NATIONAL SECURITY, SECRET EVIDENCE AND PREVENTIVE DETENTIONS:
THE ISRAELI SUPREME COURT AS A CASE STUDY

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1. INTRODUCTION

The ‘war on terror’ gave rise to various harmful state-sponsored means, including
preventive detentions, designed to stop suspected terrorists from committing future atrocities.
Judicial review provides the main protection against arbitrary and unjustified preventive
detention, which is often based on secret evidence.

In the first decade of the twenty-first century, the Israeli Supreme Court reviewed
hundreds of preventive detention cases. Scholars have argued—based on the Court’s rhetoric
in a few renowned cases – that Israel’s judicial review of preventive detentions is robust and
effective.¹ However, there has been little scrutiny of the Court’s actual review practice beyond
a handful of high-profile, oft-quoted cases. This chapter presents, for the first time, a
systematic empirical analysis of the Israeli Supreme Court’s case law regarding preventive
detention from 2000 to 2010. The analysis encompasses all of the relevant judgments,
including hundreds of short, laconic and unpublished decisions. The findings reveal a
meaningful gap between the rhetoric of a few renowned cases and actual practice. On the one
hand, this study reveals that out of the 322 cases decided by the Israeli Supreme Court in this
period, not a single case resulted in a release order, and in no case did the Court openly reject

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Israeli Supreme Court, 45(3) VANDERBILT JOURNAL OF TRANSNATIONAL LAW 639 (2012).
¹ Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 MICH.
the secret evidence. On the other hand, more subtle Court dynamics were detected, such as ‘bargaining in the shadow of Court’ and ‘mediation’ efforts on behalf of the Court.

In order to lift the veil of secrecy that typically characterizes judicial proceedings regarding preventive detentions, the study involved seventeen in-depth interviews, with all of the relevant stakeholders, including Supreme Court Justices, defense lawyers, state attorneys, Israeli Security Agency (ISA) representatives, and former detainees. These interviews provide a unique glimpse into the judicial review process and reveal some of the behind-the-scenes dynamics of that process.

Put together, the comprehensive case law analysis and in-depth interviews offer extensive information on the actual practice and the inherent difficulties of judicial review of preventive detention cases, and reveal the unique methods the Court has developed to confront them. Fundamentally, they cast doubt on arguments that Israel’s detention model is one that should be emulated by other countries.

2. JUDICIAL REVIEW OF PREVENTIVE DETENTIONS: THE NORMATIVE FRAMEWORK

This paper focuses on a specific preventive detention regime, also referred to as ‘executive detention’,2 ‘administrative detention’,3 or ‘security detention’.4 This type of detention is a proactive mechanism operated by the Executive or military authorities in order to prevent future harm to national security.5 In accordance with this mechanism, individuals can be preventively detained although they have never committed any crime; they are being detained in order to prevent them from committing future crimes or offenses.

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In the first decade after the emergence of a global ‘war on terror’, preventive detention without criminal charge has become an increasingly popular counter-terrorism mechanism. The Guantánamo detainees are perhaps the most infamous example, but they are not alone. All around the globe, from India, to Israel, to the Russian Federation, to Australia, states facing terrorist threats are employing some sort of preventive detention regime. Interestingly, even states such as Israel, which has used preventive detention for decades, introduced new preventive detention regimes and began using them more widely after the terrorist attacks in the US on September 11, 2001.

Judicial review of preventive detention is particularly important for several reasons: (a) the inherent imbalance between the state and the detainee; (b) the state’s reliance on secret evidence and ex parte proceedings; (c) the Court’s deference to the state’s discretion in issues of national security; and (c) the bias of all decisionmakers in favor of detention, given the differential risks of false positives and false negatives. An incorrect decision is revealed only when the executive or the judge releases from custody a dangerous individual who is later

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8 Jinks, supra note 2.


12 See infra.


15 David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories 118 (2002); Kitai-Sangero, supra note 4, at 912.
involved in a terrorist activity. An incorrect decision that approves detention of an innocent individual who would never have committed a terrorist act is invisible, and indeed, unknowable.  This is substantially different than criminal proceedings, which deal with past offenses. If an offense has already occurred, a defendant can materially prove his or her innocence as to that offense. But an innocent person wrongly detained can never prove that he would not have engaged in illegal acts even if he had been free.

Since one of the basic characteristics of preventive detentions is the reliance on privileged intelligence information provided by undisclosed sources, and collected, secretly, by state security agencies, the Court’s judicial review in these cases becomes even more challenging.

