05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner-Appellee,

v.

C. T. HANFT, U.S.N. Commander, Consolidated Naval Brig,
Respondent-Appellant.

APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF *AMICUS CURIAE* OF COMPARATIVE LAW SCHOLARS AND EXPERTS ON THE LAWS OF THE UNITED KINGDOM AND ISRAEL IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*

Amici are comparative law scholars and experts on the laws of the United Kingdom and the State of Israel.[1] They file this brief to assist this court in assessing Appellant's assertion of executive authority to detain a citizen arrested in a civilian setting indefinitely and without clear legislative authorization. Such unfettered executive power undermines core principles respected by other constitutional democracies, including those that have suffered a long history of terrorist attacks.

INTRODUCTION AND SUMMARY

Both terrorism and democratic values transcend borders. Democratic allies of the United States also face threats of terrorism; for some, these threats began long before September 2001. But these allies have consistently rejected permitting the executive to assume the unrestrained detention power that Appellant seeks here. Each recognizes that effective opposition to terrorism can and must embody democratic values, and they remain committed to the central principles of separation of powers and due process. Accordingly, these allies limit executive power to detain suspected terrorists in four distinct ways: (1) specific legislation authorizing detention; (2) meaningful judicial review; (3) time constraints; and

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[1] Names and affiliations of *Amici* are included in Appendix I. All parties consented to the filing of this brief.

(4) access to counsel. The Executive here seeks license to dispense with all four limits.

The practices of the United Kingdom and Israel are particularly instructive. These two countries, the most experienced veterans in democracy's war on terrorism, have both rejected unfettered executive power as a tool in that war. Experience has taught them that in a nation's most frightening moments, restraints on executive power may seem to hobble security efforts, but that this view is shortsighted: these very restraints are democracy's decisive weapon. As the Supreme Court of Israel has declared:

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

Public Committee Against Torture v. Israel, HCJ 5100/94 ¶ 39 (May 26, 1999).

ARGUMENT

I. THE EXPERIENCE AND LAWS OF OTHER DEMOCRACIES CAN USEFULLY INFORM THE JUDGMENT OF THIS COURT.

Since the Founding, the Supreme Court has repeatedly affirmed the relevance of international law and practice in interpreting the Constitution.[2]

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[2] Chief Justice Marshall invoked the "assent of mankind" as powerful support for the Court's historic ruling on the meaning of the Constitution in *McCulloch v.*

Justice Breyer has noted that the experiences of other nations "may . . . cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). As Chief Justice Rehnquist observed over fifteen years ago, "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, *Constitutional Court-Comparative Remarks (1989), in* Germany and Its Basic Law: Past, Present, and Future – A German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

In an earlier moment of national crisis, the Court looked to other nations to define the constraints on executive power during war. The Court's seminal decision, *Ex Parte Milligan*, relied on England's practices to buttress its rejection of the Executive's claim to excessively broad wartime powers: "[M]artial law," the Court declared, "has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject." 71 U.S. (4 Wall.) 2, 128 (1866).

Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); *see also, e.g., Robertson v. Baldwin*, 165 U.S. 275, 283-86 (1897); *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The modern Court consistently continues to rely on international practices. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 710-12, 718 n.16 (1997) (Rehnquist, C.J.); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting).

More recently, Justice Brennan declared that "[p]rolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain . . . the expertise necessary to distinguish the bona fide from the bogus. . . . [I]t may well be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security." Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 Isr. Y.B. Hum. Rts. 11, 18-20 (1988).

Amici share the conviction that the practices of other democracies, especially those experienced in fighting terrorism, is useful in assessing the scope of executive power in this case. Appellant claims the inherent and unilateral power to detain individuals in civilian settings indefinitely and without charge. Yet the United States' principal democratic allies – Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom (hereinafter "democratic allies") – squarely reject such a claim.[3] Consistent with the Supreme Court's admonishment that even in war "[the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake," *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2650 (2004), these democratic allies carefully control executive power and preserve the

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[3] Unless otherwise noted, references to Israel are to detention within the State of Israel. Detention in the West Bank and Gaza is subject to international humanitarian law and military law and will be discussed in Section II.B, *infra*.

system of checks and balances. Through the deliberative process, legislatures of these allies provide the executive ample detention power, but only as part of a detailed statutory regime that guarantees basic safeguards, including judicial review, time constraints on detention, and access to counsel. If this court were to allow the unilateral executive power that Appellant seeks, it would make the United States an anomaly among the world's leading democracies.

II. U.S. DEMOCRATIC ALLIES REGULATE DETENTION IN CIVILIAN SETTINGS WITH LEGISLATIVE AUTHORIZATION THAT IS CLEAR, SPECIFIC, AND PROTECTIVE OF FUNDAMENTAL RIGHTS.

Each of the democratic allies – including nations with long histories of fighting terrorism, those that have been recently threatened by al Qaeda, and those actively participating in the current conflicts in Iraq and Afghanistan – have refused to allow the executive to assume unilateral and unfettered power to detain citizens arrested in civilian settings. Instead, these nations vigorously defend their national security through detailed legislation that explicitly authorizes the use of preventive detention but also guarantees basic procedural safeguards.[4]

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[4] For a summary of the provisions of the statutes discussed in this Part, see Appendix II.

A. Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom All Use Detention to Fight terrorism But Require Legislative Authorization, Meaningful Judicial Review, Time Constraints, and Access to Counsel.

Legislative authorization. None of the democratic allies of the United States allows the executive to detain citizens in civilian settings without a clear statement from the legislature. Unlike the current U.S. practice, all of these allies authorize and circumscribe the executive's detention power by detailed statutory provisions that guarantee detainees procedural safeguards, including judicial review, constraints on the length of detentions, and access to counsel. By requiring a clear legislative mandate for any detention, these nations provide legis lative and judicial checks on the otherwise unfettered power of the executive.

Judicial review. Meaningful judicial review of the necessity and legality of detention is a fundamental part of the detention legislation of other democracies dealing with threats of terrorism. National statutes vary with respect to when judicial review must occur. Some require judicial approval prior to the detention of individual suspects. Others allow review to occur after detention but provide specific time limits by which detainees must be brought before a judge. And although some countries permit the executive branch to apply for extensions of the detention periods, they have been careful to allow detainees to challenge the grounds for such extensions before an independent judicial authority.

Time constraints on detention. All democratic allies subject preventive detention to meaningful judicial review within rigid time limits fixed by law. Moreover, most of the democratic allies set an absolute limit – usually just a few days – on the length of time a suspect may be detained without charge. The United Kingdom and Israel limit the length of any detention order but not the number of times that order may be renewed. Instead, they provide for judicial scrutiny and review of renewal requests. In no case do any of these countries permit the executive to detain an individual indefinitely without review by the courts.

