
\(^{173}\) Roach supra note 6  
\(^{174}\) Barak supra note 12  
\(^{175}\) IBID.
protection, as if there were no human rights. The Court must insist on ascertaining the specific security considerations that prompted the government's actions. The Court must also be persuaded that these considerations actually motivated the government's actions and were not merely pre-textual.

Subsequently, the Court must ask if the government’s policy could be better implemented to protect a terrorist’s rights through less restrictive means. The Court determined that the interrogation techniques which were in question in the Torture Case did not meet this standard. However, they left the opportunity open for the use of aggressive interrogation techniques in the case of a ticking time bomb. The Court takes a very conservative position on evaluating the state’s policies unless there is a clear violation of human dignity.

9. The US Experience: An Emergency Which Transcends Even the Constitution?

Throughout US history, there are instances where there was a threat which was treated as a national emergency. In previous national emergencies, US courts diluted normal judicial checks to a considerable degree. However, the Courts never stood idly by while the administration had policies which were meant to legally justify torture as has occurred since 9/11. While the torture memos are no longer in effect, it is important to explore them in order to demonstrate just how severely the US executive branch managed to manipulate the memos in an attempt to justify something which should be considered morally abhorrent.

The torture memos were drafted soon after 9/11 when the administration was still reeling from the fear and urgency inflicted by the attacks. One quote states that after reviewing the daily

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176 Mersel supra note 56 p 92
177 Barak supra note 12
178 Schulhofer supra note 139
179 The following is a reworked section is taken from an essay which was submitted to Professor Norris Legal Ethics class Elliott Willschick. “The Torture Memos”. 2010.
intelligence regarding threats against the US, one “begins to imagine a threat so big that it becomes an obsession.”\textsuperscript{180} John Yoo and Jay S. Bybee were lawyers working for the Office of Legal Counsel (OLC). They produced what have now come to be known as the torture memos. Both men argue that the torture memos are the product of the circumstances which dictated that the government needed to thwart future attacks by any means necessary.\textsuperscript{181} In retrospect, there have not been additional attacks on US soil. One could argue that this is due in part to the use of torture, but the use of torture is not as widespread to justify being considered a major factor in preventing attacks.

The memos were precipitated by executive inquiries regarding the ability to quickly obtain information from captured terror suspects and their sponsors. The purpose of the first memo was to provide views on the standards of conduct under the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by 2340-2340A of Title 18 of the US Code.\textsuperscript{182} It was specifically with regard to conduct outside of the US.\textsuperscript{183} The main purpose of the memos can be summed up in a quote by Jay Bybee who said "the information gained from interrogations may prevent future attacks by foreign enemies.\textsuperscript{184} Any effort to apply [the criminal provision outlawing torture] in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."\textsuperscript{185} This theory of extreme executive power essentially freed the US from following any laws which prohibit torture if they could be justified as being part of the President’s executive powers.

This extreme view of executive power permitted Yoo to navigate around any constraining legal protections. This can be seen in his analysis of 2340A which classifies torture as acts inflicting,
and that are specifically intended to inflict, severe pain or suffering, whether mental or physical.\textsuperscript{186} The most noteworthy part of this definition comes in the form of intent. If the interrogator does not intend to cause pain by their actions then they are justified in using torture to extract information. This effectively raised the threshold for what constitutes a prohibited act by stating that those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. They further concluded that certain acts may be cruel, inhuman or degrading but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.\textsuperscript{187} The memo gives the illusion that it is legitimate by conducting a historical analysis of the statute. The threshold they established is that the pain must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death.\textsuperscript{188} Essentially, they wrote that the statute only prohibits extreme acts.\textsuperscript{189} Similarly, they come to the same conclusion for the treaty and that criminal sanctions only apply in extreme circumstances.