In order to confront the difficulties posed by the use of secret evidence, two distinct models of judicial review have emerged in preventive detention cases: the ‘judicial management’ model and the ‘special advocate’ model. The former rests on ex parte proceedings, in which the judge plays a cardinal role in executing an independent, inquisitorial scrutiny of the secret evidence. The latter model introduces ‘special advocates’ or government attorneys approved by state authorities, whose role is to represent the detainee’s interests with respect to the secret evidence, and are permitted to confront that evidence in closed proceedings. The special advocate communicates with the detainee before seeing the evidence, but generally cannot once he has been exposed to the secret evidence.

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16 Kitai-Sangero, supra note 4, at 909.
17 Van Harten elaborates on three different weaknesses in this regard: (1) the judge is precluded from hearing additional information that the individual could have supplied had he known the Executive’s claims; (2) courts are uniquely reliant on the Executive to be fair and forthcoming about confidential information; and (3) the dynamic or atmosphere of closed proceedings may condition a judge to favor unduly the security interest over priorities of accuracy and fairness. Gus Van Harten, Weaknesses of Adjudication in the Face of Secret Evidence, 13 INT’L J. EVID. & PROOF 1, 1 (2009).
18 See Barak-Erez & Waxman, supra note 12, at 21–2.
19 See id. at 27–31.
20 Id.
judicial management model is employed in the Israeli preventive detention regime, the special advocate system was adopted in the United Kingdom and Canada.21

Comparing and analyzing these two models, Professor (and now Supreme Court Justice) Daphna Barak-Erez and Professor Matthew Waxman recently opined that, roughly speaking, the special advocate model enhances participation, while the judicial management model is designed to enhance accuracy – and can better regulate the detention system across many cases.22 This chapter will assess the validity of this proposition by empirically analyzing the Israeli Supreme Court judicial review of preventive detentions.

3. PREVENTIVE DETENTIONS IN ISRAEL

Israel currently holds more than 300 detainees under three different preventive detention regimes.23 In the Israeli Territory applies the Emergency Powers (Detentions) Law of 1979 (IDL).24 Under the IDL regime, the Minister of Defense is vested with the authority to order a person’s detention without trial for the protection of state security and public safety for a period of up to six months. The detention may be extended indefinitely by repeatedly issuing new orders.25 The IDL mandates judicial review by the civilian court system;26 initially, within forty-eight hours from the time of arrest,27 and then repeatedly every three months.28 Since detention orders are often based on secret evidence, the IDL specifies that while assessing the secret evidence, the reviewing judge is not bound by the regular rules of evidence.29

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23 As of May 2012.
24 Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1979) (Isr.).
25 Id. § 2(a).
28 Id. § 5.
29 Id. § 6. For discussion on secret evidence in Israeli preventive detention proceedings, see Barak-Erez & Waxman, supra note 12, at 19.
particular, the judge may ‘admit evidence not in the presence of the detainee or his representative, or without revealing it to them’, if he is convinced that disclosure of the evidence is liable to ‘harm the security of the region or public security’.30

In the West Bank (and until recently also in Gaza) – an area regarded by Israeli courts as subject to belligerent occupation – military law applies and independently authorizes preventive detention.31 The most recent military order governing preventive detentions in the West Bank is Preventive Detentions Order No. 1591 (MDO).32 The MDO authorizes IDF’s military commanders to detain a person for a maximum period of six months when there is ‘a reasonable basis to believe that the security of the region or public security’ requires it.33 Here too, the detention may be extended indefinitely, six months at a time.34 The detainee must be brought before a military judge within eight days to determine whether the detention is justified.35 Similar to the IDL regime, the MDO includes a provision permitting the use of secret evidence that is not revealed to the detainee or his (or her) representative, and permits deviations from the regular rules of evidence.36 The military court’s decision may be appealed to the Military Court of Appeals by either the detainee or the military commander.37 Although, according to the MDO, the decision of the Military Court of Appeals should be the last instance of review for the military commander’s decision, a practice developed over the years of

30 Emergency Powers (Detention) Law § 6(c).
33 Id. § 1(a).
34 Id. § 1(b).
35 Id. § 4(a).
36 Id. §§ 7–8.
37 Id. § 5.
submitting habeas corpus petitions to the Israeli Supreme Court, sitting as High Court of Justice, to review the decisions of the Military Court of Appeals.\textsuperscript{38}

