Due Process Protections in the War on Terrorism:
A Comparative Analysis of Security-Based Preventive Detention in the
United States and the United Kingdom

Presented to the
Department of Government
in partial fulfillment of the requirements
for the degree with honors
of Bachelor of Arts

Harvard College
March 2012
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<tr>
<td>ATCSA</td>
<td>Anti-Terrorism, Crime, and Security Act 2001</td>
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<td>AUMF</td>
<td>Authorization of the Use of Military Force</td>
</tr>
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<td>CSRTs</td>
<td>Combatant Status Review Tribunals</td>
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<tr>
<td>DOD</td>
<td>Department of Defense</td>
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<td>DOJ</td>
<td>Department of Justice</td>
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<tr>
<td>DTA</td>
<td>Detainee Treatment Act</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>GTMO</td>
<td>Guantanamo Bay Detention Facility</td>
</tr>
<tr>
<td>HRA</td>
<td>Human Rights Act 1998</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IRA</td>
<td>Irish Republican Army</td>
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<tr>
<td>MCA</td>
<td>Military Commissions Act 2006</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>NIAC</td>
<td>Non-International Armed Conflict</td>
</tr>
<tr>
<td>NSC</td>
<td>National Security Council</td>
</tr>
<tr>
<td>OLC</td>
<td>Office of Legal Counsel</td>
</tr>
<tr>
<td>POW</td>
<td>Prisoner of War</td>
</tr>
<tr>
<td>PTA</td>
<td>Prevention of Terrorism Act 2005</td>
</tr>
<tr>
<td>SIAC</td>
<td>Special Immigration Appeals Commission</td>
</tr>
<tr>
<td>TA</td>
<td>Terrorism Act 2000</td>
</tr>
<tr>
<td>UCMJ</td>
<td>Uniform Code of Military Justice</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
</tbody>
</table>
INTRODUCTION

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

— Justice Anthony Kennedy, June 12, 2008

The Context

I first encountered the practice of preventive detention for terrorist suspects while interning at the American Civil Liberties Union two years ago. Yet, the term “preventive detention” was hardly used in the office—rather, the staff attorneys replaced it with “indefinite detention,” recounting stories of detainees held at Guantanamo Bay (GTMO) without charge or trial. Moazzam Begg, a British Muslim, was detained in GTMO for three years for attempting to set up a girls’ school in Kabul, Afghanistan. Another British Muslim, Omar Deghayes, was a law student in England who was sent to GTMO for five years after studying Afghanistan’s legal system, and he ultimately became blind in one eye after numerous beatings. Similarly, Ruhal Ahmed and Shafiq Rasul, childhood Muslim friends raised in England, were placed at GTMO for two years after attending a friend’s wedding in Pakistan.¹ All of these men had been detained at Guantanamo Bay without charge because they had been in the wrong place at the wrong time, had a certain physical appearance, and practiced a certain faith. Where was the American constitutional principle of due process that protects the innocent and identifies the guilty when these men were detained?

That principle was not afforded to them. While the heightened security of the United States (U.S.) may have indeed safeguarded the nation from security threats, the due process rights of individuals—foundational norms of liberal democracies—were pushed aside.

Since 9/11 and the ensuing “War on Terrorism,” democracies have struggled to balance upholding their liberal norms of due process while simultaneously preserving national security under the threat of terrorism. International laws of war, primarily the Geneva Conventions, provide little guidance, as they were designed to regulate behavior between warring sovereign states, and have little to say regarding conflict between state and non-state actors. Hence, the legal situation remains unclear in terms of how states should address the problem of terrorist non-state actors. The traditional armed conflict model is difficult to apply because of terrorists’ disregard for the laws. Democratic states thus face a dilemma between effectively addressing terrorism through extralegal draconian measures and remaining compatible with the rule of law.

A key issue that demonstrates this tension is the use of preventive detention by states seeking to enhance their security. The United Nations (UN) defines preventive detention as “persons arrested or imprisoned without charge.”\(^2\) The Fourth Geneva Convention allows for a state to detain civilians who appear to pose a security threat in the context of a non-international armed conflict


an armed conflict between a state and a non-state actor, such as a terrorist group. While the procedural rules of preventive detention in international armed conflict are elaborated in the Third Geneva Convention, there are a limited number of treaty provisions under international humanitarian law that apply to such detention in non-international armed conflict. Because the international law governing preventive detention is not explicitly codified, states tend to exploit this vagueness to implement their preferred policies through domestic law, including indefinite detention.

Many organizations and scholars have sought to identify prevailing norms for preventive detention in order to avoid the creation of detention systems that violate safeguards considered to be fundamental human rights. The International Committee of the Red Cross (ICRC) has codified a list of fifteen recommended safeguards for preventive detention drawing from international humanitarian law. Others have maintained that the most critical protections are those contained in the Fourth Geneva Convention, since they provide a “battle-tested” basis for preventive detention in all types of conflicts. These protections relate to the

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6 Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence,” International Review of the Red Cross 87, no. 858 (June 2005): 376. While the author produced the article in her personal capacity, the ICRC adopted this paper as an official ICRC paper.
7 Ibid., 377. The legal sources on which the standards are based include: the Fourth Geneva Convention; Article 75 of Additional Protocol I to the Geneva Conventions; Article 3 Common to the Geneva Conventions; Additional Protocol II; and customary rules of international humanitarian law.
notion of due process—the guarantee that legal proceedings will be fair and will provide an opportunity to be heard before the government acts to deprive one of life, liberty, or property. These protections include: (1) immediate review of detention by the state, (2) the ability of the detainee to appeal the detention decision (habeas or judicial review), (3) periodic review of continued detention, and (4) release of the detainee when reasons for his detention have ceased. For the purposes of this research, these core procedures will constitute “sufficient due process” for preventive detention for terrorist suspects. If at least one of these protections is not present, the remaining procedures will be considered “limited due process.” These procedural safeguards offer a baseline to ensure that states adopting security-based preventive detention strike a delicate balance between national security and personal liberty.

Unfortunately, many preventive detention systems do not meet the standards of these basic protections, which are stipulated in international law as fundamental human rights. The United Nations’ International Covenant on the Civil and Political Rights (ICCPR), a part of the International Bill of Human Rights, explicitly asserts that each individual has the right to due process of the law.⁹ This fundamental human right is violated by practices of indefinite detention wince there is no habeas review or termination of detention. The infringement of this human right is not the only consequence of indefinite detention. It also undermines the democratic notion of the rule of law, the idea

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⁹ ICCPR, ratified General Assembly Resolution 22001 (XXI) of December 16, 1966 (entry into force March 23, 1976), Article 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).
that no individual, not even government authorities, are above the law. By violating domestic due process guarantees, policies of indefinite detention often require extralegal executive power during times of emergency. If such executive prerogative goes unchecked, it may undermine a democracy’s commitment to the rule of law as well as the preservation of civil liberties.\(^\text{10}\)

Following the terrorist attacks of September 11, 2001 and the proclamation of the War on Terrorism, the United States and the United Kingdom (UK) enacted counterterrorism policy that expanded executive power to detain terrorist suspects indefinitely.\(^\text{11}\) In the U.S., President Bush asserted his constitutional wartime powers to detain anyone suspected of terrorist activity as “enemy combatants.”\(^\text{12}\) The Bush Administration then created a detention facility at Guantanamo Bay, Cuba to hold these suspects indefinitely without due process. When President Bush left office seven years later, detainees had gained limited due process protections, but were still being held indefinitely at GTMO.

After 9/11, the UK similarly expanded the powers of the executive to detain foreign nationals indefinitely and without full due process.\(^\text{13}\) After three years, its policy of indefinite detention for foreign nationals was struck down and replaced with executive control orders with sufficient due process.\(^\text{14}\) Following


\(^\text{11}\) Stephanie Blum, “Preventive Detention in the War on Terror: Comparison of How the U.S., Britain, and Israel Detain and Incapacitate Terrorist Suspects,” *Homeland Security Affairs* 3 (October 2008), 1.


\(^\text{14}\) Gross, 134.
the London terrorist attacks in 2005, the Government did not implement indefinite detention but used this system of control orders. For British citizens, sufficient due process was kept in place both after 9/11 and the London bombings.\textsuperscript{15} In comparison to the U.S., citizens automatically had sufficient due process protection, and it only took the UK three years to provide sufficient due process for terrorist suspects who were foreign nationals.

\textit{Defining the Puzzle}

The U.S. and the UK share many similarities, including their level of economic development, regime type, and liberal culture. In addition to these structural similarities, they both have very similar legal tools to prosecute terrorists. We would therefore expect both countries to implement similar types of preventive detention regimes. The different detention systems created post-9/11 thus raises the following puzzle: \textit{Why was the UK able to provide sufficient due process protections to terrorist suspects while the U.S. could only afford minimal due process and maintained its policy of indefinite detention between 2001-2008?} In other words, what factors motivate the practice of preventive detention with limited due process and indefinite detention? Because of the manifest deprivation of liberty and due process that occurs in unchecked preventive detention, an investigation of the forces that influence this practice is a paramount concern.

The scope of this analysis is limited to democracies. Given their emphasis on the rule of law, democracies are expected to adhere to civil liberties since such liberties are guaranteed through constitutions, legal codes, and/or common law.

\textsuperscript{15} Blum, 2.
Consequently, it is compelling to explore the conditions under which democracies deprive detainees of certain civil liberties during national security crises. Examining autocracies would not be beneficial for this research since in these regimes, we would not expect autocratic leaders, who are able to act above the law, to guarantee civil liberties to detainees.

**Preview of Argument**

I argue that a democracy’s political structure—in other words, the interaction and balance of power among its political institutions—determines the due process protections provided in preventive detention during emergencies (or security-based preventive detention). A democracy’s political structure exists on a continuum that ranges from a pure separation of powers system (akin to the U.S. presidential democracy) to a pure fusion of powers system (akin to the UK parliamentary democracy). In a separation of powers, the executive typically asserts authority during emergencies; since state survival is the top priority during security crises, few, if any, due process protections would be provided in preventive detention. The independence of each institution and lag of institutional processes make it difficult for the other branches to constrain or check such extralegal executive authority *ex post facto*; hence, limited due process and indefinite detention become entrenched in the system. In contrast, in a fusion of powers democracy, where legislative power is shared between the executive and legislature, the executive cannot make unilateral policies but must undertake extensive consultations with the legislature to create policy. Hence, this system enables *a priori* constraints on executive power during emergencies, and because
of the range of voices present in the decision-making process, due process protections are generally granted.

I realize that this argument rests upon a tenuous relationship between a macro-level process (interaction among institutions) and a micro-level outcome (the number and type of procedural safeguards afforded). The gap between these variables suggests that there may be an additional variable that intervenes to determine whether due process protections are afforded in preventive detention. Hence, I anticipate that the political structure theory may interact with another variable to determine the form of preventive detention. The following section details alternative variables that may interact with the political structure theory, or operate independently, to explain the due process protections afforded in preventive detention.

First, path dependence could explain why some states provide greater due process than others. A policymaker often chooses the option that requires the least amount of cognitive resources. This leads to a continuation of existing policies, particularly when the costs of switching policy are high. While this theory does not have explanatory power in the U.S. since affordable alternatives existed other than indefinite detention, it has some explanatory power in the UK. The UK was able to immediately provide sufficient due process to citizens as it used the existing laws it had crafted during its security crisis in the 20th century with Irish Republican Army (IRA) terrorists. Path dependence, however, does not explain why the UK harnessed its immigration laws to indefinitely detain foreign nationals at the same time.
A second theory, threat perception, holds that policy may be influenced by a government’s perception of the existing threat it faces. Perception of threat exerts a cognitive influence on the willingness of policymakers to trade civil liberties for security. When the threat is high, we would expect states with preventive detention to offer fewer, if any, due process protections. Alternatively, when the threat wanes, we would expect a return to sufficient due process. While this theory explains how extralegal executive authority is justified during emergencies, its explanatory weakness lies in its empirical difficulties to precisely measure threat levels and their duration. Hence, it is difficult to accept the argument that indefinite detention prevailed in the U.S. for eight years due to the heightened sense of threat, even though no major terrorist attacks manifested in the U.S. after 9/11. Moreover, this theory cannot explain why Britain instituted indefinite detention for foreign nationals after 9/11 but not after the London bombings, when the threat faced by the UK was presumably higher.

Finally, the selection of a legal framework may determine the distribution of due process protections. During security situations, a state has the option of using an existing legal framework to derive detention policy: a national security framework, immigration law framework, or a criminal law framework. Selection of the first two enable lower due process protections given their flexibility because of security issues, while selection of the latter requires sufficient due process protections. While this theory suggests that the U.S. and the UK may have chosen differing frameworks to develop their detention policy from, which
would explain the variation in due process, it does not offer any explanation for why states choose a certain framework.

To analyze the validity of these theories, I employ qualitative social science methods, including content analysis and process tracing, to the case studies of the U.S. and the UK. The selection of these two cases allows for maximization of the variance caused by the independent variables since they each represent the extreme forms of a separation of powers and a fusion of powers system. Moreover, their structural and procedural similarities control for other key variables. This would lead us to expect similar procedural safeguards afforded to terrorist suspects in each country.

To carry out my analysis, I first collected all of the documents relevant to every decision made regarding preventive detention policy in each country. I identified the due process protections afforded at each stage to create a timeline of each policy and its effect on the level of due process provided. Next, I developed a rigorous coding device for political discourse that would allow me to identify which statements would support each hypothesis. I read through all of these documents and applied this coding device. With this content analysis at hand, I used process tracing to identify the causal relationships between the independent variables and the variation in due process.

My analysis uncovered two major findings. First, an interaction of the political structure, threat perception, and legal framework theories best explains variation in due process afforded to terrorist suspects in each country. The legal framework selected by policymakers affected the distribution of due process:
national security and immigration detention frameworks enabled detention without due process while a criminal law paradigm required sufficient due process. In each case, the choice of legal framework was made possible, and even influenced, by the country’s political structure during emergencies. Second, path dependence operates by influencing the continuation of existing preventive detention procedures.

My findings showed that in the U.S. separation of powers system, under the heightened sense of threat after 9/11, unilateral executive authority facilitated the Bush Administration’s selection of a laws-of-war paradigm (national security framework) to enable indefinite detention without due process. The Republican-controlled Congress utilized this laws-of-war paradigm to continue indefinite detention without habeas review; yet, the Supreme Court’s intervention led to Congress’ eventual inclusion of minimal due process. Indefinite detention remained.

In the UK, the executive first used a security-based immigration framework to indefinitely detain non-citizen terrorist suspects under the heightened sense of threat produced by 9/11. However, the judiciary immediately struck it down. Moving forward, the fusion of powers required the executive to engage in extensive consultation with the legislature to derive a new preventive detention policy through its existing criminal law framework. The interaction between these two branches (1) enabled a priori constraints on executive preference to utilize a security-based framework and (2) allowed Parliament to have a voice as to which legal framework was selected. By locating preventive
detention for terrorist suspects within criminal law, due process protections were
guaranteed. Path dependence in the UK led seamlessly to sufficient due process
protections for citizens after 9/11.

Why Study Preventive Detention?

Overall, this thesis provides insight into how the structure of political
institutions interacts with legal frameworks during emergencies to contribute to
the formulation of preventive detention systems. Beyond explaining the
mechanisms of such interactions, this thesis contributes to an understanding of
how political structures impact human rights within the broader context of
security policymaking. The findings of this investigation are instructive for
answering a number of questions regarding the relationship between decision-
making and the protection of human rights.

Beyond the theoretical contributions of this study, this research has
significant real-world implications. Given the rise of global terrorism within the
past decade, states may need to create preventive detention systems. The findings
of this research can identify the processes of such decision-making and selection
of legal framework that are likely to result in preventive detention with sufficient
due process protections for terrorist suspects. This is more important than ever
before since an increase in the level of terrorism worldwide suggests that more
suspects, including many innocent individuals, could be detained for purely
security reasons. Accordingly, it is vital that states adopt detention systems that
protect the fundamental human right to due process guaranteed under the rule of
law. Moreover, the findings of this research can be generalized beyond security-
detention, to the policy-formulation of detention regimes relating to immigration
detention, pre-trial detention, and health-based quarantines. In each of these areas,
the policy implications from this research could provide meaningful input in
creating systems sensitive to and protective of due process.

Structure of Essay

Chapter 1 sketches how due process protections were altered in the U.S.
and UK preventive detention systems from 2001 - 2008. After mapping this out, I
turn to the existing literature on comparative institutions, decision-making during
emergencies, and legal frameworks. From this, I derive alternative explanations
and present my argument for the political structure as the critical variable
affecting due process in preventive detention.

Chapter 2 elaborates upon the research methodology adopted. It also
includes a quantitative analysis of the results of my content analysis. Chapter 3
and 4 develop detailed narratives of how preventive detention policy was formed
in the U.S. and the UK, respectively. Finally, I present the conclusions of this
investigation and consider its theoretical contributions, policy implications, and
areas for future research.
CHAPTER 1: ANALYTICAL APPROACH

This chapter first provides a trajectory of the due process protections afforded to terrorist suspects in the U.S. and UK preventive detention systems. I then discuss the literature on comparative institutions, policymaking during emergencies, and legal frameworks to generate my argument and derive alternative hypotheses.

Overview of Preventive Detention Policy

My dependent variable is the variation in due process protections provided in preventive detention. For the purposes of this research, I analyzed all policy decisions that affected the four procedural safeguards constituting “sufficient due process.” These safeguards include: (1) initial state review by an appropriate court or administrative board to verify the reasons for detention; (2) judicial or habeas review, which is the ability for a detainee to appeal the state’s detention, (3) periodic review, and (4) release of the detainee when reasons for his detention have ceased, measured by the period of time in detention without charge or trial (pre-charge detention). These four units were selected in order to apply a rigorous, unbiased framework to each country when assessing the detention policy. Each of these units have been addressed in international law, treaties, and studies and have been known to reflect baseline standards for any type of detention, hence in line with the United Nations’ commitment to afford detainees the same rights as those in criminal justice systems.\footnote{The UN emphasized that the procedures used to combat terrorism, including the detention of terrorist suspects, should be proportionate with established international legal norms. S.C. Res 1456, ¶ 6, U.N. Doc. S/RES/1456 (January 20, 2003) (“States must ensure that any measures taken...“) The policy decisions...}
examined include the executive orders, legislation, and judicial opinions that gave rise to changes in due process provided over time within each country.

I will provide more detailed analyses on how detention policy changed in the UK and U.S. in their own case study chapters. However, below I include two tables that visualize the variation in my dependent variable over time. Tables 1 and 2 document how each unit of due process was affected by each policy decision. If the policy did not affect the particular safeguard, I denoted this as “No Change.” Analyzing the variation of preventive detention between states and within state systems requires investigation over time. I used the time interval of the War on Terrorism between September 2001 (when it was declared) and August 2009 (when President Bush left office and President Obama was elected and removed the phrase “War on Terrorism”).

Table 1 illustrates the change that occurred in the U.S. Immediately after 9/11, the detention system formed did not provide for any of the safeguards necessary for due process. Seven years later, the safeguards that were provided include initial state review of detainee status, operated through military-run tribunals, and periodic review on an annual basis of detention. The policy only provided limited appeal to a judicial authority for review. Moreover, the period of detention remained indefinite throughout the entire interval.

