LUISS

Degree Program in International Relations

Course of Comparative Public Law

Public security and non-citizen discrimination post-9/11: the role of fundamental rights and courts in the USA and Europe.

Prof. Elena Griglio

SUPERVISOR

Prof. Gregory Alegi

CO-SUPERVISOR

Viola Fornari - 653052

CANDIDATE

Academic Year 2023/2024

Table of Contents

Introduction

The attacks on the United States on September 11, 2001, marked a defining moment in global security policy, ushering in a paradigm shift in counterterrorism measures and their legal implications. Governments worldwide responded by enacting a series of legislative reforms aimed at enhancing national security, often at the expense of individual rights and civil liberties. The immediate concern for public safety resulted in the expansion of executive power, the introduction of extraordinary measures targeting non-citizens, and a general reconfiguration of legal principles governing fundamental rights[1]. These developments have contributed to the securitization of migration and counterterrorism policies, reinforcing legal distinctions between citizens and non-citizens in ways that have significantly impacted the protection of fundamental rights[2]. The heightened scrutiny and differential treatment of non-citizens in the post-9/11 era stem from the association between immigration status and national security threats. Following the attacks, governments increasingly framed non-citizens, particularly those from Muslim-majority countries, as potential security risks, leading to the proliferation of restrictive policies specifically targeting them[3]. This securitized approach has legitimized extraordinary legal measures that would have been more difficult to justify if applied universally to all individuals, regardless of citizenship status.

The issue of discrimination between citizens and non-citizens in the post-9/11 context has deep historical and legal roots. While legal systems have long distinguished between the rights of citizens and non-citizens, the post-9/11 period saw a marked intensification of these disparities under the justification of national security. Non-citizens became the primary subjects of restrictive counterterrorism measures, including indefinite detention, extraordinary rendition, and expansive surveillance regimes. This shift raises critical questions about the principle of equality and non-discrimination, which is foundational in both constitutional and international human rights law. Indeed, the principle of equality prohibits arbitrary distinctions in the enjoyment of fundamental rights, yet post-9/11 security policies have systematically reinforced differential treatment based on citizenship status[4]. In this context, the balance between security and liberty became one of the most contentious issues in contemporary legal scholarship. While the need for effective counterterrorism policies is undisputed, the extent to which such measures encroach upon constitutional and human rights protection raises profound legal and ethical concerns. The post-9/11 security landscape has demonstrated a clear trend: the erosion of certain fundamental rights, particularly for non-citizens, in

[1] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 1–5.
[2] Clive Walker, 'Citizenship Deprivation and Cosmopolitanism' in Arianna Vedaschi and Kim Lane Scheppele (eds), *9/11 and the Rise of Global Anti-Terrorism Law* (Cambridge University Press 2021) 80–106.
[3] Susan M Akram and Kevin R Johnson, 'Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims' (2002) *NYU Ann Surv Am* , 295–356.
[4] Neal Katyal, 'Equality in the War on Terror' (2007) 59 *Stanford Law Review* 1365, 1367–1370.

the pursuit of public safety. This phenomenon is particularly evident in the policies enacted by the United States and several European states, where the legal frameworks have evolved to accommodate security imperatives, often at the expense of constitutional safeguards. The securitized approach adopted by the United States in response to the September 11 attacks has exerted a profound influence not only on its domestic legal landscape but also on international legal and policy frameworks. The introduction of mechanisms such as blacklisting in economic sanctions by the United Nations and the European Union exemplifies the extent to which the American security paradigm has influenced global governance structures[5]. Furthermore, European legislative frameworks have been substantially shaped by this security-first approach, resulting in significant transformations in counterterrorism laws and fundamental rights protections. The collapse of the Twin Towers thus represented a pivotal moment that redefined global security policies, facilitating the emergence of legal frameworks that prioritize public security over traditional rights protections. This shift has contributed to a broader reevaluation of fundamental rights and standards of equality in an era perceived as one characterized by continuous insecurity emergency.

This thesis examines the relationship between counterterrorism legislation and fundamental rights, with a particular emphasis on the disparate treatment of citizens and non-citizens in the post-9/11 context. It endeavors to analyze the responses of legal systems in the United States and the European Union to threats of terrorism, especially regarding their strategies for either safeguarding or, in certain instances, limiting individual rights. The primary focus of this research pertains to the tension that exists between national security imperatives and legal protections, highlighting the significance of judicial interpretations and the role of courts in resolving these conflicts. A key focus of this thesis centers on the principle of non-discrimination in the context of counterterrorism measures, particularly in relation to the treatment of both citizens and non-citizens. For instance, one may consider the following question: Has the shared tendency of both the United States and European legal systems to strengthen security policies and prevention measures led to a reconsideration of traditional efforts to align fundamental rights protections for citizens and non-citizens? On what premises have restrictive measures against non-citizens been adopted, and to what extent have they resulted in the erosion of fundamental rights? These questions serve as the analytical framework for examining whether counterterrorism policies have contributed to a broader shift in the legal treatment of non-citizens and the role of courts in addressing these challenges. More broadly, this study situates itself within the ongoing legal and scholarly debate on the balance between security and individual rights, emphasizing the necessity of evaluating post-9/11 counterterrorism policies not only as

[5] Council on Foreign Relations, 'The 9/11 Effect and the Transformation of Global Security' (8 September 2021) https://www.cfr.org accessed 18 February 2025

emergency measures but also as long-term developments with profound implications for the rule of law.

The first chapter establishes the foundation for this discussion by examining the evolution of fundamental rights and their application to both citizens and non-citizens in national security contexts. It explores the legal responses of the United States to the challenges posed by 9/11, followed by an analysis of counterterrorism legislation in France and the United Kingdom. This comparative approach facilitates a nuanced understanding of how different legal systems have structured their security policies while navigating constitutional and human rights constraints. Special attention is given to the structural and institutional mechanisms that govern rights enforcement, including constitutional provisions, judicial oversight, and the influence of supranational legal frameworks orders.

The second chapter explores the specific judicial responses in the United States to the post-9/11 security framework. It critically evaluates the key legislative instruments that shaped U.S. counterterrorism policy, including the USA PATRIOT Act, the Military Commissions Act, and executive orders regarding the detention and treatment of suspected terrorists. The chapter places particular emphasis on habeas corpus and due process rights, analyzing landmark Supreme Court cases (*Rasul v. Bush, Hamdi v. Rumsfeld, Hamdan v. Rumsfeld,* and *Boumediene v. Bush*) that have shaped the legal landscape concerning the rights of detainees held at Guantánamo Bay.

The third chapter shifts focus to judicial interpretations of counterterrorism measures in Europe. It examines the responses of the European Court of Human Rights and national courts in cases concerning counterterrorism laws, particularly regarding non-citizens. The chapter assesses how judicial rulings have shaped the boundaries of counterterrorism powers and whether European legal systems have effectively maintained a balance between security and fundamental rights. By analysing key cases, this chapter highlights the role of courts in mitigating the impact of extraordinary measures and reinforcing the principle of equality in the application of fundamental rights.

A comparative perspective is essential for understanding the broader implications of counterterrorism measures on fundamental rights. This thesis aims to demonstrate that, while the legal traditions of the United States and Europe differ significantly, both have experienced a convergence in their approaches to counterterrorism, particularly in the use of extraordinary measures that disproportionately affect non-citizens. By examining judicial responses to these policies, this study evaluates whether courts have effectively reinforced the principle of equality and non-discrimination or contributed instead to the normalization of security-driven legal frameworks exceptionalism.

Ultimately, this research seeks to contribute to the ongoing debate on the legal and ethical ramifications of counterterrorism policies. Through an examination of judicial interpretations

pertaining to fundamental rights in both the United States and Europe, with particular emphasis on the principle of equality, this thesis highlights the essential function of legal institutions in safeguarding against the erosion of the fundamental principles of constitutional democracy by security policies.

Chapter 1: Counter-Terrorism Legislation and the Legal Divide: Citizenship, Security, and Discrimination in Comparative Legal Systems Post-9/11

1.1 Fundamental Rights in the Context of National Security

The interplay between public security and the treatment of non-citizens has become a critical issue in the post-9/11 era, particularly as states implement measures that challenge traditional understandings of rights and liberties. Central to this discussion is the role of fundamental rights, which, although recognized independently of citizenship status, are often applied differently in practice, particularly in national security contexts where states impose restrictions that disproportionately affect non-citizens. This chapter situates fundamental rights within this broader context, exploring their function and interpretation in legal systems shaped by the tension between national security and individual protections.

The federal structure of the United States has historically served as a framework for comparing the European multilevel system dedicated to safeguarding fundamental rights[6]. The federal structure of the United States has historically served as a framework for understanding the protection of fundamental rights within its constitutional system. The U.S. legal framework provides a distinct approach to fundamental rights protection, shaped by its constitutional tradition and federal structure. Rights are enshrined in the Bill of Rights, which establishes protections such as due process, equal protection, and freedom from arbitrary detention. The Bill of Rights primarily safeguards civil and political rights, including freedom of speech, religion, and assembly (First Amendment); the right to bear arms (Second Amendment); protection against unreasonable searches and seizures (Fourth Amendment); and guarantees of fair trial and due process (Fifth and Sixth Amendments). These rights apply to all individuals within U.S. jurisdiction, yet their enforcement has historically varied depending on citizenship status and national security considerations. The judiciary, particularly the U.S. Supreme Court, has played a pivotal role in interpreting the extent of these rights, particularly in cases involving non-citizens subjected to counterterrorism measures. In contrast, the European multilevel system operates within a framework where fundamental rights are concurrently upheld within state constitutions, European Union law, and the European Convention on Human Rights (ECHR). Each of these layers of human rights protection is enforced by distinct yet interrelated

[6] Federico Fabbrini, 'Of Floors, Ceilings, and Human Rights: The European Fundamental Rights Architecture in Comparative Perspective' in Federico Fabbrini (ed), *Fundamental Rights in Europe* (Oxford, Oxford University Press 2014).

institutions, particularly national courts, the European Court of Human Rights (ECtHR), and the Court of Justice of the European Union (CJEU). Unlike the U.S. federal model, where a single Supreme Court serves as the ultimate interpreter of constitutional rights, Europe's multilevel governance system allows for a more fragmented but complementary approach to rights protection.[7] The events following 9/11 underscored the ways in which public security concerns can disrupt established legal norms, particularly in their impact on non-citizens. In the name of counterterrorism, states have adopted measures that not only expand executive power but also test the limits of judicial oversight. This chapter highlights how these shifts have necessitated a re-evaluation of fundamental rights frameworks, exposing tensions between protecting public security and ensuring equal treatment under the law.

In examining fundamental rights, this chapter does not limit its scope to their theoretical underpinnings but explores their practical implications in contexts where public security concerns intersect with legal protections. Post-9/11 security measures, particularly in the United States and Europe, have led to significant shifts in how fundamental rights are applied, especially in cases involving non-citizens. These measures have often prioritised collective security over individual liberties, raising questions about the adequacy and consistency of judicial responses to such challenges. Later in the chapter, particular attention is given to the legislative frameworks of the United Kingdom and France, where counterterrorism policies have shaped the balance between national security and fundamental rights, offering further insight into the broader European legal response to contemporary security threats.

1.1.1 Fundamental rights in the U.S. legal framework

In U.S. Constitutional law, fundamental rights are a set of rights that the Supreme Court has recognised as requiring strong protection from government interference[8]. These rights are explicitly stated in the Constitution, particularly within the Bill of Rights[9], or derived through the interpretation of specific constitutional clauses, such as the Due Process Clause[10]. They are deemed "fundamental" because they are considered essential to individual liberty and should remain beyond the influence of

---

[7] *Federico Fabbrini, 'Of Floors, Ceilings, and Human Rights: The European Fundamental Rights Architecture in Comparative Perspective' in Federico Fabbrini (ed), Fundamental Rights in Europe (Oxford, Oxford University Press 2014)* 4.

[8] Legal Information Institute, 'Fundamental Right' (Cornell Law School) https://www.law.cornell.edu/wex/fundamental_right accessed 4 November 2024.

[9] The Bill of Rights, comprising the first ten amendments to the United States Constitution, enshrines fundamental civil liberties and was ratified in 1791.

[10] Legal Information Institute, 'Due Process' (Cornell Law School) https://www.law.cornell.edu/wex/Due_Process accessed 4 November 2024.

ordinary political processes, warranting their protection within the Constitution[11]. Any law infringing upon a fundamental right must typically undergo strict scrutiny to be upheld as constitutional.

Fundamental rights under the U.S. Constitution are not limited to citizens; many of them apply to "persons", as explicitly stated in the Due Process Clauses of both the Fifth and Fourteenth Amendments[12]. These clauses ensure that non-citizens within U.S. jurisdiction are entitled to protections such as due process and equal protection under the law. Similarly, most provisions of the Bill of Rights, including freedom of speech, freedom of religion, and protection against unreasonable searches and seizures, extend to all individuals regardless of citizenship status. However, some constitutional rights, such as the right to vote or the ability to hold certain public offices, are explicitly reserved for U.S. citizens. The extent of protections available to non-citizens may also depend on their immigration status and physical presence within U.S. territory. In cases involving non-citizens detained outside U.S. borders, constitutional protections have been more limited, as seen in cases such as *Boumediene v. Bush* (2008)[13], where the Supreme Court ruled that certain habeas corpus rights extended to Guantánamo detainees, but only after significant legal debate. The Fourteenth Amendment to the U.S. Constitution provides the foundation for protecting fundamental rights, encapsulating critical protections such as Due Process and equal protection under the law. It asserts that no state shall "*deprive any person of life, liberty, or property, without due process of law,*" *nor deny anyone* "*equal protection of the laws*[14]." This clause requires state actions that impact individual rights to be carefully scrutinised, mainly when the legislation affects certain fundamental liberties or suspect classifications.

The concept of fundamental rights within U.S. constitutional law is often traced back to *Skinner v. Oklahoma ex rel. Williamson*[15], in which the Supreme Court applied strict scrutiny to a statute that mandated the sterilisation of habitual criminals. This level of scrutiny was deemed necessary because the law impinged upon a fundamental civil right. Subsequently, in cases concerning apportionment, Chief Justice Earl Warren emphasised the critical role of the right to vote, describing it as essential to preserving other basic civil and political rights[16]. Therefore, any alleged restriction on citizens' voting rights requires thorough and rigorous judicial review. This heightened standard of review evolved, as seen in cases where the Court struck down restrictions on voting

[11] Legal Information Institute, 'Due Process' (Cornell Law School) https://www.law.cornell.edu/wex/Due_Process accessed 4 November 2024.
[12] Full texts available at: National Constitution Center, 'The Constitution: Amendments' https://constitutioncenter.org/the-constitution/amendments accessed 4 November 2024.
[13] The case *Boumediene v. Bush*, 553 U.S. 723 (2008), will be discussed in Chapter 2.
[14] US Const amend XIV, § 1.
[15] *Skinner v Oklahoma*, 316 US 535, 541 (1942).
[16] *Reynolds v Sims*, 377 US 533, 558 (1964).

eligibility. In *Shapiro v. Thompson*[17], Justice William Brennan articulated the "*compelling state interest*" standard, indicating that for any infringement on fundamental rights to be justified, the state must demonstrate a highly significant and necessary purpose[18]. This standard was subsequently invoked in several voting rights cases, where limitations on these rights were invalidated, and the doctrine has since been expanded and applied in various other contexts involving fundamental rights[19]. The Court's interpretation of which rights warrant heightened protection under Equal Protection analysis has varied, creating a "sliding scale" of review[20]. While certain rights, such as the right to vote, travel, or procreate, trigger strict scrutiny, others, like education, have been subject to more restrained review unless explicitly guaranteed by the Constitution[21]. This sliding scale was prominent in *San Antonio Independent School District v. Rodriguez*[22], where the Court declined to recognise education as a fundamental right despite its societal importance because it lacked an explicit constitutional guarantee. Thus, the Fourteenth Amendment's Equal Protection Clause remains a critical yet evolving battleground for defining fundamental rights and balancing governmental interests with individual liberties[23]. The Court's gradual expansion and refinement of fundamental rights, whether through strict scrutiny, intermediate scrutiny, or newer frameworks, illustrates the ongoing negotiation of equality and protection within the U.S. legal system[24]. Moreover, the U.S. Supreme Court's interpretive approach often grants broader latitude to governmental authority in times of crisis, reflecting a degree of flexibility in rights protection under exigent national security circumstances. Although strict scrutiny is typically applied to any governmental encroachment upon fundamental rights, historical precedent reveals that emergency contexts may permit deviations, reflecting the U.S. system's pragmatic response to security challenges.

In conclusion, the European Union and the United States provide contrasting yet instructive frameworks for interpreting fundamental rights, especially where such rights intersect with national security imperatives. Each system embodies distinct legal principles and historical underpinnings in balancing individual liberties with public security concerns. Within the European framework, the European Court of Human Rights (ECHR) frequently employs the principle of proportionality, requiring that governmental restrictions on fundamental rights be strictly necessary and demonstrably

---

[17] *Shapiro v Thompson*, 394 US 618, 634 (1969).
[18] Congressional Research Service, 'Overview of the Equal Protection Clause' (Constitution Annotated) https://constitution.congress.gov/browse/essay/amdt14-S1-8-13-1/ALDE_00000839/ accessed 4 November 2024.
[19] *Ibid,* para 2.
[20] *Ibid,* para 2.
[21] *Ibid,* para 5.
[22] *San Antonio Independent School District v Rodriguez*, 411 US 1, 18 (1973).
[23] Legal Information Institute, 'Appropriate Level of Scrutiny: Current Doctrine' (Constitution Annotated, Cornell Law School) https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/appropriate-level-of-scrutiny-current-doctrine accessed 22 November 2024
[24] *Ibid,* para 1.

justified by specific security needs. This principle is reinforced by robust data protection regulations and the EU Charter of Fundamental Rights, underscoring Europe's foundational commitment to privacy and individual autonomy.

These divergent frameworks illustrate a fundamental philosophical divide: The ECHR's adherence to a rights-centric, universalist model contrasts with the U.S. approach, which accommodates adjustments based on security exigencies. Notwithstanding these differences, there is an observable convergence on specific contemporary issues, particularly in judicial efforts to curb excessive state surveillance. This signalled a shared judicial recognition of the importance of safeguarding individual rights amidst evolving security pressures.

1.1.2 Fundamental rights in the EU legal framework

The European Union's foundational values, articulated in Article 2 of the Treaty on European Union, emphasise respect for human dignity, freedom, democracy, equality, the rule of law, and the protection of human rights, including the rights of minority groups[25]. These principles form the bedrock of the EU's commitment to fundamental rights, and their protection represents one of the Union's core obligations. The EU and its institutions, as well as each of its Member States, are bound to uphold these rights across all policies and programs.

The Charter of Fundamental Rights of the European Union[26] provides a comprehensive framework outlining the personal, civic, political, economic, and social rights individuals enjoy within the Union[27]. This Charter complements national rights systems, reinforcing protections but not replacing national frameworks. In instances where fundamental rights are infringed upon, individuals can seek justice through national courts. In cases of violations of civil and political rights, they may appeal to the European Court of Human Rights[28]. Additionally, when a Member State fails to comply with EU law in ways that infringe upon individual rights, the European Commission holds the authority to bring that State before the Court of Justice of the European Union[29]. While the Charter of Fundamental Rights of the European Union applies primarily to individuals within the scope of EU law, its protections are not limited to EU citizens. Many of its provisions explicitly apply to

[25] Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (online edn, Oxford Academic 2019) https://doi.org/10.1093/oso/9780198759393.003.5 accessed 4 November 2024.

[26] Charter of Fundamental Rights of the European Union, proclaimed 7 December 2000 and entered into force 1 December 2009 with the Treaty of Lisbon, consolidating fundamental rights protected within the EU legal order.

[27] European Commission, 'Why do we need the EU Charter of Fundamental Rights?' (European Commission) https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en accessed 4 November 2024.

[28] *Ibid,* para 2.

[29] European Parliament, *The Boundaries of the Commission's Discretionary Powers When Handling Petitions and Potential Infringements of EU Law: From Legal Limits to Political Collaboration in Enforcement?* (IPOL_STU (2022)703589, 2022) 12.

"everyone", regardless of nationality, such as the right to dignity (Article 1 CFR), liberty (Article 6 CFR), and fair trial guarantees (Article 47 CFR)[30]. However, certain rights, such as the right to vote and stand as a candidate in European Parliament and municipal elections (Article 39 CFR), are reserved for EU citizens[31]. Additionally, the Treaty on the Functioning of the European Union (TFEU) recognizes rights that apply broadly, particularly in areas related to non-discrimination (Article 18 TFEU), asylum (Article 78 TFEU), and the protection of fundamental rights more generally[32]. Non-citizens also benefit from legal protections under the European Convention on Human Rights (ECHR), which extends its safeguards to all individuals under the jurisdiction of a contracting state.To further support these protections, the EU has established the European Union Agency for Fundamental Rights[33], a specialised independent body tasked with addressing the full scope of rights enshrined in the Charter[34]. The Agency provides expertise, research, and advice on fundamental rights issues, ensuring these values remain central to the EU's mission and guiding principles. The literature has thoroughly explored the European Union's trajectory in safeguarding fundamental rights from multiple perspectives, substantively and institutionally. The establishment of the single market has inevitably influenced the national frameworks for the protection of fundamental rights, thereby positioning the Court of Justice in a situation where it cannot disregard this issue while further developing the self-referential nature of the Treaties. In responding to this challenge, the Court has effectively elevated the regulations governing free movement to the level of fundamental rights.[35]. Consequently, it is unsurprising that the initial constitutional conflict between the Court of Justice and national courts engaged in constitutional review arose concerning the quality of fundamental rights protection[36].

The assertion of jurisdiction by the Court of Justice regarding the protection of fundamental rights was anticipated to result in constitutional conflicts, particularly considering that national courts, prior to the establishment of the European Union, functioned as the principal guardians of these rights.[37]. The European Union's identity as a distinct constitutional order has been significantly shaped by its approach to fundamental rights. Therefore, despite the initial economic motivations behind

[30] *Charter of Fundamental Rights of the European Union* [2012] OJ C326/391.
[31] *Ibid.*
[32] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C326/47.
[33] European Union Agency for Fundamental Rights, established in 2007 to provide expert advice and support to EU institutions and Member States on fundamental rights matters.
[34] European Parliament, 'Fundamental Rights in the EU' (*European Parliament*) https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu accessed 4 November 2024.
[35] Ana Bobić, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union, Oxford Studies in European Law* (online edn, Oxford Academic, 15 December 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.
[36] *Ibid,* para 2.
[37] *Ibid,* para 2.

European integration, the Court of Justice has developed a constitutional framework that safeguards fundamental rights by broadening its existing authority[38].

Protecting fundamental rights is a crucial area in which federalist arguments are particularly compelling. The multilevel system encompassing national, supranational, and international protections for fundamental rights presents an optimal context for exploring the normative dimensions of EU federalism[39].

The evolution of fundamental rights protection within the European Union has undergone significant transformations, influenced by the interplay between national courts and the Court of Justice of the European Union (CJEU)[40]. Initially, before the EU's establishment, national courts were the primary guardians of fundamental rights, and their authority remained undisputed, as their jurisdictions did not overlap with that of the CJEU[41]. However, as European integration progressed and the single market was established, the CJEU expanded its authority, inevitably leading to institutional frictions concerning the protection of fundamental rights[42].

This shift began in the late 1960s when the CJEU started asserting its role in protecting fundamental rights. It culminated in landmark decisions acknowledging the importance of these rights within the EU legal order[43]. The Stauder[44] and Internationale Handelsgesellschaft[45] cases marked critical moments when the CJEU began to define and expand its fundamental rights protection framework, asserting that respect for basic rights was integral to its general law principles. The subsequent period of constitutional conflict saw national constitutional courts, particularly the *Bundesverfassungsgericht* in Germany and the *Corte Costituzionale* in Italy, respond to the CJEU's expanding jurisdiction by asserting their authority to review EU law against national standards of

---

[38] Ana Bobić, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford Studies in European Law (online edn, Oxford Academic 15 December 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

[39] Federico Fabbrini, 'Of Floors, Ceilings, and Human Rights: The European Fundamental Rights Architecture in Comparative Perspective' in Federico Fabbrini (ed), *Fundamental Rights in Europe* (Oxford, Oxford University Press, 2014).

[40] Ana Bobić, 'Developments in the EU-German Judicial Love Story: The Right to Be Forgotten II' (2020) 21(S1) *German Law Journal* 31, 39 https://doi.org/10.1017/glj.2020.15.

[41] *G Federico Mancini, 'The Making of a Constitution for Europe' in Robert O Keohane and Stanley Hoffmann (eds), The New European Community (1st edn, Routledge 1991) 18.*

[42] *Ibid*, page 19.

[43] Ana Bobić, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford Studies in European Law (online edn, Oxford Academic 15 December 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

[44] *Stauder v City of Ulm (Case 29/69) [1969] ECR 419*. In this judgment, for the first time, the European Court of Justice declares that it upholds respect for fundamental human rights embedded within the general principles of Community law.

[45] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70) [1970] ECR 1125*. In this judgment, the Court builds upon the Stauder precedent, affirming that respect for fundamental rights is an essential aspect of the general principles of law safeguarded by the Court of Justice. It further asserts that the protection of these rights, though drawing inspiration from the shared constitutional traditions of Member States, must be upheld within the framework of the Community's structure and objectives.

fundamental rights protection[46]. This led to the development of a dynamic where national and EU legal orders coexisted, with an evolving understanding of their respective roles and the principle of primacy. By the time of the Solange II[47] decision, the German and Italian courts had adopted a more cooperative stance. They recognised that the CJEU generally ensured adequate protection of fundamental rights, provided that this protection was comparable to national standards[48]. This acknowledgment fostered a balance of judicial power, allowing for a more nuanced interaction between national courts and the CJEU. Overall, the protection of fundamental rights within the EU has shifted from a landscape marked by clear institutional boundaries to one characterised by overlapping jurisdictions and cooperative engagement. This has enhanced the discourse surrounding the substantive standards of fundamental rights protection in a pluralistic legal environment.

The European Union has consistently upheld fundamental rights protections; however, the security landscape underwent a profound transformation in the aftermath of the September 11 attacks. The perceived increase in transnational terrorism, coupled with the acknowledgment of Europe as a logistical hub for terrorist networks, prompted a substantial expansion of security measures at both national and EU levels. This transition was marked by the swift implementation of counterterrorism legislation, including the European Arrest Warrant (EAW), which significantly redefined judicial cooperation and law enforcement among Member States. Since the end of the Cold War, Europe has progressively developed a broad concept of security that integrates various issues into a continuous spectrum, spanning from illegal immigration to organised crime and international terrorism[49]. Until September 11, 2001, terrorism was regarded as a "less fundamental security threat"[50], as European governments, influenced by expectations of peaceful change and intergovernmental cooperation, focused on lesser security challenges that did not directly threaten state borders. This period allowed

---

[46] Ana Bobić, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union, Oxford Studies in European Law* (online edn, Oxford Academic, 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

[47] *BVerfGE 73, 339 (2 BvR 197/83) Solange II* (22 October 1986). A landmark decision concerning the relationship between EU law and German constitutional law is made by the Solange II case, and it is recognized by the German Constitutional Court. The compatibility of EU law with the fundamental rights protected under the German Basic Law (Grundgesetz) was asserted by the Court in Solange I to be reviewable: it was determined that this review would occur as long as a thorough fundamental rights framework was lacking in the EU. In Solange II (1986), the Court decided to revise its previous stance and stated that it would refrain from conducting such reviews as long as the EU made sure that it provided sufficient protection of fundamental rights. The conditions under which oversight by the German Court in relation to EU law would be exercised were clarified and an important step in balancing national sovereignty with European integration was marked by this decision.

[48] Ana Bobić, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union, Oxford Studies in European Law* (online edn, Oxford Academic, 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

[49] *Ibid,* 7.

[50] Elke Krahmann, '*The Emergence of Security Governance in Post-Cold War Europe*' (ESRC "One Europe or Several?" Programme Working Paper 36/01, Sussex European Institute, University of Sussex 2001) https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=eb5dd9f95dc614d8a5f857f5096891a320e62893 accessed 4 November 2024.

collaboration with a wide range of state and non-state actors[51]. However, the large-scale attacks in New York and Washington on that date marked a turning point. Although no significant terrorist attacks linked to Islamic extremism were reported within the EU following 9/11, a critical incident was narrowly avoided in December 2001 when passengers subdued a "shoe bomber" on American Airlines Flight 063[52]. Additionally, authorities dismantled several cells planning attacks across Europe in Italy, Germany, the Netherlands, Belgium, the United Kingdom, France, and Spain, with counter-terrorism efforts focusing mainly on disrupting recruitment and financing networks[53].

While many European terrorist groups remain active, there has been an increased emphasis on the Islamist threat and Europe's role as a logistical hub for such groups since the 2001 attacks on the United States. With the diminishing threat of conventional war in Europe, terrorism has gained prominence as a security issue, recognised as an international challenge requiring enhanced cooperation at the European level. The events of September 11 catalysed a rapid adoption of new legal frameworks within individual states and at the EU level[54]. The heightened political focus on terrorism enabled expedited decision-making, allowing agreements and draft measures to progress quickly[55]. One of the most significant developments in this period was the political agreement on the EU Arrest Warrant, achieved three months after 9/11 during the JHA Council meeting on December 6-7, 2001. This legal instrument, previously stalled, was designed to streamline extradition processes based on the principle of mutual recognition, a concept that, since the Tampere European Council[56], had been recognised as a foundation for criminal justice cooperation in the EU. Despite the use of urgent parliamentary procedures to expedite its adoption, political agreement on the warrant was reached swiftly. However, final adjustments to address various controversial aspects delayed its implementation by six months[57].

The European Arrest Warrant (EAW)[58], established by the June 13, 2002, framework decision, marked a transformative step in developing a unified European law enforcement area. The EAW introduced a common framework for extradition across EU Member States, replacing traditional

---

[51] *Ibid*, 6.
[52] *Ibid,* 7.
[53] Monica Den Boer, *9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment* (Policy Papers No 6, Groupement d'Études et de Recherches – Notre Europe, September 2003) 4.
[54] David Bonner, 'Managing Terrorism While Respecting Human Rights? European Aspects of the Anti-Terrorism Crime and Security Act 2001' (2002) 8(4) *European Public Law* 498.
[55] *Ibid*, 498.
[56] The Tampere European Council in October 1999 marked a pivotal moment for the EU's justice and home affairs (JHA) policies, setting over 60 priorities to create an "Area of Freedom, Security, and Justice." It aimed to ensure free and safe movement, equal legal protection for all EU citizens, and emphasized the EU's role beyond economics to impact citizens' daily lives.
[57] Monica Den Boer and Jorg Monar, '11 September and the Challenge of Global Terrorism to the EU as a Security Actor' [2002] *Journal of Common Market Studies* 40, 11.
[58] European Commission, 'European Arrest Warrant' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en accessed 4 November 2024.

extradition laws with a streamlined, judicially controlled process that embodies the principles of mutual recognition and cooperation among European nations[59]. This system facilitates the cross-border surrender of individuals to face prosecution or serve sentences for criminal offences, thereby addressing challenges posed by transnational crime within the EU's open borders[60]. The EAW not only simplifies extradition procedures but also signifies an unprecedented commitment by Member States to relinquish certain aspects of national sovereignty in favour of a collaborative European approach to justice and security[61] The principle of mutual recognition is central to the EAW's framework, which mandates that judicial decisions made in one Member State must be respected and enforced in others[62]. This principle allows judicial decisions, such as arrest warrants, to have immediate legal effect across borders without intermediate diplomatic approval. This depoliticisation of the extradition process is significant, as it removes the influence of political considerations from the decision to surrender individuals between Member States. Additionally, the EAW abolishes the "double criminality" requirement for a specified list of 32 offences, meaning that the executing state need not verify that the alleged offence is a crime under its laws, provided it meets the criteria in the issuing state[63]. This development is particularly important for enhancing judicial efficiency and maintaining uniformity in handling severe crimes such as terrorism, trafficking, and organised crime

To ensure that the rights of individuals are upheld within this streamlined process, Article 11 of the framework decision emphasises fair trial protections for requested persons[64]. When a person is arrested under the EAW, the competent judicial authority of the executing Member State must inform them of the contents of the arrest warrant and the option to consent to surrender[65]. Additionally, the individual has the right to legal counsel and an interpreter, reinforcing procedural fairness and aligning with the broader EU commitment to upholding fundamental rights during cross-border judicial cooperation[66]. While the EAW represents progress toward a unified approach to European security, its implementation has been challenging. Member States retain some discretion in applying the warrant, leading to variations in national transposition laws that impact the effectiveness and

[59] *Ibid*, para 2.
[60] *Ibid* para 1.
[61] *Ibid* para 1.
[62] *Ibid* para 2.
[63] European Commission, 'European Arrest Warrant' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en accessed 4 November 2024, para 3.
[64] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584 accessed 4 November 2024.
[65] European Commission, 'European Arrest Warrant' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en accessed 4 November 2024, para 3.
[66] *Ibid*, para 4.

consistency of the EAW[67]. Some states, such as France and the United Kingdom, have integrated additional grounds for non-execution, which include human rights concerns and procedural protections. The Commission has expressed concerns about these deviations, noting that they could undermine the efficacy of the EAW by allowing certain states to prioritise national sovereignty over cooperative enforcement[68]. Furthermore, issues related to the execution timelines, translation requirements, and compliance with procedural guarantees continue to surface, highlighting the need for increased mutual trust and procedural harmonisation across Member States[69]. Nonetheless, the EAW remains a critical tool in fostering cooperation and upholding the rule of law within the EU, demonstrating the potential of integrated judicial frameworks to respond to the complexities of cross-border crime and security in a shared legal space[70].

Another significant legal measure intended to advance the process of legal harmonisation within the EU is the Framework Decision on Terrorism, adopted at the Justice and Home Affairs (JHA) Council meeting on December 6-7, 2001, albeit with three parliamentary reservations[71]. This decision employs the core concept of "terrorist offences," establishing minimum standards for defining the elements of such criminal acts and creating a unified list of offences. Regarding penal sanctions, the JHA Council set a maximum penalty of fifteen years imprisonment for individuals leading a terrorist organisation and a maximum of eight years for participation in a terrorist group[72]. Similarly to the European Arrest Warrant, the Framework Decision on Freezing Assets of Suspects[73] had also been under development. Proposed in November 2000 as part of the mutual recognition agenda, it initially aimed to apply to offences such as drug trafficking, fraud affecting the EU budget, money laundering, counterfeiting of the euro, corruption, and human trafficking, with an extension to terrorism added later[74]. The proposal, introduced in February 2001, allows for the automatic

---

[67] *Ibid,* para 4.
[68] *Ibid,* para 4.
[69] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584 accessed 4 November 2024.
[70] Robert Schuman Foundation, 'The European Arrest Warrant and Its Application by the Member States' (*Robert Schuman Foundation*) https://www.robert-schuman.eu/en/european-issues/0016-the-european-arrest-warrant-and-its-application-by-the-member-states accessed 4 November 2024.
[71] Monica Den Boer, '9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment' (2003) *Groupement d'Études et de Recherches – Notre Europe* https://institutdelors.eu/wp-content/uploads/2020/08/policypaper6_01-2.pdf accessed 4 November 2024.
[72] Robert Schuman Foundation, 'The European Arrest Warrant and Its Application by the Member States' (*Robert Schuman Foundation*) https://www.robert-schuman.eu/en/european-issues/0016-the-european-arrest-warrant-and-its-application-by-the-member-states accessed 4 November 2024.
[73] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003F0577 accessed 4 November 2024.
[74] European Commission, 'Confiscation and Freezing of Assets' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/confiscation-and-freezing-assets_en accessed 4 November 2024.

enforcement across Member States of orders to freeze assets or evidence, mandating that each state treat these orders as if issued by its national authorities.

1.2 The Legal Divide Between Citizens and Non-Citizens in the U.S. and in the EU

Legal systems in the EU and the US often implement differential treatment based on an individual's citizenship status, particularly in contexts where national security considerations are at play. This section aims to critically analyse the legal distinctions that privilege citizens over non-citizens, revealing how such discrepancies can undermine the very principles of equality and justice that fundamental rights are designed to uphold.

In the EU and U.S. contexts, these restrictions manifest starkly in the treatment of non-citizens under immigration and national security laws. Legal structures often reserve certain privileges and protections, such as voting, holding public office, or certain employment rights, exclusively for citizens.

1.2.1 The U.S. Perspective on Citizen and Non-Citizen Distinction: Security and Rights

Anchored by a distinct national identity, the U.S. prioritises national security and economic considerations as foundational pillars of its immigration policy. In the aftermath of the September 11 attacks, the United States intensified its focus on national security, particularly within immigration policies. This shift resulted in stricter regulations for non-citizens, leading to a multifaceted and rigorous system that subjects individuals to comprehensive checks and balances. Such a framework reflects a policy orientation prioritising and safeguarding national borders, frequently placing security considerations above broader humanitarian or integrative concerns, including access to legal remedies and the possibility of a fair trial.

The post-9/11 security measures in the United States primarily targeted non-citizens due to the atypical nature of Al-Qaeda as a transnational and decentralized terrorist organization. Unlike traditional state-sponsored threats or domestic extremist groups, Al-Qaeda operated as a fluid, adaptable entity, with no fixed territorial base and a highly diffuse structure that allowed it to recruit, train, and coordinate attacks across multiple jurisdictions. As outlined in Shaul Mishal and Maoz Rosenthal's study, "Al Qaeda as a Dune Organization: Toward a Typology of Islamic Terrorist Organizations," Al-Qaeda functioned not as a rigid hierarchical network but as a self-regenerating

structure, capable of expanding, contracting, and shifting its operations as needed[75]. This unconventional form of organization made it particularly difficult to counter through conventional military or law enforcement strategies. Instead, policymakers in the U.S. saw immigration control and border security as key counterterrorism tools, aimed at preventing the entry and movement of potential operatives linked to Al-Qaeda's transnational network[76]. This rationale led to the expansion of government powers in regulating and restricting non-citizens, particularly those from Muslim-majority countries. The USA PATRIOT Act (2001) and the REAL ID Act (2005) introduced stringent vetting procedures, increased surveillance, and broader executive discretion in detaining and deporting non-citizens suspected of security threats. The impact of the USA PATRIOT Act in reshaping counterterrorism and immigration enforcement will be further examined in the subsequent section, with a particular focus on its legal and constitutional implications. Additionally, the plenary power doctrine, long upheld by the U.S. Supreme Court, reinforced the idea that immigration matters, including exclusions, detentions, and removals, fall largely outside the scope of constitutional protections afforded to citizens. This was evident in cases like *Demore v. Kim* (2003[77]), where the Court upheld mandatory detention for certain categories of non-citizens in the name of national security. Beyond legal restrictions, the perception of non-citizens as a primary security risk was shaped by the fact that all 9/11 hijackers were foreign nationals who had legally entered the U.S. under various visa programs. The fear of additional foreign terrorist infiltration reinforced the government's justification for policies that subjected non-citizens to heightened scrutiny, travel restrictions, and reduced access to legal remedies.

In essence, the post-9/11 focus on non-citizens was not arbitrary but rather a direct response to the nature of the threat posed by Al-Qaeda. Its decentralized, global recruitment strategies and ability to exploit legal entry routes into Western states led to a counterterrorism approach where immigration policies became a frontline defense mechanism against potential threats. However, these policies also raised critical legal and human rights concerns, particularly regarding due process and equal protection, which became central to the judicial debates in subsequent years and will be further examined in the second chapter.

Freedom of movement is a fundamental right principally reserved for citizens. Non-citizens face distinct limitations based on federal and, occasionally, state-level regulations. These legal frameworks are structured around the principles of immigration control, security, and administrative

[75] Shaul Mishal and Maoz Rosenthal, *Al Qaeda as a Dune Organization: Toward a Typology of Islamic Terrorist Organizations* (Working Paper MC20, The Whitney and Betty MacMillan Center for International and Area Studies at Yale) https://www.files.ethz.ch/isn/46602/mc20.pdf.
[76] *Ibid.*
[77] *Demore v. Kim*, 538 U.S. 510 (2003)

oversight, creating a complex regulatory environment for non-citizens regarding both entry and internal movement. While freedom of movement is a fundamental right, it is principally reserved for U.S. citizens, as affirmed by the Privileges and Immunities Clause of Article IV, Section 2 and the Fourteenth Amendment's Privileges or Immunities Clause[78]. Non-citizens, by contrast, are subject to a complex regulatory framework that governs both their entry and internal movement, primarily rooted in federal immigration law, executive authority, and national security measures. The plenary power doctrine, established in Supreme Court rulings such as *Chae Chan Ping v. United States*[79] and *Fong Yue Ting v. United States*[80], has historically granted Congress and the executive branch broad discretion in regulating immigration matters, including the ability to limit the movement of non-citizens without the same constitutional guarantees afforded to citizens. This doctrine has consistently underpinned the government's authority to impose entry restrictions, detentions, and travel limitations on non-citizens in the interest of national security and public order.

In statutory terms, the Immigration and Nationality Act (INA) serves as the legal foundation for regulating non-citizens' movement, dictating the conditions of entry, residence, and deportation[81]. The INA empowers the executive branch to implement restrictions on non-citizens' mobility through visa regulations, mandatory reporting requirements, and detention measures for those awaiting legal proceedings. These restrictions vary depending on an individual's immigration status, with undocumented immigrants, asylum seekers, and visa holders often facing additional limitations on their freedom of movement. The REAL ID Act (2005)[82] further reinforced these restrictions by tightening federal identification requirements, indirectly affecting non-citizens' ability to obtain driver's licenses and, consequently, their capacity to travel freely within the U.S.

At the judicial level, courts have generally deferred to the executive branch when reviewing restrictions on non-citizens' movement, particularly when such measures are justified under national security considerations. In *Zadvydas v. Davis*, the Supreme Court held that indefinite detention of non-citizens who cannot be deported violates due process, recognizing that non-citizens physically present in the U.S. are entitled to certain constitutional protections. However, this protection has not been extended to non-citizens outside U.S. territory, as reaffirmed in *Trump v. Hawaii*[83], where the Court upheld the executive authority to impose entry bans on foreign nationals based on security concerns. Additionally, in *United States v. Martinez-Fuerte*, the Supreme Court ruled that the government may conduct immigration checkpoints near U.S. borders without probable cause,

[78] U.S. Constitution, art IV, § 2
[79] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)
[80] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)
[81] Immigration and Nationality Act 1952, 8 USC § 1101 et seq
[82] REAL ID Act 2005, Pub. L. No. 109-13, 119 Stat. 302
[83] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)

demonstrating the broad latitude afforded to authorities in monitoring and restricting the movement of non-citizens[84]. While lawfully present non-citizens are generally permitted to travel within the U.S., their mobility remains conditional and subject to federal immigration regulations. Individuals on temporary visas may be restricted in their ability to change residence or employment, while those on parole or pending asylum status may be required to report to immigration authorities periodically[85]. This layered regulatory structure reflects the U.S. government's dual approach to immigration control, balancing national security imperatives with limited constitutional protections for non-citizens. Ultimately, the distinction between citizens and non-citizens in the realm of movement is a product of both constitutional doctrine and legislative policy, reinforcing the state's authority to regulate mobility in ways that prioritize border security and sovereign control. These restrictions, while legally justified, remain a contested aspect of U.S. immigration law, particularly in cases where they intersect with due process and equal protection claims, which will be examined in greater detail in the subsequent sections of this thesis.

In U.S. law, the term "alien" refers to any individual who is neither a citizen nor a national of the United States, as defined by the Immigration and Nationality Act (INA)[86]. The INA categorises aliens based on various legal statuses, including resident and non-resident, immigrant and non-immigrant, asylee and refugee, and documented and undocumented individuals[87]. Under the INA, a U.S. national is a person who, while not holding citizenship, owes permanent allegiance to the United States, often through an oath of naturalisation. Specifically, in immigration law, the classification of individuals by "alienage" operates as a fundamental construct, reflecting the United States' broader mechanisms for restricting the legal and social boundaries that distinguish citizens from non-citizens[88]. This distinction extends beyond mere administrative categorisation; it constitutes a purposeful delineation that informs national identity and underscores the state's sovereign authority over membership and rights within U.S. borders[89]. The concept of alienage, therefore, embodies the U.S. government's regulatory approach to determining who may engage fully within the nation's legal and societal framework and who, conversely, is relegated to a position of conditional participation, subject to differential legal standards and scrutiny.

---

[84] *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)
[85] *Demore v. Kim*, 538 U.S. 510 (2003)
[86] '8 U.S. Code § 1101 - Definitions' (*LII / Legal Information Institute*) https://www.law.cornell.edu/uscode/text/8/1101 accessed 13 November 2024.
[87] Legal Information Institute, 'Alienage Classification' (*Constitution Annotated, Cornell Law School*) https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-classification accessed 4 November 2024.
[88] *Ibid,* para 2.
[89] Linda Bosniak, 'The Difference That Alienage Makes' in *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006) 37–76 https://doi.org/10.1515/9781400827510-004 accessed 4 November 2024.

The theoretical foundation of alienage as a boundary-setting mechanism is deeply rooted in principles of territorial sovereignty, through which the state asserts its prerogative to regulate and control the population within its jurisdiction[90]. By formally designating individuals as "aliens," U.S. immigration law emphasises the exclusivity of specific rights and privileges for citizens while simultaneously establishing a distinct regulatory framework for non-citizens that is predominantly informed by security and economic imperatives[91]. In the post-9/11 context, this framework has become particularly pronounced, with national security concerns intensifying the procedural and substantive distinctions applied to individuals classified as aliens, thereby instituting increasingly restrictive measures for those seeking entry or lawful residence. The classifications associated with alienage serve to establish a systematic approach to the preservation of national identity. They delineate those individuals who owe permanent allegiance to the United States, whether through citizenship or acknowledged national status, from those perceived as "outsiders," whose access to the nation is contingent and whose integration is restricted[92]. This distinction functions as an administrative instrument and a legal and symbolic boundary that underscores the United States' approach to an inclusive yet selectively controlled national character. In this way, alienage operates as a multifaceted boundary, delineating full membership from partial inclusion, with significant implications extending beyond individual rights to the framework of U.S. immigration policy and its underlying conception of national identity[93]. Establishing alienage rests with the claimant, who must meet a "clear and satisfactory" evidentiary standard to initiate deportation proceedings[94]. For a court to issue a deportation order, it must find clear, unequivocal, and convincing evidence of alienage[95]. Different classifications define an alien's relationship to the United States. The terms "resident alien" and "non-resident alien" have mainly been replaced by "immigrant" and "non-immigrant," though classifications such as "refugee" and "asylee" are also used[96]. Despite their non-citizen status, many aliens are entitled to a range of rights comparable to those U.S. citizens hold. For example, aliens have the right to employment, and state measures that discriminate against aliens in favour of local

---

[90] Linda S Bosniak, 'The Citizen and the Alien: Dilemmas of Contemporary Membership' (2006) 5(4) *Perspectives on Politics* https://doi.org/10.1017/S1537592707072283 accessed 4 November 2024.

[91] Legal Information Institute, 'Alienage Classification' (*Constitution Annotated, Cornell Law School*) https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-classification accessed 4 November 2024.

[92] Peter H Schuck, 'The Re-Evaluation of American Citizenship' in Christian Joppke (ed), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, 1998; online edn, Oxford Academic, 1 November 2003) 210 https://doi.org/10.1093/0198292295.003.0007 accessed 20 November 2024.