In 2002, the Israeli parliament introduced a new preventive detentions law: the \textit{Incarceration of Unlawful Combatants Law of 2002 (UCL)}\textsuperscript{39}. The UCL gives state authorities the power to detain ‘unlawful combatants’, who are as defined in § 2 of the law as persons who have taken part in hostilities against the State of Israel, directly or indirectly, or who are members of a force carrying out hostilities against Israel, and who do not satisfy the conditions of prisoner of war status under international humanitarian law.\textsuperscript{40} According to the UCL, persons identified as unlawful combatants may be subject to preventive detention for an unlimited period of time if the Chief of Staff believes that their release will harm state security.\textsuperscript{41} Article 5(a) determines that within fourteen days from the date of arrest, the detainee must be brought before a district court judge to determine if the detention is justified.\textsuperscript{42} A district court judge must then review the detention every six months.\textsuperscript{43} Article 5(e) permits the court to depart from the rules of evidence, including the admittance of evidence without the presence of the detainee or the detainee’s lawyer.\textsuperscript{44} In June 2008, the Israeli Supreme Court ruled on several appeals that attacked the constitutionality of the UCL based on Israeli constitutional law and international humanitarian law.\textsuperscript{45} While upholding the law and dismissing the appeals,\textsuperscript{46} the Court interpreted the law narrowly, thus minimizing its scope of application.\textsuperscript{47}

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\item[38] Esther Rosalind Cohen, \textit{Justice for Occupied Territory? The Israeli High Court of Justice Paradigm}, 24 COLUM. J. TRANSNAT’L L. 471, 471 (1986).
\item[40] \textit{Id.} art. 2.
\item[41] \textit{Id.} art. 3(a).
\item[42] \textit{Id.} art. 5(a).
\item[43] \textit{Id.} art. 5(c).
\item[44] \textit{Id.} art. 5(e).
\item[45] CrimA 6659/06 A v. State of Israel, 47 I.L.M. 768, para. 3 (2008) (Isr.).
\item[46] \textit{Id.} para. 53.
\item[47] \textit{Id.} para. 21.
\end{footnotes}
4. THE JUDICIAL REVIEW PROCESS

4.1 The Reasoned and Renowned Judgments

Israeli and international scholars alike generally accept that the Israeli Supreme Court’s judicial review of preventive detention cases is robust and effective. The Israeli judicial review model is characterized as ‘interventionist’, and the Israeli Supreme Court was commended for asserting judicial review over government actions that affect Palestinians, both within Israel and the West Bank and Gaza, even in the midst of the Palestinian uprising. In spite of the common criticism that the use of secret evidence contradicts basic requirements of fairness and due process, the Israeli Supreme Court has been praised for developing ‘an activist approach in its review role of the non-disclosed evidence’.

Indeed, some of the Court’s landmark cases in this regard created meaningful legal constraints on the Executive. The extraordinary decision in the Bargaining Chips case, for example, which prohibited detention for the purpose of using detainees as bargaining chips to trade for release of Israeli captives, was undoubtedly a courageous decision that was not easily received by state authorities or the Israeli public. In other well-known cases, the Court stressed the significance of judges thoroughly examining the materials, ensuring that every piece of evidence connected to the matter at hand is submitted to them, and never allowing the high

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52 Barak-Erez & Waxman, supra note 12, at 23–4.

53 In this case, the petitioners were Lebanese citizens held by Israeli authorities as bargaining chips in an attempt to release an Israeli navigator from captivity. In its decision—reversing its previous judgment on the matter—the Supreme Court held that the desire to release Israelis from captivity does not justify preventive detention. The Court determined that administratively detaining the petitioners may only be justified by their individual dangerousness. CrimFH 7048/97 Anonymous v. Minister of Def. 54(l) PD 721, 743 [2000] (Isr.).
volume of cases to affect either the quality or the extent of the judicial examination.\textsuperscript{54} In a more recent case, the Court dealt specifically with the problem of secret evidence, stating that the state’s use of secret evidence imposes on the Court a special duty to take extra care in reviewing the confidential material and to act as the detainee’s ‘mouth’.\textsuperscript{55} These and similar high profile decisions have been cited by legal scholars in Israel and in other countries as demonstrating a rigorous and activist judicial approach to preventive detention cases.\textsuperscript{56} As appealing as this image may be, the legal scholarship thus far has been deficient in asking whether the practice matches the rhetoric. While the Court’s review of the normative legal framework is indeed powerful, its ability to review concrete detention orders is much less meaningful. When the actual practices are examined, it becomes clear that the reasoning of these few cases offers a misleading description of the actual judicial review practice and its outcomes.