Access to counsel. Another central element of the detention policies of the democratic allies is access to counsel. Each of these countries' laws provide the detainee access to a lawyer soon after detention begins. In most instances, access to counsel is allowed within hours.

B. Lessons From Two Democracies With Long Experience Fighting Terrorism: The United Kingdom and Israel

The experiences of the United Kingdom and Israel are particularly instructive in considering Appellant's claims that the executive possesses the inherent power to detain citizens indefinitely and without charge as part of the fight against terrorism. These U.S. allies have suffered from serious terrorist acts for decades, and both allow for the detention of suspected terrorists for interrogative or

preventative purposes. But neither resorts to the measures Appellant claims are necessary in this case.

In the United Kingdom, suspected terrorists may be detained under two parallel systems: As part of the criminal process, the police may detain individuals for up to fourteen days. Alternatively, the Secretary of State may apply to the courts for a "control order," under which a wide variety of liberty restrictions may be imposed on an individual. In Israel, suspected terrorists may be subject to administrative detention. In the West Bank and Gaza, suspects may also be detained by the military during military operations. Notwithstanding these differences, both systems allow for executive detention only pursuant to clear legislative authorization and subject to extensive procedural protections contained detailed statutes.

1. The United Kingdom

The United Kingdom's vigorous response to terrorism evolved over the course of decades, shaped by both a history of sustained terrorist attacks and revelation of serious abuses of detainees by the executive branch. Even during the periods of the worst terrorist attacks, however, use of preventive detention has always been specifically authorized by legislation that has included basic safeguards to protect fundamental rights.

The United Kingdom has confronted terrorist activity on a large scale since "the Troubles" began in Northern Ireland in the late 1960s.[5] In just seven months (August 1971 to March 1972), for example, Northern Ireland experienced 1,130 explosions and 2,000 shootings. On July 21, 1972, known as "Bloody Friday," twenty bombs exploded in Belfast, killing eleven and seriously wounding more than 100. Over the twenty-year period ending in 1990, more than 2,750 people were killed (2,000 of them civilians) and more than 31,900 were seriously injured in Northern Ireland alone. This occurred in a territory with a population of only 1.5 million – about the same as the current population of Philadelphia.

Terrorism was also a constant and deadly presence in England. In October 1974, for example, the bombing of a Guildford pub killed five and injured fifty-four. In November, two more pubs were bombed in Birmingham, killing twenty-one and injuring 184. In 1979, a British Member of Parliament was assassinated, killed by a car bomb within steps of the House of Commons.

In response to these severe and constant terrorist attacks, Parliament enacted the Prevention of Terrorism (Temporary Provisions) Act 1974, c. 56 (U.K.) ("PTA") in 1974. Regularly renewed for decades, PTA created new executive powers to detain and interrogate suspected terrorists. These powers, however,

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[5] The following historical account is adapted from Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L.Rev. 1906, 1931-33 (2004) and Marie-Therese Fay, et al., Northern Ireland's Troubles: The Human Costs 43-49 (1999). *See also Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, ¶¶ 34-58 (1978).

were accompanied by legislatively mandated protections. For example, PTA limited detention to a forty-eight hour period, which could be extended by a cabinet-level official but only for a maximum of five additional days.[6] Importantly, PTA and its successor statutes were subject to periodic review and renewal by the legislature. *See Brogan and Others v. United Kingdom*, 11 Eur. H.R. Rep. 117, ¶¶ 27-29 (1988).

In addition to domestic protections directly incorporated in PTA, individuals detained in the United Kingdom can seek review of the legality of their incarceration in the European Court of Human Rights ("ECHR"), which monitors compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("Convention"). Where states derogate from the Convention's requirements, the permissibility of such derogation is itself subject to judicial review. Derogation is allowed only in situations where a "war or other public emergency threatening the life of the nation" exists and only to the extent that is "strictly required by the exigencies of the situation." Convention, art. 15(1).

In *Brogan and Others v. United Kingdom*, the ECHR held that detaining an individual under PTA for a period of four days and six hours without presentment to a court violated the right to liberty enshrined in Article 5 of the Convention. 11

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[6] PTA § 7(2).

Eur. H.R. Rep. at ¶ 62. In response, the United Kingdom entered a derogation from Article 5. The ECHR later held that a derogation involving seven days without presentment to a court was valid, but only after emphasizing that the delay was excessive by just a few days and that suspects had access to counsel after no more than forty-eight hours. *See Brannigan & McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539, ¶¶ 63-64 (1994).[7]

Despite the protections contained in domestic statutes and provided by international review, a series of independent reports documented serious abuses of detainees held under PTA.[8] Later revelations of wrongful convictions in a number of prominent terrorism prosecutions[9] ultimately led the United Kingdom to repeal

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[7] Significantly, the ECHR subsequently held that a detention of fourteen days without judicial review or other safeguards was "exceptionally long," and thus was not a valid derogation. *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553, ¶ ¶ 78, 81 (1996). This temporary detention is far less restrictive than the indefinite detention imposed here.

[8] *See* Lord Shackleton, *Report of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976* (1978), summary *available at* http://www.bopcris.ac.uk/bop1974/ref4807.html; Earl Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* (1983), *available at* http://www.bopcris.ac.uk/img1984/ref3808_1_1.html; Judge H.G. Burnett, QC, *Report of the Committees of Inquiry into Police Interrogation Procedures in Northern Ireland* (1979), *available at* http://cain.ulst.ac.uk/hmso/bennett.htm.

[9] *See Birmingham Six: R. v. McIlkenny* [1992] 2 All E.R. 417, C.A. (Crim.); *Guildford Four: R. v. Maguire* [1992] 1 QB 936, C.A. (Crim); *Judith Ward: R. v. Ward* [1993] 1 W.L.R. 619, C.A. (Crim.).

PTA and revoke the executive's unrestrained latitude to detain terrorism suspects for seven days.