[93] *Ibid,* 211.

[94] *Woodby v Immigration and Naturalization Service, 385 US 276, 286 (1966).*

[95] US Department of Justice, *EOIR Immigration Law Advisor: Volume 8, Number 8* (2014) https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/05/vol8no8_edit3.pdf accessed 8 November 2024.

[96] Legal Information Institute, 'Alienage Classification' (Constitution Annotated, Cornell Law School) https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-classification accessed 4 November 2024.

citizens in hiring practices are prohibited[97]. Employers must also provide aliens with federal and state-mandated minimum wages[98].

Within the U.S. legal architecture, the Constitution extends fundamental protections to non-citizens primarily through the Fifth and Fourteenth Amendments, which provide the foundational guarantees of due process and equal protection[99]. These amendments construct a constitutional hierarchy through which essential rights are afforded universally to all individuals within U.S. jurisdiction, irrespective of citizenship status[100]. Specifically, the Fifth Amendment, applicable to federal government actions, and the Fourteenth Amendment, binding on state actions, ensure that non-citizens are entitled to essential procedural and substantive safeguards. This interpretive framework reinforces the principle that the U.S. Constitution's protections extend to "persons" rather than exclusively to citizens. This stance has been integral in judicial interpretations upholding due process and equal protection for non-citizens across federal and state levels.[101] Nonetheless, the scope and application of these protections vary significantly depending on the context, particularly where state interests intersect with individual rights. Judicial scrutiny in non-citizen cases depends on the nature of the governmental interest, with a spectrum of standards applied. For instance, laws that affect fundamental rights or invoke "suspect classifications" such as race or national origin generally invoke "strict scrutiny," the highest level of judicial review.[102] Under this standard, the government must demonstrate that any restriction serves a "compelling state interest" and is narrowly tailored to achieve that interest.[103] However, while strict scrutiny rigorously applies to cases affecting fundamental rights for citizens, its application to non-citizens can be moderated, especially in domains involving immigration control or national security.[104] This adjustment reflects a calibrated judicial approach that balances individual protections with the broader imperatives of state sovereignty and public security.[105]

In matters specifically related to immigration, where federal authority is most pronounced, the "legitimate government interest" standard frequently prevails[106]. This more deferential level of

---

[97] *Immigration and Nationality Act*, 8 USC §§ 1101 et seq.
[98] *Ibid,* § 1101(a)(15)(Q).
[99] National Constitution Center, 'Amendment XIV: Citizenship Clause' (National Constitution Center) https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 accessed 4 November 2024.
[100] *Ibid*, para 1.
[101] National Constitution Center, 'Amendment XIV: Privileges or Immunities Clause' (*National Constitution Center*) https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 accessed 4 November 2024.
[102] *Korematsu v United States, 323 US 214, 223 (1944).*
[103] Legal Information Institute, 'Content-Based Regulation' (*Constitution Annotated, Cornell Law School*) https://www.law.cornell.edu/constitution-conan/amendment-1/content-based-regulation accessed 4 November 2024.
[104] *Mathews v Diaz, 426 US 67, 77 (1976).*
[105] Legal Information Institute, 'Strict Scrutiny' (*Cornell Law School*) https://www.law.cornell.edu/wex/strict_scrutiny accessed 4 November 2024.
[106] Congressional Research Service, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations* (RL34345, 2008) 5 https://sgp.fas.org/crs/misc/RL34345.pdf accessed 4 November 2024.

scrutiny grants Congress extensive discretion to legislate distinctions between citizens and non-citizens, consistent with its constitutionally delegated powers over immigration and naturalisation[107]. Courts have thus interpreted this authority as permitting Congress a considerable latitude to regulate entry, exclusion, and alienage without invoking the same rigorous scrutiny applied in domestic civil rights cases.[108] Consequently, while non-citizens retain essential due process and equal protection rights, these rights are embedded within a judicial framework that varies according to the context. Judicial scrutiny is remarkably adaptive in areas where national security or public order intersects with individual liberties, thereby allowing for a nuanced balance between upholding constitutional protections and accommodating the state's prerogative to maintain security and sovereign authority within the bounds of due process.

In the context of the judiciary, individuals who are not citizens of the United States are generally granted protections comparable to those afforded to citizens. Specifically, both the Fifth and Fourteenth Amendments ensure that non-citizens receive due process and equal protection under the law. Furthermore, courts frequently interpret the protections against unreasonable searches and seizures, as outlined in the Fourth Amendment, to extend to non-citizens as well.[109] The U.S. Constitution grants Congress primary authority over immigration and alienage laws, allowing it to define the rights and responsibilities associated with legal immigrant status[110]. However, when legislation differentiates between aliens and citizens, it must serve a legitimate government interest related to immigration, with courts applying strict scrutiny to assess the law's constitutionality[111]. Individual states may confer additional rights to aliens within their jurisdictions, provided that such rights do not contravene federal law or the Constitution and pertain to a legitimate state interest[112]. Generally, both documented and undocumented immigrants are entitled to pursue legal actions within U.S. federal courts, as federal civil rights statutes permit aliens to file civil rights claims[113]. Additionally, non-resident aliens are empowered to initiate lawsuits in U.S. courts if the basis for their cause of action originated within the United States[114]. Recent rulings by the Supreme Court have expanded this right to encompass non-resident aliens who have been detained by U.S. military forces.

---

[107] *Mathews v Diaz, 426 US 67, 77 (1976).*
[108] *Ibid*
[109] Legal Information Institute, 'Amendment XIV' (Cornell Law School) https://www.law.cornell.edu/constitution/amendmentxiv accessed 4 November 2024.
[110] US Constitution, Article I, Section 8, Clause 18, Subsection 8.1.
[111] Congressional Research Service, 'ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers' (*Constitution Annotated*) https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ accessed 4 November 2024.
[112] *Plyler v Doe, 457 US 202, 216 (1982)*. In this sentence, the Court held that states cannot deny free public education to children based on their immigration status, emphasizing that any state action affecting non-citizens must align with constitutional protections.
[113] 42 USC § 1981, Equal Rights Under the Law.
[114] Legal Information Institute, 'Alien' (*Cornell Law School*) https://www.law.cornell.edu/wex/alien accessed 4 November 2024.

The following chapter will examine these landmark decisions in greater detail, analyzing their implications for the relationship between national security policies and fundamental rights. Federal statutes grant aliens access to federal courts under federal question jurisdiction for civil rights claims, Equal Protection Clause violations, and claims under the Refugee Act of 1979[115]. Additionally, federal diversity jurisdiction allows aliens to participate in diverse citizenship suits, provided at least one U.S. citizen is a party[116]. However, if aliens are the sole parties on either side of a suit, diversity jurisdiction does not apply[117].

The entry and exit of non-citizens are governed by federal immigration laws, primarily through the Immigration and Nationality Act (INA). This act outlines requirements for obtaining visas, standards for admissibility, and grounds for removal. Non-citizens must meet specific criteria to enter the U.S., and they may be denied entry or face deportation if they are found in violation of visa terms, have committed criminal offences, or are deemed a security threat. Through these strict controls, the INA seeks to balance the nation's openness to foreign nationals with its commitment to national security and public order. Upon entering the borders of the United States, non-citizens typically possess the right to move freely; however, specific restrictions may be imposed based on their immigration status. For example, individuals who have been granted parole or those who are seeking asylum may encounter additional reporting obligations or travel restrictions while awaiting the resolution of their cases. Likewise, holders of non-immigrant visas, including those designated for work or study, may experience indirect limitations on their movement owing to restrictions concerning employment and residency. Such conditions are instituted to ensure that non-citizens comply with the specific purpose for which they were granted entry, thereby emphasizing the U.S. immigration system's commitment to regulation and accountability.

In addition to the Immigration and Nationality Act (INA), which forms the foundational legal framework for managing non-citizen entry and status, the United States has implemented various security-focused legislation, particularly in response to evolving threats and challenges following the September 11 attacks. These policies, often enacted to bolster national security, have introduced rigorous measures that specifically affect non-citizens, emphasising surveillance, enforcement, and border control. Significant post-9/11 legislative acts, such as the USA PATRIOT Act, the Homeland Security Act, the REAL ID Act, and the Authorization for Use of Military Force (AUMF), have expanded the government’s power to monitor, detain, and regulate non-citizens in the name of

---

[115] US Congress, *S.643 - Refugee Act of 1979* (96th Congress, 1979–1980).

[116] Congressional Research Service, 'Amdt14.S1.8 Equal Protection' (*Constitution Annotated*) https://constitution.congress.gov/browse/essay/amdt14-S1-8/ accessed 4 November 2024.

[117] Holland & Knight LLP, 'Diversity Jurisdiction Does Not Extend to Suit Involving Stateless Alien' (2011) https://www.hklaw.com/en/insights/publications/2011/09/diversity-jurisdiction-does-not-extend-to-suit-inv accessed 4 November 2024.

national security. Collectively, these acts reflect a legal environment where immigration control and national security increasingly intersect, establishing a multi-layered approach to managing non-citizen presence and movement within U.S. borders.

These legislative measures, along with their implications for fundamental rights and the evolving balance between liberty and security, will be explored in greater detail in subsequent sections of this thesis.

1.2.2 The EU Approach to Distinguishing Citizens from Non-Citizens: Rights and Protections

While the U.S. legal framework relies on the broad classification of 'aliens,' the European Union distinguishes non-citizens primarily through the concept of third-country nationals (TCNs), which operates within a more structured legal framework. In the European Union legal framework, the distinction between citizens and non-citizens is primarily drawn between EU nationals and third-country nationals (TCNs). Under Article 20 of the Treaty on the Functioning of the European Union (TFEU), individuals holding nationality of an EU Member State are recognized as EU citizens, granting them a specific legal status that includes freedom of movement, residence rights, and non-discrimination within the Union. By contrast, individuals who do not hold the nationality of an EU Member State are classified as third-country nationals (TCNs) and are subject to different legal regimes regarding entry, residence, and rights protections. The concept of "third-country nationals" (TCNs) is widely used in EU migration and asylum law, distinguishing these individuals from both EU citizens and stateless persons. While TCNs retain certain fundamental rights under international and European human rights law, their legal status within the EU is predominantly regulated through secondary legislation, including the Schengen Borders Code, the Long-Term Residents Directive (2003/109/EC), and the EU Charter of Fundamental Rights. The legal framework governing TCNs reflects a balance between state sovereignty and the EU's commitment to human rights, particularly in areas such as freedom of movement, security, and access to legal protections.

Freedom of movement within the EU is primarily reserved for EU citizens, as enshrined in Directive 2004/38/EC. In contrast, third-country nationals must comply with visa requirements, residence permits, and national immigration laws, which vary across Member States. Article 2 of Protocol No. 4 to the European Convention on Human Rights (ECHR) also recognizes freedom of movement and residence for persons lawfully present in a state's territory, extending some protections to TCNs. However, these rights are not absolute; states retain the discretion to impose restrictions based on national security, public order, and immigration control considerations.

The European legal system further differentiates between various categories of third-country nationals, including asylum seekers, refugees, and long-term residents. The Qualification Directive (2011/95/EU)[118] sets minimum standards for the protection of refugees and subsidiary protection beneficiaries, ensuring that these groups are afforded basic rights to residence, employment, and social assistance. Meanwhile, the Long-Term Residents Directive provides an avenue for third-country nationals who have legally resided in an EU Member State for at least five years to obtain enhanced rights, including greater mobility across Member States. However, despite these protections, third-country nationals continue to face practical barriers and legal constraints that differentiate their rights from those of EU citizens.

Various international treaties reinforce the distinctions by acknowledging non-citizens' rights and permitting states to regulate the extent of these rights. The *International Covenant on Civil and Political Rights* (ICCPR)[119], for example, prohibits arbitrary expulsion of lawful non-citizens yet allows for expedited expulsion processes if justified by compelling national security concerns. Regional instruments, such as the European Convention on Human Rights (ECHR) and the Treaty of Amsterdam[120] within the European Union, attempt to harmonise protections for non-citizens, especially asylum seekers, by setting minimum standards for their treatment[121]. Yet, despite these formal protections, non-citizens often face practical barriers and exclusions that underscore a hierarchical approach to rights, reflecting a broader trend in which national security and sovereignty concerns tend to eclipse universal rights norms. This nuanced distinction between citizens and non-citizens is a focal point for examining the inherent tension within legal frameworks that purport to uphold universal human rights while selectively applying them based on citizenship status, particularly in high-stakes areas such as immigration control, counterterrorism, and state security.

Article 12 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right to freedom of movement, emphasising the fundamental liberty of individuals to move freely within a state, choose their residence, and leave any country, including their own[122]. This article also

---

[118] Directive 2011/95/EU [2011] OJ L 337/9.

[119] UN General Assembly, 'International Covenant on Civil and Political Rights' (16 December 1966) United Nations, Treaty Series, vol 999, p 171 https://www.refworld.org/legal/agreements/unga/1966/en/17703 accessed 9 November 2024.

[120] The Treaty of Amsterdam, which entered into force on May 1, 1999, built upon immigration and asylum policies initially outlined in the Maastricht Treaty. It mandated that, within five years of its implementation, the European Council establish essential measures across member states. These measures required each state to process asylum claims, set minimum standards for the reception of asylum seekers, define criteria for recognizing third-country nationals as refugees or beneficiaries of subsidiary protection, establish procedures for granting and revoking refugee status, and set minimum standards for providing temporary protection.

[121] Janneke Gerards (ed), *Fundamental Rights: The European and International Dimension* (1st edn, Cambridge University Press 2023).

[122] Paul M Taylor, 'Article 12: Freedom of Movement of the Person' in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 325–353.

permits states to impose limitations on these rights under specific conditions, particularly for non-citizens. Article 12(1) grants freedom of movement and residence within a state's territory to those lawfully present, while Article 12(2) extends the right to leave any country freely[123]. Meanwhile, Article 12(3) outlines permissible restrictions that states may apply, provided they are "*necessary to protect national security, public order, public health or morals, or the rights and freedoms of others*" and are consistent with other rights recognised in the Covenant[124]. The provisions of Article 12 apply to both citizens and non-citizens; however, states maintain discretion over the conditions under which non-citizens are permitted to reside or move within their borders. While citizens of a state are inherently considered lawfully within its territory, non-citizens must often fulfil certain legal conditions to achieve lawful residency. Once non-citizens obtain this status, they are entitled to protections under Article 12(1) against arbitrary restrictions on their movement and residence. Nevertheless, states retain significant authority to regulate these rights, and non-citizens are subject to further limitations in cases where national security, public order, or similar concerns are invoked[125]. The commentary on Article 12 underscores the potential for disparity in treatment between citizens and non-citizens. For instance, while citizens may generally exercise the right to free movement with fewer conditions, non-citizens may face more stringent regulations[126]. This is particularly evident in cases where states impose restrictive measures, such as house arrest or regional confinement, on specific groups of non-citizens due to political, social, or security concerns. For example, certain countries impose localised restrictions on movement for groups identified as security risks or political dissenters, often citing the protection of public order as justification[127]. These measures demonstrate how Article 12 allows states to balance individual freedoms with broader societal concerns. However, such measures must adhere to the principles of legality, necessity, and proportionality as outlined by the Human Rights Committee in its General Comment No. 27 on freedom of movement.

The principles of necessity and proportionality serve as essential checks on states' discretionary powers under Article 12(3)[128]. According to the Human Rights Committee, any restriction on freedom of movement must be justified by a compelling state interest, such as protecting national security or public health. Moreover, the limits must be the least intrusive means available to achieve the intended purpose. For instance, prohibiting entry to specific regions due to environmental hazards or restricting movement to prevent the spread of infectious diseases may be justified under

[123] *Ibid*, 325-253.
[124] *Ibid*, 325-353.
[125] Paul M Taylor, 'Article 12: Freedom of Movement of the Person' in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 330.
[126] *Ibid,* 336.
[127] *Ibid,* 337.
[128] *Ibid,* 337.

public health grounds. However, these measures must be applied in a manner that does not undermine the essential right to freedom of movement, nor should they be used as tools of arbitrary discrimination, especially against marginalised groups[129]. In practice, the rights enshrined in Article 12 are subject to varying interpretations and implementations across different jurisdictions. In the European context, Protocol No. 4 of the European Convention on Human Rights includes similar protections. Still, it allows states to impose restrictions on movement for reasons such as public safety and national security. The American Convention on Human Rights and the African Charter on Human and Peoples' Rights also incorporate provisions that mirror Article 12 of the ICCPR[130]. Yet, unlike the ICCPR, these regional instruments often offer more explicit protections or constraints specific to the context of each region[131]. This variation highlights the inherent tension between international standards and national sovereignty in determining the scope of non-citizens' rights to movement and residence. In conclusion, Article 12 of the ICCPR encapsulates a commitment to freedom of movement while recognising the state's right to impose necessary restrictions. The application of these provisions to non-citizens reveals a complex interplay between universal rights and state prerogatives, where the imperative to protect national interests frequently conflicts with the Covenant's ideals of equality and non-discrimination. This tension underscores the need for robust international oversight and consistent adherence to the principles of necessity, proportionality, and non-arbitrariness to ensure that the rights of non-citizens are safeguarded within the bounds of legitimate state concerns.

Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR) articulates the right to freedom of movement and the freedom to choose residence within a state for individuals lawfully present[132]. These rights are foundational within international human rights law, reflecting principles enshrined in Article 13 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Civil and Political Rights (ICCPR). However, the ECHR provides that these freedoms may be restricted in alignment with democratic society interests, such as protecting national security, public order, and public health or safeguarding the rights and freedoms of others[133]. This conditionality acknowledges the complex reality that, despite the broad ideal of

---

[129] *Ibid*, 338.
[130] *Ibid,* 325.
[131] Taylor PM, 'Article 12: Freedom of Movement of the Person' in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 325.
[132] Council of Europe, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto* (16 September 1963) art 2 https://rm.coe.int/168006b65c accessed 4 November 2024.
[133] William A Schabas, 'Freedom of Movement/Liberté de Circulation' in *The International Covenant on Civil and Political Rights: A Commentary* (Oxford University Press 2015) 1052–1066 https://doi.org/10.1093/law/9780199594061.003.0074 accessed 9 November 2024.

universal rights, states retain discretion in applying certain rights based on national priorities, particularly where non-citizens are concerned[134]. The scope and application of Article 2 vary notably between citizens and non-citizens. For citizens, freedom of movement within national borders is generally unrestricted. Non-citizens often experience additional limitations, primarily due to security and public order concerns[135]. The historical drafting of Protocol 4 acknowledges this distinction, reflecting the cautious approach European states have traditionally taken towards non-citizens' rights. Restrictions targeting non-citizens under Article 2 have become increasingly significant in recent years due to shifting security policies. For example, counterterrorism measures have introduced selective travel restrictions and conditions on movement for non-citizens deemed potential security risks. Such measures demonstrate the state's ability to limit non-citizens' rights based on criteria that might not apply to citizens[136]. Furthermore, the ECHR stipulates that any limitations on movement must be "necessary in a democratic society," invoking a proportionality standard[137]. This principle requires states to justify restrictions by demonstrating that they are lawful, essential, and minimally invasive. The European Court of Human Rights (ECtHR) has interpreted these standards to require states to balance individual freedoms against public interest. For instance, restrictions imposed on individuals due to perceived public health threats or crime prevention must meet the proportionality test to avoid arbitrary discrimination, primarily if they predominantly target non-citizens. Judicial reviews often assess the purpose of such restrictions, and the duration and intensity of measures imposed on individuals, indicating a nuanced approach to balancing state sovereignty with personal liberty[138].

Comparatively, Article 2 of Protocol 4 intersects with broader international and regional protections, such as the EU Charter of Fundamental Rights, which reserves freedom of movement within the EU primarily for EU citizens while extending limited protections to third-country nationals. This selective application demonstrates how citizenship remains a determinant factor in accessing fundamental rights within the European legal landscape[139]. By maintaining distinctions between citizens and non-citizens, European states prioritise security and public interest over universal access to certain freedoms, underscoring a persistent tension between state interests and the

---

[134] William A Schabas, *The European Convention on Human Rights: A Commentary*, Oxford Commentaries on International Law (Oxford University Press 2015; online edn, Oxford Academic) https://doi.org/10.1093/law/9780199594061.001.0001 accessed 29 October 2024.
[135] *Ibid,* 1061.
[136] Schabas WA, *The European Convention on Human Rights: A Commentary*, Oxford Commentaries on International Law (Oxford University Press 2015; online edn, Oxford Academic) https://doi.org/10.1093/law/9780199594061.001.0001 accessed 29 October 2024, 1053
[137] *Ibid*, 1064.
[138] *Ibid*, 1065.
[139] William A Schabas, 'Freedom of Movement/Liberté de Circulation' in *The International Covenant on Civil and Political Rights: A Commentary* (Oxford University Press 2015) 1052–1066 https://doi.org/10.1093/law/9780199594061.003.0074 accessed 9 November 2024.

egalitarian principles enshrined in international human rights law[140]. To summarise, while Article 2 of Protocol 4 promotes freedom of movement, it equally permits states to impose targeted restrictions on non-citizens under the guise of public interest. Such measures illustrate the inherent balance states must maintain between respecting individual rights and addressing collective security concerns. As security policies evolve, the ECtHR's role in interpreting these restrictions remains crucial in safeguarding non-citizens' rights against potential abuses, ensuring that measures are not only legally justified but also proportionate and necessary within a democratic society.

Article 6 of the Charter of Fundamental Rights of the European Union, together with Articles 47 § 2 and 48, ensures the prohibition of arbitrary deprivations of personal liberty, especially within the framework of judicial cooperation and the harmonisation of national laws (Chapter V)[141]. This enshrines the principle of habeas corpus within EU law. The rights outlined in Article 6 correspond directly to those guaranteed by Article 5 of the European Convention on Human Rights (ECHR), and, in accordance with Article 52(3) of the Charter, they carry the same meaning and scope[142]. Consequently, any limitations imposed on these rights may not exceed those permitted under the ECHR, as specified in the text of Article 5[143]. More specifically, Article 5 of the European Convention on Human Rights (ECHR) safeguards the fundamental right to liberty and security, establishing clear parameters within which an individual's liberty may be restricted by law. This article stipulates that any deprivation of liberty must align with specific conditions that serve public order and lawful governance[144]. Permissible circumstances include detention following a lawful conviction, confinement to enforce compliance with legal obligations or court orders, and detention based on reasonable suspicion of criminal activity where it is necessary to prevent further offences or escape[145].

Article 5 further allows for the detention of minors under educational supervision, and individuals posing public health risks, such as those with contagious diseases, mental disorders, or substance addictions, may also be lawfully detained. Immigration control measures provide additional grounds, permitting detention to prevent unauthorised entry or to facilitate deportation or extradition. Procedural safeguards are embedded within these restrictions: detained individuals must be promptly informed of the reasons for their detention in an accessible language and brought swiftly

---

[140] *Ibid,* 1052-1066.
[141] Marianna Biral, 'M. Daniele, *Habeas Corpus. Manipolazioni di una garanzia*, Giappichelli, 2017' (2018) *Diritto Penale Contemporaneo* https://www.penalecontemporaneo.it/d/5981-m-daniele-habeas-corpus-manipolazioni-di-una-garanzia-giappichelli-2017 accessed 13 November 2024.
[142] J Crijns, 'The Right to Liberty and the Principle of Habeas Corpus' in J Gerards (ed), *Fundamental Rights: The European and International Dimension* (Cambridge University Press 2023) 259–281.
[143] Council of Europe: European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security* (31 December 2020) 1-60 https://www.refworld.org/jurisprudence/caselawcomp/echr/2020/en/123535 accessed 15 November 2024.
[144]Monica Den Boer, *9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment* (Policy Papers No 6, Groupement d'Études et de Recherches – Notre Europe, September 2003) 7.
[145] *Ibid*, 7.

before a judicial authority, ensuring the right to a fair and timely trial. Additionally, Article 5 guarantees the right to challenge the legality of detention through judicial review, mandating prompt release if the detention is found to be unlawful. In cases where Article 5 is breached, affected individuals are entitled to compensation, underscoring the ECHR's commitment to preventing arbitrary deprivations of liberty and maintaining judicial oversight over state powers.

1.3 Balancing liberty and security, a turning point: the USA PATRIOT ACT and the AUMF

The events of September 11, 2001, constituted a pivotal moment in the evolution of United States national security policy, catalyzing prompt and extensive legislative responses. Notably, among the most consequential legislative measures were the Authorization for Use of Military Force (AUMF), enacted in the immediate aftermath of the attacks, and the USA PATRIOT Act, instituted thereafter. These initiatives aimed to confer upon the government augmented authority to confront emergent threats, including terrorism and foreign combatants.

1.3.1 The USA PATRIOT Act

The USA PATRIOT Act, enacted in October 2001 in the wake of the September 11 attacks, represents a pivotal shift in U.S. national security legislation. Officially titled the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act," this statute was designed to address the evolving threats posed by global terrorism[146]. The legislation expanded law enforcement agencies' surveillance and investigative powers, enabling improved access to communication records, financial transactions, and other essential information[147]. Furthermore, the Act promoted improved information sharing among intelligence, defense, and law enforcement entities, effectively addressing the fragmented characteristics of counterterrorism initiatives prior to September 11, 2001,[148]. By implementing these provisions, the USA PATRIOT Act sought to optimize the identification and prevention of terrorist activities while balancing the intricate relationship between national security and civil liberties.[149].

[146] USA PATRIOT Act 2001, Pub L No 107-56, 115 Stat 272.
[147] US Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty* https://www.justice.gov/archive/ll/highlights.htm accessed 4 November 2024.
[148] *Ibid, 2*.
[149] *Ibid,* 4.

One of the Act's most controversial aspects was its authorization of roving wiretaps, delayed notification search warrants, and the collection of business records under judicial approval[150]. These provisions, while bolstering counterterrorism efforts, raised significant concerns regarding privacy and due process protections, particularly for non-citizens[151]. Critics argued that the breadth of these powers risked overreach, potentially infringing upon constitutional rights[152]. Despite these critiques, proponents of the Act emphasized its necessity in adapting to the technological and organizational sophistication of modern terrorist networks[153]. By allowing federal agencies to act with greater speed and coordination, the USA PATRIOT Act became a cornerstone of the post-9/11 legal framework, reflecting the United States' prioritization of national security in an era of unprecedented threats[154].

The USA PATRIOT Act not only broadened the government's capacity for surveillance and law enforcement but also introduced significant changes to judicial oversight and the interpretation of civil liberties during wartime[155]. Federal district courts, often the first to evaluate cases involving the Act, exhibited substantial deference to executive actions in national security matters, particularly in terrorism-related and immigration cases[156]. This deference reflects a broader trend where courts prioritize governmental authority to address immediate security threats, sometimes at the expense of individual freedoms[157]. Scholars have noted that these decisions align with historical patterns of judicial behavior during crises, where the executive's prerogative in foreign and domestic security is rarely curtailed[158]. At the core of the judicial scrutiny surrounding the PATRIOT Act lies the tension between upholding constitutional protections and enabling effective counterterrorism strategies. For instance, surveillance provisions such as roving wiretaps and the use of delayed notification search warrants ("sneak and peek" warrants) have drawn criticism for relaxing traditional Fourth Amendment safeguards[159]. Research indicates that judicial bodies, especially at the trial level, frequently align with the government, underscoring the importance of these instruments in preventing

---

[150] *Ibid, 2*.
[151] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (*US Commission on Civil Rights*) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024.
[152] American Civil Liberties Union, 'How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants' (*ACLU*) https://www.aclu.org/documents/how-anti-terrorism-bill-permits-indefinite-detention-immigrants accessed 18 November 2024.
[153] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (*US Commission on Civil Rights*) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024.
[154]US Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty* https://www.justice.gov/archive/ll/highlights.htm accessed 4 November 2024, 3.
[155] USA PATRIOT Act 2001, Pub L No 107-56, 115 Stat 272.
[156] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (US Commission on Civil Rights) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024.
[157] *Ibid,* 11.
[158] Christopher P Banks and Steven Tauber, 'U.S. District Court Decision-Making in USA PATRIOT Act Cases after September 11' (2014) 35(2) *Justice System Journal* 157.
[159] American Civil Liberties Union, 'How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants' (*ACLU*) https://www.aclu.org/documents/how-anti-terrorism-bill-permits-indefinite-detention-immigrants accessed 18 November 2024.

acts of terrorism rather than addressing occurrences of excessive governmental overreach[160]. The role of interest groups in shaping judicial outcomes has also emerged as a critical factor in cases involving the PATRIOT Act. Organisations such as the American Civil Liberties Union (ACLU) and Electronic Frontier Foundation (EFF) have actively challenged elements of the Act, particularly its surveillance and detention provisions[161]. While their involvement has occasionally led to rulings that restrict governmental authority, the broader trend in federal district courts suggests a reluctance to overturn government policies during periods of heightened security concerns[162]. This reflects the judiciary's broader struggle to balance national security imperatives with constitutional accountability, underscoring the complexity of interpreting the PATRIOT Act in post-9/11 litigation[163]. The Act marked a significant shift in U.S. immigration policy by embedding counterterrorism measures within immigration enforcement, disproportionately targeting non-citizens[164]. Section 411[165] expanded the definition of "terrorist activity" to include even tenuous affiliations with organizations labeled as terrorist, criminalizing actions such as fundraising for humanitarian purposes. This redefinition retroactively applied to activities that occurred before the Act's passage, subjecting non-citizens to deportation for past associations[166]. By equating non-citizens' administrative or humanitarian actions with terrorism, the Act blurred the line between immigration violations and criminal conduct[167].

Section 412 of the PATRIOT Act reinforced this criminalization by permitting the indefinite detention of non-citizens certified as national security threats[168]. The Attorney General was granted the power to detain individuals based on "reasonable grounds to believe" they posed a threat, a standard significantly lower than the probable cause required in Criminal Law[169]. These individuals were effectively treated as criminals without being formally charged, facing mandatory detention without bail or an adversarial hearing[170]. This process denied them the procedural protections

---

[160] Christopher P Banks and Steven Tauber, 'U.S. District Court Decision-Making in USA PATRIOT Act Cases after September 11' (2014) 35(2) *Justice System Journal* 142.
[161] American Civil Liberties Union, 'How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants' (ACLU) https://www.aclu.org/documents/how-anti-terrorism-bill-permits-indefinite-detention-immigrants accessed 18 November 2024.
[162] *Ibid*
[163] Christopher P Banks and Steven Tauber, 'U.S. District Court Decision-Making in USA PATRIOT Act Cases after September 11' (2014) 35(2) *Justice System Journal* 1439.
[164] US Department of Justice, *The USA PATRIOT Act: Preserving Life and Liberty* https://www.justice.gov/archive/ll/highlights.htm accessed 4 November 2024.
[165] USA PATRIOT Act 2001, Pub L No 107-56, 115 Stat 272.
[166] American Civil Liberties Union, 'How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants' (ACLU) https://www.aclu.org/documents/how-anti-terrorism-bill-permits-indefinite-detention-immigrants accessed 18 November 2024.
[167] *Ibid,1*.
[168] *Ibid,* 1.
[169] Council on Foreign Relations, 'How a Single Phrase Defined the War on Terror' (*Council on Foreign Relations*) https://education.cfr.org/learn/reading/how-single-phrase-defined-war-terror accessed 18 November 2024.
[170] Shirin Sinnar, 'Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act' (2002-2003) 55(1419) *Stanford Law Review* 1442.

typically afforded to criminal defendants, such as access to evidence and the ability to challenge the basis of their detention[171]. The Act's reliance on indefinite detention disproportionately affected Arab and Muslim non-citizens, who were often held on minor immigration violations. These individuals were swept up in broad enforcement actions and subjected to prolonged detention under vague accusations of national security risks[172]. For many, detention became a punitive experience akin to criminal incarceration despite the lack of formal charges or criminal convictions. The lack of transparency and reliance on classified evidence further eroded their ability to defend themselves, reinforcing the perception that non-citizens were inherently suspicious or dangerous[173]

The criminalization of non-citizens under the PATRIOT Act extended beyond detention to include deportation processes that mirrored punitive legal proceedings[174]. Deportation, traditionally considered an administrative action, was weaponized as a tool for counterterrorism[175]. Many non-citizens were deported under allegations of providing "material support" to organizations classified as terrorists, even when their actions were lawful humanitarian efforts[176]. By conflating immigration enforcement with counterterrorism, the Act institutionalized a system that treated non-citizens as second-class individuals, stripping them of constitutional protections afforded to citizens. This criminalization was further evident in the government's broader use of immigration law as a counterterrorism tool, where detention and deportation often occurred in secrecy. Non-citizens were denied access to legal representation, and families were often unaware of their whereabouts[177]. These practices mirrored aspects of criminal incarceration but without the procedural safeguards of the criminal justice system. The profiling of Arab and Muslim communities also underscored the discriminatory underpinnings of these measures, further stigmatizing non-citizens as potential threats rather than individuals entitled to equal protection under the law[178].

The treatment of non-citizens under the USA PATRIOT Act provides a stark prelude to the more extreme policies implemented in Guantánamo Bay. The Act's provisions laid the groundwork for indefinite detention, systemic profiling, and the erosion of procedural safeguards for non-citizens, policies that were later expanded and institutionalized in the context of the War on Terror[179]. These

---

[171] *Ibid,* 1143.
[172] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (US Commission on Civil Rights) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024.
[173] *Ibid,* 4.
[174] *Ibid,*12.
[175] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (US Commission on Civil Rights) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024, 13.
[176] *Ibid,* 8.
[177] US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (US Commission on Civil Rights) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024, 11.
[178] *Ibid,* 9.
[179] Council on Foreign Relations, 'How a Single Phrase Defined the War on Terror' (Council on Foreign Relations) https://education.cfr.org/learn/reading/how-single-phrase-defined-war-terror accessed 18 November 2024.

developments underscore the critical role of non-citizens in post-9/11 security frameworks, positioning them as central figures in the broader conflict between national security and human rights. This dynamic sets the stage for a deeper exploration of detention practices and the criminalization of non-citizens in Guantánamo Bay, as will be addressed in Chapter Two. While the USA PATRIOT Act addressed the domestic dimensions of counterterrorism through expanded surveillance and law enforcement powers, the Authorization for Use of Military Force (AUMF) marked a decisive shift toward a global military strategy, granting the executive unparalleled authority to wage war against those implicated in the September 11 attacks and beyond.

1.3.2 The Authorization for Use of Military Force (AUMF)

The 2001 AUMF was drafted in the immediate aftermath of the September 11 attacks and passed with overwhelming congressional support just three days later. Its sixty-word operative clause granted the president unprecedented authority to use "all necessary and appropriate force" against those determined to have planned, authorized, committed, or supported the attacks or who harbored those entities[180]. This resolution, ostensibly aimed at al-Qaeda and its affiliates, laid the legal foundation for the United States' expansive counterterrorism operations across the globe[181]. While drafted as an immediate response to a national emergency, its broad and undefined language has allowed for its application far beyond the circumstances of September 11, transforming it into a tool for indefinite and geographically unbounded military engagement[182]. The AUMF represented a significant shift in the balance of power between Congress and the executive branch. Historically, Congress has held the constitutional power to declare war while the president, as commander-in-chief, executes military operations. However, the AUMF blurred this distinction by effectively delegating Congress's war-declaring authority to the president without explicit limits on its scope or duration[183]. By invoking this authority, successive administrations have waged wars and conducted military actions in countries such as Afghanistan, Iraq, Syria, Yemen, and Somalia, often without seeking additional congressional approval[184]. This expansion of executive power under the guise of the AUMF has been criticized for undermining the system of checks and balances envisioned by the U.S. Constitution[185].

---

[180] US Congress, *S.J.Res.23 - Authorization for Use of Military Force* (107th Congress, 2001–2002).
[181] Mark Pearcy, '"Sixty Words": Teaching About the Authorization for Use of Military Force (AUMF)' (2018) 109(5) *The Social Studies* 255–264 https://doi.org/10.1080/00377996.2018.1515718.
[182] Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2102.
[183] *Ibid*, 2072.
[184] *Ibid*, 2077.
[185] Philip R Trimble, 'The President's Constitutional Authority to Use Limited Military Force' (1995) 89(1) *American Journal of International Law* 84–87 https://www.jstor.org/stable/2203897 accessed 22 November 2024.

Detention practices, especially those at Guantánamo Bay, have drawn significant criticism for bypassing traditional legal protections and disproportionately targeting non-citizens. This issue, including the role of the judiciary in addressing indefinite detention under the AUMF, will be explored in depth in Chapter Two, with a focus on key Supreme Court cases and their broader implications. The AUMF has also served as the legal foundation for controversial military practices, including drone strikes, renditions, and targeted killings. These operations, often conducted in countries without active war zones, have raised significant concerns regarding the erosion of sovereignty and international law[186]. For instance, the use of drone strikes under the AUMF has frequently led to civilian casualties, further straining U.S. relationships with foreign governments and fueling anti-American sentiment[187]. The AUMF's elastic interpretation has extended its relevance far beyond its original intent, shaping U.S. foreign and military policy for over two decades. Its broad application has underscored the challenges of waging war against non-state actors and transnational networks, where traditional concepts of war, such as defined battlefields and clear endpoints, are increasingly obsolete.[188] As the legal justification for practices ranging from indefinite detention to targeted killings, the AUMF exemplifies the complex intersection of national security, executive authority, and individual rights, a theme that resonates deeply with the issues explored in subsequent chapters of this thesis.

As previously analyzed, the USA PATRIOT Act reshaped the domestic legal framework for counterterrorism by significantly expanding law enforcement and surveillance powers, particularly in ways that affected non-citizens. Through its broadened definitions of terrorism and material support, it facilitated the detention and deportation of non-citizens under conditions that raised serious concerns about judicial review and habeas corpus protections. Similarly, the Authorization for Use of Military Force (AUMF) extended the United States' counterterrorism strategy onto the global stage, granting the executive unprecedented authority to wage war against those deemed responsible for the September 11 attacks and beyond. Together, these measures established a comprehensive legal framework that prioritized security at the potential expense of fundamental rights. In contrast, the European Union's response to terrorism adopted a more rights-oriented approach, balancing security measures with the protection of fundamental liberties. These contrasting approaches highlight the need for a comparative analysis of the U.S. and European systems, particularly in the context of

[186] Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2102.
[187] Mark Pearcy, '"Sixty Words": Teaching About the Authorization for Use of Military Force (AUMF)' (2018) 109(5) *The Social Studies* 257 https://doi.org/10.1080/00377996.2018.1515718.
[188] Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2117

judicial interpretations, the treatment of non-citizens, and the enduring tension between national security and individual rights. This will serve as a key focus of the subsequent chapters.

The AUMF has not only shaped U.S. counterterrorism policy but also sparked significant legal and constitutional debates, as will be explored in Chapter Two. Key Supreme Court cases such as *Rasul v. Bush (2004), Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008) reveal how this legislation has been interpreted, contested, and indirectly modified in its application. While the courts acknowledged the AUMF as a basis for the executive branch's expanded wartime powers, they also imposed limits to address its potential overreach. These decisions underscored the tension between national security imperatives and the preservation of fundamental rights, particularly in the context of indefinite detention, the use of military commissions, and the denial of habeas corpus protections for non-citizens. The judiciary's role in scrutinizing the broad authority granted under the AUMF highlights both its enduring influence and the significant challenges it presents to the balance of powers and the safeguarding of individual liberties. This contested legacy will serve as a focal point for analyzing the evolving dynamics of national security and executive authority in the post-9/11 era.

1.4 European counterterrorism legislation: United Kingdom and France

The legislative measures adopted in Europe in response to the post-9/11 terrorist threat reflect a diverse approach, shaped by the legal and constitutional traditions of individual Member States as well as the supranational directives of the European Union. In the European context, the fight against terrorism has led to the strengthening of internal security laws, many of which aim to balance the protection of fundamental rights with the imperative of safeguarding national security.

This section aims to demonstrate how European countries navigate this delicate balance, particularly when contrasted with the United States. While both regions confront similar challenges in countering terrorism, the European approach often underscores the principles of proportionality and privacy protections, reflecting a broader commitment to upholding individual freedoms, even amidst intensified security concerns.

1.4.1 Counterterrorism in the United Kingdom: the legislative response to 9/11 events and the London bombings of 2005

The United Kingdom's focus on security policies predated the 9/11 attacks, as evidenced by its counterterrorist regulations in response to the Irish Republican Army's (IRA) activities during the

1970s, 1980s, and 1990s[189]. However, the events of September 11, 2001, introduced a new dimension to security concerns, prompting legislative reforms to address emerging threats. One of the most notable British responses to 9/11 was the creation of the "CONTEST" strategy ("Counter-Terrorism Strategy"), first published in 2003 and subsequently updated. This comprehensive framework comprised four pillars: '*Pursue'*, '*Prevent'*, '*Protect'*, and '*Prepare'*, each targeting different aspects of counterterrorism[190]. The '*Pursue'* element focused on identifying, detaining, and prosecuting individuals involved in planning terrorist activities. The '*Prevent'* pillar aimed to mitigate radicalization within at-risk sectors or communities. '*Protect'* emphasized strengthening defenses against terrorist operations, while '*Prepare'* sought to minimize the impact of unavoidable attacks[191]. These principles became the foundation for the UK's long-term counterterrorism strategy.

The London bombings of July 7, 2005 (7/7) provided further impetus to enhance antiterrorism legislation. In the aftermath, new measures were introduced to criminalize the promotion of terrorism, disrupt recruitment efforts, and implement stricter procedures to prevent suspected terrorists from entering or remaining in the UK[192]. However, these changes were met with criticism regarding the increasing number of arrests and the proliferation of terrorism-related laws[193]. Among the most significant legislative acts during this period were the Terrorism Act of 2006, the Counterterrorism Act of 2008, the Terrorism Prevention and Investigation Measures Act of 2011, and the Counterterrorism and Security Act of 2015. The UK's legislative response to 9/11 was among the most stringent in Europe, reflecting a proactive stance on national security. Between 2001 and 2005, the government enacted laws that expanded powers of detention, communication data retention, and restrictions on movement. These measures significantly impacted fundamental rights, with provisions that allowed for marked discrimination between nationals and non-nationals and frequent derogations from the European Convention on Human Rights (ECHR).

1.4.1.1 The Anti-Terrorism Crime and Security Act (2001)

The Anti-Terrorism Crime and Security Act (ATCS), enacted on December 14, 2001, sought to broaden the scope of existing legislation to provide the government with essential powers to combat

[189] B Golder and G Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis: Research and Practice* 4 https://doi.org/10.1080/13876980500513335 accessed 9 January 2025.
[190] Stefano Bonino, 'Policing Strategies against Islamic Terrorism in the UK after 9/11: The Socio-Political Realities for British Muslims' (2012) 32(1) Journal of Muslim Minority Affairs 6 https://doi.org/10.1080/13602004.2012.665619.
[191] Spelthorne Borough Council, 'CONTEST: Anti-Terrorism' https://www.spelthorne.gov.uk/article/16985/CONTEST-anti-terrorism.
[192] The Law Library of Congress, 'The UK's Legal Response to the London Bombings of 7/7' (The Law Library of Congress, 21 May 2013) https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/.
[193] *Ibid*.

terrorism in the aftermath of 9/11. Building on the definition of terrorism established in the Terrorism Act 2000, the ATCS introduced new provisions to strengthen counterterrorism measures. Key aspects of the Act included expanded powers to freeze and seize terrorist assets, enhanced police investigation powers, and improved information-sharing mechanisms for counterterrorism purposes[194]. The Act also reformed immigration procedures to prevent international terrorists from exploiting asylum laws[195]. Part 2 of the Act granted the Treasury authority to freeze terrorist assets during investigations, while Part 5 extended racially aggravated offenses to include religious hostility[196]. One of the most controversial provisions was the indefinite detention of foreign nationals suspected of terrorism without trial, authorized under a certificate issued by the Secretary of State[197]. This measure, applicable to individuals who could not be deported due to the risk of torture, was heavily criticized for violating the principle of non-discrimination and Article 5 of the ECHR, which protects liberty and security[198]. Although the Act relied on a state of emergency declaration to justify its derogation under Article 15 of the ECHR, the House of Lords ruled in 2004 that the provision was incompatible with the ECHR. Consequently, the ATCS was replaced by the Prevention of Terrorism Act in 2005.

1.4.1.2 The Prevention of Terrorism Act (2005)

The Prevention of Terrorism Act, enacted in March 2005, was a direct response to the House of Lords' ruling against indefinite detention under the ATCS. This legislation introduced "control orders," preventive measures that imposed restrictions on individuals suspected of involvement in terrorism-related activities, regardless of their nationality. Control orders included prohibitions on possessing certain items, restrictions on movement, and limitations on communication and association[199]. Two types of orders were established: "derogating" orders, which allowed measures infringing on liberty under Article 5 of the ECHR, and "non-derogating" orders, which required judicial authorization but did not violate fundamental rights[200]. The regime faced criticism for its reliance on a lower standard of proof, permitting orders based on reasonable suspicion rather than concrete evidence[201]. Despite several legal challenges, including cases brought before the House of

[194] Explanatory Notes to *Antiterrorism Crime and Security Act 2001*.
[195] Virginia Helen Henning, 'Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?' (2002) 17(6) *American University International Law Review* 1268.
[196] Explanatory Notes to *Antiterrorism Crime and Security Act 2001*, par.16.
[197] ATCS Act 2001, Part 4.
[198] *Ibid*, p. 498.
[199] Explanatory Notes to *Prevention of Terrorism Act 2005*.
[200] House of Commons Library, 'The Anti-terrorism, Crime and Security Act 2001' (House of Commons Library, 23 January 2013) https://commonslibrary.parliament.uk/research-briefings/sn03438/.
[201] House of Commons Library, 'The Anti-terrorism, Crime and Security Act 2001' (House of Commons Library, 23 January 2013) https://commonslibrary.parliament.uk/research-briefings/sn03438/, 7.

Lords in 2007, the control orders remained a central feature of UK counterterrorism efforts until their replacement by the Terrorism Prevention and Investigation Measures Act in 2011. The 2005 London bombings were a traumatic moment for British society and politics, intensifying concerns over national security and reinforcing the sense of an elevated threat. In response, the Acts of 2006 and 2008 reflected a continued restrictive approach to counterterrorism legislation. However, a gradual shift emerged with the Acts of 2011 and 2015, which attempted to strike a better balance between security and safeguarding individual rights. This shift was likely influenced by growing criticism from human rights organizations and committees, as well as pressure from the judiciary, which had issued rulings challenging some of the limitations imposed on rights and freedoms.

1.4.1.3 The Terrorism Act 2006

The *Terrorism Act 2006* sparked significant controversy and underwent extensive scrutiny in both the House of Commons and the House of Lords. Even after coming into force on 30 March 2006, it continued to face opposition and criticism. The Government defended the Act as a necessary response to the renewed terrorist threat following the 7/7 bombings. The legislation amended existing counterterrorism laws, particularly the *Terrorism Act 2000*, and introduced several new terrorism-related offences. One key provision was the offence of encouraging terrorism, which supplemented the existing common law offence of incitement to commit a crime. The Act also criminalized the publication of statements that incite or "glorify" terrorism, expanding the Secretary of State's powers to proscribe organizations that glorify terrorism or engage in activities linked to it. It further established offences related to preparing for terrorist acts and receiving terrorist training, imposing penalties on individuals who acquire skills intended for terrorism purposes[202]. The Act extended measures related to the encouragement and glorification of terrorism, as well as the dissemination of terrorist publications, to include offences conducted electronically. This adaptation aimed to address the use of social media and other digital platforms for terrorist purposes[203]. Another controversial element of the Act was its expansion of police powers, particularly the extension of the pre-charge detention period for terrorist suspects from 14 to 28 days, subject to judicial approval. The Government initially proposed increasing the detention period to 90 days, arguing that this was necessary to prevent terrorism. However, this proposal was rejected, as was a provision seeking to close extremist mosques. Due to substantial criticism, particularly from civil liberties organizations, several amendments were made to the Act. Despite these changes, the Act remains in force today.