\textbf{4.2 The Actual Practice of the Court – All of the Relevant Decisions}

In the first decade of the twenty-first century, the Israeli Supreme Court performed judicial review of 322 preventive detention cases. Out of these, not even a single case resulted in a judicial decision to release the detainee,\textsuperscript{57} and only 14 percent received an elaborated and reasoned judgment, while the rest received only a summary order of affirmance. Ninety-five percent of the Court judgments were based on secret evidence that was presented by the state during ex parte hearings.\textsuperscript{58} Below are some of the main findings.

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\footnote{HCJ 3239/02 Marab v. IDF Commander in the W. Bank 57(2) PD 349 [2002] (Isr.), at para. 33 (quoting Sajadiya 42(3) PD at 821).}
\footnote{HCJ 11006/04 Khadri v. IDF Commander in Judea & Samaria para. 6 [2004] (unpublished decision) (Isr.).}
\footnote{See, e.g., Barak-Erez & Waxman, supra note 12; Blum, supra note 46; Mersel, supra note 46.}
\footnote{With the exception of the Lebanese Bargaining Chips case, which originated in 1994 in an appeal that was denied. In 1997, the Court agreed to rehear the case, and in April 2000 accepted the petitioner’s legal claim that the IDL does not authorize the state to detain non-dangerous aliens as ‘bargaining chips’ for purposes of future negotiations. Anonymous, supra note 52.}
\footnote{This detail relates to the 220 cases that were heard in Court (as will be explained hereinafter, 102 of the cases were withdrawn before the Court’s hearing). In the remaining 5 percent the Court did not conduct ex parte proceedings since the case concerned only legal questions, was dismissed \textit{in limine} or due to the objection of the detainee.}
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4.2.1 The outcomes of the cases

One of the most interesting and surprising findings relates to the results of the cases; in particular, to the striking gap between the robust language of the published cases and the complete absence of actual intervention regarding individual detention orders. In the 282 MDO cases, the Court granted only two petitions (less than 1 percent); the first being the state’s petition to reverse the Military Court of Appeals' decision to release a detainee. The only successful petition submitted by a detainee against specific military detention orders is the Marab case, in which the Court invalidated military detention orders that authorized IDF officers in the West Bank to order the detention of a detainee for a period of twelve days (under one order) and eighteen days (under another order), without any judicial involvement. However, this declaration of nullification was suspended for a six month period and the Court did not actually order to release any of the detainees.

Regarding the thirteen IDL appeals, four (31 percent) were partly successful: in two cases, the Supreme Court shortened the length of the detention orders; in another two cases the Court reversed part of the district court’s legal analysis, thus setting out a binding legal framework for the lower court in accordance with the detainees’ legal arguments.

Of the twenty-seven UCL appeals, only one was partly successful. In A v. State of Israel, the Court accepted the detainee’s argument that he did not fall under the UCL’s definition of ‘unlawful combatant’. But instead of ordering his immediate release, the Court suspended its judgment for twenty-one days to enable the state to consider other alternatives.

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59 HCJ 1389/07 Commander of IDF Forces in the Judea & Samaria Area v. Military Court of Appeals [2007] (Isr.).
61 Id. para. 36.
65 Id.
Additionally, in five of the cases, the Court shortened the time periods between judicial reviews.  

4.2.2 Rate of withdrawals

The research identified a significant rate of withdrawals: 36 percent of the MDO cases were withdrawn by the petitioners (the detainees) a short period of time before the court hearing. Moreover, in 19 percent of the MDO cases, the petitions were withdrawn after the Court had examined the secret evidence ex parte. An explanation for this unique and surprising phenomenon will be offered hereinafter, in section 5.2.

4.2.3 The length of the decisions

Out of the remaining MDO cases (which were not withdrawn by the detainees), only 12 percent ended in detailed and reasoned judgments (of more than three pages), while 70 percent resulted in very short (one to six lines), summary decisions offering little or no analysis of the evidence or law. In contrast, IDL and UCL appeals never resulted in such short judgments; most resulted in a detailed, reasoned and fully-elaborated decision of more than three pages (85 percent in the UCL appeals and 69 percent in the IDL appeals), while the remaining cases resulted in short (one to three page) decisions.

4.2.4 The length of the detention

Although the length of a detention is one of the most crucial and relevant factors for judicial review, in 66 percent of its MDO decisions the Court never mentions it. In contrast, all decisions in UCL cases include the length of the detention, and only one IDL decision omitted this important detail. More importantly, in the decisions that did not review the

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67 The reasons for this finding will be discussed in section VI(B), infra.
detention’s length, 32 of the cases involved administrative detentions longer than two years. All of these cases concerned non-Israeli detainees, either Palestinians or Lebanese citizens.