A second memo was drafted in the summer of 2002.\textsuperscript{190} The CIA asked if specific interrogational techniques would violate Section 2340A of title 18 of the US code.\textsuperscript{191} The memo states that this is occurring in the course of an international conflict with Al Qaeda.\textsuperscript{192} The CIA had a high value terrorist in custody and was convinced that he was withholding vital information. They also justified the pressing nature of this matter as there was an increase in communications which were being intercepted by the CIA.\textsuperscript{193} They proposed that there was a need to use “high pressure techniques” which would encourage the detainee to divulge this information. These methods consisted of stress techniques such as forcing the prisoner to stand for long periods of time to the most controversial technique known as waterboarding.\textsuperscript{194} It was later revealed that the high value detainee who was waterboarded was Khalid Shaikh Mohammed, who was believed to have

\textsuperscript{186} Bybee supra note 181 at 1
\textsuperscript{187} IBID at 1
\textsuperscript{188} IBID at 1
\textsuperscript{189} IBID at 1
\textsuperscript{190} Office of the Attorney General, “Memorandum for John Rizzo Acting General Counsel for the Central Intelligence Agency: Interrogation of Al Qaeda Operative”. August 1, 2002 (Rizzo)
\textsuperscript{191} IBID
\textsuperscript{192} IBID
\textsuperscript{193} IBID P. 1
\textsuperscript{194} Bybee supra note 181
helped plan the attacks of Sept. 11. Waterboarding essentially consists of simulating drowning. The memo explains that waterboarding triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that in fact he is not drowning.” The memo is careful to note that a medical professional would be present to monitor the process and thus one can infer that it will be administered in the safest manner possible.

Moreover, the memo carefully analyzes each technique with these assurances in mind. They determine that the goal of these techniques is not to inflict pain. Furthermore, the CIA uses these techniques when training certain agents and they reported that these techniques do not produce any prolonged mental harm. The CIA allegedly consulted both internal and external experts before recommending the implementation of these interrogation methods. In particular, the CIA conducted a mental assessment of the high value detainee and determined that he would not necessarily experience any lasting mental harm from the proposed interrogation techniques. The memo does not demonstrate any research beyond what the CIA provided.

While the memo clearly indicates that it is contrary to Section 2340A for any person outside of the United States to commit torture or attempt to commit torture, the memo establishes that the threshold to be met in order to constitute torture must be severe physical pain as mentioned in the previous memo. The second memo determined that the proposed pressure techniques did not meet this threshold. In particular, they concluded that the potentially most radical technique, waterboarding, did meet the threshold of imminent death found in Section 2340A but it did not

197 Rizzo supra note 190. p. 4
198 IBID p. 4
199 IBID p. 8
200 IBID p. 9
201 IBID p. 11
inflict any pain, harm or severe prolonged suffering whatsoever.\textsuperscript{202} Substantial mental harm would have to last months or even years.\textsuperscript{203} According to the memo, waterboarding simply produced physical discomfort for a short period of time.

As mentioned above, the memo concluded that in order to satisfy the specific intent requirement, an interrogator must expressly intend to cause severe pain or suffering.\textsuperscript{204} The presence of medical and interrogation experts supported the belief that the main intent of these procedures was not to inflict harm.\textsuperscript{205} None of these techniques were found to violate 2340A.\textsuperscript{206} Even if an interrogator was found to have gone further than what the memos authorized, there was the possibility they could justify their actions under a defense of necessity.\textsuperscript{207} While this is similar to what the Israeli Court decided, they did not set such a high threshold that nearly any interrogation method could be justified even with a defense of necessity. These memos were not a mere blip as they were not only limited to the early part of the US government’s anti-terrorism policies. One of the memos, dating from 2005, gave CIA officers a green light to blend various interrogation tactics to more effectively extract information from suspects.\textsuperscript{208} It should be noted that these techniques were only to be used in limited circumstances for certain high value suspects. The illusion of control through these supposed safeguards and the use of medical professionals to supervise the techniques are similar to the justifications employed by the GSS. In both instances the GSS and the CIA attempted to limit their interrogations to very specific instances but they were unable to do so. The C.I.A. began jailing suspects in 2002, creating a detention and interrogation program from scratch to deal with so-called "high value detainees" of

\begin{itemize}
\item \textsuperscript{202} Rizzo supra note 190 p. 11
\item \textsuperscript{203} Rizzo supra note 190 p. 16
\item \textsuperscript{204} IBID p. 16
\item \textsuperscript{205} Rizzo supra note 190 p. 16
\item \textsuperscript{206} IBID p. 18
\item \textsuperscript{207} Department of Justice (Office of Professional Responsibility. “Investigation in to the office of legal counsel’s memoranda concerning issues related to the Central Intelligence Agency’s use of “Enhanced Interrogation Methods on Suspected Terrorists. July 29, 2009. p.74
\end{itemize}
the war on terror. It located its overseas jails based largely on which foreign governments were most accommodating and rushed to relocate the prisoners when word of the sites leaked.