With this extensive experience, Parliament recently enacted three laws specifically authorizing and defining the executive's power to detain suspected terrorists: (1) Terrorism Act 2000, c. 11 (U.K.) ("2000 Act"), *amended by* Criminal Justice Act 2003, c. 44, §306 ("2003 Act"), which governs the use of detention as part of criminal investigations; (2) Anti-Terrorism, Crime and Security Act 2001, c. 24 (U.K.) ("ATCSA"), which governed detention of foreign nationals who could not be prosecuted or deported;[10] and (3) Prevention of Terrorism Act 2005, c.2 (U.K.) ("2005 Act"), which allows the executive to impose various restrictions on individuals, including extended detention, for preventive or interrogation purposes. With each law, Parliament specifically authorized (and limited) executive powers to detain individuals, guaranteed speedy judicial review, provided access to counsel, and imposed time limits on confinement.[11]

By repealing PTA and enacting the 2000 Act, Parliament circumscribed the executive's powers to detain terrorism suspects in the criminal justice system. The

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[10] These provisions have since been repealed. *See* 2005 Act § 16.

[11] By submitting this brief, *Amici* do not express their views on the legality of these laws, which have been criticized as insufficiently protective of individual rights. *Amici* refer to these laws for the sole purpose of indicating that the United Kingdom requires substantially greater oversight of executive power than that claimed by the Executive here.

2000 Act authorized temporary detention without charge, but conditioned this grant of executive authority on legislative and judicial oversight and strict time limits on detention.

The 2000 Act authorizes the police to arrest individuals they "reasonably suspect to be a terrorist" and detain them for forty-eight hours without a warrant or other judicial approval.[12] Absent judicial approval, however, the police must release or charge the detainee after forty-eight hours.[13] Detainees have a right to have access to counsel "as soon as is reasonably practicable, privately and at any time."[14]

The most significant change in the 2000 Act is Parliament's decision to replace the absolute authority the PTA provided the executive to detain suspects for seven days with judicial review of the government's application to extend detention beyond the first forty-eight hours.[15] A court may extend the detention by five days, but the police must generally apply for such an extension within the first

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12 2000 Act § 41(1), (3).

13 *Id.* § 41(3). In addition, an independent officer must review whether the detention is "necessary" every twelve hours during the first forty-eight hours. 2000 Act Schedule 8 ("Schedule 8"), ¶¶ 21(1)-(3), 23, 26.

14 Schedule 8, ¶ 7(1). The act provides for limited discretion to delay. *See* Schedule 8, ¶ 8.

15 *Compare* PTA § 7(2) (authorizing extended detention based on approval by high-level executive official) *with* 2000 Act Schedule 8, ¶ 29 (requiring application to judicial authority to extend detention beyond forty eight hours).

forty-eight hours of detention.[16] The police may then apply for a second extension of up to seven days.[17] Thus, an individual may be held in custody without charge for a maximum of fourteen days, but only after two rounds of judicial review.

The detainee is entitled to notice of the extension application and must be provided the opportunity to respond with representation by counsel.[18] The judicial authority must be satisfied that continued detention is "necessary to obtain relevant evidence" and that the investigation is "being conducted diligently and expeditiously."[19] As a result, even the temporary detention of suspected terrorists is authorized under the 2000 Act only if it is connected to an active criminal investigation.

Since the horrific attacks of September 11, 2001, the United Kingdom has been the United States' principal ally in fighting the war on terror and the conflicts in Iraq and Afghanistan. As a result, al Qaeda explicitly threatened the United Kingdom with terrorist attacks. The United Kingdom responded to these threats by expanding executive power to detain suspected terrorists. At no time, however, did the United Kingdom assert that the executive possessed unfettered and unilateral

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16 Schedule 8, ¶¶ 29, 30(1)-(2), 36. The police may have an additional six hours to apply for an extension but only if applying within the initial forty-eight hours was not reasonably practicable. *Id.* ¶ 30(2).

17 *Id.* ¶ 36, *as amended by* 2003 Act § 306.

18 Schedule 8, ¶ 33.

19 *Id.* ¶ 32(1)(a)-(b) (emphasis added).

power to label an individual an enemy combatant and to detain him indefinitely and without charge. Instead, the Parliament passed two laws, the ATCSA and the 2005 Act, specifically authorizing expanded executive detention power, while also defining the limits of that power.

Proposals of both the ATCSA and the 2005 Act inspired vigorous debate in Parliament. Indeed, the contentious debate over the expansive scope of executive power authorized by the 2005 Act resulted in Parliament's longest session in ninety-nine years.[20]

These vigorous debates in Parliament highlight the value of an extensive deliberative process in ensuring that individual liberty is not unnecessarily sacrificed to unfettered executive power. Parliament authorized the executive to exercise broad powers to fight terrorism, but only after incorporating statutory provisions guaranteeing checks on those powers, including protections for the

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20 *See* Patrick Wintour and Alan Travis, *The Longest Day*, The Guardian, Mar. 12, 2005, at 1. The ferocity of this debate belies the Executive's claim that through the Authorization of the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), the U.S. Congress intended to confer on the Executive – silently and without debate – the sweeping power to detain individuals in a civilian setting.

detainee and ongoing legislative oversight of the effectiveness and necessity of those executive powers.[21]

The relevant detention provisions of the ATCSA, adopted in the months immediately after September 11, affected only one narrow category of detainees: foreign nationals whom the government could neither prosecute nor deport. Through Part IV of the ATCSA, Parliament authorized the executive to detain such individuals for a lengthy period, but only after subjecting the use of these powers to periodic oversight by the legislature (including an annual sunset provision and submission of periodic reports on the effects and implementation of the statute), mandating that detainees were entitled to a number of procedural protections, and judicial review of individual detentions.[22] In order to authorize lengthy detention of foreign nationals without charge or deportation, the United Kingdom entered a derogation to Article 5 of the European Convention.[23]

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[21] Several *Amici*, in their capacity as Parliamentarians, remain firmly opposed to the restrictions of liberty contained in the 2005 Act for failing to strike a fair balance between liberty and national security. They present the U.K. example only to highlight that the Executive's claim to power in this case is vastly broader than that even contemplated by the United Kingdom.

[22] *See generally* ATCSA §§ 21-29; Special Immigration Appeals Commission (Procedure) Rules (2003), Rules 35, 37. The legislatively mandated reports were sharply critical of the statute's implementation. *See* Privy Counsellor Review Committee, 2003, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, H.C. 100, at 52-56 (Dec. 18, 2003) ("Newton Report").

[23] Newton Report at 52-53.

Several foreign nationals challenged their detention and appealed to the House of Lords, the United Kingdom's highest court. A panel (8-1) ruled that Part 4 of the ATCSA was inconsistent with the United Kingdom's obligations under the Convention and the Human Rights Act of 1998, c. 42 (U.K.) ("Human Rights Act"), which implemented the Convention. *A and Others v. Secretary of State for the Home Department*, [2004] U.K.H.L. 56.