4.2.5 The nationality of the detainees

Ninety-five percent of the cases concerned Palestinian detainees from the West Bank and Gaza, with the remaining five percent divided almost equally between Israeli Palestinians, Israeli Jews, and Lebanese nationals.

4.2.6 The court’s ‘recommendations’ to the parties

In 15 percent of the cases heard by the Court, the Court included in its decision specific instructions, recommendations or suggestions regarding the case. These included requests for the state to reconsider its position, recommendations not to prolong the detention in the future, or statements that new and updated materials would be required in order to issue future detention orders. Additionally, in 9 percent of the MDO cases the Court successfully mediated between the parties and memorialized their agreement or the state’s concessions. A typical such agreement is that the state will not issue a new detention order at the end of the current detention order, as long as no new intelligence information will be gathered against the detainee during the current detention period. In other cases, although upholding the detention order, the Court’s judgment included general future legal instructions on preventive detention, such as instructions to the state to interrogate detainees immediately after their arrest (invalidating the state’s practice of holding Palestinians in preventive detention for long periods of time without conducting any interrogation).68

68 See, e.g., HCJ 1546/06 Gazawi v. Military Commander in the W. Bank para. 6(3) [2006] (unpublished decision) (Isr.); HCJ 6068/06 El-Afifi v. Military Commander in the W. Bank para. 6(5) [2006] (unpublished decision) (Isr.); HCJ 9015/06 Taweel v. Military Commander in the W. Bank para. 4(2) [2006] (unpublished decision) (Isr.).
5. ‘BEHIND THE SCENES’ OF THE JUDICIAL REVIEW PROCESS

The case law analysis revealed a surprising increase in the number of petitions and appeals to a court that has not released a detainee from preventive detention in the last ten years; as well as a high and unexplained rate of withdrawals. In order to suggest some possible explanations for these findings, the author conducted seventeen in-depth interviews with the various stakeholders that participate in the judicial review process, namely: Supreme Court Justices, state attorneys, defense lawyers, ISA representatives and Palestinian (former) detainees. Due to the sensitivity of the discussed issues and the limited amount of information contained in the relevant judgments, these interviews provide a rare opportunity to witness the actual dynamics of the judicial review process.

5.1 Secret Evidence, Ex Parte Proceedings, and the Judicial Management Model

The analysis of the Court’s decisions revealed an almost absolute reliance on ex parte proceedings and on secret evidence during the preventive detention hearings. In the interviews, almost all of the former Supreme Court Justices expressed at least some level of discomfort with the use of secret evidence, as well as with the Court’s ability to question the state’s position. One of the Justices expressed a feeling of profound unease in handling such cases, and explained that these hearings are extremely difficult due to their unique ex parte and preventive character. Justice B added a similar description:

You have a feeling of discomfort. I never enjoyed sitting in preventive detention cases. No one enjoys it. Judges don’t like these cases, because we are trained to criminal proceedings, with witnesses, cross-examination . . . It is not pleasant. You want to run away from it as fast as you can, but you know that it is necessary for the sake of your people and country.

More specifically, one justice noted the difficulty judges have differing with the ISA assessment of the secret evidence:

69 Interview with Justice A, Supreme Court of Isr. (Dec. 20, 2010).
70 Id.
71 Interview with Justice B, Supreme Court of Isr. (Dec. 21, 2010).
The judges cannot differ with the ISA story. How can I? I don’t have the defense lawyer jumping to say ‘it never happened,’ ‘this is not true.’ My ethos, as a judge, is that I have two parties. Of course, I can think by myself, but I need tools, which are missing . . . at most I have very limited tools.\textsuperscript{72}

Defense lawyers considered the hearings wholly inadequate. Defense Lawyer C demonstrated the dynamics of such proceedings, stating that:

The state attorneys should also come to the hearing nervous and tense—but they are always very relaxed. They know that no matter what they say or do, they will always win.\textsuperscript{73}

All of the defense lawyers that participated in the research expressed frustration with the way that the reliance on secret evidence and ex parte proceedings undermined their ability to ‘fight back’ and to challenge the ISA narrative. ‘I feel like a blind defense lawyer’, and ‘I represent my client with two hands tied behind my back’ were common metaphors during the interviews.\textsuperscript{74} The detainees themselves expressed similar views. ‘The ISA determines everything’,\textsuperscript{75} Detainee B explained. Detainee A felt the same:

I never knew what the case against me was, or what the evidence against me was. I had no information, and therefore had nothing to say in my defense.\textsuperscript{76}