9.1 Government Authorized Torture and the Ensuing Torture Culture it Creates

The following section will explore what happens when torture is employed as initially it is meant to be constrained but in practice this is extremely difficult to accomplish. Once the option to torture is put on the table, it is very difficult to keep its use limited. Torture is unreliable and it can be justified under many circumstances. Furthermore, even if some of the interrogation techniques could be justified as not constituting torture, the reliance on these theoretical and fictional justifications for torture creates serious issues as interrogators work in the field. Interrogators are not necessarily better able to gauge when torture is necessary and furthermore, they are not always qualified to administer the techniques in a “proper” manner. Policies like the torture memos give an alleged legal authorization for interrogators to commit acts which can lead to other more serious acts. The very nature of torture does not permit one to have a clear outline and limits of how these interrogations should proceed. The information obtained through torture is only revealed after the torture takes place. If one had knowledge that a suspect had actionable information which could prevent an imminent attack then perhaps a limited use of torture could be justified. However, this is rarely the case when interrogators work in the field.

Policies like the torture memos created a precedent for abuses at Guantanamo Bay and Abu Ghraib as they signalled that torture was endorsed by the government in certain circumstances. However, torture is an all or nothing activity and once one got into it, it was useless to try to establish limits and forbid certain practices. Both the GSS and the CIA attempted to employ torture in a limited capacity. GSS interrogators argued that torture regularly produced accurate information to stop ticking bombs. However, in cases which the GSS justified the arrest of

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209 CIA supra note 195
210 IBID
211 Rejali supra note 25 at 502
named individuals as imminent ticking bombs, interrogators routinely went home for the weekends and evenings, behaviour that cannot be easily squared with claims that time was critical.\textsuperscript{212} Similarly the CIA attempted to limit torture to a dozen high-value Al Qaeda targets. All of them confessed, and no one died in CIA hands. However, CIA officials have authorized the interrogation of others besides these fourteen. Despite CIA official’s denials, at least five CIA detainees have died in Iraq and Afghanistan.\textsuperscript{213} For example, one detainee in Afghanistan was doused with water and left standing all night only to die of hypothermia.\textsuperscript{214} The officer who committed this act was apparently young and untrained.\textsuperscript{215} These examples illustrate the difficulties in having a consistent administration of torture when one is faced with the realities of fighting terrorists. Abu Ghraib is an example of what happens when a state adopts a torture culture. Abu Ghraib is “not a few bad apples-it is the apple tree.”\textsuperscript{216} Abu Ghraib resulted in certain prisoners being abused. The photos do not show anyone who was considered a high value suspect or situations in which time was of the essence. Instead they show soldiers who likely did not understand their boundaries as they knew that the possibility of mistreating suspects was at least on the table.

Furthermore, after assuming command of Abu Ghraib, General Miller claimed that high-value intelligence increased by 50 percent once torture was abandoned.\textsuperscript{217} This is another example of how torture is ineffective. A state such as the US which has a reputation for being a champion of freedom and democracy throughout the world can hardly expect to have other states respect the legitimacy of this role while committing acts of torture. Moreover, a state’s adherence to the legal restrictions on torture helps to create reciprocity. A state that tortures cannot reasonably expect that its soldiers will not be tortured if captured by the enemy.