<table>
<thead>
<tr>
<th>Policy</th>
<th>Initial State Review</th>
<th>Judicial Review</th>
<th>Periodic Review</th>
<th>Pre-Charge Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Military Order 11/2001</td>
<td>None. Up to discretion of Sec. of Defense.</td>
<td>None</td>
<td>None. Up to discretion of Sec. of Defense.</td>
<td>Indefinite</td>
</tr>
<tr>
<td><strong>Hamdi v. Rumsfeld (2004)</strong></td>
<td>No Change</td>
<td>Held that judicial review was required for U.S. citizens.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td>Executive Response to Hamdi</td>
<td>The Government released and charged the only 2 citizen detainees.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Rasul v. Bush (2004)</strong></td>
<td>No Change</td>
<td>Held that judicial review was required for aliens.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td>DOD Order CSRTS 7/2004 [applied to foreign nationals]</td>
<td>Yes, by CSRT within 30 days of capture.</td>
<td>None</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td><strong>Detainee Treatment Act 2005</strong></td>
<td>No Change</td>
<td>Special judicial review of challenges to final CSRT rulings by the D.C. Circuit Court.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td><strong>Hamdan v. Rumsfeld (2006)</strong></td>
<td>No Change</td>
<td>Held DTA did not prevent the Court from habeas review and military commissions were illegal.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td><strong>Military Commissions Act 2006</strong></td>
<td>No Change</td>
<td>Special judicial review of challenges to final CSRT rulings by the D.C. Circuit Court.</td>
<td>Annual</td>
<td>No Change</td>
</tr>
<tr>
<td><strong>Boumediene v. Bush (2008)</strong></td>
<td>No Change</td>
<td>Held that CSRTs provided insufficient review necessary and MCA was unconstitutional suspension of habeas review.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
</tbody>
</table>
Table 2 below illustrates the changes that occurred in the UK. The UK had different detention policies for citizens and foreign nationals. For the former, immediately after 9/11, any citizen detained had sufficient due process. By the end of 2008, the only change was that pre-charge detention increased from seven to forty-two days. For non-citizens after 9/11, indefinite detention was permissible upon an initial review by an executive-administered tribunal. This system was repealed and replaced in 2005 with executive control orders that enabled detention for a maximum of twelve months but provided sufficient due process. Hence, the UK was able to afford both citizens and foreign nationals sufficient due process, whereas the U.S. failed to do so for both.
### Table 2. Variation in Due Process Protections in the United Kingdom

<table>
<thead>
<tr>
<th>Policy</th>
<th>Initial State Review</th>
<th>Judicial Review</th>
<th>Period Review</th>
<th>Pre-Charge Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATCSA 2001 [applied to aliens]</td>
<td>SIAC tribunals</td>
<td>None</td>
<td>None</td>
<td>Indefinite</td>
</tr>
<tr>
<td>A v. Secretary of State (2004) [applied to aliens]</td>
<td>No Change</td>
<td>No Change</td>
<td>No Change</td>
<td>Held indefinite detention not permissible. Repealed Part 4 of ATSCA.</td>
</tr>
<tr>
<td>Prevention of Terrorism Act 2005 [applied to aliens and citizens]</td>
<td>Upon arrest with a control order reviewed by a court.</td>
<td>Yes, after 7 days.</td>
<td>Annual</td>
<td>Maximum of 12 months.</td>
</tr>
<tr>
<td>Terrorism Act 2006 [applied to citizens]</td>
<td>No Change</td>
<td>No Change</td>
<td>No change</td>
<td>Maximum of 28 days.</td>
</tr>
<tr>
<td>Secretary of State v. MB and AF (2007) [upheld PTA]</td>
<td>No Change</td>
<td>Yes, after 7 days; yet subject to discretion of Home Secretary.</td>
<td>No Change</td>
<td>No Change</td>
</tr>
<tr>
<td>Counterterrorism Bill 2008 [applied to citizens]</td>
<td>No Change</td>
<td>No Change</td>
<td>No Change</td>
<td>Maximum of 42 days.</td>
</tr>
</tbody>
</table>

**Literature Review**

This thesis will draw from existing scholarship within three schools of thought that may help explain variation in types of preventive detention systems
adopted: structural approaches, actor-based approaches, and institutional approaches. For structural approaches, I will begin by examining the literature on democratic political structures and how they are affected during emergencies. For actor-based approaches, I will draw from scholarship on realism and threat perception. Finally, for institutional approaches, I examine literature concerning path dependence and compliance with legal frameworks.

Structural & Actor-Based Approaches

Political Structures & Emergency Powers. Compared to authoritarian regimes, democracies are more likely to uphold liberal tenets that would predict guarantees of due process. Yet, democracies may clamp down on such liberal policies when they find themselves facing national security or emergency crises. Acts of terrorism against states generate such emergencies, as they constitute “sudden and extreme occurrences.”¹⁸ During such circumstances, executives may claim more power than they would otherwise be permitted to exercise. Because the exigent nature of emergencies requires immediate action, the executive has been known to be able to take action for the public good—this is known as the “Lockean prerogative.”¹⁹ John Locke insisted that in emergencies, the government had to have legally unconstrained power to “act according to

¹⁸ Fatovic, 3.
discretion for the publick good, without the prescription of the Law, and sometimes even against it.”

The structure and power of political institutions within democracies are affected when executives assert authority and expand their power. To understand this impact, the range of institutional power within democracies must be understood. Democracies fall along a continuum that represents the range of power distribution across political institutions, with pure separation of powers on one end and fusion of powers on the other. In a pure separation of powers system, the branches of government (executive, legislative, and judicial) have separate, independent powers and areas of responsibility that enable checks and balances against each other. In a fusion of powers system, the power and responsibilities of the executive and legislature are merged.

There are a number of mixed systems along this continuum, but the purest form of a separation of powers system tends to be associated with a presidential system. This system has an executive with considerable constitutional power who is directly elected by the people for a fixed term but may be removed by the legislature with a super-majority impeachment. The purest form of a fusion of powers system is generally associated with a parliamentary system in which the only democratically legitimate institution is parliament, which in turn appoints the executive. Thus the executive is a subset of the legislature. Consequently, the

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prime minister (as the legislative representative of the queen, the executive) and his cabinet compose the government, and their authority is completely dependent upon parliamentary confidence—they may be removed at any time with a majority no confidence vote.^{23}

Scholars debate which of these systems provides the best stability for the political process. Juan Linz emphasizes the “perils of presidentialism,” particularly the potential of a president usurping too much power. A president exercises the functions of a chief executive not possessed by a prime minister; thus he can stand against the array of particular interests represented by the legislature. Linz argues that such divergence in power, in addition to the guaranteed fixed terms of presidents, causes rigidity in the political process. Parliamentarism, he asserts, imparts flexibility to the political process since the power of the executive is reliant upon legislative support. Moreover, the Prime Minister does not have undue power since he is just the “spokesperson for a temporary governing coalition” and cannot be detached from parliamentary opinion.^{24} Scott Mainwaring and Matthew Shugart critique Linz’s claim that parliamentary systems offer a better political process than presidential systems do. They argue that each nation’s given institutional combinations influence the success of democracy. For example, presidential systems can work effectively when the president has weak legislative powers amongst other factors.^{25} This debate shows there exist differences on the policymaking process depending on

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^{23} Ibid., 51.  
^{24} Ibid., 56.
whether a separation of powers or a fusion of powers system exists. This difference in power distribution and its effect on policymaking is often exacerbated during emergencies.

**Realism.** Actor-based approaches provide an understanding of the range of policy options available to the executive during emergencies. Classical realists argue that there are no limits to the exercise of power, as state survival is the most important in a world of anarchy, trumping human rights. Thomas Hobbes emphasizes that subjects within a contractual agreement with the state agree to give up some of their liberties in exchange for common security.\(^{26}\) Niccolo Machiavelli, though disagreeing with Hobbes’ theory of social contract, asserts that the sole aim of the executive would be to seek power (and hence security) regardless of any ethical considerations. He remarked, “Because you cannot always win if you respect the rules, you must be prepared to break them.”\(^{27}\) Under these realist schools, the rule of law can be broken—and civil liberties suspended—for the purposes of national security. Hence, during emergencies, executives may harness such realist approaches to justify preventive detention without due process, arguing that without it, national security and state survival could be compromised.

As an institution, the executive may also be justified in establishing indefinite detention without due process. Clement Fatovic argues that since

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“emergency is by definition ungovernable by the rules that govern normal life,” an effective response to emergencies requires that some institutions react quickly to address threats even if against the law. Accordingly, because neither the legislature nor the judiciary is capable of the “swift energetic action required to deal with an emergency,” the executive must be the authoritative body when an emergency does occur. Executives may possess special resources, such as legally binding executive orders, which enable them to formulate responses “more rapidly…than can legislatures, courts, and bureaucracies.” Hence, proponents of the inherent executive power theory assert that emergencies allow executives to exercise extraordinary discretion either without express legal authorization or in direction violation of the law. The executive can thus easily deem detention without due process necessary during an emergency.

In the pure separation of power system in the United States, executive emergency powers may result in a unilateral presidency. This is an atypical tendency given the institutional checks and balances by the other branches intended to prevent such an occurrence. However, history has shown that separation of powers is suspended during times of crises, in which executives have developed powers that encompass legislative, executive, and adjudicative functions. James Madison, justified an expansionist view of presidential power by articulating: “The Executive power being in general terms vested in the President, all the power of Executive nature not particularly taken away must

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28 Fatovic, 70.
29 Ibid., 3.
belong to that department.” Under such reasoning, Congress and the judiciary have granted the executive broad authority in emergencies primarily as it was considered an aspect of the president’s role as commander in chief. Members of the legislature and the judiciary may experience realist fears of state survival, motivating them to show deference to the executive during crises. These processes thus may explain why preventive detention with no due process can be enacted in separation of powers systems during times of crisis.

The judiciary, however, may be able to impose limited constraints. In democracies, the function of the judiciary is to uphold the rule of law by ensuring that rights enumerated in the constitution, common laws, and legal codes are respected by the other branches. When executive power suspends such rights, particularly that of habeas corpus (the right to judicial review of state detention), this disrupts the ability of the judiciary to uphold rule of law, and due process is affected. Due process is legally guaranteed for citizens through domestic law and for non-citizens through international law in both the U.S. and UK. If an executive employs preventive detention without due process, the judiciary may constrain this power by affirming the rights of individuals under habeas corpus, as

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32 U.S. Const. Amend. V (“No person shall be…deprived of life, liberty, or property, without due process of law.”); U.S. Const. Amend. XIV (“…nor shall any State deprive person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); 18 U.S.C. § 2241 (c)(3) (“As used in this section the term "war crime" means any conduct…which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict.”); UK Human Rights Act 1998, Art. 5 (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”); UK Human Rights Act 1998, Art. 6 (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).
provided by the law in both countries. While this may result in limited due process, sufficient due process would be difficult to achieve under the institutional constraints posed by a separation of powers system.

The issue with judicial processes is that they require a significant amount of time to have any effect on the policy(ies) adopted by the executive during emergencies. The judiciary may only modify the power of the executive once a case relating to the issue reaches its high-level jurisdiction, and this could take months since the court only hears one to two percent of cases appealed. Additionally, there is the issue of standing—one can only bring a case challenging the constitutionality of a law if he/she has been harmed by it. The Court may only rule on the narrow scope of this appeal and cannot rule on any other issue. Therefore, these institutional processes both delay the ability of the judiciary to immediately exert its check on executive emergency power and limits the scope of the ruling to specific issues. Furthermore, the question then becomes how or whether the executive will implement the Court’s ruling. As Howard Ball has noted, “The Court has no mechanisms for enforcing its orders; no formal sanctions to attach to a president’s noncompliance.” Yet this does not mean executive power goes unchecked—political sanctions may come into play if a president decides to ignore the Supreme Court.

Within a fusion of powers system, the executive is also able to assert and exercise greater policymaking discretion during emergencies for the same realist
fears described earlier. During emergencies, the prime minister in a pure parliamentary system may suspend due process for national security concerns. The other branches will likely defer to the executive out of similar concerns for national security. Over time, though, both the legislature and judiciary may impose constraints on expanded executive authority. Unlike within a separation of powers system, this process is must more rapid and is more likely to lead to sufficient due process. First, emergency executive power has greater potential to be constrained by the dependent relationship of the executive and the legislature.\textsuperscript{35} The executive cannot exercise emergency powers unilaterally; it can only do so under delegated authority and consent from the legislature. Hence, the legislature may constrain executive power \textit{a priori} (from before). A significant difference to note between separation of powers and fusion of powers systems is that in the former constraints imposed on the executive must occur \textit{ex post facto} (after the fact), while in the latter the constraints may occur \textit{a priori} and \textit{ex post facto}. This suggests that both the creation and reforms of preventive detention in a fusion of powers system have a greater ability to be modified to include due process protections at a faster pace than within a separation of powers system.

Moreover, the necessity of legislative supervision during emergencies may lead to sufficient rather than limited due process. First, legislators will tend to utilize and/or modify existing legislation as a result of path dependence (described in the next section). Second, there exists a multitude of opinions in the legislature,

\textsuperscript{35} Martinez, 2499.
including voices that represent those that sit on judiciary and human rights committees, who are more keen on ensuring due process remains protected.

**Threat Perception & Civil Liberties Trade-Off.** Decision-making may also be influenced by perceptions during a crisis. When people perceive a “heightened sense of threat,” their support for civil liberties lowers.\(^{36}\) In democracies, the level of support for democratic norms may be challenged when they conflict with other important values, such as security.\(^{37}\) Theorists have noted that at times there must be value trade-offs with civil liberties, and some argue that safety and security are truly more basic needs than self-actualization and freedom.\(^{38}\)

Threat perception can also exert a cognitive influence on the willingness to trade civil liberties for personal security. The perception of threat enhances attention to contemporary information and to the source of anxiety. It also promotes decreased reliance on habitual cues.\(^{39}\) If a heightened sense of threat allows people to disregard habitual predispositions, then people may rely less on social norms protecting civil liberties to favor efforts to combat terrorism. Furthermore, sociotropic threat against society or cherished values and norms usually outweighs a sense of personal threat, leading governments to act in antidemocratic or intolerant ways. These theories of threat perception suggest that indefinite detention regimes would be implemented in countries immediately

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following a terrorist attack—when the threat is intense and tangible. These ideas imply that as the security threat wanes (as time moves forward past the day of the terrorist attacks), liberal norms will reinstate due process safeguards.

**Institutional Approaches**

*Path Dependence.* In contrast to the common exercises of comparative political science, which attempt to explain large effects by invoking large single-causes, scholars in historical institutionalism have sought to identify logical inferences by looking at events temporally. These institutional arguments offer claims in which institutions, or man-made formal or informal organizations, rules, or norms, cause an actor to move in a certain way. Historical institutionalism tends to emphasize the decisions made early in political time to explain complex phenomena. History impacts decision-making because choices made at time \( t \) have the potential to constrain choices made at time \( t+1 \) and thus early policies and decisions may continue. When such an instance occurs, policies may become path dependent, or continuing as initiated until another adequate force can alter it. Path dependence does not mean that policies are locked in a permanent path. Change is possible, but within certain limitations—in other words, until something terminates the mechanisms that generate the continuity. This historical institutional theory of path dependence may explain how due process protections are afforded in preventive detention based on a state’s history.

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While there are many different processes at work in path dependence, this work will focus on only several primary aspects of path dependence. First, institutional inertia causes path dependence. When it comes to decision-making, the inclination for leaders to “conserve cognitive resources” in seeking information and developing options may lead to institutional inertia.\textsuperscript{42} Inertia begins with problems of accessibility: individuals concentrate on issues about which they have a lot of information.\textsuperscript{43} This idea of accessibility is further supported by research that demonstrates the “ease of recall strongly influences judgments in ways that cannot be explained by the rational seeking and using of information.”\textsuperscript{44} As a result, decision-makers tend to search for policy alternatives “that are only marginally different from the current one.”\textsuperscript{45} The chosen option tends to be the one that best corresponds to a decision-maker’s pre-existing beliefs or an existing policy as long as it is not “inadequate.”\textsuperscript{46}

Second, path dependence may also occur due to “increasing returns dynamics.” This economic principle helps to explain an actor’s reticence or inability to change policy courses since the costs of switching from one alternative to another may increase over time.\textsuperscript{47} Once an increasing returns process is established, positive feedback may lead to a single equilibrium, which in turn may be resistant to change. Increasing returns processes that are related to

\begin{thebibliography}{99}
\bibitem{Ibid} Ibid., 345.
\bibitem{Jervis} Jervis, 348.
\bibitem{Ibid} Ibid.
\end{thebibliography}
path dependence have several characteristics: (1) unpredictability—early events may have a large effect that could lead to many different outcomes; (2) inflexibility—the farther along the process one is, the harder it becomes to switch to another path (hence, movement down a particular path may lock-in one policy); (3) path inefficiency—the lock-in outcome may result in lower pay-offs in the long run when compared to earlier possible alternatives.\(^48\)

Brian Arthur has identified three important factors or mechanisms that produce increasing returns processes and drive path dependence: (1) fixed costs—when set-up or fixed costs are high, policymakers have an incentive to stick with an existing option; (2) learning effects—individuals tend to choose what they have done repetitively before and apply this to related activities; (3) coordination effects—a policymaker will choose an option if other peers are also embracing that option.\(^49\)

Based on this literature, preventive detention systems may thus be the consequences of politically expedient decision-making, in which the form of detention resembles existing preventive detention systems as a result institutional inertia and/or high costs to switch policy. In the U.S., path dependence may explain why it took the U.S. seven years (as opposed to the UK’s three) to provide minimal due process protections. After President Bush administered indefinite detention without due process, institutional inertia and the costs of switching legal frameworks may have been high because of the processes to transfer detainees from GTMO to the U.S. This would explain why the U.S. continued to afford

\(^48\) Ibid.
minimal due process. In the UK, path dependence may explain the automatic provision of sufficient due process to citizens. Because the UK already had existing security-based preventive detention policy for terrorist suspects given its history with the IRA, institutional inertia and/or increasing returns dynamics influenced the application of such laws to terrorist suspects.

Legal Frameworks. Institutionalism extends beyond historical approaches for understanding policymaking to existing legal rules and norms within society. Theories using legal institutions suggest that the distribution of procedural safeguards is determined by legal obligations. Scholars Gabriella Blum and Philip Heymann argue that the type of legal framework used affects the form of preventive detention.\(^5^0\) There are generally three legal frameworks used to establish preventive detention: a national security framework, an immigration framework, and a criminal law framework.

A country’s detention policy is within a national security framework “if [it is] anchored in special powers delegated to the executive at times of war, national emergency, or crisis.”\(^5^1\) Both the U.S. and the UK have used such executive power in times of national security to detain individuals. U.S. history contains several instances of experimentation with national security preventative detention. The most paradigmatic example is the Enemy Alien Act of 1798.\(^5^2\) This authorizes the president during a declared war to detain, deport, or restrict the liberty of anyone over the age of fourteen who is a citizen of the country with

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\(^{51}\) Elias, 129.

which the U.S. is at war, without requiring a finding of culpability or suspicion. It therefore provides the government with enormous power to engage in preventive detention since it allows for deportation and detention without due process.

Presidents have invoked this act during the War of 1812, World War I, and World War II to detain enemy aliens. The most notorious use of this was the interment of 110,000 persons of Japanese descent—including 70,000 U.S. citizens—during WWII on the basis of detaining “enemy aliens.” In Korematsu v. United States, the Supreme Court upheld regulations relating to national origin based on broad deference to the war-making powers of the president and Congress.