Although each judge reached his or her conclusions through slightly different analyses, the panel affirmed two important principles: First, indefinite detention is incompatible with the right to individual liberty that is fundamental to a democratic state. As one judge declared, "[i]ndefinite detention without charge or trial is anathema in any country which observes the rule of law." *Id.* ¶ 74 (Lord Nicholls).[24] Second, the court plays a crucial role in reviewing overly broad claims to executive power: "[T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself." *Id.* ¶ 42 (Lord Bingham).[25]

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[24] *See also, e.g., A and Others*, [2004] U.K.H.L. at ¶ 86 (Lord Hoffmann) ("The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom."); ¶ 100 (Lord Hope).

[25] *See also, e.g., id.* ¶ 80 (Lord Nicholls); ¶¶ 108, 113 (Lord Hope); ¶¶ 176-79 (Lord Rodger); ¶¶ 225-26 (Baroness Hale); ¶ 240 (Lord Carswell).

In light of these principles, and despite recognizing the wide latitude necessarily afforded to the executive to deal with national security issues, the House of Lords held that targeting foreign nationals for prolonged detention without charge was unlawful because the executive could not satisfy the Convention's requirement that such a derogation be "strictly required by the exigencies of the situation."[26]

In response to the Lords' decision, Parliament reevaluated its balance between executive power and individual liberty and, after a lengthy and heated debate, enacted the 2005 Act. The new statute specifically grants the Secretary of State a new "power to make a control order" through which he may curtail an individual's liberty in a wide variety of ways.[27] Included in this power is the authority to order an individual to "remain at . . . a particular place," which has been interpreted to include house arrest.[28]

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26 *See, e.g., id.* ¶¶ 30-36, 43 (Lord Bingham); ¶¶ 126, 132 (Lord Hope); ¶ 155 (Lord Scott); ¶¶ 167-70 (Lord Rodger); ¶¶ 227-31 (Baroness Hale); ¶ 240 (Lord Carswell). Specifically, these judges pointed to the absence of similarly draconian restrictions on the liberty of nationals, which were found to pose a similar terrorist threat in the United Kingdom, as evidence of the excessiveness of the Executive's power to detain foreign nationals indefinitely. In addition, several judges found that the ATCSA unlawfully discriminated against foreign nationals. *See, e.g., id.* ¶ 68 (Lord Bingham); ¶ 138 (Lord Hope).

27 2005 Act § 1(2).

28 *Id.* § 1(5).

Although Parliament gave the Secretary wide latitude in restricting individual liberty, it simultaneously imposed an elaborate set of procedures regulating the issuance and continuance of such orders. Parliament imposed the greatest restrictions on the issuance of "derogating control orders," *i.e.*, orders that sufficiently restrict individual liberty as to require a formal derogation from the Convention.[29] Indefinite and solitary detention without charge, like the kind imposed on Jose Padilla, falls into this category. Through these requirements, Parliament has ensured that the legislative and judicial branches will play active roles in monitoring the executive's exercise of these new powers.

Under the 2005 Act, Parliament retained at least three important oversight functions. First, Parliament conditioned its authorization of these new powers on the insertion of a one-year sunset provision, thereby requiring the legislature to revisit the necessity of these new powers in just twelve months.[30] Although Parliament authorized the Secretary to issue an order extending the act for an

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[29] *See* 2005 Act §§ 4-6. The other type of control order authorized by the 2005 Act is a "non-derogating control order," which authorizes less restrictive limitations. Even the issuance of these less restrictive orders requires at least two hearings in court. *Id.* § 3. *Amici* do not address non-derogating control orders because they do not embrace the kind of confinement of which Padilla complains.

[30] § 13(1).

additional year, this order will not take effect unless approved by both Houses of Parliament.[31]

Second, individual control orders in effect for lengthy periods are also subject to legislative approval. Derogating control orders normally last six months, absent extensions by the court.[32] Even if a court approves extensions, however, Parliament mandated that a derogating order will be effective only if twelve months has not elapsed since either (i) a derogation to the Convention has been formally designated pursuant to the protocols set forth in the Human Rights Act, or (ii) the Secretary issues an order stating that it is necessary to continue to impose restrictions on the individual.[33] If the Secretary pursues the latter process, the Secretary must receive prior approval by both Houses of Parliament before issuing the order.[34] Where an emergency precludes prior legislative approval, the Secretary must seek and receive approval by both Houses within forty days of issuing the order.[35]

Finally, the 2005 Act requires the Secretary to report to Parliament every three months on use of control orders and mandates a periodic assessment of these

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31 § 13(4)-(6).
32 § 4(8).
33 § 6(1)(b).
34 § 6(3).
35 § 6(4)-(6).

powers by an independent authority.[36] These reports will aid the legislative branch when it assesses whether to reauthorize these executive detention powers.

In addition to legislative oversight, Parliament guaranteed that executive power would not be exercised without judicial approval and procedural safeguards, such as time limits on derogating control orders and representation by counsel.

Under the 2005 Act, a civilian court – not the executive – is the only institution authorized to issue, modify, or extend a derogating control order.[37] The Secretary must apply to the court for permission to issue the order. Upon receipt of the application, the court is required "to hold an immediate preliminary hearing" and determine whether four criteria have been met: the evidence presented has potential probative value regarding terrorist activity; "reasonable grounds" exist to believe that restraints are needed to protect the public; the risk to the public "arises out of . . . a public emergency;" and the obligations imposed on the individual are of the type included in the U.K. derogation from the Convention (collectively, "the

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[36] § 14. In addition to domestic reports, the European Commissioner for Human Rights, who monitors compliance with the Convention, has recently criticized provisions of the act as an "only thinly disguise[d]" end run around the normal criminal process. European Commissioner for Human Rights, *Report on the Visit to the United Kingdom*, Comm.D.H. 10 (June 8, 2005), *available at* http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH%282005%296_E.doc.

[37] §§ 1(2)(b), 4(9), 7(4)-(5). However, an individual who poses a flight risk may be preventively detained by the police upon application for a derogating control order, but only for up to forty-eight hours without judicial approval. § 5(3), (4).

four criteria").[38] Significantly, unlike the court's preliminary review of non-derogating control orders, which is limited to determining whether the Secretary's decision to issue the order is "obviously flawed," the court makes an independent determination when deciding whether to issue a derogating control order.[39]

If the derogating control order is granted by the court, a "full hearing" to consider the order on the merits is immediately scheduled. The order may be confirmed only if the High Court is "satisfied, on the balance of probabilities," that the four criteria are met.[40] Again, the court makes an independent assessment of the sufficiency of the application.