[202] Explanatory Notes to Terrorism Act 2006.
[203] Christian A Honeywood, 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights' (2016) 9(3) *Journal of Strategic Security* 34.

1.4.1.4 The Counter-Terrorism Act 2008

The political debate surrounding the proposal to extend the pre-charge detention period to 90 days continued during the passage of the *Counter-Terrorism Act 2008*, which was approved in November 2008. Initially, the Act was intended to include an extension of the detention period from 28 to 42 days. However, this proposal was ultimately rejected by the House of Lords. Despite this setback, the *Counter-Terrorism Act 2008* introduced several stringent measures. The provisions of the Act were developed in line with the Government's counterterrorism objectives, including granting new powers for collecting and sharing counterterrorism intelligence; introducing further regulations on the detention and questioning of terrorist suspects, as well as the prosecution and sentencing of terrorism offences; imposing notification requirements on individuals convicted of such offences; and enhancing powers to combat terrorist financing[204].Specifically, Part 1 of the Act introduced the power to collect fingerprints and DNA samples from individuals subject to control orders, enabling their full use in terrorism investigations. Part 2 provided for the questioning of terrorist suspects after they had been charged, while Part 3 allowed for extended sentences for individuals convicted of terrorism-related offences. Those convicted could also be monitored by police and required to remain within the UK. Additionally, the Treasury was granted new powers to intervene in cases of suspected money laundering or terrorist financing involving transactions outside the UK. The Act also amended the *Regulation of Investigatory Powers Act 2000* to permit the disclosure of intercept material in exceptional cases and introduced changes to the control order system established under the *Prevention of Terrorism Act 2005*[205].

1.4.1.5 The Terrorism Prevention and Investigation Measures Act 2011

The *Terrorism Prevention and Investigation Measures Act 2011* marked an important shift in British counterterrorism legislation, as it reflected the Government's efforts to balance security measures with the protection of civil liberties. This rebalancing was likely prompted by growing criticism and debate over the impact of counterterrorism laws on individual rights, particularly the severe restrictions imposed under the control orders regime. Judicial pressure also played a role, as numerous court rulings strongly criticized the control orders for their significant limitations on fundamental rights. The Act, which was approved in December 2011, stemmed from a January 2011

[204]The Guardian, 'Counter-Terrorism Act 2008' (19 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/counter-terrorism-act.
[205] Explanatory Notes to the *Counter-Terrorism Act 2008* (UK) https://www.legislation.gov.uk/ukpga/2008/28/notes/contents.

review of counterterrorism and security powers, including a reassessment of the control orders established by the *Prevention of Terrorism Act 2005*. The Government's aim was to replace the control orders with a more targeted and less intrusive system, referred to as *Terrorism Prevention and Investigation Measures* (TPIMs)[206]. These measures were intended to protect the public from individuals suspected of involvement in terrorism-related activities who could not be prosecuted or, in the case of foreign nationals, deported. Additionally, the TPIMs sought to enable more effective methods for gathering evidence that could lead to prosecutions[207]. The TPIMs included restrictions such as GPS tagging, reporting requirements, and limitations on travel, movement, association, communication, finances, work, and study[208]. While some of the measures under the TPIMs were considered similar to those under the control orders regime, there were significant differences. The 2011 Act introduced enhanced safeguards for individuals subject to these measures, including rigorous scrutiny before their imposition and a maximum duration of two years, which could only be renewed if sufficient evidence indicated that the individual had re-engaged in terrorism[209]. Furthermore, restrictions that excessively interfered with an individual's daily life were required to be proportionate, clearly justified, and kept to the minimum necessary to protect the public[210]. The Act also provided clearer definitions of the restrictions that could not be imposed. Although the Act represented progress in balancing intrusive security measures with the protection of civil liberties, it did not fully satisfy the Joint Committee on Human Rights, and some human rights concerns persisted. In the years following its enactment, the Act was amended several times.

1.4.1.6 The Counterterrorism and Security Act 2015

In 2014, the British Government determined that strengthening counterterrorism legislation was essential. This decision followed a report by the independent Joint Terrorism Analysis Centre, which declared that the UK's national terrorist threat level had risen from "substantial" to "severe," indicating that a terrorist attack was "highly likely[211]." The *Counterterrorism and Security Act 2015* received Royal Assent in February 2015, enhancing the powers associated with the UK's counterterrorism strategy, known as CONTEST. For example, Part 5 of the Act introduced a legal

[206]UK Home Office, 'Terrorism Prevention and Investigation Measures Act Collection' (*UK Government*) https://www.gov.uk/government/collections/terrorism-prevention-and-investigation-measures-act.
[207] House of Lords, House of Commons, Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011, Tenth Report of Session 2013–14* (HC 2013–14, 231) 3.
[208] *Ibid, 9.*
[209] *Terrorism Prevention and Investigation Measures Act 2011, sch 5* *https://www.legislation.gov.uk/ukpga/2011/23/schedule/5*.
[210] *Ibid.*
[211] Explanatory Notes to the *Counterterrorism and Security Act 2015* (UK) https://www.legislation.gov.uk/ukpga/2015/6/notes/contents.

obligation for local authorities to "have due regard to the need to prevent people from being drawn into terrorism" when performing their functions[212]. The Act also included provisions to impose temporary travel restrictions on individuals suspected of involvement in terrorism. Specifically, it granted the Executive the power to seize the passports of such individuals for up to 30 days. It also introduced the *Temporary Exclusion Order*, which authorized the Government to prevent anyone suspected of terrorism-related activity from returning to the UK for up to two years, with the possibility of renewal[213]. Furthermore, the Act strengthened measures under the *Terrorism Prevention and Investigation Measures Act 2011*, including increased monitoring of suspected terrorists through requirements such as residing in a specific location[214]. Part 3 of the Act expanded the grounds on which the Secretary of State could require communication service providers to retain data, aiding authorities in identifying individuals. Part 4 introduced new border and transport security arrangements, while Part 6 amended the *Terrorism Act 2000* to address insurance payments made in response to terrorist demands and provided powers to examine goods. Additionally, the Act reinforced independent oversight of UK counterterrorism legislation by extending the statutory powers of the Independent Reviewer of Terrorism Legislation and establishing a Privacy and Civil Liberties Board[215].

Many of the Acts discussed in this section have been significantly amended and no longer exist in their original form. For instance, the *Anti-Terrorism, Crime and Security Act 2001* remains a cornerstone of UK counterterrorism legislation but exists in its amended 2019 version, which omits several of its earlier controversial provisions. Similarly, the *Terrorism Prevention and Investigation Measures Act 2011* continues to apply but in its modified 2020 form. In recent years, new legislation has been enacted, such as the *Counterterrorism and Border Security Act 2019*[216]. Efforts to balance security with the protection of individual rights have been ongoing, with the role of the Independent Reviewer of Terrorism Legislation becoming increasingly significant. Nonetheless, criticisms about limitations on fundamental rights remain prominent, particularly as counterterrorism measures continue to expand in response to the evolving threat of terrorism[217]. One thing remains clear: the UK is a leading actor in the fight against terrorism and continues to regard Islamist terrorism as the most significant threat to national security.

---

[212] London Councils, 'Counter-Terrorism and Security Act 2015 and the Prevent Programme' (*London Councils*) https://www.londoncouncils.gov.uk/node/28115/counter-terrorism-and-security-act-2015-and-prevent-programme.
[213] Christian A Honeywood, 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights' (2016) 9(3) *Journal of Strategic Security* 39.
[214] *Counter-Terrorism and Security Act 2015*, pt 2 https://www.legislation.gov.uk/ukpga/2015/6/part/2.
[215] *Ibid, para 7.*
[216] US Department of State, 'Country Reports on Terrorism 2019: United Kingdom' (2019) https://www.state.gov/reports/country-reports-on-terrorism-2019/united-kingdom/.
[217] Jacob Rowbottom, 'Terrorism Law and the Erosion of Free Speech in the UK' (VerfBlog, 2022) https://verfassungsblog.de/os4-uk/.

1.4.2 Counterterrorism in France: the legislative response to 9/11 attacks and the 2015 Paris attacks

The terrorist attacks perpetrated by Al-Qaeda on September 11, 2001, marked a watershed moment in global security policies. These unprecedented events spurred states into action, making national and international security a paramount priority across Western countries. As a result, counterterrorism emerged as the central doctrine underpinning security strategies in the West[218].

In France, the groundwork for anti-terrorism legislation was already laid during the 1980s in response to the Paris terrorist attacks of 1985-86. These incidents prompted the French authorities to establish specific counterterrorism tools earlier than most other European nations[219]. Notably, France introduced a distinct legal framework that diverged from ordinary criminal law and continues to serve as the basis for contemporary counterterrorism measures. For instance, Law No. 86-1020 of September 9, 1986, marked the first instance of aggravating penalties for crimes linked to "terrorist enterprises." This law also established specialized investigative bodies, such as the central counter-terrorism service, to exclusively handle terrorism-related cases[220]. Additional legislation enacted between 1991 and 1997 progressively removed terrorism cases from ordinary jurisdiction and expanded surveillance and search powers[221]. Furthermore, the 1995 "Vigipirate" governmental plan provided a comprehensive framework of responsibilities and principles for combating terrorism[222].

The September 11 attacks underscored the need for a more robust and comprehensive domestic response to terrorism. Unlike the United States, which framed terrorism as an external threat and responded with military interventions in the Middle East[223], France treated terrorism primarily as a domestic security issue. Consequently, the existing surveillance and control mechanisms were reinforced, and new measures were implemented. French legislation after 9/11 significantly bolstered the powers of administrative authorities and law enforcement while introducing a range of restrictions affecting individuals, organizations, and the broader population[224].

---

[218] Julie Alix and Olivier Cahn, 'Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale' (2017) *Revue de science criminelle et de droit pénal comparé* 846.

[219] Antoine Garapon, 'Les dispositifs antiterroristes de la France et des États-Unis' (Esprit, 2002) https://esprit.presse.fr/article/antoine-garapon/les-dispositifs-antiterroristes-de-la-france-et-des-etats-unis-13547.

[220] Francesco Ragazzi, 'L'évolution de la politique anti-terroriste en France depuis les attentats de 2015: Anticipation, Prévention et Répression' https://www.sciencespo.fr/ceri/en/content/l-evolution-de-la-politique-anti-terroriste-en-france-depuis-les-attentats-de-2015-anticipat.

[221] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.

[222] *Ibid*.

[223] Antoine Garapon, 'Les dispositifs antiterroristes de la France et des États-Unis' (Esprit, September 2002) *Esprit* 128 https://esprit.presse.fr/article/antoine-garapon/les-dispositifs-antiterroristes-de-la-france-et-des-etats-unis-13547.

[224] Jean-Claude Paye, 'Lutte antiterroriste et contrôle de la vie privée' (2003) 11(1) *Multitudes* 91 https://doi.org/10.3917/mult.011.0091.

Post-9/11 French legislation emphasized prevention over reaction, adopting restrictive measures that significantly impacted individual freedoms. This preventive approach became particularly pronounced following the November 2015 Paris attacks, which prompted the declaration of a state of emergency. The resulting extraordinary measures, justified by the severity of the terrorist threat, reflected a shift towards "normalizing" emergency powers. This normalization process transformed exceptional administrative powers into permanent legal instruments, demonstrating a perceived necessity for such measures to ensure the safety of French citizens. The September 11 attacks catalyzed the introduction of new counterterrorism measures across Western nations, including France[225]. French legislative responses following 9/11 displayed a consistent trend toward enhancing preventive security measures, such as expanded surveillance, stricter controls over public and private spaces, and greater administrative powers. These developments often drew criticism for their substantial limitations on fundamental rights.

1.4.2.1 The "Day-to-Day Security Law" (Law No. 2001-1062 of November 15, 2001)

One of the first legislative measures enacted in response to the 9/11 attacks was Law No. 2001-1062, also known as the "Loi sur la sécurité quotidienne." This law, passed under an atmosphere of urgency and consensus among Parliament, the Prime Minister, and the President, bypassed preventative review by the Constitutional Council[226]. The legislation introduced a broad array of tools to combat terrorism and illegal arms trafficking. Among its provisions, it expanded judicial police powers, allowing identity checks, vehicle searches, and enhanced powers for private security agents to conduct searches and frisks[227]. Additionally, the law established the National Institute of Scientific Police and introduced measures such as mandatory DNA sampling for individuals refusing to cooperate, with fingerprints stored in a national database[228]. It also imposed severe penalties for financing terrorism, including the confiscation of assets[229]. The law addressed the potential misuse of information and communication technologies by permitting the preventative retention of connection

[225] Roseline Letteron, 'Après 11 septembre: La difficile construction d'un droit de l'antiterrorisme' (*Le Club des Juristes*) https://www.leclubdesjuristes.com/justice/apres-11-septembre-la-difficile-construction-dun-droit-de-lantiterrorisme-par-roseline-letteron-585/.

[226] Jean-Claude Paye, 'Lutte antiterroriste et contrôle de la vie privée' (2003) 11(1) *Multitudes* 91 https://doi.org/10.3917/mult.011.0091.

[227] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.

[228] Mariel Garrigos Kerjean, 'La tendance sécuritaire de la lutte contre le terrorisme' (2006) 28 *Archives de politique criminelle* 189–213 https://hal.science/hal-00425667.

[229] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.

data for one year. Financial administrative agents were authorized to access these records[230]. Shortly after its enactment, the law's scope was further expanded[231].

1.4.2.2 The "Law on Orientation and Planning for Internal Security" (Law No. 2002-1094 of August 29, 2002)

In August 2002, the French government enacted Law No. 2002-1094, which reorganized internal security structures and extended police and judicial powers[232]. This legislation, passed under urgency procedures, fostered international cooperation in counterterrorism efforts and introduced advanced surveillance systems to monitor internet activities[233]. The law encouraged the involvement of various security professionals and emphasized citizen participation in combating insecurity[234]. It also provided financial, technical, and human resources to strengthen security measures, setting the stage for future legislative developments[235].

1.4.2.3 The "Law for Internal Security" (Law No. 2003-239 of March 18, 2003)

Continuing the trajectory of its predecessors, Law No. 2003-239 legitimized judicial police and gendarmerie file archives while reinforcing local and municipal police powers[236]. The legislation broadened the national fingerprint database established in 2001 and prolonged provisions of the "Day-to-Day Security Law."[237] It also introduced new public safety measures and strengthened the role of prefects in overseeing domestic security[238].

1.4.2.4 The "Law on Combating Terrorism and Miscellaneous Provisions on Security and Border Controls" (Law No. 2006-64 of January 23, 2006)

---

[230] Law n° 2001-1062, 15th November 2001.
[231] Jean-Claude Paye, 'Lutte antiterroriste et contrôle de la vie privée' (2003) 11(1) *Multitudes* 98 https://doi.org/10.3917/mult.011.0091.
[232] Law n° 2002-1094, 29th August 2002.
[233] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.
[234] *Ibid*.
[235] Jean Danet, 'Le droit pénal et la procédure pénale sous le paradigme de l'insécurité' (2003) 25 *Archives de politique criminelle* 41–42
[236] Mariel Garrigos-Kerjean, 'La tendance sécuritaire de la lutte contre le terrorisme' (2006) 28 *Archives de politique criminelle* 194 https://hal.science/hal-00425667.
[237] Mariel Garrigos-Kerjean, 'La tendance sécuritaire de la lutte contre le terrorisme' (2006) 28 *Archives de politique criminelle* 194 https://hal.science/hal-00425667.
[238] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.

Adopted after the London bombings of July 2005, this law marked a significant escalation in counterterrorism efforts[239]. Key measures included extending police custody durations for terrorism suspects, mandating one-year data retention by telecommunications providers, and enabling administrative rather than judicial oversight of data access[240]. Surveillance measures were expanded to include high-risk areas, with administrative powers extended to freeze financial assets linked to terrorism[241].

1.4.2.5 The "Law on Security and Fight Against Terrorism" (Law No. 2012-1432 of December 21, 2012)

Faced with a persistent terrorist threat, France enacted Law No. 2012-1432 to strengthen domestic counterterrorism tools[242]. This law extended the provisions of the 2006 legislation and introduced the prosecution of individuals involved in terrorist acts abroad, even without dual criminality[243]. It also revised laws governing the entry and residence of foreigners in relation to security concerns[244].

1.4.2.6 The "Law Strengthening Counter-Terrorism Provisions" (Law No. 2014-1353 of November 13, 2014)

Prompted by the rise of ISIS and the risk posed by returning jihadists, this law granted the Minister of Interior the power to prohibit individuals from leaving France if suspected of planning terrorist activities abroad[245]. It also allowed prosecution for preparatory acts of terrorism by "lone wolves" and authorized the administrative blocking of websites inciting terrorism[246].

1.4.2.7 The "Law on Intelligence Sector" (Law No. 2015-912 of July 24, 2015)

---

[239] Vie Publique, 'Lutte contre le terrorisme: Sécurité et contrôles frontaliers' https://www.vie-publique.fr/rapport/29595-lutte-contre-le-terrorisme-securite-et-controles-frontaliers.
[240] Jean Kilpatrick, 'Quand un état d'urgence temporaire devient permanent, le cas de la France' (2020) *Transnational Institute* 24.
[241] Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.
[242] 'Loi relative à la sécurité età la lutte contre le terrorisme, Loi n° 2012-1432 du 21 décembre 2012' (Journal Officiel n°298, 22 December 2012) https://www.senat.fr/dossier-legislatif/pjl12-006.html.
[243] Jean Kilpatrick, 'Quand un état d'urgence temporaire devient permanent, le cas de la France' (2020) *Transnational Institute* 24.
[244] 'Loi relative à la sécurité età la lutte contre le terrorisme, Loi n° 2012-1432 du 21 décembre 2012' (Journal Officiel n°298, 22 December 2012) https://www.senat.fr/dossier-legislatif/pjl12-006.html.
[245] 'France: Anti-Terrorist Law Prohibiting Citizens from Leaving France Found Constitutional' (30 October 2015) https://www.loc.gov/item/global-legal-monitor/2015-10-30/france-anti-terrorist-law-prohibiting-citizens-from-leaving-france-found-constitutional/.
[246] Law n° 2014-1353 of 13th November 2014, art.9.

This legislation provided a legal framework for intelligence services to utilize advanced techniques for acquiring information[247]. It transferred traditional judicial police prerogatives to intelligence services, enabling virtual infiltration and IT data collection[248]. The law's expansive provisions, criticized for their intrusiveness, significantly empowered intelligence agencies while reducing judicial oversight[249]. In summary, post-9/11 French legislation adopted a preventive approach, emphasizing surveillance and administrative control over reactionary measures. These laws prioritized public security but often limited fundamental rights and curtailed judicial oversight. This trend, accentuated during the 2015-2017 state of emergency, introduced unprecedented shifts within France's constitutional framework.

Although the French Government had prioritized counterterrorism measures in the years following the 9/11 attacks, the Paris attacks of 13 November 2015, targeting the Bataclan and the Stade de France, further heightened tensions and intensified the focus on national security. In response, President François Hollande declared a state of emergency the day after the attacks. The state of emergency is a special legal regime in France that allows for the temporary restriction of certain rights to address serious threats to public safety and national security. However, these measures are intended to restore a "normal" situation and ensure full respect for rights as soon as possible[250]. The state of emergency in France is governed by three key provisions: Law No. 55-385 of 3 April 1955, Article 16 of the Constitution, and Article 36 of the Constitution. The 1955 Law grants extraordinary powers to administrative authorities, such as the Minister of the Interior and regional prefects; Article 16 provides the President of the Republic with special powers; and Article 36 regulates the state of siege, upon which the state of emergency is modeled. To enact a state of emergency, it must be formally decreed by the President of the Republic in consultation with the Council of Ministers and is justified in cases of imminent danger arising from serious breaches of public order or public calamities. Extending the state of emergency beyond 12 days requires approval by Parliament. Initially introduced as a temporary measure, the state of emergency was extended six times by the legislature, ultimately remaining in effect until 1 November 2017. In November 2015, there was even an unsuccessful attempt to enshrine the state of emergency in the Constitution.

The state of emergency, which officially began on 14 November 2015, granted extensive powers to the Minister of the Interior. These powers included placing individuals deemed dangerous under

[247] Vie Publique, 'Loi relative au renseignement' https://www.vie-publique.fr/loi/20737-securite-loi-relative-au-renseignement.

[248] Étude d'impact, 'Loi relative au renseignement' (2015) Dossier législatif 40 https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000030375694/.

[249] Jane Kilpatrick, 'Quand un état d'urgence temporaire devient permanent: Le cas de la France' (Transnational Institute, November 2020) https://www.tni.org/files/publication-downloads/france_and_the_states_of_emergency_online_french.pdf.

[250] *Ibid*.

house arrest, restricting freedom of movement for people and vehicles in certain areas and conducting detentions[251]. Administrative authorities were also empowered to ban public meetings and demonstrations, dissolve associations deemed a threat to public order and authorize administrative searches[252]. Between 2015 and 2017, the original text of the 1955 Law was amended several times to allow for even stricter measures[253]. Despite the prolonged state of emergency, it was deemed insufficient to address the ongoing terrorist threat. Consequently, the government incorporated some of the extraordinary powers granted under the 1955 Law into ordinary legislation, effectively normalizing many measures initially justified by the state of emergency[254]. Notably, the provisions of the 1955 Law are administrative and therefore preventive in nature, meaning they are not subject to prior judicial review[255]. A significant trend in French counterterrorism legislation, particularly from 2014 onward, has been the growing dominance of the Executive in restricting individual freedoms. Decisions to limit freedoms, made by prefects based on intelligence services' information, often bypass judicial oversight, which would typically require evidence collected by the judicial police in the context of an investigation[256]. Another notable trend following the 2015 attacks has been the increasing restrictions on individual rights and liberties, accompanied by an expansion of powers granted to police and administrative authorities.

1.4.2.8 The "Law prolonging the application of the Law No. 55-385 of 3 April 1955" (Law No. 2015-1501 of 20 November 2015)

Adopted through an accelerated legislative process that began on 18 November, the *Law of 20 November 2015* was a direct response to the Paris attacks of 13 November 2015. It extended the application of the 1955 Law governing the state of emergency for three months, starting on 26 November 2015, and introduced additional powers to strengthen its provisions[257]. The law expanded the grounds for imposing house arrest, allowing it to be applied to individuals for whom there were "serious reasons to believe that their behavior constitutes a threat to public safety and order[258]." House arrest could be enforced at any time, day or night, and the assigned residence regime was also modified. For example, the Minister of the Interior was empowered to require individuals under house

[251] *Ibid, 5*.
[252] *Ibid, 9*.
[253] *Ibid*.
[254] Stéphanie Hennette-Vauchez, 'The State of Emergency in France: Days Without End?' (2018) 14(2) *EuConst* 279, 704 https://shs.hal.science/halshs-04123906.
[255] *Ibid, 709*.
[256] Julien Fragnon, 'L'antiterrorisme à la française : répression, prévention, anticipation' (*The Conversation*, 2020) https://theconversation.com/lantiterrorisme-a-la-francaise-repression-prevention-anticipation-137562.
[257] Law No 2015-1501 of 20 November 2015, art 1.
[258] *Ibid*.

arrest to periodically report to police authorities[259]. Another significant amendment introduced by this legislation was Article 14-1, which granted administrative courts the authority to review the legality of measures imposed by public authorities under the state of emergency[260].To enhance oversight, the law required the Government to immediately inform Parliament of any decisions made in relation to the state of emergency, thereby improving the transparency and accountability of the measures. Additionally, *Law No. 2015-1501* strengthened provisions for disbanding associations or groups deemed a threat to public order and expanded the government's powers to block websites promoting terrorism[261].The adoption of this law was justified by a political narrative that emphasized the severity of the attacks, described as "the worst terrorist acts committed in Europe since the Second World War[262],"and portrayed them as an ongoing threat requiring stricter security measures.

1.4.2.9 The "Law Strengthening the Fight Against Organised Crime, Terrorism, and Their Financing, and Improving the Efficiency and Guarantees of Criminal Proceedings" (Law No. 2016-731 of 3 June 2016)

The *Law No. 2016-731* aimed to enhance the tools available for combating terrorism and its financing by amending the *French Penal Code*, the *Penal Procedure Code*, and the *Code of Internal Security*[263].The law provided judges and prosecutors with new investigative powers, such as the ability to conduct nighttime searches in homes linked to terrorism cases, particularly in situations where there was a risk of injury or loss of life. It also allowed for the use of proximity-based technical devices to intercept connection data, which could be used to identify the terminal equipment of a user[264]. In addition to expanding investigative tools, the law toughened penalties for online jihadist propaganda and broadened the circumstances under which police forces could use firearms[265]. It also increased the powers of the administrative police by introducing measures to monitor "returnees" individuals believed to have left France to join terrorist groups abroad and who pose a potential threat

[259] État d'urgence et autres régimes d'exception (article 16, état de siège)' (*vie-publique.fr*, 15 May 2024) https://www.vie-publique.fr/questions-reponses/269427-etat-durgence-et-autres-regimes-dexception-article-16-etat-de-siege.
[260] Julie Alix and Olivier Cahn, 'Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale' (2018) *Revue de science criminelle et de droit pénal comparé* 2018/4, 715 https://shs.hal.science/halshs-02245511.
[261] Law No 2015-1501 of 20 November 2015 prorogating the application of Law No 55-385 of 3 April 1955 relating to the state of emergency and strengthening the effectiveness of its provisions, art 1. This citation refers to Article 1 of the law, which extends the state of emergency declared by Decree No. 2015-1475 of 14 November 2015 for a period of three months from 26 November 2015. For the full text, see: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031500831.
[262] Jane Kilpatrick, 'Quand un état d'urgence temporaire devient permanent: Le cas de la France' (Transnational Institute, November 2020) https://www.tni.org/files/publicationdownloads/france_and_the_states_of_emergency_online_french.pdf.
[263] 'Chronologie de la législation antiterroriste depuis les années 1980' (*vie-publique.fr*, 15 May 2024) https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.
[264] Lutte contre le terrorisme : les avancées grâce à la loi du 3 juin 2016' (*Ministère de l'Intérieur*, 27 July 2016) https://mobile.interieur.gouv.fr/Archives/Archives-des-actualites/2016-Actualites/Lutte-contre-le-terrorisme-les-avancees-grace-a-la-loi-du-3-juin-2016.
[265] *Ibid*.

upon their return. Under these provisions, the Minister of the Interior was authorized to impose security measures on such individuals[266]. The law further sought to bolster security by strengthening access controls at venues hosting major events and enhancing protections for witnesses under threat. It also imposed stricter conditions for the acquisition and possession of firearms[267]. Lastly, the legislation created a specific offence targeting the trafficking of cultural property originating from terrorist groups' operations.

1.4.2.10 The "Law on Public Security" (Law No. 2017-258 of 28 February 2017)

The *Law No. 2017-258* on public security aimed to strengthen the legal framework governing the activities of law enforcement, making their interventions more effective and providing greater legal clarity regarding the use of weapons. The law established unified regulations for the use of firearms, applying the same framework to police officers and gendarmes, while making only minor distinctions between firearms (potentially lethal) and less-lethal weapons[268].
Additionally, the legislation reinstated the offence of habitual consultation of terrorist websites, a provision that had previously been struck down by the Constitutional Council. To address this issue, the law specified that such consultation must be accompanied by a clear intent to adhere to terrorist ideology[269].

1.4.2.11 The "Law Strengthening Internal Security and the Fight Against Terrorism" (Law No. 2017-1510 of 30 October 2017)

The *Law of 30 October 2017* was a pivotal piece of legislation that ended the state of emergency by incorporating several exceptional measures into ordinary law[270]. It transferred provisions from the 1955 Law into the *Code of Internal Security*, expanded intelligence and border control powers, and granted administrative authorities' wider powers to prevent terrorism[271]. Prefects were authorized to establish security perimeters, regulate access, close places of worship promoting

---

[266] Julie Alix and Olivier Cahn, 'Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale' (2018) Revue de science criminelle et de droit pénal comparé 2018/4, 853 https://shs.hal.science/halshs-02245511
[267] Law n° 2016-731 of 3rd June 2016.
[268] Jane Kilpatrick, 'Quand un état d'urgence temporaire devient permanent: Le cas de la France' (Transnational Institute, November 2020) 26 https://www.tni.org/files/publicationdownloads/france_and_the_states_of_emergency_online_french.pdf.
[269] 'Sécurité publique : policiers, usage des armes à feu, anonymat' (*vie-publique.fr*, 1 March 2017) https://www.vie-publique.fr/loi/20990-securite-publique-policiers-usage-des-armes-feu-anonymat.
[270] Julien Fragnon and Karine Roudier, 'Entre répression et prévention, retour sur l'antiterrorisme en France' (2018) *Confluences Méditerranée* https://shs.hal.science/halshs-01905279v1.
[271] Jane Kilpatrick, 'Quand un état d'urgence temporaire devient permanent: Le cas de la France' (Transnational Institute, November 2020) 16 https://www.tni.org/files/publicationdownloads/france_and_the_states_of_emergency_online_french.pdf.2020) 16 https://www.tni.org/files/publicationdownloads/france_and_the_states_of_emergency_online_french.pdf

terrorism, and impose surveillance measures on individuals deemed a threat to public safety[272]. The law drew criticism for normalizing the state of emergency and permanently integrating rights-restricting measures into ordinary legislation, which removed judicial oversight of administrative decisions[273]. This shift toward expanded administrative powers reflects the profound influence of terrorist attacks on France's counterterrorism strategy.

This chapter has analyzed how the legal frameworks in the United States and the European Union differentiate between citizens and non-citizens regarding the protection of fundamental rights, particularly within the context of national security. Although both systems have historically established legal safeguards for non-citizens, the post-9/11 era represented a pivotal juncture during which security concerns increasingly influenced the breadth and implementation of these protections rights. The distinction between citizens and non-citizens in the protection of fundamental rights varies significantly between the United States and the European Union, both in their legal frameworks and in their responses to post-9/11 security concerns. In the United States, the Constitution extends certain fundamental rights to all individuals, including non-citizens, primarily through the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. However, in the context of national security and immigration control, the government has historically exercised broad discretionary powers over non-citizens, as seen in the USA PATRIOT Act and Supreme Court rulings such as *Demore v. Kim*. These legal frameworks have enabled prolonged detentions, limited judicial oversight, and increased executive authority in immigration enforcement, disproportionately affecting non-citizens in counterterrorism policies. In contrast, the European Union's legal framework is structured around a multilevel system of rights protection, where EU law, national constitutions, and the European Convention on Human Rights (ECHR) collectively safeguard fundamental rights. Unlike in the U.S., EU law explicitly differentiates between EU citizens and third-country nationals (TCNs), with freedom of movement and non-discrimination rights primarily reserved for EU citizens under Directive 2004/38/EC. While third-country nationals benefit from certain human rights protections, their legal status is often conditional on immigration laws, national security considerations, and asylum policies. Following September 11, 2001, both legal systems witnessed a securitization of rights, but their approaches differed. In the United States, the expansion of executive authority led to preventive detention, expanded surveillance, and restricted access to judicial review for non-citizens suspected of terrorism. In contrast, the European Union, while also prioritizing security, emphasized judicial cooperation and mutual recognition mechanisms, such as the European Arrest Warrant (EAW) and the Framework Decision on Terrorism, to harmonize

[272] Law n° 2017-1510 of 30th October 2017, art.1.
[273] *Ibid, Art. 3.*

counterterrorism efforts while maintaining a legal framework rooted in human rights principles. However, both legal systems have faced challenges in balancing security imperatives with the protection of fundamental rights, particularly for non-citizens who remain subject to stricter regulations, surveillance, and limitations on procedural guarantees in the name of national security.

Chapter 2: The Protection of Habeas Corpus and Due Process of Law for Citizens and Non-Citizens in Post-9/11 U.S. Jurisprudence

As discussed in Chapter 1, the Authorization for Use of Military Force (AUMF), enacted by the U.S. Congress on September 18, 2001, served as the legislative foundation for military actions against those responsible for the 9/11 attacks. However, the extensive powers granted to the executive branch under the AUMF raised significant legal and constitutional concerns, particularly regarding the protection of habeas corpus rights and the due process of law. In addition to its significant delegation of military authority, the Authorization for Use of Military Force (AUMF) presented challenges to the conventional separation of powers by markedly enhancing executive discretion to the detriment of congressional oversight and judicial review. By empowering the President to initiate military operations and detain individuals without necessitating case-by-case congressional approval, the AUMF fortified the executive's wartime powers, thereby diminishing the legislative branch's involvement in decisions pertaining to detention and counterterrorism strategies. Moreover, the exclusion of detainees from federal court jurisdiction, rationalized on the basis of national security, spawned judicial challenges regarding the extent of executive authority in relation to detention and trial processes, leading to pivotal Supreme Court rulings that aimed to reinstate judicial oversight. Furthermore, the AUMF facilitated deviations from fundamental rights protections, permitting indefinite detention without the filing of charges, the establishment of military commissions with constrained procedural safeguards, and the extrajudicial treatment of detainees in facilities such as Guantánamo Bay. These actions effectively circumvented established due process guarantees and fueled ongoing discussions regarding the limitations of executive authority in matters of national security matters. This section examines the legal implications of the AUMF, focusing on its impact on non-citizens detained in the context of the "War on Terror," with particular attention to the jurisprudence of the U.S. Supreme Court.

2.1 Guantánamo Bay a legal "Black Hole"

Guantanamo Bay, located in a cove at the southeastern tip of Cuba, is infamously home to a U.S. military detention facility designed to house terrorism suspects, individuals referred to as "*enemy aliens*" or, as designated by the U.S. executive branch, "*enemy combatants*"[274]. The detainees come from diverse backgrounds, including members of the Afghan military and terrorist organizations like

[274]Legal Information Institute, 'Enemy Combatant' (*Cornell Law School*) https://www.law.cornell.edu/wex/enemy_combatant.

Al-Qaeda. They are deliberately denied the status of "*prisoners of war*," which would otherwise entitle them to the rights guaranteed under the Third Geneva Convention[275]. The establishment of the detention facility at Guantánamo Bay cannot be fully understood without considering the historical and geopolitical context, particularly the legal and territorial arrangements between Cuba and the United States.

In 1902, Cuba declared independence but remained bound by the "Cuban American Treaty of Relations," later formalized in Cuba's Constitution through the so-called "Platt Amendment"[276]. Article VII of this amendment stipulated that, "to enable the United States to maintain the independence of Cuba, protect its people, and safeguard its own defense, the Government of Cuba will sell or lease to the United States the necessary lands for naval bases or coaling stations, at specified points agreed upon with the President of the United States"[277]. Consequently, a portion of Guantanamo was leased to the United States in exchange for an annual rent. Notably, Article III of the agreement specified that while "ultimate sovereignty" over Guantanamo Bay resides with the Republic of Cuba, the U.S. retains "complete jurisdiction and control" over the territory during the period of occupation[278]. According to the U.S. government's interpretation, Cuba's sovereignty is effectively suspended and will only be reinstated upon the termination of U.S. control over the territory. The situation remains unchanged despite Cuba's post-revolutionary government expressing its desire to terminate the agreement and refusing to accept rent payments.

The 1934 U.S.-Cuba Treaty reaffirmed the permanence of the arrangement, stipulating that the U.S. would not vacate the base, nor could Cuba withdraw from the agreement without mutual consent. It is significant, however, that Article II[279] of the agreement restricts the use of Guantanamo Bay to naval or coaling stations. In practice, its current use as a maximum-security military prison, represents a departure from this original purpose.

The September 11, 2001, terrorist attacks, claimed by Al-Qaeda[280], prompted the United States to launch a military campaign in Afghanistan aimed at dismantling the Taliban regime that had

---

[275] The Third Geneva Convention pertains to the treatment of prisoners of war. It was concluded on August 12, 1949, and came into force the following year. Full text available at: https://www.refworld.org/legal/agreements/icrc/1949/en/35606.

[276] Approved on May 22, 1903, the Platt Amendment was an agreement between the United States and Cuba aimed at safeguarding Cuba's independence from foreign interference. It allowed significant U.S. influence over Cuba's international relations and domestic affairs to ensure the preservation of its sovereignty. Full text available at: https://www.archives.gov/milestone-documents/platt-amendment.

[277] National Archives, 'Platt Amendment: Milestone Documents' https://www.archives.gov/milestone-documents/platt-amendment.

[278] *Ibid*.

[279] *Ibid*.

[280] The terrorist organization was established in the late 1980s by Saudi billionaire Osama Bin Laden, with the aim of supporting Islamic guerrilla warfare against the Soviet occupation of Afghanistan. The first attack against the United States occurred in Yemen in 1992, followed by other attacks targeting Western countries. Bin Laden was also the mastermind behind the attacks on September 11, 2001, at the World Trade Center, on March 11, 2004, in Madrid, and on July 7, 2005, in London.

provided support to Osama bin Laden and his followers. Individuals suspected of involvement, direct or indirect, in the attacks were detained by U.S. forces and subsequently transferred to Guantanamo. An analysis of the measures and policies implemented by the U.S. executive branch in its counterterrorism strategy sheds light on the rationale behind the detention of prisoners at Guantanamo. As explained in Chapter 1 part 1.3, the U.S. Congress adopted a Joint Resolution immediately following 9/11 authorizing the use of military force. This resolution granted President George W. Bush the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001"[281]. Within this framework, the executive branch assumed control over the state of emergency[282] and adopted extraordinary measures to safeguard national security. On November 13, 2001, President Bush issued a *Presidential Military Order* concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism[283]." This order raised significant concerns regarding the separation of powers, as it effectively violated legislative matters (creation of judicial bodies, establishment of criminal provisions and amendment of procedural rules), executive (regulation and appointment of new judicial bodies), and judicial functions[284]. The absence of checks and balances inherent in this order posed a tangible threat to individual rights and liberties.

The scope of the Presidential Order[285], based on case-by-case determinations by the President, applies to non-U.S. citizens who are believed to:

i. Have been members of Al-Qaeda.
ii. Have supported or facilitated international terrorist activities that harm U.S. citizens, national security, economic interests, or foreign policy; or
iii. Have knowingly assisted individuals involved in such activities.

[281] Authorization for Use of Military Force, Pub L No 107-40, 115 Stat 224 (18 September 2001). Full text available at: https://www.govinfo.gov/content/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf.
[282] As reported by the Legal Information Institute (*Cornell Law School*), "A state of emergency is a government declaration stating that because of some crisis, the normal workings of political and social life are suspended in the given jurisdiction. A state of emergency may alter government operations, order specific action by individuals, and suspend regular civil rights." In the United States, there is no specific regulation in this regard, but certain exceptions to constitutional provisions can be applied, such as: the Joint Resolution 23, through which, after September 11, 2001, Congress "granted the President full powers to defend the nation"; The Patriot Act of 2001, which delegated extensive authority to the executive branch in this context; The Presidential Military Order, which established measures concerning the "detention, treatment, and trial of certain individuals, non-citizens, in the war on terrorism," including the establishment of military commissions. Full text available at: https://www.studiperlapace.it/view_news_html?news_id=20041223164125.
[283] Full text available at: https://www.studiperlapace.it/view_news_html?news_id=20041223164125
[284] *Ibid*.
[285] *Ibid*.

As mentioned earlier, U.S. authorities categorize these individuals as "*enemy combatants*," a status not recognized under international law. This designation denies them the protections afforded to "*prisoners of war*" and differentiates them from captured soldiers in conventional armed conflicts. Instead, these individuals are deemed perpetrators of deliberate civilian-targeted violence within an "international armed conflict." To better understand this situation, on February 20, 2002, Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, clarified the U.S. government's stance during a speech at Chatham House, London: "The right to wage war in conditions of legitimate belligerence is reserved for States, their armed forces, or groups under a responsible command. Individuals lacking these minimum organizational requirements, or the capacity or willingness to conduct operations in compliance with the laws of war, have no right to wage acts of war against a State. Members of Al-Qaeda fail to meet the criteria for lawful combatants under the laws of war. By violating these laws and conducting hostile acts, these individuals are unlawful combatants. Their actions, aimed at indiscriminately targeting civilians within an international armed conflict, constitute war crimes in reviewing this new challenge, we have concluded that the Geneva Conventions do apply, however, to the Taliban leaders who sponsored terrorism. But a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.[286]" While rejecting the application of the Third Geneva Convention to these detainees, the U.S. has nonetheless opted to grant them certain rights afforded to prisoners of war as a matter of policy[287].

The Presidential Order also established special military commissions tasked with the trial of Guantanamo detainees. Exclusively composed of U.S. military personnel, these commissions function outside the scope of standard judicial processes and the principles upheld by U.S. District Courts[288]. Subsequent directives issued by the Department of Defense delineated the operations of these tribunals, thereby instituting a parallel judicial system that is exempt from conventional

[286] Full speech available at: https://2001-2009.state.gov/s/wci/us_releases/rm/2002/8491.htm
[287] Elizabeth More, "The Guantanamo Detainees in America's 'War on Terrorism'" (2006) 1 Journal of Policing, Intelligence and Counter Terrorism 53–64.
[288] Full text available at: https://www.studiperlapace.it/view_news_html?news_id=20041223164125

institutional safeguards and oversight[289]. These commissions were composed of three to seven officers appointed by a designated Appointing Authority within the Department of Defense. However, this framework effectively created a parallel judicial process outside the institutional system, circumventing the rules and safeguards typically guaranteed by the legal order.

The U.S. government has excluded domestic courts from jurisdiction over these detainees, allowing the President to unilaterally determine their status without judicial review[290]. The U.S. executive branch, represented by its President, thus assumes the authority to unilaterally determine the status of individuals detained, without involving a judicial body in the process. As a result, although the detainees are accused of violating norms of international law, the provisions of the 1949 Geneva Convention are not necessarily applied to them. According to the U.S. government, these provisions are exclusively applicable to prisoners of war. Consequently, the Geneva Convention is denied to the Guantánamo detainees because, at the time of their capture, they were not wearing uniforms or any distinguishing insignia signifying affiliation with a belligerent state, and therefore cannot be classified as prisoners of war[291]. Instead, they are designated as "*enemy combatants.*" Moreover, as members of the organization Al Qaeda, which is considered a "non-state actor," the detainees are excluded from the protections of the Convention. This is because the Convention fully applies only in cases where a contracting state is under occupation or when signatory states are engaged in a "declared war" or an "armed conflict."[292] Particularly noteworthy in this regard is the memorandum[293] dated January 25, 2002, drafted by White House Counsel Alberto R. Gonzales and addressed directly to the President of the United States. The memorandum concerned the "Application of the Geneva Convention Relative to Prisoners of War to the Conflict with al Qaeda and the Taliban[294]." In the document, Gonzales recommended the non-application of the Convention, emphasizing that this authority fell within the constitutional powers of the President. Three main arguments were presented to justify this stance:

i. Declaring the Convention inapplicable "eliminates any need to determine prisoner-of-war status on a case-by-case basis".

[289] ACLU, 'Interested Persons Memorandum Regarding Military Commission Order No. 1' https://www.aclu.org/documents/interested-persons-memorandum-regarding-military-commission-order-no-1.
[290] *Ibid*.
[291] Andrea De Petris, "Guantanamo: un buco nero nella 'terra della libertà'" (2004) *Quaderni del Seminario sui Diritti Fondamentali in Europa* (2) http://archivio.rivistaaic.it/materiali/anticipazioni/guantanamo/index.html.
[292] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, Articles I, II, III, and IV, 75 UNTS 135. Full text available at: https://www.refworld.org/legal/agreements/icrc/1949/en/35606.
[293] Full text available in the appendix of Michael Ratner and Ellen Ray, *Prigionieri di Guantanamo. Quello che il mondo deve sapere* (Nuovi Mondi, 1st edn, 2005).
[294] *Ibid*.

ii. The war on terror "renders Geneva's strict limitations on the interrogation of enemy combatants obsolete".
iii. Finally, not adhering to the Geneva Convention "substantially reduces the threat of criminal prosecution in the United States under the War Crimes Act[295]."

Michael Ratner, in the volume *Prigionieri di Guantanamo: Quello che il mondo deve sapere (*co-authored with Ellen Ray*),* states that "the Gonzales memorandum represents the beginning of the end of legality regarding the treatment of Guantánamo prisoners[296]."
The occurrences at Guantanamo Bay have faced substantial criticism and have been characterized as a "*legal black hole*[297]" due to the lack of a conventional judicial process capable of guaranteeing a transparent and equitable determination of charges and defense. In order to conduct a comprehensive analysis of the circumstances and the ensuing legal "limbo," it is imperative to examine three fundamental aspects[298]:

i. The condition and treatment of detainees.
ii. The legitimacy of the Military Commissions.
iii. The non-compliance with international law norms and principles.

Regarding the initial point, there is a notable lack of proper identification of individuals who have been detained from the moment of their capture and the repeated conduct of interrogations without access to legal representation[299]. Reports[300] indicate that family members and legal counsel have been systematically denied communication with the prisoners, and only a limited number of journalists have been permitted access to the facility, subject to stringent codes of conduct[301]. These journalists' reports, along with other testimonies, describe the detainees' conditions as follows:

[295] 18 USC § 2441: War Crimes. Full text available at: <https://uscode.house.gov/view.xhtml?req=(title:18%20section:2441%20edition:prelim).
[296] Michael Ratner and Ellen Ray, *Prigionieri di Guantanamo*. *Quello che il mondo deve sapere* (Nuovi Mondi, 1st edn, 2005) 29.
[297] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) *International and Comparative Law Quarterly* 1–15 http://www.jstor.org/stable/3663134.
[298] Tommaso Frosini, 'Lo stato di diritto si è fermato a Guantánamo' https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/anticipazioni/guantanamo_frosini/index.html.
[299] *Ibid*.
[300] Amnesty International, "United States of America: Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay" (30 April 2002) https://www.amnesty.org/en/documents/amr51/054/2002/en/.
[301] Andrea De Petris, "Guantanamo: un buco nero nella 'terra della libertà'" (2004) *Quaderni del Seminario sui Diritti Fondamentali in Europa* (2) http://archivio.rivistaaic.it/materiali/anticipazioni/guantanamo/index.html.

"Detainees, prohibited from any contact with other prisoners, are confined 24 hours a day in single cells measuring 1.80 x 2.50 meters, with mesh walls exposed to external observation on all four sides, subjected to sunlight during the day and artificial light at night, and exposed to subtropical temperatures as the cells lack air conditioning, which all other buildings on the base are equipped with. Prisoners are identified by cell numbers rather than names and are allowed out of their cells for only 90 minutes per week, in 30-minute intervals every two days, 10 of which are allotted for showering. However, these breaks can be further restricted as punishment for rule violations, such as engaging in hunger strikes, which in some cases led to force-feeding by authorities. Isolation cells, fully sealed with steel walls and lit by artificial light 24 hours a day, are also in use"[302]. Prisoners reportedly sleep on concrete floors without mattresses and use a hole in the ground as a toilet. They are categorized by the color of their prison uniforms based on their level of cooperation: orange for non-cooperative detainees and white for those who cooperate and earn certain privileges. Non-cooperative detainees must also wear a belt with chains binding their ankles and wrists when leaving their cells[303]. Interrogations conducted by military authorities are said to have indefinite durations and occur without legal representation or safeguards. This is evidenced by a letter[304] submitted to the U.S. Senate Armed Services Committee by two former detainees, Shafiq Rasul and Asif Iqbal, who were released in 2004. In the letter, they detailed practices during interrogations, asserting that "these and other episodes, along with the brutality, humiliation, and degradation, were clearly the result of official policies and orders[305]." They recounted the use of shackling, intimidation by dogs, forced fasting, beatings, and other abusive practices[306]. Documentation strongly suggests that torture was employed at Guantanamo to extract useful information from prisoners[307]. This legal and ethical controversy will be further examined in the next section, particularly in the context of key U.S. Supreme Court cases, including *Hamdi v. Rumsfeld* and *Boumediene v. Bush*.