The UK similarly has used executive power to detain individuals during both World Wars “for securing the public safety.” The Law Lords ruled that the inability for detainees to use habeas corpus to challenge their detentions was “necessary in a time of great public danger to entrust great powers to the executive.” This executive power to detain terminated following World War II. However, Britain utilized it again during the Troubles in Northern Ireland. During this conflict with the IRA terrorists, the British imposed indefinite detention from 1971 to 1975 on the basis of national security. The process failed in capturing the main leaders of the IRA, and instead radicalized many more to join the IRA. Additionally, the combination of incompetent arrests, stories of torture and cruel punishment, and the indefinite internment sparked a wave of violence across the

55 Blum, 14.
North, with no military gains to offset the impact internment had on the nationalist community.\textsuperscript{57}

A variation of these types of national security frameworks is a “laws-of-war paradigm” in which detention policy is derived from the laws of war. Blum and Heymann argue that the application of this paradigm has justified the lack of due process protections in preventive detention. James Morrow’s findings shed light on the mechanism that causes the lack of due process under the laws of war. Morrow suggests that compliance to the laws of war depends on the reciprocity of enforcement by both parties involved in the armed conflict. The reciprocal enforcement that aids this compliance helps explain “inhumane treatment” against “non-state opponents” since non-state actors “do not recognize the laws of war and adopt atrocity as their central strategy.”\textsuperscript{58} These findings suggest that democracies are likely to abandon legal commitments in order to triumph in wartime against non-state opponents, such as terrorists.

\textit{Immigration Framework.} In instances when there is not a formally declared war or armed conflict, both the U.S. and the UK have used preventive detention through immigration regulations. The U.S. relied on preventive detention based upon immigration law during the Palmer Raids of World War I in the winter of 1919-1920.\textsuperscript{59} These raids were initiated by terrorist bombings in Washington, D.C. against government officials. In response, the government mounted a nationwide roundup of foreign nationals for their ties to communist

\textsuperscript{57} Blum and Heymann, 94.
organizations. Immigration law was the only proper authorization for targeting individuals for their politics, and thus, without any peacetime sedition law in place, these raids focused on foreign nationals.

Currently, provisions in the Immigration and Nationality Act regulate the status of aliens suspected of terrorist activity through three channels: (1) hearings before an immigration judge; (2) detention by the Attorney General that must result either in a criminal charge or deportation hearing; or (3) through the “Alien Terrorist Removal Procedures” that involve the Alien Terrorist Removal Court, which is a part of the federal court system.\(^\text{60}\)

From the perspective of the government, immigration proceedings and deportation are preferable for several reasons. Deportation is not a punishment and hence the rights attached to criminal trials are not applicable to deportation hearings.\(^\text{61}\) This enables the government to rely on hearsay to deport and detain noncitizens on the basis of secret evidence presented to the judge.

The UK has also utilized its immigration laws for preventive detention. The 1971 Immigration Act instituted preventive detention for persons denied entry to the country. The Home Office was given the authority to detain or offer temporary admission to people based on executive discretion. While the laws of the UK Border Agency state this “detention must be used sparingly, and for the shortest period necessary,” the lack of an explicit limit enables indefinite


\(^\text{61}\) Fong Yue Ting v. United States, 149 U.S. 698 (1893) (held that deportation is not punishment and does not require the protections of the criminal process).
detention without due process.\textsuperscript{62} Hence, both the U.S. and the UK could conceivably use their existing immigration laws to indefinitely detain foreign nationals without due process.

\textit{Criminal Law Framework}. A criminal law or pre-trial detention framework applies “if the jurisprudential and/or legislative basis for its detention of terrorist suspects is anchored in its criminal law and penal code.”\textsuperscript{63} Under criminal law, a state can justify preventive detention for the objectives of incapacitation and intelligence gathering, but this requires proof of criminal acts and burdens the interrogation process with rules that protect against self-incrimination and provide a right to counsel.\textsuperscript{64} When states use a “criminal law paradigm” for detention purposes, a variation of its criminal procedures is implemented since not all of the traditional criminal law requirements (i.e. “clear advance statement of the prohibited conduct giving warning to the individual; findings of past facts, rather than far less certain predictions about future conduct” etc.) may be applicable in the cases of terrorist suspects.\textsuperscript{65} The rules of criminal procedure are modified to achieve security goals while preserving traditional freedoms. Regardless of these modifications, scholars agree that detention derived from criminal law is “generally regarded as the least extreme/most rights-respecting system of detention.”\textsuperscript{66}

In the U.S., criminal law has traditionally been used for prosecuting terrorist acts. The criminal justice system provides defendants with a number of

\begin{itemize}
\item \textsuperscript{62} Immigration Act 1971, § 4; UKBA 2009a, chp. 55.1.3.
\item \textsuperscript{63} Elias, 129.
\item \textsuperscript{64} Blum and Heymann, 96.
\item \textsuperscript{65} Ibid., 97.
\item \textsuperscript{66} Elias, 130.
\end{itemize}
rights, including but not limited to the requirement of proof beyond a reasonable doubt; strict evidentiary rules; the prohibition against *ex parte* evidence; the privilege against self-incrimination; the right to trial before an impartial jury; the right to counsel; and the right to due process of law.\(^{67}\) Collectively, these rights demonstrate a procedural commitment to reducing the rate of wrongful conviction. Prior to the 1990’s, terrorism was addressed through the lens of criminal law and its procedural safeguards. Under this system, criminal justice effectively obtained numerous convictions of terrorists.\(^{68}\) While the criminal justice system did allow for more procedural safeguards, it imposed some restraints on criminal prosecution due to difficulties of apprehension, liability, and proof that limited the options of federal prosecutors.

The UK began to use a version of its criminal law for pre-charge detention following the failure of British policies relying on a national security framework during the Troubles in Northern Ireland. It switched to using emergency pre-trial regulations that were routinely renewed to deal with the terrorist threats posed by the IRA.\(^ {69}\) Instead of unchecked executive detention, these regulations included pre-charge detention periods with judicial review at various intervals. After the IRA bombings of two pubs in Birmingham killed twenty-one people and injured 160 in 1974, the Prevention of Terrorism Act of 1974 was introduced.\(^ {70}\) This allowed the police to arrest and detain anyone suspected “to be or have been


\(^{68}\) Chesney and Goldsmith, 1092.

\(^{69}\) Blum, 14.

involved in acts of terrorism” for seven days without charge, but with the approval of the secretary of state. For the first forty-eight hours, the detainees could be held without access to counsel. Under general criminal law in Britain, for comparison, pre-charge detention cannot exceed ninety-six hours (four days) and access to counsel must be provided within the first thirty-six hours.

Following the peace process with Northern Ireland in 1999, the UK passed the Terrorism Act 2000 (TA) that codified the temporary provisions of the PTA.

Under the TA, individuals can be held pending criminal charges for terrorist acts, but are entitled to prompt notification of the charges they face. A suspect’s arrest must be reviewed by an officer as soon “as reasonably practicable” after the time of the arrest. Individuals detained on terrorism charges have a right to challenge extensions of their pre-charge detention in the Court of Appeals and are appointed counsel if they do not have the means to acquire their own. Special provisions apply to terrorism-related hearings, ranging from camera hearings, securitycleared judges, and special prosecution/defense. Due process protections are enabled because UK criminal law must comply with the ECHR and the ICCPR, as incorporated in its domestic law through the Human Rights Act of 1998. Hence, in both the U.S. and UK, criminal law offers detention with sufficient due process for terrorist suspects.

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71 Schulhofer, 1939.  
72 Ibid.  
73 Donohue, 7. During this interval, as the violence in Northern Ireland escalated, the government enacted the Northern Ireland Emergency Provisions Act in 1972 that allowed the government to intern terrorist suspects for seventy-two hours without charge based on suspicion; yet these special arrest powers ended in 1987.  
74 Terrorism Act, 2006, c. 11, § 23 (Eng.).  
75 Terrorism Act, 2000, c. 11, §. 8 (Eng.).
In sum, these three legal frameworks can explain variation in the due process protections of the U.S. and the UK preventive detention systems. In the U.S., the use of a national security would enable indefinite detention without due process. Since the U.S. was “at war” with Al-Qaeda and associated terrorists, who were non-state actors engaged in combat, the Geneva Convention protections for state actors did not apply to these detainees in this “laws-of-war” paradigm. In the UK, a switch in legal framework may explain its change in policy from indefinite detention to detention with due process. The UK could have either used a national security or immigration framework to justify indefinite detention; however, we would ultimately expect the UK to utilize its criminal law to derive its detention policy, which would require it to afford sufficient due process.

**Hypotheses**

This vast amount of literature provides an assortment of alternative hypotheses, or independent variables, to consider in explaining the variation in due process protections in preventive detention. This paper will argue that the political structure of institutions and how it changes during emergencies primarily affects the due process protections in preventive detention for terrorist suspects. Accordingly, the independent variable is the political structure of institutions within a democracy—a separation of powers system or a fusion of powers system—represented by the executive, the legislature, and the judiciary. My hypotheses will be based upon the political structure within the U.S. (separation of powers) and UK (fusion of power) and how they change during emergencies. My hypotheses, along with the alternate hypotheses, are as follows:
Figure 1. Framework of Argument

![Diagram showing the Framework of Argument]

**Central Hypotheses**

**Political Structure USH1**: When the President claims executive prerogative during emergencies, detention without due process tends to be created as the executive puts forth national security concerns over due process protections due to realist fears for state survival. The other branches tend to show deference to such prerogative during emergencies due to similar realist fears.

**Political Structure USH2**: Over time, in a separation of powers system due process is granted by judicial checks (enforced by the legislature) on executive power in its function to uphold the rule of law. Yet, institutional processes lead to minimal rather than sufficient due process since (a) checks can only occur *ex post facto* policy enactment and thus any changes require much time to materialize; and (b) the Court may only rule on narrow issues of standing.

**Political Structure UKH1**: When the Prime Minister claims executive prerogative during emergencies, detention without due process tends to be created as the executive puts forth national security concerns over due process protections due to realist fears for state survival. The others branches tend to show deference to such prerogative during emergencies due to similar realist fears.
Political Structure UKH2. Over time, as a function of the fusion of power, sufficient due process should be granted because of the multitude of opinions, in Parliament who are able to provide their input. These due process protections will occur much quicker than in a separation of powers system as Parliament can more easily constrain executive power a priori enactment of detention policy.

Alternate Hypotheses

Path Dependence USA3. Path dependence in U.S. institutions leads to detention systems with minimal due process due to (a) institutional inertia, and/or (b) increasing returns dynamics, such as the high set-up costs, learning effects, and coordination effects, that inhibit major changes to existing policy.

Path Dependence UKA3. Path dependence in UK institutions causes sufficient due process within its preventive detention system as (a) institutional inertia, and/or (b) increasing returns dynamics, such as high costs, learning effects, and coordination effects, push policymakers to utilize existing terrorism laws codified during the terrorism crisis of the IRA.

Legal Framework USA4. U.S. perception of the terrorism crisis as “war” led to detention without due process as the use of a “laws-of-war” framework allowed for (a) the abandonment of legal commitments since non-state terrorist suspects could not reciprocate respect to international norms for due process, and/or (b) derogation from the international law that respects human rights, as specified during times of emergency.

Legal Framework UKA4. The UK’s change from indefinite detention to detention with sufficient due process results from a switch in legal frameworks to derive detention policy. While it initially used a national security or immigration framework to justify indefinite detention, it ultimately utilized its existing criminal law, which required sufficient due process.

Threat Perception USA5. The severity, novelty, and mass fatality of 9/11 led to detention without due process as it (1) produced a heightened sense of threat that allowed U.S. government officials to disregard predispositions toward democratic due process norms and/or (2) deeply affected cognitive and psychological attitudes of executive members. As the threat wanes, U.S. liberal norms would reinstate and guide institutions to rectify policies in support of due process.

Threat Perception UKA5. Initially, after 9/11 and after the 7/2005 bombings, we would expect the UK to institute indefinite detention without due process due to the heightened sense of threat that allows government officials to disregard predispositions to due process norms. As the threat wanes, UK liberal norms should reinstate and guide institutions to rectify policies in support of due process.
CHAPTER 2 – METHODOLOGY & QUANTITATIVE ANALYSIS

Case Selection

This thesis uses comparative case studies of the United States (a pure separation of powers systems) and the United Kingdom (a pure fusion of powers system). I chose these countries because I wanted to select two democracies that had to respond immediately to large-scale terrorist attacks using preventive detention. I selected the United States since it was the first country that was attacked in the contemporary global terrorism conflict and responded using preventive detention. Next, out of the other countries that were similarly attacked and instituted preventive detention, I selected the United Kingdom because of the similar structural and procedural characteristics it shares with the United States that would allow for a controlled case study analysis.

The selection of these two cases thus allows for maximization of the variance caused by the independent variables since the similarities of these countries control for other key variables, including: the degree of economic development, regime type (democracy), and liberal culture. Beyond these structural similarities, both countries have similar legal frameworks from which they have historically derived preventive detention policy: national security powers, immigration laws, and criminal law. The fact that both countries have the same tools for detaining terrorists increases the expectation that both of them would utilize the same type(s) of preventive detention when faced with similar terrorist threats.
Research Method

In order to assess the hypotheses outlined in the previous chapter, I conducted a qualitative analysis of each case through chronological process tracing during the period of September 2001 – November 2008 (eight years). I selected this time interval as it encompasses the duration of the Bush presidency and the rhetorical War on Terrorism, as well as the period of time prior to and following the terrorist bombings in the UK in 2005. During this interval, both countries implemented and/or revised security detention systems following 9/11 and continued to do so until the end of the period. Additionally, during this time interval, party politics are held constant in each country since the Republican Party and the Labour Party controlled their respective governments for the entirety of this period.

Through this time interval, I process trace within each case study. Process tracing requires formulating a set of theories and then deriving predictions about patterns that would occur in the real world if that theory were valid. The theories I have selected to test are the political structure, threat perception, path dependence, and legal frameworks theories. The hypotheses presented earlier serve as these theories’ predictions. I chose to use process tracing because this method would allow me to identify causal mechanisms between my independent and dependent variables.


77 While the Blair Ministry ended in 2007 and was replaced by the Gordon Brown Ministry, the government still remained control under the Labour Party.
Before I began process tracing, I identified within each country the events that contributed to variation in my dependent variable (units of due process protections afforded in preventive detention). These included all of the relevant executive decisions, legislative actions, and judicial opinions/judgments that related to the formulation of preventive detention policy in each case. For each of these policy outcomes, I assessed how the policy affected, if at all, each individual due process unit and mapped out changes in detention policy in both countries during the time interval. The results of this were provided in Tables 1 and 2.

After this, I collected all of the documents that would allow me to understand each policy outcome and the factors that could have affected the provision of due process protections in each country. This entailed acquiring the following for each branch of government:

<table>
<thead>
<tr>
<th>Table 3. Indicators for the Independent Variable</th>
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<tr>
<td><strong>Branch within Political Structure</strong></td>
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<tr>
<td><strong>Executive</strong></td>
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<tr>
<td><strong>Legislature</strong></td>
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<td><strong>Judiciary</strong></td>
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</table>
These types of documents were selected because they would shed light on the reasoning of policymakers within each branch. While I recognize that other channels for discussion of policy may exist—particularly private communications—these types of documents cover all of the publicly accessible information about government policymaking.

After collecting these documents, I developed a coding device for identifying language that could be counted as evidence for or against a particular hypothesis. This coding device enabled me to conduct a systematic content analysis of the language employed in all of the documents. Content analysis is a tool used to determine the presence of certain words, concepts, and/or themes within texts and to quantify their presence in a systematic manner.78 The results are used to make inferences about the messages and motives of the text, author, or audience of the document. By examining the specific language within the documents relating to preventive detention policy, I am able to infer the motivating factors behind the decision-making process.

The content analysis method is a combination of (a) conceptual and (b) relational analysis: (a) the concepts (various hypotheses) are examined in the documents through the presence of certain words used with respect to a specific argument; then, (b) the relationships between concepts in a text are examined. To develop the coding device to carry out content analysis, I first revisited my hypotheses and generated language that I would expect to see in the documents that would support or undermine each hypothesis. I randomly selected two

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samples from each of the six groups of documents and performed an in-depth content analysis on each, noting all the language that matched the language I had expected for each hypothesis. I also noted language that may have related to another alternative hypothesis that I did not originally generate.

The results of this preliminary content analysis led me to develop a coding device with language criteria for each of the hypotheses. This coding device can be found in the appendix. Underneath the expected language, I insert “preliminary examples” of the language found in the sample documents during my initial review. These phrases became the ones I expected to see, or synonyms thereof, throughout all of the documents in support of or against each hypothesis. I applied this coding device to the remainder of the documents, noting in a coding chart which documents contained support for which hypotheses.

While this coding device proved useful to carry out systematic content analysis, I realized there are limitations in relying on political discourse. Most significantly, such discourse, particularly in committee hearings and debates, is known to be open to the public. Consequently, political discourse may not represent all of the true intentions behind the policy formulation, but rather the discourse the government would like the public to hear. Yet, these forums (parliamentary debates, congressional hearings, etc.) are intentionally made public to keep the government accountable for the decisions they make. Indeed, these are the only times in which all legislators are brought together for the purpose of discussing a single policy, and thus it would be difficult to disguise true intentions.
Another limitation that arises from the use of political discourse is the nature of decision-making itself. The literature on decision-making emphasizes the influence of individual psychology, perception, cognition, and information processing. This literature attempts to map out the belief structures of the decision-makers and how international events shape these structures. While analyzing the language of decision-makers is one avenue to comprehending their cognition, it still does not allow us to consider other psychological factors that influence decision-making.

There also exist limitations in using content analysis. Reliability is a key concern as it rests upon the coder’s accuracy in coding data the same way throughout the entire analysis. Another concern is that content analysis is inherently reductive to a point that undermines the purpose of analyzing language since the holistic meaning of the text may become lost in the process. This leads to the major obstacle in using content analysis—the validity of the conclusions made by the analytical inferences. Many question whether the conclusions follow from the data or instead are explained by other phenomena/the context of the text. Particularly for this thesis, the question would be similar to asking whether the greatest number of linguistic references supporting a hypothesis accurately reflects the true motives for the variation in due process protections.

While these limitations are troubling, they are not fatal for the use of content analysis in this thesis. First, to ensure that I coded documents consistently, I adhered strongly to the coding device I created, and because I organized data

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collection by hypothesis I was able to keep track of all the coded language that matched each hypothesis. In this way, I was able to easily refer to the data table to see what language I could expect for a given hypothesis in any new document that I coded. Second, to avoid the effects of becoming too reductive, I did not use a program that generates a quantitative count of coded language. Instead, I read through every single document, which provided me with the context necessary to understand whether the language did indeed provide evidence for a certain hypothesis, since there could have been many scenarios where the expected language did not necessarily serve as evidence for a hypothesis. This process of thoroughly reading the documents in chronological order of their occurrence enabled me to ensure that my inferences were valid since I was able to locate each statement within a larger context. Third, instead of relying on just a quantitative analysis of the content analysis, I use qualitative case studies to provide a broader context to understanding the results of the content analysis.