Even the state attorneys felt that the judicial review of preventive detentions is ‘handicapped’\textsuperscript{77} by the reliance on secret evidence presented during the ex parte hearing. ‘In some cases even I felt that it was too easy’,\textsuperscript{78} said State Attorney A. Another state’s attorney further clarified:

With all the good will on the part of everybody, there is no way to conduct a fair ex parte hearing. The human nature and the dynamic of the process prevent fair hearing of the case.\textsuperscript{79}

\textsuperscript{72} Interview with Justice D, Supreme Court of Isr. (Dec. 22, 2010).
\textsuperscript{73} Interview with Defense Lawyer C (Dec. 22, 2010).
\textsuperscript{74} Interview with Defense Lawyer A (Dec. 19, 2010); Interview with Defense Lawyer B (Dec. 20, 2010).
\textsuperscript{75} Interview with ‘Mohamed’, Admin. Detainee. (Jan. 12, 2011).
\textsuperscript{76} Interview with ‘Yusuf’, Admin. Detainee (Jan. 12, 2011).
\textsuperscript{77} Interview with State Att’y B, (Dec. 23, 2010).
\textsuperscript{78} Interview with State Att’y A, (Dec. 21, 2010).
\textsuperscript{79} Interview with State Att’y B, (Dec. 23, 2010).
As revealed by the interviews, the absence of the defense lawyer and the detainee from the hearing is problematic not only because it makes challenging the ISA evidence difficult, but also because the presence of an adversary is critical to the development of a unique courtroom dynamic. Both state attorneys and ISA representatives felt that the unique atmosphere and dynamics of the ex parte proceedings created a trust-based relationship between the Justices and themselves. As explained by State Attorney C:

The ex parte proceedings create intimacy between the state representatives and the Justices.  

State Attorney A stated the interactions created a ‘secret dialogue’ between the state attorneys and the Court. ISA Representative A added his impression that the closed-door hearings and the repeated interaction created a ‘shared language’ used by the ISA representatives, the state attorneys, and the Supreme Court Justices.

Surprisingly, and in stark contrast to the scholarly view of these proceedings as rigorous and thorough, almost all of the interviewees – including the Justices themselves – agreed that the judicial management model suffers from inherent weaknesses that prevent, at least to some extent, meaningful and independent judicial assessment of the secret evidence. Interestingly, almost all of the Justices and state attorneys strongly supported the special advocate model and favored its implementation in the Israeli system. The interviews suggest, along with the finding that in ten years the Court has never rejected the use of secret evidence or released a detainee based on the insufficiency of the secret evidence, that the judicial management model may be less robust and effective than is currently believed.

5.2 Bargaining in the Shadow of the Court

Two of the most interesting and surprising findings previously discussed are the increasing number of petitions to the Court, despite the fact that the Court has not released an

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80 Interview with State Att’y C, (Jan. 26, 2011).
81 Interview with State Att’y A, (Dec. 21, 2010).
individual in the past ten years, and the high withdrawal rate of petitions. The interviews shed some light on these findings and suggest possible explanations that link these issues together.

Regarding the prehearing dynamics, many of the MDO petitions appeared to be submitted not to initiate a judicial review process, but rather to instigate some sort of negotiations with the state’s representatives and prompt a settlement. Apparently, as is evident from the interviews with state attorneys and ISA members, the submission of a petition to the HCJ instigates an internal state process, in which the ISA reassesses the necessity of the detention. If, at the end of this process, the ISA insists on the necessity of the detention, a specific state attorney is assigned to examine the strength of the case, and in some cases pressures the ISA to reach a settlement. The relevant attorneys – both state attorneys and defense lawyers – described at length this process of ‘bargaining in the shadow of the Court’, and explained the ‘behind the scenes’ impact of the Court on the state’s position. As was revealed by the interviews, this ‘bargaining’ process is pursued by detainees’ lawyers not only to reach a beneficial settlement, but also to acquire some information regarding the strength and nature of the secret evidence. The high withdrawal rate – 36 percent of the MDO cases – is therefore explained by either a settlement ending the detention (usually not immediately, but within a couple of months), or an ‘understanding’ on the detainee’s part that the secret evidence is strong, and it is therefore useless, and maybe even harmful, to continue with the judicial review process and present the secret evidence to the Court.

