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# Terrorism Law between the Executive and Legislative Models

*President Barack Obama chose to start his presidency with the promulgation of three executive orders on anti-terrorism measures, aimed at changing important policies promoted by his predecessor, President George Bush. This choice highlights the involvement of the executive branch in the creation and shaping of U.S. anti-terrorism law. It serves as a starting point for this Article which focuses on the institutional aspects of this field. More specifically, the Article evaluates the significance of the choice between promulgating anti-terrorism measures through the executive branch (the executive model) rather than through the legislative branch (the legislative model), while addressing the distinction between a "pure" and a "weak" executive model (a term used to denote broad legislative authorizations that do not involve actual normative limitations on the scope of executive power). The Article maps out the two models and evaluates their respective advantages and disadvantages from a comparative perspective. The analysis reveals that in practice, these two ideal models of terrorism law are never adopted exclusively, and that Western democracies have tended to embrace both in different contexts and in a way that does not necessarily reflect the difference between parliamentary and presidential systems. In fact, preferences for these models vary at different times and in different contexts within the same political system, e.g., a preference for the executive model in the context of law enforcement vis-à-vis a preference for the legislative model in the context of criminal justice. The evaluation of the models focuses on the transparency of anti-terrorism measures, their duration, the immediacy of their application, the availability of judicial review, the scope of anti-terrorism measures, and the public debate they elicit.*

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## I. INTRODUCTION: TWO MODELS OF TERRORISM LAW

Three executive orders promulgated by President Barack Obama in his first week in office focus on reforming anti-terrorism measures—the first establishes a task force for reviewing detention policy options,[1] the second addresses the closure of the Guantánamo Bay detention facilities,[2] and the third focuses on defining the rules of lawful interrogations.[3] All these orders are aimed at changing policies established by President George Bush, policies which were also based on presidential decisions, such as the military order concerning the detention of non-citizens suspected of terrorism, promulgated after September 11, 2001.[4] President Obama's reform is only one example that shows the role of the executive branch in the creation and shaping of anti-terrorism law. This involvement is not a matter of course. A fundamental question underlying anti-terrorism law is the choice between promulgating anti-terrorism measures through the executive branch and promoting laws which regulate them through the legislative branch. Each choice has its implications.

So far, the choice between executive-based and legislative-based anti-terrorism measures has not been at the core of the debate surrounding legal responses to terrorism. This debate has usually been devoted to the question of whether anti-terrorism law is compatible with human rights norms. Accordingly, it has paid relatively little attention to the institutional aspects of anti-terrorism law, with one exception—the ever-growing interest in the availability (or lack) of judicial review. Indeed, the focus on judicial review has been the subject of classical English precedents, such as *Liversidge*,[5] and of newer decisions of the U.S. Supreme Court in *Rasul*[6] and *Boumediene*.[7] Bruce Ackerman referred to this focus on judicial review as the "model of judicial-management."[8]

This Article concentrates on the institutional aspects of anti-terrorism law.[9] More specifically, it evaluates the significance of the choice between promulgating anti-terrorism measures through the

1. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009): Review of Detention Policy Options.

2. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009): Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities.

3. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009): Ensuring Lawful Interrogations.

4. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 (Nov. 16, 2001).

5. Liversidge v. Anderson, [1942] A.C. 206.

6. Rasul v. Bush, 542 U.S. 466 (2004).

7. Boumediene v. Bush, 127 S. Ct. 1478 (2007).

8. *See* Bruce Ackerman, *The Emergency Constitution*, *113* YALE L.J. 1029, 1041 (2004).

9. An example of an analysis focusing on the institutional aspects of anti-terrorism law is the work of Bruce Ackerman, *id.* Ackerman, however, concentrates on the

executive as opposed to doing so through the legislative branch. These two options will be referred to as the *executive model of terrorism law* and the *legislative model of terrorism law.*

The *legislative model of terrorism law* represents the view that anti-terrorism initiatives, which necessarily infringe on human rights, should be based on special legislation establishing concrete rules and specific powers in areas such as interrogation or detention of suspected terrorists. In contrast, according to the *executive model of terrorism law* anti-terrorism initiatives may be based not only on powers expressly recognized by legislation, but also on the powers of the executive branch, as defined by the Constitution or by very broad legislative authorizations.[10] To evaluate their respective advantages and disadvantages, the analysis uses illustrations from various legal systems.

It bears pointing out that the two models share allegiance to the rule of law and also that the executive model, as defined and discussed here, does not imply acting beyond the scope of the legal limits.[11] Support for the executive model, then, is not to be equated with denying protection against unauthorized and illegal executive initiatives. This distinction is especially relevant to the debate on the use of force during interrogations.[12]

In practice, these two models of terrorism law are never adopted exclusively; Western democracies have usually followed both models in varying formats and combinations depending on the different contexts.

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American constitutional context, whereas the current article aims to evaluate the meaning of institutional choices in this area with reference to other systems as well.

10. This is a different terminology than that proposed by Ferejohn and Pasquino, which regards anti-terrorism measures as reflecting the legislative model when they are based on authorizing legislation, even when the relevant legislation only offers special authorizations to the executive. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 I.CON: INT'L J. CONST. L. 210, 217 (2004) ("The legislative model handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive"). In contrast, this Article refers to broad statutory authorization to the executive as another form of the executive model. Thus, the current typology does not center on the formal source of power but rather on the question whether the basic normative choices are made by the legislature or by the executive.