At both the preliminary and full hearings, the individual is represented by counsel.[41] If security concerns require the exclusion of the individual and his counsel, a special advocate is appointed to represent the detainee's interests during those hearings.[42]

Importantly, like the legislative oversight provisions, judicial supervision of derogating control orders is tied to clear time limits on detention. Parliament

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38 § 4(1)(a), (3).

39 *Compare* § 3 *with* § 4(3).

40 § 4 (7).

41 Although not explicitly guaranteed, the Act refers to the individual's "legal representative" in several sections. *See, e.g.*, 2005 Act Schedule §§ 4(2), 7.

42 2005 Act Schedule §§ 4(2)(c); 7(1).

limited the duration of derogating control orders to six months.[43] Although Parliament authorized courts to renew the orders an unlimited number of times, each renewal requires an application by the Secretary and explicit approval by the court after a hearing at which the detainee is represented.[44]

In sum, the choices made by the United Kingdom through long experience with domestic and international terrorism ensure that the executive's exercise of detention powers is explicitly authorized and strictly supervised by both the legislature and the courts.

2. Israel

Although Israel has vigorously fought terrorism since its founding in 1948, it has done so without resorting to the measures Appellant claims are necessary. Like the United Kingdom, Israel regulates detention legislatively, imposes time constraints on detention, allows detainees access to counsel, and guarantees judicial review.

Terrorist violence against Israel escalated after the 1967 war. In the late 1960s and throughout the 1970s, terrorist organizations conducted a series of devastating attacks in Israel. In the 1980s, terrorists launched attacks against Israel from Lebanon. Beginning in December 1987, Israel faced the first intifada and

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[43] 2005 Act § 4(8).

[44] *Id.* § 4(8)-(10).

violent demonstrations designed to force the Israeli military from the West Bank and Gaza and to establish an independent Palestinian state.[45]

During the second intifada, which began in September 2000, terrorist violence intensified. Between September 2000 and June 2003, 243 Israelis were killed and more than 1400 wounded in a nation of six million as a result of suicide bombings by Hamas organizations alone.[46] Although Israel has forcefully responded to this ongoing threat, it has continued to recognize the fundamental constraints that Appellant asks this court to ignore.

Israel's Basic Law mandates that detention must be pursuant to specific legislative authorization "and to an extent no greater than required."[47] The Knesset enacted the Emergency Powers (Detention) Law of 1979 ("Detention Law"), which explicitly confers authority on the Minister of Defense to detain

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45 *See generally* Israel Ministry of Foreign Affairs, *History – The State of Israel*, *available at* www.israel-mfa.gov.il/mfa/history/history%20of%20Israel.

46 *See* Israel Ministry of Foreign Affairs, *Summary of Terrorist Attacks Recently Thwarted by Security Services*, *at* http://www.mfa.gov.il/MFA/Government/Communiques/2003/Summary+of+Terror+Attacks+Recently+Thwarted+by+Sec.htm (last modified June 11, 2003).

47 Basic Law: Human Dignity and Liberty, 1992 ("Basic Law"), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm ("There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise ... except by a law . . . enacted for a proper purpose, and to an extent no greater than required." *Id.* §§ 5, 8; *see also* A.D.A. 2/94, *Ben Yoseph v. State of Israel* (Sept. 1, 1994), ¶ 3 (affirming requirement of legislative authorization for administrative detention).

individuals within Israel if he finds "reasonable cause to believe that reasons of state security or public security" require detention.[48]

The law is replete with procedural protections. It guarantees a detainee access to counsel[49] and requires that he be brought before the President of the District Court in the jurisdiction of arrest within forty-eight hours[50] for *de novo* review; the court is required to exercise independent discretion concerning the suitability of the detention order.[51] The court must vacate the detention order if it does not find "objective reasons of state security or public security" that require the detention.[52] A detainee may appeal the District Court's decision directly to the Supreme Court of Israel.[53]

After this initial hearing, the District Court must review the detention order within three months.[54] The Minister of Defense may extend a detention order for a period of up to six months.[55] While consecutive extensions are permitted, judicial

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48 Emergency Powers (Detention) Law 1979, § 2(a), 33 L.S.I. 89 (1978-79).
49 A detainee's counsel can be restricted to members of the bar "authorized . . . to act as military defense counsel." *Id.* § 8(b).
50 *Id.* § 4(a). Israel's five District Courts are its highest courts below the Supreme Court. *See* Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983-84).
51 Baruch Bracha, *Checks and Balances in a Protracted State of Emergency – The Case of Israel*, 33 Isr. Y.B. Hum. Rts. 123, 148 (2003).
52 Detention Law, § 4(c).
53 *Id.* § 7(a).
54 *Id.* § 5.
55 *Id.* § 2(b).

review is required at least every three months.[56] Detainees also have the right to counsel and to be present at these review hearings, although, as with the initial hearing, evidence may be sealed for security reasons.[57]

The Supreme Court of Israel has taken an active role in reviewing the use of detention authority,[58] particularly since the Knesset enacted the Basic Law in 1992. The court has emphasized that administrative detention is a severe and unusual measure that is difficult to reconcile with democratic values and therefore should be employed only as a last resort.[59] Thus, the Supreme Court held in 1999 that the 1979 law does not confer authority to detain persons who are not themselves terrorist threats as "bargaining chips."[60] In response, the Knesset enacted the 2002 Incarceration of Unlawful Combatants Law.[61] This law extends the power of detention to members of a force perpetrating hostile acts against Israel even without a showing of actual or threatened personal involvement in such acts.[62]

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56 *Id.* § 5.

57 *Id.* § 8(a), 6(c).

58 *See* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 Ariz. J. Int'l & Comp. Law 721, 758 (2001).

59 A.D.A. 2/94, *Ben Yoseph v. State of Israel* (Sept. 1, 1994), ¶ 3.

60 Further Hearing [F.H.] 7048197, *Plonim v. Minister of Defense*, 54(1) P.D. 721 (original in Hebrew; summarized in English *in* 30 Isr. Y.B. Hum. Rts. 340 (2000)).

61 Incarceration of Unlawful Combatants Law, 2002, *available at* http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6/ 0/IncarcerationLawedited140302.doc (last visited Apr. 9, 2004).

62 *Id.* § 2.