In addressing the legality of the Military Commissions, it is essential to first clarify that, as previously mentioned, they were established by the Military Order of November 2001, which outlined their fundamental framework. This detailed framework was subsequently specified in Military Commission Order No. 1 31, dated 21 March 2002, along with the eight subsequent "Military Instructions 32[308]," issued by the Department of Defense on 30 April 2003. Among these, Instruction No. 2 is particularly significant as it specifies in detail the jurisdiction of the Military Commissions

[302] Carlo Bonini, *Guantanamo. USA, viaggio nella prigione del terrore* (Einaudi, 2004) 21–33.
[303] *Ibid*.
[304] Michael Ratner and Ellen Ray, *Prigionieri di Guantanamo. Quello che il mondo deve sapere* (Nuovi Mondi, 1st edn, 2005), Appendix.
[305] *Ibid*.
[306] Carlo Bonini, Guantanamo. USA, viaggio nella prigione del terrore (Einaudi, 2004) 21–33.
[307] *Ibid, 29*.
[308] Full text available at: https://home.army.mil/carson/7216/5089/9342/article-32-guide.pdf.

over the types of offenses that can be prosecuted[309]. This extensive body of rules essentially rewrites the principles of due process, significantly altering its balance and safeguards. Specifically, the executive branch is entrusted with exclusive powers over criminal prosecution, the enforcement of sentences (both custodial and capital), and any potential decision to review a judgment, which, by law, is not subject to appeal[310]. The Department of Defense has established a review commission to serve as a court of second instance; however, its members are individually appointed by the President[311]. Moreover, if the accused rejects the defense counsel assigned by the military, they may hire a civilian attorney. However, the civilian attorney (as well as the press) must leave the courtroom whenever classified information designated as secret defense is presented[312]. The evidentiary standards are equally striking: evidence is admissible as long as it is deemed "convincing to a reasonable person[313]." This constitutes an extraordinary code of criminal procedure rules specifically designed and written for enemy combatants.

The final point of our analysis remains to be addressed concerning the non-application of norms and principles established at the international level. Evidence of the considerable challenge faced by the U.S. administration in addressing the application of international law to the Guantánamo context emerges from two memoranda specifically drafted to interpret the Geneva Convention's applicability. The first memorandum, prepared by Alberto R. Gonzales and addressed to President Bush (previously discussed), advocated disregarding international rules. The second[314], written in response to the first, was signed by Secretary of State Colin L. Powell and addressed to both Alberto R. Gonzales and Condoleezza Rice (National Security Advisor), presenting a well-reasoned argument in support of adherence to international norms. Concerning the initial memorandum from Gonzales, as previously mentioned, it advised against the application of the Convention, asserting that this decision rested solely with the President's constitutional authority powers. In contrast, Powell's memorandum advocates for the application of the Convention to all detainees at Guantánamo Bay. It underscores that the United States has never concluded that the Conventions are inapplicable in armed conflicts involving U.S. military personnel[315]. Powell contended that adhering to the Conventions would help ensure that American soldiers captured in conflict are treated as prisoners of war, while

[309] Full text available at: https://www.mc.mil/Portals/0/milcominstno2.pdf
[310]Tommaso Frosini, "Lo stato di diritto si è fermato a Guantánamo" https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_20032010/materiali/anticipazioni/guantanamo_frosini/index.html#sdfootnote21anc.
[311] *Ibid*.
[312] *Ibid*.
[313]Ronald Dworkin, "The Threat to Patriotism" *The New York Review of Books* (28 February 2002) https://www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/.
[314] Full text available in the appendix of Michael Ratner and Ellen Ray, Prigionieri di Guantanamo. Quello che il mondo deve sapere (Nuovi Mondi, 1st edn, 2005).
[315] Full text available in the appendix of Michael Ratner and Ellen Ray, Prigionieri di Guantanamo. Quello che il mondo deve sapere (Nuovi Mondi, 1st edn, 2005).

also reducing legal challenges to detentions, "projecting a positive image internationally" and "preserving the credibility and moral authority of the United States[316]." Powell concluded with the following recommendation directed at Gonzales: "I hope you will reconsider the position outlined in the memorandum in light of these considerations, which, in my view, will help the President understand the options available and their consequences[317]."

The non-compliance with international legal principles represents a significant concern in the Guantanamo case. The Third Geneva Convention of August 12, 1949, explicitly delineates the rights and protections afforded to prisoners of war. Articles 4 and 5 specify the criteria for establishing prisoner-of-war status and mandate that any uncertainties regarding such status must be adjudicated by a competent tribunal. Nonetheless, the U.S. government contends that there is no requirement for judicial review to ascertain the status of individuals at Guantanamo detainees[318]. This position has been contested by the International Committee of the Red Cross, Amnesty International, Human Rights Watch, and various legal scholars, who underscore the significance of judicial oversight. The discourse regarding adherence to international norms highlights the more extensive legal and ethical questions pertaining to Guantanamo detainees, which will be further analyzed in light of U.S. Supreme Court rulings in the subsequent section.

2.2 The Suspension Clause and Its Challenges in the War on Terror[319]

As previously articulated, following the terrorist attacks of September 11, the treatment of individuals captured in Afghanistan was determined solely by President Bush, in accordance with the war powers delegated to him by Congress through a resolution authorizing the use of armed force. The head of the executive branch contended that the offenses ascribed to the alleged terrorists represented a substantial threat to national security, thereby rationalizing both the exclusion of jurisdiction from United States civil and military courts and the alteration of the standards and procedural safeguards ordinarily enforced within the nation. Considering all these factors, it becomes evident why certain detainees at Guantanamo felt compelled to submit appeals to the Federal Courts, assisted by relatives, friends, or civil rights organizations, invoking the writ of habeas corpus[320] and

[316] *Ibid*.
[317] *Ibid*.
[318] Irini Papanicolopulu and Tullio Scovazzi, *Conflitti armati e situazioni di emergenza: la risposta del diritto internazionale* (Giuffrè Editore, 2007) 30.
[319] Davide Bacis, 'Bad dudes a Guantanamo: promesse elettorali che andrebbero disattese' (9 February 2018) *DPCE Online* https://www.dpceonline.it/index.php/dpceonline/announcement/view/79.
[320] As stated in "Habeas Corpus," Legal Information Institute, Cornell Law School (https://www.law.cornell.edu/wex/habeas_corpus): Habeas corpus, Latin for "that you have the body," is a writ used in the U.S. federal court system to determine the validity of a state's detention of a prisoner. It allows a prisoner or other detainee, such as an institutionalized mental patient, to be brought before a court to assess whether their imprisonment or

asserting their right to an impartial and independent judicial determination regarding the legitimacy of their detentions. In this context, it is also important to note that, during an initial phase, the majority of federal courts dismissed the habeas corpus petitions filed, justifying their decisions by citing the judges' lack of jurisdiction due to the non-American nationality of the detainees and the extraterritorial nature of the detention facility situated outside the state's borders. Consequently, the petitions presented were declared inadmissible by the Court of Appeals for the Ninth Circuit in 2002, which ruled that the petitioners lacked the standing to file habeas corpus petitions on behalf of individuals unknown to them[321]. Subsequently, the group of petitioners appealed to the Supreme Court, which, in May 2003, issued a ruling stating that "the petition for a writ of certiorari is denied[322]." A second petition was submitted by the relatives of certain prisoners who appealed to the Court of Appeals for the District of Columbia Circuit. The Court subsequently rejected the petition, citing the Supreme Court's earlier decision in *Johnson v. Eisentrager* (1950)[323]. In that case, the Supreme Court ruled that United States courts lack jurisdiction over habeas corpus petitions filed by individuals associated with German intelligence services. These individuals were accused of espionage during World War II, arrested and convicted in China by U.S. authorities, and later detained at the American military facility in Landsberg am Lech[324]. The Court concluded that "nothing in the laws of the United States acknowledges the authority of foreigners captured abroad to seek the review of habeas corpus rights[325]." A pivotal development occurred in 2003, when the Supreme Court affirmed the admissibility of the habeas corpus petition of certain Guantanamo prisoners[326]. The rulings promulgated in 2004 elucidated two fundamental issues related to detention Guantanamo:

i. The territorial status of the Guantanamo base, the law governing imprisonment, and the jurisdiction of the courts over potential petitions.
ii. The limitations on fundamental rights permitted within a democratic system in light of the alleged culpability of terrorism.

---

detention is lawful. A habeas petition proceeds as a civil action against the State agent, typically a warden, responsible for holding the defendant in custody. The writ can also be used to examine extradition processes, the amount of bail, and the jurisdiction of the court. Its sources include the Constitution, statutory law, and case law, with the Suspension Clause of the Constitution (Article I, Section 9, Clause 2) providing key constitutional grounding.

[321] Tommaso Frosini, "Lo stato di diritto si è fermato a Guantánamo" https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_20032010/materiali/anticipazioni/guantanamo_frosini/index.html#sdfootnote21anc.

[322] Ibid.

[323] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[324] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[325] *Ibid*.

[326] Helen Keller and Magdalena Forowicz, "A New Era for the Supreme Court After *Hamdan v Rumsfeld*?" (2007) 67(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 3 https://www.zaoerv.de/67_2007/67_2007_1_a_1_42.pdf.

2.2.1 *Rasul v. Bush (2004)*: Redefining Access to Justice for Non-Citizens

With regard to the initial point, discussed in the rulings of *Rasul et al. v. Bush*[327], the Court recognizes that the Guantanamo detention camp, despite its location on non-U.S. territory and its formal designation under Cuban sovereignty, remains subject to full U.S. jurisdiction in accordance with the Treaty. Consequently, the Court affirms the applicability of U.S. law and the federal habeas corpus statute, thereby dismissing the *Eisentrager* case as an authoritative precedent, which judges have referenced to reject the petitions of detainees[328].

The case of *Rasul v. Bush* drew upon several key precedents to address the question of habeas corpus jurisdiction, illustrating a nuanced legal evolution in the interpretation of territorial and custodial requirements. As previously cited, *Johnson v. Eisentrager* serves as a precedent regarding the jurisdictional limits of habeas corpus. Another significant precedent, *Ahrens v. Clark (1948)*[329], established the principle of territorial limitations for habeas corpus petitions. In this case, the Supreme Court construed the phrase "within their respective jurisdictions" in the federal habeas corpus statute to indicate that the petitioner must be physically present within the territorial jurisdiction of the district court. This territorial requirement was initially employed to justify the dismissal of habeas corpus petitions from detainees at Guantanamo, as the detention center was situated outside the territorial boundaries of the United States. Conversely, *Braden v. 30th Judicial Circuit Court of Kentucky (1973)*[330] presented a more flexible interpretation of jurisdiction. The Court in Braden determined that the writ of habeas corpus does not operate on the petitioner but rather on the custodian purportedly holding the individual unlawfully. This interpretation permitted jurisdiction as long as the custodian could be reached through service of process, irrespective of the petitioner's physical location. The Braden ruling provided a means for challenging the restrictive territorial limits established in Ahrens, thereby enabling the Rasul petitioners to assert the applicability of habeas corpus to detainees held at Guantanamo Bay. In relation to the second point, the Court unequivocally asserts that "*enemy combatants*," a classification established by the government to delineate the subjects of the Presidential Order, retain the entitlement to procedural safeguards, including the right to an impartial and independent judge to assess the legality of their detention. The reasoning underlying the Court's conclusion is fundamentally based on the assertion of the Constitution's universal applicability, which cannot be rendered inoperative, even in times of warfare or within the specific context characterized by the struggle against terrorism. The Supreme Court indicates, in no

[327] *Rasul v Bush*, 542 U.S. 466 (2004).
[328] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
[329] *Ahrens v Clark*, 335 U.S. 188 (1948).
[330] *Braden v 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

uncertain terms, that the President, in exercising the extraordinary powers conferred subsequent to the terrorist attacks, must continue to comply with constitutional stipulations and international regulations concerning armed conflicts, as codified in treaties ratified by the United States, which cannot be disregarded under any circumstances. By referencing Articles 4 and 5 of the Third Geneva Convention[331], the Court thus underscores the necessity for intervention, even in the context of non-traditional armed conflicts, by a competent tribunal to assess the status of captured individuals and determine their eligibility for the protections afforded by the Convention itself. Furthermore, the Court identifies the specific circumstances under which individual rights may be restricted in the interest of national security. These restrictions must, where feasible, uphold the right to a fair trial. Nonetheless, in exceptional circumstances, such as during wartime or in the context of counter-terrorism efforts, certain limitations on individual rights may be permissible[332]. In spite of these restrictions, there exist minimum standards, referred to as "core rights," which must be consistently maintained. These rights encompass the right to be informed of the charges levied against oneself, the opportunity to contest those charges in a legal proceeding, and the right to legal representation before an independent and impartial tribunal. The Court, having disregarded the compliance of the 2001 Presidential Order with the aforementioned requirements, determined that it cannot deny the petitioners a review of their detention. As Guantanamo lacks a competent tribunal, any federal court, as part of the judiciary of the United States, may be deemed competent to adjudicate the habeas corpus petitions of the detainees, according to the Supreme Court. Overall, the ruling was profoundly divisive, with three justices, Antonin Scalia, William Rehnquist, and Clarence Thomas, expressing strong dissent. Their objections centered around the assertion that the Court's decision contradicted well-established precedent, improperly extended judicial reach, and interfered with the executive's authority in wartime[333]. Justice Scalia, articulating the dissenting opinion, posited that the majority had irresponsibly overturned settled law, particularly the precedent established in *Johnson v. Eisentrager (1950).* In Eisentrager, the Court had ruled that enemy aliens detained outside U.S. sovereign territory were not entitled to habeas corpus rights in U.S. courts. Scalia argued that Rasul directly contradicted this precedent, effectively granting judicial review to detainees who, under previous rulings, would have been beyond the jurisdiction of U.S. courts. He criticized the majority for expanding habeas rights in a manner that neglected long-standing limitations on the extraterritorial application of constitutional protections. Beyond its departure from precedent, the dissent regarded

[331] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, Articles 4 and 5, 75 UNTS 135.
[332] Tommaso Frosini, "Lo stato di diritto si è fermato a Guantánamo" https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/anticipazioni/guantanamo_frosini/index.html#sdfootnote21anc.
[333] *Rasul v Bush*, 542 US 466 (2004).

the ruling as a perilous judicial encroachment into realms traditionally reserved for the executive and legislative branches. Scalia underscored that the military had relied on Eisentrager as settled law in its treatment of wartime detainees and that, by granting access to U.S. courts, the Supreme Court was undermining the government's ability to execute military operations. He contended that decisions regarding the legal status of detainees and their access to judicial review ought to be determined by Congress, rather than being imposed by the judiciary. By asserting control over these matters, the Court was, in his estimation, exceeding its constitutional role and disrupting the balance of powers.
Scalia additionally raised concerns regarding the practical implications of the decision. He cautioned that permitting Guantánamo detainees to file habeas petitions would pave the way for an overwhelming number of lawsuits from enemy combatants, potentially overburdening the judicial system and obstructing national security efforts. In his evaluation, the ruling engendered uncertainty in an area where clarity and deference to executive authority were essential. He concluded his dissent with a pointed critique of the majority's reasoning, arguing that the reinterpretation of habeas jurisdiction was legally flawed and would have lingering consequences for U.S. counterterrorism policy.

The dissenting opinions in *Rasul v. Bush* illustrate that the ruling was far from a straightforward, uncontested expansion of habeas rights. Rather, it embodied a fundamental tension between national security concerns and constitutional protections, revealing deep divisions within the Court. While the majority regarded judicial oversight as crucial to upholding the rule of law, the dissent perceived it as an overreach that threatened to diminish executive authority in wartime. This judicial division underscored the broader legal and political debates that would persist in the years following the decision, shaping the evolving landscape of detainee rights in the War on Terror.

2.2.2 *Hamdi v. Rumsfeld (2004)*: Balancing National Security and Individual Liberties

Another focal Supreme Court case is *Hamdi v. Rumsfeld (2004)*[334], which explored the tension between national security and the constitutional rights of citizens. Unlike *Rasul v. Bush*, which examined the habeas corpus rights of non-citizens detained at Guantánamo Bay, the case of Hamdi involved a U.S. citizen designated as an "enemy combatant." This distinction is of paramount importance, as *Hamdi* lies outside the primary focus of this thesis, which investigates the disparate treatment of citizens versus non-citizens in the context of national security. Nonetheless, the ruling remains pertinent in demonstrating how the Supreme Court endeavored to reconcile executive

[334] *Hamdi v Rumsfeld,* 542 US 507 (2004).

authority with individual rights, even in circumstances where national security concerns were of utmost significance.

This case centred on Yasser Hamdi; a U.S. citizen detained as an "enemy combatant" based on allegations of supporting the Taliban regime. Hamdi was held without trial and denied access to legal counsel, raising significant questions about the limits of executive power and the applicability of the Fifth Amendment's due process guarantees to U.S. citizens classified as enemy combatants[335]. The Court's decision emphasized the primacy of citizenship in safeguarding individual rights. In a 6-3 ruling, the Court declared that the government cannot indefinitely detain a U.S. citizen without affording basic due process protections, including the right to challenge the grounds of their detention before a neutral decision-maker. While the Authorization for the Use of Military Force (AUMF) provided a statutory basis for the detention of enemy combatants, the ruling underscored that due process remains inviolable, even during periods of national crisis. The Court's assertion that "it is during our most challenging moments that our commitment to due process is most severely tested" reflects the enduring importance of constitutional principles in balancing liberty and security[336]. In its reasoning, the Court rejected the executive branch's argument for broad discretion in detention matters, highlighting the judiciary's crucial role in upholding the rule of law. The ruling affirmed that habeas corpus, the "Great Writ", ensures judicial oversight over executive actions, particularly when they infringe upon fundamental rights[337]. Although the Court acknowledged the government's national security concerns, it maintained that even in wartime, citizens must retain the ability to contest executive decisions that strip them of liberty, thereby reaffirming the precedence of citizenship over the designation of "enemy combatant." This decision marked a significant limitation on executive authority, reinforcing the importance of judicial review in maintaining the delicate balance of governance. Although Hamdi v. Rumsfeld does not directly relate to the central focus of this thesis, which examines the legal divide between citizens and non-citizens, it nonetheless underscores the judiciary's commitment to upholding constitutional safeguards, even amidst national security pressures. In contrast to Rasul v. Bush, where the Court expanded habeas protections to non-citizens, Hamdi reinforced the notion that citizenship offers a more robust defence against executive overreach, reaffirming the fundamental distinction in how the U.S. legal system treats citizens versus non-citizens in the context of national security.

[335] *Hamdi v Rumsfeld*, 542 US 507 (2004).
[336] *Hamdi v Rumsfeld*, 542 US 507 (2004).
[337] *Ibid*.

2.2.3 The Combatant Status Review Tribunals

The United States government responded to these Court rulings by establishing the *Combatant Status Review Tribunals* (July 7, 2004)[338], review bodies in which suspected terrorists awaiting trial could challenge their designation as enemy combatants. These tribunals, henceforth referred to as CSRT, aimed to address the procedural deficiencies identified in previous adjudications, thus offering detainees restricted avenues to contest their designation as "enemy combatants." For detainees identified as non-enemy combatants, the policy stipulates their transfer to their country of citizenship or their release in a manner that aligns with both domestic and international obligations, as well as U.S. foreign policy.[339] The CSRT process confirmed the status of at least 520 individuals as enemy combatants, and all new detainees sent to Guantánamo were required to undergo a CSRT hearing[340]. However, Combatant Status Review Tribunals (CSRTs) were constrained in their scope. They lacked the authority to ascertain whether an enemy combatant was considered "lawful" or "unlawful" under the law of war, which is a crucial distinction for the jurisdiction of military commissions. This limitation prompted two military commission judges to conclude that the determinations made by CSRTs were inadequate as a foundation for military commission jurisdiction, necessitating that the commissions themselves conduct independent assessments of unlawful enemy combatant status prior to assuming cases jurisdiction[341]. CSRTs functioned as administrative, rather than adversarial, proceedings. Each detainee was afforded an opportunity to present "reasonably available" evidence and witnesses to a panel of three commissioned officers to argue that they did not meet the definition of an enemy combatant[342]. The term "enemy combatant" was broadly defined to include individuals who were members of or provided support to Taliban or al Qaeda forces or associated entities engaged in hostilities against the United States or its coalition partners, this definition also extended to individuals who had committed belligerent acts or directly supported hostilities[343]. Detainees were represented in these proceedings by military officers who were not part of the Judge Advocate

[338] Department of Defense, *Memorandum for the Secretary of the Navy* (7 July 2004) 'Order Establishing Combatant Status Review Tribunal' https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.
[339] Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.
[340] Josh White and Shailagh Murray, "Guantanamo Ruling Renews the Debate Over Detainees" *The Washington Post* (6 June 2007) A3.

[342] Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.
[343] Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.

General (JAG) Corps[344].They had the option to participate in their hearings or remain silent[345]. Notably, the tribunals were not bound by the traditional rules of evidence that govern judicial proceedings, and the government's evidence was presumed to be "genuine and accurate[346]." Nevertheless, the government was required to provide the tribunal with all relevant evidence, including evidence that might negate the detainee's designation as an enemy combatant[347].

CSRTs were tasked with assessing, "to the extent practicable," whether statements made by or about the detainee had been obtained through coercion and determining the probative value, if any, of such statements[348]. While the detainee's personal representative was allowed to view classified evidence and offer comments to the tribunal to assist in its determinations, they did not act as advocates for the detainee's interests[349]. If the tribunal determined that the evidence did not meet the required standard to justify the detainee's continued designation as an enemy combatant, and if this determination was approved through the chain of command, the detainee would be notified of the decision once transportation arrangements were finalized or earlier if deemed appropriate by the task force commander[350]. In March 2002, the Department of Defense introduced a parallel process for periodically reviewing the status of detainees[351]. This review process, similar to the CSRT framework, allowed Guantánamo detainees to present information to a review board on an annual basis during ongoing hostilities to argue that they no longer posed a threat or that it was in the interest of the United States and its allies to release them[352]. If new information affecting a detainee's classification as an enemy combatant emerged, a new CSRT could be convened under the same procedures[353]. In such cases, detainees' countries of nationality could, subject to national security considerations, submit information on their behalf[354]. The Combatant Status Review Tribunals (CSRTs) were intentionally designed to offer a procedural framework through which detainees could

---

[344] The Judge Advocate General's Corps (JAG or JAG Corps) functions as the military justice branch or legal specialty of the United States Air Force, Army, Coast Guard, Marine Corps, and Navy. Officers within the JAG Corps are commonly referred to as judge advocates. Judge advocates handle various legal areas, including administrative law, government contracting, civilian and military personnel law, the law of war, international relations, and environmental law. They also act as prosecutors in courts-martial proceedings within the military.

[345] Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.

[346] *Ibid*.

[347] *Ibid, para-G (8)*

[348] Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.

[349] *Ibid, para-H (7)*

[350] Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.

[351] US Department of Defense, "DoD Announces Draft Detainee Review Policy" (3 March 2004) http://www.defenselink.mil/releases/2004/nr20040303-0403.html.

[352] *Ibid*

[353] US Department of Defense, "DoD Announces Draft Detainee Review Policy" (3 March 2004) http://www.defenselink.mil/releases/2004/nr20040303-0403.html.

[354] *Ibid*.

contest their designations as enemy combatants. However, the administrative characteristics of these tribunals, coupled with their inadequate procedural safeguards, prompted considerable criticism. The presumption that the government's evidence was infallible, the exclusion of conventional legal representation, and the tribunal's lack of jurisdiction to determine unlawful combatant status underscored the inherent limitations of the CSRT process as a replacement for judicial review. These deficiencies will subsequently be examined in future legal challenges, culminating in landmark decisions such as Boumediene v. Bush, which will be analyzed in Chapter 2.3.

The legal landscape following key Supreme Court decisions such as *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004), coupled with the establishment of Combatant Status Review Tribunals (CSRTs), underscored significant procedural and legal challenges in balancing detainee rights with national security concerns. In response to these challenges and growing scrutiny over the treatment of detainees in U.S. custody, Congress enacted the Detainee Treatment Act of 2005 (DTA)[355] to provide clearer guidelines and safeguards for detainee handling.

2.2.4 The Detainee Treatment Act of 2005 (DTA)

The Detainee Treatment Act of 2005 (DTA) was enacted in response to growing concerns about the treatment of detainees in U.S. custody and to address legal ambiguities that arose following the Supreme Court's decision in *Rasul v. Bush* (2004). The Act mandated uniform standards for the interrogation of individuals held by the Department of Defense and explicitly prohibited cruel, inhuman, or degrading treatment of detainees under the control of any U.S. agency[356]. This prohibition aligned with the U.S. Constitution's Fifth, Eighth, and Fourteenth Amendments, as interpreted by the Senate in its understanding of the U.N. Convention Against Torture's ban on cruel treatment. Despite its clear stance on prohibiting inhumane treatment, the DTA included significant limitations: it did not create a legal cause of action for detainees to challenge inconsistent treatment in court, nor did it allow judicial challenges related to the conditions of detention at Guantánamo Bay[357]. The DTA also offered legal protections to U.S. officials, providing a defense against lawsuits or prosecutions arising from the treatment or interrogation of detainees[358]. This provision appears to have been a compromise, as reports suggest that the Bush Administration initially sought to exempt

[355] Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2680 (2005), as amended through Pub L No 111-84, 123 Stat 2190 (2009). Full text available at: https://www.govinfo.gov/content/pkg/COMPS-489/pdf/COMPS-489.pdf.
[356] 42 USC § 2000dd (Chapter 21D: Prohibition of Torture)
[357] Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.
[358] Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2680 (2005), as amended through Pub L No 111-84, 123 Stat 2190 (2009). Full text available at: https://www.govinfo.gov/content/pkg/COMPS-489/pdf/COMPS-489.pdf.f

the Central Intelligence Agency (CIA) from the prohibition on cruel treatment. The Administration argued that the President required "maximum flexibility" to address the unique challenges posed by the global war on terrorism[359].While the Act ultimately did not carve out such an exception, the inclusion of legal defenses underscored the tension between executive discretion and legislative efforts to ensure accountability. A key component of the DTA was the "Graham-Levin Amendment[360]," which required the Department of Defense to submit procedural rules for determining detainees' status to the Armed Services and Judiciary Committees of Congress[361]. Although the amendment neither mandated nor authorized formal status determinations, it required that Congress be notified 30 days before implementing any changes to these rules[362]. Originally, the amendment sought to exclude evidence obtained through coercion from status determinations, but the final version adopted less stringent language. Instead, it required tribunals or boards to assess, "to the extent practicable," whether a detainee's statements were coerced and to evaluate the probative value of such statements[363]. Another significant aspect of the Graham-Levin Amendment was its elimination of federal courts' statutory jurisdiction over habeas corpus petitions filed by noncitizens detained at Guantánamo Bay[364]. This provision, however, allowed limited appeals of status determinations made through Combatant Status Review Tribunals (CSRTs). In the case of Boumediene v. Bush (2008), which will be analyzed comprehensively in Chapter 2.3, the Supreme Court deemed unconstitutional the provision that eliminated habeas corpus jurisdiction, asserting that it contravened the Suspension Clause[365]. While the Court observed that the appellate process established by the Detainee Treatment Act (DTA) "remains intact," it determined that this procedure does not serve as a sufficient alternative to habeas corpus review. Subsequently, the District of Columbia Circuit concluded that the DTA's appellate process was no longer relevant, thereby designating habeas corpus petitions as the exclusive means for detainees to pursue judicial review of their circumstance's detention[366]. In addition to addressing habeas corpus jurisdiction, the DTA provided a framework for appeals of military commission sentences to the District of Columbia Circuit Court of Appeals. Under the Act, the Court was required to review sentences in capital cases

---

[359] Eric Schmitt, "Exception Sought in Detainee Abuse Ban" *The New York Times* (25 October 2005) https://www.nytimes.com/2005/10/25/us/exception-sought-in-detainee-abuse-ban.html.
[360] Full text available at: https://www.justice.gov/sites/default/files/ola/legacy/2009/08/07/072309-amend-s1390-defense-auth-act-fy-2010.pdf
[361] *Ibid*.
[362]Human Rights Watch, "Supplemental Submission to the Committee Against Torture" (3 May 2006) https://www.hrw.org/news/2006/05/03/human-rights-watch-supplemental-submission-committee-against-torture.
[363] Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.
[364] *Ibid*.
[365] *Boumediene v Bush*, 553 U.S. 723 (2008).
[366] Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.

or those involving imprisonment terms of ten years or more, while cases with lesser sentences were subject to discretionary review[367]. The parameters of appellate review were narrowly tailored, focusing on whether the military commission's decision to procedural standards that align with Military Commission Order No. 1, which executed President Bush's previous Military Order, and whether such standards were congruent with relevant U.S. constitutional and statutory law.

Section 1005(e) of the DTA amended 28 U.S.C. § 2241[368], explicitly removing jurisdiction from any federal court to hear habeas corpus petitions filed by or on behalf of aliens detained at Guantanamo Bay. Additionally, the DTA granted the D.C. Court of Appeals exclusive jurisdiction to review decisions made by the Combatant Status Review Tribunals (CSRTs). However, the legality and procedural fairness of these commissions were soon challenged, culminating in the landmark case *Hamdan v. Rumsfeld (2006)*[369].

2.2.5 *Hamdan v. Rumsfeld (2006)*: Executive Power and the Limits of Military Tribunals

Salim Ahmed Hamdan, a Yemeni national, previously served as the driver for Osama bin Laden. Hamdan challenged the authority of the Bush administration to prosecute him before a military commission that was established without explicit approval from Congress. The Supreme Court ruled in favor of Hamdan, holding that the administration lacked the constitutional authority to unilaterally create such commissions[370]. The Court emphasized that these tribunals violated the Uniform Code of Military Justice (UCMJ)[371] and Article 3 of the Geneva Conventions[372], which require trials to be conducted by "regularly constituted courts" that provide essential judicial guarantees. By bypassing Congress, the administration exceeded its powers, undermining both domestic and international legal norms. Justice Stevens, articulating the majority opinion, emphasized that Common Article 3 of the Geneva Conventions is applicable to conflicts involving non-state actors, such as al-Qaeda[373].
This ruling reaffirmed that even detainees apprehended in such circumstances are entitled to essential judicial protections, illustrating the Court's increasing incorporation of international humanitarian law within U.S. jurisprudence. The Court explicitly held that the provisions of Common Article 3, especially the prohibition on sentencing and executing individuals without the judgment of a

[367] Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2680.
[368] Full text available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-1999-title28-section2241&num=0&edition=1999.
[369] *Hamdan v Rumsfeld*, 548 US 557 (2006).
[370] *Ibid*.
[371] Full text available at: https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter47&edition=prelim
[372] Full text available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf
[373] *Hamdan v Rumsfeld*, 548 US 557 (2006).

"regularly constituted court" offering the judicial guarantees recognized by civilized societies, can be enforced through habeas corpus petitions. This ruling established that detainees detained at Guantánamo Bay possess the right to invoke these protections within the federal judiciary.

The Hamdan ruling marked a significant departure from the Court's traditional deference to executive wartime decisions, signaling a reassertion of constitutional checks and balances.[374] By determining that congressional authorization is a prerequisite for the establishment of military commissions, the Court has reaffirmed the essential role of the legislative branch in the context of war powers. This cautious approach effectively curtails any implicit authorizations that might lead to an unchecked expansion of executive authority. Furthermore, the ruling underscored the judiciary's pivotal role in safeguarding the rule of law, even amidst national crises. As the Court articulated, the exigencies of military necessity cannot, by themselves, serve as a justification for the creation of tribunals that are at odds with constitutional principles and international obligations[375]. This decision addressed the constitutionality of military commissions established by the Bush administration, determining that such tribunals were unconstitutional in the absence of explicit congressional authorization. The Supreme Court concluded that these commissions contravened the Uniform Code of Military Justice (UCMJ) as well as Common Article 3 of the Geneva Conventions, which dictate specific judicial guarantees for detainees. The Court elucidated that the President lacks unilateral authority to establish military commissions and underscored the necessity for consistency between the procedures of military commissions and those regulating courts-martial. Moreover, the Court affirmed that Common Article 3 extends to conflicts involving non-state actors, thereby necessitating compliance with international humanitarian law standards in these situations.

Subsequent to this case, the government allocated exclusive jurisdiction to the District of Columbia Circuit Court of Appeals for the review of both the decisions rendered by the Combatant Status Review Tribunals (CSRTs) and those made by the military commissions.

2.2.6 The Adoption of The Military Commisons Act (MCA)

This condemnation prompted the government to swiftly adopt the Military Commissions Act (MCA) 72 in October 2006, which aimed to align the military commissions with the Supreme Court's mandates. However, it explicitly denied Guantanamo's enemy combatants the right to habeas corpus,

---

[374] Helen Keller and Magdalena Forowicz, "A New Era for the Supreme Court After *Hamdan v Rumsfeld*?" (2007) 67(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 1–42 https://www.zaoerv.de/67_2007/67_2007_1_a_1_42.pdf.

[375] *Helen Keller and Magdalena Forowicz, "A New Era for the Supreme Court After Hamdan v Rumsfeld?" (2007) 67(1) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) https://www.zaoerv.de/67_2007/67_2007_1_a_1_42.pdf, 30.*

even if their status had not yet been determined (Section 7)[376]. Furthermore, Section 5 of the Act addressed the applicability of the Geneva Conventions, stipulating that neither the Conventions nor their Additional Protocols could be invoked in habeas corpus proceedings before U.S. courts to claim individual rights[377]. Section 7 of the MCA was later reviewed by the Supreme Court in its landmark ruling on June 12, 2008, in *Boumediene et al. v. Bush, President of the United States et al*.[378] This case, which will be discussed in chapter 2.3, is noteworthy as the Court reiterated and expanded its views on the matter, emphasizing the relationship between the protection of fundamental rights and liberties against the arbitrary exercise of power and the safeguarding of another equally essential principle in a democratic framework: the separation of powers. According to the Supreme Court, this principle is guaranteed by the inalienability of habeas corpus. In this manner, the Supreme Court dismissed the government's assertion that Guantanamo Bay continues to be under Cuba's formal sovereignty, a stance the Court regarded as erroneous. Furthermore, it distanced itself from the conclusions drawn in the *Eisentrager* case, which it deemed inapplicable to the present circumstances. The Court concluded that the review mechanisms established under the Detainee Treatment Act[379] were insufficient to rectify the illegality of suspending the writ of habeas corpus and reaffirmed the federal courts' jurisdiction to assess the legality of detainees' imprisonment. While underscoring the importance of preserving the separation of powers, the Court recognized the necessity for judicial restraint in matters concerning the executive branch's role in safeguarding national security and addressing terrorism. Nevertheless, it directed federal judges to dismiss habeas corpus petitions unless detainees had first utilised the procedures explicitly outlined in government regulations. Exceptions were made for cases of unreasonable delay that infringed upon the detainee's right to be informed of the charges against them and to contest their detention. In instances where a case reaches a federal court due to the exhaustion of these specialised procedures, the Court advised judges to strike a balance, avoiding excessive interference with military justice while ensuring that detainees' rights are not diminished. The Court further emphasised that the responsibilities of institutions tasked with ensuring national security, such as intelligence agencies and the military, must be balanced with the obligation to uphold fundamental individual rights. It affirmed that, within a democratic framework, individual liberty and national security are not mutually exclusive; rather, they can and must coexist through adherence to the law and the Constitution, which remain fully applicable even in times of crisis or exceptional circumstances.

[376] Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600, s 7
[377] *Ibid, s 5*
[378] *Boumediene v Bush,* 553 US 723 (2007).
[379] Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2680.

2.3 Due Process of law in the Context of Post-9/11 Detentions[380]

In Chapter 2.2, the focus was primarily on the challenges to habeas corpus in the context of post-9/11 detentions, touching upon related mechanisms such as military commissions and Combatant Status Review Tribunals (CSRTs). These mechanisms, while introduced as tools to address national security concerns, have raised profound questions about their compatibility with the due process guarantees enshrined in U.S. constitutional law. In this section, I will delve more deeply into the operation and legal implications of these mechanisms, exploring how they represent significant deviations from traditional judicial processes. The two pivotal Supreme Court cases that illuminate these challenges, Hamdan v. Rumsfeld (2006) and Boumediene v. Bush (2008), will be analyzed to demonstrate how the judiciary addressed the tension between national security imperatives and the fundamental principles of due process.

The Combatant Status Review Tribunals (CSRTs) were administrative mechanisms established by the U.S. Department of Defense in 2004 to determine whether individuals detained at Guantánamo Bay qualified as "enemy combatants." These tribunals emerged in response to growing judicial scrutiny, particularly following the Supreme Court's decision in *Rasul v. Bush* (2004), which, as discussed in Chapter 2.2, affirmed that Guantánamo detainees had the right to challenge the legality of their detention under federal habeas corpus statutes. The CSRTs aimed to provide a process for detainees to contest their designation as enemy combatants but operated outside the traditional judicial system, raising significant concerns about procedural fairness and adherence to constitutional principles[381]. The CSRTs were distinct from other legal mechanisms, such as courts-martial or traditional prisoner-of-war (POW) determinations under the Third Geneva Convention. Unlike POW determinations, which involve a robust analysis of the detainee's rights under international humanitarian law, the CSRTs were designed to classify detainees as enemy combatants based on limited evidentiary standards[382]. Critics have argued that this framework denied detainees the protections guaranteed by international law[383], particularly since the tribunals operated under the premise that groups like al Qaeda and the Taliban did not meet the criteria of lawful combatants under Article 4 of the Third Geneva Convention. As such, CSRTs were not competent to adjudicate POW status, focusing instead on confirming whether individuals fell within the broad category of enemy

[380] *In re Guantanamo Detainee Cases*, https://casetext.com/case/in-re-guantanamo-detainee-cases-3
[381] Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.
[382] Geoffrey Corn, Eric Talbot Jensen, and Sean Watts, "Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher" (11 April 2007) *Yale Law Journal Forum* https://www.yalelawjournal.org/forum/understanding-the-distinct-function-of-the-combatant-status-review-tribunals-a-response-to-blocher.
[383] *Ibid*.

combatants. Despite their stated purpose, the CSRTs faced widespread criticism for their lack of procedural safeguards. Detainees were not granted legal representation, and the tribunals relied heavily on classified evidence that was not disclosed to the detainee. Moreover, the burden of proof was effectively shifted onto the detainees, who were required to rebut the presumption of their enemy combatant status without access to meaningful resources[384]. These limitations led to significant challenges in upholding due process, ultimately prompting further judicial intervention, such as the Supreme Court's rulings in *Hamdan v. Rumsfeld* (2006) and *Boumediene v. Bush* (2008), which reaffirmed the judiciary's role in safeguarding fundamental rights against arbitrary executive actions.

2.3.1 The Role of Military Commissions and the Military Commissions Act of 2006: Legal Foundations and Controversies

Before turning to the landmark *Boumediene v. Bush* decision, it is essential to examine the role of military commissions in the post-9/11 legal framework and the significant legislative changes brought about by the Military Commissions Act of 2006. Understanding the nature and jurisdiction of military commissions, as well as the procedural rules established by the Act, provides critical context for the judicial challenges and constitutional questions addressed in *Boumediene*.

Following the congressional authorization to use military force in response to the terrorist attacks of September 11, 2001, President George W. Bush issued a Military Order (M.O.) authorizing the trial of non-citizens suspected of terrorism or related activities by military commissions[385]. The M.O. applied to individuals designated as subject to its provisions, including detainees at the U.S. Naval Station in Guantánamo Bay. President Bush determined that 20 detainees at Guantánamo fell under the scope of the M.O., with 10 ultimately charged for trial before military commissions[386]. The M.O. stipulated that individuals tried under this system would have no access to U.S. courts to appeal verdicts or seek other legal remedies. However, this restriction was effectively invalidated by the Supreme Court's 2004 decision in *Rasul v. Bush*[387]. As stated in chapter 2.2, Military Commissions are specialized courts established by military commanders during wartime to prosecute offenses under the law of war[388]. These tribunals have historically been used in situations such as martial law

[384]Geoffrey Corn, Eric Talbot Jensen, and Sean Watts, "Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher" (11 April 2007) *Yale Law Journal Forum* https://www.yalelawjournal.org/forum/understanding-the-distinct-function-of-the-combatant-status-review-tribunals-a-response-to-blocher..

[385] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, § 1(a), 66 Fed Reg 57,833 (16 November 2001) (hereinafter "M.O.").

[386] "Instructions for Military Commissions on Trying Aliens Charged with Terrorism" (2003) 97(3) The American Journal of International Law 706–709 https://doi.org/10.2307/3109868.

[387]Alberto R Gonzales, "Martial Justice, Full and Fair" *The New York Times* (30 November 2001) https://www.nytimes.com/2001/11/30/opinion/martial-justice-full-and-fair.html..

[388]Jennifer Elsea, "Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions" CRS Report RL31191 (11 December 2001).

or military occupation, where regular civil courts cannot function[389]. In past conflicts, military commissions applied the international law of war directly, rather than relying on domestic criminal statutes, unless such statutes explicitly reflected international legal norms[390]. Traditionally, the procedural rules governing military commissions mirrored those of courts-martial[391]. Statutory authority for these tribunals has long allowed them to prosecute individuals and offenses specified either by statute or by the law of war[392]. Military commissions have historically been used in contexts such as the U.S.-Mexico War, the Civil War, the Philippine Insurrection, and the occupation of Germany and Japan following World War II[393]. President Bush's Military Order establishing military commissions to try suspected terrorists sparked significant controversy both domestically and internationally. Critics argued that the tribunals could violate constitutional and international legal rights, thereby undermining the legitimacy of their verdicts. In response, the Bush Administration issued procedural rules for the tribunals, which were seen as an improvement over the original language of the M. O[394]. However, critics maintained that these safeguards were insufficient[395]. Concerns included the potential for indefinite detention without charges, as permitted under the original M. O[396]., and the Department of Defense's authority to continue detaining individuals cleared by military commissions[397]. Allegations from military prosecutors suggested that the commissions were rigged to secure convictions, though a Pentagon Inspector General investigation found no substantiation for these claims[398]. Congress did not address military commissions until after the Supreme Court's decision in *Rasul v. Bush*. As seen in the previous chapter, in December 2005, Congress passed the Detainee Treatment Act of 2005 (DTA), which did not formally authorize military commissions but amended Title 28 of the U.S. Code to eliminate judicial jurisdiction over habeas corpus claims by individuals detained as "enemy combatants". In *Hamdan v. Rumsfeld* (2006), the Supreme Court invalidated the military commission system established by the Military Order,

---

[389] *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).
[390] U.S. Army Field Manual (FM) 27-10, *The Law of Land Warfare*, sec. 505(e) (1956) (hereinafter "FM 27-10").
[391] William Winthrop, *Military Law and Precedents* (2nd edn, Government Printing Office 1920) 841–842 https://www.loc.gov/item/2011525304.
[392] *10 USC § 821*.
[393] David W Glazier, "Precedents Lost: The Neglected History of the Military Commission" (2005) 46(1) *Virginia Journal of International Law* 1, Fall https://papers.ssrn.com/sol3/papers.cfm?abstract_id=811045.
[394] Military Commission Order No. 1 ("M.C.O. No. 1"), reprinted in (2002) 41 *ILM* 725.
[395] American College of Trial Lawyers, "Supplemental Report on Military Commissions for the Trial of Terrorists" (October2005)http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2152.
[396] U.S. Department of State, "Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba" (Inter-American Commission on Human Rights, Organization of American States, 2002) 25.
[397] Jennifer K Elsea, "The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice" CRS Report RL31600 (25 September 2006).
[398] Neil A Lewis, "Two Prosecutors Faulted Trials for Detainees" *The New York Times* (1 August 2005) https://www.nytimes.com/2005/08/01/politics/two-prosecutors-faulted-trials-for-detainees.html.

ruling that while Congress had authorized the use of military commissions in principle, such tribunals were required to follow procedural rules closely aligned with those of courts-martial, as mandated by the Uniform Code of Military Justice (UCMJ)[399]. In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 (MCA). The MCA formally authorized the use of military commissions and established procedural rules that, while modeled on the UCMJ, diverged from it in significant ways[400]. The Act sought to provide a clearer statutory framework for military commissions, addressing the procedural deficiencies identified by the Supreme Court while balancing national security concerns and individual rights.

The Military Commissions Act of 2006 (MCA) granted the Secretary of Defense explicit authority to convene military commissions for prosecuting "alien unlawful enemy combatants." These commissions were designed to adjudicate cases involving individuals accused of engaging in hostilities or materially supporting hostilities against the United States or its allies. Unlike President Bush's earlier Military Order, which faced criticism for its overly expansive jurisdiction, the MCA aimed to narrow the scope of such tribunals. The original M.O. was broad enough to encompass non-citizens with no demonstrated connection to al Qaeda, the September 11 attacks, or acts of terrorism, as well as individuals whose actions fell outside the statutory or traditional scope of offenses triable by military commissions. By contrast, the MCA sought to formalize and codify jurisdiction, focusing on those who engaged in hostilities, purposefully supported hostilities, or were determined to be unlawful enemy combatants through a Combatant Status Review Tribunal (CSRT) or another competent tribunal established by the executive branch[401].

The Act defined an "unlawful enemy combatant" as either:

i. a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or.
ii. a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense[402].

[399] 10 USC § 801 et seq. The authority for military commissions is derived from 10 USC §§ 821 and 836.
[400] The MCA also amended the DTA to eliminate jurisdiction for pending habeas cases, Pub L No 109-366, § 7, but the Supreme Court held that provision to be unconstitutional, see: *Boumediene v Bush*, 553 U.S. 723 (2008).
[401] *Military Commissions Act of 2006*, Pub L No 109-366, 120 Stat 2600, codified at 10 U.S.C. §§ 948a–950t.
[402] 10 U.S.C. § 948a (1).