In addition to these qualifications, there were many advantages to using content analysis. First, content analysis directly examines communication via primary texts and thus represents the heart of social interaction. This enables the researcher to have closeness to the text that permits flexibility to tailor the method to the specific research. For the purposes of my research, this enabled me to identify certain language and analyze its context to determine whether it supported my hypotheses. I did not have to simply rely on a quantitative count. In using a context-driven analysis, I was able to better understand the motivations of speakers.
Second, content analysis provides insight into complex models of human thought and the use of language, which cannot be easily extrapolated from other types of social science research methods. This was extremely beneficial for my thesis since the entire purpose of my research and content analysis was to better understand the motivating factors of policymakers through their use of language. Finally, content analysis can serve purposes beyond the extent of the research. It can provide valuable insights, historical and cultural, about the time period in which the texts are analyzed by offering a picture of how society operated. Through my content analysis, I learned much about the behind-the-scenes politics that occurs among policymakers since such interaction is not easily perceived through secondary news sources.

After carrying out content analysis on all of the documents, I now had my observations: public and private statements by actors about why they took certain actions. I organized my results in chronological order by event, so that I could see which hypotheses were interacting to affect the detention policy at that specific point in time. After I did this, I went through and compared these observations with the predictions of the theories to assess the relative merits of each theory on the basis of congruence or alignment between the predictions of each (hypotheses) and the observations. My process tracing led me to develop the two detailed narratives presented in the following chapters regarding the causality of the detention policies in the U.S. and the UK.

There were several benefits to using process tracing for my analysis. First, it compensated for the fact that a statistical relationship between my two variables
would not have been logical, and such an analysis would not have allowed me to examine the causal processes directly. Process tracing allowed me to overcome this limitation by closely examining the relationships between my variables, rather than relying on correlations. Second, process tracing allowed me to uncover other alternative variables that I did not generate earlier. Third, it was useful in generating and analyzing data on causal mechanisms since it inherently checks for the validity of claims and allows for causal inference on the basis of even just a few cases.\(^{80}\)

Process tracing has several drawbacks; yet I was able to mitigate their effects through my tailored methodology. One of the drawbacks is the possibility of intervening variables that may interrupt the causal path linking the posited variable to the observed effects; thus the inferential value of the causal path is weakened.\(^{81}\) Fortunately, because I noted evidence for support of intervening variables at each stage of the casual path, even if such variables interacted with another, the effect would not damage the entire causal pathway. Another drawback I had to overcome was that theories do not generally make specific predictions about each of the steps in a causal process, particularly for complex phenomena, but rather provide predictions based on the holistic pathway.\(^{82}\) In order to avoid such ambiguities, I applied each theory at every stage of the causal pathway and made a prediction under that theory for observed effects for each independent variable; then I compared the observations with my specified

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\(^{80}\) Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard University, 2005), 221.

\(^{81}\) Ibid., 222.

\(^{82}\) Ibid.
predictions. A final drawback of process tracing I faced was that there was sometimes more than one hypothesized causal mechanism consistent with any piece of process-tracing evidence, and this left uncertainties as to whether one was causal and the other spurious. In order to determine which theory satisfactorily explained the case or whether they were complementary to understanding the evidence, I examined the broader context from where the evidence was taken and/or created counterfactuals of whether each variable or just their interaction was necessary to gain the perceived outcome.

**Quantitative Analysis**

Table 4 shows the results from a purely quantitative count of observations supporting the various hypotheses. If one piece of the evidence was consistent with two of the hypotheses and not merely a spurious indicator for one, I counted it for each of the hypotheses. Additionally, my number count only includes those pieces of evidence that supported, not disproved, the hypothesis. There were some instances where my observations were not consistent with any of my predictions, but rather pointed to other variables I had not considered. These variables are categorized under “Other” in Table 4.

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83 Ibid., 223.
Table 4. Quantitative Count of Coded Evidence

<table>
<thead>
<tr>
<th>Theory</th>
<th>Number Count</th>
<th>Percentage of Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>US</td>
<td>UK</td>
</tr>
<tr>
<td>Political Structure 1</td>
<td>86</td>
<td>34</td>
</tr>
<tr>
<td>Political Structure 2</td>
<td>88</td>
<td>71</td>
</tr>
<tr>
<td>Path Dependence</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Legal Framework</td>
<td>72</td>
<td>56</td>
</tr>
<tr>
<td>Threat Perception</td>
<td>19</td>
<td>29</td>
</tr>
<tr>
<td>Other^84</td>
<td>13</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>283</td>
<td>200</td>
</tr>
</tbody>
</table>

This quantitative analysis of the content illustrates that in a purely numerical count, the political structure theory is best supported in both cases (U.S. – 63%; UK – 53%), closely followed by the legal framework theory (U.S. – 26%; UK – 28%). While this suggests that the majority of pieces of evidence were consistent with the political structure theory’s predictions, the findings are not entirely determinative. First, a pure quantitative count distorts the weight assigned to each piece of evidence. During my coding process, I noted whether the evidence was “weak,” “medium,” or “strong” based on the context it was used and their determinative effect on the variation in outcome. Fully authorized statements, such as internal executive memos or judicial opinions were rated as “strong.” Statements that were made in committee publications or reports were rated “medium,” and statements made in floor or parliamentary debates or in

^84 For the United States, evidence suggests the following support for these alternate hypotheses I did not consider as motivating the variation: geographic location of detention regime – 1% and reputation – 1%. For the United Kingdom: historical experience – 1% and impact on demography – 2%.
secondary sources were coded as “weak.” A pure quantitative measure thus does not include the weights assigned to each of these pieces of evidence—and this distorts the impact of a judicial opinion and a mere opinion stated by a legislator in a committee hearing.

Second, a quantitative count distorts the results because decision-making instances within the causal process that had a greater number of individuals would have automatically had a greater number of statements regarding certain hypotheses simply because more voices had a chance to speak. Yet, this does not provide any direction as to which voice was the most compelling and actually drove the change in policy. Third, there is no way to comprehend the interaction of multiple variables through this numerical count.

Because these quantitative findings are not wholly determinative and could provide misleading conclusions, a qualitative analysis through process tracing each country’s policy was essential to comprehend the mechanisms by which preventive detention policy was affected. This qualitative account is presented in the next two chapters through case studies of the U.S. and UK preventive detention systems during the War on Terrorism.
CHAPTER 3: CASE STUDY OF THE UNITED STATES

This chapter examines the case of the United States to assess whether the central or alternate hypotheses offer sound explanations for the formulation of preventive detention policies after 9/11. It assesses each policy decision that affected the detention policy by (a) outlining expectations based on the different independent variables; (b) describing how the policy shaped due process protections at that point, (c) identifying the influencing motives for such change (or lack thereof), and (d) analyzing its support/rejection of expected hypotheses.

9/11 triggers unilateral executive authority. Under the political structure theory, we would expect President Bush after 9/11 to exercise unilateral executive authority and create detention without sufficient due process, disregarding habeas corpus for the sake of state survival. This would be facilitated through the separation of powers system since the other branches would be unable to constrain such power a priori. Rather, both the legislature and judiciary would defer to the executive for similar realist fears of state survival.

If the legal framework theory applies, we would expect that the Bush Administration would invoke a national security framework to enable detention without due process since legal commitments can be abandoned for non-state actors who cannot reciprocate legal obligations. Yet, if the threat perception theory is valid, this framework would not matter—rather we would see the implementation of detention without due process because of the heightened sense of threat that justifies the suspension of liberties. Finally, if path dependence were a sound explanation, we would first expect institutional inertia to push the U.S. to
utilize existing internment policies to institute indefinite detention; then because the set-up costs of switching policies to include sufficient due process protections would be too high, minimal due process would be afforded.

Following 9/11, President Bush declared a “War against Terrorism.” The Bush Administration introduced the Authorization of the Use of Military Force (AUMF) in order to “to authorize the use of...armed forces against those responsible for the recent attacks.” Congress passed the resolution in three days, articulating that the President had constitutional authority to take action to prevent terrorism. The White House assigned the Office of Legal Counsel (OLC) to design a strategy for prosecuting captured terrorists. Consequently, the Bush Administration produced a Military Order, which established military commissions to try terrorist suspects. These commissions did not offer any elements of due process and thus enabled indefinite detention of detainees.

Additionally, this order allowed the executive to label suspect individuals as “enemy combatants,” who could be detained “at an appropriate location designated by the secretary of defense outside or within the U.S.” In using this label, the Bush Administration employed an armed-conflict model that treated terrorist suspects as unlawful combatants, who do not qualify for prisoner-of-war (POW) protections under the Geneva Conventions.

88 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter “M.O.”].
These executive actions align with the political structure, threat perception, and legal framework hypotheses. The separation of powers allowed Bush to exercise executive prerogative under emergencies to issue binding orders that established preventive detention for aliens and U.S. persons. The President affirmed the necessity of the order by emphasizing the gravity of the threat posed by terrorism:

Having fully considered the magnitude of the potential deaths, injuries and property destruction that would result from potential acts of terrorism against the United States … I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest and that issuance of this order is necessary to meet the emergency.\(^{90}\)

This intensified threat perception enabled the mechanism that realist fears of security and survival by the executive could trump civil liberties.

The lack of due process stems from the Administration’s labeling of the terrorist suspects as “enemy combatants.” U.S. Attorney General Alberto Gonzales defined enemy combatants as “captured soldiers or saboteurs who may be detained for the duration of hostilities. They need not be guilty of anything; they are detained simply by virtue of their status as enemy combatants in war” [emphasis added].\(^{91}\) The Bush Administration utilized a national security legal framework based on the laws of war to derive detention policy since this would enable executive discretion since the President serves as commander in chief. In fact, an OLC memo to the President on August 2, 2002, illustrated the justification and motivations of using this laws-of-war paradigm:

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\(^{90}\) M.O. (Nov. 16, 2001).

As commander in chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information...Any effort [by Congress] that interferes with the President’s discretion of such core matters as the detention and interrogation of enemy combatants...would be unconstitutional...Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.  

By applying a laws-of-war framework to the crisis, the Bush Administration knew it would be able to carry out unchecked extralegal powers since wartime authority remained exclusively with the executive branch.

The Bush Administration harnessed this framework so it would be allowed to carry out its preferences of indefinitely detaining suspects. In an OLC memo, Deputy Assistant Attorney General John Yoo explained why due process protections could not be afforded to enemy combatants under the laws of war: “[T]he Geneva Convention deals only with state parties and al Qaeda is not a state. As for Taliban soldiers, Afghanistan under the Taliban was a ‘failed state’ to which the convention also does not apply.”  

This perspective enabled the Bush Administration to defend detention without due process by claiming that the Geneva Conventions did not apply to terrorists since they would not reciprocate the norms of compliance, thus substantiating the legal framework hypothesis.

Detention without due process was critical in the eyes of the Bush Administration for two reasons. First, it enabled the President to gain intelligence

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and information related to tentative terrorist plots of the enemy. Yoo stated such “information is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operations is perhaps the most effective means of preventing future terrorist attacks upon U.S. territory.”94 In addition, the Administration argued this policy was necessary to incapacitate terrorists so they would not return to the battlefield.95 According to the Geneva Conventions, incapacitation and detention are permissible until the end of “hostilities,”96 and this rule enabled the Bush Administration to justify its practice of indefinite detention given the ongoing nature of the war.

The ability of the Bush Administration to exercise executive authority without constraints by the other branches elucidates the significance of the separation of powers system. Since threat perception justified the exercise of this authority, the Bush Administration was able to select an appropriate framework that would maximize its own preferences. Hence, the laws-of-war paradigm was chosen since its lack of application to non-state actors allowed the Bush Administration to justify indefinite detention without due process and essentially operate outside legal constraints. This sequence of events illustrates that the political structure interacted with threat perception and the selection of the legal framework to determine preventive detention policy in the U.S.

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95 *Hamdi v. Rumsfeld*, Oral Argument, at 26-27. Deputy Solicitor General Paul Clement argued in the oral argument that incapacitation was a legitimate rationale for designating them as an enemy combatant.

96 Geneva Convention III, Art. 18 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).
Congress and the judiciary defer to the executive. Both Congress and the judiciary deferred to the executive by not resisting the expansion of executive power. Indeed, within the following year, Congress did not introduce any bills curtailing the President’s authority over the detention process, nor was there any case brought to the Supreme Court dealing with detainees.

However, political structure could not have been the sole explanatory factor for the other institutions’ deference to the executive. Immediately after the executive order was made, concern to check the President’s power was exhibited. Senator Patrick Leahy (D-VT) issued a statement condemning this unilateral executive action.97 This concern led to a Senate Judiciary Committee hearing to assess the legality of the executive order. Most witnesses testified that the order was within the President’s constitutional authority as Commander in Chief.98 Attorney General Ashcroft underlined the importance of executive powers during national crises by emphasizing the terrorist threat and its ability to “threaten civilization” through “slaughter of thousands of innocents.”99 These comments illustrate that the heightened sense of threat espoused by the executive influenced realist fears of state survival that led to institutional deference. Additionally, these powers were perceived as necessary for the President during war—hence, the framing of the crisis as an armed conflict under the laws-of-war paradigm.

98 DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, United States Senate, 109th Cong. (2001) (opening statement of Patrick Leahy, Chair, Senate Committee on the Judiciary).
significantly influenced congressional deference. Deference to such executive prerogative lasted three years until the courts finally stepped in.

*The judiciary attempts to constrain executive authority.* If the political structure hypotheses hold true, we would expect that over time other branches would check the executive. Through such constraints, due process would be afforded given the judiciary’s role as a protector of the rule of law. For the alternative hypotheses, we would expect the legislative and/or judicial branch to (a) point toward the level of threat to justify the provision of due process or the lack thereof; (b) experience institutional inertia that would result in path dependence and the continuation of the Bush Administration’s detention policy; or (c) support the use of the laws-of-war paradigm to hold detainees indefinitely.

The Supreme Court heard two cases that challenged the Bush Administration detention policy: *Hamdi v. Rumsfeld (2004)* and *Rasul v. Bush (2004).* In *Hamdi,* the Court rejected the Bush Administration’s detention without due process. The Court held that the executive could detain enemy combatants but due process requires U.S. citizens to be able to challenge their status before an independent tribunal. Ensuring right of appeal (judicial or habeas review) was critical because this was the only way the judiciary could assess the executive’s determination of enemy combatants; such review was directly linked the indefinite nature of the detention because without judicial review, detainees could be detained indefinitely as an “enemy combatant” until “hostilities” ended.

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In reaching this ruling, the Court focused on the rights of individuals afforded in the Constitution, particularly in relation to the suspension clause: “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.”\(^{102}\) In reference to this clause the Court asserted, “Absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”\(^{103}\) By expressing the importance of the writ, the Court duly noted the importance of constraining expansive executive power: “The Great Writ allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”\(^{104}\) In so holding, the Court rejected the Government’s argument that separation of powers principles mandated a restricted role for the courts in national security crises. The Court’s ruling thus aligns with the political structure hypothesis of an institutional check on expansive executive authority given the Court’s duty to ensure that the rule of law is upheld.

In line with the checks and balances of a separation of powers system, the executive had to comply with the Court’s ruling. At the time, there were only two U.S. citizens held without due process at GTMO. Following the decision, the government discharged one and transferred him to federal custody for trial on

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\(^{102}\) U. S. Const., Art. I, §9, cl. 2.

\(^{103}\) *Hamdi*, 537.

\(^{104}\) Ibid., 539.

 Immediately after Hamdi, the Court heard Rasul, in which the lack of judicial review for foreign nationals held at GTMO was challenged. In ruling that the federal courts did indeed have jurisdiction to consider challenges to the detention of foreign nationals, the Court relied on reasoning that judicial review still applies to detainees held by the executive in territories where the U.S. exercises “plenary and exclusive jurisdiction.”\footnote{Rasul v. Bush 542 U.S. 466 (2004).} Moreover, the Court again harnessed its duty to uphold the writ again stating, “Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ.”\footnote{Ibid., 479.} Thus, in both cases the Court acted to check executive power in its role as the institution to protect the rule of law, as expected by the separation of powers hypothesis.

\textit{Executive complies but limited judicial review granted.} In response to the rulings, the DOD issued an order that created Combatant Status Review Tribunals (CSRTs), a forum where detainees could contest their status as an enemy combatant before a panel of military judges within thirty days of capture.
Detainees still lacked a right to appeal, did not have their status periodically reviewed, and a termination date was not provided.\textsuperscript{108}

The executive branch used the Court’s narrow ruling on the need for “review” of detainee status to justify the lack of sufficient due process, including appropriate judicial review. Following \textit{Rasul}, the DOJ filed a brief, stating, “the [Rasul Court] expressly declined to address whether and what further proceedings would be appropriate.”\textsuperscript{109} It claimed that the Court left open the question of whether additional due process safeguards should be granted. Thus, while the government stated the CSRTs were modeled after those in Article 5 of the Geneva Conventions, they were in fact highly inadequate to meet sufficient due process requirements.

This response to the Court’s ruling aligns with the separation of powers and legal framework hypotheses. The executive did comply with the Court’s restraint, hence supporting the dynamics between institutions in a separation of powers system. But this only resulted in minimal due process since it enacted only a narrow interpretation of the Court’s opinion. The executive claimed to derive this unit of due process from the Geneva Conventions, thus showing its continuation of the laws-of-war paradigm.

\textit{Legislative compliance}. Following the Court’s rulings, the legislature was prompted by the Bush Administration to establish procedures for detainee review. The Senate Judiciary Committee held a hearing in which Chairman Arlen Spector

stated it was the “job of Congress” to introduce legislation relating to detainee procedures.\textsuperscript{110} William Barr, the former Attorney General, provided testimony appraising the Administration’s policies on detention, particularly as it fell within Bush’s constitutional prerogative as commander in chief.\textsuperscript{111} Moreover, he reiterated multiple times the rationale of incapacitation, stating, “The primary basis to detain combatants is to prevent them from returning to the battlefield.”\textsuperscript{112} Furthermore, Deputy Associate Attorney General Michael Wiggins stated, when responding to Senator Biden’s question whether there was an end to the conflict, combatants could legally “be held in perpetuity.”\textsuperscript{113} This again emphasizes how the sole factor of an individual’s status determination ascribed by the executive as an “enemy combatant” could lead to indefinite detention if there was no judicial review of such a determination.

These testimonies illustrate support for the legal framework theory. As long as the War on Terrorism continued, a wartime detention framework could be invoked and this justified the labeling of suspects as “enemy combatants.” The use of this laws-of-war paradigm could justify indefinite detention even if due process protections were given since the end of hostilities was nowhere in sight. While such testimony is not as strong as an executive order or internal memos


\textsuperscript{111} Ibid., 109th Cong. 46 (2005) (testimony of William Barr, former Attorney General, Senate Committee on the Judiciary) (“The President's commander in chief powers include all those powers necessary and proper to conduct war, to win war, and to defend the country... a necessary and important incident of that power...is the power to detain enemy combatants for the duration of the hostilities.”).

\textsuperscript{112} Ibid., 109th Cong. 7 (2005) (testimony of Thomas Hemingway, Brigadier General, Legal Advisor to the Appointing Authority for the Office of Military Commissions, Department of Defense, Senate Committee on the Judiciary).

\textsuperscript{113} Ibid.,109th Cong. 9 (2005) (testimony of Michael Wiggins, Deputy Associate Attorney General, Senate Committee on the Judiciary).
from the White House, it informs us of the opinions senators were supplied with before they began drafting legislation to outline detainee procedures.

These opinions seemed to have traction as Republican Senators replicated them during the floor debate of the Detainee Treatment Act 2005 (DTA), whose ultimate passage was a result of the Bush Administration’s close contact with Senator Lindsey Graham (R-SC). Through a controversial amendment hastily added by Senators Graham, Jon Kyl (R-AZ), and Carl Levin (D-MI), the DTA stripped all federal courts of jurisdiction over habeas petitions by those held at GTMO, except for the U.S. Court of Appeals for the D.C. Circuit, which was narrowly authorized for limited jurisdiction “to determine the validity of any final decision of a CSRT that an alien is properly detained as an enemy combatant.” The legislature made it difficult for detainees to have judicial review of their status—and hence the duration of their detention—because of the restricted capacity of appeals the D.C. Circuit could entertain.