11. Hence, it should be distinguished from a willingness to accept the possibility of executive actions beyond the rule of law. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011 (2003).

12. Secret services tend to use physical measures in interrogations although, formally, the existing legislation in Western countries does not allow this. These practices are not part of the executive model of terrorism law but rather a direct challenge to the rule of law. A separate debate in this regard is whether, in extreme circumstances, it is better to legalize torture and subject it to judicial review, as Alan Dershowitz argues, or to prefer an absolute ban on torture with the assumption that officials will disobey it in extreme cases. *See* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2003-04); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004).

The focus on the allocation of responsibilities between the executive and the legislature in the area of terrorism law reflects broader theoretical concerns with the proper role of the executive branch.[13] These concerns have special characteristics in the context of terrorism law due to considerations uniquely relevant to it, such as the need to act in an expedient manner.

To be sure, the institutional analysis of anti-terrorism law does not diminish the importance of evaluating each decision also in terms of its compatibility with human rights norms. Instead, these two types of analysis—the institutional discussion and the human rights oriented discussion—complement one another. In fact, the institutional analysis deals with the conditions which later on grow the specific decisions to be scrutinized.

## II. THE TWO MODELS AND THE CONSTITUTIONAL FRAMEWORK

The analysis of the two models has to be situated within the constitutional tradition of each legal system. In parliamentary systems that do not elect the executive directly, the exercise of broad powers by the executive without express legislative authorization enjoys less legitimacy than the exercise of similar powers by the head of an executive branch directly elected by the voters. This difference explains the tendency of the U.S. legal system to be relatively open to the executive model of terrorism law. At the same time, however, the propensity to support the different models is influenced not only by the constitutional framework. While this framework will prove to be important, the type of the anti-terrorism initiative at stake and the political context are equally critical. Accordingly, the two models will be discussed first with particular reference to the British tradition (characterized as following the legislative model) and the U.S. tradition (characterized as following the executive model), but then will be explored also by going beyond the differences between these constitutional legacies.

### *A. The Legislative Model and the British Tradition*

The legislative model of terrorism law reflects an understanding of the rule of law according to which all actions of the executive branch must be based on specific empowering legislation, especially if these actions infringe upon human rights. In British law, traditionally inspired by this approach, the main anti-terrorism measures enforced throughout the twentieth century (usually to cope with the

13. *See* THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE (Paul Craig & Adam Tomkins eds., 2006); Symposium, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power*, 115 YALE L.J. 2218 (2006).

IRA) were based on express legislation.[14] British anti-terrorism actions were often criticized for being insufficiently protective of human rights, not for failing to meet the formal condition of legislative authorization.

The British model has inspired the legal systems of former colonies and British-ruled areas. An example of particular interest in this regard is Israel, which inherited various anti-terrorism measures from the British Mandate period in Palestine and has, to a large extent, retained the British approach to legislating anti-terrorism measures.[15]

### *B. The Executive Model and the U.S. Tradition*

Unlike the legislative model of terrorism law, systems fully committed to the executive model are hard to find. After all, unconditional support for the executive model would reflect a willingness to grant unlimited powers to the executive. Some systems, however, are willing to forgo specific legislation when concrete anti-terrorism initiatives are at stake. Indeed, as explained below, all countries are willing to allocate *some* anti-terrorism measures to the executive even without express legislation. Analyses of the differences between systems in this regard should therefore focus on the scope of their willingness to accept executive-based regulation of anti-terrorism measures and on the contexts in which these measures are applied.

The U.S. legal system is willing to endorse the executive model of terrorism law according to the definition proposed here, which covers also executive action based on broad legislative authorization, at least in some important contexts. U.S. legislation includes the regulation of anti-terrorism powers in such major areas as finance, surveillance, and immigration.[16] At the same time, other core issues

14. Such as, among others, the practice of administrative detentions introduced by the Civil Authorities (Special Powers) Act (Northern Ireland), 1922.

15. When the British confronted resistance against their rule in Palestine, they legislated a detailed anti-terrorism law—The Defence (Emergency) Regulations, 1945, 1442 PG (Supp. No. 2) 1055—which are still in force in Israel (although amended). The Israeli example is particularly interesting due to the high intensity of terrorist threats that Israel has encountered over the years. Soon after the establishment of Israel in 1948, the Prevention of Terrorism Ordinance, No. 33 of 5708-1948, 1 LSI 76 (1948) (Isr.) was enacted. At a later stage, the old regime of administrative detentions based on the Defence Regulations was replaced by the Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1978-79) (Isr.).