While this definition extended the scope of military commission jurisdiction to individuals providing material support for hostilities, it excluded U.S. citizens, who could not be tried by these commissions, though their detention was not explicitly barred[403]. Critics noted, however, that the MCA failed to define terms like "hostilities" or "supporting hostilities," leaving open the possibility of subjective interpretations. This lack of clarity raised questions about whether military commissions could try civilians or non-combatants, potentially conflicting with the longstanding judicial principle against subjecting civilians to military jurisdiction when regular courts are operational[404]. While aliens within the U.S. are generally entitled to the same protections in criminal trials as citizens, the MCA left unresolved constitutional concerns about applying military commission jurisdiction to permanent resident aliens[405]. The MCA also refined procedural rules, exempting military commissions from several Uniform Code of Military Justice (UCMJ) provisions, such as the right to a speedy trial and pretrial investigations. These exemptions, combined with the broad discretion granted to the executive branch in determining detainee status, drew significant criticism. Critics argued that the procedural safeguards remained inadequate to protect fundamental rights, raising questions about the fairness of trials conducted under the MCA. Importantly, the MCA revoked federal courts' jurisdiction to hear habeas corpus petitions from detainees classified as "unlawful enemy combatants." This provision directly conflicted with the constitutional guarantees of habeas corpus, setting the stage for the landmark Supreme Court decision in *Boumediene v. Bush* (2008), which invalidated the MCA's jurisdictional restrictions. The interplay between the MCA's legislative framework and the judiciary's response highlights the enduring tension between national security interests and the preservation of individual rights in the post-9/11 era. To facilitate the process, the Secretary delegated authority to a "convening authority," tasked with overseeing critical procedural and administrative duties, including accepting or rejecting charges, convening commissions, appointing personnel, approving plea agreements, and conducting post-trial reviews. One of the MCA's central features was its departure from the Uniform Code of Military Justice (UCMJ). While the MCA stated that its procedures were "based upon" those for general courts-martial, it exempted military commissions from adhering to several key UCMJ requirements, including speedy trials (Article 10), self-incrimination warnings (Article 31), and pretrial investigations (Article 32)[406]. Additionally, the MCA established Chapter 47A in Title 10 of the U.S. Code, expressly limiting the

[403] Human Rights Watch, "Briefing Paper on U.S. Military Commissions" (25 June 2003) 5 https://www.hrw.org/legacy/backgrounder/usa/military-commissions.pdf.
[404] Jennifer K Elsea, "Detention of American Citizens as Enemy Combatants" (31 March 2005) *Congressional Research Service* 57–58 https://sgp.fas.org/crs/natsec/RL31724.pdf..
[405] *Ibid, 5*.
[406] *10 U.S.C. §§ 810, 831, 832* (2022) (UCMJ arts 10, 31, 32).

binding authority of UCMJ interpretations on military commissions[407]. These changes were introduced to address the procedural issues identified in *Hamdan v. Rumsfeld* (2006), where the Supreme Court invalidated the earlier military commission framework for failing to comply with UCMJ standards[408].

While the MCA authorized military commissions to try various offenses under the law of war, including murder, terrorism, and material support for terrorism, some crimes raised legal questions. For instance, conspiracy and material support for terrorism lacked a clear basis in the traditional law of war, leading to criticism that their inclusion might violate established principles of international and domestic law[409]. Moreover, the MCA introduced procedural safeguards to reduce concerns about command influence over military commissions, prohibiting unlawful influence on commission members and counsel[410]. Despite these measures, concerns persisted regarding the broad discretion afforded to the convening authority, who held significant power over key aspects of the trial process, including charge approval and post-trial reviews[411]. In subsequent years, judicial and legislative developments would continue to address the limitations of the MCA, including revisions made in 2009 to strengthen procedural fairness and clarify the jurisdictional scope of military commissions. Nonetheless, the MCA of 2006 marked a critical effort by Congress to codify a framework for military commissions in response to legal challenges and the demands of national security policy. The MCA also did not clearly specify which body had the authority to determine whether an individual met the definition of an "unlawful enemy combatant." The government initially relied on CSRT determinations to assert jurisdiction. However, military commission judges challenged this reliance, ruling that CSRT findings were inadequate for establishing jurisdiction. The CSRTs were designed primarily to determine whether detainees could be held under the laws of war, not to decide whether they were lawful or unlawful combatants under the MCA's framework[412]. For example, in the case of Salim Hamdan, one military commission judge found that the CSRT findings did not meet the evidentiary standards required to assert jurisdiction, while another concluded that the commission itself lacked the authority to make such determinations[413]. These rulings were later reversed by the Court of Military Commission Review (CMCR), which held that while CSRT findings alone could not establish jurisdiction, the MCA permitted military commissions to independently determine the

[407] *Ibid*.
[408] Congressional Research Service, The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues (CRS Report No R41163, 17 May 2012) https://www.everycrsreport.com/reports/R41163.html
[409] *Hamdan v Rumsfeld*, 548 US 557 (2006).
[410] Congressional Research Service, The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues (CRS Report No R41163, 4 August 2014) 38 https://crsreports.congress.gov/product/pdf/R/R41163
[411] *Ibid, 38*.
[412] *Hamdan v Rumsfeld*, 548 US 557 (2006).
[413] Congressional Research Service, The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues (CRS Report No R41163, 4 August 2014) 6 https://crsreports.congress.gov/product/pdf/R/R41163

status of detainees[414]. The CMCR further distinguished between the purposes of CSRTs and the MCA, emphasizing that Congress carefully defined jurisdiction to limit its application to a select group of individuals subject to military commissions. The court also highlighted the procedural deficiencies of relying solely on CSRT findings for this purpose, as detainees were not informed during their status reviews that such determinations could later subject them to criminal prosecution[415]. This misalignment with Congress's intent that military commissions function as legitimate courts adhering to the procedural guarantees mandated by Common Article 3 of the Geneva Conventions necessitated changes to the burden of proof. Consequently, the prosecution in military commission trials was tasked with establishing jurisdiction over each defendant, a practice formally codified in the Manual for Military Commissions in 2009[416].

The jurisdictional framework established by the Military Commissions Act of 2006, while intended to provide legal clarity for military tribunals, provoked significant constitutional and legal challenges. Among these, the denial of habeas corpus under Section 7 of the MCA emerged as a central point of contention. By eliminating judicial oversight for detainees classified as "unlawful enemy combatants," the Act effectively insulated executive decisions from independent review, raising profound concerns about the separation of powers and the protection of fundamental rights. While earlier Supreme Court decisions such as *Hamdan v. Rumsfeld* addressed procedural deficiencies in military commissions, the broader constitutional question of habeas corpus, particularly for non-citizens detained at Guantánamo Bay, remained unresolved.

2.3.2 *Boumediene v. Bush* (*2008)*: A Landmark Victory for Habeas Corpus

The unresolved tension culminated in *Boumediene v. Bush* (2008)[417], a case that directly challenged Section 7 of the MCA and its compatibility with the Suspension Clause of the U.S. Constitution. The Supreme Court's decision in *Boumediene* not only struck down this provision but also reaffirmed the judiciary's indispensable role in safeguarding individual rights, even in the context of national security. The following section will explore the Court's reasoning in this landmark case, analyzing its implications for the balance between executive authority and constitutional guarantees, as well as its broader impact on the legal status of detainees at Guantánamo Bay.

Although the Supreme Court clarified in *Rasul v. Bush* (and later reaffirmed in *Boumediene v. Bush*, discussed below) that detainees at Guantánamo Bay have the right to challenge their detention in

[414] *Ibid, 6*.
[415] Congressional Research Service, The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues (CRS Report No R41163, 4 August 2014) 6 https://crsreports.congress.gov/product/pdf/R/R41163
[416] *Ibid, 15*.
[417] *Boumediene v Bush*, 553 US 723 (2008).

federal courts, the question of whether they can enforce rights under the Geneva Conventions or other international laws remains unresolved. Before the Detainee Treatment Act (DTA) removed habeas corpus review, the Justice Department argued that Rasul addressed only the issue of jurisdiction and that the precedent set by the 1950 Supreme Court decision in *Johnson v. Eisentrager* continued to restrict the relief available to detainees. While some district judges in the D.C. Circuit agreed with this interpretation, others did not. For instance, some judges ruled that detainees had the right to legal counsel, while one judge concluded that detainees must be treated as prisoners of war (POWs) until a "competent tribunal" determined otherwise. However, this latter decision was reversed on appeal.

Prior to the enactment of the Military Commissions Act (MCA) of 2006, several significant cases influenced the legal landscape, notably those that ultimately culminated in the Supreme Court's decisions in Boumediene v. Bush and Hamdan v. Rumsfeld. The Court of Appeals for the D.C. Circuit had dismissed these cases due to a lack of jurisdiction under the MCA; however, the Supreme Court ultimately overturned these rulings in both instances. By doing so, it returned the cases to the district courts for substantive consideration. Another significant case involved *Ali al-Marri*, a noncitizen arrested in the United States and subsequently detained as an enemy combatant in military custody. Initially, the Supreme Court agreed to hear the case after the Fourth Circuit upheld al-Marri's detention, but before the Court could rule, the government requested permission to release al-Marri from military custody and transfer him to civilian jurisdiction to face criminal charges. The Supreme Court granted the request, vacated the Fourth Circuit's judgment, and remanded the case to the lower court with instructions to dismiss it as moot. This series of decisions, though procedurally complex, highlighted the ongoing tensions between executive authority, legislative intervention, and judicial review in the context of post-9/11 detention policies. The differing judicial interpretations of *Rasul* and *Eisentrager* underscored the lack of consensus regarding the scope of detainee rights under U.S. and international law, paving the way for the Supreme Court's eventual intervention in *Boumediene* to address fundamental questions about constitutional protections and the Suspension Clause.

The landmark Supreme Court decision in *Boumediene v. Bush*, delivered on June 12, 2008, marked a pivotal moment in U.S. legal history by affirming the constitutional guarantee of habeas corpus for detainees held at Guantánamo Bay. In a 5-4 ruling, the Supreme Court declared that noncitizens detained by the U.S. military at Guantánamo could invoke the Suspension Clause of the U. S[418]. Constitution, thereby invalidating Section 7 of the Military Commissions Act (MCA) of 2006. The decision was a decisive rejection of Congress's attempt to eliminate judicial oversight over the classification of detainees as "enemy combatants," reaffirming the judiciary's role as a critical check

[418] Robert M Chesney, 'Boumediene v Bush' (2008) 102(4) *American Journal of International Law* 848 https://doi.org/10.2307/20456685.

on executive power, even during periods of heightened national security concerns. The ruling built upon earlier decisions, such as *Rasul v. Bush* and *Hamdan v. Rumsfeld*, by directly confronting the constitutional limits of executive authority in the context of indefinite detention.

At the heart of *Boumediene* lay the question of whether the Suspension Clause could extend to noncitizens detained outside the sovereign territory of the United States. The government argued for a strict geographic interpretation, contending that constitutional protections, including habeas corpus, did not apply to Guantánamo Bay because it was technically under Cuban sovereignty[419]. Conversely, the detainees asserted that the United States' complete control over the base rendered such formalistic distinctions meaningless. In a majority opinion authored by Justice Kennedy, the Court sided with the detainees, emphasising a pragmatic approach over geographic formalism[420]. It determined that constitutional protections hinge not on nominal sovereignty but on practical control. By emphasising the unique nature of Guantánamo as a territory falling under U.S. jurisdiction for all practical intents and purposes, the Court dismissed the government's dependence on precedents such as *Johnson v. Eisentrager,* which denied habeas corpus rights to German nationals detained in U.S.-occupied Germany post-World War II, as previously elucidated. The Court further examined whether the alternative review mechanism established by the MCA and the Detainee Treatment Act (DTA) provided a constitutionally sufficient substitute for habeas corpus. The MCA authorized the D.C. Circuit Court of Appeals to review decisions of the Combatant Status Review Tribunals (CSRTs), but this review was narrowly constrained, allowing courts only to evaluate whether the CSRTs adhered to their own procedures and regulations. The alternative mechanism lacked critical elements of habeas corpus, including the ability for detainees to present new evidence or challenge the government's evidence. Justice Kennedy underscored that meaningful habeas review requires both a "meaningful opportunity" to contest the legality of detention and the court's power to order release if detention is found to be unlawful. The MCA's failure to meet these standards led the Court to conclude that Section 7 violated the Suspension Clause[421].

The ruling in *Boumediene* carried significant legal and practical implications. By establishing that Guantánamo detainees could challenge their detention in federal courts, it imposed new procedural obligations on the government, requiring it to present sufficient evidence to justify detention[422]. This marked a departure from the limited and often opaque CSRT proceedings, which had previously upheld most detainees' enemy combatant designations without meaningful scrutiny.

---

[419] Seth R Farber, 'Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration' (2010) 98(3) *California Law Review* 989 http://www.jstor.org/stable/27896698.
[420] *Boumediene v Bush*, 553 US 723 (2008).
[421] *Boumediene v Bush*, 553 US 723 (2008).
[422] Seth R Farber, 'Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration' (2010) 98(3) *California Law Review* 1016 http://www.jstor.org/stable/27896698.

The decision also reaffirmed habeas corpus as a safeguard against arbitrary detention and emphasized the judiciary's responsibility to uphold constitutional principles, even during times of national emergency. Although celebrated as a victory for civil liberties, the ruling faced criticism for potentially interfering with the executive branch's ability to address national security threats. Figures like John Yoo criticized the decision as judicial overreach, arguing that it encroached upon matters traditionally reserved for the political branches of government. While *Boumediene* provided clarity on the applicability of the Suspension Clause to Guantánamo, it left unresolved questions about the broader scope of constitutional rights for detainees. For instance, the decision raised the possibility of extending similar rights to detainees held in other U.S.-controlled facilities abroad, such as Bagram Airfield in Afghanistan[423]. The Court's rejection of a bright-line sovereignty test in favor of a more nuanced, practical approach created uncertainty about how far its reasoning might extend[424]. Additionally, the decision did not address the substantive limits of the government's detention authority, leaving open questions about the criteria for designating individuals as enemy combatants. These unresolved issues underscored the complexities of balancing individual rights with national security in the post-9/11 era and highlighted the ongoing tensions between the judiciary, executive, and legislative branches. Ultimately, *Boumediene* affirmed the principle that the U.S. government's exercise of power, even in extraordinary circumstances, must remain accountable to the Constitution. The decision reinforced the judiciary's role in ensuring that no branch of government operates beyond constitutional limits. However, it also left the courts to grapple with complex procedural and substantive questions that would shape the future of detention policy and the interpretation of constitutional protections in the context of global counterterrorism efforts. This ruling, though transformative, was not the conclusion of the debate over the balance between security and liberty but rather a critical step in an ongoing legal and political process.

The legal landscape surrounding post-9/11 detentions, as examined in the preceding sections, reveals a persistent tension between national security imperatives and the fundamental legal principles of habeas corpus and due process. Chapter 2.2 explored the erosion of habeas corpus protections in the War on Terror, detailing how executive policies and legislative measures, such as the Authorization for Use of Military Force and the Detainee Treatment Act, sought to limit judicial oversight and expand the government's authority over detainees. The subsequent analysis in Chapter 2.3 further demonstrated how the U.S. Supreme Court, through landmark rulings such as *Rasul v. Bush, Hamdi v. Rumsfeld, Hamdan v. Rumsfeld, and Boumediene v. Bush*, challenged and, in some

[423] Joshua Alexander Geltzer, 'Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After *Boumediene* and the Relationship Between Habeas Corpus and Due Process' (2012) 14(3) *University of Pennsylvania Journal of Constitutional Law* 719 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1049&context=jcl.
[424] *Ibid, 720*.

instances, curtailed the executive's unilateral power by reaffirming constitutional and international legal safeguards. The evolution of these judicial interventions underscores the fundamental question at the heart of this discourse: to what extent can democratic institutions reconcile security policies with the rule of law? As the following section illustrates, this legal struggle did not conclude with the Bush administration but continued into the presidency of Barack Obama, whose policies reflected both continuity and change in the approach to counterterrorism, detention, and the rule of law.

2.4 The Obama administration: A Turning Point?

In November 2008, following an electoral campaign characterized as masterful by analysts and commentators, the first presidency of Democrat Barack Obama commenced, succeeding that of Republican George W. Bush. This administration began under the auspices of continuity with the nation's historical legacy while simultaneously harboring significant promises of progress renewal.
In his inaugural address, delivered in January 2009, the newly elected president invoked both the constitutional tradition and the nation's future, stating:
"Today I say to you that the challenges we face are real. They are serious and they are many. They will not be met easily or in a short span of time. But know this, America: They will be met. On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics ... As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake. And so, to all other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born: know that America is a friend of each nation and every man, woman, and child who seeks a future of peace and dignity, and we are ready to lead once more"[425].

Today, as we revisit these words, we must ask ourselves: was this genuine political agenda or a masterful exercise in rhetoric?
The answer to this question will form the foundation of the following section.
It is indeed accurate that certain initial intentions of President Obama were, over time, substantially limited by opposition from Congress and a considerable portion of public opinion. This opposition has hindered and continues to obstruct the realization of the commitments he unequivocally

[425] Full speech available at: https://obamawhitehouse.archives.gov/blog/2009/01/21/president-barack-obamas-inaugural-address

articulated on January 21, 2009: "Our goal is to close Guantanamo within the next year ... It is expensive. It is inefficient. It harms the international standing of the United States[426]."

Let us therefore retrace the key milestones that led from this initial decisive statement, made the day after his inauguration, to the present day, with the Guantanamo Bay facility still operational. Consistent with Obama's announced objective of a clear shift in the *war on terrorism*, on January 22, 2009, the President issued three executive orders[427] aimed at dismantling the mechanism of military commissions and redefining the principles of counterterrorism efforts.

In particular, the first of these orders[428], "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," begins with a review of the preceding seven years of operations at the base, followed by prescriptive provisions. This initial "review" appears to implicitly highlight the inefficiency of the Bush administration: out of approximately 800 detainees, some of whom were released without specific charges, only three trials were conducted. The measures introduced by Obama are subsequently outlined. More specifically, the directive mandated the closure of the detention facility within a maximum period of one year. Should any prisoners remain at the time of the facility's closure, they were to be either released, transferred to other detention facilities, or relocated to other states[429]. Additionally, a procedure for reviewing the status of each detainee was established and immediately implemented through the work of a multidisciplinary team comprising the following members: the Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and other officials[430]. Regarding the operations of this team, the presidential order set out the procedures for review, beginning with the collection of information on detainees by the Department of Justice. This process culminated in assessing the feasibility of release or transfer or, if neither option was viable, evaluating the appropriateness of initiating legal proceedings[431].

---

[426] Mark Tran and Matthew Weaver, "Barack Obama: Administration Drafts Order to Close Guantánamo Camp Within Year" *The Guardian* (21 January 2009) https://www.theguardian.com/world/2009/jan/21/guantanamo-barack-obama-draft-order-closure.

[427] As Cornell Law School Legal Information institute states "An executive order is defined as a declaration by the president or a governor which has the force of law, usually based on existing statutory powers. Executive orders do not require any action by the Congress or state legislature to take effect, and the legislature cannot overturn it

[428] Full text available at: https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf

[429] *Executive Order 13492: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* (22 January 2009) s 3 https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

[430] *Ibid, sec. 4(a) e 4(b).*

[431] *Executive Order 13492: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* (22 January 2009) s 4(c) https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

Furthermore, Section 6 of the executive order unequivocally mandates the application of Article 3 of the 1949 Geneva Conventions to detainees, assigning the Secretary of Defense the responsibility to ensure that actual detention practices comply with the established rules[432]. This provision holds substantial significance in practice. It permits the dissolution of the distinction previously established by the Bush administration between prisoners of war and unlawful combatants, thus circumventing the theoretical dichotomy inherent to these two statuses. Furthermore, it alleviates the resulting challenges related to case-specific verification by mandating that Article 3, common to the Geneva Conventions, be respected for every detainee. It is necessary, however, to highlight another substantial modification introduced by the executive order, which concerns the elimination of prior interrogation techniques and, consequently, the methods of evidence collection previously employed. The executive order issued by the President of the United States on November 13, 2001, in establishing the applicable framework, was silent on the issue of interrogation procedures and techniques. This omission allowed Secretary of Defense Donald Rumsfeld to authorize the use of methods aimed at compelling detainees, who were not classified as prisoners of war, to cooperate[433]. Notwithstanding the provisions of the Eighth Amendment to the U.S. Constitution, which prohibits *cruel and unusual punishments*[434], the Secretary of Defense specifically approved 24 interrogation methods, ranging from sleep manipulation to isolation.

Under Obama's doctrine, all prisoners, regardless of status, were to be subjected to the same treatment. The specific interrogation methods and techniques authorized by the previous administration for *unlawful combatants* were deemed illegal, as evidenced by the provisions of the initial executive order discussed earlier. Obama, however, reinforced and reaffirmed the illegitimacy of such practices with a separate executive order, *Ensuring Lawful Interrogations*[435], issued on the same date as the first, thereby marking a definitive break from the past. This new order immediately repealed Bush's executive order of July 20, 2007, which had granted detainees treatment similar to that outlined in the Geneva Conventions, albeit with a highly restrictive interpretation of Article 3 common to those conventions. According to Obama, interrogations could only be considered lawful if they fully adhered to the humanitarian principles enshrined in the aforementioned Geneva Conventions. Another significant break with the past involved dismantling of the interrogation system for suspected terrorists conducted by intelligence agencies. This system had previously been based

---

[432] *Ibid, sec 6*.

[433] *Memorandum of the Commander – U.S. Southern Command by Rumsfeld* (16 April 2003) https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/03.04.16.pdf.

[434] *US Constitution, Amendment VIII* https://constitution.congress.gov/constitution/amendment-8/.

[435] *Ensuring Lawful Interrogations* (Obama White House Archives) https://obamawhitehouse.archives.gov/realitycheck/the-press-office/ensuring-lawful-interrogations.s

both on the 19 specific procedures outlined in the *Army Field Manual*[436] and on additional measures introduced by the Bush administration. Obama stipulated that all interrogations must be conducted exclusively in accordance with the provisions of the *Army Field Manual*. Through the executive order, he mandated the termination of all executive acts related to prisoner interrogations that had been approved after September 11, 2001[437]. As a result, numerous information-gathering practices, such as "sleep adjustment"[438] or "waterboarding"[439], along with any form of physical coercion or alteration, became illegal and inadmissible. However, the use of certain psychological coercion techniques remained permissible, albeit strictly limited. On May 15, 2009, just a few months after the new President's declaration of innovative intentions, he appeared to temper the reformist tone of his initial statements with an unexpected assertion made in an official declaration: the military commissions, established under Bush, were deemed "appropriate for prosecuting enemies who violate the laws of war[440]." In the same statement, the President acknowledged that, while these commissions had proven inefficient and lacked a legal framework clearly oriented toward safeguarding procedural guarantees, they would need to be redesigned in their procedures and principles based on precise guidelines. Specifically, the use of "cruel, inhuman, and degrading interrogation methods" was prohibited, as statements obtained through such methods were deemed inadmissible[441]. The evidentiary use of "hearsay" was to be cautious and strictly limited, meaning such statements could not constitute evidence if rebutted by the defense[442]. Additionally, defendants were to be guaranteed full freedom in selecting their legal counsel and afforded the right to abstain from making statements. Although Obama's policy called for a revision of the procedures before military commissions, albeit hypothetically and lacking explicit legislative support, the lingering influence of the "enemy criminal law" approach persisted[443]. This approach appeared to mark a definitive departure from relying on federal courts for counterterrorism efforts. On May 20, 2009, the U.S. Senate overwhelmingly opposed (90 votes to 6) the allocation of $80 million intended for the

[436] *Army Field Manual 2-22.3: Human Intelligence Collector Operations* (6 September 2006, Department of Defense) https://irp.fas.org/doddir/army/fm2-22-3.pdf.
[437] *Executive Order 13492: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* (22 January 2009) s 3 https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf.
[438] Silvio Riondato, "Sul diritto penale di guerra degli Stati Uniti d'America: La Tortura" (2004) 5 *Pubblicazioni Centro Studi per la Pace* https://files.studiperlapace.it/spp_zfiles/docs/20060827222034.pdf.
[439] *Ibid*.
[440] *Statement by President Barack Obama on Military Commissions* (Obama White House Archives) https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-military-commissions.
[441] *Ibid*.
[442] *Ibid*.
[443] Marco Rebecca, "Evoluzioni della dottrina Obama sul regime 'Guantanamo' per la lotta al terrorismo" https://www.penale.it/page.asp?mode=1&IDPag=792.

closure of the Guantanamo Bay facility[444]. This decision, supported by an almost unanimous Democratic bloc, created a significant impasse for Obama's policy, highlighting the effectiveness of Republican arguments against the potential transfer of detainees to U.S. soil. The Republicans, along with a large segment of public opinion, consistently opposed hosting "some of the most dangerous men in the world" within the nation. The following day, in a speech[445] delivered at the National Archives, the President attempted to regain support by providing clarifications on the government's political strategy, which until that point had appeared anything but clear and decisive. He reiterated the necessity of trials before federal or military courts, with the resulting release, repatriation, or transfer of certain detainees to other countries; for those deemed dangerous, he considered continued detention essential. Obama's speech, however, did not yield the desired effect. The liberal wing of his own party reacted negatively to the preservation of Bush's military commissions, while human rights organizations strongly criticized the prospect of indefinite detention without trial. At the same time, former Vice President Dick Cheney addressed the American Enterprise Institute, arguing against the transfer of detainees to U.S. territory, citing well-known security concerns. He described such a move as a monumental mistake, both for the present and the future[446]. On October 28, 2009, the President secured the approval of the *Military Commissions Act*, which revised the procedures of the military commissions and definitively legitimized their existence[447]. In the fall of 2009, the U.S. government faced significant challenges in its efforts to close the Guantanamo Bay detention facility and pursue federal trials for high-profile detainees. Initially, discussions had included transferring prisoners to a maximum-security prison in Thompson, Illinois, but plans for dismantling Guantanamo were soon abandoned. The administration sought to hold federal trials for Khalid Sheikh Mohammed, the alleged mastermind behind the 9/11 attacks, and four other suspects[448]. Despite strong Republican opposition, the Senate ultimately approved the plan to conduct the trials near Ground Zero in New York City. Attorney General Eric H. Holder announced that the suspects would be moved from Guantanamo to a federal prison on the East Coast for trial, garnering worldwide attention. However, the plan faced logistical challenges, including an estimated $200 million annual security cost, and provoked widespread criticism from New York residents, who argued that the city, still grappling

[444] Daniel Nasaw in Washington and agencies, "Senate Democrats Reject Funding for Guantánamo Closure" The Guardian (20 May 2009) https://www.theguardian.com/world/2009/may/20/close-guantanamo-funding-senate-obama.
[445] Full text available at: https://obamawhitehouse.archives.gov/the-press-office/remarks-President-national-security-5-21-09
[446] Full text of the speech available at: https://www.politico.com/news/stories/0509/22823_Page2.html
[447] Luciano Patruno, "Il Congresso americano vara il 'Military Commissions Act of 2006': l'estremismo dello 'stato di eccezione' e l'incostituzionalità delle sue regole 'speciali'" (20 October 2006) Costituzionalismo.it https://www.costituzionalismo.it/il-congresso-americano-vara-il-military-commissions-act-of-2006-lestremismo-dello-stato-di-eccezione-e-lincostituzionalita-delle-sue-regole-sp/.
[448] Charlie Savage, "Accused 9/11 Mastermind to Face Civilian Trial in N.Y." *The New York Times* (14 November 2009) https://www.nytimes.com/2009/11/14/us/14terror.html.

with the trauma of 9/11, was not an appropriate venue for the trials[449]. Public protests erupted, and local leaders expressed frustration with the lack of federal support in addressing the backlash. Negotiations between the administration and Republicans failed to resolve the controversy, leading to the eventual abandonment of the plan to hold trials in New York. This decision dealt a blow to the Obama administration, as it not only symbolized a retreat from its objectives but also underscored the difficulties in closing Guantanamo. The administration's inability to establish clear policies for the transfer and resettlement of detainees further delayed the closure of the detention facility, amplifying public criticism and political challenges. In August 2010, the Department of Defense advocated for trials to remain under the jurisdiction of military courts, arguing that the years of work undertaken by military prosecutors would otherwise be wasted. From a different perspective, Secretary of State Hillary Clinton deemed it inappropriate to conduct military trials at Guantanamo without also proceeding with federal trials[450]. The only trial fully conducted on U.S. soil was that of Ahmed Ghailani, who faced multiple charges, including complicity in the 1998 bombings of U.S. embassies in Kenya and Tanzania[451]. On November 17, 2010, he was convicted by a jury for "conspiring to destroy U.S. property" but acquitted of the remaining 284 charges against him. This outcome sparked criticism, with some claiming that "an Al Qaeda terrorist came close to being released[452]." In December 2010, the Republican-majority Congress ruled that detainees could not "set foot" on U.S. soil, even for trial purposes. The administration interpreted this decision as an intrusion on Executive powers and urged Obama to respond. However, the President merely expressed his dissent. On March 7, 2011, the President signed a new Executive Order[453]. In presenting new policies for detainee management, the order admitted the possibility of indefinite detention, a decision expected to affect at least 48 of the 172 detainees at the time. This move provoked an outcry from human rights organizations, with Amnesty International declaring: "With a single stroke of the pen, President Obama extinguished any glimmer of hope that his administration would restore the rule of law[454]." Although Obama did not rule out the future involvement of federal courts, Attorney General Holder stated that such a possibility was rendered almost impossible due to Congress's highly restrictive

[449] *Ibid*.
[450] Dafna Linzer, "Guantánamo as Prison and Courtroom: Is a White House Policy Unraveling or Coming Together?" *ProPublica* (25 January 2011) https://www.propublica.org/article/guantanamo-as-prison-and-courtroom-is-a-white-house-policy-unraveling-or-co.
[451] Federal Bureau of Investigation, "Ahmed Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of U.S. Embassies in East Africa" (17 November 2010) https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo111710a.htm.
[452] *Ibid*.
[453] *Executive Order 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force* (7 March 2011) https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba.
[454] Amnesty International USA, "Amnesty International Statement on President Obama's Immigration Executive Order" (21 November 2014) https://www.amnestyusa.org/press-releases/amnesty-international-statement-on-president-obamas-immigration-executive-order/.

decisions. In January 2012, Obama began his second presidential term, delivering another inaugural address centered on themes of peace, equality, freedom, democracy, equal opportunity, and the rule of law, once again invoking the nation's constitutional tradition. However, what had appeared as specific promises in his first inaugural address, some of which were left unfulfilled, were viewed by many in his second address as rhetorical statements lacking substantive content.

Without delving into a detailed analysis of Guantanamo-related events during Obama's second presidency, it is evident that the debate surrounding the issue remained highly prominent. This was fueled by various incidents, including the release of detainees who later returned to terrorism[455], the Bergdahl case[456], the leaked classified documents on detainee treatment published by Wikileaks, the capture of Ahmed Abu Khattala[457], and numerous other developments. It is worth noting that, like Obama, both George W. Bush and Obama's first Republican challenger, John McCain, had expressed their intention to close Guantanamo, yet none succeeded in doing so. Regardless of political evaluations, Obama's administration deserves recognition for certain achievements: reducing the number of operational camps from five to three, significantly decreasing the overall number of detainees, and greatly improving detention conditions[458]. These efforts marked gradual progress toward aligning with international standards of legality and due process.

The evolution of U.S. policy on Guantánamo Bay following the Obama administration underscores the enduring complexities surrounding indefinite detention, military commissions, and national security law. Despite early attempts by President Obama to dismantle the detention framework inherited from the Bush era, his administration ultimately failed to achieve its most emblematic objective—the closure of Guantánamo. The subsequent administrations have taken markedly different approaches, yet none have resolved the fundamental legal and political issues at stake. Under President Trump, the policy direction shifted dramatically, with Executive Order 13823 reversing Obama's efforts and reaffirming Guantánamo's role in U.S. counterterrorism strategy[459]. This order not only maintained the facility's operation but also authorized the transfer of additional

---

[455] House Committee on Appropriations – Republicans, "More Released Gitmo Detainees Returning to Terrorism - Approps Republicans Insist on Immediate Halt to Transfers and Releases" (13 May 2010) https://appropriations.house.gov/news/press-releases/more-released-gitmo-detainees-returning-terrorism-approps-republicans-insist.

[456] "'Who Are the 5 Guantanamo Detainees Swapped in Exchange for Bergdahl?'" *NBC News* (2 June 2014) https://www.nbcnews.com/storyline/bowe-bergdahl-released/who-are-5-guantanamo-detainees-swapped-exchange-bergdahl-n119376.

[457] Office of Public Affairs, "Ahmed Abu Khatallah Found Guilty of Terrorism Charges in September 2012 Attack in Benghazi, Libya" (*United States Department of Justice*, 28 November 2017) https://www.justice.gov/opa/pr/ahmed-abu-khatallah-found-guilty-terrorism-charges-september-2012-attack-benghazi-libya.

[458] Wolfgang Kaleck, 'Obama's Tentative Steps Against Torture' (ECCHR, 2015) https://www.ecchr.eu/en/publication/obamas-tentative-steps-against-torture/.

[459] Donald J Trump, *Executive Order 13823: Protecting America Through Lawful Detention of Terrorists* (30 January 2018) https://www.presidency.ucsb.edu/documents/executive-order-13823-protecting-america-through-lawful-detention-terrorists.

detainees, although no new prisoners were transferred during Trump's presidency, and the detainee population continued to decline as individuals were released or repatriated. While Trump upheld military commissions as a key instrument for prosecuting terrorism suspects, the broader legal framework governing Guantánamo remained largely unchanged.

The Biden administration has taken a more incremental approach, prioritizing diplomatic efforts to reduce the detainee count while refraining from issuing a definitive executive order to close the facility[460]. In February 2021, Biden's administration launched a formal review of Guantánamo, signaling a renewed commitment to its closure[461]. In July 2021, the first detainee transfer since 2016 was conducted with the repatriation of Abdul Latif Nasir to Morocco, reflecting an effort to gradually reduce the prison population[462]. More recently, in January 2025, 11 Yemeni detainees were transferred to Oman, bringing the detainee count to 15 remaining prisoners[463]. Notwithstanding these endeavors, the facility continues to operate, and considerable legal and political impediments endure. Opposition from Congress, concerns regarding national security, and the overarching military commission system have rendered substantial reform challenging. Advocacy organizations persist in their efforts to compel the administration to honor its commitment to closing Guantánamo; however, bipartisan resistance within Congress has thwarted any decisive measures. As of 2025, Guantánamo Bay continues to be operational, serving as a testament to the enduring institutional and political challenges that have hindered successive administrations from entirely dismantling the post-9/11 detention system. The legal framework that governs indefinite detention and military commissions, although subject to change, remains fundamentally unresolved, thereby highlighting the ongoing tensions between executive authority, congressional jurisdiction, and the protection of human rights within U.S. counterterrorism policy.

[460] Sacha Pfeiffer, 'Biden's Guantánamo Legacy "One Step Forward, Several Steps Backwards"' *NPR* (18 January 2025) https://www.npr.org/2025/01/16/nx-s1-5252468/guantanamo-biden-legacy
[461] *Ibid.*
[462] Missy Ryan and Anne Gearan, 'Biden Administration Repatriates Guantánamo Bay Inmate to Morocco' The Washington Post (19 July 2021) https://www.washingtonpost.com/national-security/guantanamo-biden-abdul-latif-nasir/2021/07/19/3f523f2e-e885-11eb-84a2-d93bc0b50294_story.html
[463] US Department of Defense, 'Guantánamo Bay Detainee Transfer Announced' (11 February 2024) https://www.defense.gov/News/Releases/Release/article/4022534/guantanamo-bay-detainee-transfer-announced/

Chapter 3
Counter-Terrorism Jurisprudence in the European Union: Balancing Security and Fundamental Rights

In both the United States and Europe, counterterrorism policies have incited considerable legal and political discourse regarding their implications for fundamental rights. As delineated in Chapter 2, the post-9/11 period in the United States witnessed an augmentation of executive authority, the establishment of military commissions, and the dilution of habeas corpus protections for non-citizens, all purportedly justified by national security imperatives. While the American legal framework afforded extensive discretionary power to the executive branch, it encountered judicial opposition, as reflected in pivotal Supreme Court rulings that endeavored to curtail governmental overreach. In Europe, analogous tensions surfaced between security and fundamental rights; however, the legal and institutional responses manifested differently. Contrarily, in the United States, counterterrorism policy has been predominantly shaped by the executive and judiciary, whereas European approaches have been profoundly influenced by supranational legal frameworks, notably the European Convention on Human Rights (ECHR) and European Union (EU) law. These systems have imposed restrictions on state actions, requiring that emergency measures adhere to principles of proportionality and obligations pertaining to fundamental rights. Nevertheless, apprehensions regarding national security have frequently precipitated the implementation of exceptional measures, many of which have disproportionately impacted non-citizens. This chapter examines how France and the United Kingdom, two countries that have historically assumed a prominent role in shaping European counterterrorism legislation, have instituted restrictive security policies in response to terrorist threats. These measures have frequently resulted in derogations from fundamental rights, encompassing the expansion of surveillance powers, prolonged detention, restrictions on movement, and limitations on judicial oversight. A comparative analysis of France and the United Kingdom offers insights into the ways in which national security imperatives have transformed the legal landscape for non-citizens, reflecting, in certain respects, the legal challenges faced in the United States.

3.1 Counterterrorism and Non-Citizen Discrimination: the impact of fundamental rights in France and United Kingdom

A significant number of security policies designed to address the terrorist threat have led to numerous restrictions on civil liberties and fundamental rights, sparking suspicion and criticism from various human rights organizations and associations. These groups argued that anti-terrorism

legislation undermined the civil liberties upon which democratic societies are built[464]. As a result, the implementation of exceptional measures to combat terrorism necessitated a communication strategy aimed at justifying the rationale behind such provisions and dispelling doubts regarding their necessity and their potential adverse effects on public freedoms[465]. Additionally, some journalists, politicians, and academics seemed to propose that, although fundamental human rights must remain inviolable under all circumstances, other liberties may occasionally be sacrificed as a necessary "lesser evil" in the fight against terrorism[466]. Furthermore, various studies have highlighted that civil liberties, political rights, and fundamental freedoms have been eroded by counterterrorism laws, not only due to the expansion of state coercive powers but also because, in the wake of terrorist attacks, the public has shown a greater willingness to accept or even demand robust government measures that may curtail individual freedoms in the interest of physical security[467]. Among the fundamental rights most commonly restricted by anti-terrorism legislation are the right to freedom of movement (particularly to control the movement of foreign fighters), the sanctity of the home (via house searches), the right to privacy (through data retention measures), freedom of association, freedom of religion, the right to liberty and security, freedom of expression and communication[468], and the prohibition against discrimination. In France, the most extensive criticism regarding the restriction of civil liberties was directed at the laws enacted immediately after the 9/11 attacks, the prolonged duration of the state of emergency declared in 2015, and the incorporation of extraordinary measures into permanent and ordinary legislation. These emergency measures were framed as evidence that democracy could respond decisively to its adversaries and as an instrument to address the severity and exceptional nature of the threat[469].

France, alongside the United Kingdom, has been listed among the top five countries on a "name-and-shame" list published by various non-governmental organizations concerned with human rights protection, including Human Rights Watch (HRW), Reporters Sans Frontières (RSF), and the International Federation of Human Rights (FIDH). These organizations viewed counterterrorism

---

[464] Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) *Government and Opposition* 3.
[465] Anastassia Tsoukala, "La légitimation des mesures d'exception dans la lutte antiterroriste en Europe" (2006) 61 *Cultures & Conflits* 2.
[466] Leonardo Baccini and others, "Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?" (2018) *Studies in Conflict & Terrorism* 341.
[467] Lance Y Hunter, "Terrorism, Civil Liberties, and Political Rights: A Cross-National Analysis" (2016) 39(2) *Studies in Conflict & Terrorism* 167.
[468] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Springer, 2009) 304–305.
[469] Anastassia Tsoukala, "La légitimation des mesures d'exception dans la lutte antiterroriste en Europe" (2006) 61 *Cultures & Conflits* 6.

legislation in these countries as violating civil rights[470]. The impact of French counterterrorism laws on fundamental rights did not diminish even during the state of emergency declared in November 2015, which lasted until 2017. Moreover, some scholars have argued that the French counterterrorism approach demonstrated that fundamental rights in France were compromised in favor of security, partly due to the population's acceptance of such measures, reflecting a traditional deference toward the State's authority to ensure safety and order[471]. A particularly troubling aspect of the situation for civil liberties was the restricted role of judicial oversight and the extensive discretionary powers granted to administrative authorities. Regarding the weakening of individual rights, the empowerment of administrative bodies was significant, as administrative authorities traditionally did not regulate restrictions on freedoms, a responsibility that fell to judicial institutions. The increased authority of administrative bodies, coupled with limited judicial scrutiny, undermined the traditional checks designed to ensure that limitations on liberties were lawful, proportionate, and non-discriminatory[472]. This situation resulted in administrative agents having broad discretion. In several instances, restrictions on public gatherings were not directly tied to preventing violent attacks and therefore could not be justified as necessary or proportionate under the state of emergency. Additionally, the incorporation of exceptional measures into ordinary law, particularly with the October 2017 legislation, normalized the state of emergency, eroding human rights protection standards and leading to violations of individual rights that were not always proportional or necessary in countering terrorism[473]. In France, the supremacy granted to police and intelligence services, the excessive empowerment of administrative authorities, and the institutionalization of certain emergency measures into permanent legislation severely compromised fundamental rights, without sufficient judicial oversight. From 2015 to 2017, it was reported that there were 4,444 house searches, 754 house arrests, 656 geographical bans, 59 protection and security zones, 39 bans on demonstrations, 29 closures of bars and theaters, and 19 closures of places of worship[474]. These developments raise questions about whether the French government effectively balanced liberty and security in its counterterrorism policies. In the United Kingdom, the impact of the Human Rights Act 1998 on both judicial interest in human rights and societal attitudes made counterterrorism legislation, such as the Antiterrorism Crime and Security Act 2001, subject to significant criticism from public opinion, legal

[470]Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) *Government and Opposition* 7.
[471] Craig Sudborough, "The War Against Fundamental Rights: French Counterterrorism Policy and the Need to Integrate International Security and Human Rights Agreements" (2007) *Suffolk Transnational Law Review* 478.
[472] Fionnuala Ní Aoláin, "L'exercice contemporain des pouvoirs d'urgence: Réflexions sur la permanence, la non-permanence et les ordres juridiques administratifs" (2018) *Cultures & Conflits* 24.
[473] Stéphanie Hennette-Vauchez, "The State of Emergency in France: Days Without End?" (2017) *Cultures & Conflits* 720.
[474] François Molins, "Lutte antiterroriste et libertés" (2018) *Cultures & Conflits* 13.

experts, and human rights organizations. Framing the fight against terrorism as a "war" against a new kind of enemy allowed the government to present emergency measures as "sacrifices" deemed necessary to protect British citizens[475]. The public's relative acceptance of such exceptional measures was partly due to a redefinition of liberty and the role of human rights within British society[476].

Nonetheless, UK legislation has shown some effort to balance counterterrorism measures with the protection of civil liberties and human rights. For example, the work of the Joint Committee on Human Rights has been notable, as it allowed human rights implications to be scrutinized by a select committee and occasionally sparked political debate during the legislative process[477]. Similarly, the more frequent appointment of the Independent Reviewer of Terrorism Legislation since 2015 indicates a growing governmental concern for safeguarding human rights. However, fundamental rights and civil liberties in the UK have been significantly affected by counterterrorism laws, particularly those enacted in response to terrorist attacks or heightened perceptions of terrorist threats. This duality reflects the tension between the UK's reputation as a global leader in liberty, bolstered by strong human rights frameworks like the Human Rights Act 1998[478], and its implementation of some of the most restrictive counterterrorism measures in Europe, including derogations from the European Convention on Human Rights (ECHR) obligations[479]. Notably, the UK has also authorized some of the longest periods of detention without charge[480].

In broader terms, fundamental rights in the UK have at times been politicized and selectively applied, revealing the complexity of achieving an ideal balance between safeguarding human rights and implementing national security measures. This equilibrium is critical not only because excessive restrictions on individual rights may undermine the essence of liberal democracy, but also because such measures may prove counterproductive in combating terrorism. By alienating and fostering dissatisfaction in communities disproportionately affected by these policies, such measures risk creating environments that terrorist groups could exploit for recruitment[481].

---

[475] Anastassia Tsoukala, "La légitimation des mesures d'exception dans la lutte antiterroriste en Europe" (2006) 61 *Cultures & Conflits* 3.

[476] *Ibid,7.*

[477] Clive Walker, "Human Rights and Counterterrorism in the UK" in Marie Breen-Smyth (ed), *Ashgate Companion to Political Violence* (Ashgate, 2016) 8.

[478]Todd Landman, "The United Kingdom: The Continuity of Terror and Counterterror" in Alison Brysk and Gershon Shafir (eds), *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (University of California Press, 2007) 77.

[479] *Ibid*

[480] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Springer, 2009) 313.

[481] Jessie Blackbourn, Counterterrorism and Civil Liberties: The United Kingdom Experience, 1968-2008 (Routledge, 2016) 73.

3.1.1 The right to privacy and to a private life

The right to privacy, including the right to a private life, ensures an individual's protection from intrusions into personal matters and the unauthorized collection or dissemination of private information[482]. In France, this right faced significant restrictions under several counterterrorism laws, such as Law No. 2001-1062 of 15 November 2001. These limitations stemmed from the expansion of police powers related to identity checks, search and inspection authorities, and provisions governing the retention of online communication data. Specifically, Article 29 of the aforementioned law authorized the preventive retention of internet connection data for a twelve-month period without prior judicial approval, granting administrative agents relatively easy access to this data. The substantial infringement on the right to privacy through practices such as extensive body and vehicle searches prompted questions about the law's constitutionality and its implications for human rights. Unsurprisingly, the legislative process was criticized by human rights advocates[483]. For example, the National Consultative Commission on Human Rights identified certain provisions of the 2001 law as threats to privacy that would have minimal impact on counterterrorism efforts[484]. Further restrictions on the right to private life were introduced by the Law of August 2002, which broadened surveillance capabilities over citizens[485]. The right to privacy was again weakened by Law No. 2003-239 of 18 March 2003, which allowed for non-transparent management of individuals' personal data[486]. Even after the state of emergency ended, the right to private life remained affected by individual administrative control and surveillance measures, many of which were integrated into ordinary legislation through the Act of October 2017[487].

In the United Kingdom, the right to privacy was impacted by the Anti-Terrorism Crime and Security Act 2001, particularly due to the broad provisions for retaining communications data[488].
The Anti-Terrorism, Crime and Security Act 2001 (ATCSA) introduced broad data retention provisions, allowing telecommunications companies and internet service providers to store metadata

---

[482] Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) Government and Opposition 11.
[483] Anna Oehmichen, Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France (Springer, 2009) 299.
[484] *Ibid,285.*
[485] Jean-Claude Paye, "Lutte antiterroriste et contrôle de la vie privée" (2003) 11(1) Multitudes 99.
[486] Anna Oehmichen, Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France (Springer, 2009) 299.
[487] David Hebinger, "La sécurité et les libertés. L'adaptation de la législation antiterroriste française dans le contexte post-13 Novembre 2015" (2018) 31 Le Champs de Mars, Presses de Sciences Po 90.
[488] Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) Government and Opposition 14.

from phone calls, emails, and online activities for extended periods. This information could be accessed by law enforcement and intelligence agencies without requiring a judicial warrant, raising concerns about mass surveillance and the lack of independent oversight[489]. Additionally, biometric data collection, including fingerprints and DNA profiles, was authorized for individuals suspected of terrorism-related offenses, even in cases where no formal charges were brought against them.
Further restrictions were introduced through the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs), which replaced the Control Order system but retained many of its most intrusive measures[490]. TPIMs imposed residence requirements, effectively subjecting individuals to a form of house arrest, and movement restrictions that could include exclusion from specific locations or cities. Those under TPIMs were also subjected to electronic tagging, curfews, and strict monitoring of their internet and phone communications, with prohibitions on using certain electronic devices or encrypted messaging platforms. Unlike traditional criminal proceedings, TPIMs could be imposed based on intelligence assessments rather than concrete evidence, limiting the affected individual's ability to challenge the restrictions in court[491].