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\textsuperscript{212} Rejali supra note 25. p. 517  \\
\textsuperscript{213} IBID. p. 500  \\
\textsuperscript{214} IBID. p. 500  \\
\textsuperscript{215} IBID. p. 501  \\
\textsuperscript{216} Luban supra note 34 at 18  \\
\textsuperscript{217} Rejali supra note 25. p. 518
\end{flushright}
9.2 Excluding the Judiciary

The failure of the US Supreme Court to rule on the issue of torture is due in part to the Bush administration’s legislative attempts to keep these cases out of the US court system. The Executive has relied heavily on the Authorization for Use of Military Force Against Terrorists (Pub.L. 107-40, 115 Stat. 224), enacted September 18, 2001 to carry out its anti-terrorist policies. Similarly to the torture memos, the government created a classification for terrorists known as an ‘unlawful enemy combatant’. An unlawful enemy combatant is neither granted the protections of the Geneva Conventions nor the civil liberties accorded to a US citizen. This classification was used immediately after 9/11. Essentially, those who fall under this classification are placed in a legal void. The government was very careful not to bring unlawful enemy combatants onto US soil in an attempt to bar them from having access to US courts. The government was successful until the Supreme Court ruled that the Geneva Conventions do apply to those who were apprehended as unlawful enemy combatants and that they should be able to access the federal court system in Hamdi v. Rumsfeld in 2004. The Hamdi plurality accurately articulated that some of the government’s policies could have disastrous consequences in reminding us that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 

Subsequent to this ruling, the Bush administration passed the Military Commissions Act (2006). It was hoped that the MCA would seal off decisions made regarding the seizure and detention of people from around the world from the judiciary by an administration that claimed the world as its battlefield. Fortunately, the Court confirmed again that these detainees have access to the federal court system in Boumediene v. Bush. The Court also ruled that the procedures laid out in the Detainee Treatment Act are not adequate substitutes for the habeas writ and the MCA operates as an unconstitutional suspension of that writ.

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218 Military Commissions Act 2006
220 Issacharoff supra note 145 p. 69

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illustrate that the Supreme Court has jurisdiction to hear cases brought by torture victims who have been classified as not having access to the Court system. While the Supreme Court has been less deferral on keeping unlawful enemy combatants from accessing the court system, the Court has yet to go beyond that by challenging the government on their use of certain techniques which constitute torture in order to procure evidence from certain suspects.

9.3 Assessing Institutional Competence: Waterboarding in the US

While some of the techniques authorized by the torture memos are more difficult to classify as torture, such as slapping one’s face or sleep deprivation, there is no denying that waterboarding cannot be considered legal under any liberal democratic constitution. Nevertheless, the torture memos concluded that waterboarding did meet the threshold of imminent death found in Section 2340A but it did not inflict any pain, harm or severe prolonged suffering whatsoever. In order to prohibit waterboarding, substantial mental harm would have to last months or even years. According to the memo, waterboarding simply produced physical discomfort for a short period of time.

Upon further examination, this argument falls apart. According to one JAG in the Nevada National Guard, waterboarding is much more serious than the memos specify;

“The victim may be immersed in water, have water forced into the nose and mouth, or have water poured onto material placed over the face so that the liquid is inhaled or swallowed. The media usually characterize the practice as “simulated drowning.” That’s incorrect. To be effective, waterboarding is usually real drowning that simulates death. That is, the victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut.”

224 Rizzo supra note 190 p. 11
225 IBID p. 16
While the drowning is stopped, severe psychological damage can last for years.\(^{227}\) The victim is not told how long they will be subjected to this treatment and even if no immediate harm results, there is the potential for increased anxiety at not knowing when it will end. As mentioned earlier, the US has harshly criticized those who have used torture throughout history. After WWII the US prosecuted several Japanese soldiers for waterboarding US POWs.\(^{228}\) Furthermore, in 1983 a Texas Sheriff was convicted and given a ten year sentence due to his use of water torture to extract confessions from prisoners.\(^{229}\) Moreover, U.S. military tribunals and U.S. judges have examined certain types of water-based interrogation and found that they constituted torture.\(^{230}\)

Therefore, the US Supreme Court should not defer to the Executive on a technique such as waterboarding as it has legal precedents which could be cited and thus there would be no argument that the Court lacks expertise to analyze such acts or that it is overstepping its mandate due to institutional weakness.