Without ignoring the advantages of this practice, mainly the state’s internal inspection that sometimes leads to ending the detention, there are some inherent deficiencies. First, there

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83 Interview with ISA Legal Advisor A, Isr. Sec. Agency (Feb. 14, 2011); Interview with State Att’y A, supra note 75.
84 Interview with State Att’y A, id.
86 Interview with Defense Lawyer A, supra note 71; Interview with Defense Lawyer B, supra note 71; Interview with Defense Lawyer C (Dec. 22, 2010); Interview with State Att’y A, supra note 75; Interview with State Att’y B, supra note 74; Interview with State Att’y C, (Jan. 26, 2011).
87 Interview with Defense Lawyer B, supra note 71.
88 Id.
is a meaningful imbalance between the state and the detainee. The detainee and his or her lawyer come to the negotiation table knowing nothing at all regarding the quality, reliability, and quantity of the state’s information, and therefore may be pressured to agree to poor settlements. Second, the Court is not aware of the majority of these cases, does not scrutinize them, and therefore cannot exercise its relative advantage in regulating the detention system. Moreover, it is precisely in these cases – in which the ISA prefers not to go to Court – that judicial review would be the most necessary and useful.

This bargaining dynamic is not restricted to the prehearing stage of the process. In many MDO cases the Court itself was involved in the bargaining process, suggesting to both the detainee and the state various alternatives to the continuation of the detention (including deportation). In 13 percent of the MDO cases the Court stated specific recommendations for the state, including recommending that the state not issue a prolonged detention order or that a senior ISA officer be involved in such a decision. While the state does not automatically implement such recommendations, the Supreme Court’s statements can potentially influence the military courts’ judicial review. Accordingly, ISA Representative A emphasized the restraining effect of the Court, and the desire of the ISA to avoid ‘bad decisions’.

Many of the interviewees emphasized the effective shift of judicial review from the main stage, the courtroom, to the behind-the-scenes actions: internal state proceedings and negotiations with the defense lawyers, either before or after the court hearing. In this context, State Attorney B emphasized the shift of the review from the Court to the state authorities, and expressed discomfort with having to play this dual role:

A part of the judicial review is transferred from the Court to the state attorneys, and since they represent the ISA – they are under conflict of interests.

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90 Interview with ISA Legal Advisor A, supra note 80.
91 Interview with State Att’y B, supra note 74.
State Attorney C added his own impression, explaining that this duality does not produce a robust state scrutiny of the necessity of the detention:

> The state attorney’s power should not be overstated or idealized. We represent the ISA even in borderline cases, especially when we are dealing with masses of cases, and the idea that we are conducting a meaningful review is not more than a myth.\(^{92}\)

ISA representatives affirmed this assertion, stating that the ISA conducts an independent assessment when a petition is submitted to the Supreme Court, and offers a settlement only if it coincides with its own agenda.\(^{93}\)

In short, although the bargaining process may sometimes lead to releases of detainees, it is not necessarily desirable due to its several weaknesses, including: the inherent imbalance of the process; the blindness of the detainee regarding the secret evidence and its strength; and the finding that, indeed, in many of the cases, the settlement represents ISA interests alone.

5.3 ‘Law in the Books’ vs. ‘Law in Action’

The case law analysis revealed a significant gap between the rhetoric of a few renowned cases and actual practice; between legal reasoning and meaningful interpretation of, and sometimes even intervention in, the normative framework of the detention regimes and the overall acceptance of secret evidence and detention orders. Moreover, as the case law analysis revealed, most of the decisions concerning detention orders are short and laconic, ignoring most of the unique circumstances and specific details of the case. In the interviews, both defense lawyers and former detainees expressed their frustration with this practice, which ignores the individual characteristics of the detainees and tends to neglect crucial details, such as the detention’s length. As one defense lawyer stated

> There is no human being in the case: not where he is from, not how old he is, not even how long his detention is; nothing.\(^{94}\)

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\(^{92}\) Interview with State At’y C, supra note 83.

\(^{93}\) Interview with ISA Legal Advisor A, supra note 80.

\(^{94}\) Interview with Defense Lawyer A, supra note 75.
The state attorneys shared this feeling of discomfort and opined that the entire process of preventive detentions, from the detention order, to the appeal, to the military court, to the petition to the HCJ, is merely ‘a copy-paste from the beginning to the end’. This description was affirmed by ISA Representative A, who characterized the process as an ‘assembly line’, and expressed discomfort with the effects of this process on the ISA methods:

I am not a fan of preventive detentions not because it infringes the right to liberty, but rather because of its effect on the ISA work . . . This is, of course, a very convenient tool, but when you use it too much it becomes dull.