The Counterterrorism and Security Act 2015 introduced Temporary Exclusion Orders (TEOs), which allowed the government to prevent British citizens suspected of terrorist involvement abroad from returning to the UK[492].. These orders could be issued without a trial and, in some cases, even without the individual being formally charged with an offense. TEOs required those affected to apply for a permit to return, which could be granted under strict conditions, such as mandatory reporting to authorities, participation in a deradicalization program, or restrictions on their travel and residence upon re-entry[493]. As a result, TEOs severely impacted the right to private and family life, as individuals could face prolonged separation from their relatives and, in some cases, be stranded abroad with limited legal recourse.

3.1.2 The freedom of movement

[489] HM Revenue & Customs, 'The Anti-terrorism, Crime and Security Act 2001 (ATCSA)' *Economic Crime Supervision Handbook* (UK Government, last updated [if available]) https://www.gov.uk/hmrc-internal-manuals/economic-crime-supervision-handbook/ecsh22500
[490] UK Home Office, 'Terrorism Prevention and Investigation Measures Act' (UK Government) https://www.gov.uk/government/collections/terrorism-prevention-and-investigation-measures-act
[491] *Ibid.*
[492] Helen Fenwick, "Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counterterrorism and Security Act 2015" (2016) 30(3) International Review of Law, Computers & Technology 179.
[493] House of Lords Select Committee on the Constitution, *Constitutional Implications of the Government's Counterterrorism Proposals* (HL 2014–15, 92) https://publications.parliament.uk/pa/ld201415/ldselect/ldconst/92/9203.htm

Freedom of movement, which encompasses the right to travel within a country's borders, leave the country, and return to it, was a primary target of French and British counterterrorism legislation. This right was particularly restricted to control and monitor the mobility of foreign fighters and suspected terrorists.

In France, significant limitations on freedom of movement were introduced by the Law of November 2001, the Law of March 2003, and Law No. 2006-64 of 23 January 2006. These laws enhanced measures such as house arrests, the searching of moving or parked vehicles, and mechanisms for monitoring individuals' movements, while also extending the duration of police custody[494]. The National Commission on Information and Liberty criticized these measures, declaring that "the liberty-security balance has never been challenged to such a point and security has never been valued to the detriment of liberty to such extent[495]." The preventive nature of these measures was seen as overly broad, restricting the freedoms of a disproportionately large number of individuals. The 2014 legislation further eroded freedom of movement through the introduction of exit bans from French territory based solely on suspicions that an individual might engage in future terrorist activities[496]. These restrictions, administered without prior judicial oversight, raised concerns about their impact on fundamental liberties. During the state of emergency, freedom of movement was further curtailed through increased administrative powers, such as identity checks, warrantless searches, and geographical limitations imposed by prefects. Even after the formal end of the state of emergency, these restrictions persisted, with continued use of house arrests and administrative controls.

In the United Kingdom, freedom of movement was similarly constrained. Alongside expanded powers for house arrests, the introduction of Temporary Exclusion Orders (TEOs) under counterterrorism laws sought to prevent individuals who had traveled to Syria to support or fight for ISIS from freely returning to the UK. These measures were criticized for potentially violating the UK's obligations under the International Covenant on Civil and Political Rights, which states that "nobody shall be arbitrarily deprived of the right to enter his own country[497]." However, others argued that TEOs were not arbitrary, as they were subject to judicial oversight. Despite this, the impact on freedom of movement remained significant, as exclusion periods could last for up to two years[498].

---

[494] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Springer, 2009) 291.
[495] *Ibid,292.*
[496] Jean Borricand, "Politique antiterroriste française et respect des droits fondamentaux" (2008) *Cultures & Conflits* 176.
[497] *International Covenant on Civil and Political Rights* (ICCPR), Article 12.
[498] Helen Fenwick, "Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counterterrorism and Security Act 2015" (2016) 30(3) *International Review of Law, Computers & Technology* 177.

3.1.3 The right to liberty and security

The right to liberty and security, enshrined in Article 5 of the European Convention on Human Rights (ECHR), focuses on protecting individuals from arbitrary detention rather than ensuring their personal safety, while broadly safeguarding personal freedom[499]. This right was not only restricted but outright violated by the UK's Anti-Terrorism Crime and Security Act 2001. Part IV of the Act permitted the indefinite detention of non-national terrorist suspects when deportation could lead to torture. This provision severely limited the right to liberty and security to an extent that was difficult to justify, even in light of the heightened terrorist threat[500]. Notably, this measure entirely disregarded the principle of "the lawful detention of a person after conviction of a competent court," as outlined in Article 5 of the ECHR[501]. The intrusive nature of the measure failed to meet the conditions under Article 15 of the ECHR, which govern derogations from Convention obligations. In 2004, the House of Lords ruled the provision disproportionate to the threat posed to national security and discriminatory, as it applied exclusively to foreign nationals, thus violating Article 14 of the ECHR. Although the measure was repealed in 2005, its application over a four-year period represents one of the most intrusive and harmful regulations for human rights protection in this context. Between 2001 and March 2005, sixteen individuals were detained under this Act[502]. In 2005, the Prevention of Terrorism Act introduced the control orders regime, which further infringed on the right to liberty and security. These control orders allowed for restrictions that extended beyond the protections provided under Article 5 of the ECHR. The wide-ranging scope of the restrictions and the possibility of imposing multiple limitations simultaneously made the measures excessively intrusive, often causing significant distress to the individuals subjected to them[503]. The UK Joint Committee on Human Rights, in its 2007 report, deemed the control orders themselves a violation of the fundamental right to liberty under Article 5[504]. The situation was worsened by the fact that these derogating orders were imposed based on mere suspicion and minimal evidence of an individual's involvement in terrorist activities. The right to liberty and security was further undermined by the Terrorism Act 2006, which extended the pre-charge detention period for terrorist suspects from 14 to 28 days.

---

[499] Equality and Human Rights Commission, "Article 5: Right to Liberty and Security" https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security.

[500] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Springer, 2009) 306.

[501] *European Convention on Human Rights* (ECHR), Article 5.

[502] David Bonner, *Counterterrorism and European Human Rights since 9/11: The United Kingdom Experience* (Ashgate, 2007) 109.

[503] Sascha Dov Bachmann and M Burt, "Control Orders Post 9/11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma" (2010) 15 *Deakin Law Review* 131, 137.

[504] *Ibid, 139.*

Human rights organizations, including Liberty and Amnesty International, criticized this extension as a violation of the principle that an individual should not be detained without trial longer than necessary[505]. Finally, the Counter-Terrorism Act 2008 continued to infringe upon this right due to insufficient safeguards against arbitrary detention and the risk of abuses that contravened European human rights standards[506].

In France, this entitlement faced significant curtailments due to multiple counterterrorism statutes, including Law No. 2001-1062 of 15 November 2001. Its restriction stemmed from the expansion of law enforcement authority regarding identity verifications, inspection and search prerogatives, as well as regulations on the storage of digital communication records. Indeed, Article 29 of the aforementioned legislation sanctioned the preventive retention of Internet connection data for a period of twelve months, without requiring prior judicial authorization, thereby granting administrative officials' easy access to such information. Given the substantial encroachment upon the right to privacy, particularly through extensive body and vehicle searches, serious concerns were raised regarding its constitutional validity, its repercussions on human rights, and, consequently, the legislative process itself was, unsurprisingly, contested by human rights advocates[507]. For instance, the National Consultative Commission on Human Rights denounced specific provisions of the 2001 Law as a potential threat to individual privacy, arguing that they would bear no tangible impact on counterterrorism efforts[508]. The right to private life faced additional constraints under the Law of August 2002, which broadened the scope of public surveillance mechanisms[509]. Similarly, Law No. 2003-239 of 18 March 2003 further jeopardized privacy rights due to the opaque handling of personal data permitted by its provisions[510]. Even following the termination of the state of emergency, the right to privacy remained subject to restrictions, as certain administrative control and surveillance measures were incorporated into ordinary legislation through the Act of October 2017[511].

3.1.4 The right to inviolability of a home

[505] "Counter-Terrorism Act: A Dagger at the Heart of the Constitution" *The Guardian* (19 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/counter-terrorism-act.
[506] *Ibid*.
[507] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Intersentia 2009) 299.
[508] *Ibid, 285*.
[509] Jean-Claude Paye, *Lutte antiterroriste et contrôle de la via privée* (Éditions Yves Michel 2009) 99.
[510] Anna Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France* (Intersentia 2009) 287.
[511] Denis Hebinger, "La sécurité et les libertés. L'adaptation de la législation antiterroriste française dans le contexte post-13 Novembre 2015" (2018) 31 *Le Champs de Mars*, Presses de Sciences Po 90.

The right to the inviolability of the home is a fundamental aspect of an individual's privacy and is explicitly protected under Article 12 of the Universal Declaration of Human Rights of 1948, which states that "no one shall be subjected to arbitrary interference with his ... home..."[512]. In France, this right was significantly impacted by the provisions of the Law of March 2003, which expanded the legal basis for conducting house searches. Similarly, in the United Kingdom, the broadening of powers to carry out house searches also infringed upon the right to the inviolability of the home.

3.1.5 The right to freedom of assembly and association

The right to freedom of assembly and association, enshrined in Article 11 of the European Convention on Human Rights (ECHR), guarantees individuals the ability to gather peacefully, engage in protests, and form or join associations to achieve shared objectives.

In France, this right was significantly undermined by one of the most contentious aspects of the country's post-9/11 counterterrorism legislation: the initial vagueness in the legal definition of terrorism. This lack of clarity failed to exclude minor crimes, thereby broadening the scope of actions considered terrorist in nature. Other provisions lacking legal precision further impacted this right, such as those criminalizing associations with individuals involved in terrorist activities, without adequately distinguishing between innocent and criminal relationships or requiring evidence of strategic involvement or intent[513]. The restricted exercise of freedom of assembly and association was highlighted by incidents where hundreds of individuals were arrested, yet only a small number were found to have any connection to terrorist activities[514]. Additionally, the special powers granted to French administrative authorities during the state of emergency were used to target political activists[515]. Amnesty International reported in 2017 that such measures violated both the right to freedom of assembly and the right to protest[516]. For example, in October 2016, emergency legislation was invoked to prohibit two demonstrations opposing the expulsion of migrants and refugees from Calais[517].

In the United Kingdom, freedom of assembly and association was primarily affected by the Terrorism Prevention and Investigation Measures (TPIMs) introduced under the Prevention of

---

[512] *Universal Declaration of Human Rights* (1948)
[513] Craig Sudborough, "The War Against Fundamental Rights: French Counterterrorism Policy and the Need to Integrate International Security and Human Rights Agreements" (2007) *Suffolk Transnational Law Review* 476.
[514] *Ibid, 475.*
[515] Stéphanie Hennette-Vauchez, "The State of Emergency in France: Days Without End?" (2017) *Cultures & Conflits* 708.
[516] *Ibid.*
[517] Jean Kilpatrick, "Quand un état d'urgence temporaire devient permanent: Le cas de la France" (2006) *Cultures & Conflits* 13.

Terrorism Act 2011 and by the Counterterrorism and Security Act 2015. However, these measures were designed to interfere with these rights on a more proportional and necessary basis compared to earlier counterterrorism policies[518].

3.1.6 The freedom of expression

According to Article 10 of the European Convention on Human Rights (ECHR), freedom of expression encompasses the right "to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[519]."

In France, this right was significantly curtailed by Law No. 2014-1353 of 13 November 2014, which amended the Penal Code to include the offence of "apology of terrorism," particularly in the context of online public communication services[520]. This legislation targeted the expression of opinions rather than acts of terrorism, as codified in Article 421-2-5 of the Penal Code. The definition of "apology of terrorism" in this article was overly broad, failing to differentiate between provocative or polemical remarks that fall within the bounds of legitimate debate and statements that incite hatred or violence[521]. As such, the November 2014 law exceeded the standards set by international and European law for balancing the repression of incitement to terrorism with the protection of freedom of expression[522]. Even the European Court of Human Rights acknowledged that the concept of "apology of terrorism" constitutes a restriction on freedom of expression[523].

In the United Kingdom, freedom of expression was similarly impacted by counterterrorism legislation, particularly the Terrorism Act 2006. One of the most controversial provisions of this Act was the criminalization of the glorification and incitement of terrorism, with specific reference to online content[524]. For example, the Act defines "glorification of terrorism" as "any form of praise or celebration" of a terrorist act, whether past, future, or general, where "members of the public could reasonably be expected to infer that, what is being glorified as conduct, should be emulated by them in existing circumstances[525]." A person may be found guilty if deemed reckless in expressing any

---

[518] David Bonner, *Counterterrorism and European Human Rights since 9/11: The United Kingdom Experience* (Ashgate, 2007) 115.
[519] *European Convention on Human Rights* (ECHR), Article 10.
[520] Emmanuelle Daoud and Charlotte Godeberge, "La loi du 13 novembre 2014 constitue-t-elle une atteinte à la liberté d'expression?" (2014) *AJ Pénal, Dossier Lutte contre le terrorisme* 564.
[521] François Dubuisson, "Lutte contre le terrorisme et liberté d'expression: Le cas de la répression de l'apologie du terrorisme" in *La Lutte Contre Le Terrorisme* (Editions Pedone, 2017) 277.
[522] *Ibid, 284.*
[523] *Ibid.*
[524] David Murray, "Freedom of Expression, Counterterrorism and the Internet in the Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights" (2009) 27(3) *Netherlands Quarterly of Human Rights* 340.
[525] *Terrorism Act 2006*, para 20.

form of praise or celebration. However, this interpretation depends on the subjective judgment of "members of the public," making it difficult to clearly distinguish between recklessness and negligence[526]. Notably, the Act specifies that it is "irrelevant" whether any individual is actually "encouraged or induced" to commit terrorism[527]. The limitations on freedom of expression stem from the risk that an individual's actions might be interpreted as glorification of terrorism, even when they more appropriately fall under protected speech that does not meet the threshold of criminality[528]. This restriction extends to online expression, where the absence of direct, face-to-face communication increases ambiguity in determining whether an individual's speech constitutes a crime[529]. Furthermore, the Act of 2006 improperly constrained freedom of expression by basing the offence of encouraging terrorism on the vague and expansive definition of terrorism outlined in the Terrorism Act 2000. Additionally, the Terrorism Prevention and Investigation Measures Act 2011 impacted freedom of expression by allowing authorities to restrict or prohibit the use of certain electronic communication tools. Although the Act did not permit the outright prohibition of all communication tools or complete denial of internet access, unlike earlier laws, it still introduced measures that constrained individuals' ability to freely communicate[530].

3.1.7 The freedom of religion

Freedom of religion, as outlined in the right "to manifest his religion or belief, in worship, teaching, practice and observance" under Article 9 of the European Convention on Human Rights[531], was significantly restricted by counterterrorism measures in both France and the United Kingdom.
In France, the limitations on the freedom of religion were primarily due to the systematic and discriminatory application of anti-terrorism provisions, which disproportionately targeted Muslim communities. These measures frequently treated Muslims with suspicion based solely on their religious beliefs rather than concrete evidence of criminal activity. For example, the closure of places of worship and condemnation of "rigorous practice of Islam" or connections with "radical Islamist movements" not only infringed on the freedom of religion but also fostered discrimination against

[526] David Murray, "Freedom of Expression, Counterterrorism and the Internet in the Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights" (2009) 27(3) *Netherlands Quarterly of Human Rights* 340.
[527] Emily Parker, "Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States" (2007) 21(2) *Emory International Law Review* 716.
[528] David Murray, "Freedom of Expression, Counterterrorism and the Internet in the Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights" (2009) 27(3) *Netherlands Quarterly of Human Rights* 340.
[529] *Ibid,349*.
[530] Anne Duffy-Meunier, Sébastien Hourson, and Christine Sénac, "La lutte contre le terrorisme et les droits fondamentaux au Royaume-Uni" (2017) 30 *Droit Comparé et Européen* 219.
[531] *European Convention on Human Rights* (ECHR), Article 9.

Muslims in French society[532]. This environment contributed to a notable increase in Islamophobic incidents in France since 2015[533]. The conflation of Islam with terrorism, coupled with framing Islam as a national security threat, had significant negative repercussions for Muslim communities, a concern raised by numerous human rights organizations[534]. Amnesty International, for instance, condemned the use of emergency measures in 2016, including the expulsion of foreigners, for their harmful impact on Arab and Muslim communities in France[535].

Similarly, in the United Kingdom, counterterrorism legislation also restricted freedom of religion and contributed to the rise of Islamophobia. When the Terrorism Act 2006 was enacted, members of Parliament, media, and proponents of the law explicitly indicated that its focus would be on targeting radical Muslim speech[536]. In practice, security and policing powers were disproportionately directed at Muslim individuals, who were often viewed as "suspect communities" requiring government intervention to prevent radicalization and extremism[537]. Many young Muslims reported that being stopped and searched under counterterrorism powers became their most frequent interaction with the police[538]. The frequency of such stops, combined with witnessing similar treatment of others, created feelings of alienation and perceptions of racial and religious discrimination. Notably, in 2010, 87% of terrorism-related prisoners in Great Britain identified as Muslim[539]. By incorporating religion into counterterrorism measures and restricting freedom of religion, public discourse increasingly associated Islam and Muslim individuals with terrorism. This association not only encouraged discriminatory behavior but also deepened the sense of alienation experienced by Muslim communities[540].

---

[532]Enes Bayraklı and Farid Hafez (eds), *European Islamophobia Report 2016* (SETA, 2017) https://www.islamophobiareport.com/EIR_2016.pdf.
[533] *Ibid*.
[534] Shaima Jorio, *La sécurisation des politiques migratoires françaises, en contexte européen: Effets sur les droits humains des migrants et des réfugiés* (Thesis, University of Quebec, 2020) 166.
[535] *Ibid*.
[536] Emily Parker, "Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States" (2007) 21(2) *Emory International Law Review* 722.
[537] Tahir Abbas and Imran Awan, "Limits of UK Counterterrorism Policy and Its Implications for Islamophobia and Far-Right Extremism" (2015) *International Journal for Crime, Justice and Social Democracy* 17.
[538] Tariq Choudhury and Helen Fenwick, "The Impact of Counter-Terrorism Measures on Muslim Communities" (2011) *International Review of Law, Computers & Technology* 173.
[539] *Ibid, 153*.
[540] Mary J Hickman et al., *'Suspect Communities'? Counter-Terrorism Policy, the Press, and the Impact on Irish and Muslim Communities in Britain: Report of a Research Project Funded by the Economic and Social Science Research Council (1974–2007)* (2011) 4.

3.2 The Escalating Divide: Citizens, Non-Citizens, and Eroding Equal Rights

Antiterrorism legislation has not only adversely impacted fundamental human rights and civil liberties in France and the United Kingdom but has also legitimized discrimination between citizens and non-citizens. This has undermined the principles of non-discrimination and equality, as non-nationals were often viewed as potential participants in terrorist activities. This perception was fueled by the widespread tension and fear following terrorist attacks, along with political propaganda and debates. A key driver of this increased discrimination has been the enactment of more restrictive immigration laws, often coinciding with the adoption of counterterrorism measures across much of Europe. These restrictive immigration policies reinforced the notion of immigrants as potential terrorists and justified making it more difficult for them to enter and reside within French and British borders. Moreover, the differentiation between citizens and non-citizens, or citizens of foreign origin, was exacerbated by broad provisions on citizenship deprivation, which became a common counterterrorism tool and an integral aspect of the antiterrorism strategies in both countries.

The relationship between immigration, asylum, and national security has long been acknowledged, but it gained significant prominence following the 9/11 attacks. This shift was driven by concerns over the interplay between terrorism, border control, and the movement of people, coupled with rising fears of foreigners and exclusionary political rhetoric[541]. The 9/11 attacks also fostered the perception of individuals as threats to the state based on their ethnicity or religious beliefs rather than their nationality. Consequently, counterterrorism policies began to reshape immigration laws and policies. Governments increasingly justified restrictive immigration measures as necessary for national security, utilizing these strategies as tools in their broader counterterrorism efforts[542].

In the wake of 9/11, most European nations reinforced border controls and tightened migration policies, making it more difficult for potential migrants to move legally[543]. Following the Paris attacks of 2015, several European states debated new methods to monitor and track immigrants, aiming to address fears of Islamist terrorists infiltrating migratory flows[544].Studies indicate that immigration policies became more stringent under the influence of counterterrorism legislation, especially after 9/11, for two primary reasons. The first reason is rooted in security considerations, with governments aiming to increase the costs of terrorist infiltration and thereby reduce the likelihood of attacks. The

[541] Elspeth Guild, "Immigration, Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001" in Bulent Gokay and R B J Walker (eds), *11 September 2001: War, Terror and Judgement* (Taylor & Francis Group, 2003) 170.
[542] Vincenzo Bove, Tobias Böhmelt, and Enzo Nussio, "Terrorism Abroad and Migration Policies at Home" (2021) *Journal of European Public Policy* 191.
[543] *Ibid*.
[544] *Ibid*.

second reason is tied to political accountability, as governments sought to address public fears and meet demands for enhanced security[545]. In this context, much like antiterrorism laws, immigration policies accompanying counterterrorism measures often had a symbolic function. Politicians used these policies to signal their commitment to combating terrorism, reassuring the electorate of their actions against perceived threats. However, these policies frequently targeted Arab or Muslim immigrants, fostering alienation and discrimination while reinforcing racial and religious stereotypes within public opinion[546]. Linking immigration policies to counterterrorism measures has often backfired, as marginalized and discriminated ethnic communities may become more susceptible to supporting terrorism. The following sections will examine the cases of France and the United Kingdom, where governments incorporated strict immigration laws into their counterterrorism strategies, exacerbating discrimination between citizens and non-citizens.

3.2.1 Restrictive Pathways: Immigration and Asylum Measures in the United Kingdom

The tightening of immigration, asylum, and border controls played a central role in the UK's counterterrorism legislation and parliamentary debates following 9/11. Immigration and asylum policies became instruments for addressing concerns regarding the interplay between human rights protections and national security policies.[547]. In British political debates, terrorism was often framed as an issue involving the monitoring of foreigners, both those entering the UK and those already residing within its borders[548]. This discourse was influenced by two predominant beliefs: firstly, the notion that potential terrorists could exploit asylum and immigration systems; and secondly, the utilization of immigration mechanisms, such as the Special Immigration Appeals Commission (SIAC), as instruments in the struggle against terrorism.[549]. This institutional connection between counterterrorism and immigration policies was codified in the Anti-Terrorism Crime and Security Act 2001, particularly in Part IV, titled "Immigration and Asylum." This Act introduced the controversial provision of indefinite detention for non-nationals suspected of terrorism and included measures for retaining fingerprint data in immigration and asylum cases[550]. Moreover, it enabled the revocation of residence permits based on ministerial certification of an individual as a terrorism

[545] Marc Helbling and Daniel Meierrieks, "Transnational Terrorism and Restrictive Immigration Policies" (2020) 57(4) *Journal of Peace Research* 565.
[546] Alexander Spencer, "Using Immigration Policies as a Tool in the War on Terror" (2007) 7(1) *Crossroads* 40.
[547] Alessandra Buonfino and Jef Huysmans, "Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK" (2008) 56 Political Studies 769.
[548] *Ibid*.
[549] *Ibid*, 773.
[550] Alexander Spencer, "Using Immigration Policies as a Tool in the War on Terror" (2007) 7(1) Crossroads 22.

threat[551]. In November 2002, the Nationality, Immigration and Asylum Act came into effect, further expanding detention powers. Under this law, asylum seekers could be detained at any point during their application process, and refugees convicted of relatively minor offences could also face detention[552]. This provision was criticized for contravening the UK's obligations under the Refugee Convention[553]. Additionally, the Act denied asylum support to individuals who failed to file their claims "as soon as reasonably practicable" after arriving in the UK or who could not disclose how they had entered the country. NGOs criticized this measure for its potential to severely impact the lives of thousands of asylum applicants, and it was later found to breach Article 3 of the European Convention on Human Rights by the Court of Appeal[554]. The Act also expanded the powers of immigration officers and privatized certain aspects of immigration control[555].

The bombings in London in 2005, although perpetrated by British citizens, reignited political attention towards foreign individuals, with the discourse insinuating that foreign Muslim extremists had breached British borders.[556]. Immigration measures were thus increasingly shaped by terrorism-related events and their associated legislation. A notable example was the Immigration, Asylum and Nationality Act of 2006, which prohibited asylum for anyone deemed to have committed or incited terrorism or encouraged its preparation[557]. Critics argued that this provision was overly broad, as it failed to account for the wide-ranging and ambiguous definition of terrorism at the time[558]. The Act also expanded deportation and removal powers, enabled police to access advanced passenger information for individuals entering or leaving the UK, and allowed immigration officials to seize travel documents and register biometric data[559]. Following the Terrorism Act of 2006, the United Kingdom Borders Bill was introduced and subsequently ratified in the year 2007. This legislative measure was informed by the Home Office's 2007 White Paper, entitled "Securing the UK Border: Our Vision and Strategy for the Future," which sought to "securitize" migration as an element of broader counterterrorism efforts[560]. The strategy included establishing stricter border controls to

---

[551] Elspeth Guild, "Immigration, Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001" in Bulent Gokay and R B J Walker (eds), 11 September 2001: War, Terror and Judgement (Taylor & Francis Group, 2003) 177.
[552] Nationality, Immigration and Asylum Act 2002, Part IV.
[553] The Guardian, "Criticism of the Nationality, Immigration and Asylum Act" The Guardian (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.
[554] Deryn Stevens, "The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?" (2004) 67(4) The Modern Law Review 618.
[555] *Ibid, 622.*
[556] Alessandra Buonfino and Jef Huysmans, "Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK" (2008) 56 *Political Studies* 777.
[557] *Explanatory Notes to the Immigration, Asylum and Nationality Act 2006.*
[558] The Guardian, "Criticism of the Nationality, Immigration and Asylum Act" The Guardian (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.
[559] *Ibid.*
[560] Derek McGhee, "The Paths to Citizenship: A Critical Examination of Immigration Policy in Britain Since 2001" (2009) *Patterns of Prejudice* 42.

prevent terrorist suspects from entering the UK and introduced measures such as the Visa Waiver Test, which assessed the level of risk posed by individuals from specific countries. These legislative measures illustrate how the UK's immigration and asylum policies became tightly interwoven with counterterrorism strategies, often at the expense of human rights protections and non-discrimination principles. The UK Borders Act significantly strengthened the powers of immigration control and the Border and Immigration Agency, granting immigration officers police-like powers, including increased authority for detention, entry, search, and seizure[561]. These measures were heavily criticised by civil liberties organisations, as they were seen as racially and socially contentious[562]. The Act also introduced mandatory biometric identity documents for non-EU immigrants and gave the Secretary of State broad powers to retain and share immigrants' information[563]. Additionally, the Act allowed for the automatic deportation of non-citizens convicted of certain offences or sentenced to imprisonment of over one year[564]. It also imposed additional reporting and residency requirements on immigrants with limited leave to remain in the UK[565]. These provisions subjected non-citizens to extensive controls, including tracking their entry and exit from British territory[566]. The Criminal Justice and Immigration Act introduced a special immigration status for individuals deemed involved in terrorism, barring them from entering or remaining in the UK and imposing restrictions on their residence and employment[567]. Further measures to tighten immigration controls were included in the Borders, Citizenship and Immigration Act of 2009, which enhanced border control mechanisms, expanded customs powers for immigration agents, criticized as overly invasive by the National Council on Civil Liberties, and imposed stricter requirements for obtaining residential status[568]. In 2014, heightened security concerns arose with the anticipated return of approximately 400 individuals who had left the UK to fight in Syria and Iraq[569]. In response, the Immigration Act of 2014 introduced measures that significantly reduced appeal rights, restricted the ability of detained individuals to apply for immigration bail, and tightened restrictions on appeals against removal and deportation orders

---

[561] The Guardian, "Criticism of the Nationality, Immigration and Asylum Act" The Guardian (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.
[562] *Ibid*.
[563] *Explanatory Notes to the Immigration, Asylum and Nationality Act 2006*, para 4–5, 19–20.
[564] *Ibid*, para 12-18.
[565] "Criticism of the Nationality, Immigration and Asylum Act" *The Guardian* (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.
[566] Mary Bosworth and Elspeth Guild, "Governing Through Migration Control: Security and Citizenship in Britain" (2008) 48 *British Journal of Criminology* 710.
[567] *Criminal Justice and Immigration Act 2008*, Part X.
[568] "How Immigration Laws Curtail Civil Liberties" *The Guardian* (13 February 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/feb/13/civil-liberties-immigration.
[569] Lucia Zedner, "The Hostile Border: Crimmigration, Counterterrorism, Crossing the Line on Rights?" (2019) 22(3) *New Criminal Law Review* 331.

based on Article 8 of the ECHR[570]. The Act also included various provisions designed to enhance the UK's image as a "hostile environment" for migrants, particularly irregular immigrants[571]. This hostile environment was further solidified by the Immigration Act of 2016, introduced a year after the Counterterrorism and Security Act of 2015. The 2016 Act strengthened immigration enforcement by eliminating the automatic in-country right of appeal for most immigration and deportation cases and introduced additional measures to reinforce immigration laws[572].

In conclusion, the United Kingdom was among several states that sought to deploy comprehensive legislative tools to prevent the movement of potential terrorists across national borders[573]. However, the increased focus on immigration control, driven by counterterrorism concerns, often resulted in the convergence of counterterrorism, immigration, and asylum policies. This intersection blurred the distinction between citizens and non-citizens, not only in terms of legal rights but also in terms of the qualitative sense of belonging and inclusion[574]. The criminalization of migration reshaped the security landscape for UK citizens, further merging immigration and counterterrorism frameworks at the border[575]. Moving forward, the UK government has continued to pursue an immigration policy that fosters a hostile environment, leveraging the overlap between criminal, immigration, and counterterrorism legislation while granting exceptional powers to police and immigration officials under the banner of security[576].

3.2.2 Restrictive Pathways: Immigration and Asylum Measures in France

In France, the influence of terrorism fears on asylum and immigration policies has been deeply rooted in the concepts of public order and national security, which have long been used as justification for the expulsion of non-nationals[577]. After 1994, the concept of public order became increasingly central to French immigration laws, and from 2001 onwards, it was further expanded to encompass the entirety of an alien's movements. Maintaining a status of not being a threat to public order became

---

[570] Ana Aliverti, "The New Immigration Act 2014 and the Banality of Immigration Controls" (2014) *Borders Criminology Blog* https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/05/new-immigration.https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/05/new-immigration

[571] *Ibid*.

[572] "What's New in the Immigration Act 2016?" *Cross Border Legal* https://www.crossborderlegal.co.uk/whats-new-immigration-act-2016/.

[573] Lucia Zedner, "The Hostile Border: Crimmigration, Counterterrorism, Crossing the Line on Rights?" (2019) 22(3) New Criminal Law Review 324.

[574] Mary Bosworth and Elspeth Guild, "Governing Through Migration Control: Security and Citizenship in Britain" (2008) 48 *British Journal of Criminology* 714.

[575] *Ibid*.

[576] Lucia Zedner, "The Hostile Border: Crimmigration, Counterterrorism, Crossing the Line on Rights?" (2019) 22(3) *New Criminal Law Review* 324.

[577] Claire Saas, "The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears" in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner* (Koninklijke Brill NV, 2007) 233.

a prerequisite for entry, residence, and continued presence in French territory[578]. Immigrants also faced intensified identity checks and administrative detentions aimed specifically at them. In the wake of the 9/11 attacks, data shows that the number of irregular immigrants detained for the purpose of expulsion rose by 30% between September and October 2001[579].

As in many other European nations, the enactment of counterterrorism legislation in France coincided with increasingly restrictive immigration policies, with the prevailing climate of fear fostering the perception of migrants as potential terrorists or criminals. Notably, in 2003, alongside the adoption of the Law on Internal Security of 18 March, the Sarkozy Law on Immigration was introduced in November of the same year. This law marked one of the most stringent reforms to French immigration policy since World War II and was publicly justified as a response to the emergency posed by the terrorist threat[580].

The Sarkozy Law introduced several restrictive measures:

i. It tightened visa and entry procedures.
ii. It extended the duration of administrative detention for non-nationals denied residence rights.
iii. It created a database containing digital fingerprints and photographs for visa applications, facilitating closer monitoring of irregular immigrants.
iv. It imposed stricter penalties for aiding irregular entry and residence[581].

Additionally, the law made residence in France more precarious for non-nationals, stipulating that a ten-year residence permit would only be granted upon proof of integration into French society[582].

In 2004, French asylum law underwent further changes influenced by counterterrorism legislation and concerns about national security. Amendments replaced the right to asylum with a subsidiary protection system and increasingly invoked the concept of being a "threat to public order" as a condition for admissibility in asylum processes[583]. This reform was heavily criticized by the Coordination Française pour le Droit d'Asile, as it was seen as undermining the application of the Refugee Convention in France[584].

---

[578] *Ibid, 247.*
[579] *Ibid, 250.*
[580] *Ibid, 260.*
[581] Loi n° 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000795635/.
[582] Claire Saas, "The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears" in Elspeth Guild and Anneliese Baldaccini (eds), *Terrorism and the Foreigner* (Koninklijke Brill NV, 2007) 233.
[583] *Ibid, 233.*
[584] *Ibid, 258-259.*

The trend of reinforcing immigration legislation persisted with the enactment of the Law of 23 January 2006, succeeded by the *Loi relative à l'immigration et à l'intégration*, which took effect in July 2006. This statute introduced further restrictions, including the elimination of automatic regularization after a decade of residency, instead substituting it with a ten-year resident card contingent upon the attainment of a French language diploma.[585]. Subsequent laws further intensified restrictions, such as the *Loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile* (November 2007), which introduced new challenges for family reunification, and the Loi relative à *l'immigration, à l'intégration et à la nationalité* (June 2011), aimed at deterring illegal immigration by amending expulsion procedures, extending the maximum detention period for irregular immigrants from 35 to 42 days, and limiting access to legal assistance before the National Court of Asylum.[586] These legislative changes highlight how France's counterterrorism strategy has profoundly influenced immigration and asylum regulations, prioritising national security at the expense of migrants' and asylum seekers' rights. During the state of emergency in France from 2015 to 2017, exceptional laws were adopted that specifically targeted migratory control and immigration regulations, as discussed in the previous chapter. One notable example is the *Law of 13 November 2014*, which introduced Articles 214-1 to 4 in the Code of Entry and Residence of Foreigners and the Right to Asylum. These provisions were employed to strengthen the existing exceptional regimes, particularly in overseas territories territories. Since the adoption of the *Law of 30 October 2017*, measures such as expulsion and house arrest have increasingly relied on administrative decisions, reflecting the harmonisation of surveillance systems for counterterrorism and the regulation of foreigners. Non-nationals have effectively been positioned as the focal point of the so-called "permanent state of emergency." This framework has extended criminal law provisions concerning the prevention and enforcement of religious radicalisation, applying them in a manner that disproportionately targets Muslims and, more broadly, non-citizens.[587] Border controls were also reinforced, driven by the perceived connection between terrorism and immigration. In 2017, the Council of State validated the extension of border controls, citing the existence of a link between migratory flows and the terrorist threat[588]. This convergence between the regulation of foreigners and emergency counterterrorism logic is evidenced not only by the *Law of 2017* but also by the *Law on Immigration and Asylum*, which came into force in September 2018. This law expanded administrative investigations to include asylum seekers, relying on the Internal Security Code, which

[585] Peter May, "Ideological Justifications for Restrictive Immigration Policies: An Analysis of Parliamentary Discourses on Immigration in France and Canada (2006–2013)" (2016) 14 *French Politics Journal* 294.
[586] *Ibid*.
[587] Jean-Philippe Foegle, "Les étrangers, cibles de l'état d'urgence" (2018) 117 *Plein Droit Revue* 8.
[588] *Ibid, 9*.

had already been extended in 2017 to cover all public officials[589]. These investigations normalized and generalized the police registration of non-nationals, enabling the unrestricted use of foreign intelligence information to identify potential terrorists among refugees[590]. The 2018 law also reduced the period for asylum seekers to file their applications from 120 days, as stipulated in the *Law of 29 July 2015* on asylum reform, to just 90 days after their arrival in France[591]. Moreover, it tightened expulsion measures and increased the duration of administrative detention for irregular migrants.[592]

In conclusion, while France has historically been regarded as one of Europe's leading host countries for asylum seekers, often adopting policies aimed at facilitating the integration of immigrants, its approach shifted significantly during periods of heightened terrorist threats and the 2015-2017 state of emergency. In these periods, harsh immigration policies were aligned with counterterrorism legislation, particularly as the perception of immigrants as potential terrorists grew stronger.

3.3 The Role of French and British High Courts in Balancing Counterterrorism and Fundamental Rights

3.3.1 The Jurisprudence of the United Kingdom's House of Lords

The House of Lords, as the upper house of the UK Parliament, functioned as the final court of appeal in the British judicial system until 2009 through its Law Lords (Lords of Appeal in Ordinary), a group of judges who exercised the House's judicial functions[593]. This dual role allowed the House of Lords to act both as a judicial body and as a counterbalance to the Government during a period when British counterterrorism legislation was at its most controversial, often criticized for significantly restricting fundamental rights, as discussed in previous chapters. Historically, the House of Lords exhibited judicial deference towards the Executive and other branches of government, particularly during periods of crisis or warfare. In such scenarios, the Executive frequently faced minimal opposition regarding its claims related to national security. This judicial self-restraint can be attributed to several factors: the perception that national security matters are non-justiciable, given their constitutional unsuitability for judicial intervention; the judiciary's limited access to classified information, which is often withheld by the Executive in the context of national security; and the

[589] *Ibid*.
[590] *Ibid*.
[591] "Asile et Immigration: La Loi du 10 Septembre 2018" *Vie Publique* https://www.vie-publique.fr/eclairage/19455-asile-et-immigration-la-loi-du-10-septembre-2018.
[592] *Ibid*.
[593] *UK Parliament* https://www.parliament.uk/business/lords/.

entrenched British principle of Parliamentary sovereignty, which has traditionally constrained judicial oversight of legislative decisions.[594].

However, this deferential pattern began to erode following the 9/11 attacks, as the House of Lords increasingly challenged executive unilateralism in the realm of security. Unlike the French Constitutional Council, which maintained a deferential approach in its review of counterterrorism legislation, the House of Lords adopted a more non-deferential stance, rigorously scrutinizing the Government's security measures[595]. The House of Lords demonstrated its new disposition through landmark rulings that critically examined controversial government policies, such as: the indefinite detention of non-nationals, the control orders regime, and the use of evidence obtained through torture[596]. These decisions highlight the House of Lords' significant contribution to limiting Executive overreach into fundamental rights, marking a departure from earlier judicial attitudes that viewed national security as a domain beyond judicial review[597]. Scholars attribute this evolving judicial attitude to several factors. One significant factor has been the increasing engagement of civil society. The growing involvement of civil society organisations advocating for human rights and civil liberties, such as Liberty and Justice, has played a key role. These organisations frequently intervened in major cases heard by the House of Lords, promoting greater scrutiny of government policies.[598].

In second place, the incorporation of the European Convention on Human Rights (ECHR) into UK domestic law through the Human Rights Act 1998 (HRA), which came into effect in 2000, offered the judiciary a stronger foundation for intervening in human rights cases.[599]. The HRA also facilitated the establishment of the Joint Committee on Human Rights, which reviewed the impact of counterterrorism legislation on human rights. The House of Lords often referred to these reports in its judgments[600]. In conclusion, a reconceptualization of the "War on Terror' is warranted, as it is viewed as an extended and unpredictable era of tension. This viewpoint may have led to a diminished level of deference toward the Executive, given that it did not require the same urgency or extraordinary measures typically associated with conventional warfare.[601]

The jurisprudence of the House of Lords during this period signifies a considerable transformation in the judicial approach to counterterrorism legislation. By contesting the Executive

---

[594] John Ip, "The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?" (2010) 19(1) *Michigan State University College of Law Journal of International Law* 3.
[595] *Ibid., 28.*
[596] *Ibid., 33.*
[597] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 *International Journal of Constitutional Law* 173.
[598] John Ip, "The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?" (2010) 19(1) Michigan State University College of Law Journal of International Law 3.
[599] *Ibid., 39.*
[600] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 International Journal of Constitutional Law 173.
[601] *Ibid., 59.*

and undertaking rigorous examination of security measures, the House of Lords transitioned from its historically deferential position. This evolution was further enhanced by advocacy from civil society, the integration of the European Convention on Human Rights into domestic law, and the distinct nature of the "war on terror." Consequently, the House of Lords played a more proactive role than its French equivalent, the Constitutional Council, in the protection of fundamental rights and in constraining executive encroachment into the domain of individual liberties freedoms.

According to some constitutional scholars, the shift in the House of Lords' approach to counterterrorism legislation has not been a radical transformation. Critics argue that the House of Lords could have exercised stronger oversight of the Executive, as the degree of judicial deference varied among the Law Lords and was often inconsistent[602]. However, it remains significant that issues of national security ceased to be viewed as entirely off-limits to judicial review, moving away from a position of blanket deference[603]. This non-deferential shift was notably marked by the *Belmarsh* case of 2004, which established that the Government could no longer freely justify restrictive counterterrorism measures solely on the grounds that national security fell under its exclusive purview[604]. Following this precedent, the Government increasingly faced the obligation to justify its counterterrorism provisions in alignment with human rights standards, a trend influenced by House of Lords decisions, even though these decisions could not directly invalidate legislation[605].

Under the Human Rights Act 1998 (HRA), the House of Lords was empowered to issue declarations of incompatibility, signaling that certain provisions of a law were inconsistent with human rights obligations. While these declarations could not compel the repeal of legislation (since only Parliament holds that authority), they often resonated within civil society and exerted moral pressure on the Government to amend or reconsider its policies.

Since the 9/11 attacks, the House of Lords and the broader judicial system demonstrated an increased willingness to scrutinize Executive actions in the domain of national security, a sector previously regarded as unsuitable for judicial intervention. This new level of engagement reflected a growing recognition of the profound impact of counterterrorism measures on individual rights and freedoms, countering the historically excessive judicial discretion in this field[606].

---

[602] Max Harris, "Public Law Values in the House of Lords - In an Age of Counterterrorism" (2011) 17 Auckland University Law Review 139.

[603] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 International Journal of Constitutional Law 173.

[604] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 International Journal of Constitutional Law *192*.

[605] Cian R.J. Murray, "Nudging or Fudging: The UK Courts' Counterterrorism Jurisprudence Since 9/11" (2016) 21(1) *Journal of Conflict and Security Law* 111.

[606] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Routledge, 2008) 347.

To further illustrate the House of Lords' approach to balancing public security demands with the protection of fundamental rights, the following key decisions will be analyzed:

i. *A v Secretary of State for the Home Department* [2004] UKHL 56 (*Belmarsh* case).
ii. *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 (*Torture Evidence* case).
iii. *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
iv. *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28.

These decisions critically assessed the compatibility of counterterrorism measures with fundamental rights, particularly focusing on the infringement of individual liberties through mechanisms such as indefinite detention without trial of non-nationals, the use of torture-induced evidence, and the control orders regime under the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005.

3.3.1.1 Non-Nationals and Indefinite Detention: The Impact of the Belmarsh Case

The *Belmarsh* case (*A v Secretary of State for the Home Department* [2004] UKHL 56) represented a landmark shift in the judicial approach of the House of Lords. It rejected the long-standing notion that courts should adopt a passive stance on national security issues, affirming that such matters were no longer beyond the reach of judicial review[607].

The contested provision, Section 23 of the Anti-terrorism, Crime and Security Act 2001, permitted the indefinite detention without trial of foreign nationals suspected of terrorism who could not be deported to their country of origin due to the risk of torture. The provision relied on the UK's derogation from Article 5 of the European Convention on Human Rights (ECHR), which protects the right to personal liberty, through the activation of the derogation procedure outlined in Article 15 ECHR. Between December 2001 and December 2004, seventeen individuals were detained under this power, nine of whom challenged the lawfulness of their detention before the Special Immigration Appeals Commission (SIAC)[608], the Court of Appeal, and ultimately the House of Lords[609].

Given the constitutional significance of the case, a special panel of nine Law Lords was convened, instead of the usual five[610]. The appellants argued that the requirements for derogation under Article

[607] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 *International Journal of Constitutional Law* 183.
[608] According to the Court of Appeal, the UK Government's measure was deemed proportional, in response to the threat.
[609] Sangeeta Shah, "The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish" (2005) 5(2) *Human Rights Law Review* 406.
[610] David Feldman, "United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001" (2005) 1(3) *European Constitutional Law Review* 534.

15 ECHR had not been met. They contended that there was no "public emergency threatening the life of the nation", as required under Article 15, asserting that the alleged emergency was neither imminent nor temporary, noting that the UK was the only European state to have invoked derogation from the ECHR[611]. Furthermore, they argued that the indefinite detention of non-nationals is disproportionate, especially as it solely pertains to foreign nationals, thus resulting in discrimination based on nationality. The majority of the Law Lords accepted the Home Secretary's assertion that a public emergency threatening the life of the nation existed. They cited the European Court of Human Rights' (ECtHR) doctrine of the "margin of appreciation", which grants states a degree of discretion in determining what constitutes a genuine threat to public safety. The judges acknowledged that the executive branch was better positioned to evaluate such emergencies, as the judiciary lacked access to classified information and the resources to challenge the Government's assessment[612]. The acceptance of the Government's position constituted the sole deferential element within the ruling. Nevertheless, even this acknowledgment represented a significant advancement, given that British courts have traditionally refrained from scrutinizing the Executive's evaluation of national security issues.[613].

The *Belmarsh* case represents a pivotal moment in British judicial history, as the House of Lords affirmed its authority to review and, when necessary, invalidate counterterrorism measures that violate fundamental rights. While the majority exhibited some deference to the Executive regarding the existence of a public emergency, the decision emphasized a significant transition toward a more assertive role for the judiciary in reconciling national security with the safeguarding of individual liberties. Lord Hoffmann's dissent, in particular, underscored the possibility of an even more rigorous judicial approach to evaluating Executive power within this context counterterrorism. Furthermore, the Law Lords were tasked with determining whether the power to detain non-nationals without trial during a public emergency exceeded what was "strictly required by the exigencies of the situation", necessitating a proportionality test. This test had not been rigorously applied by the Special Immigration Appeals Commission (SIAC) and the Court of Appeal, which had instead deferred the matter to the executive branch[614]. The House of Lords, however, conducted a thorough proportionality analysis. Lord Bingham structured his reasoning around three key elements:

---

[611] Sangeeta Shah, "The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish" (2005) 5(2) *Human Rights Law Review* 406.
[612] *House of Lords Judgment: A and others v Secretary of State for the Home Department* (16 December 2004) https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm.
[613] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 *International Journal of Constitutional Law* 182.
[614] *A v Secretary of State for the Home Department* [2004] UKHL 56, para 44.

i. Whether the legislative goal was sufficiently significant to justify restricting a fundamental right.
ii. Whether the provisions were rationally designed to achieve the statutory purpose; and
iii. Whether the measures infringed rights no more than was necessary to achieve the legitimate objective[615].