16. The most famous U.S. legislation in this regard is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act], enacted after September 11, 2001. Another important example is the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C.) (FISA) discussed later. Accordingly, it is not argued here that the United States is endorsing only the executive model, but rather that it is willing to accept it with regard to some anti-terrorism measures.

related to the fight against terrorism—especially detentions—have traditionally not been regulated by specific legislation.[17] The executive model of terrorism law is plausible in the context of the U.S. understanding of the rule of law, focused on the U.S. Constitution and on the way in which it allocates powers to the various branches of government. Nevertheless, the United States also has a tradition of resisting presidential endeavors to use broad emergency powers without legislation,[18] and the scope of executive power remains controversial.[19]

The relevant precedents for the executive's use of anti-terrorism measures without express and specific legislation were handed down during World War II. At the time, threats to national security were posed by enemy states rather than terrorist organizations, but concerns about hostile activities by individuals operating on domestic soil were relevant then as well. President Roosevelt's orders were ostensibly based on his war powers against persons suspected of aiding the enemy. These orders allowed their detention and their trial before military commissions.

Two major examples where these procedures were applied are the German saboteurs' case[20] and the incarceration of U.S. citizens and residents of Japanese origin.[21] The German saboteurs' case concerned a small group of German spies, part of an anti-American mission, who were caught on U.S. soil. The President issued an order that authorized their trial before a military commission and hence their detention for this purpose. During the war with Japan, the President also issued several orders subjecting all persons of Japanese ancestry on the West coast to restricted freedom of movement. The orders included curfew in their residences during the evening hours and at night and even imposed removal from their homes and internment. The U.S. Supreme Court, by and large, upheld these measures.

Based on these precedents, President Bush issued an order after September 11, 2001 mandating the detention of terrorists, who were considered enemy combatants.[22] Detention powers were exercised here as well, without being expressly recognized in legislation. This reflects the vitality of the executive model in U.S. law.

17. The enactment of the Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006) discussed later, did not change this reality because it focused on the trials of enemy combatants and not on their detention as such.

18. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

19. For a symposium on presidential powers in the context of emergency and terrorism, see 81 IND. L.J. 1139 (2006).

20. *Ex parte Quirin*, 317 U.S. 1 (1942).

21. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

22. *See supra* note 4.

### C. *The U.S. Debate on the Executive Model and Broad Legislative Authorization*

"Pure" manifestations of the executive model of terrorism law are orders promulgated directly on the basis of executive powers recognized by constitutional law, without additional statutory authorization. In the United States, this pure form has traditionally been supported by the federal government, which considered presidential emergency orders to be based on the president's war powers. American courts, however, while not completely ruling out the possibility of supporting some executive orders on the basis of the president's constitutional war powers, have tended to base them on broad authorization found in legislation.

In the German saboteurs' case, the U.S. Supreme Court professed to find a statutory basis for the presidential order, although this interpretation of the respective legislation is doubtful.[23] As to the internment of Americans of Japanese origin, the executive orders were promulgated without legislation, but Congress later ratified them by making any disregard for the restrictions issued by the military commander a criminal offense.[24]

For the purpose of the present analysis, executive orders that are solely based on blank authorization in a statutory text (*"to take necessary steps to confront threats to national security,"* or the like) should be regarded as falling within the scope of the executive model. In

23. *See* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2671 (2005).

24. The original executive order of the president in this matter was signed on February 19, 1942 (Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942)). The order purported to

> authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

Legislation on this matter followed a month later, on March 21, 1942. The wording of the law was:

> whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

(Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173, *repealed by* Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 21, 62 Stat. 683, 868).

such cases, the legislature gives *carte blanche* to the executive without providing any normative guidance. Although this is a "weak" form of the executive model, it retains its most important feature: leaving normative choices to the executive.[25]

In cases dealing with anti-terrorism measures heard since September 11, 2001, the U.S. Supreme Court has clearly shown a preference for the weak form of the executive model. A week after the attack, on September 18, 2001, Congress issued a Joint Resolution authorizing the President to use all necessary force against nations and individuals involved in supporting this attack, known as the Authorization for the Use of Military Force (AUMF).[26] This very general authorization was interpreted as constituting the basis for detaining terrorists, although the wording of the resolution does not mention detentions nor does it specify any limitations on the power to detain. The majority opinion in *Hamdi v. Rumsfeld*,[27] authored by Justice O'Connor, mentioned the AUMF as the source of the power to detain terrorists caught in Afghanistan.[28] The legality of detaining terrorists captured outside the Afghanistan battlefield has so far not been evaluated by the U.S. Supreme Court, but the same interpretation could perhaps support such detentions as well.[29] In fact, the

25. Issacharoff and Pildes have argued that the U.S. Supreme Court had based its protection of liberties in times of emergency on the process-based requirement of bicameralism and, accordingly, was willing to accept harsh executive measures supported by the legislature. *See* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 I.CON: INT'L J. CONST. L. 296 (2004). They have admitted, however, that one of the limitations of this approach is that the so-called supporting legislation was very broad (*id.* at 327). For this reason, this Article does not give much weight to legislative support of this sort.

26. Pub. L. No. 107-40, 115 Stat. 224 (2001). According to Section 2(a):

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

27. Hamdi v. Rumsfeld, *542 U.S.* 507 (2004).

28. Justice O'Connor wrote:

> There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the Al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

*Id.* at 592.