The floor debate illustrates how the laws-of-war framework led to this outcome. Nearly all of the legislators viewed the conflict within the laws-of-war paradigm chosen by the executive. Senator Graham used such rhetoric in the Senate debate:

I do not want the enemy combatant al-Qaida terrorist to be able to go in our courts... I do not think the American people want it. I want al-Qaida members to be detained in armed conflict. They should not have due process rights beyond what the Geneva Conventions ever envisioned. [emphasis added]

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115 DTA § 1005(a)(1)(A).
Because the legislators applied the laws-of-war paradigm, they continued to accept that indefinite detention was permissible since there was no identifiable end to the War on Terrorism.

The outcome of the DTA also supports an interaction of the political structure and legal framework theories. Executive power was constrained by checks exercised by the other branches. However, this in and of itself did not result in limited due process. Rather, the legislators embraced the laws-of-war paradigm espoused by the executive, and in doing so was able to grant minimal due process in line with the Geneva Conventions; however indefinite detention continued under the perception that hostilities were still ongoing.

_Judiciary checks executive power._ In June 2006, another habeas challenge was brought to the Court. In *Hamdan v. Rumsfeld* (2006), the Court held that the DTA did not prevent the federal courts from hearing habeas petitions of GTMO detainees.\(^\text{117}\) The Court affirmed that even if a terrorist suspect posed a threat to the country, “[T]he Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.”\(^\text{118}\) It found habeas corpus to be a guarantee of due process that could only be suspended—and only by Congress—in response to invasion or insurrection.

Additionally, the Court faced the question of whether Congress had authorized President Bush to create the military commissions. The Court found it had not—neither the AUMF nor DTA provided congressional authorization.\(^\text{119}\) Even if there had been authorization, Justice Stevens asserted the Court’s

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118 Ibid., 72.
119 Ibid., 59.
authority to strike down the military commissions, since they violated standards within both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.120

This opinion supports the separation of powers and the legal framework hypotheses. First, acting within its role as the upholder of the rule of law, the Court reaffirmed that habeas review was essential; hence supporting the separation of powers notion that the Court would protect due process. Second, the Court found the commissions to be incompatible with the procedures outlined in the laws of war. The use of “closed hearings,” admission of “any evidence that would have probative value,” and the possibility that the accused and his civilian counsel could be excluded from the proceedings violated procedures described in UCMJ Article 36 and Article III of the Geneva Conventions, which require:

[E]ach Party to the conflict shall be bound to apply, as a minimum, certain provisions protecting [p]ersons … placed hors de combat by … detention, including a prohibition on the passing of sentences … without previous judgment … by a regularly constituted court affording all the judicial guarantees.121

Such a view illustrates that the Court also used the laws-of-war paradigm for formulation of detention policy, but interpreted its application differently. It interpreted Article III to afford “some minimal protection, falling short of full protection under the Conventions” to non-state actors involved in a conflict.122 Because Article II does not define “regularly constituted courts,” the Court construed this to be an “ordinary military court,” whose procedures had been violated by the commissions.

120 Ibid., 67.
121 Ibid.
122 Ibid.
Justice Stevens implied that even without the laws-of-war framework, *Hamdan* would still have to be given minimal due process. Stevens wrote:

Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians… the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.\textsuperscript{123}

Concluding on this note, the Court gave President Bush two choices: (1) either use the UCMJ courts-martial or criminal justice procedures to try detainees or (2) work with Congress to draw up a new set of procedures for the commissions. The Bush Administration chose the latter.

*Congress passes the MCA.* Following *Hamdan*, we would expect under the separation of powers theory that the executive would comply with the Court’s ruling given that it was an explicit check on executive power. Additionally, we might expect Congress to pass legislation that develops a process for detention in accord with the Court’s ruling to include judicial review instead of relying on executive determinations. The sequence of events post-*Hamdan* however does not wholly align with these expectations.

In support of the separation of power’s prediction of executive compliance to judicial rulings, the president’s spokesperson announced in July 2006, “The White House is now working with Congress to try to come up with a means of providing justice for detainees at GTMO in a manner that’s consistent with the Court’s ruling.”\textsuperscript{124} The Bush Administration presented a draft proposal to the Senate Judiciary Committee on August 2, 2006.

\textsuperscript{123} Ibid., 72.

A few months later, Congress passed the Military Commissions Act of 2006 (MCA) that was very similar to Bush’s proposal.\footnote{Military Commissions Act of 2006, Public Law 109-366, Oct. 17, 2006, Sec. 6.Subch. IV § 950j(b).} This legislation essentially wrote the Bush Administration’s detention policy into law, making minor adjustments merely to comply with the Court’s ruling. First, it expanded the definition of an “enemy combatant” to include “those who purposefully and materially supported hostilities against the U.S.”\footnote{Ibid., Sec. 4, Subchapter. VI § 950e.} Unlike the predictions of the separation of powers theory, the legislature expanded, rather than checked, executive power by broadening executive discretion over enemy combatants.

Next, the MCA explicitly prohibited any appeals that invoked protection under the Geneva Conventions based on the reasoning that enemy combatants were not protected by the laws of war—hence, supporting the legal framework hypothesis that due process protections were minimal as a result of the selection of legal framework. Finally, under the same logic, the MCA explicitly denied federal court jurisdiction to hear habeas corpus petitions filed by enemy combatants, with the exception of the D.C. Circuit Court in order to comply minimally with the Court’s ruling in Hamdan.\footnote{Ibid., Sec. 4 Subchapter. VII § 948r.}

The outcome of this legislation adhered only in part to the separation of powers hypothesis. The theory correctly predicted executive “compliance” as the Bush Administration went to Congress to pass legislation in line with the Court’s ruling. However, Congress did not abandon the detention practices instituted by the Bush Administration, but rather codified them into law. Limited due process
continued because the legislature adopted the laws-of-war paradigm and provided the minimal protections required by UCMJ procedures.

In fact, the use of such a paradigm explains why indefinite detention persisted while the rest of the due process protections were granted. The perception of the necessity of the laws-of-war paradigm was prevalent among legislators in the MCA floor debates. Senator Lindsey Graham, who sponsored the amendment to remove habeas review from the courts, provides an example of the use of this framework:

> The issue for the Congress is whether habeas corpus rights should be given to an enemy combatant noncitizen … and whether the military should make the determination of who an enemy combatant is versus judiciary… Do we really want to allow the federal judiciary to have trials over every decision about who an enemy combatant is or is not, taking that away from the military?\(^ {128}\)

Using the language of “enemy combatant” and emphasizing the role of the military in making determinations of status, Senators harnessed the laws-of-war paradigm. In doing so, the Senators found it justifiable for the military rather than the judiciary to carry out review of detainee status and hence determine the duration of detention. Even though minimal due process was afforded through CSRTs, the policy of indefinite detention continued because the judiciary could not have a final say on the status of enemy combatants, and thus they could be detained as long as the conflict continued. Senator Leahy described the impact of the lack of habeas review, stating: “[The MCA bill] would permit the President to

\(^ {128}\) 152 CONG. REC. 10,266 (2006).
detain indefinitely—even for life—any alien…without any meaningful opportunity for the alien to challenge his detention.”

The Court’s final attempt to include judicial review. Following the passage of the MCA, a case was brought to court by a number of detainees, again challenging the status of their detention. In Boumediene v. Bush (2008), the majority held that the CSRT procedures were not a sufficient substitute for judicial review of habeas petitions and thus struck down the section of MCA that stripped federal courts of jurisdiction as unconstitutional. The Court held that citizens and foreign nationals held at GTMO as enemy combatants had a right to habeas review in federal courts. In reaching this conclusion, the Court emphasized the need to respect the doctrine of separations of powers with judicial review by the Court, not the executive.

In response to whether the President had Congressional authorization to determine if habeas corpus applies to enemy combatants, the Court affirmed:

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say ‘what the law is’… the habeas writ is itself an indispensable mechanism for monitoring the separation of powers.

Denial of judicial review, in the Court’s view, undermines the most fundamental tenet that distinguishes separation of powers—giving the Court the authority to determine habeas corpus. The Court derived due process procedures for enemy combatants from its constitutional obligation to ensure that such rights are not

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129 Ibid., 10,271.
131 Ibid., 553 U.S. 758 (2008).
suspended by the executive without justifiable circumstances.\textsuperscript{132} This reasoning lends support to the separation of powers hypothesis in which the Court enacts due process protections as a function of its institutional responsibilities.

In invoking the significance of the writ of habeas corpus, the Court located the rights of enemy combatants within constitutional law. The Court reflected that habeas review was more compelling for those detained by executive order than when held within the criminal justice system:

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent."

By locating the rights of terrorist suspects within constitutional law, rather than the laws of war, the Court showed that regardless of the legal framework selected by the executive to justify its preferences, the nation’s basic notions of justice and due process could afford minimal due process to enemy combatants.

Just like the previous decisions, the Court avoided ruling on the legality of indefinite detention, particularly since it did not have jurisdiction to do so until 2009, outside of the interval of this research, when a case directly related to the matter reached the Court. In that case, the Court did not grant certiorari.\textsuperscript{133}

\textsuperscript{132} Ibid., 553 U.S. 738 (2008) (“The writ may be suspended only when public safety requires it in times of rebellion or invasion. The [Suspension] Clause is designed to protect against cyclical abuses of the writ by the Executive and Legislative Branches. It protects detainee rights by a means consistent with the Constitution’s essential design, ensuring that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance.’”).

\textsuperscript{133} The Supreme Court dismissed the case of \textit{Al-Marri v. Spagone} 4\textsuperscript{th} Cir. 06-7427 on March 6, 2009, which raised the issue of indefinite detention of a U.S. resident. Previously, the 4\textsuperscript{th} Circuit held that a U.S. resident could not be held indefinitely as a terror suspect, but must be charged,
In the aftermath of *Boumediene*, Attorney General Michael Mukasey made a speech stating that the Court had left many questions unanswered. While the Court did say detaineees have a constitutional right to habeas proceedings, Mukasey emphasized that the Court did not say how such cases would proceed or what procedures would apply. Following the Court’s fourth ruling on the issue of judicial review and detaineees, the Bush Administration still held onto the laws-of-war paradigm to justify indefinite detention for enemy combatants.

The legislature held various committee meetings following the Court’s holding in *Boumediene* during which a multitude of opinions were expressed. Yet there was no majority opinion on how to move forward, and this lack of consensus likely explains the lack of any proposed legislation to rectify the system in the remainder of 2008. This lack of coherent policy-making may have just been a result of gridlock. Reforms of MCA in compliance to the Court’s ruling were achieved under President Obama in 2009. Ultimately, the eight years of the Bush Administration began and ended with indefinite detention, but limited due process was achieved through the creation of the CSRTs.

**Summary Analysis.** Before I address the theories that were supported by the sequences of events analyzed above, I want to discuss why path dependence was not substantiated. First, there was no mention of historical indefinite deported, or released. While the court upheld the government’s authority to hold foreign nationals and legal residents as enemy combatants, this ruling emphasized that such detaineees are entitled to contest their detention in the federal courts.

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detention systems or any references made to the Japanese internment in justifying the establishment of indefinite detention—thus institutional inertia could not have been at work. Next, increasing returns dynamics did not explain the continuation of indefinite detention with limited due process. There were no high set-up costs to switch from indefinite detention to detention with sufficient due process because the U.S. has existing detention systems with sufficient due process that could have been utilized (its courts-martial and criminal justice models). However the Bush Administration chose not to use these existing frameworks, but rather to create a new model of military commissions, which ironically had high set-up costs—financial costs, economic costs, costs of bipartisanship, and costs of international prestige. By no means did the Bush Administration resist change from the existing models of detention—rather they embraced the opportunity to create a new model simply because the existing ones would not have allowed it to maximize its preferences.

The remaining theories—political structure, threat perception, and legal frameworks—interacted to explain the due process protections afforded to terrorist suspects in the United States. Having gone through a detailed analysis of the motivating factor within each event that affected detainee due process protections, it is evident that the type of detention resulted from the decision to utilize a laws-of-war paradigm. One of the most critical elements that allowed for the laws-of-war paradigm to be employed was the fact that the Republican Party controlled both houses of Congress up until 2007, during which all of the policy was made regarding preventive detention. This had a significant influence on the
legislative outcomes as the Bush Administration was able to (1) use party partisanship to gain support for his preventive detention policies, (2) have key Republican Senators and Congressman serve as spokespersons for the White House, and (3) use the election years to label Democrats as unpatriotic and/or sympathizers with terrorists if they were reluctant to support any Republican-introduced detention bills. Had the Democrats controlled either house, it is uncertain whether the laws-of-war paradigm would have been as openly embraced. Party politics thus serves as an intervening variable that may have shaped the outcome of preventive detention policy within a separation of powers system.

By harnessing a variation of a national security framework, the Bush Administration and the Republican-controlled Congress were able to do several crucial things in relation to detention policy: (1) their labeling of detainees as enemy combatants who were non-state actors meant that they did not receive the due process protections under the Geneva Conventions; (2) by framing the conflict as a “war” in the traditional sense, indefinite detention was justified based on the rationales that it would enable more effective interrogation to gain intelligence and allow for incapacitation; and (3) they insisted such objectives could only be achieved without a limited duration of detention—hence detention became permissible until “hostilities” ceased.

The laws-of-war paradigm did not determinatively result in minimal due process though—this case study illustrates that this paradigm could withstand the inclusion of due process safeguards, such as when the CSRTs were created. Like
other national security frameworks, the laws-of-war paradigm invoked by the Bush Administration was justified under executive powers, and hence its procedures were adapted in order to maximize specific executive preferences. This example illustrates the crucial interaction of the political structure and legal framework theories: democracies that provide the executive with expansive power in emergencies, such as within a pure separation of powers system, will see the executive apply any type of “national security framework” that maximizes its preferences for detention.

This interaction between the political structure, threat perception, and legal framework theories lies at the crux of explaining the United States’ detention policy. While the laws-of-war paradigm ushered the lack of due process, the choice of this framework was influenced by the separation of powers system during emergencies. In such a system, under the heightened sense of threat, the executive was the institution responsible for immediately responding to the terrorist attack. In doing so, the Bush Administration selected the laws-of-war paradigm to address the conflict of global terrorism, and this rhetoric of “war” enabled threat perception to remain high throughout the entire eight years. As a function of separation of powers, the executive was able to implement policy regarding this decision immediately—without input or a priori constraints from the other branches. Had the executive been required to consult with the other branches, there might have been a different outcome, particularly if party control of the legislature did not fall with the part of the President.
In each instance the Court reviewed detention policy, it traced detainee rights back to constitutional law and habeas review, thus grounding it in a framework more potent than that of the laws of war. After the Court’s rulings, the Bush Administration worked with Congress to provide limited due process based on the Court’s narrow holdings, but still maintained indefinite detention under the guise of ongoing wartime hostilities. This illustrates the importance of the selection of the legal framework through which detention policy is derived. And as the case of the U.S. demonstrates, in a separation of powers system where the executive has authority in emergencies, this may likely lead to the use of a preventive detention system with minimal due process.
CHAPTER 4: CASE STUDY OF THE UNITED KINGDOM

This chapter examines the United Kingdom’s experience with preventive detention following the 9/11 attacks and tests the various hypotheses under the same process that was used in the U.S. case study.

If the political structure theory holds true, we would expect that the Prime Minister, following an emergency crisis, would ask Parliament to invoke indefinite detention with limited due process in protection of state survival. The other branches would initially to defer to the executive due to similar realist concerns. Over time, we should see Parliament and the judiciary voicing concerns over due process, as state survival is no longer a strong justification for the suspension of habeas corpus, which is protected under UK common law. We should expect Parliament and the judiciary’s intervention to increase due process safeguards. First, with the fusion of powers between the executive and Parliament, there are multiple opportunities for a priori constraints of executive authority during the legislative process. These points of constraint will enable greater due process because of the multitude of opinions found in Parliament that can challenge executive authority. Second, the judiciary should impose constraints that result in sufficient due process, as it must uphold UK common law.

136 Even though it is attractive to believe that due process would be espoused more fervently given that the Lords of Appeal in Ordinary, also known as Law Lords, serve as ultimate court of appeal in the UK (the judiciary), this cannot be expected given the restrictions placed upon Law Lords in non-judicial business. While Law Lords are full members of the House and may speak and vote, they rarely do so in practice. Serving Law Lords do not (1) engage in matters of political party controversy, and (2) may excuse themselves from serving as a judge on a matter “which might later be relevant to an appeal to the House.” In October 2009, the UK the Law Lords were removed from the House of Lords and became the country’s independent supreme court as a result of the Constitutional Reform Act 2005. “Judicial Work,” House of Lords, accessed December 7, 2011, http://www.parliament.uk/documents/lords-information-office/hoflbpjudicial.pdf.
Threat perception would lead us to expect that the UK would institute indefinite detention without due process after 9/11 and the London bombings. The heightened sense of threat following these events would lead the government to suspend civil liberties for national security. However, as the threat wanes, the liberal norms of the state would guide institutions to reinstate due process. If the legal framework theory applies, we would expect that the change in policy from indefinite detention to detention with sufficient due process results from a change in use of legal frameworks to derive due process protections from. Specifically, we would expect a switch from a national security or immigration framework to that of criminal law since this framework automatically requires sufficient due process in preventive detention. Finally, if path dependence were valid, we would expect institutional inertia and/or mechanisms of increasing returns dynamics (high costs of switching policy, learning effects, or coordination effects) to influence Parliament in applying the existing preventive detention from its experience with the IRA terrorists.

_9/11 triggers executive authority_. Two months following the 9/11 terrorist attacks, Home Secretary David Blunkett introduced in Parliament the Anti-Terrorism, Crime, and Security Act 2001 (ATCSA). Parliament passed ATCSA within a month, enhancing police powers to investigate and prevent terrorist activity. ATCSA included a measure allowing for the indefinite detention of foreign nationals suspected of terrorism.\(^{137}\) This provision required the UK to

derogate from Article 5 of the ECHR and Article 9 of the ICCPR, both of which protect individuals’ right to liberty.

ATCSA, however, did provide limited due process for detainees: the right to appeal one’s detention with the assistance of counsel through the existing Special Immigration Appeals Commission (SIAC), a national security tribunal established under UK immigration law. SIAC had the ability to cancel the detention certification if they found no plausible grounds for the Home Secretary’s detention.138 Because SIAC used closed hearings where classified information could be introduced while the detainee and counsel were excluded from the proceedings, detainees lacked legitimate judicial review by a court and could be held indefinitely.