The majority of the Law Lords concluded that these criteria had not been met. They found the powers granted under Section 23 of the Anti-terrorism, Crime and Security Act 2001 to be excessive, irrational, and disproportionate[616]. A pivotal issue was the differential treatment of nationals and non-nationals, despite both being equally suspected of terrorism. The Law Lords emphasised that the terrorist threat came from both British citizens and foreign individuals, yet only the latter were subject to detention. Baroness Hale articulated this inconsistency, stating, "[...] there is no real explanation of why it is necessary to lock up one group of people sharing exactly the same characteristics as another group which it does not think necessary to lock up [...]. If it is not necessary to lock up the nationals, it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation[617]." The Government failed to establish a rational link between the aim of protecting the public from terrorism and the specific measure of detaining only non-nationals[618]. This measure was also deemed discriminatory, violating Article 14 ECHR (prohibition of discrimination), as it applied solely to foreign nationals based on irrelevant criteria like nationality or immigration status[619]. In this context, the principle of equality became inextricably linked with the proportionality analysis. The unjustified differential treatment of nationals and non-nationals culminated in the conclusion that the measure violated Article 5 of the European Convention on Human Rights (ECHR), which pertains to the right to liberty, as well as Article 14 of the ECHR. Consequently, the derogation invoked under Article 15 of the ECHR was deemed invalid, and the contested provisions were determined to be incompatible with the rights enshrined in the Convention.

The constitutional significance of the Belmarsh case is profound. It signified a pivotal departure from the judiciary's traditional stance of self-restraint, underscoring that judicial deference is not absolute, and that courts possess a vital role in evaluating national security measures. This was particularly evident in the response from the Lords to the Attorney General, who contended that the

[615] David Feldman, "United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001" (2005) 1(3) *European Constitutional Law Review* 540.
[616] Niamh Hayes, "Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords" (2005) 8 *Trinity College Law Review* 114.
[617] *A v Secretary of State for the Home Department* [2004] UKHL 56, paras 228–231.
[618] Niamh Hayes, "Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords," cit., 115.
[619] *A v Secretary of State for the Home Department* [2004] UKHL 56, para 54.

courts lacked the jurisdiction to assess the Executive's actions in response to the public emergency[620]. The Law Lords firmly rejected this notion, asserting, "[...] the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself [...]"[621]. Lord Bingham further underscored that the Human Rights Act 1998 gave judges a clear responsibility to protect fundamental rights and freedoms through judicial review, reinforcing the judiciary's legitimacy in these matters[622]. The decision also highlighted the fundamental right to liberty, irrespective of an individual's nationality. It demonstrated that any limitation on this right must meet strict conditions and undergo rigorous judicial scrutiny, from which neither the Executive nor the Legislature can exempt themselves, even in the context of national security[623].

Finally, it is particularly significant that, although the declaration of incompatibility issued by the House of Lords could not directly repeal the legislative measures, it placed substantial political pressure on the UK Government to abandon the mechanism of detention without trial. This led to the enactment of the Prevention of Terrorism Act 2005, which replaced indefinite detention with the control orders regime[624]. The decision underscored the importance of human rights, even in a context of heightened tension where public safety was prioritised[625]. The Law Lords demonstrated their ability to safeguard fundamental rights against excessive encroachments imposed by counterterrorism legislation, reinforcing the principle that an effective balance between security and liberties must always be maintained. Their intervention ensured that the pursuit of national security did not come at the unacceptable expense of individual freedoms, thereby reinforcing the rule of law during a critical period.

3.3.1.2 Reaffirming the Prohibition of Torture

The *Torture Evidence* case (*A v Secretary of State for the Home Department (No 2) [2005] UKHL 71*) further exemplifies the House of Lords' non-deferential approach, emphasizing the protection of fundamental liberties even during the "war on terror." This case revisited the human rights implications of Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ACTSA), which had previously been challenged in the *Belmarsh* case[626].

---

[620] Niamh Hayes, "Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords," cit., 123.
[621] *A v Secretary of State for the Home Department* [2004] UKHL 56, para 42.
[622] David Feldman, "United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001," cit., 547.
[623] *Ibid*.
[624] Mark Elliott, "United Kingdom: Detention Without Trial and the War on Terror," cit., 560.
[625] Cian R J Murray, "Nudging or Fudging: The UK Courts' Counterterrorism Jurisprudence Since 9/11," cit., 110.
[626] Shehzad Shah, "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues" (2006) 6(2) *Human Rights Law Review* 416.

The appellants in the Torture Evidence case were the same detainees who had contested their detention in the Belmarsh case. With the support of numerous international human rights organizations, they argued that the UK Government had relied on evidence obtained through torture during proceedings before the Special Immigration Appeals Commission (SIAC). These proceedings had certified the individuals as suspected terrorists, justifying their continued detention[627].In August 2004, the Court of Appeal rejected the appellants' claim that the admission of torture-tainted evidence violated the UK's obligations under the European Convention on Human Rights (ECHR) and the Convention Against Torture (CAT)[628]. This ruling caused a significant backlash from civil society and international human rights organizations, as it effectively allowed the Secretary of State to rely on evidence obtained through torture[629].

In December 2005, the House of Lords delivered its judgment, addressing the core question of whether SIAC, when hearing appeals under Section 25 of ACTSA 2001, could admit evidence that was or might have been obtained through torture by foreign officials, provided there was no complicity by British authorities[630]. Under common law, evidence obtained through torture is inadmissible in English courts, as the principle of fairness precludes the use of such evidence[631]. However, SIAC operates under its own procedural and evidentiary rules, validated by Parliament, which permit it to "receive evidence that would not be admissible in a court of law[632]." The Law Lords determined that evidence obtained through torture is inadmissible in Special Immigration Appeals Commission (SIAC) proceedings, irrespective of procedural guidelines. They asserted that torture is unequivocally prohibited under international law, particularly under the European Convention on Human Rights (ECHR) Article 3 and the Convention Against Torture (CAT), which embody the universal principle of the absolute prohibition of torture. This prohibition is non-derogable, even in scenarios involving national security or public emergency. Furthermore, the Lords underscored that the utilization of evidence derived from torture fundamentally compromises the rule of law. Such practices violate the principle of fairness and the integrity of judicial proceedings. They articulated that SIAC must exclude any evidence suspected of being procured through torture, and it is incumbent upon the Government to demonstrate, on the balance of probabilities, that the evidence it intends to rely upon is devoid of such taint.

---

[627] Brandon Gasper, "Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism" (2005) 21 *American University International Law Review* 294.
[628] *Ibid., 295.*
[629] Tobias Thienel, "Foreign Acts of Torture and the Admissibility of Evidence" (2006) 4(2) *Journal of International Criminal Justice* 402.
[630] *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, para 1.
[631] Shehzad Shah, "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues," cit., 417.
[632] Special Immigration Appeals Commission (Procedure) Rules 2003, Rule 44.

The case concerning Torture Evidence signifies a crucial affirmation of the absolute prohibition of torture and its ramifications for the rule of law. The judgment rendered by the House of Lords served as a pronounced repudiation of the prior ruling by the Court of Appeal, reinforcing the notion that no security justification can supersede the ban on torture. This decision also signifies a broader shift in the judiciary's propensity to contest Executive overreach, illustrating that fundamental rights must remain intact, even in the presence of considerations related to national security concerns. The judgment emphasized the judiciary's role as a guardian of human rights and represented a refusal to allow procedural rules to undermine principles established in international law. Additionally, it conveyed an unequivocal message to the Government that compliance with international human rights standards is essential, irrespective of the difficulties arising from counterterrorism initiatives. The Home Secretary contended that no legal obligation prohibited him from submitting evidence acquired through torture to the Special Immigration Appeals Commission (SIAC), claiming that its admissibility was not constrained by domestic law.[633]. The House of Lords' decision was highly significant, as it unanimously overturned the Court of Appeal's judgment by declaring that British courts, including SIAC, cannot rely on evidence that might have been obtained through torture. This prohibition applied "irrespective of where, or by whom, or on whose authority the torture was inflicted"[634]. The ruling established that torture-induced declarations are always inadmissible as evidence[635]. This decision placed the House of Lords at the center of a broader debate regarding the strength and universality of the prohibition against torture, even in extreme circumstances like the fight against terrorism[636]. The Law Lords' reasoning was rooted in the historical common law principle that torture is repugnant due to its illegality and inhumanity[637]. They also invoked Article 15 of the International Convention Against Torture (1984), which stipulates that "any statement established to have been made as a result of torture shall not be invoked as evidence in any proceedings." While this convention is not directly enforceable under British domestic law, the House of Lords relied on it to reinforce their interpretation of domestic legal principles and to challenge the Government's stance[638]. The Law Lords emphasized that antiterrorist provisions must conform to international human rights standards[639]. By affirming the inadmissibility of evidence obtained through torture, the House of Lords upheld Article 6 ECHR (right to a fair trial) and aligned with Article 15 of the Convention Against Torture. However, the House of Lords also drew a distinction between

[633] Shehzad Shah, "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues," cit., 417.
[634] A *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.
[635] John Ip, "The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges," cit., 27.
[636] Tobias Thienel, "Foreign Acts of Torture and the Admissibility of Evidence," cit., 402.
[637] Shehzad Shah, "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues," cit., 419.
[638]Tobias Thienel, "Foreign Acts of Torture and the Admissibility of Evidence," cit., 403.
[639] Shehzad Shah, "The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues," cit., 425.

judicial and administrative bodies. While they ruled that the exclusionary rule applied to courts, including SIAC, it did not extend to the executive branch, meaning the Secretary of State could use evidence obtained by torture in administrative contexts.[640] Additionally, the Lords determined that the exclusionary rule could only be invoked if it was proven that a statement had been obtained through torture. Crucially, they ruled that the burden of proof for establishing this could not be placed on the appellants.[641] The House of Lords' unequivocal condemnation of torture cannot be overstated. This judgment directly countered the notion that torture could ever be justified under certain circumstances. The ruling also invalidated any residual belief that torture was a tolerable means of combating terrorism. For many human rights organizations, this was hailed as a historic victory. Amnesty International described it as a "momentous decision" that "destroys any trace of legality with which the UK's Government had tried to defend a totally illegal and wicked policy within its measures to combat terrorism.[642]" This case decisively established the Torture Evidence case as a landmark ruling that defines the House of Lords' approach to counterterrorism measures. It emphasized the judiciary's critical role in safeguarding fundamental rights, even amidst national security challenges, and reaffirmed the absolute prohibition of torture as a fundamental principle of both domestic and international law.

3.3.1.2 The Conflict Between Control Orders and the Fundamental Right to Liberty

After certain contentious provisions of the Anti-terrorism, Crime and Security Act 2001 were repealed, new restrictive measures were introduced under the Prevention of Terrorism Act 2005 (PTA). These measures, particularly the control orders regime, became the subject of significant criticism from human rights organizations. In October 2007, the House of Lords delivered its judgment on the compatibility of the control orders regime with the right to liberty. The case involved six appellants who were suspected of involvement in terrorist activities. Although none of them had been formally charged with terrorism-related offenses, they were subjected to non-derogating control orders under Section 2 of the PTA[643]. The control orders required the appellants to remain in their residences for eighteen hours a day, with restrictions on receiving social visitors[644]. The central question before the House of Lords was whether these measures amounted to a deprivation of liberty in violation of Article 5 of the European Convention on Human Rights (ECHR), which guarantees the right to personal liberty and security[645]. The judgment revealed a diversity of views among the

[640] *Ibid, 405.*
[641] *Ibid, 408.*
[642] "Torture Evidence Inadmissible in UK Courts, Lords Rules," *The Guardian* (2005) https://www.theguardian.com..
[643] Sue Guy, "Control Orders Held to Constitute a Deprivation of Liberty" (2007) *Human Rights Law Centre* https://hrlc.org.au.
[644] *Ibid.*
[645] *Secretary of State for the Home Department v JJ* [2007] UKHL 45, para 15.

Law Lords, particularly in their interpretation of the right to liberty. Some Lords adopted a broad and evolving interpretation of rights, while others adhered to a narrower, traditional view. For instance, Lord Bingham and Baroness Hale embraced an expansive conception of liberty, asserting that the deprivation of liberty could take various forms. They argued that the Convention must be interpreted in light of prevailing legal standards and attitudes in democratic societies. According to their reasoning, liberty could be curtailed not only through formal arrest or detention but also through severe restrictions on freedom of movement and daily life[646]. Conversely, Lord Hoffmann adopted a narrower interpretation, suggesting that the right to liberty could only be violated in circumstances closely resembling imprisonment. He argued that the appellants' liberty was merely restricted, not fully deprived[647]. This divergence in judicial reasoning resulted in a non-unanimous decision. The majority of the Law Lords opted for a flexible interpretation of the right to liberty. They held that the eighteen-hour curfew imposed by the control orders constituted a severe limitation on liberty that amounted to a deprivation under Article 5 ECHR[648]. The Lords highlighted the cumulative effect of the obligations imposed by the control orders. The eighteen-hour curfew not only restricted physical movement but also resulted in prolonged isolation and confinement, with minimal contact with the outside world. As Baroness Hale noted, this created a form of "solitary confinement" for an indefinite period, depriving individuals of meaningful interaction and self-entertainment[649]. The "concrete situation" of the affected individuals, including the combined effects of the restrictions, was deemed a significant deprivation of liberty[650].

The 2007 judgment underscored the excessive and restrictive nature of the control orders regime. The House of Lords emphasised that even in the urgent fight against terrorism, a balance must be struck between security imperatives and respect for fundamental rights.

By declaring that the control orders imposed disproportionate limitations on liberty, the Lords reminded the Government of its duty to ensure that counterterrorism measures do not infringe excessively on individual freedoms. This decision further highlighted the House of Lords' role as a protector of fundamental rights, reinforcing the principle that even in times of crisis, liberty cannot be sacrificed without strict justification. The ruling not only questioned the proportionality of the control orders regime but also pushed the Government to reconsider its approach to balancing national security concerns with individual rights, thereby contributing to the ongoing dialogue on the limits of counterterrorism legislation.

---

[646] Michael Harris, "Public Law Values in the House of Lords - In an Age of Counterterrorism," cit., 129.
[647] *Ibid, para 15.*
[648] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape," cit., 187.
[649] *Secretary of State for the Home Department v JJ* [2007] UKHL 45, para 24.
[650] George Berman and Alexander Horne, "Control Orders and Prevention of Terrorism Act 2005," cit., 11.

3.3.1.2 The Conflict Between Control Orders and the Right to a Fair Trial

The case *of Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 critically questioned the control orders regime under the Prevention of Terrorism Act 2005 (PTA), particularly its compatibility with the right to a fair trial as protected by Article 6 ECHR. This decision had wide-ranging implications, as it struck at the core of the procedural fairness of control order hearings. Under Section 2 of the PTA 2005, the three appellants were subject to non-derogating control orders that imposed significant restrictions on their liberty, justified on the grounds that the Secretary of State had "reasonable grounds for suspecting" their involvement in terrorism-related activity[651]. The Law Lords, in a panel of nine judges, were tasked with determining whether the control order mechanism satisfied the individuals' right to a fair trial under Article 6 ECHR and the Human Rights Act 1998 (HRA)[652]. The critical issue was whether the use of security-cleared special advocates in closed hearings was sufficient to offset the absence of an open hearing, which would include the full disclosure of relevant evidence. The appellants argued that their rights had been violated because the judge, in a closed hearing, had relied on evidence not disclosed to them, as revealing it could compromise national security[653].

This was not the first time the House of Lords dealt with the disclosure requirements in control order cases. The issue had previously been addressed in *MB v Secretary of State for the Home Department [2007]* UKHL 46, but subsequent cases had brought the matter back before the Lords, necessitating further clarification on the minimum standards of disclosure required for a fair hearing[654]. The House of Lords unanimously held that, for a control order to be compatible with Article 6 ECHR, the individual subject to the order must be provided with sufficient information about the allegations against them to effectively instruct their special advocate. A hearing relying primarily on closed material, with only vague general statements disclosed to the appellant, would breach the right to a fair trial[655]. In such cases, the control orders could not lawfully be implemented[656]. The ruling demonstrated the House of Lords' non-deferential approach, as it firmly asserted the primacy of fair trial rights over national security concerns. Traditionally, courts had been reluctant to

---

[651] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, para 1.
[652] *Ibid*.
[653] Brenda Middleton, "House of Lords, Secret Control Order Hearings: A Qualified Victory for the Right to a Fair Trial," (2009) *The Journal of Criminal Law* 389.
[654] Michael Ryder, "Secretary of State for the Home Department v AF and Others [2009] UKHL 28" (2009) *UK Supreme Court Blog* https://ukscblog.com.
[655] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, para 59.
[656] Brenda Middleton, "House of Lords, Secret Control Order Hearings: A Qualified Victory for the Right to a Fair Trial," cit., 390.

interfere with national security measures, often prioritizing public safety over procedural fairness. However, this decision reversed that trend, affirming that national security considerations must yield to the essential requirements of a fair trial[657]. Additionally, the judgment significantly complicated the application of the control orders regime. Following the ruling, many control orders were invalidated by lower courts due to insufficient disclosure of evidence. As a result, the mechanism became increasingly difficult to implement and was applied to a much smaller number of individuals[658]. Lord Hoffmann acknowledged the gravity of the decision, stating that it "may well destroy the system of control orders, which is a significant part of this country's defences against terrorism."[659] Finally, the Home Secretary expressed dissatisfaction with the ruling, criticizing its impact on public safety and counterterrorism efforts[660]. This reaction underscored the tension between the judiciary's role in protecting fundamental rights and the Government's responsibility to ensure national security.

The case illustrates the judiciary's capacity to impose constitutional limits on Government action, even within the highly sensitive domain of national security. By invalidating a system that infringed on fundamental rights, the House of Lords reinforced its commitment to upholding the rule of law and the protection of individual liberties. This decision established a precedent for reconciling security concerns with human rights, affirming that measures which compromise the fundamental principles of justice and equity cannot be justified, even in the context of combating terrorism. It serves as a critical illustration of how judicial oversight can limit undue governmental interference with individual rights, thus preserving a fair and democratic legal system.

3.3.2 The French Constitutional Council's Approach to Counterterrorism and the Principle of Equality

In France, counterterrorism legislation has progressively granted administrative authorities increased powers, often at the expense of fundamental rights, while simultaneously diminishing the role of the judiciary in overseeing these limitations. Consequently, the constitutionality of counterterrorist laws, particularly concerning their impact on individual rights, has been repeatedly questioned. The French Constitutional Council, established in 1958, serves as the country's highest constitutional authority. Its initial purpose was not to protect individual rights and freedoms but to act as an instrument for rationalising parliamentarism, addressing the excesses of previous republics,

---

[657] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape," cit., 189.
[658] Aileen Kavanagh, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape," cit., 189.
[659] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, para 70.
[660] Frances Gibb, "Disarray Over Terror Control Orders After Law Lords Ruling on Secret Evidence" (2009) *The Times* http://www.timesonline.co.uk/tol/news/uk/article6469431.ece.

and ensuring the proper distribution of normative powers between the Government and Parliament[661]. Over time, particularly since the 1970s, the Council's role evolved to include the protection of rights and freedoms. This transformation involved expanding the catalogue of constitutionally recognised rights and employing these rights and liberties as a key source of legitimacy for the Council's decisions[662]. However, the Council's evolution into a guardian of rights and freedoms has not been without reservations, particularly regarding politically sensitive legislation[663]. This hesitancy became increasingly apparent in its constitutional reviews of counterterrorism laws. The Council's approach to balancing security measures with safeguards for rights has been characterized by a degree of deference to the legislature and a noticeable judicial self-restraint[664]. This general deferential attitude, historically embedded in the Council's institutional behavior, has persisted in its review of counterterrorism legislation, reflecting a cautious approach aimed at maintaining the constitutionality of such laws while avoiding declarations of unconstitutionality[665]. The Council has demonstrated a broad interpretation of public order and security requirements, often justifying measures that restrict constitutional rights and freedoms by emphasizing their role in protecting public security[666]. In this context, the Council has tended to view such restrictions as constitutionally acceptable, provided they serve the overarching purpose of safeguarding public order[667]. This approach highlights the Council's delicate balancing act between ensuring the constitutionality of counterterrorism measures and preserving fundamental rights, often leaning toward security priorities in politically sensitive contexts. In other words, the French Constitutional Council has often prioritized justifying the constitutionality of security provisions that restrict rights and freedoms by framing them as necessary to uphold public order, rather than challenging government decisions in sensitive contexts like the fight against terrorism[668]. This approach has led to a fallback position, distancing the Council from its role as a protector of rights and resulting in what can be perceived as inefficient judicial review[669].
Notably, the Council frequently employs the principle of "not manifest unbalance" between rights and security, rather than the stricter standard of "not proportionate and necessary," as the basis for its

---

[661] Véronique Champeils-Desplats, "Le Conseil constitutionnel, protecteur des droits et libertés?" (2011) 9 *Cahiers de la recherche sur les droits fondamentaux* 11.
[662] Véronique Champeils-Desplats, "Le Conseil constitutionnel, protecteur des droits et libertés?" (2011) 9 *Cahiers de la recherche sur les droits fondamentaux*, *14*.
[663] *Ibid, 13*.
[664] *Ibid*.
[665] Karine Roudier, "Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire" (2016) 51 *Les Nouveaux Cahiers du Conseil Constitutionnel* 38.
[666] Véronique Champeil-Desplats, "L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 2 https://hal.science/hal-01919732.
[667] Véronique Champeil-Desplats, "L'autonomisation relative des références à la sécurité dans les décisions du Conseil constitutionnel" (2018) 20–21 *Jus Politicum Revue de Droit Politique* 275.
[668] *Ibid*, 272.
[669] *Ibid*.

constitutional review. This choice has made its reviews more generalized, weaker, and less thorough, often leaving the proportionality test to administrative courts. Furthermore, even when the Council declares a legislative provision unconstitutional, it often incorporates techniques to limit or mitigate the practical effects of its decisions. As a result, declarations of unconstitutionality are almost systematically neutralized[670]. On the one hand, the Council has extensively used its power to defer the effects of its decisions, delaying the practical consequences of a ruling. On the other hand, it has diluted the impact of its unconstitutionality declarations by making decisions late, allowing unconstitutional provisions to remain in effect while continuing to infringe upon rights[671]. The Council often justifies such postponements by arguing that the immediate repeal of censored provisions would undermine the constitutional goal of safeguarding public order and cause excessive disruption[672].

Additionally, the Constitutional Council has frequently emphasized the legislator's competence to define rules concerning "civil rights and the fundamental guarantees granted to citizens for the exercise of civil liberties." By asserting that it does not possess the same discretionary powers as Parliament, the Council has adopted a "legicentrist" approach to civil liberties, refraining from providing guidance to the legislator on how to make a law constitutional[673]. It is also important to note that, prior to the 2008 constitutional reform, the Council could only review laws before their enactment, which further limited its scope of action. This limitation was particularly problematic for counterterrorism provisions introduced after the 9/11 attacks and during the state of emergency in 2015. In these cases, the Council's broad and limited control effectively endorsed the political evolution toward prioritizing defense and security requirements over rights and freedoms[674].

During the 2015-2017 state of emergency, the Constitutional Council's fallback position was reinforced by the fact that it was not the primary judicial body responsible for monitoring the measures implemented under the state of emergency[675]. Due to the administrative nature of these measures and the Council's strict interpretation of its jurisdiction in such matters, most of the litigation related to the state of emergency was handled by administrative judges[676]. Additionally, during this

---

[670]Véronique Champeil-Desplats, "L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 2 https://hal.science/hal-01919732..

[671] *Ibid*.

[672] *Ibid*, 6.

[673] Véronique Champeil-Desplats, "Le Conseil constitutionnel a-t-il une conception des libertés publiques?" (2012) *Jus Politicum Revue de Droit Politique* 6.

[674]Karine Roudier, "Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire" (2016) 51 *Les Nouveaux Cahiers du Conseil Constitutionnel* 38.

[675] Véronique Champeil-Desplats, "L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 2 https://hal.science/hal-01919732.

[676]*Ibid*.

period, the Council justified its validation of counterterrorist measures by affirming the constitutionality of the state of emergency regime[677]. By exercising only superficial oversight, concentrating on identifying "manifestly unbalanced" provisions, and invoking a presumption of constitutionality for these measures, the Council largely legitimised the state of emergency regime, and the subsequent legislative amendments derived from it.[678] Although the Constitutional Council cannot impose direct obligations on legislators in matters of security, it has allowed them significant leeway[679]. Legislative provisions are rarely censured, as the Council intervenes only when there is a clear and evident violation of constitutional rights and freedoms. This "laissez-faire" approach has the long-term effect of endorsing successive security legislation[680].

In conclusion, the mechanisms employed by the Constitutional Council in its constitutionality review of counterterrorist legislation, such as the deferral of decision effects and the superficial "manifest unbalance" standard of review, have raised concerns about its ability to maintain a balance between security and fundamental rights. This approach has contributed to legitimizing a gradual encroachment on individual freedoms, particularly during the post-9/11 era, when counterterrorism legislation was shaped by a phase of societal panic and eventually absorbed into broader security policies[681].

The following section will examine a series of decisions made by the Constitutional Council regarding the constitutionality of counterterrorism measures discussed in Chapter 1, these include:

i. Decision 2003-467 DC of 13 March 2003,
ii. Decision 2005-532 DC of 19 January 2006,
iii. Decision 2015-713 DC of 23 July 2015,
iv. Decision 2015-527 QPC of 22 December 2015,
v. Decision 2016-536 QPC of 19 February 2016, and Decision 2017-695 QPC of 29 March 2018.

The outcomes of these decisions varied between findings of “constitutionality” and “partial unconstitutionality.” However, they all reflect the Council's self-restraint in judicial review, characterized by the use of the "manifest unbalance” standard, deferral of decision effects, reliance

[677] Véronique Champeil-Desplats, "L’état d’urgence devant le Conseil constitutionnel ou quand l’Etat de droit s’accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 3 https://hal.science/hal-01919732.
[678] *Ibid, 4*.
[679] Karine Roudier, "Le Conseil Constitutionnel face à l’avènement d’une politique sécuritaire" (2016) 51 *Les Nouveaux Cahiers du Conseil Constitutionnel* 38.
[680] Véronique Champeil-Desplats, "L’autonomisation relative des références à la sécurité dans les décisions du Conseil constitutionnel" (2018) 20–21 *Jus Politicum Revue de Droit Politique* 284.
[681] Karine Roudier, "Le Conseil Constitutionnel face à l’avènement d’une politique sécuritaire" (2016) 51 *Les Nouveaux Cahiers du Conseil Constitutionnel* 43.

on interpretative reserves to preserve constitutionality, delegation of responsibility to the legislator for balancing security and rights, and the elevation of counterterrorism as a legitimate and superior objective justifying infringements on individual freedoms.

3.3.3.1 The Approval of the Controversial Internal Security Legislation

The Constitutional Council's decision 2003-467 DC of 13 March 2003 exemplifies its deferential approach in the constitutional review of counterterrorism legislation, particularly in the context of heightened security concerns following the 2001 attacks. This decision upheld the constitutionality of Law No. 2003-239 of 18 March 2003, known as the Law "for Internal Security," which, as described in Chapter 1, was one of the most restrictive laws in terms of its impact on rights and freedoms. Despite the significant limitations it imposed on individual liberties, the Council's review was notably restrained, focusing only on identifying disproportions or manifest errors by the legislator in balancing public order with the exercise of rights and freedoms[682]. The case was initiated by referrals from sixty senators and more than sixty deputies, who raised numerous concerns about the Law's provisions and their implications for individual freedoms. For example, Article 3 of the Law, which granted requisition powers to prefects for restoring public order, was criticized as being overly broad and imprecise. The senators and deputies argued that such powers did not meet the requirements of Article 34 of the Constitution and could unjustifiably interfere with civil liberties[683]. However, the Constitutional Council ruled that the legislator had not overstepped its authority in granting these powers to administrative authorities[684]. The Council also examined Articles 11 to 13, which conferred new powers on judicial police officers and their subordinates to search vehicles. These articles were challenged on the grounds that they constituted excessive infringements on fundamental rights such as the right to privacy, the inviolability of the home, freedom of movement, and individual liberty, particularly as they limited the role of judicial oversight in these proceedings[685]. In addressing this complaint, the Council invoked two key principles reflective of its deferential and self-restrained approach. First, it emphasized that it is the legislator's role to "ensure reconciliation between, on the one hand, the prevention of infringements of public order and the search for perpetrators of offences, both necessary for the safeguarding of constitutional rights and principles, and, on the other hand, the exercise of constitutionally guaranteed freedoms, including freedom of movement and respect for privacy[686]." Secondly, the Council applied its weaker standard of review,

---

[682] Conseil Constitutionnel, "*Les États d'Urgence en Droit Constitutionnel Comparé*" (Cahier du Conseil Constitutionnel No. 15, 2003) https://www.conseilconstitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier15/ccc_467dc.pdf
[683] *Decision 2003-467 DC* (13 March 2003) para 4.
[684] Conseil Constitutionnel, "*Commentaire de la décision n° 2003-467 DC du 13 mars 2003*" (2003) 2.
[685] *Decision 2003-467 DC* (13 March 2003) para 8.
[686] Conseil Constitutionnel, "*Commentaire de la décision n° 2003-467 DC du 13 mars 2003*" (2003) 2.

assessing the provisions for the absence of a "manifest unbalance" rather than evaluating whether they were proportionate and necessary. Based on this standard, it determined that the legislator's reconciliation of constitutional principles was not marred by any manifest error[687]. Moreover, throughout its decision, the Council consistently justified the restrictions on constitutionally guaranteed rights by citing the need to safeguard public order. This rationale legitimised a balance that tilted in favor of public order at the expense of protecting rights and freedoms[688]. One of the most contentious elements of the Law, as highlighted in the referrals, was Articles 21 to 25, which authorised the use of automated personal data processing systems by national police and gendarmerie services[689]. These provisions were criticised for their potential to infringe upon privacy and facilitate surveillance without adequate safeguards.

In conclusion, decision 2003-467 DC illustrates how the Constitutional Council adopted a deferential stance, often favoring security considerations over rights protection. By relying on a standard of "manifest unbalance" and framing public order as a superior constitutional objective, the Council validated measures that significantly restricted rights and freedoms, establishing a precedent for similar approaches in future counterterrorism legislation. The senators and deputies argued that Articles 21 to 25 of the Law of 18 March 2003 violated the right to private life by granting access to personal data for administrative inquiries. They contended that these provisions could allow personal data to be used against the legitimate interests of the individuals concerned, potentially infringing on their right to a normal family life[690]. However, the Constitutional Council upheld the constitutionality of these provisions, even though they imposed clear limitations on individual rights. The Council justified its decision by emphasizing the legislator's authority to establish rules governing the fundamental guarantees granted to citizens for the exercise of their civil liberties. It reiterated that it is the legislator's responsibility to ensure a balance between security needs and individual rights[691]. Applying its standard of "not manifestly unbalanced", the Council found no manifest error in the reconciliation of the contested measures with the right to private life. Furthermore, it validated the establishment of surveillance mechanisms as necessary tools for preventing public order violations[692]. In its review of other contested provisions of the Law of 18 March 2003, the Council continued to rely on arguments regarding the legislator's competence to ensure an effective balance between security and rights and the use of the "not manifestly unbalanced" standard.

---

[687] *Ibid, para 12.*
[688] Gilles Armand, "*Que reste-t-il de la protection constitutionnelle de la liberté individuelle?*" (2003) 39.
[689] Karine Roudier, "*Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire*" (2016) 39.
[690] Conseil Constitutionnel, "*Commentaire de la décision n° 2003-467 DC du 13 mars 2003*" (2003) 5.
[691] *Decision 2003-467 DC* (13 March 2003) para 20.
[692] Karine Roudier, "*Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire*" (2016) 41.

This deferential approach clearly demonstrates that the Council prioritized public order and security requirements over the full exercise of individual rights and liberties. By upholding provisions that limited rights in favor of security measures, the Council reinforced its inclination to defer to the legislature in matters of counterterrorism, thereby favoring public order at the expense of individual freedoms.

3.3.3.2 The Legal Foundations of Surveillance Mechanisms and Administrative Controls

On 19 January 2006, the French Constitutional Council issued a ruling on Law No. 2006-64 of 23 January 2006, titled the *"Law on Combating Terrorism and Miscellaneous Provisions on Security and Border Controls"*, following a referral by more than sixty senators. The law included several controversial measures, particularly regarding surveillance and administrative controls, which raised concerns about their impact on individual rights and freedoms. One of the law's most debated provisions was the obligation for telecommunications operators, Internet service providers, and public institutions offering Internet access to retain login data for one year. Unlike prior practices, this data retention was placed under administrative control rather than judicial oversight[693]. The senators specifically challenged the constitutionality of Articles 6 and 8 of the law, arguing that these provisions posed significant threats to civil liberties. Article 6 authorized the administrative requisition of traffic data from electronic communications operators and online service providers. This marked a shift from judicial to administrative oversight, creating a novel procedure for "security interceptions" under the administrative police[694]. The senators argued that this administrative control lacked adequate legal safeguards, violated Article 66 of the Constitution, which designates judicial authority as the guardian of individual liberty, and breached Articles 2, 4, and 16 of the Declaration of the Rights of Man and of the Citizen of 1789, by infringing upon individual liberty and the right to private life.[695] Instead, Article 8 extended the use of vehicle data control devices to include mobile surveillance systems installed in traced vehicles. This measure allowed for the broader surveillance of individuals, further infringing on the right to private life and freedom of movement. Critics claimed that this system of generalized traceability went beyond counterterrorism purposes, encompassing a wide range of preventive and repressive measures unrelated to terrorism[696]. Despite these objections, the Constitutional Council upheld the constitutionality of the contested provisions. It reiterated that it is the legislator's responsibility to ensure a balance between security needs and individual rights. By

[693] *Law n° 2006-64 of 23 January 2006*, art. 6.
[694] Constitutional Council, "*Commentaire de la décision n° 2005-532 DC du 19 janvier 2006*" (2006) 3 *Les Cahiers du Conseil Constitutionnel N°20* https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier20/ccc_532dc.pdf
[695] *Decision n° 2005-532 DC* (19 January 2006).
[696] *Decision n° 2005-532 DC* (19 January 2006).

applying its deferential standard of "not manifestly unbalanced," the Council determined that the measures were proportionate to their stated objectives of safeguarding public order and combating terrorism. The Council justified its decision by emphasizing the necessity of the surveillance mechanisms for public security, while downplaying concerns over the lack of judicial oversight. This decision reinforced the Council's pattern of deferring to the legislature in security-related matters, often prioritizing public order over individual freedoms.

The ruling exemplifies the Council's broader approach to counterterrorism laws: legitimizing extensive administrative powers and surveillance mechanisms, even when they intrude upon constitutional rights such as privacy and freedom of movement. This stance reflects its inclination to favor security considerations, leaving questions about the adequacy of safeguards for fundamental rights in the context of administrative controls. The Constitutional Council rejected the senators' objections and upheld the constitutionality of Articles 6 and 8 of the Law of 23 January 2006[697]. To ensure that the contested antiterrorism legislation remained within constitutional limits, the Council reiterated the reasoning applied in its 13 March 2003 decision. It emphasized that "it is the task of the legislator to reconcile the prevention of breaches of law and order, necessary to safeguard rights and principles of constitutional value, with the exercise of constitutionally guaranteed freedoms, including the right to privacy and individual liberty[698]." The Council further justified its decision by asserting that administrative police measures impacting the right to privacy are permissible when deemed necessary for safeguarding public order, which it consistently regarded as a superior objective compared to the exercise of individual liberties[699]. For example, in addressing concerns over the intrusive use of vehicle data control devices for surveillance, the Council concluded that, "in view of the objectives assigned to it by the legislator and all the guarantees it has provided," the system ensured a reconciliation "between respect for privacy and the safeguarding of public order" that was not "manifestly unbalanced[700]." In this decision, the Council depicted the controversial measures as necessary components of the fight against terrorism, which it regarded not only as a primary objective but also as sufficient justification for the potential infringement on rights and liberties. This approach reflects the Council's continued prioritization of public order over individual freedoms in counterterrorism contexts.

The 2006 decision validated antiterrorism measures that adversely impacted individual rights, including expanded surveillance and the increasing reliance on administrative authorities at the

[697] The Constitutional Council censored a terminology contained in Article 6, which was not part of the senators' complaints.
[698] *Decision n° 2005-532 DC* (19 January 2006), para. 9.
[699] Constitutional Council, "*Commentaire de la décision n° 2005-532 DC du 19 janvier 2006*" (2006) 8.
[700] *Decision n° 2005-532 DC* (19 January 2006), paras. 19–20.

expense of judicial oversight. This ruling reinforced the marginalization of judicial control and legitimized a growing role for administrative mechanisms in the "war on terror." Safeguarding public order remained the Council's paramount concern, consistently outweighing the protection of individual freedoms.

3.3.3.3 Infringements on Fundamental Rights: Privacy, Communication, and Judicial Remedy

The Decision 2015-713 DC of 23 July 2015, concerning *Law No. 2015-912 of 24 July 2015* (the "*Law on Intelligence Sector*"), is another instance where the Constitutional Council upheld the expansion of administrative powers and the use of intrusive intelligence mechanisms in counterterrorism efforts, often at the expense of rights and freedoms[701]. This decision illustrates the Council's fallback position, characterized by a relaxed constitutionality review and a presumption of constitutionality based on its repeated claim that it does not possess the same discretionary powers as the legislator[702]. The law was challenged through referrals by the President of the Senate, sixty deputies, and, for the first time, the President of the Republic, who requested the Council to examine certain provisions with respect to three constitutional guarantees: the right to privacy, freedom of communication, and the right to an effective judicial remedy. The deputies expressed concerns regarding the expansive criteria for initiating administrative investigations, the extensive technical capabilities for mass data collection, and lastly, the proportionality of these surveillance measures in the digital age, wherein they may have an impact on citizens' lives at all times.[703]. They also expressed alarm about the concentration of powers in the Executive branch, arguing that citizens lacked access to judicial oversight, which serves as the guarantor of individual freedoms[704]. The deputies further contended that the purposes of public intelligence policy, as defined by the legislator, were excessively broad and under-specified, leading to disproportionate infringements on the right to privacy and freedom of expression[705]. The primary constitutional issue, therefore, was the potential impact of these provisions on rights and freedoms[706]. Despite these concerns, the Constitutional Council declared most of the contested provisions constitutional, underscoring its deferential stance. The Council justified its decision by highlighting the necessity of public security and the fight against terrorism, which facilitated its validation of measures related to the instantaneous

[701] Karine Roudier, "Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire" (2016) 43.
[702] Véronique Champeil-Desplats, "À quoi sert encore le Conseil constitutionnel?" (2008) 30 *Plein Droit* No. 76.
[703] *Decision n° 2015-713 DC* (23 July 2015) (Saisine by 60 deputies).
[704] *Ibid*.
[705] Constitutional Council, "Commentaire Décision n° 2015-713 DC du 23 juillet 2015" (2015) 15 https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2015713dc/2015713dc_ccc.pdf.
[706] *Ibid*, para 2.

communication of technical data and the use of tools for immediate geolocation and data collection[707]. The Council held that these provisions complied with the Constitution because the legislator had been "sufficiently precise and restrictive" in defining the objectives for using such intelligence techniques[708]. It also upheld measures criticized for lacking adequate safeguards to protect freedom of expression and freedom of communication[709]. Once again, the Council relied on its standard of constitutionality, requiring only the absence of a "manifest unbalance," to validate measures concerning intelligence mechanisms and administrative access to retained connection data. It concluded that these provisions did not cause a "manifestly disproportional violation" of the right to private life[710]. Although organizations such as the UN Human Rights Committee expressed significant concerns about the law, describing it as granting "overly broad powers of highly intrusive surveillance to intelligence services[711]," the Council did not identify a disproportionate balance between public order and fundamental rights such as privacy, the secrecy of correspondence, or the inviolability of the home[712]. Finally, the Council's silence regarding the absence of judicial oversight, a key issue raised by the deputies, underscored the weakening of safeguards for individual rights[713]. This decision further demonstrates the Constitutional Council's tendency to prioritize public order and security requirements over robust protections for fundamental rights, especially in the context of counterterrorism measures.

3.3.3.4 The Constitutional Review of Restrictive Measures Under the State of Emergency

The Decision 2015-527 QPC of 22 December 2015 and the decision 2016-536 QPC of 19 February 2016 reflect the Constitutional Council's review of restrictive measures introduced for counterterrorism purposes during the state of emergency declared in 2015. These measures, often contained within France's antiterrorism framework, had significant implications for individual rights and were challenged before the Constitutional Council. Both decisions addressed specific provisions of the *Act of 3 April 1955 on the State of Emergency*, as amended by *Law No. 2015-1501 of 20 November 2015*, and highlight the Council's deferential approach when balancing security requirements with the protection of rights and liberties during the state of emergency. This case arose from a priority question of constitutionality (QPC) submitted by the Conseil d'État, which questioned the compliance of Article 6 of the Act of 3 April 1955 with constitutional rights and freedoms. Article

[707] Zoltán Szente and Fruzsina Gárdos-Orosz, *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge, 2018) 23.
[708] *Decision n° 2015-713 DC* (23 July 2015), para. 14.
[709] *Ibid*., para. 20.
[710] *Ibid*., para. 25.
[711] Human Rights Committee, "Final Observations Concerning the Fifth Period Report of France, CCPR/C/FRA/CO/5" (21 July 2015).
[712] Karine Roudier, "Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire" (2016) 45.
[713] *Ibid., 48*.

6 governed house arrest measures during the state of emergency. The appellants argued that these provisions violated rights guaranteed by Article 66 of the Constitution, including the freedom of movement, the right to lead a normal family life, and the freedom of assembly and demonstration[714]. They contended that there was "no link between the nature of the imminent danger or public calamity that led to the declaration of a state of emergency and the nature of the threat to public security and order justifying a measure of house arrest[715]." Despite these concerns, the Constitutional Council upheld the constitutionality of the contested provisions. It ruled that house arrest, as defined under Article 6, did not constitute a deprivation of liberty and imposed a limit of twelve hours on the duration of daily restrictions[716].The Council justified its decision by referencing the context of the state of emergency, emphasizing the necessity of addressing terrorism-related threats. It further declared that the measures did not amount to a "manifestly unlawful infringement of a fundamental freedom[717]." The Council took its usual self-restraint approach, leaving the proportionality review of the contested measures to administrative courts. It ensured that the legislator had sufficiently regulated the powers granted to administrative authorities and justified the measures under the constitutional framework of the state of emergency[718]. The Council confirmed that the legislator had sufficiently defined the scope and application of house arrest measures, it delegated the proportionality review of specific measures to administrative judges, avoiding an in-depth judicial review of the legislation. Finally, the Council upheld the constitutionality of the state of emergency as a basis for enacting measures that limit individual rights, framing such measures as necessary responses to the security context.

The 2015 decision demonstrates the Constitutional Council's inclination to exercise caution when reviewing counterterrorism measures during exceptional circumstances. By relying on the proportionality assessment of administrative courts and prioritizing public order over rigorous rights safeguards, the Council reinforced its deferential stance. This approach avoided directly opposing government actions during a politically sensitive period, such as the fight against terrorism.

Overall, the decision reflects the Constitutional Council's restrained role in counterterrorism cases, favoring a framework where security concerns are prioritized, and the evaluation of individual rights is shifted to other judicial bodies. This position has raised questions about the adequacy of rights protection under such exceptional regimes.

---

[714] Constitutional Council, "Commentaire Décision n° 2015-527 QPC du 22 décembre 2015" (2015) *Les Cahiers du Conseil Constitutionnel* 1 https://www.conseilconstitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2015527qpc/2015527qpc_ccc.pdf.

[715] *Ibid., 12.*

[716] *Ibid.*

[717] *Decision n° 2015-527 QPC* (22 December 2015), para. 12.

[718] Constitutional Council, "Commentaire Décision n° 2015-527 QPC du 22 décembre 2015" (2015) 22.

In January 2016, the Constitutional Council was again appealed by the Conseil d'État, responding to a priority question of constitutionality (QPC) raised by the Human Rights League. The case concerned the constitutionality of Article 11 (paragraph 1) of the Law of 1955, as amended by the Law of 20 November 2015. Under the state of emergency, Article 11 authorized administrative authorities to conduct searches and copy data stored in computer systems accessed during these searches. The Human Rights League argued that these powers violated constitutional requirements for judicial oversight of measures affecting the inviolability of the home, disproportionately infringing on individual liberty, the right to privacy, and the right to an effective judicial remedy[719]. Furthermore, the delegation of judicial police operations, potentially leading to repressive measures, to administrative authorities was heavily criticized. In its Decision 2016-536 QPC of 19 February 2016, the Constitutional Council declared the seizure of computer data unconstitutional but upheld the majority of the contested provisions of Article 11 as constitutional. Once again, the Council relied on its self-restraint techniques, delegating the proportionality review of these measures to the administrative courts. The Council justified its decision by asserting that administrative searches "operate a conciliation that is not manifestly unbalanced between the requirements of Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen and the constitutional objective of safeguarding public order[720]." The Council further justified the measures by stating that they "contribute to preventing the imminent danger or consequences of the public calamity to which the country is exposed[721]." It also legitimized the competence of administrative judges, rather than judicial judges, to address potential violations of the inviolability of the home caused by house search measures[722]. This effectively excluded the principle of the inviolability of the home from the domain of individual liberty, as safeguarded under judicial oversight[723].

Both the 2015 Decision (2015-527 QPC) and the 2016 Decision (2016-536 QPC) demonstrate the Constitutional Council's deferential approach to counterterrorism measures during the state of emergency. By employing self-restraining techniques, the Council maintained restrictive measures affecting rights and liberties within constitutional boundaries. It consistently deferred the proportionality review to administrative courts and upheld the expanding powers of the administrative apparatus, which had become a defining characteristic of the French Government's counterterrorism strategy.

---

[719] Constitutional Council, "Commentaire Décision n° 2015-527 QPC du 22 décembre 2015" (2015) 22.
[720] *Decision n° 2016-536 QPC* (19 February 2016), para. 12.
[721] *Ibid.*
[722] Caroline Valmalette, "Controverse sur la compétence du juge des perquisitions antiterroristes" (2019) 6 *Les Cahiers Portalis* 161.
[723] *Ibid., 162.*

These decisions highlight the Council's willingness to prioritize public order and security concerns over robust safeguards for individual rights, even when faced with measures that significantly impacted fundamental freedoms. By legitimizing the increasing role of administrative authorities and accepting the absence of judicial oversight in critical areas, the Council further entrenched a security-focused approach to counterterrorism, reinforcing the precedence of state interests over individual liberties.

3.3.3.5 The Enduring Deferential Stance of the Constitutional Council

The Decision 2021-822 DC of 30 July 2021 exemplifies the Constitutional Council's continued deferential approach to counterterrorism measures. This ruling is partly connected to the Decision 2017-695 QPC of 29 March 2018, as the Council employed similar review techniques to assess provisions of the *Law of 30 October 2017*, which had been amended by new counterterrorist legislation, namely *Law No. 2021-998 of 30 July 2021* (the "Law on the Prevention of Acts of Terrorism and Intelligence"). This 2021 legislation extended the incorporation of expansive administrative police powers into common law, powers that were originally inspired by the state of emergency and introduced by the 2017 law[724]. The contested provisions, challenged by the senators of the *saisine*, were criticized for being overly intrusive into fundamental rights, particularly: freedom of movement, right to private life, inviolability of the home, and right to a normal family life. Despite these concerns, the Constitutional Council upheld the constitutionality of several provisions. It reiterated that it is the legislator's responsibility to reconcile the prevention of breaches of public order with the exercise of individual freedoms, including freedom of movement and the right to privacy. The Council utilized interpretation reserves to ensure that potentially unconstitutional provisions remained within constitutional boundaries[725]. The Council asserted that the combat against terrorism represents a constitutional objective of sufficient significance to warrant limitations on individual liberties. Consistent with prior rulings, the Council utilized interpretative reserves as a means to endorse provisions that could otherwise be classified as unconstitutional. This mechanism enabled the Council to uphold restrictive measures while ostensibly preserving constitutional principles. Furthermore, the Council yielded to the authority of the legislator, reinforcing that the equilibrium between security and rights predominantly resides within the legislative domain discretion.