These assessments may shed light on why, in many of the cases, the detainees did not request to be present at their own hearings, and preferred to remain locked up in their prison cells rather than participate in the judicial review process. Defense Lawyer B, who represented the detainee in one of the few cases that received a fully elaborated legal decision, did not feel any joy of success. On the contrary, she felt even more frustrated because she was unable to share this partial success with her client:

My client was very much disappointed, since the decision wasn’t at all about him.

Moreover, the gap between the rhetoric of the few full opinions and the everyday practice in hundreds of summary, boilerplate decisions, casts a shadow over the reasoning and legal instructions articulated in some of the more detailed decisions:

The more reasoned judicial decisions are no more than a bunch of clichés, since they are not implemented . . . the Justices talk highly about being the ‘detainee’s mouth,’ but they can’t. How can they be his mouth, when they know nothing at all about his side of the story?

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95 Interview with State Att’y A, supra note 71.
96 Interview with ISA Legal Advisor A, supra note 80.
97 The database I created recorded fifty-nine such requests, all MDO cases, which are about 30 percent of the MDO cases that reached the stage of a courtroom hearing.
98 Interview with Defense Lawyer B, supra note 71.
99 Id.
The above analysis emphasizes the gap between the legal reasoning of the Court and its ability to implement its normative framework in concrete cases. While the Court’s expertise in setting the relevant rules and limitations, and in striking the general balance between liberty and security is evident, the implementation of these rules as to specific cases is much more difficult.

6. CONCLUSION

The combination of security crisis, secret evidence and preventive detentions poses unique challenges to effective judicial review. In Israel, a quasi-inquisitorial judicial management model has emerged to confront these challenges and to provide strong guarantees against arbitrary and unjustified detentions. The Israeli model of judicial management, widely discussed as a model to be emulated, has been praised for achieving the desired balance between individual liberty and national security. It was commended for its robust scrutiny of secret evidence and for safeguarding individual liberty in times of national emergency.

Nonetheless, as this research reveals, the actual practice is much more complex and may lead us to be less optimistic. The Court systematically avoids issuing release orders and gives secret evidence only minimal scrutiny. As both the case law analysis and the interviews demonstrate, the Court refrains from openly questioning the ISA assessment of the secret evidence, and prefers to either focus on general legal arguments or to be satisfied with nonbinding ‘recommendations’. At the same time, a ‘bargaining in the shadow of the Court’ phenomenon has emerged: negotiations occur between the defense lawyers, ISA representatives, and state attorneys, which lead to agreements between the state and the detainee and to the withdrawal of many of the petitions before they reach the courtroom hearing stage. While in some of these cases the agreements improve the detainee's situation and bring, eventually, to his or her release, it should be remembered that these mediation or negotiation efforts suffer from significant weaknesses – such as the inherent imbalance of the process and the blindness of the detainee regarding the secret evidence and its strength. As a result, some
detainees are pressured to agree to ‘bad settlements’, weighted unfairly in the state’s favor, which are not reviewed by the Court.

The findings summarized here should prompt doubt about the widely accepted scholarly view regarding the advantages of the judicial management model, which include revealing the ‘actual truth’ and regulating detention systems. First, the empirical analysis suggests that the Court’s ability to regulate the detention system is much more meaningful as to the legal interpretation of the statutory regime, than as to the assessment of the secret evidence and the individual circumstances of the case. The findings demonstrate that, indeed, the Court’s main impact in these cases is through crafting legal limitations by narrowly interpreting statutory language, and not by analyzing the credibility and strength of secret evidence. Moreover, as revealed by this research, most of the borderline cases are withdrawn before they reach a courtroom. The outcomes of these cases are the result of settlements between the detainee and the state, not meaningful judicial review. Therefore, the Court’s regulatory capacity is limited because the cases that could have potentially instigated such a regulatory intervention are left undecided.

Second, regarding inquisitorial fact-finding, this research identified a ‘bargaining phenomenon’, where parties resolve individual detention cases through alternative dispute resolution mechanisms, such as mediation and negotiation. These mechanisms do not focus on rigorous fact-finding or verification of the justifications for detention, and, instead promote practical solutions in the immediate interest of the parties.

Finally, the research findings demonstrate the vulnerability of democracies, in times of national security crisis, to illiberal mechanisms, and the dear price they pay to uphold schemes of secrecy and confidentiality. Specifically, the research highlights the unique challenges posed by secret evidence to fair judicial proceedings. Unfortunately, detention proceedings become an ‘assembly line’ in which ‘enemies’, ‘terrorists’ or just ‘others’ are constantly losing their most basic and valued human right: their freedom.