29. According to Bradley and Goldsmith, this should apply not only to those captured in the battlefield but also to those who cooperate with Al-Qaeda. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*,

different views expressed on *Hamdi* should be understood as reflecting the controversy over the scope of the executive model of terrorism law in the United States. The federal government was trying to promote the acceptance of the "pure" executive model by stating that "no explicit Congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."[30] This extreme version of the executive model did not obtain support by the majority of the Justices. In fact, the majority opinion refrained from deciding this issue, based on its proposition that the executive branch acted within the authorization of Congress.[31] Still, the majority opinion should not be understood as a rejection of the executive model but rather as a preference for its weak form. It enabled the executive to take far-reaching actions solely on the basis of a broad and non-detailed statutory authorization.

Current controversies about the scope of the President's powers to initiate anti-terrorism measures could fairly be described as centering on the interpretation of the broad statutory authorization he was granted. Participants in the debate seem to accept the basic assumption that anti-terrorism measures can be based on a broad authorization such as the AUMF.[32] They just have different views regarding the scope of this particular authorization.[33]

A similar analysis applies, though to a more limited extent, to Bruce Ackerman's proposal for constitutional reform in the area of emergency powers, a reform that would mandate deep involvement of Congress in declaring an emergency situation[34] and full disclosure of information by the executive branch to congressional committees.[35] This proposal was intended to weaken the dominance of the executive branch in the U.S. anti-terror effort. Yet, even this proposal has tac-

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118 HARV. L. REV. 2047, 2120 (2005) ("The plurality limited this holding to a U.S. citizen captured on a traditional foreign battlefield. The logic of its interpretation of the AUMF, however, applies to enemy combatants captured in the United States as well").

30. *Hamdi* case, *supra* note 27, at 591.

31. "We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF" (*id.*).

32. For an interpretation of the AUMF different from the one presented by Bradley and Goldsmith (*supra* note 29), see Sunstein, *supra* note 23.

33. The possibility of executive action based on the AUMF was discussed regarding interception of international telephone and Internet communications by the National Security Agency outside the scheme of the Foreign Intelligence Surveillance Act of 1978 (*supra* note 16) and without judicial warrants. The application of the AUMF for surveillance purposes as well was rejected by Judge Anna Diggs Taylor of the United States District Court for the Eastern District of Michigan, who held that this operation also violates the First and Fourth Amendments. *See* American Civil Liberties Union v. National Security Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

34. *See* Ackerman, *supra* note 8, at 1047-49.

35. *See id.* at 1050-53.

itly accepted the assumptions of the executive model of terrorism law by involving the legislature only in the process of reviewing the justifications for declaring a state of emergency. Ackerman does not call for the enactment of a set of laws that would be operative during emergencies. Hence, even according to his approach, once an emergency situation has been duly declared, the applicable norms would be stated in military orders promulgated by the president. In other words, Ackerman only suggests placing greater limitations on the executive model, through his demand that the legislature renew the initial declaration of a state of emergency at relatively short intervals; he thereby supports a weaker executive model of terrorism law.

## III. The Two Models in Action: From Constitutional Traditions to Context

Despite the traditional identification of the two models with the constitutional framework of each system (the parliamentary system in Britain and the presidential system in the United States), the adherence to one or the other in particular cases is not influenced by the different constitutional backgrounds alone. Instead, systems tend to accept both the legislative and the executive models simultaneously, with a tendency to change their approach according to the specific context.

First, and most importantly, *systems seem to find it easier to accept the executive model in the areas of enforcement and prevention* than in the area of criminal justice. This distinction reflects the traditional allocation of powers between the executive and the legislative branches—the executive must deal with immediate security threats but cannot set the norms of criminal law. Even systems usually associated with the legislative model of terrorism law have thus refrained from regulating some aspects of anti-terrorism enforcement and prevention mechanisms, leaving them open to executive regulation.[36]

The most obvious example in this regard is the failure of many systems to legislate on the matter of profiling for purposes of tracking potential terrorists. The issue of racial and ethnic profiling is highly sensitive, due to the prevalent public perception that it can contribute to effective enforcement in the area of terrorism. Ethnic profiling, however, raises moral and constitutional concerns. Due to these concerns, even countries with relatively developed anti-terrorism laws have not enacted legislation on this issue.[37] This legislative choice

36. This does not mean that there is no legislation on enforcement issues (an obvious example is the Foreign Intelligence Surveillance Act of 1978 already mentioned, *supra* note 16), but rather that the insistence on legislation tends to be higher with regard to criminal justice.

37. This is the case in Britain, Canada, Israel, and the United States. Kent Roach criticizes the Canadian legislature's refraining from addressing this issue. *See* Kent Roach, September 11: Consequences for Canada 73-74 (2003). At present, Cana-

has not resulted in complete failure to use ethnic profiling, but rather in its *de facto* allocation to the executive branch. Accordingly, in the *Gillan* case,[38] the House of Lords has acknowledged that the special powers to stop and search people, granted for the purpose of enforcing anti-terrorism legislation,[39] may be used with reference to racial or ethnic traits. Although this example deals with a power that had been granted through legislation (to stop and search), the legislature had remained silent concerning the possibility of employing racial or ethnic criteria. In practice, therefore, the issue of profiling has been left to the executive.