The 2021 decision reinforces the Constitutional Council's longstanding practice of prioritizing public order and security objectives over the robust protection of individual rights and freedoms. By

[724] Margot Pugliese, "Renforcement de la prévention d'actes de terrorisme: La loi publiée" (7 September 2021) *Dalloz le quotidien du droit* https://www.dalloz-actualite.fr/flash/renforcement-de-prevention-d-actes-de-terrorisme-loi-publiee.
[725] *Press release of Decision No. 2021-822 DC of 30 July 2021*, 3 https://www.conseilconstitutionnel.fr/sites/default/files/2021-07/2021822dc_cp.pdf.

legitimizing restrictive counterterrorism measures and embedding them into common law, the Council continued to view limitations on fundamental freedoms as a "lesser evil" in pursuit of the overarching goal of preventing terrorism.

This ruling highlights the persistence of the Council's self-restrained approach, characterized by minimal interference with legislative decisions in security matters and the use of legal mechanisms, such as interpretation reserves, to avoid direct confrontation with potentially unconstitutional measures. Consequently, the decision underscores the institutional shift toward normalizing exceptional powers originally designed for emergency situations, further entrenching the precedence of state security over individual liberties in France's counterterrorism framework.

Conclusions

The post-9/11 era has significantly transformed the domain of public security and fundamental rights, particularly concerning non-citizens. This thesis has illustrated the evolution of counterterrorism policies in the United States and Europe, which prioritize security to the expense of individual liberties. Although each legal system functions within unique constitutional and institutional frameworks, a notable convergence has been observed in their counterterrorism strategies. Both systems have employed extraordinary legal measures that disproportionately affect non-citizens, thereby raising essential questions regarding the balance between national security and human rights rights.

The primary research questions guiding this study have focused on whether the shared tendency of the United States and European legal systems to bolster security policies has led to a reassessment of fundamental rights protections for both citizens and non-citizens, and on what grounds restrictive measures against non-citizens have been implemented. The findings suggest that instead of fostering a more inclusive approach to rights protection, counterterrorism policies have reinforced legal distinctions between citizens and non-citizens. These distinctions have been justified mainly on national security grounds, enabling governments to expand executive authority and introduce exceptional measures that curtail the rights of specific groups, justified by national security considerations, though with significant implications for individuals' liberties.

One of the most striking patterns identified in this research is the dependence on legal frameworks that bypass established safeguards. In the United States, legislation such as the USA PATRIOT Act and the Authorization for Use of Military Force (AUMF) has conferred extensive discretionary authority upon the executive branch, facilitating indefinite detention, mass surveillance, and restrictive immigration measures. The detention of alleged terrorists at Guantánamo Bay serves as a paradigm of this trend, wherein national security imperatives have supplanted due process rights. Likewise, European counterterrorism legislation, most notably in France and the United Kingdom, has augmented state surveillance, extended states of emergency, and intensified police powers. These policies have disproportionately impacted non-citizens and migrant communities, reinforcing their designation as security threats rather than individuals with rights individuals. Despite these developments, courts have played an important role in mediating the balance between security and rights, particularly in reaffirming the procedural rights of both citizens and non-citizens. Landmark rulings such as *Boumediene v. Bush* in the United States and cases before the European Court of Human Rights have reinforced access to judicial review and protection against arbitrary detention, thereby attempting to realign non-citizens' rights with those of citizens in critical legal areas. In the

U.S. context, the focus on procedural safeguards, rather than substantive rights, reflects a structural characteristic of the Bill of Rights, where fundamental rights are predominantly framed as procedural guarantees (such as the right to access a court). This procedural nature of rights does not diminish the significance of judicial interventions; rather, it underscores the role of courts in upholding legal accountability and ensuring that counterterrorism policies do not entirely erode fundamental legal protections. Beyond the legal domain, counterterrorism measures have significantly impacted public perceptions and social divisions. Policies implemented in the interest of national security have fostered narratives that link non-citizens, particularly individuals from Muslim-majority countries, with security issues, a perception further reinforced by political discourse and media portrayals. This association has been intensified by political rhetoric and media representation, which have played a role in normalizing extraordinary security measures. The securitization of immigration policies, surveillance practices, and border controls has not only transformed legal frameworks but has also altered broader societal attitudes, thereby cultivating an environment of suspicion and distrust exclusion.

Another critical issue raised by this study is the long-term entrenchment of emergency powers. In both the United States and Europe, legal measures initially introduced as temporary responses to security crises have become permanent features of the legal landscape. This shift is particularly evident in migration and border control policies, where security concerns have been used to justify increasingly restrictive approaches to asylum and refugee protection. The fusion of counterterrorism and immigration enforcement has blurred the lines between national security and fundamental rights, leading to systemic erosions of legal protections for vulnerable groups. From a comparative perspective, while the United States and the European Union share a common trajectory in prioritising security over individual rights, their legal traditions shape distinct responses to counterterrorism challenges. The U.S. model, characterised by expansive executive authority and broad congressional discretion, has prioritised national security interests with minimal checks. The U.S. has struggled to curb the securitisation of law. Judicial interventions in Europe have been more frequent than in the U.S., yet they have not entirely prevented the expansion of executive power within the framework of counterterrorism policies.

Ultimately, this thesis underscores the urgent need for a more balanced approach to counterterrorism policy, one that does not sacrifice fundamental rights in the name of national security. The ongoing expansion of executive authority, the entrenchment of extraordinary legal measures, and the disproportionate targeting of non-citizens give rise to significant inquiries concerning their long-term implications for the rule of law and democratic governance. Progressing forward, the protection of fundamental rights will necessitate not only judicial intervention but also

legislative reform, advocacy from civil society, and a comprehensive political commitment to the preservation of human rights. Although the securitization of legal frameworks seems to be an enduring trend, it is imperative that courts, human rights institutions, and legal scholars continue to play a critical role in resisting the normalization of extraordinary security measures. Future research ought to further investigate the long-term implications of these policies, particularly regarding their impact on the shaping of global governance structures and the development of emerging legal standards in counterterrorism law. It is essential to address these concerns to ensure that counterterrorism policies remain congruent with the principles of justice, legal accountability, and the fundamental values upheld by democratic societies.

Bibliography

Cases

A v Secretary of State for the Home Department (No 2) [2005] UKHL 71 (Torture Evidence case).

A v Secretary of State for the Home Department [2004] UKHL 56 (Belmarsh case).

Ahrens v Clark, 335 U.S. 188 (1948).

Boumediene v Bush, 553 US 723 (2008)

Braden v 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

BVerfGE 73, 339 (2 BvR 197/83) Solange II (22 October 1986).

Decision 2003-467 DC (13 March 2003).

Decision 2005-532 DC (19 January 2006).

Decision 2015-527 QPC (22 December 2015).

Decision 2015-713 DC (23 July 2015).

Decision 2016-536 QPC (19 February 2016).

Decision 2017-695 QPC (29 March 2018).

Demore v. Kim, 538 U.S. 510 (2003)

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70) [1970] ECR 1125.

Johnson v. Eisentrager, 339 U.S. 763 (1950).

Korematsu v United States, 323 US 214 (1944).

Mathews v Diaz, 426 US 67 (1976).

Plyler v Doe, 457 US 202 (1982).

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

Reynolds v Sims, 377 US (1964)

San Antonio Independent School District v Rodriguez, 411 US 1 (1973).

Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28.

Secretary of State for the Home Department v JJ [2007] UKHL 45.

Shapiro v Thompson, 394 US 618 (1969).

Skinner v Oklahoma, 316 US (1942)

Stauder v City of Ulm (Case 29/69) [1969] ECR 419.

Trump v. Hawaii, 138 S. Ct. 2392 (2018)

United States v. Martinez-Fuerte, 428 U.S. 543 (1976)

Woodby v Immigration and Naturalization Service, 385 US 276 (1966).

Zadvydas v. Davis, 533 U.S. 678 (2001)

International Agreements

Council of Europe, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto* (16 September 1963) art 2 https://rm.coe.int/168006b65c accessed 4 November 2024.

European Convention on Human Rights (ECHR), Article 10.

European Convention on Human Rights (ECHR), Article 9.

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.

International Covenant on Civil and Political Rights (ICCPR), Article 12.

UN General Assembly, 'International Covenant on Civil and Political Rights' (16 December 1966) United Nations, Treaty Series, vol 999, p 171 https://www.refworld.org/legal/agreements/unga/1966/en/17703 accessed 9 November 2024.

Universal Declaration of Human Rights (1948).

EU Legislation

Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584 accessed 4 November 2024.

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003F0577 accessed 4 November 2024.

Directive 2011/95/EU [2011] OJ L 337/9.

European Convention on Human Rights (ECHR), Article 5.

US Legislation

'8 U.S. Code § 1101

10 U.S.C. §§ 810, 831, 832 (2022) (UCMJ arts 10, 31, 32).

10 USC § 821.

10 USC § 836.

18 USC § 2441: War Crimes.

42 USC § 1981

42 USC § 2000dd

Authorization for Use of Military Force, Pub L No 107-40, 115 Stat 224 (18 September 2001).

Department of Defense, Military Commission Instruction No.2.

Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2680

Immigration and Nationality Act, 8 USC §§ 1101 et seq.

Military Commission Order No. 1 ("M.C.O. No. 1"), reprinted in (2002) 41 ILM 725.

Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600, s 7

Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600, codified at 10 U.S.C. §§ 948a–950t.

US Congress, S.643 - Refugee Act of 1979 (96th Congress, 1979–1980).

US Congress, S.J.Res.23 - Authorization for Use of Military Force (107th Congress, 2001–2002)

US Constitution, amend VIII

US Constitution, amend XIV, § 1

US Constitution, Article I, Section 8, Clause 18, Subsection 8.1.

USA PATRIOT Act 2001, Pub L No 107-56, 115 Stat 272

UK Legislation

Antiterrorism Crime and Security Act 2001

Criminal Justice and Immigration Act 2008, Part X.

Explanatory Notes to *Antiterrorism Crime and Security Act 2001*.

Immigration, Asylum and Nationality Act 2006

Nationality, Immigration and Asylum Act 2002, Part IV.

Special Immigration Appeals Commission (Procedure) Rules 2003, Rule 44.

Terrorism Act 2006, para 20.

Terrorism Prevention and Investigation Measures Act 2011, sch 5

French Legislation

Law n° 2001-1062, 15th November 2001.

Law n° 2002-1094, 29th August 2002.

Law n° 2006-64 of 23rd January 2006.

Law n° 2012-1432, 21 December 2012.

Law n° 2014-1353 of 13th November 2014, art.9.

Law n° 2015-1501 of 20 November 2015, art 1.

Law n° 2016-731 of 3rd June 2016.

Books and Papers

Blackbourn J, *Counter-Terrorism and Civil Liberties: The United Kingdom Experience, 1968-2008* (Routledge, 2016).

Bobić A, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union, Oxford Studies in European Law* (online edn, Oxford Academic, 15

December 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

Bobić A, 'Fundamental Rights Review' in *The Jurisprudence of Constitutional Conflict in the European Union, Oxford Studies in European Law* (online edn, Oxford Academic, 2022) https://doi.org/10.1093/oso/9780192847034.003.0007 accessed 15 November 2024.

Bonner D, *Counter-Terrorism and European Human Rights since 9/11: The United Kingdom Experience* (Ashgate, 2007).

Bonner D, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Routledge, 2008) 347.

Bosniak L, 'The Difference That Alienage Makes' in *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006) https://doi.org/10.1515/9781400827510-004 accessed 4 November 2024.

Champeil-Desplats V, "L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 2 https://hal.science/hal-01919732.

Crijns J, 'The Right to Liberty and the Principle of Habeas Corpus' in Gerards J (ed), *Fundamental Rights: The European and International Dimension* (Cambridge University Press 2023) 259–281.

Den Boer M, *9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment* (Policy Papers No 6, Groupement d'Études et de Recherches – Notre Europe, September 2003).

Den Boer M, *9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment* (Policy Papers No 6, Groupement d'Études et de Recherches – Notre Europe, September 2003).

Dubuisson F, "Lutte contre le terrorisme et liberté d'expression: Le cas de la répression de l'apologie du terrorisme" in *La Lutte Contre Le Terrorisme* (Editions Pedone, 2017).

Fabbrini F, 'Of Floors, Ceilings, and Human Rights: The European Fundamental Rights Architecture in Comparative Perspective' in Fabbrini F (ed), *Fundamental Rights in Europe* (Oxford University Press 2014).

Gerards J (ed), *Fundamental Rights: The European and International Dimension* (1st edn, Cambridge University Press 2023).

Guild E, "Immigration, Asylum, Borders and Terrorism: The Unexpected Victims of 11 September 2001" in Bulent Gokay and R B J Walker (eds), *11 September 2001: War, Terror and Judgement* (Taylor & Francis Group, 2003) 170.

Klamert M and Kochenov D, 'Article 2 TEU' in Kellerbauer M, Klamert M, and Tomkin J (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (online edn, Oxford Academic 2019) https://doi.org/10.1093/oso/9780198759393.003.5 accessed 4 November 2024.

Landman T, "The United Kingdom: The Continuity of Terror and Counterterror" in Brysk A and Shafir G (eds), *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (University of California Press, 2007).

Mancini GF, 'The Making of a Constitution for Europe' in Keohane RO and Hoffmann S (eds), *The New European Community* (1st edn, Routledge 1991).

Mishal S and Rosenthal M, *Al Qaeda as a Dune Organization: Toward a Typology of Islamic Terrorist Organizations* (Working Paper MC20, The Whitney and Betty MacMillan Center for International and Area Studies at Yale) https://www.files.ethz.ch/isn/46602/mc20.pdf.

Oehmichen A, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?* (Springer, 2009).

Papanicolopulu I and Scovazzi T, *Conflitti armati e situazioni di emergenza: la risposta del diritto internazionale* (Giuffrè Editore, 2007).

Ratner M and Ray E, *Prigionieri di Guantanamo. Quello che il mondo deve sapere* (Nuovi Mondi, 1st edn, 2005) 29.

Saas C, "The Changes in Laws on Immigration and Asylum in France in Response to Terrorist Fears" in Guild E and Baldaccini A (eds), *Terrorism and the Foreigner* (Koninklijke Brill NV, 2007) 233.

Schuck PH, 'The Re-Evaluation of American Citizenship' in Joppke C (ed), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, 1998; online edn,

Oxford Academic, 1 November 2003) https://doi.org/10.1093/0198292295.003.0007 accessed 20 November 2024.

Szente Z and Gárdos-Orosz F, *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge, 2018).

Taylor PM, 'Article 12: Freedom of Movement of the Person' in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 325–353.

Tsoukala A, "La légitimation des mesures d'exception dans la lutte antiterroriste en Europe" (2006) 61 *Cultures & Conflits* 3.

Véronique Champeil-Desplats, "L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accommode de normes inconstitutionnelles" in *Rapport - Ce qui reste(ra) toujours de l'urgence*, Défenseur des Droits/CREDOF (2018) 3 https://hal.science/hal-01919732.

Walker C, "Human Rights and Counterterrorism in the UK" in Breen-Smyth M (ed), *Ashgate Companion to Political Violence* (Ashgate, 2016).

Winthrop W, *Military Law and Precedents* (2nd edn, Government Printing Office 1920) 841–842 https://www.loc.gov/item/2011525304.

Journal articles

Abbas T and Awan I, "Limits of UK Counterterrorism Policy and Its Implications for Islamophobia and Far-Right Extremism" (2015) *International Journal for Crime, Justice and Social Democracy* 17.

Akram SM and Johnson KR, 'Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims' (2002) *NYU Annual Survey of American Law* 295, 295–356.

Alix J and Cahn O, 'Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale' (2017) *Revue de science criminelle et de droit pénal comparé* 846.

Armand G, "*Que reste-t-il de la protection constitutionnelle de la liberté individuelle?*" (2003) 39.

B Golder and G Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis: Research and Practice* 4

Baccini L and others, "Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?" (2018) *Studies in Conflict & Terrorism* 341.

Bachmann SD and Burt M, "Control Orders Post 9/11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma" (2010) 15 *Deakin Law Review* 131.

Banks CP and Tauber S, 'U.S. District Court Decision-Making in USA PATRIOT Act Cases after September 11' (2014) 35(2) *Justice System Journal* 157.

Biral M, 'M. Daniele, *Habeas Corpus. Manipolazioni di una garanzia*, Giappichelli, 2017' (2018) *Diritto Penale Contemporaneo* https://www.penalecontemporaneo.it/d/5981-m-daniele-habeas-corpus-manipolazioni-di-una-garanzia-giappichelli-2017 accessed 13 November 2024.

Bonini C, *Guantanamo. USA, viaggio nella prigione del terrore* (Einaudi, 2004) 21–33.

Bonino S, 'Policing Strategies against Islamic Terrorism in the UK after 9/11: The Socio-Political Realities for British Muslims' (2012) 32(1) *Journal of Muslim Minority Affairs* 6 https://doi.org/10.1080/13602004.2012.665619.

Bonner D, 'Managing Terrorism While Respecting Human Rights? European Aspects of the Anti-Terrorism Crime and Security Act 2001' (2002) 8(4) *European Public Law* 498.

Bosniak LS, 'The Citizen and the Alien: Dilemmas of Contemporary Membership' (2006) 5(4) *Perspectives on Politics* https://doi.org/10.1017/S1537592707072283 accessed 4 November 2024.

Bosworth M and Guild E, "Governing Through Migration Control: Security and Citizenship in Britain" (2008) 48 *British Journal of Criminology* 710.

Bove V, Böhmelt T, and Nussio E, "Terrorism Abroad and Migration Policies at Home" (2021) *Journal of European Public Policy* 191.

Bradley CA and Goldsmith JL, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2102.

Buonfino A and Huysmans J, "Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK" (2008) 56 *Political Studies* 769.

Caroline Valmalette, "Controverse sur la compétence du juge des perquisitions antiterroristes" (2019) 6 *Les Cahiers Portalis* 161.

Champeil-Desplats V, "L'autonomisation relative des références à la sécurité dans les décisions du Conseil constitutionnel" (2018) 20–21 *Jus Politicum Revue de Droit Politique* 275.

Champeil-Desplats V, "Le Conseil constitutionnel a-t-il une conception des libertés publiques?" (2012) *Jus Politicum Revue de Droit Politique* 6.

Chesney RM, 'Boumediene v Bush' (2008) 102(4) *American Journal of International Law* 848 https://doi.org/10.2307/20456685.

Choudhury T and Fenwick H, "The Impact of Counter-Terrorism Measures on Muslim Communities" (2011) *International Review of Law, Computers & Technology* 173.

Corn G, Jensen ET, and Watts S, "Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher" (11 April 2007) *Yale Law Journal Forum* https://www.yalelawjournal.org/forum/understanding-the-distinct-function-of-the-combatant-status-review-tribunals-a-response-to-blocher.

Daoud E and Godeberge C, "La loi du 13 novembre 2014 constitue-t-elle une atteinte à la liberté d'expression?" (2014) *AJ Pénal, Dossier Lutte contre le terrorisme*.

De Petris A, "Guantanamo: un buco nero nella 'terra della libertà'" (2004) *Quaderni del Seminario sui Diritti Fondamentali in Europa* (2) http://archivio.rivistaaic.it/materiali/anticipazioni/guantanamo/index.html.

Den Boer M and Monar J, '11 September and the Challenge of Global Terrorism to the EU as a Security Actor' [2002] *Journal of Common Market Studies* 40.

Duffy-Meunier A, Hourson S, and Sénac C, "La lutte contre le terrorisme et les droits fondamentaux au Royaume-Uni" (2017) 30 *Droit Comparé et Européen* 219.

Elliott M, "United Kingdom: Detention Without Trial and the War on Terror," cit., 560.

Farber SR, 'Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration' (2010) 98(3) *California Law Review* 989 http://www.jstor.org/stable/27896698.

Feldman D, "United Kingdom: House of Lords on Anti-Terrorism, Crime and Security Act 2001" (2005) 1(3) *European Constitutional Law Review* 534.

Fenwick H, "Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counter-Terrorism and Security Act 2015" (2016) 30(3) *International Review of Law, Computers & Technology* 177.

Foegle J-P, "Les étrangers, cibles de l'état d'urgence" (2018) 117 *Plein Droit Revue* 8.

Garapon A, 'Les dispositifs antiterroristes de la France et des États-Unis' (Esprit, 2002) https://esprit.presse.fr/article/antoine-garapon/les-dispositifs-antiterroristes-de-la-france-et-des-etats-unis-13547.

Garrigos Kerjean M, 'La tendance sécuritaire de la lutte contre le terrorisme' (2006) 28 *Archives de politique criminelle* 189–213 https://hal.science/hal-00425667.

Gasper B, "Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism" (2005) 21 *American University International Law Review* 294.

Geltzer JA, 'Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After *Boumediene* and the Relationship Between Habeas Corpus and Due Process' (2012) 14(3) *University of Pennsylvania Journal of Constitutional Law* 719 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1049&context=jcl.

Glazier DW, "Precedents Lost: The Neglected History of the Military Commission" (2005) 46(1) *Virginia Journal of International Law* 1, Fall https://papers.ssrn.com/sol3/papers.cfm?abstract_id=811045.

Gonzales AR, "Martial Justice, Full and Fair" *The New York Times* (30 November 2001) https://www.nytimes.com/2001/11/30/opinion/martial-justice-full-and-fair.html.

Harris M, "Public Law Values in the House of Lords - In an Age of Counter-Terrorism" (2011) 17 *Auckland University Law Review* 139.

Haubrich D, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) *Government and Opposition*.

Hayes N, "Liberty v. Security - UK Anti-Terrorism Legislation, the ECHR and the House of Lords" (2005) 8 *Trinity College Law Review* 114.

Hebinger D, "La sécurité et les libertés. L'adaptation de la législation antiterroriste française dans le contexte post-13 Novembre 2015" (2018) *Le Champs de Mars*, Presses de Sciences Po.

Hebinger D, "La sécurité et les libertés. L'adaptation de la législation antiterroriste française dans le contexte post-13 Novembre 2015" (2018) 31 *Le Champs de Mars*, Presses de Sciences Po.

Helbling M and Meierrieks D, "Transnational Terrorism and Restrictive Immigration Policies" (2020) 57(4) *Journal of Peace Research* 565.

Hennette-Vauchez S, 'The State of Emergency in France: Days Without End?' (2018) 14(2) *EuConst* 279, 704 https://shs.hal.science/halshs-04123906.

Hennette-Vauchez S, "The State of Emergency in France: Days Without End?" (2017) *Cultures & Conflits*.

Henning VH, 'Anti-terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?' (2002) 17(6) *American University International Law Review* 1268.

Honeywood CA, 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights' (2016) 9(3) *Journal of Strategic Security* 34.

Ip J, "The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?" (2010) 19(1) *Michigan State University College of Law Journal of International Law* 3.

Katyal N, 'Equality in the War on Terror' (2007) 59 *Stanford Law Review* 1365, 1367–1370.

Kavanagh A, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 *International Journal of Constitutional Law* 173.

Kavanagh A, "Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape" (2011) 9 *International Journal of Constitutional Law* 183.

Keller H and Forowicz M, "A New Era for the Supreme Court After *Hamdan v Rumsfeld*?" (2007) 67(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 3 https://www.zaoerv.de/67_2007/67_2007_1_a_1_42.pdf.

Kilpatrick J, "Quand un état d'urgence temporaire devient permanent: Le cas de la France" (2006) *Cultures & Conflits*.

May P, "Ideological Justifications for Restrictive Immigration Policies: An Analysis of Parliamentary Discourses on Immigration in France and Canada (2006–2013)" (2016) 14 *French Politics Journal* 294.

McGhee D, "The Paths to Citizenship: A Critical Examination of Immigration Policy in Britain Since 2001" (2009) *Patterns of Prejudice* 42.

Murray CRJ, "Nudging or Fudging: The UK Courts' Counterterrorism Jurisprudence Since 9/11" (2016) 21(1) *Journal of Conflict and Security Law* 111.

Murray D, "Freedom of Expression, Counter-Terrorism and the Internet in the Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights" (2009) 27(3) *Netherlands Quarterly of Human Rights* 340.

Parker E, "Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States" (2007) 21(2) *Emory International Law Review* 716.

Paye J-C, "Lutte antiterroriste et contrôle de la vie privée" (2003) *Multitudes*.

Paye JC, 'Lutte antiterroriste et contrôle de la vie privée' (2003) 11(1) *Multitudes* 91 https://doi.org/10.3917/mult.011.0091.

Pearcy M, '"Sixty Words": Teaching About the Authorization for Use of Military Force (AUMF)' (2018) 109(5) *The Social Studies* 255–264 https://doi.org/10.1080/00377996.2018.1515718.

Ragazzi F, 'L'évolution de la politique anti-terroriste en France depuis les attentats de 2015: Anticipation, Prévention et Répression' https://www.sciencespo.fr/ceri/en/content/l-evolution-de-la-politique-anti-terroriste-en-france-depuis-les-attentats-de-2015-anticipat.

Roach K, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).

Roudier K, "Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire" (2016) 51 *Les Nouveaux Cahiers du Conseil Constitutionnel* 38.

Roudier K, "*Le Conseil Constitutionnel face à l'avènement d'une politique sécuritaire*" (2016) 39.

Schabas WA, 'Freedom of Movement/Liberté de Circulation' in *The International Covenant on Civil and Political Rights: A Commentary* (Oxford University Press 2015) 1052–1066 https://doi.org/10.1093/law/9780199594061.003.0074 accessed 9 November 2024.

Schabas WA, *The European Convention on Human Rights: A Commentary*, Oxford Commentaries on International Law (Oxford University Press 2015; online edn, Oxford Academic) https://doi.org/10.1093/law/9780199594061.001.0001 accessed 29 October 2024.

Shah S, "The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish" (2005) 5(2) *Human Rights Law Review* 406.

Sinnar S, 'Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act' (2002-2003) 55(1419) *Stanford Law Review* 1442.

Spencer A, "Using Immigration Policies as a Tool in the War on Terror" (2007) 7(1) *Crossroads* 40.

Stevens D, "The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?" (2004) 67(4) *The Modern Law Review* 618.

Sudborough C, "The War Against Fundamental Rights: French Counterterrorism Policy and the Need to Integrate International Security and Human Rights Agreements" (2007) *Suffolk Transnational Law Review* 478.

Sudborough C, "The War Against Fundamental Rights: French Counterterrorism Policy and the Need to Integrate International Security and Human Rights Agreements" (2007) *Suffolk Transnational Law Review*.

Thienel T, "Foreign Acts of Torture and the Admissibility of Evidence" (2006) 4(2) *Journal of International Criminal Justice* 402.

Trimble PR, 'The President's Constitutional Authority to Use Limited Military Force' (1995) 89(1) *American Journal of International Law* 84–87 https://www.jstor.org/stable/2203897 accessed 22 November 2024.

Véronique Champeils-Desplats, "Le Conseil constitutionnel, protecteur des droits et libertés?" (2011) 9 *Cahiers de la recherche sur les droits fondamentaux* 11.

Walker C, 'Citizenship Deprivation and Cosmopolitanism' in Arianna Vedaschi and Kim Lane Scheppele (eds), *9/11 and the Rise of Global Anti-Terrorism Law* (Cambridge University Press 2021) 80–106.

Weissbrodt D, *The Human Rights of Non-citizens* (Oxford University Press 2008).

White J and Murray S, "Guantanamo Ruling Renews the Debate Over Detainees" *The Washington Post* (6 June 2007) A3.

Zedner L, "The Hostile Border: Crimmigration, Counter-Terrorism, Crossing the Line on Rights?" (2019) 22(3) *New Criminal Law Review* 331.

Blogs and Websites

"'Who Are the 5 Guantanamo Detainees Swapped in Exchange for Bergdahl?'" *NBC News* (2 June 2014) https://www.nbcnews.com/storyline/bowe-bergdahl-released/who-are-5-guantanamo-detainees-swapped-exchange-bergdahl-n119376.

"Asile et Immigration: La Loi du 10 Septembre 2018" *Vie Publique* https://www.vie-publique.fr/eclairage/19455-asile-et-immigration-la-loi-du-10-septembre-2018.

"Counter-Terrorism Act: A Dagger at the Heart of the Constitution" *The Guardian* (19 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/counter-terrorism-act.

"Criticism of the Nationality, Immigration and Asylum Act" *The Guardian* (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.

"Criticism of the Nationality, Immigration and Asylum Act" *The Guardian* (15 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/nationality-immigration-asylum-act.

"France: Anti-Terrorist Law Prohibiting Citizens from Leaving France Found Constitutional"(30 October 2015) https://www.loc.gov/item/global-legal-monitor/2015-10-30/france-anti-terrorist-law-prohibiting-citizens-from-leaving-france-found-constitutional/.

"How Immigration Laws Curtail Civil Liberties" *The Guardian* (13 February 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/feb/13/civil-liberties-immigration.

"Lutte contre le terrorisme : les avancées grâce à la loi du 3 juin 2016" (*Ministère de l'Intérieur*, 27 July 2016) https://mobile.interieur.gouv.fr/Archives/Archives-des-actualites/2016-Actualites/Lutte-contre-le-terrorisme-les-avancees-grace-a-la-loi-du-3-juin-2016.

"Torture Evidence Inadmissible in UK Courts, Lords Rules," *The Guardian* (2005) https://www.theguardian.com.

"What's New in the Immigration Act 2016?" *Cross Border Legal* https://www.crossborderlegal.co.uk/whats-new-immigration-act-2016/.

Aliverti A, "The New Immigration Act 2014 and the Banality of Immigration Controls" (2014) *Borders Criminology Blog* https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/05/new-immigration.

Guy S, "Control Orders Held to Constitute a Deprivation of Liberty," *Human Rights Law Centre* (2007) https://hrlc.org.au.

Online Resources

ACLU, 'Interested Persons Memorandum Regarding Military Commission Order No. 1' https://www.aclu.org/documents/interested-persons-memorandum-regarding-military-commission-order-no-1.

Alix J and Cahn O, 'Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale' (2018) *Revue de science criminelle et de droit pénal comparé* 2018/4, 715 https://shs.hal.science/halshs-02245511.

American Civil Liberties Union, 'How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants' (*ACLU*) https://www.aclu.org/documents/how-anti-terrorism-bill-permits-indefinite-detention-immigrants accessed 18 November 2024.

Amnesty International USA, "Amnesty International Statement on President Obama's Immigration Executive Order" (21 November 2014) https://www.amnestyusa.org/press-releases/amnesty-international-statement-on-president-obamas-immigration-executive-order/.

Amnesty International, "United States of America: Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay" (30 April 2002) https://www.amnesty.org/en/documents/amr51/054/2002/en/.

Bacis D, 'Bad dudes a Guantanamo: promesse elettorali che andrebbero disattese' (9 February 2018) *DPCE Online* https://www.dpceonline.it/index.php/dpceonline/announcement/view/79.

Bayraklı E and Hafez F (eds), *European Islamophobia Report 2016* (SETA, 2017).

Charlie Savage, "Accused 9/11 Mastermind to Face Civilian Trial in N.Y." *The New York Times* (14 November 2009) https://www.nytimes.com/2009/11/14/us/14terror.html.

Congressional Research Service, 'Amdt14.S1.8 Equal Protection' (*Constitution Annotated*) https://constitution.congress.gov/browse/essay/amdt14-S1-8/ accessed 4 November 2024.

Congressional Research Service, 'ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers' (*Constitution Annotated*) https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ accessed 4 November 2024.

Congressional Research Service, 'Overview of the Equal Protection Clause' (*Constitution Annotated*) https://constitution.congress.gov/browse/essay/amdt14-S1-8-13-1/ALDE_00000839/ accessed 4 November 2024.

Congressional Research Service, "Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court" (16 September 2011) https://www.everycrsreport.com/reports/RL33180.html#fn126.

Congressional Research Service, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues* (CRS Report No R41163, 17 May 2012) https://www.everycrsreport.com/reports/R41163.html.

Conseil Constitutionnel, "*Commentaire de la décision n° 2003-467 DC du 13 mars 2003*" (2003).

Cornell Law School Legal Information Institute, "Executive Order" https://www.law.cornell.edu/wex/executive_order.

Council on Foreign Relations, 'How a Single Phrase Defined the War on Terror' (*Council on Foreign Relations*) https://education.cfr.org/learn/reading/how-single-phrase-defined-war-terror accessed 18 November 2024.

Council on Foreign Relations, 'The 9/11 Effect and the Transformation of Global Security' (8 September 2021) https://www.cfr.org accessed 18 February 2025.

Dafna Linzer, "Guantánamo as Prison and Courtroom: Is a White House Policy Unraveling or Coming Together?" *ProPublica* (25 January 2011) https://www.propublica.org/article/guantanamo-as-prison-and-courtroom-is-a-white-house-policy-unraveling-or-co.

Danet J, 'Le droit pénal et la procédure pénale sous le paradigme de l'insécurité' (2003) 25 *Archives de politique criminelle* 41–42.

Department of Defense, *Memorandum for the Secretary of the Navy* (7 July 2004) 'Order Establishing Combatant Status Review Tribunal' https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.

Deputy Secretary of Defense, "Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal" (7 July 2004) https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf.

Elsea J, "Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions" CRS Report RL31191 (11 December 2001).

Elsea JK, "The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice" CRS Report RL31600 (25 September 2006).

Ensuring Lawful Interrogations (Obama White House Archives) https://obamawhitehouse.archives.gov/realitycheck/the-press-office/ensuring-lawful-interrogations.

Equality and Human Rights Commission, "Article 5: Right to Liberty and Security" https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security.

European Commission, 'Confiscation and Freezing of Assets' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/confiscation-and-freezing-assets_en accessed 4 November 2024.

European Commission, 'European Arrest Warrant' (*European Commission*) https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en accessed 4 November 2024.

European Commission, 'Why do we need the EU Charter of Fundamental Rights?' (*European Commission*) https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en accessed 4 November 2024.

European Parliament, 'Fundamental Rights in the EU' (*European Parliament*) https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu accessed 4 November 2024.

Executive Order 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (7 March 2011) https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba.

Federal Bureau of Investigation, "Ahmed Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of U.S. Embassies in East Africa" (17 November 2010) https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo111710a.htm.

Fragnon J, 'L'antiterrorisme à la française : répression, prévention, anticipation' (*The Conversation*, 2020) https://theconversation.com/lantiterrorisme-a-la-francaise-repression-prevention-anticipation-137562.

Frances Gibb, "Disarray Over Terror Control Orders After Law Lords Ruling on Secret Evidence" (2009) *The Times* http://www.timesonline.co.uk/tol/news/uk/article6469431.ece.

Frosini T, 'Lo stato di diritto si è fermato a Guantánamo' https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/anticipazioni/guantanamo_frosini/index.html.

Frosini T, 'Lo stato di diritto si è fermato a Guantánamo' https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/anticipazioni/guantanamo_frosini/index.html.

Garapon A, 'Les dispositifs antiterroristes de la France et des États-Unis' (Esprit, September 2002) *Esprit* 128 https://esprit.presse.fr/article/antoine-garapon/les-dispositifs-antiterroristes-de-la-france-et-des-etats-unis-13547.

Garrigos-Kerjean M, 'La tendance sécuritaire de la lutte contre le terrorisme' (2006) 28 *Archives de politique criminelle* 194 https://hal.science/hal-00425667.

Haubrich D, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared" (2003) *Government and Opposition* 7.

Hennette-Vauchez S, "The State of Emergency in France: Days Without End?" (2017) *Cultures & Conflits* 720.

Hickman MJ et al., *'Suspect Communities'? Counter-Terrorism Policy, the Press, and the Impact on Irish and Muslim Communities in Britain: Report of a Research Project Funded by the Economic and Social Science Research Council (1974–2007)* (2011).

Holland & Knight LLP, 'Diversity Jurisdiction Does Not Extend to Suit Involving Stateless Alien' (2011) https://www.hklaw.com/en/insights/publications/2011/09/diversity-jurisdiction-does-not-extend-to-suit-inv accessed 4 November 2024.

House Committee on Appropriations – Republicans, "More Released Gitmo Detainees Returning to Terrorism - Approps Republicans Insist on Immediate Halt to Transfers and Releases" (13 May 2010) https://appropriations.house.gov/news/press-releases/more-released-gitmo-detainees-returning-terrorism-approps-republicans-insist.

House of Commons Library, 'The Anti-terrorism, Crime and Security Act 2001' (House of Commons Library, 23 January 2013) https://commonslibrary.parliament.uk/research-briefings/sn03438/.

House of Lords Judgment: A and others v Secretary of State for the Home Department (16 December 2004) https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm.

Human Rights Watch, "Briefing Paper on U.S. Military Commissions" (25 June 2003) 5 https://www.hrw.org/legacy/backgrounder/usa/military-commissions.pdf.

Human Rights Watch, "Supplemental Submission to the Committee Against Torture" (3 May 2006) https://www.hrw.org/news/2006/05/03/human-rights-watch-supplemental-submission-committee-against-torture.

In re Guantanamo Detainee Cases, https://casetext.com/case/in-re-guantanamo-detainee-cases-3.

Kaleck W, 'Obama's Tentative Steps Against Torture' (ECCHR, 2015) https://www.ecchr.eu/en/publication/obamas-tentative-steps-against-torture/.

Kilpatrick J, 'Quand un état d'urgence temporaire devient permanent, le cas de la France' (2020) *Transnational Institute* 24.

Krahmann E, '*The Emergence of Security Governance in Post-Cold War Europe*' (ESRC "One Europe or Several?" Programme Working Paper 36/01, Sussex European Institute, University of Sussex 2001) https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=eb5dd9f95dc614d8a5f857f5096891a320e62893 accessed 4 November 2024.

Legal Information Institute, 'Alien' (*Cornell Law School*) https://www.law.cornell.edu/wex/alien accessed 4 November 2024.

Legal Information Institute, 'Alienage Classification' (*Constitution Annotated, Cornell Law School*) https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/alienage-classification accessed 4 November 2024.

Legal Information Institute, 'Amendment XIV' (*Cornell Law School*) https://www.law.cornell.edu/constitution/amendmentxiv accessed 4 November 2024.

Legal Information Institute, 'Content-Based Regulation' (*Constitution Annotated, Cornell Law School*) https://www.law.cornell.edu/constitution-conan/amendment-1/content-based-regulation accessed 4 November 2024.

Legal Information Institute, 'Due Process' (Cornell Law School) https://www.law.cornell.edu/wex/Due_Process accessed 4 November 2024.

Legal Information Institute, 'Enemy Combatant' (*Cornell Law School*) https://www.law.cornell.edu/wex/enemy_combatant.

Legal Information Institute, 'Strict Scrutiny' (*Cornell Law School*) https://www.law.cornell.edu/wex/strict_scrutiny accessed 4 November 2024.

Legal Information Institute, 'Fundamental Right' (Cornell Law School) https://www.law.cornell.edu/wex/fundamental_right accessed 4 November 2024.

Letteron R, 'Après 11 septembre: La difficile construction d'un droit de l'antiterrorisme' (*Le Club des Juristes*) https://www.leclubdesjuristes.com/justice/apres-11-septembre-la-difficile-construction-dun-droit-de-lantiterrorisme-par-roseline-letteron-585/.

Lewis NA, "Two Prosecutors Faulted Trials for Detainees" *The New York Times* (1 August 2005) https://www.nytimes.com/2005/08/01/politics/two-prosecutors-faulted-trials-for-detainees.html.

London Councils, 'Counter-Terrorism and Security Act 2015 and the Prevent Programme' (*London Councils*) https://www.londoncouncils.gov.uk/node/28115/counter-terrorism-and-security-act-2015-and-prevent-programme.

Margot Pugliese, "Renforcement de la prévention d'actes de terrorisme: La loi publiée" (7 September 2021) *Dalloz le quotidien du droit* https://www.dalloz-actualite.fr/flash/renforcement-de-prevention-d-actes-de-terrorisme-loi-publiee.

Memorandum of the Commander – U.S. Southern Command by Rumsfeld (16 April 2003) https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/03.04.16.pdf.

Military Instructions 32. Full text available at: https://home.army.mil/carson/7216/5089/9342/article-32-guide.pdf.

Molins F, "Lutte antiterroriste et libertés" (2018) *Cultures & Conflits* 13.

National Archives, 'Platt Amendment: Milestone Documents' https://www.archives.gov/milestone-documents/platt-amendment.

National Constitution Center, 'Amendment XIV: Citizenship Clause' (*National Constitution Center*) https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 accessed 4 November 2024.

National Constitution Center, 'Amendment XIV: Privileges or Immunities Clause' (*National Constitution Center*) https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 accessed 4 November 2024.

National Constitution Center, 'The Constitution: Amendments' https://constitutioncenter.org/the-constitution/amendments accessed 4 November 2024.

Ní Aoláin F, "L'exercice contemporain des pouvoirs d'urgence: Réflexions sur la permanence, la non-permanence et les ordres juridiques administratifs" (2018) *Cultures & Conflits* 24.

Office of Public Affairs, "Ahmed Abu Khatallah Found Guilty of Terrorism Charges in September 2012 Attack in Benghazi, Libya" (*United States Department of Justice*, 28 November 2017) https://www.justice.gov/opa/pr/ahmed-abu-khatallah-found-guilty-terrorism-charges-september-2012-attack-benghazi-libya.

Pfeiffer S, 'Biden's Guantánamo Legacy "One Step Forward, Several Steps Backwards"' *NPR* (18 January 2025) https://www.npr.org/2025/01/16/nx-s1-5252468/guantanamo-biden-legacy.

Press release of Decision No. 2021-822 DC of 30 July 2021, 3 https://www.conseilconstitutionnel.fr/sites/default/files/2021-07/2021822dc_cp.pdf.

Riondato S, "Sul diritto penale di guerra degli Stati Uniti d'America: La Tortura" (2004) 5 *Pubblicazioni Centro Studi per la Pace* https://files.studiperlapace.it/spp_zfiles/docs/20060827222034.pdf.

Robert Schuman Foundation, 'The European Arrest Warrant and Its Application by the Member States' (*Robert Schuman Foundation*) https://www.robert-schuman.eu/en/european-issues/0016-the-european-arrest-warrant-and-its-application-by-the-member-states accessed 4 November 2024.

Ryan M and Gearan A, 'Biden Administration Repatriates Guantánamo Bay Inmate to Morocco' *The Washington Post* (19 July 2021) https://www.washingtonpost.com/national-security/guantanamo-biden-abdul-latif-nasir/2021/07/19/3f523f2e-e885-11eb-84a2-d93bc0b50294_story.html.

Ryder M, "Secretary of State for the Home Department v AF and Others [2009] UKHL 28" (2009) *UK Supreme Court Blog* https://ukscblog.com.

Spelthorne Borough Council, 'CONTEST: Anti-Terrorism' https://www.spelthorne.gov.uk/article/16985/CONTEST-anti-terrorism.

Steyn J, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) *International and Comparative Law Quarterly* 1–15 http://www.jstor.org/stable/3663134.

The Guardian, 'Counter-Terrorism Act 2008' (19 January 2009) https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/counter-terrorism-act.

The Law Library of Congress, 'The UK's Legal Response to the London Bombings of 7/7' (The Law Library of Congress, 21 May 2013) https://blogs.loc.gov/law/2013/05/the-uks-legal-response-to-the-london-bombings-of-77/.

Tran M and Weaver M, "Barack Obama: Administration Drafts Order to Close Guantánamo Camp Within Year" *The Guardian* (21 January 2009) https://www.theguardian.com/world/2009/jan/21/guantanamo-barack-obama-draft-order-closure.

Trump DJ, *Executive Order 13823: Protecting America Through Lawful Detention of Terrorists* (30 January 2018) https://www.presidency.ucsb.edu/documents/executive-order-13823-protecting-america-through-lawful-detention-terrorists.

UK Home Office, 'Terrorism Prevention and Investigation Measures Act Collection' (*UK Government*) https://www.gov.uk/government/collections/terrorism-prevention-and-investigation-measures-act.

US Commission on Civil Rights, 'Chapter 5: Implementing the USA Patriot Act of 2001: Civil Rights Impact' (*US Commission on Civil Rights*) https://www.usccr.gov/files/pubs/sac/dc0603/ch5.htm accessed 18 November 2024.

US Department of Defense, "DoD Announces Draft Detainee Review Policy" (3 March 2004) http://www.defenselink.mil/releases/2004/nr20040303-0403.html.

US Department of State, 'Country Reports on Terrorism 2019: United Kingdom' (2019) https://www.state.gov/reports/country-reports-on-terrorism-2019/united-kingdom/.

Vie Publique, 'Chronologie de la législation antiterroriste 1986' https://www.vie-publique.fr/eclairage/18530-chronologie-de-la-legislation-antiterroriste-1986-2024.

Vie Publique, 'Loi relative au renseignement' https://www.vie-publique.fr/loi/20737-securite-loi-relative-au-renseignement.

Vie Publique, 'Lutte contre le terrorisme: Sécurité et contrôles frontaliers' https://www.vie-publique.fr/rapport/29595-lutte-contre-le-terrorisme-securite-et-controles-frontaliers.

Official reports and documents

Army Field Manual 2-22.3: Human Intelligence Collector Operations (6 September 2006, Department of Defense) https://irp.fas.org/doddir/army/fm2-22-3.pdf.

Congressional Research Service, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations* (RL34345, 2008) https://sgp.fas.org/crs/misc/RL34345.pdf accessed 4 November 2024.

Council of Europe: European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security* (31 December 2020) 1-60 https://www.refworld.org/jurisprudence/caselawcomp/echr/2020/en/123535 accessed 15 November 2024.

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 1(a), 66 Fed Reg 57,833 (16 November 2001).

European Parliament, *The Boundaries of the Commission's Discretionary Powers When Handling Petitions and Potential Infringements of EU Law: From Legal Limits to Political Collaboration in Enforcement?* (IPOL_STU(2022)703589, 2022).

Executive Order 13492: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (22 January 2009) https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

Executive Order 13492: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (22 January 2009) https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

Explanatory Notes to *Antiterrorism Crime and Security Act 2001*

Explanatory Notes to *Prevention of Terrorism Act 2005*.

Explanatory Notes to the *Counter-Terrorism Act 2008* (UK) https://www.legislation.gov.uk/ukpga/2008/28/notes/contents.

Explanatory Notes to the *Counter-Terrorism and Security Act 2015* (UK) https://www.legislation.gov.uk/ukpga/2015/6/notes/contents.

House of Lords, House of Commons, Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011, Tenth Report of Session 2013–14* (HC 2013–14, 231).

U.S. Army Field Manual (FM) 27-10, *The Law of Land Warfare*, sec. 505(e) (1956).

US Department of Defense, 'Guantánamo Bay Detainee Transfer Announced' (11 February 2024) https://www.defense.gov/News/Releases/Release/article/4022534/guantanamo-bay-detainee-transfer-announced/.

US Department of Justice, *EOIR Immigration Law Advisor: Volume 8, Number 8* (2014) https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/05/vol8no8_edit3.pdf accessed 8 November 2024.