The creation of ATCSA directly supports the political structure hypothesis of enhanced executive power during emergencies for realist concerns of state survival, which may justify the suspension of habeas corpus. Threat perception intervened to create these realist concerns. In the debates over ATCSA, Home Secretary Blunkett defended ATCSA as the most “rational” and “proportionate” choice given the “internal and external” threats to national security.139 Blunkett further elaborated, “Circumstances and public opinion demanded urgent and appropriate action after the…attacks… I would have thought, universal call for even more draconian measures than those that I am accused of introducing.”140 In this statement, Blunkett concedes that the indefinite detention measure with SIAC review was more generous than what the Government should have introduced

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138 ATSCA 2001, s. 4(23).
139 HC Deb 19 Nov. 2001 vol 375 col 23.
140 Ibid.
given the heightened threat of terrorism. Moreover, threat perception was further justified in spurring realist fears, as the Government was only able to derogate from the ECHR by declaring “a public emergency threatening the life of the nation.”141

The legal framework hypothesis also intervened to explain the inclusion of indefinite detention. This power of indefinite detention was exercised under immigration laws enabling the detention of foreign nationals pending deportation. Just as in the U.S., the executive utilized a legal framework that would enable it to maximize its preferences. In this case, the Government’s reason for the derogation from the ECHR to implement indefinite detention was “it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.”142 Therefore, ATCSA was enacted to lower the legal standards for detention of foreign nationals suspected of involvement in terrorist activities.

Legislative deference to executive authority. Many Members of Parliament (MPs) were concerned about the expansive nature of the power to detain indefinitely and voiced those concerns. MP Oliver Letwin (West Dorset) expressed:

[T]he purpose of … Parliament …at a time such as this is not merely to enact into law the first set of propositions that occur to Her Majesty's Government, but to achieve an appropriate balance between public safety, which it is the Home Secretary's responsibility to protect, and individual liberty, which this … Parliament…were established to protect.143

141 ECHR Art. 15.
143 HC Deb 19 Nov. 2001 vol 375 col 40.
Just as expected by the political structure hypothesis, another branch acted to check extralegal executive power—and in a fusion of powers system, this check came before legislation was enacted. The need for the Government to gain Parliament’s support prior to any bill demonstrates how the legislature in a fusion of powers system can constrain executive power prior to any policy decision.

The Government realized it had to gain Parliamentary support to implement the policy of indefinite detention. In fact, Blunkett recognized the importance of Parliamentary approval, stating: “We believe that it is sensible to seek the consent of [Parliament] because unless Parliament agrees to the … associated provisions, which relate to detention, the need to seek a derogation from Article 5 and Article 15 will not arise.”144 This need for legislative support provides a sound explanation for the Government’s inclusion of limited due process through SIAC’s initial review of detention. Secretary Blunkett affirmed to Parliament that SIAC’s review process was akin to judicial review.145 Hence, members believed that SIAC provided “sufficient safeguards.”146 In addition to SIAC’s limited review, MPs made certain to ensure processes through which they could constrain the executive’s power to indefinitely detain by instituting sunset provisions within ATCSA; thus, the legislation would have to be reviewed on an

144 HC Deb 19 Nov. 2001 vol 375 col 22.
145 HC Deb 19 Nov. 2001 vol 375 col 48 (“In the cases that have gone to SIAC since the Act was passed four years ago, judicial review has not been sought, because the operation of SIAC has been judged to constitute a judicial review of the Home Secretary's certification. That is the issue that we are dealing with and that is why SIAC was seen as a substantial improvement on what existed previously…Apart from some interlocutory matters, appeal on a point of law is equal to judicial review. Therefore, judicial review exists.”).
146 HC Deb 19 Nov. 2001 vol 375 col 53.
annual basis until 2006 to determine whether it was still necessary.\textsuperscript{147} The fusion of powers system enabled the legislature to alter the executive’s policy before implementation, illustrating how this system contains built-in mechanisms to constrain unilateral executive actions.

Overall, this sequence of interaction between the Government and Parliament provides support for the interaction of the political structure, threat perception, and legal framework hypotheses. The Government selected a legal framework (immigration law) that would enable it to maximize executive preferences (indefinite detention for the prosecution of terrorist suspects) under heightened threat perception that justified the suspension of due process. Yet, the Government’s selection of this policy required consent by Parliament as a result of the fusion of powers system \textit{before} enactment of ATCSA. And to receive Parliament’s support, the Government had to ensure that there were constraints on this executive power—hence SIAC review was provided.

The interaction of these theories is supported by the likelihood that the ultimate outcome would not have been the same if only one of the variables had been present. Had the fusion of powers not been partially responsible for the outcome, it cannot be certain that the Government would have provided minimal due process protections, such as SIAC review, since it would not had to have gained Parliament’s support. The legal framework theory was equally as

\footnotesize{\textsuperscript{147} HC Deb 19 Nov. 2001 vol 375 col 40 (“I also accept, therefore, that it is probably appropriate to allow this House and the other place the opportunity to make up ex post for what we will have failed to do ex ante, by providing a drastic set of sunset clauses so that Parliament as a whole will have a full opportunity to revisit almost all parts of the Bill regularly, and so that the great bulk of it will fall away unless Parliament chooses to re-enact it. We will then have the opportunity to see how it works in practice and to investigate whether the Home Secretary is correct.”).}
important in this interaction as the selection of the immigration law framework facilitated the Government to implement indefinite detention. Moreover, without the intervening factor of threat perception, Parliament probably would not have supported the Government’s implementation of indefinite detention. The challenge that the theory of threat perception faces, however, is defining quantitatively how long a public emergency endures following a terrorist attack. While there was no discussion on this point of duration, we can certainly expect that when the UK rescinds its derogation, sufficient due process protections will be guaranteed. If that occurs, the threat perception theory will be validated in its interaction.

*Executive authority over preventive detention for citizens.* While ATCSA instituted indefinite detention for terrorist suspects who were foreign nationals, British citizens suspected of terrorist activity were held accountable to the UK’s criminal justice system. After 9/11, Parliament extended the number of days of pre-charge detention for terrorist suspects who were citizens from seven to fourteen days in the Criminal Justice Act 2003.\(^\text{148}\) While this increase did not impact citizens’ due process rights, it provides more evidence of the enhanced executive authority during emergencies. The Home Office introduced this amendment. Baroness Beverly Hughes, the Minister of State of the Home Office, noted the extension “[comes] to us from the police and [is] considered essential by them, based on their experience of the practicalities of dealing with a suspected terrorist once in police custody.”\(^\text{149}\) Baroness Hughes went on to state that from

\(^{148}\) Criminal Justice Act 2003, s. 306.  
\(^{149}\) HC Deb 20 May 2003 vol 405 col 941.
January to March 2003, the government detained 212 people under the Terrorism Act 2000. Of those, sixteen went into six days of pre-charge detention as a result of “extensions.” While the government could indefinitely hold foreign nationals under ATSCA, it retained a different process within their criminal law paradigm to detain British citizens.

While this criminal law paradigm automatically required sufficient due process since such protections were inherent to the framework, what is more significant is the Government’s use of this framework. There was no discussion in Parliament during the passage of the Criminal Justice Act or even ATCSA on whether a new detention policy had to be created for citizens—rather Parliament just amended its existing terrorism legislation, the Terrorism Act 2000 (TA 2000). In the TA 2000, the UK had codified its emergency pre-trial detention for citizens following the peace treaty that was signed with Northern Ireland in 1999, after decades of IRA terrorism in which they had experimented with different types of preventive detention systems. The failure of UK policies in stifling IRA terrorism through national-security-based indefinite detention influenced the UK to select a pre-trial detention framework through temporary emergency legislation. This legislation was renewed from 1974 until 2000, when it became the TA 2000.

Parliament’s immediate use of this existing law aligns directly with the path dependence hypothesis. Because the UK already had a system for detaining citizens in security-based preventive detention that they were familiar with and had been using for the past three decades, there was no need for the adoption of a new policy. Institutional inertia and the learning effects of repetition thus led the
UK to utilize its existing pre-trial detention with sufficient due process for citizens.

*Law Lords challenge indefinite detention.* If the political structure hypotheses hold true, we would now expect that the ability of *ex post facto* constraints within the fusion of powers system would enable the judiciary to curb executive power and restore due process for foreign nationals through its role as the protector of the rule of law. We can expect this theory to interact with one or more of the following variables to result in sufficient due process: the Law Lords would (a) point toward lower levels of violence and threats from terrorism that suggest a “public emergency” no longer exists and thus reinstate liberal norms, including due process; and/or (b) implement a new legal framework to be applied to foreign national detainees that would require sufficient due process.

The legality of ATCSA’s indefinite detention provision was questioned in *A and Others v. Secretary of State for the Home Department (the Belmarsh Detainees case).* The Law Lords found that the this provision was incompatible with Article 5 and Article 15 of the European Convention on Human Rights because it violated “the right to individual liberty, one of the most fundamental of human rights,” and that “Indefinite detention without trial wholly negates that right for an indefinite period.” The Lords also held that the indefinite detention powers were discriminatory as they only applied to foreign nationals and were not proportionate to the threat that existed.

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151 Ibid., [2004] UKHL 81.
In reaching this decision, the Lords emphasized that the power of the Government to indefinitely detain was not justified because it infringed on one of the most fundamental rights, the right to liberty as protected by Article 5 of ECHR and the Human Rights Act 1998.\textsuperscript{152} By citing its international and domestic obligations, the Court acknowledged the role of the judiciary as protectors of the rights of individuals, The Law Lords emphasized the importance of the courts in “[intervening]…when it is apparent that the primary decision-maker must have given insufficient weight to the human rights factor.”\textsuperscript{153} This illustrates support for the political structure hypothesis and the role of the judiciary to check extralegal executive power during emergencies.

The Lords’ judgment correlated also with the threat perception hypothesis. The Lords found the power of indefinite detention to be inimical in relation to the level of threat, which they believed no longer constituted a “public emergency” that would justify derogation from the ECHR. Lord Bingham noted, “The UK is the only country to have found it necessary to derogate from the [ECHR]. We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders.”\textsuperscript{154} Hence, because the conditions of a public

\textsuperscript{152} 999 UNTS 171. Article 5(1) of the ECHR and Article 9 of the ICCPR. Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001 No. 3644. The HRA officially incorporates the substantive human rights protections within the ECHR and its Protocols into UK domestic law. S.14 of the HRA allows the Home Secretary to make an order for prospective derogations to be designated for the purposes of the HRA.

\textsuperscript{153} [2004] UKHL 80 (“But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 as it is to all other legislation and ministers’ decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms.”).

\textsuperscript{154} [2004] UKHL 30.
emergency no longer existed, the Lords found it unacceptable to suspend civil liberties.

The Belmarsh holding thus supports an interaction of the political structure and threat perception hypotheses to explain the check on the Government’s emergency powers. The ex post facto constraints provided by the fusion of powers system enabled the judiciary to assess the Government’s emergency powers; in doing so, it found the Government’s derogation to be invalid. Hence, the Lords ultimately held that foreign nationals had a right to liberty and due process.

Following the Belmarsh judgment, each theory predicts detention with due process, but for different reasons. If the political structure theory is true, we would expect the fusion of powers system to provide a priori constraints on executive actions that prohibit indefinite detention; these constraints would instead lead to due process as Parliament would act in accord with the judgments of the Law Lords and the multitude of opinions in Parliament would be able to challenge the Government’s position. If threat perception were the motivating theory, we would expect debates in Parliament to cite the lack of threat and thus the reintroduction of liberal norms and due process for detainees. If the legal framework theory were true, we would see Parliament use a new framework to provide due process for detainees.

Legislative and executive compliance. On January 26, 2005, the Home Secretary provided the Government's response to the Belmarsh judgment: “The Government believes that the answer lies in a twin-track approach: specifically,
deportation with assurances for foreign nationals whom we can and should deport, and a new mechanism—control orders—for containing and disrupting those whom we cannot prosecute or deport.”

The Government then repealed Part 4 of ATCSA and introduced to Parliament a system of control orders applicable to both foreign nationals and citizens under the Prevention of Terrorism Act 2005 (PTA).

The intention was for each control order to be tailored to the particular risk posed by the suspect. For non-derogating orders, the Secretary of State and Prime Minister could make a control order against an individual if he had reasonable grounds for suspecting the individual’s involvement in terrorism-related activity and if he considered the order necessary for purposes of public safety. Each application for a control order had to be reviewed by a court. If the court approved the order, a hearing in relation to the order had to be held within seven days. If the court found the order to be flawed, the detainee could appeal the order on the principles of judicial review to the High Court. Non-derogatory control orders include policies, such as curfews and restrictions on whom a suspect can meet; these orders were limited to twelve months.

Derogating orders are those that would severely restrict a suspect’s movement in a public emergency situation. These could only be issued by the High Court at the request of the Home Secretary after a preliminary hearing to find out whether there “is a prima facie case for the order to be made.”

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156 Prevention of Terrorism Act 2005, s.11-12.
157 Ibid., s. 3(11).
replacement of ATCSA enabled sufficient due process since suspects had initial and periodic review of their detention; retained the right to appeal the initial detention determination; and could not be indefinitely detained. However, such due process protections could be suspended only if the conditions of a public emergency justified this—and these conditions had to be approved by a judicial officer to authorize the executive’s derogation from ECHR obligations.

When the PTA Bill was introduced to the House of Commons, the majority felt the orders complied with the Lords’ judgment in *Belmarsh*. In the opening statements, the Minister of State (Home Office), Baroness Patricia Scotland (Asthal) stated her reasons for publishing the Bill:

> First, I believe it meets the judgment of the Law Lords. Secondly, the Bill rightly confirms that the security of this country lies with the Government of the day… The Government is fully accountable to Parliament for the way they carry out their responsibilities and under the Bill that accountability will be manifest… and timely. At the same time the process of judicial scrutiny which I propose should meet the genuine concerns which have been raised. Thirdly, the Bill will ensure that the measures we put in place fully meet the threat we face from terrorism.\(^{159}\)

The intention of the bill to comply with the Lord’s ruling speaks to how constraints are both *a priori* and *ex post facto* within the fusion of powers system—MPs as well as the Government realized any new bill needed to comply with the High Court’s judgment. Simultaneously, though, the MPs recognized that situations of heightened threat from terrorism required flexibility to derogate from existing due process obligations.

MPs were concerned though about the expansive power given to the Home Secretary to issue the orders. Lord Bishop of Worcester, Peter Selby,\(^ {159}\)

\(^{159}\) *HL Deb 26 Jan. 2005, vol 670 col 146WA.*
argued that judges should be the ones issuing the orders, since the judiciary was the branch responsible for determining what constitutes deprivations of liberty.\textsuperscript{160} Such concerns were overridden by others who emphasized the Bill’s overall compliance with the narrow judgment of \textit{Belmarsh}. Lord Forsyth of Drumlean emphasized the orders were “designed directly to address two of the Law Lords' concerns—on discrimination and proportionality”\textsuperscript{161} by ensuring that an individual did not have his rights breached unless security circumstances justified it. To offset concerns, Parliament inserted a sunset provision that required the PTA to be renewed every year by affirmative resolution of both Houses.

The enactment of the PTA illustrates both the desire to comply with the Lords’ judgment and the desire to maintain a balance between security and liberty during public emergencies. The PTA provides more evidence for the interaction of the threat perception and political structure hypotheses. Threat perception was an intervening variable, because without it, Parliament would not have been persuaded of the need for the executive to maintain authority with judicial oversight to issue derogating control orders under emergencies. When emergencies did not exist, sufficient due process had to be granted through non-derogating control orders. Since the Government did not utilize a legal framework to maximize its preferences and suspend due process at all times, it was subject to existing due process under UK common law protected by the courts.

\textit{London bombings trigger executive authority}. The PTA received Royal Assent within eighteen days. Before the effects of the PTA could be seen, the UK

\textsuperscript{160} Ibid., col 219 (“I remain puzzled why the Government have felt it necessary therefore to go down the road of executive decision in a matter that constitutionally belongs to the judiciary.”).

\textsuperscript{161} HL Deb 26 Jan. 2005 vol 670 col 162.
suffered from a terrorist attack on London’s public transport system on July 7, 2005. The London bombings killed fifty-two people and injured seven hundred more.\textsuperscript{162} Immediately after this, because a new detention policy had just been created to cover the actions of suspect foreign nationals and citizens, the Home Office focused on exerting authority in its preventive detention in place through its criminal law. It tried to increase pre-charge detention for citizens from the fourteen-day maximum to ninety days. At the time, Prime Minister Tony Blair warned Parliament of the gravity of the terrorist threat and the need for the extension, stating: “I have to try to do my best to protect people in this country and to make sure their safety and their civil liberty to life come first. Let us have a debate about the strength or otherwise of those proposals, but for myself I find it a convincing case.”\textsuperscript{163} Despite the Prime Minister’s request for the passage of the bill, Parliament rejected it—Blair’s first parliamentary defeat. It is important to note, however, that Blair presented his own recommendation, but also encouraged debate on the issue. This vividly contrasts to Bush’s unilateral decision-making.

The Home Affairs Committee rejected the ninety-day extension.\textsuperscript{164} The Committee did not find the Government’s argument for the extension “compelling” because they did not have sufficient evidence to prove that “on such a major issue with very significant human rights implications,” an extended detention would truly serve its stated purpose of “[securing] sufficient admissible


Critically, and in contrast to the U.S., Parliament did not approve the Government’s argument that extended interrogation to gain intelligence justified lengthening pre-charge detention. The Committee found, “In general it cannot be expected that interviews of suspects during extended detention will lead to significant additional information that can be used in court.” The Committee concluded that extended pre-charge detention beyond fourteen days might be useful some times but that it was not required.

This interaction demonstrates how the fusion of powers system triggered an a priori constraint on the executive power. Even though Prime Minister Blair sought extended detention, he had no tools to implement this policy besides legislation passed by his own party. Knowing this, he appealed to Parliament and sent members of the Home Office to testify about the necessity for the policy. The fusion of powers necessitated this interaction between the two branches; and it was because of this interaction that Parliament was able to review the policy before its enactment. While the fusion of powers does not necessarily always lead to due process, this political structure enables a choice by Parliament, rather than solely the executive, in how detention policy should be made. As seen earlier, this

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165 Ibid., para 90. The government had testified to the Committee on several reasons to extend pre-charge detention beyond fourteen days: “the international nature of terrorism;” “difficulties in establishing the identity of terrorist suspects;” “the need to find interpreters;” “the need to decrypt computer files;” “the length of time needed for scene examination and analysis;” “the length of time needed to obtain and analyze data from mobile phones;” “the need to allow for religious observance by detainees;” and “delays arising from solicitors’ consultations with multiple clients.”


167 Ibid., para 31.
choice led to the utilization of the existing pre-trial detention as result of institutional inertia within path dependence.

Parliament constrains executive authority. Although the ninety-day extension did not pass, Parliament did compromise and extended the detention to a maximum of twenty-eight days in the Terrorism Act 2006. The JCHR elaborated the reasoning behind Parliament’s decision. First, they noted with appreciation “the measured tone of the Government’s reaction to the recent terrorist attacks in London,” which did not “appear to have deflected the Government from the consensual approach.” This corroborates the political structure hypothesis, as it illustrates the strength of fusion of power systems to encourage better interaction among the executive and legislative branches.

The JCHR accepted the Government’s argument that the London bombings justified the need for at least a twenty-eight day extended detention. The Government had shown that the six terrorists had all been charged—but after being detained for more than fourteen days. While threat perception seems to be attractive here, this was not the motivating factor. Rather, the Committee approved the government’s justification because it demonstrated the necessity of an extended pre-charge detention to carry out effective criminal prosecutions against terrorist suspects. This observation is reinforced by the JCHR’s conclusion that there must always be “an upper limit to pre-charge detention” to be determined only “after carefully considering the evidence relied on to

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170 Ibid., para 16-17.
demonstrate the length of time which is needed.”171 This illustrates that pre-charge detention can fluctuate within a criminal law framework, given the changing nature of technology and the complexity of terrorist plots. Thus, the Government’s preferences located the policy within the existing criminal law framework, rather than in temporary emergency responses to terrorism threats.