Another example of the tendency to leave enforcement issues to the executive branch concerns interrogation methods. The new anti-terrorism laws enacted in various countries refrain from mentioning this matter, and the result, yet again, is the de-facto allocation of normative decisions to the executive branch. The U.S. example of the infamous memos on possible forms of interrogation is central in this context,[40] but similar observations can be made with regard to systems less associated with the executive model. In Israel, for instance, special practices were long used in the interrogation of terrorists without any special legislative authorization. The use of such special methods in the interrogations conducted by the General Security Service (GSS) was debated in the 1980s, after their disclosure and exposure. The public debate led to the appointment of a special committee headed by Moshe Landau, a former Chief Justice of the Israeli Supreme Court, to define the scope of legality in the conduct of investigations in security matters. The answer given by the Landau Committee was that the GSS may use "limited physical pressure" in handling its interrogations. The committee stated that the power of the GSS to use these methods was based on the criminal law defense of necessity.[41] Thus, the Landau report was in fact willing to accept the executive model in the context of interrogations, and it was heavily criticized for recognizing the power to use force without express legislative authorization. This criticism eventually led to a change in

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dian law includes express legislation against profiling only in the context of detention powers during declared emergencies. *See* Emergencies Act, 1988 S.C., Ch. 29, § 4 (Can.).

38. R (on the application of Gillan (FC) (Appellants)) v. Comm'r of Police for the Metropolis (Respondents) [2006] UKHL 12, [2006] 2 A.C. 307 (U.K.).

39. Terrorism Act, 2000, c. 11, § 44 (U.K.).

40. *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

41. COMM'N OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY, REPORT (1987). Excerpts from the Report were translated into English and published in 23 ISR. L. REV. 146 (1989). For a critical analysis of the Landau Commission Report, see Mordechai Kremnitzer, *The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216 (1989).

the legal doctrine when the Israeli Supreme Court heard a petition against the use of force in GSS interrogations. The court held that the GSS is not empowered to use special measures in its interrogations, i.e., measures different from those used in ordinary criminal investigations conducted by the police. The court further held that any changes in this conclusion, i.e., any broadening of the interrogation powers of the GSS, require a legislative basis. According to the Court, the only exception to this rule may be the *ex-post* application of the criminal defense of necessity to an interrogator who used force for the sake of preventing the loss of human lives in a "ticking bomb" scenario.[42] This case showed a clear move toward a more complete legislative model. Since no special legislation followed the decision, however, interrogations conducted by the Israeli GSS are actually regulated by executive practice, although within the dictates of the legislation on investigations. The Court was also willing to accept that the Attorney General would state his policy regarding charges against interrogators who have used special measures in circumstances of necessity. Hence, the practical upshot is that the executive (the Attorney General) rather than the legislature defines the contours of legal investigation by the GSS. When the Israeli Knesset enacted the General Security Service Law, 2002,[43] it refrained from including a specific provision on investigation methods, thus leaving the matter to executive action based on the existing judicial precedent.

The tendency to settle on a limited application of the executive model also in the context of preventive investigation and enforcement affected even the jurisprudence of the House of Lords in its decision concerning the use of information suspected of having been gathered by third countries by way of torture. Although the House of Lords ruled against the possibility of using such information in judicial or semi-judicial proceedings, it allowed its use for the prevention of terrorist attacks (that is, for the purpose of enforcement by the executive).[44] In practice, this decision left open the possibility of the executive regulating the use of such information.

In contrast, in a rather puzzling development from the perspective of this Article, the United States, usually associated with the executive model, has issued legislation on this matter—the Detainee Treatment Act of 2005[45]—while systems usually associated with the

42. HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel [1999] IsrSC 53(4) 817. For an analysis of this decision, see Mordechai Kremnitzer & Re'em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509 (2000).

43. S.H. 1832.

44. A v. Sec'y of State for the Home Department (No. 2), [2005] UKHL 71 1, [2006] 2 A.C. 221.

45. Pub. L. No. 109-48, 119 Stat. 2739 (2005).

legislative model refrained from doing so. This legislation does not necessarily reflect a tendency to abandon the executive model of terrorism law in the United States in general. Instead, it largely reflected public discomfort with the shocking revelations of misconduct in the Abu Ghraib prison in Iraq. At the same time, this law still secures an important role for executive decisions. It provides that people under the custody or under the effective control of the Department of Defense shall not be subject "to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[46] It also limits the prohibition on the use of "cruel, inhuman, or degrading treatment or punishment" to the definitions of these terms "in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment."[47]

The detention of suspected terrorists is a key issue when evaluating the relative willingness of systems to adopt the executive model of terrorism law. Most systems that follow British tradition do not accept the idea of detentions without clear and express legislative authorizations. For example, the British law enacted after September 11, 2001 included an express authorization to hold non-nationals suspected of terrorism in unlimited custody, when deporting them was not possible.[48] This provision was harshly criticized and later declared an infringement of the Human Rights Act 1998,[49] but for the purposes of the current analysis it is important to note that it was a legislated norm.[50] Similarly, in Israel, the administrative detention of people suspected as dangerous to national security and the detention of combatants in terrorist organizations are both regulated by specific legislation.[51] This legislation may indeed be controversial,

46. *Id.*, § 1002.

47. *Id.*, § 1003.