### 9.4 Deferece and Missed Opportunities

The US Supreme Court has jurisdiction to hear cases brought by those who have been detained as terrorist suspects and have alleged been tortured. Furthermore, the Court does have enough expertise and would be in fact fulfilling its role as a defender of individual rights as it has many precedents on which to base a decision on what constitutes torture. Yet, the Court has not heard any cases in which the specific issues surround the rights of the accused being tortured. The Court has thus avoided being directly involved in this contentious issue and thus they have employed a tacit deference to the executive by not even hearing a case involving torture. This constitutes a missed opportunity as the Court should fulfill its role of defending the rights of individuals to have their human dignity preserved by not being tortured.

Moreover, the Federal Courts have not been any more active on this matter. In fact, this policy of deference has been demonstrated in many cases such as in a habeas corpus hearing in

\(^{227}\) Wallach supra note 225
\(^{228}\) IBID
\(^{229}\) IBID
\(^{230}\) IBID
Washington DC in December 2009 – more than seven years after Musa’ab Al Madhwani was taken to Guantánamo – Judge Thomas Hogan noted that the US government had “made no attempt” to refute Al Madhwani’s torture allegations, and that there was “no evidence in the record” that they were inaccurate.\textsuperscript{231} To the contrary, Judge Hogan added, the allegations were corroborated by “uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions.”\textsuperscript{232} While the judge somewhat informally rejected the evidence obtained by torture, he did accept the evidence which was later provided to the Combatant tribunal because enough time had elapsed since the initial torture.\textsuperscript{233} There was no mention of whether the government was justified in torture or the legality of such interrogations.

Similarly, despite the ruling in Boumediene, on January 6\textsuperscript{th}, 2010, in the case of Musa’ab Al Madhwani, the judge affirmed that the government could lawfully continue to hold the detainee without charge.\textsuperscript{234} Judge Hogan nevertheless made known his disquiet about Al Madhwani’s ill-treatment in custody and said that he could not see why the detainee should not be released.\textsuperscript{235} Regardless, the War on Terror label has permeated the legal landscape. While the Obama administration has dropped both the War on Terror and Unlawful Enemy Combatant labels, it has retained the position that the USA is engaged in a global war with no foreseeable end, and on this basis has continued to invoke a “law of war” framework that has distorted notions of due process and undermined human rights.\textsuperscript{236} The most troubling part of the judgment states that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are

\textsuperscript{231} Reem Bahdi, Torture, Tort and Terror: The Non-Delegable Duty to Protect Nationals From Torture in the Context of Anti-Terrorism [Forthcoming, Supreme Court Law Review and Critical Torts, edited by Sanda Rogers]

\textsuperscript{232} IBID

\textsuperscript{233} Bahdi supra note 231

\textsuperscript{234} Musa’ab Al Madhwani v. Bush III

\textsuperscript{235} Bahdi supra note 231

\textsuperscript{236} IBID
ill-suited to the bitter wine of this new warfare.\textsuperscript{237} Falling back on the comfort of prior practices supplies only illusory comfort.\textsuperscript{238}

The Obama administration’s supposed different approach has not resolved the many detentions which began under the Bush Administration as many are being upheld such as in the case of Ghaleb Al Bihani.\textsuperscript{239} At trial, the judge ruled that Al Bihani’s classification as an unlawful enemy combatant was lawful and on appeal to the DC Circuit Court of Appeals, the Obama administration argued for this to be upheld and the Court did so on January 5\textsuperscript{th}, 2010.\textsuperscript{240} The Court made a point of stating that the judiciary is required to offer the Executive “wide deference” with regard to questions concerning national security.\textsuperscript{241} Essentially the Court offers a liberal interpretation of habeas corpus and states that it need not apply in the same way that a criminal procedure requires.\textsuperscript{242} The detention of aliens outside of the sovereign territory of the US during wartime is a different and peculiar circumstance, and the appropriate habeas procedures cannot be conceived of as mere extensions of an existing doctrine.\textsuperscript{243} Rather, those procedures are a whole new branch of the tree.\textsuperscript{244} This serves as the strongest indication that the judiciary is willing to rethink its institutional role in what has been perceived as a War which justifies extraordinary measures. While it is beyond the scope of this paper, the Supreme Court urgently needs to step in and reign in the government’s powers for detaining individuals. The lower court’s deference and the lack of cases which have reached the Supreme Court on torture constitute missed opportunities for the Court to assert that the government has gone too far in circumventing the rights of individuals and needs to be reined in. Furthermore, it ignores some of the very basic tenets of the US criminal law system which do not permit evidence to be used against an individual if it was procured through torture.