As far as *Amici* are aware, this law has not been used since its application in the case that inspired it, which involved a potential prisoner exchange with Lebanon. In any case, like the 1979 Detention Law, the 2002 Unlawful Combatants Law provides for administrative detention orders that are legislatively authorized, initially limited in time but renewable upon a proper showing to a judge, and subject to judicial review with access to counsel. The law provides that a detainee must have the opportunity to meet with a lawyer no later than seven days after the detention order is approved[63] and must be brought before a District Court judge within fourteen days of incarceration to determine the appropriateness of the detention, with a further right of appeal to the Supreme Court.[64]

The West Bank and Gaza. The West Bank and Gaza lie outside the borders of the State of Israel and are therefore subject to the laws of war rather than laws governing domestic detention. Even so, the detention regime employed by Israel in the West Bank and Gaza provides robust judicial review. Israel's "Basic Law: Judicature," vests the Supreme Court of Israel with authority over detention in the

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63 *Id.* § 6(a). As with the 1979 law, counsel may be limited to those authorized to appear before the military courts. *Id.* § 6(b).

64 *Id.* § 5(a), (d). Following the initial hearing, the detention must be reviewed by the District Court at least every six months. *Id.* § 5(c). The detainee may be held until the Minister of Defense determines that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee's release would not threaten state security. *Id.* § 8.

West Bank and Gaza.[65] Acting as the High Court of Justice, the court may "hear matters in which it deems it necessary to grant relief for the sake of justice."[66] Detainees have a right to appeal military law and orders directly to the High Court of Justice.[67]

The court has recognized that the detainees' right of appeal carries with it a guarantee of due process. For example, when – like Appellant in this case – the military asserted that extended incommunicado detention was necessary to permit interrogation of suspected terrorists, the Supreme Court rejected the military's assertion of unilateral authority to curtail individual rights without prompt judicial review. In 2002, in *Marab v. IDF Commander in the West Bank*, the court reviewed a military order that authorized the detention of Palestinians for up to twelve days before judicial review. Rejecting the military's claim that a need for effective interrogation justified this practice, the court held that a twelve-day period without judicial review "unlawfully infringe[d] upon the judge's authority, thus infringing upon the detainee's liberty, which the International and Israeli

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65 Basic Law: Judicature § 15(c) (vesting the Supreme Court of Israel with jurisdiction as the final court of appeals in cases involving domestic law, and as a High Court of Justice, a court of first instance, in cases arising from detention orders in the West Bank and Gaza).

66 *Id.*

67 *See, e.g.*, H.C.J. 3239/02, *Marab v. IDF Commander*, 57 (2) P.D. 349 (Heb.) (reviewing the detention of Palestinians by the military).

frameworks are intended to protect."[68] The court also recognized the right of a detainee "to be visited by the Red Cross" and to have his family "informed of his whereabouts."[69] Thus, even in the West Bank and Gaza, and at a time of intense terrorist activity, the judiciary has subjected detention practices to careful scrutiny to guarantee basic human rights and has limited the military's ability to detain suspects indefinitely and incommunicado. Like *Brogan* and *Brannigan*, *Marab* constrains executive power by applying the due process principles that our most experienced democratic allies have learned must be part of democracy's opposition to terrorism.

CONCLUSION

A decision authorizing the executive to detain U.S. citizens in civilian settings indefinitely without clear legislative authorization would set constitutional precedent starkly inconsistent with the standards embraced by leading democracies of the world. *Amici* respectfully urge this court to affirm the judgment of the district court.

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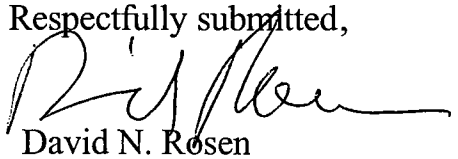
[68] *Id.* ¶ 35.

[69] *Id.* ¶ 46. In *Marab*, the court also upheld the order's provision allowing detention without access to counsel for four days with extensions available for up to 32 days.

Respectfully submitted,



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APPENDIX I

Amici include[1]:

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Eyal Benvenisti is Professor of Law at Tel Aviv University and Director of the Cegla Center for Interdisciplinary Research of the Law. He has previously served as chair of the Association for Civil Rights in Israel.

Baruch Bracha is Professor of Law at Tel Aviv University and former Dean of Haifa University School of Law. From 1980 to 1997 he was Editor-in-Chief of the Israeli Supreme Court Official Reports.

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Emanuel Gross is Professor of Law at Haifa University, and former Chief Judge of the District Military Court of the Southern Command of the Israeli Defense Forces.

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[1] *Amici* appear in their personal capacities. Current affiliations of *Amici* are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions presented.

Lord Goodhart QC has held the position of Queen's Counsel since 1979, was knighted for his public service in 1989, and appointed a Life Peer in the House of Lords of the Parliament of the United Kingdom in 1997.

Robert Hazell is Professor of Government and the Constitution, and Director of the Constitution Unit, at University College London.

Jeffrey Jowell QC is Professor of Public Law, University College London, Former Dean of the UCL Law Faculty, and a Vice President of the Council of Europe's Commission for Democracy through Law (the Venice Commission).

Lord Lester of Herne Hill QC is a Life Peer and a member of the Parliamentary Joint Select Committee on Human Rights, Honorary Professor of Public Law at University College London, and President of Interights (the International Centre for Human Rights).

Kenneth Mann has served as the State of Israel's first Chief Public Defender and is now Associate Professor of Law at Tel Aviv University.

Christopher McCrudden is Professor of Human Rights Law, University of Oxford and Overseas Affiliated Professor of Law at the University of Michigan. He is a former member of the United Kingdom's Northern Ireland Standing Advisory Commission on Human Rights, 1984-1988.

Michel Rosenfeld is Justice Sydney L. Robins Professor of Human Rights at Benjamin N. Cardozo School of Law and president of the U.S. Association of Constitutional Law.

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APPENDIX II

SUMMARY OF DETENTION LEGISLATION FOR CITIZENS OF U.S. DEMOCRATIC ALLIES

Country	**Australia**
Legislative Authority	Yes. Australian Security Intelligence Organisation Act 1979, No. 113 (1979) (Austl.), *amended to include anti-terrorism provisions by* Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, No. 77 (2003), amend. 24 (Austl.) [hereinafter ASIO].[1]
Detention Period	Detention capped at 168 hours[2] with total hours of interrogation limited to 24.[3]
Judicial Review	Yes. Judge must first authorize detention or interrogation, and such authorization must be periodically reviewed and reissued.[4] During each 24-hour period in which questioning occurs, detainee must be informed that he can seek remedy to detention and treatment in federal court.[5]
Access to Counsel	Yes. Subject to limited judicially imposed conditions to enable some interrogation.[6]

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1 Australia has recently amended its criminal code to extend the period that police may interrogate individuals arrested on suspicion of terrorism-related offences from four to twenty-four hours after arrest, with additional time in cases where investigative information is required to be obtained from other time zones. *See* Anti-terrorism Act 2004, No. 104 (2004) (Austl.), Schedule 1, §§ 4-12. The ASIO's more restrictive provisions apply to individuals, like Padilla, who have not been charged with an offence.