48. Anti-Terrorism, Crime and Security Act, 2001, c. 24, part 4 (U.K.).

49. A v. Sec'y of State for the Home Department, [2004] UKHL 56, [2005] 2 A.C. 68 (U.K.).

50. This decision led to another legislative reform: the British Parliament enacted the Prevention of Terrorism Act, 2005, c. 2, which empowers the Home Secretary to issue a "control order" against an individual, which will specify and impose a range of obligations upon him (as a weaker substitute to detention). This new model was reviewed and interpreted by the House of Lords in a series of cases—Sec'y of State for the Home Department v. JJ, [2007] UKHL 45, [2007] 3 W.L.R 642; Sec'y of State for the Home Department v. MB, [2007] UKHL 46, [2007] 3 W.L.R 681; Sec'y of State for the Home Department v. E, [2007] UKHL 47, [2007] 3 W.L.R 720; AF and Others v. Sec'y of State for the Home Department [2009] UKHL 28 (June 10, 2009); Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395.

51. The current Israeli law on administrative detentions is the Emergency Powers (Detention) Law, mentioned *supra* note 15. The legislation on the detention of combatants of terrorist organizations is the Incarceration of Unlawful Combatants Law, 5752-2002, S.H. 192. The Israeli Supreme Court dismissed a petition against the

but that is a separate issue. By contrast, as noted, the detention of terrorist combatants in the United States was based only on presidential orders or, as explained by the U.S. Supreme Court, on presidential orders supported by the vague authorization included in the AUMF.

Concerning the distinction between prevention and criminal justice suggested before, it is noteworthy that even the U.S. Supreme Court was reluctant to adopt the executive model as the norm with regard to the criminal trial of terrorists, an issue at the center of *Hamdan*.[52] The question was whether the petitioner, captured in Afghanistan, could be tried by a military commission as stated in the Military Order enacted by President Bush (and previously recognized by the *Hamdi* decision as a proper legal basis for the authorization of detention).[53] The majority opinion answered this question in the negative. Justice Stevens, who wrote most of the decision, stated that the option of convening military commissions is incidental to the conduct of war, and the authority of such a commission is limited by various preconditions (such as that the offenses were committed within the field of command of the convening officer, that they were committed within the period of war, and that they constitute violations of the laws of war).[54] Justice Stevens was also of the opinion that the procedures of the military commissions violated the provisions of the Geneva Conventions, a question that Justice Kennedy stated was not necessary to decide. The backbone of the decision, however, concerned the legitimacy of a criminal trial before a military commission without express legislative authorization on the matter. This rationale of the decision emerges even more clearly from the concurring opinion of Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, who reasoned that "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[55] The inference from this case is that even in U.S. law, the executive model of terrorism law does not apply to the area of criminal justice in cases outside the immediate context of the battlefield. In the wake of this decision, Congress enacted the Military Commissions Act of 2006,[56] which supplied the missing legislative authorization for trials by military commissions. Although this law is based on the acceptance of the legislative model in the area of criminal justice, it retains the traits of

constitutionality of this law in CrimA 6659/06 Anonymous v. Israel (June 11, 2008), *available at* http://elyon1.court.gov.il/eng/home/index.html.

52. Hamdan v. Rumsfeld, 165 L. Ed. 2nd 723 (2006).

53. *See supra* notes 27-31 and accompanying text.

54. *Id.*, at 757.

55. *Id.*, at 780.

56. *See supra* note 17.

the "weak" executive model in giving broad authorization to the President regarding the interpretation of the Geneva Conventions.[57]

A second factor influencing the tendency to settle for the executive model of terrorism law is *the proximity between the confrontation with terrorism and the conduct of war*. In the context of war, it is accepted that the military should have broad powers to act. By contrast, in ordinary times, it is expected that executive power will be confined to the contours of legislation. The majority justices in *Hamdan* thus explained that a trial before a military commission is possible in the context of the battlefield, but not outside of it.

In another context, Israel practices a policy of preventive killings of terrorists outside its territory. These actions are considered part of the conduct of a military confrontation and, therefore, are not based on legislation. Leaving aside the controversy surrounding such actions, it is revealing that Israeli authorities do not claim that these preventive killings would be legitimate within Israeli territory, which is not considered a battle zone.[58]

## IV. THE TWO MODELS EVALUATED

The analysis has shown that the executive model is more prevalent than is usually assumed—even in systems which are formally adhering to the legislative model. It is appropriate therefore to evaluate the respective advantages and disadvantages of the two models.

*Secrecy or transparency*—A major difference between legislative-based and executive-based anti-terrorism measures manifests itself in the degree of disclosure to the public. Whereas legislative schemes are in the public domain by definition because laws have to be publicized, executive initiatives may remain secret until they are leaked, as happened with the "torture memos"[59] and then with the surveillance program conducted by the National Security Agency.[60] How should this difference be evaluated? Although one may argue that the secrecy of executive-based initiatives contributes to their relative efficiency, this is a questionable view. Whereas the specifics concerning

57. Section 6 of the Military Commissions Act states:

> [A]s provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

58. The precedent of the Israeli Supreme Court stating the conditions for the use of this policy is HCJ 769/02 *The Public Committee Against Torture in Israel v. Government of Israel* (Dec. 14, 2006), *available at* http://elyon1.court.gov.il/eng/home/index.html.