After consultation between Government and Parliament, the bill was enacted. Detainees could be held for forty-eight hours, after which the police had to apply to a judge for a detention extension warrant, which could be accumulated until they reached the maximum limit of twenty-eight days. Every seven days a magistrate or High Court judge was required to designate the warrant.172 This process of judicial review stemmed from Parliament’s placement of the treatment of detainees within their existing criminal law, which requires sufficient due process.

**Judicial reaction.** In October 2007, the Court reevaluated the PTA control orders in the cases of *Secretary of State for Home Department v MB and AF*.173 The Lords faced the issue of whether a non-derogating control order imposed under the PTA constituted a criminal charge under Article 6 ECHR. The House of Lords held it did not, primarily because the purpose of the control order is to prevent, rather than punish.174 The control orders were temporary measures to be

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171 Ibid., para 29-31.
172 TA, s 41(3).
173 *Secretary of State for Home Department v MB and AF* 2007 UKHL 46 [2006] EWCA Civ 1140.
174 Ibid., para 24 (“Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offense is provided for; the order made is preventative in purpose, not punitive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.”).
used in special circumstances when national security was at stake. Lord Bingham of Cornhill observed:

[I]n ordinary civil proceedings it is appropriate to give weight to the interests of each side… [T]he state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy…But the judge is also a public authority for the purpose of the HRA and thus under a duty to act compatibly with the Convention rights unless precluded from doing so by primary legislation which cannot be read in any other way.\textsuperscript{175}

This reasoning supports an interaction of the political structure and threat perception hypotheses—the judiciary recognized that there were some instances of heightened threat when executive authority could be expanded to protect national security and infringe upon due process. However, unlike in the U.S., this determination would be made on a case-by-case basis and with judicial oversight. Due process had to be afforded unless the circumstances were compelling enough not to do so.

The Court used the same reasoning in determining that the PTA could provide a fair hearing with due process in line with Article 6 ECHR, even with the use of non-disclosed evidence in certain situations. It stated that the relevant provisions of the PTA should be read down so that they would take effect only when it was consistent with fairness for them to do so (i.e., in cases in which closed evidence was needed, the provisions would be qualified).\textsuperscript{176} Thus, the Court found that each case would essentially depend on its facts. The Court felt that a declaration of the PTA’s incompatibility with the ECHR was unnecessary.\textsuperscript{177} Following this judgment, the Government took the view that the

\textsuperscript{175} Ibid., para 70.
\textsuperscript{176} Ibid., para 72.
\textsuperscript{177} Ibid.
judiciary upheld the control orders system as the best possible means to address terrorism given its flexibility based on threat perception.  

Executive attempts to exercise authority. Simultaneous to the MF hearing in the summer of 2007, the Blair Government attempted to increase pre-charge detention to fifty-six days. The Home Office cited the “scale and nature of the current terrorist threat” and the “increasing complexity of cases” as justifications. They sent a report describing their options for pre-charge detention to Parliament for informal pre-legislative consultation before a new “Counter-Terrorism Bill” was drafted. The Government reinforced its desire to work with Parliament to create new legislation by stating in the report: “The counter-terrorism legislation that has been introduced since 2000 has all been fast tracked through Parliament… we recognise that this has resulted in criticisms. We therefore want to see this Bill go forward on a consensual basis where possible.” This action underscores how the political structure of a fusion of powers system enabled greater interaction among the executive and legislature branches when passing security legislation. This dependence enables greater choice in detention policy since more voices are involved in the decision-making process.

179 Home Office, “Options for Pre-Charge Detention in Terrorist Cases,” July 25, 2007, 9 ("The Government is clear that it will only be necessary to go beyond twenty-eight days in exceptional circumstances – where there are multiple plots, or links with multiple countries, or exceptional levels of complexity. To ensure that any new limit is indeed used only in exceptional cases, we believe that any increase in the limit should be balanced by strengthening the accompanying judicial oversight and Parliamentary accountability.").
181 Ibid., para 7.
The Government’s proposals were circulated amongst relevant committees. The JCHR concluded that the Government had not “made a compelling evidence case for extending pre-charge detention beyond the current twenty-eight days” since the power to detain to up to that limit had been rarely used. The Committee had “seen no evidence that the threat level [was] growing.”\footnote{JCHR, Counterterrorism Policy and Human Rights: 42 Days and Public Emergencies, Twenty-first Report, (HC 635 2007-08; HL 116), para 6.} Moreover, it noted that if such an extension was granted, it could lead to the “wrongful exercise of power” by the Government.\footnote{JCHR, Counterterrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation, Tenth Report, (HC 356 2007-08; HL 57).}

The Home Affairs Committee similarly found that the Government did not present sufficient evidence to justify further extended detention, particularly since such detention would infringe upon the right to liberty. Moreover, it noted that this path toward indefinite detention did not seem to match the objective of pre-charge detention: evidence-gathering. Rather it was becoming similar to internment.\footnote{Home Affairs Committee, The Government’s Counter-Terrorism Proposals, (HC 43-II 2007-08) para 21 “We consider that there should be clearer evidence of need before civil liberties are further eroded, not least because without such evidence it would be difficult to persuade the communities principally affected that the new powers would be used only to facilitate evidence gathering and not as a form of internment.”} Both Committees provided other options as opposed to extended pre-charge detention, such as post-charge questioning, which would meet the broader objective of extracting evidence.

The reasoning to oppose extended detention in both committees aligns with the threat perception, political structure, and path dependence hypotheses. In support of threat perception, the extension to fifty-six days was not granted because there was no evidence that a heightened level of threat existed. In support
of the fusion of powers hypothesis, the committees’ assessment enabled *a priori* constraints on executive power. Finally, path dependence was critical as the need for longer durations of evidence gathering was satisfied by simply altering existing pre-charge detention policy.

When Parliament did pass the Counterterrorism Bill 2008, it included a higher limit for detention at forty-two days. This limit, though, would only be available if there was “a clear and exceptional operational need, supported by the police and the Crown Prosecution Service and approved by the Home Secretary.”185 The Government agreed that this would only be used in emergency circumstances that were corroborated by police testimony for its necessity.186 Parliament agreed to the extension up to forty-two days, with no possibility of renewal, but such an extension would require approval by both Houses within thirty days.187 Additionally, the Bill allowed for post-charge questioning of terrorist suspects to offset the need to use extended detention measures.188

This sequence of events lends support to interactions amongst all the hypotheses. First, as expected by the fusion of powers hypothesis, consultation between the executive and the legislature prior to the enactment of policy enabled legislators to discuss and assess executive power relating to detention before any final policy was made. This allowed committees to critique the Government’s approach and verify whether a heightened sense of threat legitimated a longer pre-charge detention period. Second, an interaction of path dependence and the

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185 Explanatory Notes to Counterterrorism Bill 2008, para 23.
186 PBC Deb, 6 May 2008, col 251.
187 Ibid., col 303.
188 Ibid., col 337.
selection of legal frameworks hypotheses was supported. Parliament extended the existing pre-charge detention based on testimony from the police and the Crown Prosecution Services that suggested the need for a greater number of days for pre-charge detention. Institutional inertia, the desire of policymakers to conserve resources, and the effects of repetition subconsciously motivated Parliament to amend existing detention policy under its criminal law.

**Summary Analysis.** The UK’s experience with formulating detention policy between 2001 and 2008 overall validates varying interactions among all of the hypotheses. For the preventive detention policy for foreign nationals, the political structure, threat perception, and legal frameworks hypotheses motivated the outcome. The executive authority of the Government during the heightened sense of threat following 9/11 enabled it to utilize any legal framework that would maximize its ability to detain terrorist suspects without due process. The Government thus implemented indefinite detention for foreign nationals under its immigration law. Yet, while indefinite detention was permissible, there was limited due process for detainees through the SIAC tribunals. The inclusion of such due process was motivated by the fusion of powers system which enabled a priori constraints on executive emergency power as a result of required consultation between Parliament and the Government before policy enactment.

The judiciary struck down indefinite detention, as it did not find the contemporary conditions to constitute a public emergency that would justify a deprivation of liberty. In response, the Government created a system of control orders in which terrorist suspects would be afforded due process protections
guaranteed by its criminal justice obligations unless conditions of a public emergency justified more restrictive measures. This guarantee of sufficient due process and the prevention of indefinite detention were thus motivated by an interaction between (1) the theory of threat perception in which heightened levels of threat could justify the restriction of liberty and (2) the legal framework theory where the use of a variation of UK criminal law automatically required sufficient due process protections.

This sequence of policy outcomes highlights the interaction of the fusion of powers and selection of legal framework hypotheses. The choice of Parliament and the Government to derive detention policy based on criminal justice obligations, rather than on relying on executive emergency measures, enabled sufficient due process. That choice was made possible by the structure of the political institutions within the fusion of powers system. The processes of interaction between the executive and the legislature in a fusion of powers system are greater in number than in a separation of powers system, and they include built-in mechanisms for *a priori* and *ex post facto* constraints on policy enactment. Interaction between the branches before enactment allowed the Prime Minister to present the Government’s proposal to Parliament for passage; Parliamentary committees would then review it; the Government could respond to each committee report; and finally the bill would be debated. Hence, this political structure facilitated all the policymakers—the executive and legislators—to take part in the choice of detention policy, rather than leaving it up to the emergency powers of an insulated executive.
It was not simply the fact that the UK had a fusion of powers system that led to immediate sufficient due process. Rather, this system enabled a choice to be made as to which legal framework to use. With the interaction of legislators and justices—bound by the law to uphold individual rights—from the beginning of the policymaking process, minimal due process safeguards were provided in preventive detention immediately after 9/11, and within the next four years sufficient due process protections were guaranteed.

For the preventive detention of British citizens, the hypotheses of path dependence and selection of legal framework interacted to explain the provision of sufficient due process protections during the entire interval. Path dependence strongly supports why the Government did not introduce any new emergency legislation regarding preventive detention of citizens immediately post-9/11. The year before, it had codified into law its emergency preventive detention policies that had been developed for IRA terrorist suspects in the previous decades after experimentation with various security-based detention policies. This historical experience resulted in the creation of a pre-charge detention system for terrorist suspects, derived from its criminal justice framework. Given this existing system, institutional inertia in Parliament caused it to use this legislation citizen suspects. Because this existing legislation was based on UK criminal law, sufficient due process protections were already included. Throughout the eight years, these due process protections remained in place; the length of pre-charge detention was increased as a result of practical needs to investigate more complex terrorist plots.
Path dependence similarly explains why neither realist fears of state survival nor threat perception pushed the Government to introduce indefinite detention following the London bombings by terrorists. The bombings occurred several months following the enactment of the PTA, which had just replaced ATCSA’s indefinite detention policy with the system of control orders. The creation of this legislation just prior to the London bombings meant that it was still afresh in the minds of MPs. The novelty, immediacy, and adequacy of this policy thus led to institutional inertia in Parliament to continue this system of control orders, rather than creating a new one.

These two examples of path dependence illustrate the predictive power of existing preventive detention systems when detaining terrorist suspects. Although the UK could have used the conditions of a public emergency following the terrorist bombings on its own territory to justify more draconian policies of preventive detention, it did not do so. Rather it applied existing policies that had become a part of its criminal justice system. Because path dependence operated, the threat perception theory was not validated as an independent variable since the policy formulation in the UK did not align with its predictions of indefinite detention during times of heightened threat.

This case study thus sheds light on the importance of each theory in playing a role in determining preventive detention. The UK’s preventive detention for foreign nationals illustrated the impact of the political structure and threat perception theories while its pre-charge detention for citizens emphasized the
importance of historical experience with detention in determining preventive detention policy.
CONCLUSION

Comparative Analysis. Preventive detention policy in the United States and United Kingdom during the period of 2001 to 2008 differed significantly. The Bush Administration used unilateral executive power to invoke a laws-of-war paradigm, under which both foreign nationals and citizens could be held as “enemy combatants” and thus were not afforded the same protections as traditional detainees. Claiming constitutionally mandated emergency executive powers, the Bush Administration maintained indefinite preventive detention for aliens and citizens on the grounds that interrogation and incapacitation required detention until the hostilities ceased. Because the Supreme Court ruled that habeas review was necessary for both foreign nationals and citizens, minimal due process protections were eventually afforded, but the policy of indefinite detention continued.

In contrast, the United Kingdom adopted two different systems of preventive detention for foreign nationals and citizens. Immediately following 9/11, the Blair Government implemented indefinite detention with minimal due process for foreign nationals under security based-immigration law. The House of Lords, however, struck this down as a violation of the right to liberty. Through extensive consultation, the Government and Parliament created a system of control orders as a security-sensitive variation of its pre-trial detention policy. This system required sufficient due process protections unless the judiciary found that the conditions of a public emergency required minimal due process.
For British citizens, the Blair Government chose to continue using their existing criminal procedures to detain terrorist suspects. Because of the enhanced security crisis during the eight years examined, and particularly following the London bombings, the Government convinced Parliament to increase pre-charge detention from seven to forty-two days. Even though pre-charge detention increased significantly (as Parliament took into account the need to collect evidence of potentially complex terrorist plots), the maximum limit Parliament ultimately allowed was lower than what the Government desired—first ninety and then fifty-six days. Furthermore, sufficient due process protections were never changed—detainees could only be arrested under a warrant and were granted judicial review every seven days.

These two case studies do not wholly support my initial argument that the political structure of democracies determines the form of preventive detention for terrorist suspects. Rather, the analyses demonstrate that all of the theories were supported through a series of interactions: (1) the political structure of a democracy, level of threat perception, and the selection of legal framework interact to influence the form of preventive detention during an emergency, as do (2) the processes of path dependence. For the former, due process protections afforded were directly a result of which legal framework policymakers chose on the micro-level: the laws of war, security-based immigration, or a criminal law paradigm. The first two frameworks enabled policymakers to justify indefinite detention with minimal or no due process, while the latter required detention with sufficient due process. These due process protections were indirectly caused by
the political structure on the macro-level. These case studies demonstrate that the
choice of legal framework is made possible and even influenced by the structure
of political institutions and how these institutions interact during a heightened
sense of threat.

In the case of the U.S., the separation of powers system enabled the
executive to exercise enhanced extralegal power during an emergency under the
heightened sense of threat felt by Americans. As a result, the Bush Administration
was automatically given the choice of which framework to use without challenge
by the other two branches. Harnessing executive wartime powers, the President
used a laws-of-war paradigm to address the conflict and create procedures that
satisfied executive preferences to indefinitely detain terrorist suspects as enemy
combatants, unprotected by the Geneva Conventions. With this framework in
place, a deferential Republican-controlled Congress supported indefinite detention
without due process. Over time, this detention policy was challenged in the
Supreme Court, which ultimately found judicial review necessary even under a
laws-of-war paradigm. While minimal due process protections were eventually
provided, the Bush Administration was still able to maintain its policy of
indefinite detention until hostilities ceased. Hence, if a democracy provides an
executive with expansive powers during emergencies, such as in a pure separation
of powers system, the executive will have the choice of applying a “national
security” legal framework to maximize its preferences for detention, and this may
likely include policies of indefinite detention without judicial review.
In the United Kingdom, the interaction between political structure, threat perception, and legal frameworks also determined the form of preventive detention. Under the heightened sense of threat following 9/11, the Government used emergency executive authority to select a framework that would enable indefinite detention: a security-based immigration framework. Yet, unlike the separation of powers system, the executive in a fusion of powers system requires the consent of the legislature to implement policy. To gain parliamentary support for indefinite detention, the Government included minimal due process through SIAC tribunals. When the judiciary struck this down as violating the fundamental right to liberty, the Government and Parliament had to work together to create a new system. This consultation enabled Parliament to influence the choice of legal framework from which to derive detention policy, as: (1) it enabled a priori as well as ex post facto constraints on executive authority in the policy-making process, and (2) it included a range of viewpoints that could challenge the Government’s positions during executive-legislative consultation. Consequently, preventive detention policy for foreign nationals resulted in a system of control orders, derived from UK criminal law, which required sufficient due process protections of detainees unless the executive could prove to a judge that the conditions of a public emergency existed and thus would require only minimal due process. The UK’s political structure facilitated both executive and legislative participation in the selection of detention policy, rather than leaving it up to the emergency powers of an insulated executive.
While the interaction between these the political structure, threat perception, and legal framework theories explains why indefinite detention was retained in the U.S. and altered in the UK, it does not explain the immediate use of pre-trial detention for UK citizens. My analysis uncovered that path dependence was responsible for this decision. Just before 9/11, the UK had codified emergency pre-trial detention for citizens that had been in use during its conflict with the IRA in the 20th century. Having this existing policy at its disposal, institutional inertia led policymakers to simply amend the existing legislation to ensure an effective preventive detention system for terrorists of the new century. As the potential for complex terrorist plots emerged, the Government simply increased pre-charge detention within this pre-existing legislation instead of creating an entirely new system. Similar processes of path dependence also explain why the UK did not institute indefinite detention immediately after the London bombings; only months before, it had created the system of control orders. This finding suggests that historical experiences with detention have a strong impact on current forms of preventive detention. While the UK system of preventive detention is by no means the most protective of civil liberties, it does show that a democracy that has faced a long-term threat of terrorism has the ability to provide sufficient due process. Such a finding implies that the lack of experience with security-based preventive detention in the U.S. may have also affected the decision to maintain indefinite detention.

Theoretical Contributions. Altogether, this thesis demonstrates how the structure of political institutions interact with the selection of legal frameworks
and threat perception to determine the provision of due process protections in preventive detention regimes for terrorist suspects during emergencies. The type of institutional structure within a country—separation of powers or fusion of powers—impacts the choice of legal framework during a heightened sense of threat, and hence affects the due process protections in preventive detention. Moreover, path dependence plays a role in determining the form of preventive detention within countries that already have existing policies for security-based detention. The findings of this investigation are therefore instructive for resolving questions regarding the relationship between policy-making and human rights: How have political institutions interacted to provide greater protections for human rights during emergencies? What is the role of each institution in this process? How do different systems of political structures impact the formulation of preventive detention regimes? Does previous experience aid in this process?

On a broader level, my research supports different facets of existing literature. First, it supports Linz’s arguments that pure presidential systems (a separation of powers system) provide undue power to the executive, while pure parliamentary systems (a fusion of power system) enable better cohesion in policymaking. Second, it supports scholars such as Gabriella Blum and Phillip Heymann, who argue for the importance of legal frameworks in determining the type of security-based preventive detention. Yet this research goes beyond these findings to assert that the choice of legal framework is determined by its ability to maximize preferences of the policymaker. Third, it lends credence to the entire camp of path dependence theorists who note the importance of understanding the
impact of cognitive impulses and institutional inertia on the process of policymaking.

**Theory Validation.** Before deriving any policy implications, this research should be validated through further case studies of security-based preventive detention. The cases of the United States and the United Kingdom provided a baseline from which to develop an argument regarding the influence of political structure on preventive detention given their pure separation of powers and fusion of powers systems. The use of these case studies, though, particularly the United States, faces criticism regarding the possibility of these cases being an exception, rather than the norm. Many scholars have suggested the Bush Presidency represented an extraordinary example of unilateral executive power, by using an administration of lawyers to articulate and defend the exercise of inherent executive power not as a temporary response to emergency, but as a required constitutional obligation.\(^{189}\) Under this type of unexpected and controversial power, the Bush Administration’s implementation of preventive detention without due process could be seen as an anomalous case.