\begin{footnotesize}
\begin{itemize}
\item 237 Bahdi supra note 234 p. 27
\item 238 IBID p. 27
\item 239 Ghaileb Nassar Al-Bihani v. Barack Obama, President of the United States, ET AL., (No. 1:05-cv-01312-RJL) (Ghaileb)
\item 240 Bahdi supra note 231
\item 241 Ghaileb supra note 239 p. 13
\item 242 IBID p. 17
\item 243 IBID p.17
\item 244 IBID p.17
\end{itemize}
\end{footnotesize}
10. Analysis

In Ackerman's words, "[e]ven if Washington or New York were decimated, Al Qaeda could not displace the surviving remnants of political authority with its own rival government and military force." While terrorism poses a substantial threat to the US, it hardly justified the type of response which the executive has mounted. The Emergency Powers approach which was adopted by the Bush administration was based on fear. With fear, incentives and propaganda, they secured the assent or acquiescence of the press, the judiciary, the professionals and the citizenry. While more critics began speaking out as the policies endured, it is unfortunate that the judiciary has not been more active.

Furthermore, the question which remains unanswered, and which defenders of present US policy have considered unnecessary even to address, is why there would be sufficient reason to abandon the wartime checks and balances that the US, along with other Western democracies, have until now considered an essential component of the rule of law. After September 11, 2001, many said that executive abuse was far less likely and less harmful than a devastating attack that unhampered executive officials could prevent. Since 9/11, the US government has held suspects without permitting them access to the Courts using torture on them. The statement that executive abuse is far less likely to occur has been proven false. Part of the very essence of why the Constitution exists and the purpose for having institutional checks and balances is to prevent executive abuse. A liberal democracy must fight terrorism with one hand behind its back. It cannot simply cast aside what has taken so long to achieve when it finds that it is constrained by certain protections. The government undermines its own moral credibility, casts aside its role of advancing human rights in the world, and makes its citizens much less safe by committing humanitarian and human rights law violations in the name of national security. Israel serves

39 Ottawa L. Rev. 451 – 464 at 13
246 Bahdi Supra note 231. p. 283
247 IBID p. 284.
248 Schulhofer supra note 139
249 Issacharoff supra note 145 p. 69
250 Barak supra note 12
as an example of how a state can maintain its constitution and uphold the rule of law while combating terrorism.

Nevertheless, the modern liberal democracy has developed in order to have safeguards which prevent government from abusing its power. One must never forget that the Nazis were able to usher in drastic policies which infringed on human rights under the veil of emergency powers. While the US government is not nearly as oppressive as the Nazi regime, one should not underestimate the abuse which can result from unchecked executive power. The Nazi experience serves as a stark reminder of the potential for how the state’s policies designed to protect national security in the name of terrorism can also oppress its citizens. It is up to the judiciary to uphold the constitution and the rights of the individual. This is especially important when facing threats to national security as the state and the public may perceive it to be a more significant threat than it really is and thus establish severe policies which may not balance the interests of the state against the rights of the individual. The Obama administration has indeed undone some of the damage caused by the Bush regime but there is certainly more to be done.

The US Supreme Court and the Israeli Supreme Court share many institutional similarities and thus the US Court could adopt their approach to adjudicating torture and national security issues. The Israeli model is further bolstered by the fact that the military and executive officials seem to accept the court decisions imposing these safeguards. And through more than twenty years of experience, during which the terrorist threat and the judicial checking power have both intensified, there has been no major effort to flout these safeguards openly or to overturn them by legislation.252 One may argue that Israel is in fact not a successful state when combating terrorism because its people still suffer deaths and casualties in fairly frequent attacks. This argument does have merit if the only goal is to protect lives at all costs. However, a liberal democracy must protect the lives of its citizens while preserving their rights at the same time. Israel can be regarded as a success in this manner as the Court has acted as a check on the activities of the Executive yet the government has still been able to effectively combat terrorism.