59. *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 40.

60. *See supra* note 33. *See also* David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006).

the implementation of some anti-terrorism measures should remain undisclosed, the basic features of the methods used should be open to public criticism and debate.

*The tendency to provide mechanisms of judicial review*—It is reasonable to assume that laws establishing special anti-terrorism measures will tend to include mechanisms of judicial review as part of the legislative scheme, whereas special powers established by executive orders will not. This assumption is based on the hypothesis that the legislature will be inclined to limit the power it gives to the executive by subjecting it to judicial review, whereas the executive will not tend to limit itself by adding a built-in mechanism of judicial review.

A good example for this hypothesis is provided by the comparison between the Foreign Intelligence Surveillance Act 1978, according to which interceptions to communications usually necessitate judicial warrants, and the secret program of surveillance initiated by the National Security Agency on the basis of professed executive authorization, which was conducted without any form of judicial review.

However, there are counter examples as well. In the context of detention of enemy combatants under U.S. law, both the executive and the legislative branch seemed determined to similarly oppose the provision of judicial review of such detentions. The military order of the president on the detention of non-citizens did not mention the possibility of judicial review but only of trials by military commissions,[61] nor was the availability of judicial review established by any other order.[62] In a similar fashion, in the Military Commissions Act of 2006 Congress expressed a tendency to limit the access of enemy combatants to courts.[63]

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61. Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *supra* note 4, § 4.

62. In fact, the government did everything possible to prevent any kind of judicial review of this initiative. It argued against *habeas corpus* proceedings based on various grounds, including the location of the detention camp outside the territory of the United States (in Guantanamo Bay) (an argument that was finally rejected by the Supreme Court only after more than two years in which no judicial review had been available. See *Rasul*, *supra* note 6) as well as formalities such as the identity of the official against whom the *habeas corpus* writ was requested (the Supreme Court was willing to accept this formal argument when the *habeas corpus* proceedings were directed against Donald Rumsfeld rather than against the commander responsible for the place of detention. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004)).

63. *See Boumediene*, *supra* note 7. An opposite example for a legislative tradition of introducing detention regulation with a mechanism of judicial review as part and parcel of the legislative scheme can be brought from Israel. The Israeli law on administrative detention states that a person arrested according to an order of the minister of defense has to be brought before a judge within forty-eight hours (section 4(a) of the Israeli Emergency Powers (Detention) Law, 1979, mentioned *supra* note 15). If the order is approved, the decision to maintain it has to be reviewed at least once every three months, and the authorities bear the duty of initiating the process of judicial review (section 5 of the same law). Similarly, according to the Israeli Incarceration of Unlawful Combatants Law, a prisoner must be brought before a judge no later than

*Policies of judicial review*—There is another perspective on the issue of judicial review: when anti-terrorism measures are legislated, the tendency of courts to review them is likely to be more restrained, reflecting the traditional hesitation regarding judicial review of majoritarian decision-making. Conversely, a positive side effect of executive-based anti-terrorism measures may be a lesser degree of hesitation in the process of reviewing them. However, this is only a matter of degree: there is no question that also legislative-based anti-terrorism measures may be, and have been, judicially reviewed.[64]

*The durability of special anti-terrorism measures*—A further perspective on the comparison between the legislative and executive models of terrorism law concerns the possibility that anti-terrorism measures may become part of the "ordinary" legal system. Legislation on anti-terrorism is more likely to become part of ordinary law, while anti-terrorism measures based on executive orders will usually disappear when the security situation calms down because the orders are most likely to be repealed at that stage. This difference can be exemplified by a comparison between Israel and the United States. Israeli legislation on anti-terrorism may be more balanced than some of the U.S. executive orders on similar issues but the downside is that it forms part of Israel's enduring legislative scheme. The tendency to abolish anti-terrorism powers established by legislation is low, probably reflecting the assumption that it is better to have them available "for a rainy day." In Israel, the power (allocated by the legislature) to administratively detain individuals endangering the security of the state was merely reformed by introducing more checks and balances regarding its use but it was never completely abolished. The opposite view is exemplified by the U.S. attitude toward administrative detentions. Detentions outside regular criminal procedure are considered real exceptions and were never tolerated in U.S. legislation (outside the domain of immigration law). When applied, they were based on presidential orders and were therefore confined to limited periods.

A partial answer to the concern that anti-terrorism legislation may not be repealed is the use of clauses limiting the duration of the law to a stated period of time ("sunset clauses"). The continuing force of the legislation thus necessitates an additional affirmative act of

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fourteen days after issuing the incarceration order (section 5(a) of this law (mentioned *supra* note 51), with a further duty to bring the continuation of the order to the court once every six months (section 5(c) of the same law).

64. As already noted, the House of Lords had practiced judicial review over a law which purported to authorize an unlimited detention of suspected terrorists who are not British nationals (*see* A v. Sec'y of State for the Home Department, *supra* note 49). The U.S. Supreme Court had invalidated the law which purported to completely bar the possibility of *habeas corpus* relief from Guantanamo detainees (*see Boumediene, supra* note 7).

legislation.[65] In times of emergency, however, this method is of limited effectiveness due to the tendency to prolong such periods quasi-automatically.