While the claims of extraordinary executive power may be true, it does not undermine the development of this thesis’ argument. First, the history of the United States illustrates many examples of expansive presidential power in the arenas of foreign affairs and war, starting with George Washington.\(^{190}\) It is

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190 The founding father and first president, George Washington, exercised such unilateral executive power when he withheld information requested by Congress, stating that disclosure could harm the nation’s interests. Washington exercised such power in two instances: first, in response to a Senate request for certain dispatches from the Minister of France, and second in
therefore likely to expect similar uses of expansive executive power in other separation of powers systems, besides the U.S. Second, this paper has already discussed how U.S. Presidents have used such inherent power to implement preventive detention during emergencies, such as in WWI and WWII. Third, the implementation of indefinite detention without due process is not uncommon—in addition to the British, the Israelis have used such a system while Singapore, Vietnam, and Cambodia continue to do so.\footnote{While these countries have used preventive detention without due process outside of the current conflict of global terrorism, the cases of the U.S. and the UK were purposely chosen to analyze the use of such detention in the War on Terrorism so that the findings could suggest policy recommendations that may enable methods to ensure the use of preventive detention with due process in future cases of global terrorism.}

While the case studies I chose are considered “pure” and even extreme forms of separation of powers and fusion of powers systems, the findings from this research should be assessed further by analyzing mixed systems in which elements of both systems may exist. In these mixed systems, depending on the precise nature of the institutional set-up, we can surmise a mixed result based on where the policymaking power lies during emergencies. For example, if a mixed system has a president who has constitutional emergency executive powers, we can ostensibly predict that a national security framework for detention will be response to a House request on material relating to the Jay Treaty. Abraham Sofaer, “The Presidency, War, and Foreign Affairs: Practice under the Framers,” \textit{Law and Contemporary Problems} 40 No. 2 (Spring, 1976), 12-38.
used. However, if there is a mixed system where the president remains weak during emergencies and instead Parliament has policymaking authority, we can expect a pre-trial detention policy. Identifying the institution with policymaking authority during emergencies is critical to determining the direction mixed systems will take when instituting security-based preventive detention.

**Illustrative Application on a Mixed System.** India provides an illustrative case study of a mixed system with a security-based preventive detention. India is a parliamentary democracy that operates under the separation of powers doctrine. Its institutions include a President that serves as the executive, a bicameral Parliament, the Prime Minister and Council of Ministers that serve within the executive but are also members of Parliament, and an independent judiciary. While India in theory has a separation of powers system, policymaking authority during emergencies remains with Parliament—suggestions it is more akin to a fusion of powers system. India’s Constitution gives Parliament the authority to enact preventive detention laws for security purposes. Under the theory developed in this thesis, we would expect India to use a criminal law paradigm that requires preventive detention with due process protections. However, since India operates under the separation of powers, the executive may retain certain prerogatives that are likely to be utilized and may minimize the likelihood of sufficient due process.

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The current law governing preventive detention in India is the National Security Act (NSA) created by Parliament. The NSA allows for detention by executive discretion of any individual to prevent acts threatening “public order” or “national security.” The detention orders are executed in the same manner as warrants under India’s Code of Criminal Procedures, and the police officer must bring the suspect to a magistrate for judicial review within twenty-four hours. After review, the suspect may be held for up to three months; a detention that goes beyond this maximum limit requires a review by a special executive tribunal in closed hearings where the detainee does not have the right to counsel.

As expected, with a mixed system, India utilizes its criminal law to derive detention procedures and as a result sufficient due process protections are afforded to detainees; however, the executive retains certain control over the process when it comes to high-value detainees that may require lengthened detention. This brief analysis of India’s preventive detention illustrates the generalizability of this research’s findings. Beyond looking at pure presidential and pure parliamentary systems, this research can be further applied and assessed through case studies of mixed democratic systems. In doing so, we can gain further insight into: (1) which institution in a mixed system has policymaking authority during emergencies and whether this changes on a case-by-case basis, and (2) how this affects the selection of a legal framework from which to derive detention policy.

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193 Ibid., 327.
194 Ibid., 335.
Policy Recommendations. In addition to the theoretical contributions of this study, there are significant real world implications from this research. With the rise of global terrorism since the attacks of 9/11, states without existing preventive detention may find themselves facing a security crisis requiring the creation of a detention system. In such a position, the findings of this research can offer insight as to how the policy-making process can best yield sufficient due process protections that maintain a balance between protecting national security and preserving civil liberties.

Several policy implications arise from these findings that can be applicable to democracies that do not have existing preventive detention systems and face a security crisis, such as a terrorist attack. The key findings of this research suggest certain policies to promote sufficient due process protections based on domestic and international law. While policy recommendations could be made based on the macro-level findings about the political structure of democracies, these would not be as useful because (1) such structures still rely on a legal framework to derive detention policy, and (2) countries will be resistant to changing on a macro-scale its political structure for the sole purpose of improving detention policy.

In determining policy implications, I will focus on the micro-level findings that directly impact the provision of due process protections:

1. Each type of democracy should utilize their existing criminal law/pre-trial detention system when setting up security-based preventive detention. This will ensure that sufficient due process is provided.
2. If a national security detention framework is selected, incorporate due process protections from the existing criminal law paradigm and modify the system so as to allow the temporary suspension of due process for specific cases that constitute a severe threat. Such a suspension should still have judicial oversight and periodic review.

These policy recommendations are limited as there is still much research left to carry out in order to better understand the factors that strongly motivate the selection of legal frameworks.

Further Research. To validate the arguments developed in this thesis, further case studies should be done to assess the impact of the political structure of institutions and the selection of legal frameworks upon the formulation of preventive detention policy in democracies. Yet, even with validation of these arguments, there remain a number of unresolved questions that merit further research.

Rationales for Preventive Detention. If the selection of a legal framework helps determine due process protections, what drives this selection? This research has shown that the preferences of policymakers are vital in this respect. Are there certain factors or preferences that motivate the selection of each framework—what are these factors and how do they determine the selection? Investigating the political psychology of decision-makers may be a start in right direction in answering these questions. This subject area would allow for a more thorough investigation of actor-based decision-making and an analysis of any cognitive influences or biases on policy formulation.

It is also possible that policymakers’ rationales for preventive detention influence the selection of legal framework. Detention for the purposes of
interrogation and incapacitation may lend itself to a security-based or “laws-of-war” system with no limit to detention to prevent suspects from returning to the battlefield. However, preventive detention for the purposes of improving investigations in complex plots and assessing intelligence may encourage selection of a criminal law paradigm. Further research could examine the relationship between rationales for detention and the selection of legal framework, while also assessing whether each framework achieves its intended purpose.

Other Arenas for Preventive Detention. On a more general scale, the findings of this research could provide useful extrapolations for other detention contexts besides security, such as the arenas of immigration and asylum, pre-trial detention, extradition proceedings, and mental-health confinements or quarantines. While each of these contexts have specific laws, it would be useful to know if the locus of policy-making authority in different institutions impacts due process protections afforded.

Alternative Approaches to Preventive Detention. Many scholars argue for the replacement of preventive detention with alternative approaches. These approaches range from a purist interpretation, which calls for no system of preventive detention, to the creation of an entirely new court dedicated to trying suspect criminals, terrorists, and prisoners of war. In between, others have called for the creation of an “emergency constitution” with temporary provisions for preventive detention or a modification of the current criminal justice system.\(^\text{195}\) This literature lacks a comprehensive analysis of all the different components of

\(^\text{195}\) Blum, 16-17.
preventive detention—such as judicial review, the use of open or closed proceedings, evidentiary rules, and the right to confront adverse witnesses, and the right to be presumed innocent in comparison to these alternative approaches. What is needed is a rigorous comparison of alternative approaches to a system of preventive detention that has full procedural safeguards. This would allow us to better understand if alternative approaches are superior in terms of compliance to international and domestic law than current systems of preventive detention.

*Concluding Thoughts.* While this thesis provides direction as to how to protect and/or increase due process safeguards within preventive detention systems, there is still much research that needs to be done in developing the literature on the selection of legal frameworks, the rationales behind its implementation, preventive detention in other contexts, and alternative approaches. Global terrorism is currently a major threat to democracies and will continue to be so in the future. While terrorism exigencies will require immediate action to protect national security, it is critical to remember that the aim of preventive detention is based on probabilities and what *could* happen, rather than on what *has* happened. It is therefore imperative to understand the range of possibilities for detaining terrorist suspects in accordance with domestic and international law, to ensure that innocent individuals are not detained without charge for undue periods of time.

Beyond the realm of respecting fundamental human rights, preventive detention with due process is fundamental to upholding the democratic principle of the rule of law. In the current state of global affairs, with terrorism increasing,
citizens protesting against authoritarian regimes, and international conflicts persisting, it is critical that democracies, particularly the United States, remain committed to their own liberal values. We must keep in mind Justice O’Connor’s advice in *Hamdi* that “[i]t is during our most challenging and uncertain moments that our nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”196

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### Political Structure USH1

When the President claims executive prerogative during emergencies, detention without due process tends to be created as the executive puts forth national security concerns over due process protections due to realist fears for state survival. The other branches tend to show deference to such prerogative during emergencies due to similar realist fears.

<table>
<thead>
<tr>
<th>Expected Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>times of national security require expedient measures at any cost by the executive; existence of the threat of terrorism justifies unitary executive power; inherent power of president as commander in chief; plenary power of the president; executive protecting national security; superseding law</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Preliminary Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “limit Bush’s authority to protect the U.S. from terrorist attacks”</td>
</tr>
<tr>
<td>• “inherent and indisputable powers of the presidency”</td>
</tr>
<tr>
<td>• “necessary to protect national security”</td>
</tr>
<tr>
<td>• “unitary executive…virtually unlimited powers in the areas of foreign policy and national security”</td>
</tr>
<tr>
<td>• “checks and balances on each other is being fundamentally rejected by this Executive”</td>
</tr>
<tr>
<td>• “usurpation of Congressional power by the Executive”</td>
</tr>
</tbody>
</table>

### Political Structure USH2

Over time, in a separation of powers system due process is granted by judicial checks (enforced by the legislature) on executive power in its function to uphold the rule of law. Yet, institutional processes lead to minimal rather than sufficient due process since (a) checks can only occur _ex post facto_ policy enactment and thus any changes require much time to materialize; and (b) the Court may only rule on narrow issues of standing.

<table>
<thead>
<tr>
<th>Expected Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) deference to Executive to protect national security; support the President’s need for country to speak with one voice; existence of the threat of terrorism justifies unitary executive power; inherent power of president as commander in chief; plenary power of the president in foreign policy; downplay political party differences in support of Executive decisions; transfer judiciary power to the Executive</td>
</tr>
<tr>
<td>(b) Justices respect decisions of precedents in which national security concerns trump other rights during times of crisis/war; courts grant plenary power of the executive in times of national security; courts have historically been deferent to President; long tradition of respect for procedural protections, human rights, habeas corpus; separation of powers [indicates non-deference and evidence against this hypothesis]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Preliminary Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “Congress was aware that the DTA would strip the Court of jurisdiction over case”</td>
</tr>
<tr>
<td>• Boehner (R-OH) called Democrats who opposed the bill “dangerous”</td>
</tr>
</tbody>
</table>
| • Specter … voted against it because it is “patently unconstitutional on its face,” but then voted for it, saying he
believes the courts will eventually “clean it up”

- Hastert (R-IL) saying “House Democrats have voted to protect the rights of terrorists,” and Boehner decrying “the Democrats’ irrational opposition to strong national security policies.
- “protection of individual liberty”
- “designed to protect against cyclical abuses of the writ by the Executive and Legislative branches”
- “separation-of-powers doctrine…must inform the reach and purpose of the Suspension Clause”
- “inconsistent with the Court’s precedents and contrary to fundamental separation-of-powers principles”
- “practical considerations and exigent circumstances inform the definition and reach of the law’s writs, including habeas corpus”

**Political Structure UKH1.** When the Prime Minister claims executive prerogative during emergencies, detention without due process tends to be created as the executive puts forth national security concerns over due process protections due to realist fears for state survival. The others branches tend to show deference to such prerogative during emergencies due to similar realist fears.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>times of national security require expedient measures at any cost by the executive; existence of the threat of terrorism justifies unitary executive power; executive protecting national security; superseding law and civil liberties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary</td>
<td>“it was clear this [reserve] power … temporary nature and only made available to deal with grave exceptional circumstances”</td>
</tr>
<tr>
<td>Examples</td>
<td>“Many of the difficulties the Government experienced in the passage of the Terrorism Bill arose from the speed with which it was drafted”</td>
</tr>
<tr>
<td></td>
<td>“reflected the urgent need to put in place measures to tackle terrorism following the bombings of 7 July”</td>
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<td></td>
<td>“the threat level remains 'severe’”</td>
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<td></td>
<td>“the UK now faces a near-permanent emergency”</td>
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<tr>
<td></td>
<td>“Derogations from human rights obligations are permitted in order to deal with emergencies”</td>
</tr>
</tbody>
</table>

**Political Structure UKH2.** Over time, as a function of the fusion of power, sufficient due process should be granted because of the multitude of opinions, in Parliament who are able to provide their input. These due process protections will occur much quicker than in a separation of powers system as Parliament can more easily constrain executive power *a priori* enactment of detention policy.

| Expected Language | Law Lords express concern over due process violations in pre-charge detention; hold Executive accountable; Structure of the government compels consensus before legislation is passed; constraints – expect agreement or disagreement from another branch would provide evidence for/against a priori constraints; |
temporality – reference to past legislation demonstrates ex post facto constraints

<table>
<thead>
<tr>
<th>Preliminary Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Views expressed in anticipation of detailed Parliamentary debates of proposed legislation is framed as a positive thing – as an “opportunity to hold the Home Secretary to account for his/her decision”</td>
</tr>
<tr>
<td>▪ “It will be for the House as a whole to consider the rival legal analyses of the Joint Committee on Human Rights and the Government in deciding whether the Government have made a compelling case for the necessity of reserve powers”</td>
</tr>
<tr>
<td>▪ Law Lord: “That policy not only accords with the requirements of the ECHR but also reflects the basic constitutional principle that individual liberty is to be protected by the courts…”</td>
</tr>
<tr>
<td>▪ Law Lord: There is a risk that this [reserve powers] will be perceived to undermine the independence of the judiciary.</td>
</tr>
<tr>
<td>▪ Law Lord: the Bill risks conflating the roles of Parliament and the judiciary, which would be quite inappropriate… and arguably risks undermining the rights of fair trial for the individuals concerned.</td>
</tr>
</tbody>
</table>

Path Dependence USA3. Path dependence in U.S. institutions leads to detention systems with minimal due process due to (a) institutional inertia, and/or (b) increasing returns dynamics, such as the high set-up costs, learning effects, and coordination effects, that inhibit major changes to existing policy.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>justifies indefinite detention because of the difficulty of bringing terror suspects in military courts and/or federal courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Examples</td>
<td>▪ No supporting language was found in the sample documents for this hypothesis</td>
</tr>
</tbody>
</table>

Path Dependence UKA3. Path dependence in UK institutions causes sufficient due process within its preventive detention system as (a) institutional inertia, and/or (b) increasing returns dynamics, such as high costs, learning effects, and coordination effects, push policymakers to utilize existing terrorism laws codified during the terrorism crisis of the IRA.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>Fusion of powers allows the Executive and Parliament to work together to change policy in a quick manner; no burdensome costs of switching or altering policy for a particular branch</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Examples</td>
<td>▪ “the necessity of draconian powers in moments of national crisis is recognised in our constitutional history”</td>
</tr>
<tr>
<td>▪ “I mention these examples, not because they are factually similar to the present case, but to show that the problem is not a new one and that there are courts which have long been doing their best to try cases justly”</td>
<td></td>
</tr>
<tr>
<td>▪ “reflects the approach of the English courts up to now”</td>
<td></td>
</tr>
</tbody>
</table>
“basic to our system”
"We consider that the nature of the terrorist threat has changed: while there is no sharp break in the continuum between Irish republican terrorism and terrorism today, there are a number of significant developments”

**Legal Framework USA4.** U.S. perception of the terrorism crisis as “war” led to detention without due process as the use of a “laws-of-war” framework allowed for (a) the abandonment of legal commitments since non-state terrorist suspects could not reciprocate respect to international norms for due process, and/or (b) derogation from the international law that respects human rights, as specified during times of emergency.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>References to the Geneva Conventions and ICCPR and derogation from such treaties to deny due process; applicability of international law; international reputation of the United States; terrorists unable to respect international treaties</th>
</tr>
</thead>
</table>
| Preliminary Examples | - Bush precedent of classifying terrorists “like pirates, illegal combatants who do not fight on behalf of a nation and refuse to obey the laws of war.”
- “We are in a new war, with an enemy who attacks our civilians and does not wear uniforms. Therefore, we have to fight this new war with new tactics. Since the enemy attacks our civilians without provocation or warning, one of the consequences for those who attack us may be prolonged detention, not to punish them but to protect our families.” |

**Legal Framework UKA4.** The UK’s change from indefinite detention to detention with sufficient due process results from a switch in legal frameworks to derive detention policy. While it initially used a national security or immigration framework to justify indefinite detention, it ultimately utilized its existing criminal law, which required sufficient due process.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>Democratic ideals of constitutions and international treaties of human rights require us to respect due process norms; references to ECHR, ICCPR, HRA</th>
</tr>
</thead>
</table>
| Preliminary Examples | - Positive obligation to comply with ECHR; “Incompatibility” between proposed procedures and ECHR; “breach of ECHR”
- “challenge to a non-derogating control order made by Sec of State under prevention of Terrorism Act 2005 as amounting to a deprivation of liberty within ECHR”
- “The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected”
- “in this country also judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial...”
- “the concept of fairness imports a core, irreducible minimum of procedural protection, … The right to a fair hearing is fundamental” |
Threat Perception USA6. The severity, novelty, and mass fatality of 9/11 led to detention without due process as it (1) produced a heightened a sense of threat that allowed U.S. government officials to disregard predispositions toward democratic due process norms and/or (2) deeply affected cognitive and psychological attitudes of executive members. As the threat wanes, U.S. liberal norms would reinstate and guide institutions to rectify policies in support of due process.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>heightened sense of threat right after attack justifies foregoing civil liberties; as threat decreases, increases in due process; any references to changes in the level of threat</th>
</tr>
</thead>
</table>
| Preliminary Examples | “Very dangerous people who have been in the very serious business of killing Americans in large number. It is obvious that we have to keep this facility”; “The people at Guantanamo are very, very dangerous people, by and large”  
“The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. …. n some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions.” [Language that goes against this hypothesis] |

Threat Perception UKA6. Initially, after 9/11 and after the 7/2005 bombings, we would expect the UK to institute indefinite detention without due process due to the heightened sense of threat that allows government officials to disregard predispositions to due process norms. As the threat wanes, UK liberal norms should reinstate and guide institutions to rectify policies in support of due process.

<table>
<thead>
<tr>
<th>Expected Language</th>
<th>heightened sense of threat right after attack justifies foregoing civil liberties; as threat decreases, increases in due process; any references to changes in the level of threat</th>
</tr>
</thead>
</table>
| Preliminary Examples | “Indeed the prime reason for my agreement to join the Government was the level of threat and the belief…that perhaps I could do something to enhance the safety of our people and nation…The terrorists are more ruthless than those we have faced in the past.”  
“The UK is the only country to have found it necessary to derogate from ECHR. We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders.”  
“the threat from UK nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals” |
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Counterterrorism Policy and Human Rights: Counter-Terrorism Bill, Twentieth Report, JCHR. HC 548 2007-08; HL 108.


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