252 Issacharoff supra note 145 p. 69
The Emergency Powers approach relies too heavily on trusting the government to know how to administer torture. The many injustices which have been committed by American interrogators since 9/11 are proof that this trust is unwarranted as the government is unable to isolate torture to a few extraordinary cases. The Emergency Powers doctrine ignores the long history of abuse which the liberal democracy was designed to protect against. They cannot simply flout these protections in the name of national security. Democracy is a delicate balance between majority rule and the fundamental values of society that rule the majority... When the majority deprives the minority of human rights, this harms democracy.\footnote{253 Barak supra note 12 pg 16}

The debate on judicial activism can be lessened considerably if the constitution is considered supreme. Each branch of government should be concerned with upholding the constitution. Unfortunately, there are numerous concerns which may conflict with maintaining constitutional supremacy. It is the primary role of the courts to ensure that the constitution is upheld as judges can focus on making difficult decisions which uphold individual rights without being directly concerned with certain political repercussions. In the case of Israel and the US, how should both Courts continue to adjudicate on national security issues, specifically involving torture? They must first ask the question as to whether every executive or administrative policy is justiciable. The answer to that question is yes as long as the Court is mindful that they must adjudicate on the legality of these policies, especially when they infringe on individual rights and not the policies themselves. The court must ask itself what is the correct interpretation of the state power involved.\footnote{254 IBID} If this is properly defined then the responsibility of the judge, within the framework of the separation of powers, is to give the proper interpretation to the constitution and statutes will provide an interpretation which achieves a proper balance between the rights of the individual and the interests of the state.\footnote{255 IBID}
The judiciary cannot defer to the executive on torture. Torture and mistreatment becomes a matter of routine and ultimately forms a kind moral gangrene which insidiously eats away at the values democratic societies claim to hold dear such as the equal dignity and worth of all individuals and the sanctity of the rule of law. Indeed torture is best viewed not as a “set of techniques” but rather as “a social institution” because “torturing societies create laws, policies, and regulations to authorize the practises”.256 If the executive ventures into such territory with policies which endorse torture, even on a limited basis, it is the responsibility of the judiciary to ensure that the constitution is upheld and that individuals are not subjected to torture merely because there is a national security threat. The Israeli Supreme Court has adjudicated on this matter and found a proper balance while the US Supreme Court has merely deferred to the executive.

11. Conclusion

While torture poses a significant threat to a liberal democracy, its magnitude does not justify the use of torture to protect from this threat. Israel has dealt with terrorism since its inception and has generally worked within the confines of its constitutional framework. In contrast, since 9/11, the US adopted an Emergency Powers approach and torture has been adopted as a means to combat terrorism. However, torture harms the dignity of those who experience it and this runs contrary to the principles upon which a liberal democracy is based upon. Furthermore, terrorism is an ongoing issue which cannot be justified as an emergency. The suspension of constitutional protections should be reserved for very specific emergencies which can only be dealt with in an extremely short time period. The Executive has usurped the role of the judiciary by being able to make findings of guilt and to punish those found guilty through its torture policies. The separation of powers is not being respected and the US Court is not fulfilling its institutional role. The US Supreme Court would be better able to fulfill its role as the defender of individual rights while balancing the interests of the state if they were to adopt the Israeli Court’s model of adjudicating on these matters. Courts should not defer to government policies which encourage torture and infringe on the rights of individuals for the sake of national security. It is their

256 Bhadi supra note 230
institutional role to examine the legality of government polices and to ensure that the Constitution and the rule of law are being upheld while balancing the interests of the state. Terrorism can be effectively dealt with within the confines of the Constitution. The Israeli Supreme Court has adjudicated on this matter and found a proper balance while the US Supreme Court has merely deferred to the executive. This can no longer be the case and the US Supreme Court would be well served by adopting the approach of the Israeli Supreme Court when adjudicating on matters of national security so that it can fulfill its role of defending the constitution and acting as a check on the other two branches of government.
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