2 ASIO § 34C(4)(3)(c).

3 § 34HA(6),(7).

4 § 34C(1)-(6).

5 § 34DA(3).

6 § 34C(3B).

Country	Canada
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Criminal Code, R.S.C. 1985, c. C-46 §§ 83.29-83.3 (Can.), *amended by* Anti-Terrorism Act 2001, Ch. 41 (Can.).
Detention Period	Detainee must be brought before a judge within 24 hours, or as soon as one becomes available.[7] Detention must cease within 48 hours of that judicial hearing.[8]
Judicial Review	Yes. Judicial authorization of order to detain for the purposes of an investigative hearing.[9] Detainee must be brought before judge upon arrest.[10] Review of detention within 24 hours of arrest or as soon as judge becomes available.[11]
Access to Counsel	Yes. Upon arrest or detention.[12]

7 § 83.3(6).

8 § 83.3(7)-(9).

9 § 83.28(4)(7)(9).

10 § 83.29(3).

11 § 83.3(6).

12 § 83.3.

Country	France
Legislative Authority	Yes. Legislative provisions embodied in criminal code and code of criminal procedure. Most recent statute: C. PR. PÉN., arts. 63, 63-4, 706-73, 706-88 (Fr.), *last modified by* Law No. 2004-204 of Mar. 9, 2004, J.O. Mar. 10, p. 4567.
Detention Period	Initial detention of maximum 24 hours, may be extended to 48 hours with written authorization from the procureur.[13] For suspected terrorists, detention may, with written authorization from a judge, be extended for two additional 24-hour periods for a total of 96 hours.[14]
Judicial Review	Yes. Authorization of detention by a procureur within 24 hours.[15] Extensions of detention beyond 48 hours must be authorized by judge.[16]
Access to Counsel	Yes. Initial access may be delayed for 72 hours for suspected terrorists.[17]

13 Art. 63.

14 Art. 706-88.

15 Art. 63.

16 Arts. 706-88.

17 Arts. 63-4, 706-88.

Country	Germany
Legislative Authority	Yes. Legislative authorization is required by the German Constitution. Grundgesetz [GG] art. 20 (F.R.G.). Security laws established by each individual state: 1. Baden-Württemberg: Polizeigesetz Baden-Württemberg (PolG-BW) § 28 2. Bavaria: Polizeiaufgabengesetz (PAG) § 17 3. Berlin: Allgemeines Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Berlin (ASOG) § 30 4. Brandenburg: Polizeigesetz Brandenburg (BbgPolG) § 17 5. Bremen: Bremisches Polizeigesetz (BremPolG) § 15 6. Hamburg: Gesetz zum Schutz der öffentlichen Sicherheit und Ordnung in Hamburg (SOG) § 13 7. Hesse: Hessisches Gesetz über die öffentliche Sicherheit und Ordnung (HSOG) § 32 8. Mecklenburg-Western Pomerania: Gesetz über die öffentliche Sicherheit und Ordnung in Mecklenburg-Vorpommern (SOG-MV) § 55 9. Lower Saxony: Niedersächsisches Gefahrenabwehrgesetz (NGefAG) § 18 10. North Rhine-Westphalia: Polizeigesetz Nordrhein-Westfalen (PolG-NRW) § 35 11. Rhineland-Palatinate: Polizei- und Ordnungsbehördengesetz Rheinland-Pfalz (POG-RP) § 14 12. Saarland: Saarländisches Polizeigesetz (SaarPolG) § 13 13. Saxony: Polizeigesetz des Freistaates Sachsen (SächsPolG) § 22 14. Saxony-Anhalt: Gesetz über die öffentliche Sicherheit und Ordnung des Landes Sachsen-Anhalt (SOG LSA) § 37 15. Schleswig-Holstein: Landesverwaltungsgesetz Schleswig-Holstein (LVwG-SH) § 204 16. Thüringer: Polizeiaufgabengesetz (ThürPAG) § 19 National criminal law authorizing detention of criminal suspects: Criminal Procedure Code §§ 112 *et seq*. StPO (F.R.G.).
Detention Period	Individual state security laws: 1. PolG-BW § 28(3): maximum of two weeks

Country	Germany
	2. PAG § 20: maximum of two weeks 3. ASOG § 33: only while imminent threat of committing offense exists 4. BbgPolG § 20: maximum of four days 5. BremPolG § 18: only while imminent threat of committing offense exists or longer detention would not be proportionate 6. SOG § 13c: only while imminent threat of committing offense exists 7. HSOG § 35: maximum of six days 8. SOG-MV § 56: maximum of ten days 9. NGefAG § 21: maximum of ten days 10. PolG-NRW § 38: only while imminent threat of committing offense exists 11. POG-RP § 17: maximum of seven days 12. SaarPolG § 16: only while imminent threat of committing an offense exists 13. SächsPolG § 22: maximum of two weeks 14. SOG LSA § 40: maximum of four days 15. LVwG-SH: no explicit statutory limit 16. ThürPAG § 22: maximum of ten days Criminal Code: Detention without warrant: 24 hours.[18] Judge may order pre-trial investigative detention without bail. [19] Such detention may not exceed 6 months without approval by a higher court.[20]
Judicial Review	Yes. Individual state security laws: within one day.[21]

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18 StPO §§ 128, 135.

19 *Id.* §§ 112, 114.

20 *Id.* § 121.

21 *See* PolG-BW § 28; PAG § 18; ASOG § 31; BbgPolG § 18; BremPolG § 16; SOG § 13a; HSOG § 33; SOG-MV § 55; NGefAG § 19; PolG-NRW 36; POG-RP

(footnote continued on next page)

Country	Germany
	Criminal Code: Detainee must be brought before a judge within 24 hours.[22] Detainees have the right to challenge their detention,[23] and a right to attend and participate in that challenge.[24]
Access to Counsel	Yes. Individual state laws: Detainees have right to contact an attorney.[25] Criminal Code: Informed at time of arrest of right to counsel throughout the proceedings.[26] Right to court-appointed counsel after three months.[27]

(footnote continued from previous page)
§ 15; SaarPolG § 14; SächsPolG § 22; SOG LSA § 38; LVwG-SH § 204; ThürPAG § 20.

22 StPO §§ 115, 115(a).

23 *Id.* § 117 Nr. 1.

24 *Id.* § 118a Nrs. 2-3.