At any rate, even after anti-terrorism legislation or anti-terrorism executive initiatives are repealed, they never fade away completely. Abolished measures become part of the legal system's memory or reservoir and are called upon as precedents for the purpose of justifying new initiatives. As mentioned, World War II presidential orders were cited as precedents for the new initiatives taken by President Bush after September 11, 2001.

*Timing*—A standard justification for the use of executive-based anti-terrorism measures is that they can be promulgated immediately and are therefore a more effective response in emergency situations, given the length of legislative processes. This argument has some basis in reality, but only to a very limited degree. First, the history of the new anti-terrorism laws that followed September 11, 2001 shows that they were legislated within a few weeks at unprecedented (and even excessive) speed. Second, the time consideration may justify support for using executive measures for a limited period, i.e., until the legislative process is concluded, but it does not justify the use of executive measures for years as argued by the Bush administration with regard to the detention and sentencing of enemy combatants.

*Public consciousness and public discourse*—In addition to the formal legal consequences of the choice between the executive and the legislative models, this choice also entails different public consequences. In particular, legislation on anti-terrorism measures has a better potential for encouraging public discourse on the proposed measures. In contrast, a one-sided decision handed down by the executive branch does not allow public discourse to develop in the same fashion. This distinction, however, is not always clear. Proposed legislation is not actually debated when enacted under the pressure of emergency, as was the case, for example, with the USA PATRIOT Act. In addition, the potential for debate is highly dependent on the executive's political support in the legislature.[66] On the whole, how-

65. Real sunset clauses, which mandate additional legislation to prolong anti-terrorism statutes, are different from provisions that require only an executive decision for their renewal. For this distinction, see HOUSE OF LORDS AND HOUSE OF COMMONS, JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION (24th Report of Session 2005-06), paras. 165-66 (2006).

66. American writers have pointed at the lack of real checks and balances when the President and the majority dominant in the legislative branch come from the same party. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005). In addition, at least with regard to the use of force in the international domain, it was pointed out that the recourse for congressional authorization is often used for spreading political costs and

ever, public debate fares better in the context of legislation. In some cases, debate develops after the enactment of the law and the discussion centers on proposals for its amendment or even its repeal. An example for a debate which emerged after the original enactment of an anti-terrorism measure is the British legislation on the power to detain non-citizens suspected to be involved in terrorism.[67] This debate eventually led to the House of Lords decision on the incompatibility of this measure with the Human Rights Act of 1998.[68]

*Naming and scope*—The executive model typically leaves to the executive not only the decision on the terms of each anti-terrorism measure but also the prerogative to decide who counts as a terrorist to whom these measures apply. Sometimes, the real issue is not the measures themselves but the definition and identity of those subject to them. In practice, however, this difference between the two models is not as significant as it may seem at first sight. In many cases, even countries that formally adhere to the legislative model of terrorism law include in their legislation the power of the government to name and declare organizations as terrorist. These declarations then serve as a basis for criminal proceedings against individuals, the members or supporters of the designated organizations.[69]

## V. CONCLUSION

This Article has concentrated on the often overlooked aspect of anti-terrorism law—the institutional aspect. The analysis presented the importance of addressing institutional questions and even more so in times of threat to national security, taking into consideration that the choices made during such times may pervade the legal system and shape its concept of the rule of law.

The institutional analysis proposed has conceptualized the differences between anti-terrorism measures in various countries through a distinction between the legislative and the executive models of terrorism law, and offered parameters to compare their relative legitimacy.

With regard to some of the parameters discussed (such as the availability of judicial review), the evidence regarding the relative advantages and disadvantages of the legislative model and the executive model seem to be blurred and influenced by other political conditions. However, some conclusions seem to be clearer. Anti-ter-

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does not lead to any substantial debate. *See* Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907 (2007).

67. This power was originally enacted as part of the Anti-terrorism, Crime and Security Act, 2001 (*supra* note 48).

68. *See* A v. Sec'y of State for the Home Department, *supra* note 49.

69. See, for example, section 11(1) of the British Terrorism Act, 2000 (*supra* note 39), which states: "A person commits an offence if he belongs or professes to belong to a proscribed organization."

rorism measures resulting from a legislative process enjoy the advantage of being revealed to the public and hence tend to benefit more from debate by the public and within the political system. By contrast, executive-based anti-terrorism measures can claim the advantages of tending to fade away and disappear when the emergency situation ends, and of being subject to less deferential judicial review. However, even these distinctions should not be overstated—bearing in mind the hasty nature of legislative initiatives in times of crisis, on the one hand, and the power of precedents regarding the use of executive power (even when these past precedents are formally not in force) on the other hand.

More generally, the Article has demonstrated that the real question is not whether the executive model is accepted or rejected altogether but rather the degree of its acceptance: in practice, all systems are willing to allocate the power to decide on some anti-terrorism measures to the executive (even when their constitutional tradition does not seem to accept them formally). In other words, the models are not strictly wedded to the underlying constitutional systems, but rather more to perceptions of necessity (as the tendency to adopt the executive model grows, irrespective of the constitutional tradition, in the context of preventive actions or combat-related actions).