25 *See* PolG-BW § 28; PAG § 19; ASOG § 32; BbgPolG §19; BremPolG § 17; SOG § 13b; HSOG § 34; SOG-MV § 56; NGefAG § 20; PolG-NRW § 37; POG-RP § 16; SaarPolG § 15; SächsPolG § 22; SOG LSA §39; LVwG-SH § 205; ThürPAG § 21.

26 StPO §§ 136 Nr. 1, 137, 168c.

27 *Id.* § 117 Nr. 4.

Country	Israel
Legislative Authority	Yes. Legislative authorization is required by Basic Law.[28] Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978-79) (Isr.). Incarceration of Unlawful Combatants Law, 2002 (Isr.).
Detention Period	6 months, but may be renewed. Renewal requires judicial approval based on court's independent exercise of discretion. No limit on number of renewals.[29]
Judicial Review	Yes. 1979 Detention Law: Within 48 hours, the detainee must be brought before the President of the District Court to confirm, set aside, or shorten the length of detention.[30] An additional review must take place within 3 months.[31] Within 6 months, the Minister of Defense may renew the detention order or the detainee must be released. If the detention order is renewed, judicial review must occur again at 48 hours and within 3 months. The Minister of Defense may renew the detention order indefinitely.[32] The detainee can appeal to the Supreme Court.[33] 2002 Incarceration of Unlawful Combatants: Within 14 days, the prisoner must be brought before a judge of the District Court, who may uphold or quash the detention order. Within 30 days of the District Court hearing, the detainee can appeal to Supreme Court.

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28 Basic Law: Human Dignity and Liberty, 1992 §§ 5, 8.

29 Emergency Powers (Detention) Law § 2(b); Incarceration of Unlawful Combatants Law § 5(c).

30 Emergency Powers (Detention) Law § 4(a).

31 *Id.* § 5

32 *Id.* § 2(b).

33 *Id.* § 7(a).

Country	Israel
	At 6 months, detainee must be brought before a judge of the District Court, who must order the detainee's release if he finds that such release will not harm state security. Within 30 days of the review hearing, the detainee may appeal to the Supreme Court.[34]
Access to Counsel	Yes. 2002 Unlawful Combatants Law: Counsel must be provided within 7 days (but no later than 7 days prior to hearing).[35] 1979 Detention Law: Does not specify at what point detainee may have access to counsel, but indicates that detainee has right to counsel at all review proceedings.[36]

(footnote continued from previous page)

[34] Incarceration of Unlawful Combatants Law § 5.

[35] Incarceration of Unlawful Combatants Law § 6(b).

[36] Emergency Powers (Detention) Law § 8(a) (referring to "right to counsel" during all review proceedings, although counsel may be limited to members of bar "authorized . . .to act as military defence counsel in courts martial.").

Country	Spain
Legislative Authority	Yes. Constitution requires that legislation ensure "necessary participation of the courts and proper parliamentary control" over the detention of suspected terrorists.[37] L.E. CRIM. arts. 384, 489, *et seq., modified by* Organic Law 15/2003 of 25 Nov. 2003.
Detention Period	Constitutional limit of 72 hours on detention without charge,[38] which can be extended by 48 hours based on judicial discretion for suspected terrorists.[39] Detainee must be charged after initial five days, but a judge can authorize an additional eight days of incommunicado detention after charge.[40] After charging the detainee, there is a two-year limit on detention, unless a judge grants a two-year extension.[41] No detainee may be held for more than four years without being brought to trial.[42]
Judicial Review	Yes. Within 120 hours, a detainee must be brought before a judge. Extensions of detention require judicial authorization.[43]
Access to Counsel	Yes. Court may appoint counsel.[44] During period of incommunicado detention, detainee is assisted by legal aid attorney.

37 Constitución Española [C.E.] art. 55 (Spain).

38 C.E. art. 17(2).

39 L.E. CRIM. art. 496.

40 L.E. CRIM. art. 509.

41 *Id.* art. 504.

42 *Id.*

43 C.E. art. 17(4); L.E.CRIM. arts. 496, 504.

44 C.E. art. 17(3); *see also* L.E.CRIM. art. 384.

Country	United Kingdom
Legislative Authority	Yes. Criminal detention: Terrorism Act, 2000, c.11, § 41; Schedule 8 (U.K.) Preventive detention: Prevention of Terrorism Act 2005, c.2 (U.K.)
Detention Period	2000 Act: Initial 48 hours in detention.[45] May be extended for another five days and then another seven days with judicial authorization.[46] 2005 Act: Six months, but may be renewed by court for potentially indefinite period.[47] If Parliament does not renew legislation, however, authority expires at end of twelve months.[48] If legislation is renewed, individual orders in effect beyond twelve months may still require legislative approval.[49]
Judicial Review	Yes. 2000 Act: After initial 48 hours, judicial authorization of extension required.[50] 2005 Act: Only court may issue, modify, or extend a derogating control order.[51] Each order is reviewed at least twice.[52]

45 2000 Act § 41.

46 2000 Act Schedule 8, ¶¶ 29, 36, *as amended by* Criminal Justice Act 2003, c. 44, § 306.

47 2005 Act § 4(8).

48 2005 Act § 13(1).

49 2005 Act § 6(3)-(6).

50 2000 Act Schedule 8, ¶¶ 29, 36.

51 2005 Act §§ 1(2), 4(9), 7(4)-(5).

52 2005 Act §4.

Country	United Kingdom
Access to Counsel	Yes. 2000 Act: As soon as "reasonably practicable,"[53] and "at any time" within 48 hours.[54] 2005 Act: Detainee has legal representation. If security requires it, detainee's interests may be represented by "special advocate" in closed sessions.[55]

53 2000 Act Schedule 8, ¶ 7(1).

54 *Id.* ¶ 7(2).

55 2005 Act Schedule §§ 4, 7.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6396 Caption: PADILLA v. HANFT

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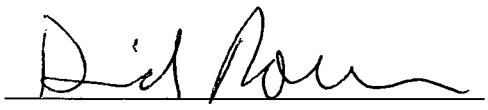

Attorney for Appellee

Dated: 6/13/2005

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I hereby certify that on this 13th day of June 2005, an original and seven copies of this Brief Amicus Curiae of Comparative Law Scholars and Experts on the Laws of the United Kingdom and Israel in Support of Appellee were filed by placing the same in Federal Express overnight mail, postage prepaid, to:

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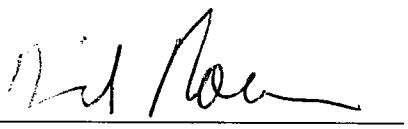

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